IN THE UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON DIVISION

IN RE:

COOK CONSTRUCTION COMPANY, INC. NO. 89-03488-JC

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that on Monday, December 4, 1989, the following proceedings were had and done before the Honorable Edward Ellington:

APPEARANCES:

WILLIAM M. BOST, ESQ.
PAUL J. STEPHENS, ESQ.
RICHARD A. MONTAGUE, JR., ESQ.
WILLIAM H. LEECH, ESQ.
KENNETH G. PERRY, ESQ.
STANLEY M. STALUS, ESQ.

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THE COURT: The debtor filed a petition for bankruptcy on November the 3rd, 1989 seeking relief pursuant to Chapter 11 of the Bankruptcy Code. The matters before the Court today are an amended emergency motion for authority to use cash collateral and prepetition accounts receivable filed by the debtor and an objection, thereto, filed by Trustmark National Bank. There's also a motion to convert the case to a case under Chapter 7 of the code or to dismiss it which was filed by Trustmark and, of course, a response has been filed to that by the debtor. The matters were properly noticed for hearing, and a three-day trial was conducted last week.

The following comments constitute the findings of fact and conclusion for law of the Court. Subsequent written judgements will be prepared and entered by the Court consistent with this opinion.

The specific section of the Bankruptcy Code which deal with the use of cash collateral is Section 363. I won't read all of it, but basically it says in this section, "Cash collateral means cash, negotiable instruments, documents of title, securities, deposit accounts or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offsprings, rents or profits or property subject to a security interest as provided in Section 552(b) of this title, whether existing before or after commencement of the

case under this title."

The code section then goes on to provide "The trustee cannot use the cash collateral unless the entity that has an interest in it consents, or after hearing, the Court makes provisions for use of it." Subsection C provides that, in effect, "At any time on request of an entity that has an interest in the property, that it can't be used, and so forth, without a hearing, and that the Court shall prohibit or condition such use, sale or leases necessary to provide adequate protection of such interest." The last part of that code section says, "In any hearing under this section, the trustee, who is the debtor in possession in this case, has the burden of proof on the issue of adequate protection."

Section 361 describes methods by which adequate protection can be provided, but I want to emphasize that those methods are not -- there are three main methods listed, but they're not exclusive. The Court can fashion methods to provide adequate protection.

Then the code section that deals with the motion to dismiss is Section 1112, and specifically in this case, 1112(b) which says, "The Court may convert a case under this chapter to a case under Chapter 7 of this title or may dismiss a case under this chapter whichever is in the best interest of creditors and the estate for cause including, one, continuing loss to or diminution of the estate and

absence of a reasonable likelihood of rehabilitation. Two, inability to effectuate a plan," and it goes on through some other things. Again, I want to emphasize that although there's a list of items there, they're not exhaustive, and the Court may dismiss for other reasons.

There are untold numbers of reported cases that construe and apply these parts of the code in all different types of factual situations; however, this Court is of the opinion that the best guidance that it can attempt to follow is that provided by the Fifth Circuit Court of Appeals and the United States Supreme Court in a series of opinions in a case commonly referred to as "Timbers of Inwood Forest." The Fifth Circuit panel opinion was rendered on July 9, 1986, and it is reported at 793 F.2d 1380. Rehearing was granted and an en banc opinion was entered on January 9, 1987 which reinstated the panel opinion. The en banc opinion is reported at 808 F.2d 363. Certiorari was granted by the Supreme Court. In an unanimous opinion rendered on January 20, 1988, the Supreme Court affirmed the Fifth Circuit. This opinion is reported at 98 L Ed 2d 740.

Although the Timber's case dealt with what constitutes adequate protection for an undersecured creditor who had filed a motion to lift stay pursuant to Section 362 of the Code, the Fifth Circuit en banc opinion, in particular, discussed the creditor protection provisions of

the code and the duty and responsibility of bankruptcy judges to balance the needs of creditors for protection, and the needs of debtors to reorganize.

