

**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

**TELEPHONE (605) 224-0560**  
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October 13, 1989

Thomas A. Lloyd, Esq.  
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Pierre, South Dakota 57501

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Re: Marcus Ray and Lana Lea Moeller  
Chapter 12                    89-30022

Dear Counsel:

Assistant United States Attorney Thomas A. Lloyd, on behalf of the Farmers Home Administration, has moved to dismiss the Chapter 12 case filed by Marcus and Lana Moeller. Having reviewed the file, briefs submitted by counsel, and other applicable case authority, the Court will grant Attorney Lloyd's motion.

The relevant facts are not in dispute. Moellers filed for relief under Chapter 11 on February 19, 1985. After enactment of the Bankruptcy Judges, United States Trustees, and Family Farmers Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (The Act), which created Chapter 12, Moellers move to convert their case. Such motion was granted, but the Court later vacated that order and directed that the case proceed under Chapter 11 of the Bankruptcy Code.

Having never had a Chapter 11 plan confirmed, Moellers moved to dismiss their case. A hearing thereon was held February 27, 1989. Such motion was granted by the Court on April 4, 1989. On May 9, 1989 (after the dismissal hearing but before the entry of

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the order) Moellers filed for relief under Chapter 12. On May 24, the FmHA moved to dismiss Moellers' Chapter 12 case. Moellers resisted, and a hearing on the motion was then held on July 12, 1989.

The FmHA cites two cases for its position that Moellers' motion must be dismissed: *In re Erickson* partnership, 856 F.2d 1068 (8th Cir. 1988) and *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989). Erickson stands for the proposition that a case commenced under Chapter 11 prior to the enactment of The Act may not thereafter be converted to a Chapter 12 proceeding. Sinclair likewise held that such conversion was improper and further held that a debtor could not dismiss a Chapter 11 case which was ineligible for conversion and thereafter refile under Chapter 12.

Moellers concede that they may not convert their case per Erickson but claim that their case is factually distinguishable from Sinclair and that application of the holding in Sinclair would be "unfair." The Court disagrees that Sinclair is factually distinguishable. In Sinclair, the debtors asked the bankruptcy judge to convert their case or alternatively to dismiss their Chapter 11 and allow them to start a new proceeding under Chapter 12. Here, Moellers' request for conversion was denied and they later asked for dismissal of their case under Chapter 11 and then filed a Chapter 12 petition before this Court could even formally grant their motion to dismiss. It is true that the debtors in Sinclair asked for permission to dismiss and refile in the alternative and made their intentions known to the court and that Moellers here did not ask in the alternative or make their true intention known. However, the Court believes that this is a distinction without a difference.

The Court is also not persuaded by Moellers' assertion that it would be unfair to forbid them to dismiss and refile. While Moellers use a number of interesting rhetorical questions concerning the unfairness of not allowing them to dismiss and refile, the fact remains that allowing them to do so would be the functional equivalent of allowing them to convert—a procedure which the Eighth Circuit has clearly held is not available under the Bankruptcy Code. As Judge Easterbrook stated in Sinclair, dismissal and refiling "is conversion by another name. Statutes control more than nomenclature, they are addressed to conduct. Proposals for conversion by another name are proposals for conversion." Id. at 1345.

Another court has faced an issue similar to that which has been presented here. In *Travelers Insurance Co. v. Olson*, 102 B.R.

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147 (Bkrctcy. C.D. Ill. 1989), the debtors initially filed under Chapter 11 of the Bankruptcy Code and later moved to convert to Chapter 12, which motion was denied. Debtors then proposed an amended Chapter 11 plan which was not confirmed by the court. Debtors thereafter made no further effort to file an amended plan of reorganization. Creditor Travelers Insurance Co. then moved to dismiss the Chapter 11 proceeding on the ground that debtors failed to file a plan. Such motion was granted, and the next day the debtors filed a Chapter 12 proceeding. Travelers moved to dismiss, claiming that debtor's actions constituted an improper conversion and that filing the Chapter 12 on the heels of the Chapter 11 violated §109(g) of the Bankruptcy Code. At the hearing on Travelers' motion to dismiss, debtors argued that their action was strategically conceived. Unlike Moellers, they recognized that they could not convert, and that if they voluntarily dismissed, they then would be prohibited from refileing under Chapter 12. Debtors in Olson, however, believed that they could refile under Chapter 12 following an involuntary dismissal. The court in Olson applied the holding in Sinclair, noting that the only factual difference between the two cases was that dismissal in Sinclair was voluntary and dismissal in Olson was not. The Judge however correctly concluded that he saw "no difference between a voluntary dismissal and an involuntary dismissal. It is an attempted conversionE.]<sup>t</sup>' Id. at 149.

The Court believes that the procedure initiated by Moellers amounts to an attempted de facto conversion which is forbidden by Erickson. Accordingly, the Court will grant FmHA's motion to dismiss Moellers' Chapter 12 case with prejudice. This constitutes the Court's findings of fact and conclusions of law. This is a core proceeding under 28 U.S.C. §157. The Court will enter an appropriate order.

Very truly yours,

Irvin N. Hoyt  
Chief Bankruptcy Judge

INH/sh

CC: Bankruptcy Clerk

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA

IN RE: ) CASE NO. 89-30022  
MARCUS RAY MOELLER and )  
LANA LEA MOELLER, )  
 ) CHAPTER 12  
 )  
Debtors. ) ORDER GRANTING FARM HOME  
 ) ADMINISTRATION'S MOTION  
 ) TO DISMISS

Pursuant to the Court's letter memorandum executed this same date,

IT IS HEREBY ORDERED that the above named debtors' Chapter 12 proceeding is dismissed with prejudice.

Dated this 13th day of October, 1989.

BY THE COURT:

Irvin N. Hoyt  
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

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

(SEAL)

(SEAL)