UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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April 28, 1989

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Re: Robert Laverne Ehrich
Chapter 11 585-00119

Dear Counsel:

The Court has considered the record in this matter and renders the following opinion.

This Chapter 11 case was filed August 28, 1985 and was pending at the effective enactment date of Chapter 12. It was converted to Chapter 12 by an order of Judge Ecker entered June 15, 1988. I took over the Rapid City calendar July 1, 1988. After the Eighth Circuit handed down In re Erickson Partnership, 856 F.2d 1068 (1988), Farm Credit Bank of Omaha (FCBO) moved to reconsider the conversion order. This Court vacated the conversion order by an order entered December 12, 1988.

Shortly after the case was essentially reconverted to Chapter 11, FCBO submitted a disclosure statement which subsequently received Court approval. The creditor's plan, among other things, would liquidate roughly 1,800 acres of the 2,400 acres owned by debtor. The debtor does not yet have a disclosure statement approved, but claims in the motion at bar that plan treatment of all creditors but FCBO has been settled.

On March 31, 1989 debtor filed an expedited motion to have

the Court determine his eligibility to dismiss the pending Chapter 11 case and file under Chapter 12. This motion was taken under advisement at the April 4, 1989 hearing.

The U.S. Trustee and FCBO objects to debtor's motion on the basis that it requests the Court to issue an advisory opinion. As Wright & Miller have explained, the terms ~"advisory opinion" have been used, somewhat inartfully, to refer to "categories of justiciability ... dealing with such problems as standing, ripeness, and mootness ..." 13 Wright & Miller, Federal Practice and Procedure, Section 3529.1 (1984) at p.298. Sources of the prohibition against advisory opinions spring from the "case or controversy" requirement of Article III, §2 of the United States Constitution, and from prudential principles concerning the "wise refusal to exercise acknowledged [judicial] power ... ." Id., §3529 at p. 285. From this Court's review of the doctrine, it is clear that Wright & Miller's observation "that many justiciability opinions are ambiguous or silent on the choice between constitutional and prudential grounds for decision" is true also of the Bankruptcy Court's application of the doctrine. Id., at p.293.

Although Bankruptcy Courts are not Article III Courts, it has been held that these Courts are constitutionally prohibited from issuing advisory opinions. In re Hamlin'5 Landing Joint Venture, 81 B.R. 651, 653 (Bkrtcy. M.D. Fla. 1987). But see, In re Quinn, 44 B.R. 622 (Bkrtcy. Mo. 1984). Other Bankruptcy Courts apply the doctrine without expressing the source of the restriction. In re Doyon, 54 B.R. 810, 812 (Bkrtcy. D.S.D. 1985); In re Davis, 23 B.R. 773, 777 (Bkrtcy. App. 9th 1982). See also, In re Bellanca Aircraft Corp., 850 F.2d 1275, 1284 (8th Cir. 1988). It is clear, however, that Bankruptcy Judges apply the doctrine whether they consider the doctrine to be constitutionally and/or nonconstitutiOn ally founded.

The Court declines to issue the requested opinion. To begin with, the debtor is actually requesting two opinions regarding contemplated future acts. The debtor clearly cannot file a Chapter 12 while under a pending preconfirmation Chapter 11 bankruptcy. Before eligibility to file a Chapter 12 becomes relevant, the pending Chapter 11 must be dismissed. The debtor does not have an unrestricted right to voluntarily dismiss a pending Chapter 11 case. E.g., Section 1112(b); In re Buttonhook Cattle Co., Inc., 747 F.2d 483, 485 N.4 (8th Cir. 1984). Debtor therefore asks for two opinions: (1) whether this Chapter 11 case can be dismissed on the debtor's motion; and (2) whether a Chapter 12 can be filed after the voluntary dismissal of a Chapter 11 case which was pending at the effective enactment date of Chapter 12. The second issue is more to the heart of the requested relief.

The debtor's likelihood of success on the motion to dismiss the long pending Chapter 11 is not a certainty. FCBO will undoubtedly object to the dismissal. After all, the creditor already "reconverted" the case from Chapter 12 to Chapter 11 and has a strong interest in seeing its partial liquidation plan confirmed. If the debtor would fail in the effort to dismiss the case, the question of his ability to file under Chapter 12 would be mooted, unripe, and constitute an advisory opinion.[1]

A large number of Chapter 11 cases were converted to Chapter 12 prior to the date the Eighth Circuit handed down Erickson. The issue concerning the ability of a debtor to file under Chapter 12 under the circumstances of this case is of potentially far flung importance. Such an issue should not be decided on an advisory basis.

This matter constitutes a core proceeding under 28 U.S.C. §157(b)(2). Since no factual issues are presented in this opinion, findings of fact will not be issued. This letter opinion shall constitute the Court's conclusions of law. The Court shall enter an appropriate order.

Very truly yours,

Irvin N.
Chief Bahkruptcy Judge

INH/sh
CC: Bankruptcy Clerk

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1 Even if the Court construed Attorney Hurley's motion as one for declaratory judgment, the same justiciability prohibitions apply. Wright & Miller at §§2757, 3529; See 28 U.S.C. §2201.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

IN RE:	)	CASE NO. 585-00119
	)	
ROBERT LAVERNE EHRICH,	)	CHAPTER 11
	)	
Debtor.	)	ORDER

Pursuant to the letter opinion executed this same date, IT IS HEREBY ORDERED that the debtor's "Motion to Determine Debtor's Eligibility to File Chapter 12" is denied.

Dated this day of April, 1989.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

(SEAL)