

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

IN RE:)	CASE NO. 87-30100
)	
LEROY JOHN RAUSCH and)	CHAPTER 12
PATRICIA EVELYN RAUSCH,)	
)	MEMORANDUM DECISION
Debtors.)	

A hearing was held on January 19, 1988 on Federal Land Bank's Motion for Relief from the Automatic Stay which alternatively requested adequate protection payments. The hearing was attended by Brent Wilbur, representing Federal Land Bank, and William Pfeiffer, representing the Debtors.

Federal Land Bank's written motion and oral argument concerned three aspects of adequate protection. First, the Bank argues that the Debtors' failure to keep county real estate taxes current on land mortgaged to the Bank impairs its collateral interest. At the hearing Debtors' counsel agreed to bring the taxes current, and to keep them current in the future, and that an order in accordance could be entered. The concession obviates this aspect of Federal Land Bank's motion.

As a second grounds for receiving adequate protection payments, the Bank argues that the value of its collateral has depreciated over the pendency of the bankruptcy case. The Bank's appeal of Judge Ecker's secured status valuation is presently pending.

At the adequate protection hearing Mr. Wilbur agreed with the Court that the depreciation issue could not be determined until the outcome of this appeal was; entered. This portion of the Bank's motion is continued and may be renewed on ten days notice.

Finally, Federal Land Bank argues that under the (doctrine of In Re Ahlers, 794 F.2d 1388 (8th Cir. 1986) it is entitled to adequate protection payments to compensate it for the lost use of its security for the period following the time it could have completed foreclosure. At the hearing³ the Bank requested this version of adequate protection in the form of interest on its claim at the rate set out in the debtors' plan of reorganization. Similarly in paragraph b. of its prayer for relief in the Bank's written motion it requests payment of "the reinvestment return on any proceeds which would be realized by foreclosure absent the existence of this bankruptcy proceeding, and further monthly payments in an amount equal to the interest accrual upon the indebtedness" owed to the Bank.

11 U.S.C. Section 1205 governs adequate protection awards in Chapter 12 proceedings. It expressly excludes the application of Section 361, the adequate protection statute of otherwise general applicability. In interpreting Section 1205, Judge Ecker has

squarely addressed the Ahlers argument put forth by the Bank. In Re Rennich, 70 B.R. 69 (Bkrtcy. D.S.D.1987). In Judge Ecker's words "a debtor in a case filed under Chapter 12 of the Bankruptcy Code is not required to pay lost opportunity costs in the form of interest payments or otherwise for the retention of secured equipment to 'adequately protect' the affected creditor." Rennich 70 B.R. at 71. This opinion of the Chief Bankruptcy Judge for the District of South Dakota rested firmly on the legislative history of Section 1205, which criticizes lost opportunity cost payments as a serious barrier to farm reorganizations.

The United States Supreme Court's recent United States Association of Texas v. Timbers of Inwood Forest Associates, Ltd.

_____ (Slip. Op. No. 86-1602, decided January 20, 1988)

decision resolves the split authority that existed in reference to Ahlers type adequate protection payments. It now appears that this type of request in bankruptcy proceedings under any chapter would be an exercise in futility.

The Bank's request for adequate protection in the form of interest payments is denied.

Regarding the creditor's motion for relief from stay, cause for lifting the stay has not been shown. This portion of the Bank's motion is likewise denied.

Counsel for the Debtors is directed to prepare findings of fact, conclusions of law and an appropriate order.

(SEAL)

Dated this 5th day of February, 1988.

BY THE COURT:

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
PATRICIA MERRITT, CLERK

By: _____
(SEAL)

(SEAL)