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Too Much Farm Debt?:
A Primer in Chapter 12 Bankruptcy

October 1, 2019

80 NEW SCOTLAND AVENUE
ALBANY, NEW YORK 12208-3494
TEL: 518-472-5888 FAX: 518-445-2303
WWW.ALBANYLAW.EDU/CLE

Too Much Farm Debt? A Primer in Chapter 12 Bankruptcy
October 1, 2019
9:30am – 12:00pm
thINCubator, 326 Broad Street, Utica, NY

Agenda

9:30am – 10:00am	Registration and Breakfast
10:00am – 10:50am	Welcome and Panelist Introductions
	History, Background and Purpose of Chapter 12
	Pre-Filing Considerations, Eligibility and Getting Appointed
10:50am – 11:00am	Break
11:00am – 11:50am	Proposal of the Plan and Confirmation Issues
	Operation of the Farm and Post-Confirmation Matters (including Plan Modification and Sales)
	Special Tax Provisions
11:50am – 12:00pm	Question/Answer Period

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Speaker Biographies

HON. DIANE DAVIS '91 was appointed as Bankruptcy Judge for the Northern District of New York, Utica Division, on March 6, 2009. Judge Davis received her B.A. in Economics and German from St. Lawrence University and her J.D. from Albany Law School. Prior to her appointment, she served as Counsel to the Chapter 13 Standing Trustee in Albany, N.Y. Before that, she clerked for Magistrate Judge Ralph W. Smith, Jr., served as Counsel to the Civil Justice Reform Commission for the Northern District of New York, and was the Assistant Director of Career Planning at Albany Law School.

PETER ORVILLE, ESQ., has been representing consumers needing to file bankruptcy since 1989. His practice area includes the Utica and Syracuse divisions of the Northern District of New York Bankruptcy Court. Along with his partner, Zachary McDonald, he operates Orville & McDonald Law, P.C., in Binghamton, N.Y. Mr. Orville graduated from Ithaca College in 1973 and Syracuse University School of Law in 1980. He was the Upstate New York State Chair for the National Association of Consumer Bankruptcy Attorneys (NACBA) and is a member of the Bankruptcy Law Network. Mr. Orville has served as a Board Member of the Central New York Bankruptcy Bar Association and the Broome County Bar Association, where he served as Chair of the Association's Bankruptcy Committee. He has been selected as a "Super Lawyer" each year since 2006 in the area of consumer bankruptcy. Mr. Orville has presented at CLEs on farm bankruptcy for NACBA, and the National Business Institute (NBI), and on student loans for the Capital Region and Central New York Bankruptcy Bar Association. He has taught trial practice and other law-related courses as an adjunct at Binghamton University and Ithaca College since 1985 and also teaches business law at SUNY Broome. In his former life, he was the Publisher of weekly "alternative" newspapers in Ithaca, N.Y. (*Ithaca Times*) and Syracuse, N.Y. (*Syracuse New Times*) and operated a progressive bookstore in Ithaca, N.Y. His legal practice concentrates on consumer bankruptcy (chapters 7, 12, 13 and the occasional 11) and also includes criminal defense.

PATRICK G. RADEL, ESQ., is a member of the law firm of Getnick Livingston Atkinson & Priore, LLP, located in Utica, N.Y. Mr. Radel concentrates his practice in the areas of bankruptcy law, creditors' rights, and federal litigation. He received his law degree summa cum laude from the University at Buffalo Law School, where he was the Executive Editor of the *Buffalo Law Review*. From 2002 to 2004, Mr. Radel served as confidential law clerk to the Honorable William M. Skretny, United States District Judge for the Western District of New York. In 2008, Mr. Radel received the Nicholas S. Priore Advocacy and Professionalism Award from the Central New York and Capital Region Bankruptcy Bar Associations. Mr. Radel is Past President of the Central New York Bankruptcy Bar Association and a member of the Standing Local Rules Committee of the Northern District of New York Bankruptcy Court. He serves on the Board of Trustees for Notre Dame Catholic Schools of Utica and is a Fellow of the New York Bar Foundation.

MARK W. SWIMELAR, ESQ., was appointed Standing Chapter 13 Trustee in the Northern District of New York, Utica, and Syracuse Divisions, in 1990. In 1995 he was appointed the Standing Chapter 12 Trustee in the Northern District of New York. He is a Past President of the Central New York Bankruptcy Bar Association and is a Past President of the Association of Chapter 12 Trustees. Mr. Swimelar graduated from the Syracuse University College of Law in 1986. Prior to becoming the Chapter 13 Trustee he was a Chapter 7 Trustee, an Assistant County Public Defender, law clerk to a Family Court Judge, and maintained a private practice in Watertown, N.Y. Prior to becoming an attorney, he was employed by the New York State Workers' Compensation Board as a Senior Social Worker. Mr. Swimelar is a Certified Social Worker and obtained a Master's Degree in Social Work from the Syracuse University School of Social Work with a specialty in family mental health. He has been a frequent speaker at seminars on bankruptcy matters and is admitted to practice in New York State and the Northern District of New York.

A Primer in Chapter 12 Bankruptcy

Presented by:

The Honorable Diane Davis[1]

United States Bankruptcy Judge for the Northern District of New York, Utica, New York

Mark W. Swimelar, Esq.

Standing Chapter 12 & 13 Trustee, Syracuse, New York

Peter A. Orville, Esq.

Orville & McDonald Law, P.C.

Patrick G. Radel, Esq.

Getnick Livingston Atkinson & Priore, LLP

ACT[2] (ASSOCIATION OF CHAPTER 12 TRUSTEES) HAS GRANTED THE PANELISTS EXPRESS PERMISSION TO USE AND DISSEMINATE THE MATERIAL TITLED, "CHAPTER 12 CASE LAW UPDATE (MAY 2012-APRIL 1, 2019 ," PREPARED FOR THE ACT[2] CONFERENCE IN INDIANAPOLIS, INDIANA IN JULY 2019.

I. INTRODUCTION TO CHAPTER 12 [See *Introduction to Chapter 12 Practice*, Jan M. Sensenich, Chapter 12 Trustee, District of Vermont, Nicholas Hahn, Godrey & Kahn, SC, Green Bay, Wisconsin, and Brittany S. Ogden, Quarles & Brady, Madison, Wisconsin]

II. Attorney Retention and Compensation

a. Pre-Retention Considerations

i. Counsel should obtain a general understanding of the prospective debtor's farming operation, prior history, and future vision in order to determine whether to undertake the representation and how to structure the fee arrangement.

ii. To set an hourly rate for the case, counsel should consider the prevalent rate in the community and ensure that the rate charged is commensurate with counsel's experience and billing rate for similar matters. For example, the current hourly rate for chapter 12 work in the NDNY ranges from $200.00 to $275.00.

iii. Counsel should differentiate between and explain to the prospective debtor what basic and supplemental, case-specific services are contemplated.

1. Basic services include representing the debtor in connection with the following: (1) determining eligibility; (2) preparing the petition, schedules, statements, and list of creditors; (3) arranging for delivery of the debtor's federal income tax return or transcripts for the most recent year before the case was filed to the standing trustee; (4) verifying with the debtor that all domestic support obligations as defined by 11 U.S.C. § 101(14A) have been paid and are current as of the petition date, and that post-petition support obligations will continue to be timely paid; (5) negotiating adequate protection payments with secured creditors; (6) obtaining appraisals for valuation of assets and, if necessary, for hearings on restructuring secured indebtedness and on calculating the

[1] I would like to thank my Career Law Clerk, Jill Dalrymple, Esq., for her assistance in the preparation of these materials.

dividend for unsecured creditors; (7) analyzing cash flow projections, crop yields, livestock production, insurance coverage, and related aspects of farm management; and (8) attending an uncontested hearing on confirmation.