In the Timber's case, and I'm quoting from it, it's a rather lengthy quote, but it kind of explains some of the philosophy, at 808 F.2d at page 373. The Fifth Circuit in the en banc opinion written by Judge Carolyn Randall King, the Court said, "The creditor protection provisions of the Bankruptcy Code reviewed in part 2 of this opinion can be made meaningful only by bankruptcy judges who are equally sensitive to the need for creditor protection as to the need for protecting the debtor's right to reorganize. A principle goal of the reorganization provision of the Bankruptcy Code is to benefit the creditors of the Chapter 11 debtor by preserving going concern values and thereby enhancing the amount recoverable by all creditors. The secured creditor benefits from a successful reorganization because its secured claim is based on a going concern basis in connection with a plan of reorganization, and the secured creditor is not compelled to liquidate his collateral at forced-sale prices; however, when there's no reasonable likelihood that the statutory objective of reorganization can be realized or when the debtor unreasonably delays, then the automatic stay and other statutory provisions designed to accomplish the reorganization objection become destructive of

the legitimate rights and interest of creditors, the intended beneficiaries. In that situation, it is incumbent upon the bankruptcy judge to effectuate the provision of the bankruptcy code for the protection of creditors less the judge keeps the codes word of promise to the ear of creditors and break it to their hope. The bankruptcy judge must meet head on his obligation to decide fairly and impartially the hard questions."

In a concurring opinion by Judge Charles Clark, he said that on these type cases, the Court should keep certain things in mind and listed five of them. The first one is "Reorganization is not of holy grail to be pursued at any length. Creditors are entitled to a prompt determination of efficacy."

A part of -- well, one of the things that opinion discussed in depth was Section 1112(b) which we have here today. In that case, the Court says -- recognized that reasonableness is a standard -- reasonableness of possibility of reorganization is a standard that somewhat reflects -- when you have a motion to lift stay, that's one thing, when you get into a 11 or 1112, it's another, and I'll read part of that. "We recognize that relief from stay hearings are usually held earlier in the case and that they are expedited, limited in scope and held on limited notice; therefore, bankruptcy court applies the 'reasonable possibility of

successful reorganization' standard, but somewhat more indulgence that wouldn't to appropriate if the motion was made at a later stage of a proceeding or if a similar issue were raised in the context of a full-blown hearing that attends a motion to dismiss or convert the case brought under Section 1112. Nonetheless, the 'effective reorganization' standard must be given meaning by the Bankruptcy Court. To prevail against the secure creditor who has moved to lift under Section 362(d)(2), the debtor must do more than evince high hope. He must be able to show a reasonable prospect for successful reorganization within a reasonable time.

Perhaps the prime avenue for relief for both the secured and unsecured creditors of the debtor who is not reorganizable or who is unreasonably denying his motion for conversion or dismissal." And then he quotes Section 1112(b), which I had previously quoted.

The Court then goes on to say Section 1112 clearly provides the Bankruptcy Court with the requisite authority to terminate a Chapter 11 case based on a showing of unreasonable delay, continuing losses coupled with the absence of a reasonable likelihood of rehabilitation or inability to effectuate a plan of reorganization. The inquiry under Section 1112 is case specific focusing on the circumstances of each debtor.

When this case went up to the United States Supreme

Court, it commented in part on some of these things. It says on page -- on 98 L Ed 2d at page 751, in talking about adequate protection, lift stay and things like this. "What this requires is not merely a showing that there is conceivably to be an effective reorganization, this property will be needed for; but that the property is essential for an effective reorganization that is in prospect." And those last words are italicized.

Turning to the case at bar, this Court has considered the testimony that was presented last week, and this weekend I reviewed the exhibits that were admitted into evidence. In regard to the issue of the use of prepetition accounts receivable and cash collateral, the Court first notes that in addition to Trustmark, other creditors assert an interest in certain items of cash collateral, most notably Southland and Fireman's Fund. As stated by the Court at the beginning of the trial, no effort to determine priority of liens will be undertaken at this time.

The debtor says that he is seeking use of two and a half to two point seven million dollars of cash collateral to cure prepetition defaults and to cover the cost of operations during the next two or three months until accounts receivable start to come in from work done postpetition. The Court is of the opinion that an order could be fashioned to protect Southland. It is also of the opinion that considering the

amount owed to Trustmark and the nature and value of its security, that adequate protection could be afforded Trustmark in the short run. However, this Court is of the opinion that the real questions which must be determined are whether the debtor has reasonable prospect for a successful reorganization and whether any potential benefits for creditors which might be derived by the used of the cash collateral are outweighed by the attendant risk.

