

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 13 Case
)	Number <u>188-00029</u>
THOMAS D. TABB AND)	
MIRIAM P. TABB)	
)	FILED
Debtors)	at 5 O'clock & 00 min. P.M.
)	Date: 2-18-88
MOVANT/CREDITOR:)	
GEORGE M. HEFFERNAN)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Following preliminary hearing on the motion of George M. Heffernan, creditor in this Chapter 13 proceeding, for relief from stay, objection to debtor's use of cash collateral and for segregation and accounting for cash collateral, I make the following

FINDINGS OF ACT

1. On January 25, 1986 Thomas D. Tabb and Miriam P. Tabb doing business as Insurance Associates of Augusta, debtors in this Chapter 13 proceeding filed January 7, 1988, purchased from George M. Heffernan (Heffernan) all of the assets of the business enterprise known as Insurance Associates of Augusta, a general insurance agency (agency) for consideration of Three Hundred Fifty Thousand and No/100 (\$350,000.00) Dollars. The purchase price is

evidenced by a promissory note from the debtors

to Heffernan dated January 25, 1986 in the sum of Three Hundred Fifty Thousand and No/100 (\$350,000.00) Dollars bearing interest at a rate of Twelve percent (12%) per annum and payable in eighty four (84) equal monthly installments of Six Thousand One Hundred Seventy Eight and 46/100 (\$6,178.46) Dollars. The promissory note was secured by all of the assets of the agency.

2. Prior to the sale, both debtors had been an employee of the agency. After the sale until March, 1987 Heffernan was an employee of the agency in full contact with the day-to-day operations of the agency including check writing authority.

3. Following the sale the agency experienced cash flow difficulties which contributed substantially to the filing of this petition for relief and which still continue.

4. On January 19, 1988 Heffernan filed motion to modify stay to permit foreclosure of lien based upon a claim that the debtors had defaulted on the payments due under the note, lacked equity in the property, failed to provide adequate protection, and used cash collateral impermissibly.

5. It is undisputed that at the time of filing the debtors were in arrears for payments due from the month of September, 1987 onwards.

6. It is undisputed that the balance due under the note including matured interest, is Two Hundred Ninety One Thousand Twenty Two and 90/100 (\$291,022.90) Dollars. The debtors contend

that they are entitled to credits against the debt for payments made by Heffernan from the agency on obligations due by Heffernan and not the debtors and that Heffernan had materially misstated the financial condition of the agency at the time of the sale. Heffernan contends that the amount due him exceeds the note balance. Although the record is unclear apparently various insurance companies have made demand upon Heffernan for payment of premiums due on policies issued by the agency. Additionally, Heffernan claims attorney's fees as called for under the promissory note.

7. The agency is currently operating out of one general checking account with all gross premiums deposited into that account. Following remittance of premiums due the insurance companies issuing policies, the average fifteen percent (15%) of the gross premium retained by the agency as its commission is disbursed to cover agency operating expenses and debt service.

8. The debtors contend the fair market value of the agency is One Hundred Twenty Thousand and No/100 (\$120,000.00) Dollars. Heffernan contends the fair market value of the agency is Two Hundred Six Thousand Three Hundred Twenty Five and No/100

(\$206,325.00) Dollars.1

1Debtor, Thomas D. Tabb testified that in his opinion the value of the agency was One Hundred Twenty Thousand and No/100 (\$120,000.00) Dollars and the debtor's proposed Chapter 13 plan values Heffernan's security at One Hundred Twenty Five and No/100 (\$125,000.00) Dollars. Heffernan based his valuation upon the gross premiums collected in calendar year 1987. Gross premiums collected were Nine Hundred Sixteen Thousand Nine

9. All payments to fund the Chapter 13 plan are to be made from the operation of the agency.

CONCLUSIONS OF LAW

Following the close of the evidence, Heffernan contended that the debtors were not eligible for relief under Chapter 13. The contention is based upon testimony of Thomas D. Tabb, debtor, that he and his wife, Miriam P. Tabb, were partners in the operation of the agency. Only an individual may be a debtor under Chapter 13 not a partnership. 11 U.S.C. §109(g) The mere use of the term "partners" by the debtor in his testimony is insufficient to disqualify the debtors from relief under this Chapter. Section 109(e) provides in pertinent part ". . . an individual with regular income and such individual's spouse may be a debtor under Chapter 13 . . ." Bankruptcy Code Section 1304