2. Supplemental services may include representing the debtor in connection with the following: (1) objections to confirmation of a plan; (2) motions to lift the stay; (3) hearings on the restructuring of secured indebtedness; (4) motions to dismiss the case; (5) motions to appoint an operating trustee; (6) nondischargeability complaints; (7) preparing or defending against post-confirmation modifications of the plan; and (8) appealing any judgment or order that is entered against the debtor.

b. Retainer Agreements
   i. Must be executed **prior** to filing.
   ii. Given the relative novelty and complexity of chapter 12 cases, including questions that may arise related to eligibility and feasibility, the retainer agreement should be detailed and specify the debtor's operational and legal obligations in a chapter 12 case. For example, it should state that the debtor must provide counsel with accurate and detailed financial records, including past tax returns, itemized farm and personal budgets, and cash flow projections, and file monthly operating reports during the pendency of the chapter 12 case.
   iii. Counsel may request a retainer to secure compensation as ultimately allowed by the court, but the retainer can only be drawn upon **after** obtaining court approval.
   iv. Counsel must provide the debtor with an executed written retainer agreement within 5 business days of first offering bankruptcy assistance to the debtor. 11 U.S.C. § 528(a)(1). The written contract must explain "clearly and conspicuously (A) the services . . . to be provided; and (B) the fees or charges for such services, and the terms of payment." 11 U.S.C. § 528(a)(2).
   v. Any retainer agreement that does not comply with the material requirements of 11 U.S.C. §§ 526, 527, and 528 is void. 11 U.S.C. § 526(c)(1). All fees paid in connection with the bankruptcy case are subject to court review – and disgorgement – under 11 U.S.C. § 329.

c. Post-Retention Considerations
   i. Disclosure
      1. Both the Bankruptcy Code, 11 U.S.C. §§ 101–1542, and Federal Rules of Bankruptcy Procedure have strict requirements for disclosure of all fees. Together, 11 U.S.C. § 329(a) and Federal Rule of Bankruptcy Procedure ("Bankruptcy Rule") 2016(b) require the disclosure of the amount and source of any compensation paid "in connection with the bankruptcy case," and the details of any fee-sharing agreement.
         a. Counsel must file a disclosure statement in accordance with Bankruptcy Rule 2016(b) within 14 days after the filing of the petition with respect to any compensation paid in connection with services rendered within one year prior to filing, or to be paid in connection with the chapter 12 case.
         b. Counsel must file a supplemental disclosure statement within 14 days after any payment, or agreement regarding payment, not previously disclosed.
         c. The disclosure statement must be filed even if counsel has charged only for advice or preparation of papers and has not appeared in the case.
         d. The disclosure statement must be filed even if counsel does not intend to file an application for compensation or reimbursement of expenses under 11 U.S.C. §§ 330 or 331.
   ii. Pursuant to 11 U.S.C. § 504, the debtor's counsel is precluded from agreeing to share compensation with any person other than a member of counsel's law firm.

d. Appointment and Duties
    i. In a chapter 12 case, the debtor generally has all of the rights and powers, and is to perform all of the functions and duties, of a trustee serving under chapter 12. The debtor therefore has the right to seek the employment of counsel under 11 U.S.C. § 327(a).
    ii. The debtor is required to file an application for approval of the employment of counsel, and, in support thereof, counsel must file an affidavit of disinterestedness and verify that counsel does not hold or represent an interest adverse to the debtor or to the estate. *See* 11 U.S.C. §§ 327(a), 101(14). Thus, appointment should be sought immediately upon filing.
    iii. *Nunc pro tunc* appointments are rare, and will only be granted in narrow situations: (1) if the court would have authorized the appointment if an application had been timely made; and (2) the delay in seeking court approval resulted from extraordinary circumstances. *Cushman v. Wakefield v. Keren P'ship (In re Keren Pshp.)*, 189 F.3d 86,87 (2d Cir. 1999).
    iv. Lack of a timely application may result in a complete denial of attorney's fees. *See, e.g.*, *In re Cashen*, 56 F. App'x 714 (7th Cir. 2002) (attorney who sought to represent a chapter 12 debtor in the state court was not entitled to compensation for pre-petition legal work or unapproved post-petition services performed).

III. Eligibility – Who May be a Chapter 12 Debtor
a. A chapter 12 case may be commenced by a "family farmer or family fisherman with regular annual income." 11 U.S.C. § 109(f). To have regular income, the family farmer or fisherman must have annual income that is sufficiently stable and regular to enable such family farmer to make payments under a chapter 12 plan. 11 U.S.C. § 101(19), (19B).
b. For an individual or an individual and spouse to qualify as a family farmer, a four-part test must be met. 11 U.S.C. § 101(18). The **individual or the individual and spouse** must: (1) be engaged in a farming operation; (2) have aggregate debts (even contingent or unliquidated debts) not to exceed $10,000,000.00 (as of April 1, 2019, subject to adjustment every 3 years); (3) have not less than 50 percent of such individual's or such individual's and spouse's noncontingent, liquidated debts on the date the case is filed (excluding a debt for the principal residence of such individual or such individual and spouse unless such debt arises out of a farming operation) arise out of a farming operation owned or operated by individual and spouse; and (4) have received from such operation more than 50 percent of such individual's or such individual's and spouse's gross income for the taxable year preceding the taxable year in which the chapter 12 case is filed or in each of the second and third taxable years preceding the filing.
    i. The first element requires that the debtor be engaged in the farming operation at the time of filing. Thus, a person who was formerly a farmer but is no longer engaged in farming or does not intend to farm during the period of the chapter 12 case may not be eligible for chapter 12 relief. Similarly, a person whose livelihood is farm related, but who is not actually a farmer, would not be eligible for chapter 12 relief. 6 Collier Bankruptcy Practice Guide ¶ 100.03[1] (collecting cases and noting that, for example, a farm equipment dealer, a seed or fertilizer dealer, a crop duster, a chicken coop cleaner, a horse trainer, or an employee of a farming enterprise should not be eligible for chapter 12). *See also*, *e.g.*, *In re Perkins*, 581 B.R. 822 (B.A.P. 6th Cir. 2018) (a debtor who raised, fed, and grazed cattle owned by another company on leased land was engaged in a farming operation since he personally cared for the cattle); *In re Vecchione*, No. 13-42201-MSH, 2013 WL 6164332 (Bankr. D. Mass. Nov. 25, 2013) (debtor who operated an agritourism business on land previously used for the sale of pumpkins and watermelons was no longer engaged in a

farming operation); *Boulder Meadows, Inc. v. Oneida Savings Bank*, 529 B.R. 494 (N.D.N.Y. 2015) (a corporation that leased its real property and was solely a landlard was not engaged in a farming operation); *In re McMahon Family Ltd. P'ship*, 495 B.R. 411 (Bankr. E.D. Wis. 2013) (a debtor that sold 18 potted trees in the year prior to filing but purported to have a tree farm was not engaged in an integrated farming operation and its diminutive activity was found to be insufficient).

ii. The second element is that the family farmer's aggregate indebtedness not exceed $10,000,000.00 (as of April 1, 2019, subject to adjustment every 3 years).

iii. "Farm debt test:" To determine whether this element is satisfied, one must exclude from the calculation any debt for the principal residence unless that debt arose out of the farming operation. In other words, the home mortgage should be included only if it secures farm debt. *Acee v. Oneida Sav. Bank*, 529 B.R. 494, 498 (N.D.N.Y. 2015) ("[I]t is the *purpose* of the debt [and the use of the proceeds] which determines whether it arises out of a farm operation.") (emphasis included in original). Also, while contingent and unliquidated debts are counted in determining the indebtedness limitation, they are excluded in calculating the farm debt test. Of the remaining debts outstanding on the petition date, over 50 percent must arise out of a farming operation owned or operated by the individual or the individual and spouse.

iv. "Farm income test:" Because a farmer may have little to no net income, the calculation focuses on gross income, which is determined by reference to the Internal Revenue Code's concept of gross income. Accordingly, a debtor's tax return for the applicable year will be *prima facie*, if not irrefutable, evidence of the amount of the debtor's gross income during the applicable period. 6 Collier Bankruptcy Practice Guide ¶ 100.03[d][i]; *In re Meadows*, No. 12-50510, 2012 WL 2411905 (Bankr. E.D. Ky. June 26, 2012) (Gross income on line 9 of Schedule F of the tax return should be utilized, which is different than gross receipts). Case law has developed parameters for the term "farming operation" that limit chapter 12 protection to persons or entities whose income is subject to the inherent risks of farming, i.e., climate, farm price fluctuation, and uncertain crop or milk production.