The Court has considered numerous things in relation to these questions. Probably the primary thing that has concerned the Court is the basic question of cash flow. As everyone recognizes, the debtor is engaged in a business that requires a great deal of capital. Cost of operating are high. Both the maintaining the staff, the asphalt plants and the equipment and then payment of things that have to paid on a weekly and monthly basis when the company is fully operational. Then there's the delay between time when expenses are incurred and work performed and the payment is received. This problem is going to be compounded in the future because a lot of trade creditors that had been willing to sell on open account in the past will only deal on a cash basis in the future as evidenced by the position taken by Southland. The amount owed to trade creditors at this time apparently exceeds nine million dollars. This is nine million dollars that had been available for use as part of

capital funds in the past that really are not there in the future.

Mr. Lefoldt testified in support of Exhibits D4 and 5 that set forth the plan of the debtor, if the debtor could use the accounts receivable and cash collateral. According to the exhibits and Mr. Lefoldt, during the first six months of 1990, the debtor would show a profit and improve its cash position; however, Mr. Cook and others testified that experience has shown that the company has lost money during the first six months of the year. Also, the assumptions of Mr. Glenn and Mr. Lefoldt were based on good weather. The testimony of Mr. Cook and Mr. Lefoldt as to things that attribute the filing were lack of capital which caused the cash flow problem and bad weather. Mr. Thiel stated that as of August 30th, 1989, the company had lost one million, eight hundered twenty-one thousand dollars.

Even considering the debtor's plans to reject numerous jobs, to sell off three and a half to five million dollars worth of equipment and otherwise down scale its operations, this Court is still unconvinced that the debtor can convert a large loss into a profit by June 30, 1990. The debtor proposes to keep 44 jobs, numerous asphalt plants and gravel operations, its cold milling operation and millions of dollars of equipment. It would still be a large operation by any standard, and capital would still be thin.

The Court did not accept Mr. Proctor's monthly cash flow analyses in its entirety. In particular, it did not accept his twelve and a half percent interest rate, nor the monthly payment of debt services projected by him which might be suspended for a period of time, but the debtor showed nothing to convince the Court that there is not a real possibility that if allowed, the debtor would not go into a full operation in a few months, spend a lot of money, hit a stretch of bad weather, run out of money, and finally take everything down.

The Court's thinking was probably influenced as much by the actions of Fireman's Fund as by any one else. I think Mr. Perry correctly stated Fireman's Fund stands to lose more in this than anyone else, and it probably has more expertise in this matter than anyone else. If the bonded job is not completed by the debtor, then Fireman's Fund must complete the job. After the Fireman's Fund has investigated the matter, they're not willing to put any new money into the deal. I believe, although only time will tell, that there's some equity in the case at this time that can be used to pay the employees at sometime in the future and to pay something toward the claims of unsecured creditors; however, if the Court allows the use of cash collateral, the Court is of the opinion that in all probability that any equity would be dissipated at the expense of employees and other unsecured

creditors.

Finally, the Court could never get a firm grip on where the profits and where the losses were generated in the overall operations. The losses in certain areas in the business were explained by claiming that they generated a profit in other areas, but the Court could never see enough profitable area to justify any future risk.

In conclusion, under the facts of this case, the Court is of the opinion that the debtor does not have a reasonable prospect for a successful reorganization and that any potential benefit of creditors which might be derived by the use of cash collateral is outweighed by the risk. The motion to use cash collateral is denied, and the motion to convert to a Chapter 7 is granted.

I would also like to add as a personal note, I am extremely sorry about what has happened. It has been a fine company, it's provided employment to a lot of Mississippians over the years. I never heard anything but good things about Mr. Cook in his leadership as community leader. I know Mr. Thiel and know that he served as volunteer coaching schools that I go to, and it's not like a lot of situations that I've seen, and I think it's a real regret and a real loss to the State, but I do believe that under all the facts that as I've stated is the way the case should be decided and orders will be entered accordingly. We adjourn.

CERTIFICATE OF COURT REPORTER

I, Theresa S. Lumley, Court Reporter and Notary Public in and for the County of Copiah, State of Mississippi, hereby certify that the foregoing 13 pages, and including this page, contain a true and correct transcript of proceedings, as taken by me in the aforementioned matter at the time and place heretofore stated, as taken by stenotype and later reduced to typewritten form under my supervision by means of computer-aided transcription.

I further certify that I am not in the employ of or related to any counsel or party in this matter and have no interest, monetary or otherwise, in the final outcome of this proceeding.

Witness my signature and seal this the 7th day of December, 1989.

Theresa S Lumley

THERESA S. LUMLEY

My Commission Expires:

May 20, 1992