IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

IN RE:	§	
	§	
RONALD JAMES HETTLER AND	§	CASE NO. 02-50465-RLJ-11
ROBIN LEE HETTLER,	§	
	§	
DEBTORS.	§	

MEMORANDUM OPINION

The court considers confirmation of the First Amended Plan, as modified by the Modification to Plan (the "Modified Plan") filed by the Debtors Ronald Hettler and Robin Hettler. William David Brenholtz, the major creditor in this case, objects to the Modified Plan. Hearing on the Modified Plan, along with hearing on the modified plan filed in the companion case of Cornwall Personal Insurance Agency, Inc., Case No. 02-50463, was held May 27, 2003.

This court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334 and 11 U.S.C. § 1129. This is a core proceeding in accordance with 28 U.S.C. § 157(b)(2)(L).

Ronald Hettler is the sole shareholder of Cornwall Personal Insurance Agency, Inc. ("Cornwall"). Cornwall filed Chapter 11 on April 12, 2002. The Hettlers filed their Chapter 11 case on April 15, 2002. The event that forced both the Hettlers and Cornwall to seek bankruptcy protection was a state court judgment obtained by Brenholtz in the 364th District Court of Lubbock County, Texas, against Cornwall and the Hettlers. The judgment, which includes punitive damages, is for breach of contract, tortuous interference with business relationships, conversion, and fraud – all arising from the former business relationship between Brenholtz and Cornwall and the Hettlers. Brenholtz's claims in both this case and the Cornwall case are defined by the state court judgment.

This results in a claim in the Cornwall case of approximately $495,652.22 and in this case of approximately $642,601. A significant portion of the judgment is joint and several between the Hettlers and Cornwall which results in an aggregate of the two claims exceeding the total amount of the judgment. A chart reflecting the allocation of damages awarded by the judgment, Brenholtz's Ex. 6, is attached and incorporated herein.

After the state court rendered its judgment, Brenholtz proceeded to attempt to collect on the judgment from Cornwall and the Hettlers. Unable to post a supersedeas bond pending appeal, Cornwall and the Hettlers filed their respective Chapter 11 cases.

Cornwall and the Hettlers have appealed the state court judgment. The parties have estimated that the appeal will be decided before the end of 2003. This court has lifted the stay and approved employment of special counsel to prosecute the appeal.

The Hettlers' first amended plan, filed November 27, 2002, specially classified Brenholtz and proposed that the Hettlers would pay

> the liquidated amount, up to $520,001.00, as the Courts may allow, at 6% interest over 178 months, with the first payment commencing thirty (30) days after the completion of the Brenholtz lawsuit, whichever is later. . . .[Cornwall] will pay the joint and several liability of the Debtor's [sic] and [Cornwall] as set out in it's [sic] plan of reorganization. Debtor will pay only the sole liability of Debtors Ron Hettler and Robin Hettler to Brenholtz in this plan. Debtor [sic] proposes to pay, after liquidation [sic] the balance owed, if any up to the remaining $520,001.00. That is the debt that the judgement rendered solely against Debtors, Ron Hettler and Robin Hettler. Debtor will pay interest on the judgement at the rate of 6%. Payment will commence thirty (30) days after the debt becomes final and liquidated, payable over 178 months. The initial payment is $3,150.00 . . . . That payment is paid for 12 months. At that point the payment increases to $3,308.00 per month, for twelve months. At the end of the second year, the payment increases to $3,473.00. At the end of the third year, the payment increases to $4,946.00.

The first amended plan further provided that any proceeds realized by the Hettlers in a lawsuit against Travelers Insurance Company would be applied to the Brenholtz judgment.

The Debtors' first amended plan, with the above-stated proposal, was considered by the court at a confirmation hearing held February 24, 2003. Confirmation was considered in accordance with section 1129(b) of the Code, the so-called "cram down" provision, as the Debtors had met the requisite provisions of section 1129(a). The court specifically addressed the fair and equitable requirements of section 1129(b) and, specifically, whether the plan's treatment of Brenholtz's claim provided Brenholtz with "property of a value, as of the effective date of the plan, equal to the allowed amount of the claim." 11 U.S.C. § 1129(b)(1)(B)(i) (2003). The court denied confirmation of the Hettlers' first amended plan. In general, the court held that the plan failed to provide for the present value of Brenholtz's claim. Specifically, the court found that there was no evidence establishing that deferred payments, with interest accruing at 6%, constituted payment of the present value of the claim. The interest accrual under the first amended plan did not begin until the appeal of the state court judgment was finalized, many months following the effective date of the plan. The court found that the initial escrow payments of $500 a month, which were to be made pending appeal, would, in effect, negatively amortize the Brenholtz claim. Finally, the court considered the first amended plan as fundamentally flawed as it effectively absolved the Hettlers from liability on the portion of the judgment that is joint and several with Cornwall.