c. For a **corporation or partnership** to qualify as a family farmer, a four-part test must be met: (1) the corporation or partnership must have more than 50 percent of the outstanding stock or equity held by one family or by one family and the relatives of the members of the family, and the family or relatives must conduct the farming operation; (2) not less than 80 percent of the value of the corporation's or partnership's assets must consist of assets related to the farming operation; (3) the aggregate debts of the corporation or partnership must not exceed $10,000,000.00 (as of April 1, 2019, subject to adjustment every 3 years); and (4) not less than 50 percent of the aggregate, noncontingent, liquidated debts (excluding a debt for one dwelling that is owned by the corporation or partnership and that is occupied as a principal residence by a shareholder or partner, unless the debt arises out of a farming operation), on the date the case is filed, must arise out of the farming operation owned or operated by the corporation or partnership. 11 U.S.C. § 101(18)(B). Additionally, a corporation with any publicly traded stock cannot qualify as a family farmer.

i. There is no income requirement for corporate or partnership farmers.

ii. An LLC may fall under this definition. *See Fort Christopher's Thoroughbreds, LLC*, Unpublished Order Denying Motion to Dismiss for Lack of Eligibility, Chapter 12 Case No. 12-10016 (Bankr. N.D.N.Y. Feb. 12. 2014).

iii. The Family Ownership Requirement: 11 U.S.C. § 101(45) defines the term "relative" broadly as an "individual related by affinity or consanguinity within the third degree as

determined by common law, or individual in a step or adoptive relationship with such third degree," but it does not define the term "family." "Family is presumably a narrower term and would apply only to spouses, parents and children, or perhaps to grandparents and grandchildren as well. . . . The family or the members of the family must conduct the farming operation, although there does not appear to be any requirement that the family members who own the stock be the same persons who conduct the farming operation." 6 Collier Bankruptcy Practice Guide ¶ 100.03[2][b].

iv. "Farm Assets Test:" This test requires the debtor to value all of its assets on the petition date and to determine whether those assets are related to the debtor's farming operation. Assets that are owned by the corporation or partnership but that are not part of the debtor's farming operation should not be included as farm assets.

v. The indebtedness limitation is exactly the same as the requirement for individuals.

vi. The farm debt requirement uses virtually the same test as the test applicable to individuals, except that the residential debt exclusion can apply to a dwelling owned by the corporation or partnership if a shareholder or partner principally resides in the dwelling, whether or not that person is actually involved in the farming operation.

IV. Pre-Filing Considerations

a. Pre-bankruptcy Planning: Should some assets be sold, surrendered, or distributed to creditors pre-petition? What steps can the debtor take to minimize objections?

b. Advantages of chapter 12:

i. Chapter 12 allows the debtor to retain assets without the approval of unsecured creditors even when they are not paid in full provided that all projected disposable income during the chapter 12 plan period goes to payments under the chapter 12 plan. *See* 11 U.S.C. § 1225(b)(1)(B).

ii. Chapter 12 provides for an automatic stay of actions against co-debtors on consumer debts. 11 U.S.C. § 1222(b)(1).

iii. Chapter 12 allows the debtor to cramdown secured claims to the value of the collateral, including claims with respect to the debtor's personal residence. 11 U.S.C. § 1222(b)(2).

iv. Chapter 12 allows for payments on secured debt beyond the term of the chapter 12 plan. 11 U.S.C. § 1222(b)(9).

v. Property of the estate includes property acquired after the commencement of the case as well as earnings from the farming operation. 11 U.S.C. § 1207(a).

vi. Chapter 12 includes the authority to sell farm assets free and clear of liens without obtaining the lienholder's consent. *See* 11 U.S.C. § 363.

vii. Chapter 12 has certain tax advantages, including the ability to treat taxes arising from the sale of farm assets as unsecured claims that can be discharged. 11 U.S.C. § 1232.

c. Insurance: The debtor must be able to provide the trustee with certificates of insurance showing that general comprehensive/public liability, casualty coverage, Workers' Compensation, and vehicle policies are in full force and effect.

d. Cash Flow Projections and Feasibility: The debtor should be able to produce financial results from last year's farming operation and estimates or projections for the current or next year. In order to confirm a chapter 12 plan, the debtor must be able to demonstrate that the debtor has the ability to make all payments called for under the proposed chapter 12 plan. *See* 11 U.S.C. § 1225(a)(6). This means that the debtor's burden is to establish "a reasonable probability of success," *In re Ellis*, 478 B.R. 132, 139 (Bankr. N.D.N.Y. 2012), by providing "reasonable assurance that the [chapter 12] plan can be effectuated," *In re Chickosky*, 498 B.R. 4 (Bankr. D. Conn. 2013). Therefore, the debtor should be able to produce detailed cash flow statements

projecting income and expenses over the life of the plan. *See also In re Howe Farms LLC*, Chapter 12 Case No. 13-61601, 2014 Bankr. LEXIS 4385 (Bankr. N.D.N.Y. Oct. 16, 2014) (the plan proponent must prove that the plan satisfies all of the requirements for confirmation, including the present value requirement under 11 U.S.C. § 1225(a)(5)(B)(ii)).

e. Liquidation Analysis: In order to confirm a chapter 12 plan, the debtor must be able to prove that the amount to be distributed under the chapter 12 plan for each allowed unsecured claim is not less than the amount that would be paid on such claim if the debtor were liquidated under chapter 7. *See* 11 U.S.C. § 1225(a)(4). Consideration should be given to preparation of an accurate analysis of the liquidation value of all the property of the debtor's estate.

f. Appraisals: If it is anticipated that appraisals will be needed for confirmation of the chapter 12 plan, these should be prepared by qualified and impartial appraisers prior to filing. For example, a debtor may need appraisals to determine the value of secured claims for purposes of treating such claims within the chapter 12 plan. Any appraisal should be based on fair market value rather than liquidation value. The liquidation value should also be included, however, for the purpose of showing that each creditor is receiving more under the chapter 12 plan that it would in a chapter 7 case.

g. Adequate Protection Estimates: 11 U.S.C. § 1205 requires the debtor to provide adequate protection to secured creditors to protect the value of their interest in the property subject to their liens by making a cash payment or periodic cash payments to compensate for depreciation or interest accrual by other senior obligations, providing a replacement or substitute lien, or paying reasonable rent. 11 U.S.C. § 1205(b)(1)–(3).

h. Monthly Operating Reports: The debtor will be required to file pre-confirmation monthly operating reports and the trustee may require periodic reports post-confirmation until a final decree is granted.

i. Field Visit: Debtor should be prepared for a field visit on behalf of the Chapter 12 Trustee.

V. Automatic Stay of Actions Against Codebtors

a. 11 U.S.C. § 1201(a) imposes an automatic stay of the commencement or continuation of any civil action to collect all or a portion of a consumer debt of the debtor from any individual liable on such debt with the debtor (the "co-debtor stay"). A consumer debt is one incurred primarily for personal, family, or household purposes. 11 U.S.C. § 101(8).

b. Relief from the automatic stay imposed by 11 U.S.C. § 1201 must be obtained by motion in accordance with Bankruptcy Rules 4001(a)(1) and 9014. 11 U.S.C. § 1201(c) sets forth three grounds for relief from stay: (1) the codebtor, rather than the debtor, received the consideration for the creditor's claim, 11 U.S.C. § 1201(c)(1); (2) the chapter 12 plan proposes not to pay such claim, 11 U.S.C. § 1201(c)(2); or (3) such creditor's interest would be "irreparably harmed by continuation of the stay," 11 U.S.C. § 1201(c)(3). With respect to the third ground, irreparable harm may be shown by demonstrating that any applicable statute of limitations is set to run, the codebtor is disposing of or dissipating the debtor's assets, or the chapter 12 debtor is dilatory or unable to confirm a chapter 12 plan. 6 Collier on Bankruptcy Practice Guide ¶ 100.09.

VI. Relief from the Automatic Stay Against Debtor or Property of the Estate

a. 11 U.S.C. § 362(a) applies to chapter 12 cases.

b. Because of the reduced time period from filing of a chapter 12 case to plan confirmation, secured creditors will likely focus more on dealing with their proposed treatment under the chapter 12 plan rather than seek relief from the automatic stay. However, where the debtor is tardy in filing or confirming a plan, a secured creditor does have the option of seeking stay relief under 11 U.S.C. § 362(d) for cause, including lack of adequate protection, or on the basis that the debtor

does not have equity in the property and the property is not necessary for an effective reorganization. 11 U.S.C. § 362(d)(1)–(2).

