

**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 21, 1988

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Re: Robert L. and Donna N. Esohenbaum  
Chapter 13 386-00023

Dear counsel:

This case raises the issue whether a Chapter 13 bankruptcy, pending at the effective date of Chapter 12, may be converted to Chapter 12.

The Debtors filed under Chapter 13 on March 14, 1986. They operate a farming and ranching operation on 2,080 acres in Hand County, South Dakota. Pursuant to a stipulation, Farm Credit System, in this case RCA, was granted ex parte relief from stay by an Order entered January 6, 1988. Deutz-Allis Credit Corporation was granted relief from stay by a stipulated Order entered February 9, 1988. On February 29, 1988, a Motion to Convert to Chapter 12 was filed by Ron Volesky, who replaced the Debtors original counsel. Tom Lloyd, Assistant United States Attorney, objected on behalf of the Farmers Home Administration. Both the PCA and Deutz Allis responded, stating they did not oppose conversion, but if an Order converting was entered, the creditors requested that it specify their relief from stay continue. Patrick Dougherty represents Deutz-Allis, and Brent Wilbur represents Farm Credit Systems.

At the April 5, 1988, Pierre, South Dakota hearing on Debtors'

motion, Mr. Wilbur withdrew PCAa response as moot by virtue of full payment of RCA's claim. Mr. Wilbur appeared on Mr. Dougherty's behalf, however, and restated Deutz-Allis written response. Mr. Wilbur also represents record as to plan treatment. Mr. Lloyd again objected to the conversion on behalf of FmHA.

FmHA first objects to Eschenbaums' conversion from chapter 13 to Chapter 12 as impermissible as a matter of law. Mr. Lloyd cites Section 302(c)(1) of the Bankruptcy Judges, United States Trustees, and Family Farmers Bankruptcy Act of 1986, (28 U.S.C. 581 note) which provides:

(c) Amendments Relating to Family Farmers.

(1) The amendments made by subtitle B of title IT shall not apply with respect to cases commenced under title 11 of the United States Code before the effective date of this Act.

The subtitle referred to contains chapter 12 of the Bankruptcy Code- chapter 12s effective date is November 26, 1986.

Mr. Lloyd presents an interesting issue which the cases do not answer unanimously. Nevertheless, the issue has been settled in this District, and there is no purpose in offering ray analysis. Judge John B. Jones for the District Court of South Dakota has held that Section 302(c) does not prevent conversion of chapter 11 and 13 cases pending November 26, 1986 to chapter 12. In Re Erickson partnership, 74 BR. 670 (1987) (Erickson I). The decision affirmed Chief Bankruptcy Judge Ecker of this District. 68 B.R. 819. Erickson I "disregards" the language of the statute in favor of the legislative committee report which allows conversion in the Court's discretion- The Erickson I appeal was argued in trout of an Eighth circuit Court of Appeals panel on April 12, 1988. Because the Eighth Circuit opinion may not be handed down for months, this Court will not await its guidance and will follow the District Court opinion.

The Court will now consider the merits of the conversion issue.

Section 1307 provides in pertinent part:

(d) Except as provided in subsection (e) of this section, at any time before the confirmation of a plan under section 1325 of this title, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 11 or 12 of this title.

(e) The court may not convert a case under this chapter to a case under chapter 7, 11 or 12 of this title if the debtor is a farmer,

unless the debtor requests such conversion.  
(if) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

Further guidance is also offered by the legislative statement reprinted in Erickson I which states the ability to successfully reorganize in chapter 12 is "[c]hief among the factors" weighing in the conversion balance.

Mr. Lloyd's objection alleges the Debtors do not qualify to file under chapter 12, and that Section 1307(f) therefore prevents conversion. Section 109(f) restricts a chapter 12 filing solely to "a family farmer with regular annual income...." Section 101(17) defines a "family farmer" as an individual and spouse engaged in a farming operation whose aggregate debts do not exceed \$1,500,000.00, and 80% of whose aggregate noncontingent, liquidated debts (excluding debt for the principal residence, unless the debt arises out of the farming operation) on the date the case is filed arose out of the farming operation, and who received 50% of their gross income for the taxable year preceding the taxable year in which the case was filed from the farming operation. "Farming operation" includes ranching. Section 101(20). Section 101(18) defines a "family farmer with regular annual income as debtors whose annual income is sufficiently stable and regular to enable such family farmer to make payments under a" chapter 12 plan. It is the Debtors' burden to prove they qualify for chapter 12 treatment. In *Re Rott*, 73 B.R. 366 (Bkrtcy. D.N.D. 1987). The Court will now consider whether the Eschenbaums meet the statutory criteria.

