IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEBRASKA

IN RE:	
ELDON C. WICHMANN and RITA WICHMANN	BK. 87-521
Debtors.	
BUSINESS MEN'S ASSURANCE COMPANY OF AMERICA,	
Plaintiff,	CV. 87-0-599 CV. 87-0-862 CV. 87-0-863
v.	
ELDON C. WICHMANN and RITA WICHMANN,	ORDER
Defendants.	

These matters are before the Court on appeals of decisions of the Bankruptcy Court. Business Men's Assurance Company of America (hereinafter BMA) appeals from the Bankruptcy Court's order of July 7, 1987, establishing the appropriate rate of interest to be applied to appellant's claim (CV. 87-0-599), the Bankruptcy Court's October 21, 1987, order overruling its motion to dismiss (CV. 87-0-862), and the Bankruptcy Court's October 21, 1987, order of confirmation (CV. 87-0-863).[1/]

1/ Appellees (hereinafter debtors or Wichmanns) argue that BMA's appeals of the motion to dismiss and interest rate orders are interlocutory. The Court need not address the question since all issues are included in BMA's appeal of the order of confirmation which is properly before the Court. Accordingly, all issues will be addressed in a single order.

INTEREST RATE

This action involves a Chapter 12 family farmer reorganization. The Bankruptcy Court ruled "[i]n this and future Chapter 12 cases, a yield on a treasury bond with the remaining maturity matched to the average amount outstanding during the term of the allowed claim, plus a two per cent upward adjustment to account for the risk is, in this Court's opinion, the prevailing market discount rate." **In the matter of Wichmann**, 77 Bankr. 718, 721 (Bankr. D. Neb. 1987).

Debtors initially objected to the Bankruptcy Court's determination arguing that the contract rate of interest should have been imposed. However, in their brief on appeal of the order of confirmation, debtors concede agreement with the Bankruptcy Court's decision on interest rates. Thus the Court will not address the contract rate argument.

BMA contends that the Bankruptcy Court must determine market rate by determining the outcome of an arms-length bargain between businessmen on a case by case basis with reference to affidavit evidence of interest rates on a comparable loan.

This Court may review the Bankruptcy Court's legal conclusions **de novo** but the Bankruptcy Court's findings of fact may not be set aside unless clearly erroneous. Bankr.R. 8013, **Wegner v. Grunewaldt**, 821 F.2d 1317, 1320 (8th Cir. 1987); **In re Martin**, 761 F.2d 472, 474 (8th Cir. 1985).

Determining an appropriate interest rate involves a factual inquiry. **United States v. Neal Pharmacal Co.**, 789 F.2d 1283, 1286 n.8 (8th Cir. 1986)(referring to determinations under §1129(a)(9)(C)); **In re Monnier Bros.**, 755 F.2d 1336, 1340 n.3 (8th Cir. 1985)(noting "selection of an appropriate interest rate is in part a factual inquiry"). As such, the Bankruptcy Court's decision is subject to review under the clearly erroneous standard.

"[I]n determining the discount rate, the Court must consider the prevailing market rate for a loan of a term equal to the payout period, with due consideration for the quality of the security and the risk of subsequent default." **United States v. Neal Pharmacal**, 789 F.2d at 1285 (**quoting In re Monnier Bros.**, 755 F.2d at 1339 and 5 **Collier on Bankruptcy** ¶ 1129, at 1129-65). Although **Monnier** and **Neal** deal with determinations of rates of interest under 11 U.S.C. § 1129, the language of that section is substantially the same as 11 U.S.C. § 1225(a)(5)(B). Accordingly, "[t]here is no reason to except Chapter 12 reorganizations from the market standard." **Matter of Doud**, 74 Bankr. 865, 867 (Bankr. S.D. Iowa 1987). The prevailing market rate approach has thus been applied to reorganizations under Chapter 12. **See e.g., Doud**, 74 Bankr. at 869; **In re Edwardson**, 74 Bankr. 831 (Bankr. D. N.D. 1987); and **In re Citrowske**, 72 Bankr. 613 (Bankr. D. Minn. 1987).