VII. Proposal of the Plan

a. Pursuant to 11 U.S.C. § 1221, only the debtor may file a chapter 12 plan. This section requires that the chapter 12 plan be filed by the debtor within 90 days after commencement of the case. This period may be extended but only if the court finds that "the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable." 11 U.S.C. § 1221. The use of this phrase rather than "for cause" suggests that the burden of proof is higher for this relief.

b. 11 U.S.C. § 1222 sets forth the mandatory provisions that must be contained in a chapter 12 plan and certain permissible provisions that may be included at the option of the debtor.

i. **Mandatory Provisions**: (1) the chapter 12 plan must provide for the submission of all or such portion of the future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan, 11 U.S.C. § 1222(a)(1); (2) the chapter 12 plan must provide for the full payment, in deferred cash payments, of all priority claims under 11 U.S.C. § 507, unless the holder of a claim agrees to accept less favorable treatment, 11 U.S.C. § 1222(a)(2); and (3) the chapter 12 plan must provide the same treatment for each class of claim or interest within a particular class, unless the holder of a particular claim or class agrees to less favorable treatment, 11 U.S.C. § 1222(a)(3).

ii. **Permissive Provisions**: (1) the chapter 12 plan may designate classes of unsecured claims to the extent permitted by 11 U.S.C. § 1122, which means that a claim may be placed in a particular class only if such claim is substantially similar to the other claims in the class and the separate classification does not unfairly discriminate against any designated class, 11 U.S.C. § 1221(b)(1); (2) the chapter 12 plan may treat claims for a consumer debt of the debtor where the debtor is a co-obligor differently than other unsecured claims, 11 U.S.C. § 1222(b)(1); (3) the chapter 12 plan may modify the rights of holders of secured claims, including the rights of residential mortgage lenders, 11 U.S.C. § 1222(b)(2); (4) the chapter 12 plan may provide for the curing or waiving of any default, 11 U.S.C. § 1222(b)(3); (5) the chapter 12 plan may provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or other unsecured claim, 11 U.S.C. § 1222(b)(4); (6) the chapter 12 plan may permit the debtor to make current payments under a secured obligation concurrently with the debtor's curing of defaults, 11 U.S.C. § 1222(b)(5); (7) the chapter 12 plan may permit the debtor to assume, reject or assign any executory contract of unexpired lease of the debtor to the extent permitted by 11 U.S.C. § 365 and to the extent not previously rejected by the debtor, 11 U.S.C. § 1222(b)(6); (8) the chapter 12 plan may provide for payment from either property of the estate or other property of the debtor, 11 U.S.C. § 1222(b)(7); (9) the chapter 12 plan may provide for the sale of all or any part of the property of the estate or the distribution of all or any part of property of the estate among those having an interest in such property, 11 U.S.C. § 1222(b)(8); and (10) the plan may provide for the payment of allowed secured claims for a discretionary period–including beyond the period of the plan for making payments to the trustee, as determined by the debtor, 11 U.S.C. § 1222(b)(9).

c. In a chapter 12 case, the debtor has the right to bifurcate a secured creditor's claim under the chapter 12 plan (the "cramdown provision"). The debtor can therefore divide undersecured claims into a secured portion, equal to the value of the collateral, and an unsecured portion, consisting of the balance.

d. The term of the chapter 12 plan must be at least three years unless the court "for cause" approves a longer period, but such period cannot exceed five years. 11 U.S.C. § 1222(c).

VIII. Pre-Confirmation Modification of the Plan

a. The debtor may modify the chapter 12 plan at any time before confirmation and the modified plan will supersede the previous plan. 11 U.S.C. § 1223(a)–(b).

b. Any holder of a secured claim that has accepted or rejected the plan will be deemed to have accepted or rejected the modified plan unless the modification provides for a change in the rights of such claimant and such holder changes its previous acceptance or rejection by filing an acceptance or objection to the amended plan. 11 U.S.C. § 1223(c).

IX. Operation of the Farm

a. The debtor will remain in control of the farm and will operate the farm subject to the provisions of the Bankruptcy Code. 11 U.S.C. § 1203.

b. Post-Petition Taxes, Wages, and Expenses of Administration: The debtor must remain current with all expenses of administration during the pendency of the chapter 12 case. The debtor, as a fiduciary of the bankruptcy estate, must withhold, collect, and deposit all taxes owed to the Internal Revenue Service and state and local taxing authorities. These taxes include, but are not limited to, federal and state withholding, employee's portion of F.I.C.A., federal and state unemployment insurance, and sales and use taxes. All administrative priority wages, employee-related payments, and other expenses of administration must also be paid as they become due.

c. Periodic Collateral Inspections: Secured lenders may require periodic collateral inspections.

d. Use, Sale, or Lease of Property of the Estate in the Ordinary Course of Business: Pursuant to 11 U.S.C. § 363(c)(1), the debtor may dispose of property of the estate in the ordinary course of business without notice and a hearing. Thus, the debtor may plant, cultivate and harvest crops, or raise livestock. The debtor may also use non-liened proceeds of the sale of crops, milk, or livestock for the continued operation of the farm and for living expenses in the ordinary course of business.

e. Use, Sale, or Lease of Property of the Estate in the Non-Ordinary Course of Business: 11 U.S.C. § 363(c)(2) requires the debtor to obtain prior court approval for the use, sale, or lease of property of the estate when such use, sale, or lease is not in the ordinary course of business of the debtor. Accordingly, sales of farmland or farm equipment can only be done after notice and a hearing with court approval.

f. Non-Ordinary Course Expenditures: Any expenditure of the estate's funds outside the ordinary course of business, such as the purchase of additional farmland, cattle, or capital equipment, must be done on notice and hearing with court approval. 11 U.S.C. § 363(c)(2).

g. Use of Cash Collateral: If proceeds from the sale of crops, milk, or livestock constitute cash collateral, the debtor must segregate those proceeds and may not use the same unless the secured creditor consents or the court, after notice and a hearing, authorizes such use. 11 U.S.C. § 363(c)(4). The court will condition the debtor's use of cash collateral upon the debtor's provision to the secured party of adequate protection of its interest in the cash collateral.

h. Obtaining Credit in the Ordinary Course of Business: Pursuant to 11 U.S.C. § 364(a), the debtor may obtain unsecured credit and incur unsecured debt in the ordinary course of business and such debt will be allowable as an administrative expense under 11 U.S.C. § 503(b)(1).

i. Obtaining Credit in the Non-Ordinary Course of Business: 11 U.S.C. § 364(b) provides that a debtor may not obtain credit or incur unsecured debt other than in the ordinary course of business without prior court approval. 11 U.S.C. § 364(c) also requires prior court approval before the debtor may obtain creditor or incur debt that is either given priority over certain administrative expenses or secured by a lien on property of the estate.

j. Sales of Farmland or Equipment Free and Clear of Interests: 11 U.S.C. § 1206 authorizes the chapter 12 trustee to sell farmland or farm equipment free and clear of any interest of an entity other than the estate in circumstances other than those permitted by 11 U.S.C. § 363(f), the latter of which is available to the debtor. This provision is unique to chapter 12 cases and would permit the downsizing of farming operations prior to the proposal of a chapter 12 plan. 6 Collier Bankruptcy Practice Guide ¶ 100.11[3].