Hundred Ninety Nine and 52/100 (\$916,999.52) Dollars with a fifteen percent (\$15%) average commission earned on gross premiums the commissions earned for the agency in calendar year 1987 was One Hundred Thirty Seven Thousand Five Hundred Forty Nine and No/100 (\$137,549.00) Dollars. Heffernan testified that

z multiplier of the commissions earned in the preceding twelve-month period is .he standard method of valuing insurance agencies. Heffernan applied a multiplier of 1.5 to arrive at his fair market value of Two Hundred Six Thousand Three Hundred Twenty Five (\$206,325.00) Dollars. The multiplier used at the time of the sale of the agency from Heffernan to the debtors was 1.6. Heffernan testified that he lowered the multiplier to 1.5 because of the decline in commissions over the 1986 calendar year. Thomas D. Tabb testified that the commissions for calendar year 1987 were down Thirty Thousand and No/100 (\$30,000.00) Dollars from the 1986 level.

defines a self-employed individual as a debtor engaged in business. The term "debtor" used in Section 1304 can only be construed to mean debtor as defined under Section 109(e). The debtors are husband and wife and work together in the operation of their business meeting the eligibility requirements of Chapter 13. Courts have recognized that the husband and wife owners of a "Mom and Pop" enterprise can file jointly for relief under Chapter 13 even though the benefits and risks of the business are shared such as is the case with partnerships. See, e.g. In Re: Ward, 6 B.R. 93 (Bankr. M.D. Fla. 1980). The contentions of Heffernan are without merit on the issue of eligibility.

Heffernan contends that he is entitled to relief from stay based upon the debtors' lack of equity in the property securing his loan, which consists of all of the assets of the on-going business enterprise. Evidently, Heffernan is proceeding under 11 U.S.C. §362(d)12) in this ground for relief. Section

362(d)(2) sets forth two requirements for relief from stay. First, the debtor must not have an equity in the property, and second, the property must not be necessary to an effective reorganization.

Heffernan has met the first requirement. Although the exact fair market value of the agency is in dispute, there is no dispute that the value is less than the present amount due under the note without consideration for credits claimed due by the debtors. At this point, Heffernan is an

undersecured creditor, and the debtors have no equity in the property. The debtors have shown that the agency securing Heffernan's loan is the only business operated by the debtors and the debtors' sole source of income to fund the proposed Chapter 13 plan. Heffernan's contention fails under the second requirement as the property is necessary for an effective reorganization.

The remaining contentions of Heffernan fall under §362(d)(1) which provides that relief shall be granted for cause, including lack of adequate protection. Heffernan points to the debtors' use of cash collateral without his permission and without court approval as required under 11 U.S.C. §363(b)(2). Heffernan claims a security interest in the entire on-going business, including the premiums derived from the sale of new and renewal insurance policies. The cash premiums paid come under his lien, and the debtors are using this cash to operate the business,

including the payment of debtors' salaries. This impermissible use of cash collateral is depleting the assets of the business, thereby depriving this creditor of adequate protection for his interest. As evidence Heffernan testified that various insurance companies had made demand upon him for premiums due from the agency for policies issued by the agency. Although the evidence is unclear, apparently Heffernan remains liable for the premiums. The debtors refute this allegation by asserting that all premiums due insurance companies and demanded

of Heffernan were premiums due on insurance policies issued before the sale of the business and undisclosed to the debtors at the time of sale or were issued by Heffernan after the sale to G & H Construction, a proprietary business owned by Heffernan and that he had failed to pay the premiums to the agency. The debtors concede that atleast a portion of the premium paid to the agency by the purchases of insurance policies constitute cash collateral. Heffernan contends the entire premium constitute cash collateral.

The debtors contend that only the commission due the agency constitutes cash collateral, which commission averages fifteen percent (15%) of the gross premium paid. The debtors contend that upon issuance of the insurance policy a trust relationship is created between the agency and insurance company.

The agency acts as a fiduciary holding the net premium owed by the company in trust until the agency remits the same. The debtors contend the regulations of the State of Georgia Insurance Commissioner require remittance to the company within 72 hours of payment by the purchaser of the policy. Heffernan states that he has never heard of such regulation and that each company sets its own remittance procedures. As a general proposition, an independent insurance agent acts as the agent for the insureds, rather than for the insurer. European Bakers, Ltd. v. Holman, 177 Ga. App. 172 (1985). Thus, the agency owes a fiduciary duty to the purchaser instead of the company issuing the policy. The

question of agency in this context is one of fact, See, e.g. Johnson v. Pennington Ins. Agency., 148 Ga. App. 147 (1978). The debtors, however, have disclosed no evidence which would undermine the effect of the general rule and that would demonstrate that they were agents for the insurers.