The only witness called at the April 5 hearing was the debtor, Mr. Eschenbaum. He testified that the Debtors were less than \$1,500,000.00 in debt, and that over 80% of the Debtors' income was derived from the farming operation. Judging by the liabilities listed in the schedules and testified to, over 80% of the aggregate non-contingent, liquidated debts of the Debtors at the relevant date arose out of the farming operation. These liabilities are set out below. This testimony is uncontradicted and generally in accord with the Debtors' schedules which were signed under penalty of perjury. See Bankruptcy Rule 1008. The Court finds that the Eschenbaums are "family farmers."

The Debtors' remaining hurdle is to establish they are "family farmers with a regular income, meaning they must demonstrate an ability to fund their Chapter 12 plan. The parties settled PCA's claim for \$225,000.00 which has been paid in full by funds produced from selling cattle. Mr. Eschenbaum admitted on cross-examination that the Debtors only steady source of income is cattle sales. All crops grown are used for feed. He testified that 135 "young cows" remained after the PCA sale. 100 to 115 calves were expected to be produced in 1988. The Debtor testified to a history of over 90% calf crops. This should provide for a stable income. According to Mr. Eschenbaum, based on current prices, at least \$500.00 per head, or roughly \$60,000.00 could be expected to

be produced from a sale of the calves. The next calf sale would occur approximately one year from the date of the hearing. The witness also testified that the operation had 300 tons of alfalfa, and possessed ample pasture and machinery. There also remained an excess of \$10,000.00 from the PCA sale which constitutes further income. The \$43,000.00 Mr. Eschenbaum testified as also coming from the PCA sale appears to have been cash collateral repaid to the PCA, and not income. See Transcript of September 1, 1987 hearing at 4. However, Mr. Eschenbaum testified he had "quite a bit" of the \$43,000.00 remaining. (Transcript at 17).

The witness testified that the operation would incur \$15,000.00 to \$20,000.00 in expenses from the date of the hearing until the end of 1988, including real estate taxes. The only major creditor remaining is Farmers Home Administration. In Mr. Eschenbaum's opinion, the value of the agency's collateral is \$59,600.00, the same value placed in the unconfirmed chapter 13 plan filed October 2, 1986. This value is presently undisputed. The remaining secured, priority, and general unsecured creditors possess much smaller claims. GMAC has settled treatment of its \$3,400.00 claim. The Debtors are to pay \$2,000.00 by May, 1988, and the remaining \$1,400.00 in two installments. Federal Land Bank's claim totals only roughly \$1,200.00. The Internal Revenue Service has filed a tax lien to attempt to secure a claim of \$4,242.56. Mr. Eschenbaum testified that approximately \$10,000.00 in real estate taxes was due Hand County. The Debtors' real estate tax payment due in 1988 totals approximately \$4,500.00. Finally, there are large apparently unsecured labor claims totalling \$18,500.00, owed to Mr. Eschenbaum's son, daughter and daughter-in-law. However, a maximum of \$5,500.00 of this amount would qualify as a priority claim under Section 507(a) (3) (B), and the actual amount is probably much less than this. According to the schedules, there is less than \$40,000.00 in general unsecured debt.

Even allowing for an optimistic feasibility assessment by Mr. Eschenbaum, the Debtors should have enough stable income to fund a Chapter 12 plan. The Court finds that the Eschenbaums are family farmers with regular annual income.

The Court also grants the motions of PCA and Deutz-Allis, which Mr. Volesky has not resisted.

This matter is a core proceeding under 28 U.S.C. 157. This opinion shall constitute the findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and 9014 and F.R. Civ. P. 52. Counsel for the Debtors is instructed to prepare an appropriate order. See Bankruptcy Rule 9021.

Very truly yours,

Irvin N. Hoyt  
Bankruptcy Judge

INH/sh  
CC: Bankruptcy Clerk