X. Confirmation of the Plan

a. Bankruptcy Rule 2002(a)(8) prescribes a 21-day notice period for the time fixed for filing objections and the hearing to consider confirmation of a chapter 12 plan.

b. The court is required to conclude the hearing on confirmation of the chapter 12 plan not later than 45 days after the chapter 12 plan is filed, unless the court finds "cause" for an extension.

c. 11 U.S.C. § 1225 sets forth the requirements for confirmation:

i. The debtor bears the burden of proving that the plan is confirmable. *Howe Farms LLC*, Chapter 12 Case No. 13-61601, 2014 Bankr. LEXIS 4385, at *10.

ii. The chapter 12 plan must comply with the provisions of chapter 12 and any other applicable chapters, including chapters 1, 3, and 5. 11 U.S.C. § 1225(a)(1). Thus, the chapter 12 plan must comply with 11 U.S.C. § 1222 and the debtor must meet the eligibility requirements of 11 U.S.C. § 109.

iii. All applicable fees and costs must be paid. 11 U.S.C. § 1225(a)(2).

iv. The chapter 12 plan must be proposed in good faith. 11 U.S.C. § 1225(a)(3).

v. The chapter 12 plan must satisfy the "best interests" test, meaning that the value, as of the effective date of the plan, of property to be distributed under the plan on account of each unsecured claim equals or exceeds the amount that would be paid on each claim under a chapter 7 case. 11 U.S.C. § 1225(a)(4).

vi. With respect to secured claims, the chapter 12 plan can include one of three options: (1) consensual treatment; (2) surrender of the secured property to the creditor; or (3) cram down, meaning that the secured creditor will retain its lien securing its claim and be paid the present value of the secured portion of its claim. 11 U.S.C. § 1225(a)(5).

vii. The chapter 12 plan must satisfy the "feasibility" test, meaning that the debtor will be able to make all payments under the plan and to comply with the plan. 11 U.S.C. § 1225(a)(6).

viii. The Debtor must be current on all amounts required to be paid post-petition under a domestic support obligation, as defined by 11 U.S.C. § 101(14A). 11 U.S.C. § 1225(a)(7).

ix. If the trustee or a holder of an allowed unsecured claim objects to confirmation of the proposed chapter 12 plan, the court may not confirm the chapter 12 plan unless (1) the plan provides that all of the debtor's projected disposable income to be received during the life of the plan will be applied to make payments under the plan, and (2) the value of the property to be distributed under the plan period is not less than the debtor's projected disposable income, or (3) if the objection was filed by the holder of an unsecured claim, that the property to be distributed under the plan on account of such claim has a value, as of the effective date of the plan not less than the amount of such claim.

XI. Post-Confirmation Modification

a. 11 U.S.C. § 1229 provides that the chapter 12 plan may be modified at any time after confirmation but before the completion of payments upon motion by the debtor, trustee, or the holder of an allowed unsecured claim. 11 U.S.C. § 1229(a).

b. Modification may be for the purpose of: (1) increasing or decreasing payments under the chapter 12 plan, 11 U.S.C. § 1229(a)(1); (2) extending or reducing the time period for making payments under the chapter 12 plan, 11 U.S.C. § 1229(a)(2); (3) altering the amount of payments to a

secured creditor to take into account payments received by a creditor from a source outside the payments to a particular creditor to take into account payments received by such creditor from a source outside the chapter 12 plan, 11 U.S.C. § 1229(a)(3); or providing for the unsecured claim of a governmental unit against the debtor or the estate that arises before the filing of the petition, or that arises after the filing of the petition and before the debtor's discharge, as a result of the sale, transfer, exchange, or other disposition of property used in the farming operation, 11 U.S.C. §§ 1229(a)(4), 1232.

XII. Other Post-Confirmation Matters

a. The provisions of a confirmed chapter 12 plan bind the debtor and each of the debtor's creditors and, if the debtor is a partnership or corporation, its partners and equity security holders as well. 11 U.S.C. § 1227(a). This is true whether or not such creditors' claims or interests were provided for by the chapter 12 plan or whether or not such creditors accepted or rejected the chapter 12 plan. *Id.*

b. Except to the extent the chapter 12 plan or the confirmation order provide otherwise, confirmation of the chapter 12 plan vests all property of the estate in the debtor. 11 U.S.C. § 1227(b). In the NDNY, property of the estate does not vest until completion of the plan.

c. Except to the extent the chapter 12 plan or the confirmation order provide otherwise, the property of the estate vesting in the debtor will be free and clear of any claim or interest of any creditor provided for in the chapter 12 plan. 11 U.S.C. § 1227(c).

d. The binding effect of the confirmed chapter 12 plan is dependent upon the court's entry of a discharge to the debtor. 11 U.S.C. § 1228(a). *See* 11 U.S.C. §§ 348, 349.

e. A standard discharge under 11 U.S.C. § 1228(a) covers all debts of the debtor provided for by the chapter 12 plan and allowed under 11 U.S.C. § 503 or disallowed under 11 U.S.C. § 502, with the exception of secured debts to be paid beyond the plan term and any debts specifically excepted from discharge under 11 U.S.C. § 523(a).

f. The debtor may apply for a "hardship discharge" under 11 U.S.C. § 1228(b) on notice to all creditors. The court, in its discretion, may grant the same upon finding that: (1) the debtor's failure to complete the chapter 12 plan payments is due to circumstances for which the debtor should not justly be held accountable; (2) that the value, as of the effective date of the chapter 12 plan, of property distributed under the chapter 12 plan to holders of unsecured claims is not less than such holders would have received as of such date had the debtor's estate been liquidated under chapter 7; and (3) that modification of the plan under 11 U.S.C. § 1229 is not feasible. A hardship discharge extends only to unsecured debts provided for by the chapter 12 plan or disallowed under 11 U.S.C. § 502, except for debts on which the last payment is due beyond the original plan period and debts excepted from discharge under 11 U.S.C. § 523(a). 11 U.S.C. § 1228(c).

g. A chapter 12 discharge may be revoked upon the request of a party in interest made on notice within 180 days after entry of the confirmation order, upon the court's finding of fraud. 11 U.S.C. § 1230(a). If the confirmation order is revoked, the court shall either dismiss the chapter 12 case or convert it to a case under chapter 7, unless the debtor proposes and the court confirms a modification of the chapter 12 plan within a time fixed by the court. 11 U.S.C. § 1230(b).

h. A chapter 12 debtor has an absolute right to dismiss and, unless the case has previously been converted from chapters 7 or 11 to chapter 12, to convert a chapter 12 case at any time. 11 U.S.C. § 1208(a)–(b).

i. Upon request of a party in interest, and after notice and a hearing, the court may dismiss a chapter 12 case if it finds "cause." 11 U.S.C. § 1208(c). Cause includes, but is not limited to, the following: (1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to

creditors; (2) nonpayment of any fees and charges; (3) failure to file a chapter 12 plan timely under 11 U.S.C. § 1221; (4) failure to commence making timely payments required by a confirmed chapter 12 plan; (5) denial of confirmation of a chapter 12 plan and denial of a request made for additional time for filing another chapter 12 plan or a modification of a chapter 12 plan; (6) material default by the debtor with respect to a term of a confirmed chapter 12 plan; (7) revocation of the order of confirmation and denial of confirmation of a modified chapter 12 plan; (8) termination of a confirmed chapter 12 plan by reason of the occurrence of a condition specified in the chapter 12 plan; (9) continuing loss or diminution of the estate and absence of a reasonable likelihood of rehabilitation; or (10) failure by the debtor to pay any domestic support obligation that first becomes payable after the petition date.

j. Upon request of a party in interest, and after notice and a hearing, the court may also dismiss a chapter 12 case or convert a chapter 12 case if the court finds that the debtor has committed fraud in connection with the case. 11 U.S.C. § 1208(d).

XIII. Special Tax Provisions Applicable to Chapter 12

a. 11 U.S.C. § 1231(a) provides that if a confirmed chapter 12 plan calls for the issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer, such acts will not be subject to any law or imposing a stamp tax or similar tax. 11 U.S.C. § 1231(a).

b. A chapter 12 debtor will qualify under Internal Revenue Code § 108(a)(1)(A) and will not have to treat as income debts discharged in the chapter 12 case. 6 Collier Bankruptcy Practice Guide ¶ 100.19.

c. 11 U.S.C. § 1232 provides for claims filed by a government unit based on the disposition of property used in a farming operation to be treated as general unsecured claims subject to discharge.

Association of Chapter 12 Trustees

PRESENTS

Chapter 12 Case Law Update

(May 2012 – April 1, 2019)

SPEAKERS

The Honorable Judge Diane Davis
United States Bankruptcy Judge for the Northern District of New York
Mark W. Swimelar
Standing Chapter 12 & 13 Trustee, Syracuse, NY
Cherie N. Knotts
Attorney for Standing Chapter 12 & 13 Trustee Kara L. West, Chattanooga, TN

July 15-16, 2019
Indianapolis, Indiana

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Farming Operation Test (11 U.S.C. § 101(18) and (21))

First Circuit

In re Vecchione, Case No. 13-42201-MSH, 2013 WL 6164332 (Bankr. D. Mass. Nov. 25, 2013)

A pro se debtor filed an adversary contemporaneously with his petition to void the pre-petition foreclosure sale of his real property. The issue was whether the debtor had a farming operation. The debtor argued that he had an agri-tourist business which provided recreational activities including ice skating, hayrides, archery, etc. Two years prior, the debtor had a farming operation consisting of selling pumpkins and watermelons. The court held that there was no farming operation and dismissed the case. "By his logic, Disneyland is a farming operation because it was built on land that had formerly been an orange grove." If the debtor had tax returns to prove he had farming income, filed his case prior to the foreclosure and also filed prior to converting the farm to an agri-tourism business he probably would have qualified. In many cases, timing for the filing of a petition under chapter 12 is important.