The Debtors' Modified Plan sets forth a combined total liability, including the joint and several liability with Cornwall, of $642,601. The plan then states as follows:

If [Cornwall] fails to pay one [sic] $1.00 on the judgement, then the Debtors believe that the liquidation of the assets of [Cornwall], including the book of business, would generate approximately $400,000.00. The accounts are pledged on a line of credit to First United Bank, Lubbock. . . . Liquidating the property would generate $300,000.00 to be paid to all the unsecured creditors. This will result in a proportionate payment on the joint and several liability of $ [sic] $165,000.00. This liquidated amount of $487,601.00 is subject to further reduction through Debtor's claim objection, attacking the validity of the punitive damage awards.

The Modified Plan then sets forth the specific payments to be made on the Brenholtz judgment.

The Debtor will begin making payments of $2,438.00 per month to an escrow account 30 days following the confirmation of the Plan. This escrow is based on 6% of the claim amount. If the claim amount is reduced by the Debtor's claim objection, then the escrow will be reduced to 6% interest on the actual amount. Once and if the appeal of the Brenholtz judgment is finally resolved in Brenholtz's favor, Brenholtz will be entitled to collect the escrow account and the Debtor will begin making payments to Brenholtz directly. The claim will begin to accrue Court approved interest beginning the date of confirmation.

Debtor will pay on the liquidated claim as follows: The Plan calls for the Debtor to pay the liquidated amount, up to $487,601.00 as the Courts [sic] may allow, at 6% interest over 66 months, with the first payment commencing thirty (30) days after the completion of the Brenholtz appeal. . . . The judgment must be liquidated and final. This class shall receive payment of post-petition interest at the rate of 6%. [Cornwall] will pay the joint and several liability of the Debtors and [Cornwall] as set out in [its] plan of reorganization. In the event that [Cornwall] fails to pay any of [its] joint and several liability, subject to the Debtor estimates [sic] its claim as set out above, Debtor will pay up to $487,601.00 [sic] That is the debt that the judgement rendered solely against Debtors, Ron Hettler and Robin Hettler, with contribution credit given as to the liquidation value of [Cornwall], only. Payment will commence thirty (30) days after the debt becomes final and liquidated, payable over 66 months. The initial payment amount is $3,150.00 . . . . That payment is paid for 12 months. At that point the payment increases to $3,308.00 per month, for twelve months. At the end of the second year, the payment increases to $3,473.00. At the end of the third year, the payment increases to $4,946.00. . . . At the end of the fifth year, the payment increases to $5,129.00. The proceeds from the Travelers lawsuit will be paid pursuant to the policy.

Any funds realized by the Debtor from the Traveler's claim would be applied against the amount owing to Brenholtz; however, payment of the Traveler's recovery would not affect the proposed payment structure.

> Payments will be made on the 15th of each month, the first payment being due on the 15th of the first month following the date of confirmation. If the Debtor fails to make a timely payment, Brenholtz will notify the Debtor in writing of the default. If the default is not cured within 20 days of the notification, Brenholtz may proceed to collect upon the entire amount of the judgment.
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> Interest to be applied is calculated as follows: The U.S. Treasuries [sic] 10 year bond rate as to the date of confirmation plus a risk component of 2.0%, but in no event would the interest rate be less than 6.0%.

Debtors' Modification to Plan.

The Hettlers contend that the Modified Plan satisfies the requirements of 1129(b) and request confirmation of the plan. Brenholtz disagrees, contending that the Modified Plan is still not fair and equitable and unfairly discriminates against Brenholtz. Brenholtz argues that the payment scheme set forth in the Modified Plan fails to cover the entire amount of his claim, including the joint and several liability shared with Cornwall, and that the absolute priority rule requires that the Hettlers provide, as a backstop in the event Cornwall does not satisfy the joint and several liability, for full payment of the joint and several liability. The court has issued its Memorandum Opinion granting confirmation of the modified plan in the Cornwall case. Such plan does provide for payment of that portion of the judgment that is joint and several with the Hettlers.