Decisions vary as to what interest rate best approximates the "prevailing market rate" for a loan of comparable risk and term. **See Neal Pharmacal**, 789 F.2d at 1286.

The various rates that courts have utilized include the contract rate, the legal rate, the rate determined under 26 U.S.C. § 6621 of the Internal Revenue Code, the treasury bill rate, and the treasury bill rate with adjustments made for risk. In re **Mitchell**, 39 Bankr. 696, 700 (Bankr. D. Or. 1984).

In the present case, the Bankruptcy Court establishes one method for determining what interest rate best represents the market rate. Its methodology is not at variance with Eighth Circuit decisions. The Court has reviewed the record in this case and applicable law and cannot state that the Bankruptcy Court's decision is clearly erroneous. This Court affords ample deference to the Bankruptcy Court in this regard. For the reasons set forth in the Bankruptcy Court's decision **In the Matter of Wichmann**, 77 Bankr. 718 (Bankr. D. Neb. 1987), this Court affirms the Bankruptcy Court's opinion.

BMA argues that the Bankruptcy Court is required to perform a case by case analysis on interest rates. BMA presented evidence by affidavit of the market rate for a loan of this type. The Bankruptcy Court rejected its evidence, noting "no lenders would make a loan of this type to any debtor in bankruptcy." **Wichmann**, 77 Bankr. at 720. The Bankruptcy Court further found that adoption of the method proposed by the creditor would require expert testimony in every case and would introduce additional cost and delay into the confirmation process. **Id.** This Court agrees. The Court notes that the Bankruptcy Court expressly held that it would consider evidence of special

circumstances in cases where the creditor believes that the proposed discount rate is inapplicable. BMA presented no evidence of any special circumstances in this case.

BMA argues that the discount rate established by the Bankruptcy Court is erroneous for the reason that the rate does not include profit. "[A]pplication of a proper discount rate in a Chapter 12 setting should not focus on any profit factor for creditors." **Matter of Doud,** 74 Bankr. at 869. **See also In re Fisher,** 29 Bankr. 542, 547 (Bankr. D. Kan. 1983)(holding the element of profit is inappropriate under Chapter 13). BMA also asserts that the two per cent figure added by the Bankruptcy Court to account for risk is arbitrary and is not supported by evidence. The Bankruptcy Court relied on **Matter of Doud,** 74 Bankr. at 869, in support of its adoption of that amount. Factors weighing on the risk adjustment are adequately discussed in that opinion. **Id.** Also, BMA does not propose any alternative risk factor or any alternative method for calculating the risk. The Court is satisfied that, in the absence of any showing to the contrary, a two per cent upward adjustment will adequately compensate creditors for risk.

MOTION TO DISMISS

BMA appeals the Bankruptcy Court's overruling of its motion to dismiss. BMA asserts that debtors are ineligible under Chapter 12 for the reason that they previously obtained a Chapter 7 discharge in 1985 and accordingly obtained a discharge of any indebtedness to BMA. BMA thus asserts that it has no claim

subject to reorganization. It also contends that debtors have attempted to unilaterally affirm their debt by scheduling BMA's "claim" into their Chapter 12 proceeding, and have done so in bad faith.

The Bankruptcy Court found that "[n]either the legislative history nor the specific language of Chapter 12 indicate that debtors previously in Chapter 7 are prohibited from receiving the benefits of Chapter 12." **In the Matter of Wichmann**, Bk. 87-521, slip op. at 1-2 (Bankr. D. Neb. Oct. 21, 1987). The Court further reasoned that since debtors have title to the land and BMA has a lien on the land, BMA has a claim against property of the estate, notwithstanding the fact that debtors have no personal obligation to BMA. **Id.** at 2.