Second Circuit

In re Victorious, LLC**,** 545 B.R. 815 (Bankr. D. Vt. 2016)

A secured creditor moved to dismiss this case due to ineligibility. The debtor owned a fishing vessel used for commercial fishing operations in Alaska. The sole asset of the debtor-LLC was a fishing vessel, and the sole member of the debtor was another entity called Alaska Tendering Company, LLC which had two individual members.

The court held that to be eligible under chapter 12, if the debtor is a corporation, its majority ownership must be held by human beings, not by another entity; it must be those individual owners of the debtor who conduct the farming or fishing operation. Since the debtor was not an individual or an entity which was owned by one family, the court held that it was not eligible. The court relied on *Acee v. Oneida Savings Bank*, 529 B.R. 494 (N.D.N.Y. 2015).

The court further analyzed the purpose of chapter 12 and the intent to protect farmers and fisherman. The court questioned whether the intervening corporate entity should be overlooked to consider the individual members who actually conducted the fishing operation. The court held that the intervening entity had unclean hands due to misconduct and violations of previous court orders from a prior bankruptcy proceeding.

The court also held that the debtor had no operating income whatsoever: the only source of income came from a loan from one of the individuals. In addition, the debtor's schedules and statement of financial affairs indicated no annual income for 2015 or for the prior two years.

For all of those reasons the court dismissed the case.

Boulder Meadows, Inc. v. Oneida Savings Bank, 529 BR 494 (N.D.N.Y. 2015)

The issue in this case was whether the corporation that leased its real property was simply a landlord. The bankruptcy court held that the debtor was solely a landlord and dismissed the case. The district court affirmed agreeing that the corporation did not qualify under chapter 12 since it was a landlord, not engaged in farming operations. Based on the facts, the tenant was the sole stockholder of the corporation and also a co-debtor on the mortgage. There was a second related corporation that leased the land for farming. The debtor argued that an intertwining of the relationships between the corporations should qualify the debtor as part of the farming operation. The debtor, however, did not present evidence that the sole stockholder of the second corporation leasing the property was the farmer. The debtor also argued that the debtor was blindsided by the eligibility objection, but that was not raised before the bankruptcy in the previously filed motion to reconsider. The district court affirmed the lower court. See also the companion case Acee, *infra.*

In re Fort Christopher's Thoroughbreds, LLC, Case No. 12-10016 (Bankr. N.D.N.Y Jan. 29, 2014) (transcript of oral opinion available through pacer)

The creditor argued that this horse farm was only providing boarding and other services, not conducting farming operations. The debtor argued that it was a breeding facility. The horses were bred off the farm, but foals were born on the farm. The court held that because all of the horses on the farm were there for breeding, a farming operation existed. Therefore, the debtor qualified under chapter 12.

Fourth Circuit

In re Fisher, 570 B.R. 500 (Bankr. M.D.N.C. 2017)

The debtor was in the business of crushing rock and selling the stone and gravel. The court held that this did not constitute a farming operation as it was markedly distinct from the usual markers for farm products and not subject to the inherent risks of farming. See also Dismissal and Conversion, Lack of Good Faith, *infra.*

Fifth Circuit

In re McLawchlin, 511 B.R. 422 (Bankr. S.D. Tex. 2014)

The trustee filed a motion to dismiss or convert this case on the basis that the debtor was not eligible for chapter 12. The bankruptcy court held that the debtor was not eligible for chapter 12. Although the debtor received at least 50% of his income from the farming operation, he was not engaged in a farming operation on the petition date. The court also held that it had authority to convert a farmer to another chapter other than chapter 7. In this case the debtor requested his case be converted to a case under chapter 13.

The debtor discontinued his farming operation at the time of filing his petition. His sole source of income was Social Security and he testified that he was not going to pursue farming activities other than to provide hay to friends and relatives for free.

Sixth Circuit

In re Penick, Case No. 17-20178, 2017 WL 3772620 (Bankr. E.D. Ky. Aug. 28, 2017)

A creditor objected to the confirmation of the debtor's plan arguing that he was not eligible for chapter 12 and, at the same time, moved to lift the stay arguing that the plan was not feasible. With respect to eligibility, the creditor contended that the debtor's timber operation was not a farm. The debtor contended that it had two farming components, a calf-raising operation along with the timber operation. The court reviewed the definition of a farming operation. The court noted that the statute should be liberally construed, and it used the totality of circumstances in determining eligibility. Based on the facts, the court held that the timber operation is part of the farming operation and held that the debtor was eligible for chapter 12. See also Confirmation, Feasibility, *infra.*

In re Williams, Case No. 15-11023, 2016 WL 1644189 (Bankr. W.D. Ky. Apr. 22, 2016)

The UST moved to dismiss the debtors' chapter 12 case because the debtors did not engage in farming operations based on testimony provided at the meeting of creditors. Specifically, the trustee argued that the debtors leased land to their son who physically planted and harvested crops and that such actions do not constitute a farming operation. The court found that the debtors were more involved in the farming operation than merely being landlords; they owned the equipment, purchased the supplies, obtained crop insurance, made the decision of what crops were to be planted, and incurred all profit and loss in their own name. With these facts, the court held that the debtors were engaged in farming operations.

Seventh Circuit

In re McMahon Family Ltd. P'ship, 495 B.R.411 (Bank. E.D. Wis. 2013)

This case involved what the debtor called a tree farm. The court denied confirmation and dismissed the case. The court's decision was based on the fact that the debtor never received any income from a tree farming operation; that the debtor failed to prove it could make any payments under the plan; and that none of the seedlings planted had been harvested. The court went on to note that there was not an integrated farming operation and that the debtor only sold 18 potted trees in the last year -- a diminutive activity.

Eighth Circuit

In re Hemann, Case No. 11-00261, 2013 WL 1385404 (Bankr. N.D. Iowa Apr. 3, 2013)

In this case the IRS objected to eligibility. The court reviewed the small partnership exception, under which the corporate form is ignored and individuals are taxed. The partnership is a mere conduit for income and assets. The IRS objected to eligibility because the debtors downsized the farm and changed forms from a partnership to an individual family small farm. The IRS argued that the debtors had no farming operation prior to filing. The court found that the change in the nature of the farm was not relevant and confirmed the plan. The court also

determined that § 1222(a)(2)(A) applied to the tax liability incurred for the prepetition sale of the debtors' farm partnership interest.

Ninth Circuit

In re Myrstol-Snyder, 530 B.R. 850 (D. Mont. 2015)

The trustee moved to dismiss on the grounds that debtor was not eligible as a family farmer. The court held that gardening and raising some animals did not qualify the debtor as a family farmer.

The debtor claimed that she had income from raising chickens, selling eggs and earned $1,000 by selling horses over the last five years. However, she did not report any farm income on her tax returns. Even though she planted a garden and raised pigs, she did so for her family's consumption. The court held that it must review the debtor's tax returns to determine if her farming income exceeded her other gross income. As a result of her taxes showing no farm income, the case was dismissed due to ineligibility.

In re Loverin Ranch, 492 B.R. 545 (Bankr. D. Or. 2013)

A creditor moved to dismiss this case on the grounds that the filing of the petition was not authorized because all partners did not agree to the bankruptcy. The court granted the motion to dismiss, holding that consent of all partners was necessary.