The sum of $642,601, recognized under the Modified Plan, includes the entirety of the joint and several liability of the Hettlers and Cornwall. As stated, the Cornwall plan proposes to pay the joint and several liability of Cornwall and the Hettlers in full. The Hettlers submit that the liquidation of Cornwall's assets will, at a minimum, produce $172,828. After crediting this sum, the Modified Plan proposes deferred payments to cover the balance of the liability. The liquidation analysis of Cornwall, and hence the minimum payment in the event of Cornwall's demise, was not rebutted. The court notes,

however, that the liquidation analysis of Cornwall fails to recognize other debts (debts other than the Brenholtz judgment). Such other creditors of Cornwall would presumably share pro rata in the event of Cornwall's liquidation. This would then reduce the net amount available to apply against the joint and several liabilities of the Brenholtz judgment. Of significance to the court, however, is the provision of the Modified Plan that addresses Brenholtz's rights if the Hettlers default. Any default must be cured within 20 days of written notification from Brenholtz. If not cured, "Brenholtz may proceed to collect upon the entire amount of the judgment." Therefore, the liability to Brenholtz, as measured by the judgment, would effectively be accelerated and Brenholtz could then proceed to collect the full amount of the accelerated liability, including that portion that is joint and several with Cornwall, from the Hettlers personally.

The issues concerning whether the Modified Plan unfairly discriminates against Brenholtz and whether the 6% interest rate provides Brenholtz with the present value of his claim are identical to those raised in the Cornwall case. *See* Court's Memorandum Opinions entered February 28, 2003 and July 25, 2003 in the Cornwall case. These issues are therefore resolved in the Hettlers' favor.

The court must address two other issues. First, the Modified Plan states that the deferred payments will be made over 66 months, which clearly will not amortize the Brenholtz claim, assuming the judgment is not significantly reduced on appeal.

Ronald Hettler testified that it will take approximately 14 years to pay the judgment as it presently stands. Apart from the statement that payments will be made for 66 months, all other provisions of the Modified Plan as it concerns the Brenholtz claim, and the testimony presented in support of the plan, contemplate deferred payments to Brenholtz until the Brenholtz claim is satisfied.

Brenholtz's expert noted the 66 month payout, but also testified that the Hettlers could make significantly increased payments given their projected income. No issue has been raised, either in this case or the Cornwall case regarding the Hettlers' (and Cornwall's) ability to make the payments called for under the respective plans. The statement regarding the 66 month payout was a mistake. The plan is to be read as requiring payments to Brenholtz until the Brenholtz claim is satisfied.

The second issue concerns Brenholtz's objection that the Modified Plan contains no mechanism to keep him apprised of the status of the proposed escrow payments. This is a valid objection. The Hettlers will therefore be directed to provide Brenholtz with copies of all deposits made into the escrow account and a monthly statement of the status of the account.

The court is satisfied that the Modified Plan presents an acceptable, and confirmable, solution to the difficult issues raised by the judgment. The Modified Plan preserves the rights of both Brenholtz and the Hettlers under the judgment as it now stands and pending appeal. Were the court to deny confirmation, the Hettlers would likely end up in Chapter 7. They would presumably lose their interest in Cornwall and the ability to repay the Brenholtz judgment. Brenholtz would also lose. A Chapter 7 may well result in discharge of his punitive damages award. *See* 11 U.S.C. § 726(a)(4) (payment of claims for punitive damages from property of the estate subordinated to payment of other unsecured creditors).

Given the treatment of the Brenholtz claim (and judgment) under the Modified Plan and the uncertainty of the judgment in light of the pending appeal, the court recognizes that future disputes may arise concerning the plan provisions and the plan's treatment of Brenholtz's claim. The Modified Plan is

not a model of clarity; it is the Hettlers' proposal. Accordingly, the provisions of the Modified Plan should, if necessary, be construed against the Hettlers.

The court finds that the Modified Plan satisfies the provisions of 1129(b) and will therefore approve confirmation, provided the order confirming plan specifically provide that (1) the payments to Brenholtz contemplated by the plan shall continue until Brenholtz's claim is paid in full; and (2) the Hettlers provide Brenholtz with copies of all deposits made into the escrow account and a monthly statement of the status of the account.

SIGNED: July 25, 2003.

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ROBERT L. JONES
UNITED STATES BANKRUPTCY JUDGE