There is ample support for the Bankruptcy Court's position. **See Matter of Metz**, 820 F.2d 1495 (9th Cir. 1987); **In re Klapp**, 80 Bankr. 540 (Bankr. W.D. Okla. 1987); **In re Camp**, 78 Bankr. 58 (Bankr. E.D. Pa. 1987); **Matter of Lagasse**, 66 Bankr. 41 (Bankr. D. Conn. 1986); and **In re Lewis**, 63 Bankr. 90 (Bankr. E.D. Pa. 1986)(all holding that a Chapter 13 petitioner may include a mortgage claim within a plan even though the underlying obligatiion of the mortgage was discharged in the debtor's prior bankruptcy case). **But see In re McKinstry**, 56 Bankr. 191 (Bankr. D. Vt. 1986) and **In re Binford**, 53 Bankr. 307 (Bankr. W.D. Ky. 1985)(holding that a naked lien, after discharge of the underlying debt, does not constitute a "claim" against the estate).

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Although the cases deal with proceedings under Chapter 13, the rationale is equally applicable to Chapter 12 proceedings. The Bankruptcy Code defines claim as including a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured . . . ." 11 U.S.C. § 101(4). The Code's specific rules of construction also state that the term "'claim against the debtor' also includes a claim against the property of the debtor." 11 U.S.C. § 102(2). The legislative history of § 102(2) suggests that where a creditor's only rights are against the debtor's property, then those rights "would give rise to a claim that would be treated as a claim against the debtor personally, for purposes of the Bankruptcy Code." H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 315 (1977), **reprinted in** 1978 U.S. Code Cong. & Admin. News 6787, 6272; see also **Matter of Lagasse**, 66 Bankr. at 43; **In re Camp**, 78 Bankr. at 63.

There is no statutory prohibition to the practice of including a previously discharged claim in a subsequent plan of reorganization except the good faith filing requirement. **Matter of Metz**, 820 F.2d at 1495. BMA urges that debtors acted in bad faith. "A bankruptcy judge's finding that a plan is proposed in good faith is a finding of fact to be reviewed under the clearly erroneous standard." **Id.** at 1497. The filing of successive

bankruptcy actions does not constitute bad faith per se. Id. There is no evidence to indicate that the Bankruptcy Court's finding in this regard is clearly erroneous.

ORDER OF CONFIRMATION

BMA's appeal of the Bankruptcy Court's order of confirmation is partially premised on its assertions that the Bankruptcy Court applied the incorrect interest rate and improperly overruled its motion to dismiss. Those arguments are disposed of in the Court's discussion infra.

BMA also appeals the Bankruptcy Court's valuation of the real estate in question. BMA concedes that the valuation question is one of fact, but submits that this Court is not restricted on its review to the clearly erroneous standard because only affidavit testimony was adduced. "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous . . . ." Bankr.R. 8013 (emphasis added). A finding regarding valuation based on conflicting evidence must be accepted unless clearly erroneous. In re Pittman, 8 Bankr. 299, 301 (Bankr. D. Colo. 1981).

Under that standard of review, this Court finds no error in the Bankruptcy Court's valuation. Debtors submitted evidence that the property at issue was appraised at $110,590 and $105,760. BMA submitted an appraisal in the amount of $145,000. The Bankruptcy Judge arrived at a valuation of $117,000. The Court found: "The evidence of value presented by the debtors is

more persuasive than that of the creditor." There is evidence in the record to support the Bankruptcy Court's finding and this Court cannot say that it is clearly erroneous.

BMA also disputes the Bankruptcy Court's finding of feasibility. Again, this Court cannot state that the Bankruptcy Court's findings are clearly erroneous.

IT IS ORDERED that the final judgment of the bankruptcy court is affirmed and these appeals are dismissed.

DATED this 9th day of June, 1988.

BY THE COURT:

LYLE E. STROM, Chief Judge
United States District Court

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