Farming Income and Debt Test (11 U.S.C. § 101(18A) and (18B))

Second Circuit

Acee v. Oneida Savings Bank, 529 B.R. 494 (N.D.N.Y. 2015)

The court held that the debtor's case should be dismissed due to his failure to satisfy the debt-limit test that requires that at least 50% of the debts be related to the farming operation. Section 101(18)(A) provides that the debt limit calculation should exclude the personal residence debt if it is not part of the farming operation. The court excluded the personal residence as a farm debt but then included it in the non-farming debt which put the debtor's farm debt at 43% of the total debt. On appeal the district court reversed and held that the residence should have been excluded from the total debt calculation. The matter was remanded back to the bankruptcy court and was confirmed. See also the companion case Boulder Meadows, Inc., *supra.*

In re Fort Christopher's Thoroughbreds, LLC, Case No. 12-10016 (Bankr. N.D.N.Y Jan. 29, 2014) (transcript of oral opinion available on pacer)

The debtor was an LLC who had only one member. The creditor argued that the debtor failed to satisfy the income requirement because a substantial portion of the income was from the boarding of horses, not breeding. The court held that the income test was not a requirement under §101(18)(B). The creditor argued that the corporate veil should be pierced since this was a sole member corporation. The court stated that if that was true, an LLC could file a Chapter 13. See Also Eligibility, Farming Operation Test, *supra.*

Fourth Circuit

In re Carter, 570 B.R. 500 (Bankr. M.D.N.C. 2017)

The debtor and her husband owned some real property which was encumbered. On the eve of the foreclosure sale, the debtor's husband and then the debtor filed for relief under chapter 13. Each case was dismissed, the final one with the court's finding that the debtors were dishonest in their schedules and were willfully violating court orders. Three creditors filed motions to dismiss arguing that the debtor was not a family farmer and that she had filed her case in bad faith.

At a hearing on the motion to dismiss, the court noted that the debtor made material statements in her testimony that were inconsistent with her sworn schedules and affidavit. Also, the schedules and statements in the current case were not consistent with the filings in the debtor's prior case. Although the court found that the debtor met the first three requirements of § 101(18)(A), she did not meet the farming debt and farming income requirements of that section.

The debtor alleged that she was involved with a variety of farming operations. The court specifically concluded that the crushing of rock and the sale of aggregate or gravel did not constitute a farming operation, even though the debtor's documents, schedules and tax returns all assumed such sales were a part of her farming operations.

After taking into account the debt and income associated with the mining and gravel production, the debtor's debts arising out of her farming operations were less than 50% of her total debt and less than 50% of the gross income was associated with farming operations. The court dismissed the case. See also Dismissal and Conversion, Lack of Good Faith, *infra*.

Sixth Circuit

In re Perkins, 581 B.R. 822 (B.A.P. 6th Cir. 2018)

The bankruptcy court confirmed this debtor's chapter 12 plan over the objection of the creditor, and the creditor appealed. The BAP affirmed the bankruptcy court's decision. There were two primary issues: (1) whether the debtor was over the debt limit; and (2) whether the plan was feasible.

In regard to the debt limit issue, the BAP held that whether the debt limit was exceeded is determined by the debtor's schedules so long as they were prepared in good faith. The bankruptcy court did not have to wait until the deadline for proof of claims to be filed. The bankruptcy court did not have to accept the face value of all filed proof of claims. The BAP held that the debt limitation creates a "gateway into the bankruptcy process" rather than a jurisdictional limitation. The debtor did fail to list several creditors including the IRS. However, the court held that the amounts owed were uncertain and found the debtor eligible for chapter 12 relief. See also Confirmation, Feasibility, *infra*.

In re Meadows, Case No. 12-50510, 2012 WL 2411905 (Bankr. E.D. Ky. Jun. 26, 2012)

The debtors did not meet the eligibility requirements because their farming operation did not provide more than 50% of their gross income for the preceding taxable year or each of the second and third preceding taxable years. The debtors sought to equate money received from

livestock sales to "gross income," but the court held that "gross receipts" are not the same as "gross income" when evaluating eligibility.

In re Perkins, Case No. 13-31277, 2013 WL 5863732 (Bankr. E.D. Tenn. Oct. 30, 2013)

Farm Credit objected to confirmation of the plan. The debtors were in the cattle grazing business. They raised, fed and grazed cattle. Farm Credit argued that the debtors were not eligible because not more than 50% of their income was from farming. The court held that the debtors were engaged in farming operation since Mr. Perkins personally cared for the cattle owned by another company. The fact that the cattle were grazed on leased land was irrelevant. In regard to the requirement that at least 50% of the income must come from farming, the court held that it would use the definition of **gross** income as provided in the Tax Code. If the Court had used net income the debtors would have fallen under the 50% requirement.

In addition, the debtors' Social Security benefits were not included in the debtors' total income. Because the Social Security benefits were not factored into the debtors' gross income, the court chose not to include it in the 50% income analysis saying that it made no difference in the outcome. See the appellate court decision, *supra.*

Seventh Circuit

In the Matter of Clark, 550 B.R. 429 (Bankr. N.D. Ind. 2016)

In this case, the creditor objected to the debtor's eligibility under chapter 12 because his total debt exceeded the maximum. The court dismissed the case, finding the debtor's debt exceeded the maximum allowed. In reaching that conclusion, the court considered not only the debtor's schedules but also looked beyond the schedules to the value of the claims filed in the case, which exceed the statutory debt limit, even though the debtor challenged the accuracy of some of those claims. See, however, In re Perkins, 581 B.R. 822 (B.A.P. 6th Cir. 2018), *supra*.

Ninth Circuit

In re Davis, 778 F.3d 809 (9th Cir. 2015)

This case was dismissed due to the debtor being over the debt limit. The debtor argued that she was under the debt limit due to a prior chapter 7 case, where a deficiency judgment would have been discharged. The court pointed out the split among courts regarding the effect of a prior discharge, but it held that the aggregate debt for debt limitations purposes would include any unsecured deficiency because the foreclosure had not been completed. The debtor wanted the court to find that the secured claim was limited by the property value, not the total amount of the claim.

The court of appeals affirmed the lower court and stated that the amount of a debtor's aggregate debts included the entire amount of her creditors' claims whether secured or unsecured and whether enforceable against debtor or only against debtor's property. A creditor's claim remains a debt so long as it is enforceable against either the debtor or the debtor's property;

accordingly, the debtor's aggregate debts included the amount of that claim, even after discharge of personal liability under chapter 7.

In re DeGour, 478 B.R. 1 (Bankr. C.D. Cal. 2012)

The issue in this case was whether the debtors' gross income was at least 50% from farming. The court looked to the Tax Code for a definition of gross income. At the time of the petition, the joint debtor also had a marketing and consulting business.

The joint debtor had gross income from a non-farming subchapter S corporation wholly owned by the joint debtor. The court included this income in the debtors' gross income when determining the debtors' eligibility for chapter 12. The farming operation's income was $84,912 but the joint debtor's income from the subchapter S corporation was about $200,000. The debtors argued that if net income from the subchapter S corporation was considered they would qualify as family farmers.

The court used the gross income of the subchapter S corporation for the farming income calculation and dismissed the case because over 50% of the debtors' gross income was not attributable to the farming operation.

In re Allen, Case No. 0:11-bk-15206-EWH, 2012 WL 1207233 (Bankr. D. Ariz. Apr. 10, 2012)

The court held that the debtors did not qualify as "family fisherman." Section 101(19A) defines "family fisherman" as, "an individual or individual and spouse engaged in a commercial fishing operation- (i) whose aggregate debts do not exceed $1,757,475 and not less than 80 percent of whose aggregate noncontingent, liquidated debts . . . on the date the case is filed, arise out of a commercial fishing operation owned or operated by such individual or such individual and spouse; and (ii) who receive from such commercial fishing operation more than 50 percent of such individual's or such individual's and spouse's gross income for the taxable year preceding the taxable year in which the case concerning such individual or such individual and spouse was filed." The debtors failed to show that "not less than 80%" of their "aggregate, noncontingent, liquidated debts" arose out of a commercial operation, and they failed to show that they "own or operate" a commercial fishing operation.

In re Marek, Case No. 11-21158-TLM, 2012 WL 2153648 (Bankr. D. Idaho Jun. 13, 2012)

The debtors were not eligible for chapter 12 relief because they did not meet the definition of "family farmer." The debtors' annual income for the taxable year preceding the filing of the chapter 12 case was incorrectly stated, and the debtors refused to produce credible and probative evidence supporting their claim that their gross income was primarily from "farming operations."

Tenth Circuit

In re Woods, 743 F.3d 689 (10th Cir. 2014)

The creditor in this case objected to eligibility based on the non-farming debt being greater than the farming debt. The creditor argued that the personal residence should be excluded from the farming debt, and if that debt was excluded, the non-farming debt would be greater than the

farming debt and the farmer would be ineligible for chapter 12. The lower court held that the debtors were eligible for chapter 12 relief because the construction debt of their homestead was considered to arise out of their farming operation. Although debts on a principal residence are typically excluded as debts arising out of a farming operation, in this case, the house served as the main office for the farm and was therefore directly connected to the debtors' farming activities.

