

**United States Bankruptcy Court
Western District of Wisconsin**

Cite as: [Unpublished]

In re William E. Kuenzi, Jr. and Eloise M. Kuenzi, Debtors
Bankruptcy Case No. 92-31382-13

United States Bankruptcy Court
W.D. Wisconsin

April 14, 1993

Michael J. Rynes, Bankruptcy Law Services, Madison, WI, for debtors.
Patricia M. Gibeault, Axley Brynerson, Madison, WI, and Robert J. Elliott, Janesville, WI, for AgriBank, FCB.

William A. Chatterton, Ross & Chatterton, Madison, WI, Chapter 13 Trustee.

Robert D. Martin, United States Bankruptcy Judge.

MEMORANDUM DECISION

On November 24, 1992, I granted the motion by AgriBank, FCB ("AgriBank") to reconsider my order confirming the debtors' amended Chapter 13 plan filed on July 24, 1992. Upon reconsideration and for the reasons stated herein, I find that the debtors' amended Chapter 13 plan cannot be confirmed.

William and Eloise Kuenzi ("debtors") filed a petition for relief under Chapter 13 on April 21, 1992. On July 17, 1992, a hearing was held to consider confirmation of the Chapter 13 plan and AgriBank's motion for dismissal or adequate protection. At that hearing, I determined that the value of the property at issue was \$190,000.00 and AgriBank's allowed secured claim was approximately \$157,000.00.⁽¹⁾ Finding that the Chapter 13 plan was not feasible, I denied confirmation and stayed dismissal of the case for ten days to allow amendment of the plan or conversion.

The debtors filed an amended plan on July 24, 1992. At the hearing on confirmation of the amended plan on September 8, 1992, the parties disagreed on the amount of AgriBank's secured claim as determined in the July hearing. Denying confirmation of the debtors' amended plan, I allowed ten days for the parties to secure a transcript of the July hearing and submit affidavits in proof of the secured claim. A hearing was held October 19, 1992 on the debtors' motion for reconsideration of the September 8, 1992 decision. I granted the motion for reconsideration on October 26, 1992 and confirmed the plan for the reasons stated in the filed statement of reasons.

The October 26, 1992 order conditioned confirmation upon the debtors filing, within ninety days, a statement of their intentions as to when and under what terms the property proposed for sale under the plan was to be disposed and carrying out that stated intention. On November 19, 1992, the debtors filed a second amended Chapter 13 plan, which eliminated the proposed sale of property, but contained no other statement of their intentions. On November 24, 1992, I granted AgriBank's motion to reconsider confirmation and took the matter under advisement.

As a preliminary matter, the second amended plan is not before the court. The second amended plan is not a specific statement of the debtors' intentions as contemplated by the October 26, 1992 order. For lack of a proper statement of intentions and for the purposes of this decision, the second amended plan serves only to indicate the debtors' intention not to sell their property.

A close examination of the plan, the record, and the letter briefs filed by the parties reveals that the feasibility of the amended plan must be reassessed. The debtors have submitted a five year plan which proposes to repay AgriBank in full within the plan period. Specifically, the plan provides that, after payment of \$500.00 to Farmers Home Administration ("FmHA"), the real estate taxes, the attorney fees, and the car payments, AgriBank will receive all available funds. Once the taxing authorities and FmHA are paid, and the Wisconsin Managed Forest Program is in full effect, the plan provides for refinancing through an outside source to repay AgriBank in full. The plan further proposes the sale of 140 acres and two Harvestor silos in the event that a sale would work to the mutual benefit of the debtors and AgriBank.

As I stated at the September 8, 1992 hearing, I must question the feasibility of any plan that proposes a lump sum payment in five years unless the amortization in the meantime is substantial. In my October 26, 1992 statement of reasons, I confirmed the amended plan based on calculations that AgriBank's claim would be reduced from \$161,943.34 to approximately \$139,000.00 in five years. Finding the \$139,000.00 amount to be approximately seventy-five percent of the \$190,000.00 value of the property, it appeared likely that refinancing would be available. However, as AgriBank correctly asserts, the priority of payment provided for in the plan results in the negative amortization of AgriBank's claim. According to the plan, payment on AgriBank's claim would not commence until approximately the third year of the plan.⁽²⁾ In the interim, interest would accrue on AgriBank's secured claim, substantially increasing its claim.⁽³⁾ In the third year of the plan, because the debtors would still be making car payments, the payments to AgriBank would be applied to interest.⁽⁴⁾ At the end of the third year, AgriBank would have no reduction in principal and would be owed more than one year's interest. In the fourth year, for the first time, some amount of plan funds would be applied against the principal owed AgriBank.

The debtors acknowledged that this court's previous amortization calculations were even more optimistic than their own. According to the debtors' initial calculations, AgriBank's secured claim would be reduced to approximately \$154,400.00, and not \$139,000.00, at the end of five years. This amount is approximately eighty-one percent of the \$190,000.00 value of the property.

By either parties' calculations, it is clear that there will not be a significant reduction in AgriBank's claim by the end of the plan period. As a result, refinancing is not a likely possibility. Accordingly, I find that the amended plan is not feasible and confirmation must be denied.⁽⁵⁾

Confirmation of the debtors' amended plan is further denied on the basis that the debtors have failed to comply with this court's October 26, 1992 order. That order conditioned confirmation upon both the filing of a statement of intentions as to when and under what terms the property was to be disposed and the realization of that stated intention. Recognizing the closeness of the feasibility question in my order, I explicitly conditioned confirmation on the partial liquidation of certain collateral. The condition was not incidental to my decision; it was an integral component. Despite the amended plan's provision that "[n]either the sale of land or Harvestors is necessary to satisfactory completion of Plan," the order conditioning confirmation on the realization of such a sale effectively negated that provision.

For the foregoing reasons, confirmation of the debtors' amended plan filed on July 24, 1992, is denied.

END NOTES:

1. In my October 26, 1992 statement of reasons, I determined that the exact amount of AgriBank's allowed secured claim was \$161,943.34. That finding is not at issue in this proceeding.
2. After payment of \$500.00 to FmHA, \$1,000.00 of attorney's fees, and \$284.43 per month for car payments, all plan funds would be used to pay real estate taxes. According to the Chapter 13 trustee's calculations, approximately \$33,106.86 would be needed to pay those taxes and interest (\$28,056.66 at twelve percent interest). Payment of the taxes would take approximately two years.
3. After two years, the debt to AgriBank would include all of its principal (\$161,943.34) and two years of accrued interest (\$25,910.00 at the eight percent rate in the plan).
4. In the third year of the plan, there would be \$32,704.00 available to fund the plan (\$19,500 [\$750.00 x 26 pay periods] + \$8,614.00 CRP income + \$4,590.00 land rental income). From that amount, the following would be paid prior to payment to AgriBank: \$2,943.36 trustee's commission, \$3,650.00 current real estate taxes, and \$3,413.16 car payments. This would leave \$22,697.48 available to pay AgriBank (\$32,704.00 - \$10,006.52).
5. AgriBank objects to paragraph 8 of the amended plan which provides that AgriBank must cooperate with the updating of the abstract of deed to allow the debtors' entry into the Conservation Reserve Program and the Wisconsin Managed Forest Program. AgriBank contends that this provision subordinates its first mortgage position in favor of the Department of Natural Resources in violation of 11 USC § 1325(a)(5)(B). Because I have denied confirmation on feasibility grounds, I do not address this objection to the plan.