The relationship between the debtors and the issuing companies is one of contract. At the time the insurance policy is issued and premium is paid to the agency is contractually bound to remit the net premium to the company. The failure to remit constitutes a breach of contract, creating a debtor/creditor relationship between agency and company and

subjecting the agency to a claim for damages under applicable state contract law. A failure to remit would subject the agency to a claim for damages as well as loss of its ability to issue policies of insurance with the concurrent harm to the overall welfare and value of the agency as an on-going business. Without adequate safeguards, Heffernan's interest is not adequately protected.

Regarding the net commission due the agency from each premium paid, so long as the commissions are used to meet the normal operating expenses of the agency, Heffernan is adequately protected. All income to the agency is generated by premiums paid for new or renewed policies of insurance. This is the nature of an on-going business, and this on-going business constitutes the essence of Heffernan's security. The debtors had

proposed a plan funded ultimately by the continued operation of the agency. This is not a liquidation. It is in the best interests of all parties that the business continue, which continuance requires the payment of normal operating expenses.

Bankruptcy Code Section 361 sets forth various non-exclusive methods of providing adequate protection to a creditor in Heffernan's position. In fashioning adequate protection in this situation, care must be taken to preserve the status quo, both the on-going business and Heffernan's security interest therein. To

prevent any further depreciation of the value of the security and to compensate Heffernan in the event the value does depreciate, Heffernan may be granted a post-petition security interest in the cash received by the agency, less the premiums paid and the agency's normal operating expenses, to provide the adequate protection required by Section 362. Such a security interest would essentially be a replacement lien, providing the sort of adequate protection authorized by Section 361(2).

ORDER

Consistent with the verbal order issued at the conclusion of the preliminary hearing in this matter, the debtors have demonstrated a reasonable likelihood that they will prevail at a final hearing. The relief from stay is denied. No later than close of business February 3, 1988, the debtors shall open a checking account denominated Insurance Associates of Augusta

premium deposit account, or utilizing similar identifying terms, at a federal deposit insurance corporation covered banking institution in Richmond County, Georgia, and commencing February 4, 1988 they shall deposit to said account all insurance premiums collected. Within 72 hours of payment of the policy of insurance, the debtors shall disburse the net premiums due to the issuing company. On a monthly basis the debtors shall disburse the

commissions due the agency on premiums collected to the general operating account of the agency. All funds in the general operating account of the agency shall be used solely for the purpose of paying the normal operating expenses of the agency, including the debtors' salaries as set forth in their petition schedules and payments to the Chapter 13 Trustee under the proposed plan. By the fifteenth (15th) day of each month, the debtor shall file with the Court and serve the Chapter 13 Trustee and movant's counsel a statement setting forth the gross premiums collected during the proceeding month, the amount disbursed to each insurance company under the terms of this order, and the commission earned from each company's premium and deposited into the general operating account of the agency. The debtors shall also furnish a breakdown of all disbursements from the general operating account of the agency. All excess funds shall be retained in the general operating account of the agency pending further order of the Court.

To protect Heffernan's security interest in the debtors'

cash collateral, movant is granted a replacement lien and security interest in all cash remaining in the agency's general operating account after the payment of insurance premiums and normal operating expenses have been deducted to the extent that any of such post-petition collateral is not already subject to the

respective lien and security interest of movant. These liens and security interest are and shall be valid, binding and enforceable as of the date of this order without the necessity of movant taking any other action, including the filing of any additional security agreements or documents with respect thereto, and will continue in full force and effect until further order by this Court.

Recognizing that any default by the debtors in meeting the foregoing adequate protection requirements would severely damage Heffernan's security interest in the on going business, in the event of default by the debtors in any of the terms of this order, Heffernan may file motion for relief from stay with accompanying affidavit setting forth the default with certificate of service attached verifying service upon debtor and debtors' counsel prior to filing. Upon the expiration of five (5) business days without responding affidavit of the debtors factually disputing the allegation of movant's affidavit, the Court may enter an order granting relief from stay without further hearing.

The hearing in this matter was a preliminary hearing.

Unless within ten (10) days of the date of this order a party requests a final hearing which request must be based upon an assertion that additional evidence will be presented, this order

shall be the final order in the matter.

ENTERED at Augusta, Georgia this 18th day of February,
1988.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE