

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:) In Proceedings
) Under Chapter 12
HERBERT J. WIEGMANN and)
CECILIA C. WIEGMANN,) No. BK 88-30498
)
Debtor(s),)
)
HERBERT J. WIEGMANN and)
CECILIA C. WIEGMANN,)
)
Plaintiff,)
)
V.)
)
KOHLBRECHER TRUCK SERVICE,)
INC.,)
)
Defendant.)

MEMORANDUM AND ORDER

The parties to this proceeding have been doing business together for approximately twenty years. Clarence Kohlbrecher is the President of Kohlbrecher Truck Service, Inc., a family business which sells various farm supplies. Herbert and Cecilia Wiegmann (debtors) operate a dairy farm.

Kohlbrecher Truck Service routinely extends credit to their customers, and charges a two percent finance charge per month for this service. However, if the account is paid within ten days of the first statement, the customer receives a one percent cash discount. The debtors often made purchases on credit for their farm, which were subject to the finance charge. It was not uncommon for Kohlbrecher Truck Service to carry the purchases for months on end, each month adding an additional two percent.

On January 31, 1987, the debtors and Kohlbrecher Truck

service entered into a repayment agreement which provided that the debtors would be assessed only a one percent per month finance charge instead of the usual two percent on the outstanding balance. Thus, from January 31, 1987, until the debtors filed their chapter 12 petition, they were assessed a finance charge of one percent per month pursuant to the repayment agreement.

On June 24, 1988, the debtors filed for relief under chapter 12 of the Bankruptcy Code. Kohlbrecher Truck Service filed a proof of claim for \$7,088.22, which amount included both purchases and accumulated finance charges.¹ The debtors objected to Kohlbrecher's claim alleging that the interest charged was usurious. The question before this Court is whether the sale and purchase of goods on an open account is subject to the state usury law.

What constitutes usury is a matter of legislative control. The Illinois usury statutes apply only to those contracts which in substance involve a loan of money or forbearance to collect money due. Ill.Rev.Stat., ch. 17, para. 6401-6419 (1987 & Supp. 1988). There can be no usury when there is in no sense a loaning of money. Tyrcha v. Wesolek, 187 Ill.App. 3d 354, 543 N.E. 2d 222, 224 (1989); McComb v. McWilliams, 153 Ill.App. 3d 601, 505 N.E. 2d 1378, 1379 (1987). A bona fide sale is not a loan or forbearance of money. Computer Sales Corporation v. Rousonelos Farms, Inc., 546 N.E. 2d 761, 763 (1989); Tyrcha, 543 N.E. 2d at 224; McComb, 505 N.E. 2d at 1379; Grecht v. Suson, 3 Ill.App. 3d 183, 278 N.E. 2d at 193 (1971). Thus,

¹The proof of claim consisted of purchases dating back to May, 1985. Of the total claim, \$2,283.12 represented finance charges.

a bona fide sale of property is not usurious regardless of how unconscionable it may be. 35 I.L.P., Usury §3 at 425 (1969). Undeniably the transactions in question were bona fide sales and not loans.

Where the transaction is a sale, the parties may make such a bargain as they can agree upon. Like any other agreement a promise to pay interest may be inferred from the particular mode of dealing between the parties. Avers v. Metcalf, 39 Ill. 307 (1866); Barliant v. Follett Corp. 138 Ill.App. 3d 756, 483 N.E. 2d 1312, 1317 (1985). In the present case the common practice between the parties was that Kohlbrecher would sell on credit to the debtors, and if the account was paid within ten days of the first statement, the debtors received a cash discount, if the account was not paid within thirty days a finance charge was added to the balance. For at least ten years the debtors consented to, and paid the finance charges, as well as accepted the cash discounts. Thus, the course of dealing between the parties establishes an agreement to pay a finance charge.

The Court therefore finds that there was an agreement to pay a finance charge on an account due over thirty (30) days. The Court further finds that the transactions were bona fide sales and not subject to the usury statute.

Debtors further objected to the claims of Siddell Grain Bins, Inc.,² N.C. Pries Implement, Inc., and Wade Sales and Service, Inc. on

²Debtors also objected to the claim of Siddell Grain Bins, Inc. on the ground the claim was not timely filed. The claims bar date was October 18, 1988, and Siddell filed its claim October 17, 1988. Therefore, the claim was timely filed.

the grounds that the interest charged was usurious. The Court does not have any evidence regarding the nature of the transactions involved in those claims. Debtors' counsel should examine the claims of the above stated creditors, in light of this ruling and advise the Court within seven (7) days if they intend to pursue the stated objections.

IT IS ORDERED that debtors' objection to the claim of Kohlbrecher Truck Service, Inc. is DENIED.

IT IS FURTHER ORDERED that debtors' counsel shall advise the Court within seven (7) days of their intentions in regard to the claims of Siddell Grain Bins, Inc., N.C. Pries Implement, Inc., and Wade Sales and Service, Inc.

/s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: February 22, 1990