The court of appeals, held that: (1) if debt for a debtor's principal residence "arises out of a farming operation," it should not to be excluded from his aggregate noncontingent, liquidated debt in calculating whether at least 50% of such debt arises from farming operation, but only if the residence debt is directly and substantially connected to the farming operation; (2) the debt for a debtor's principal residence has "direct and substantial connection to a farming operation" only if proceeds of the loan were directly applied to, or utilized in, farming operation; and (3) the mere fact that a residence built with proceeds of a construction loan serves to house the office, books, and records of a farm operated by a debtor, or that a residence is located on land used by a debtor for a farming operation, was insufficient, without more, to establish the requisite connection, for purposes of assessing a debtor's eligibility for chapter 12 relief.

The court of appeals vacated and remanded the case back to the bankruptcy court to determine if that particular debt on the personal residence had anything to do with the debtors' farming operation.

Prior Cases (11 U.S.C. § 109(g))

Sixth Circuit

In re Herremans, 532 B.R. 701 (Bankr. W.D. Mich. 2015)

In this case, the creditor moved to dismiss based on the debtors' voluntary dismissal of their prior case while a request for relief from stay was pending. The court denied the motion to dismiss because the affidavits of default which triggered relief from the stay in the prior case were filed after the debtors' motion to voluntarily dismiss.

Eighth Circuit

In re Bryngelson, Case No. 15-00704, 2015 WL 4127079 (Bankr. N.D. Iowa Jul. 8, 2015)

The creditor moved to dismiss this case based on the debtor's willful failure to abide by the orders of the court in a case pending in the prior 180 days. The bankruptcy court dismissed the case and imposed the 180-day bar based on the debtor's failure to timely communicate with the court and to follow court orders after the withdrawal of his counsel in the prior chapter 12 case.

CASE ADMINISTRATION

Fees and Administrative Claims

First Circuit

In re Giger, 504 B.R. 286 (Bankr. D. Me. 2014)

The debtor initially filed for relief under chapter 7. When the chapter 7 trustee determined that the debtor's fishing boat was not exempt, the debtor converted to chapter 12. The chapter 7 trustee filed an application for administrative expense under § 330, and the debtor proposed payment of that expense in his plan, which provided for 100% payment to unsecured creditors. The bankruptcy court questioned whether the chapter 7 trustee could be awarded compensation, although no party objected to the requested fee. The court denied the request for fees stating that § 326(a) limits the court's discretion to award fees to a trustee. The court denied the chapter 7 trustee's motion to reconsider.

Second Circuit

In re Simpson, Case No. 17-10442, 2018 WL 6975199 (Bankr. D. Vt. Dec. 21, 2018)

In this case, the debtors objected to the amended proof of claim of the creditor, which asserted over $100,000 in attorneys' fees. The debtors' objection challenged the lack of supporting documentation for the fees, the reasonableness of the fees, and the creditor's failure to file an application for the allowance of the fees. The court held that § 330 applied to counsel of a third party, such as a secured creditor, and examined the reasonableness of the fees in light of the lumped time entries and other claims of unreasonableness. The court ultimately reduced the total fee by approximately 10%.

Third Circuit

In re Thorpe, Case No. 17-2606, 2018 WL 6068445 (3d Cir. Nov. 20, 2018)

In this case, the debtors retained an attorney on a contingency basis to represent them in state court. During that state court case, the debtors filed for relief under chapter 12, and the attorney was suspended for practice for one month because his failure to complete his yearly CLE requirement by one credit. During his period of administrative suspension, the attorney negotiated a large settlement for the debtors; they learned of his suspension and asked about it prior to accepting the settlement. The debtors then retained other counsel, who advised them to accept the settlement, which they did. The attorney filed a motion to recover the contingency fee pursuant to his contract with the debtors, because they accepted the settlement that he had negotiated.

The court of appeals held that the attorney had no contractual entitlement to the contingency fee, but the appellate court remanded to the bankruptcy court to determine whether the attorney may recover under *quantum meruit*, which was not initially addressed by the bankruptcy court. This remand reversed the bankruptcy court's holding that the attorney's conduct

while suspended was so wrongful that he was completely barred from recovery. In reaching this conclusion, the court of appeals noted that under applicable state law the ethical rules cannot be used to alter substantive legal rights. In other words, the bankruptcy court should have analyzed whether the attorney's conduct precluded recovery under *quantum meruit* because of unclean hands, not merely whether there was a violation of an ethical rule. After presenting this distinction, the appellate court determined that the attorney was not barred from equitable recovery because of unclean hands.

In re Mortellite, Case No. 17-21818, 2017 WL 6276099 (Bankr. D.N.J. Dec. 8, 2017)

In this case, the secured creditor moved for the allowance and payment of an administrative expense priority claim that was provided for in the agreement to allow the debtors to use the creditor's cash collateral. The debtors objected to the motion for payment, arguing that § 1205(b)(4) prohibits the allowance of such a claim to a secured creditor as a part of adequate protection. The court disagreed with the debtors, holding that the debtors had explicitly negotiated for the allowance of such a claim, and that the case law and commentary on § 1205(b) suggests that the allowance of an administrative claim, alone, is not enough for adequate protection in chapter 12.

Fifth Circuit

In re Speir, Case No. 16-11947, 2018 WL 3814276 (Bankr. N.D. Miss. Aug. 8, 2018)

The debtor proposed to pay certain secured creditors directly rather than through trustee disbursement under the plan. The trustee argued that the debtor was required to pay the trustee an amount equal to his fee on the payments to pre-petition debts altered by the plan and the debtor's attorneys' fees. In other words, the trustee argued that he was entitled to a fee on all payments made to impaired and administrative claims, whether or not those payments are trustee or debtor disbursed. The court adopted the *Pianowski* factors to determine whether payments should be allowed to be made directly for impaired creditors. After reviewing each factor, the court allowed the debtor to make payments to all secured creditors directly, save for the one creditor whose claim was significantly altered by the plan.

In re Daniels, Case No. 13-30010, 2016 WL 556361 (Bankr. W.D. La. Feb. 11, 2016)

The case trustee filed a fee application requesting compensation that equaled 5% of the total disbursements under the plan since appointment. Two creditors objected. The issue before the court was whether the full 5% fee was reasonable in this case. The court adopted the position often used in chapter 7 that absent extraordinary circumstances, the trustee should be compensated at the full commission rate. In this case, the percentage fee was only 34% of funds disbursed to unsecured creditors, and there were no allegations that the trustee's performance fell below a reasonable standard. Therefore, the trustee was awarded the full 5% commission.

In re McLendon, 506 B.R. 243 (Bankr. N.D. Miss. 2013)

Under the confirmed plan in this case, the debtor was to make payments to the trustee for 36 months and directly to the creditor thereafter with a balloon payment at year 5. During the pendency of the plan, the debtor filed a motion to sell a portion of a farmland and remit the proceeds to the creditor. The proposed sale would not affect the other payment terms under the plan, i.e. neither the plan payment to the trustee during the 36 months nor the installment payment to the creditor would be altered by the sale and remittance of proceeds. The trustee's only objection to the sale was the payment of the percentage fee from the proceeds. The trustee argued that payments made to impaired creditors, whether made directly or disbursed by the trustee, are "payments under the plan" from which the trustee is entitled a fee; the court disagreed. The court focused on the language of 28 U.S.C. § 586(e)(2) which directs the trustee to take a percentage fee on funds received by the trustee under the plan. The court held that the trustee was not entitled to receive a fee from the proceeds because the sale was not contemplated under the plan and the proceeds did not flow through the trustee's office.

Sixth Circuit

In re Huepenbecker, 546 B.R. 381 (Bankr. W.D. Mich. 2015)

The debtors challenged the fee application of the trustee's attorney. The bankruptcy court applied *Baker Botts* and held that time spent defending the fee application at the trial level and also on appeal was non-compensable. The debtors also argued that the trustee's attorney should not receive any fee because the debtors were managing their business and the proposed plan paid a 100% dividend. The court rejected that argument noting that the trustee's attorney had assisted the trustee in performing the trustee's statutory duties. The prior appellate decision in this case can be found at Huepenbecker v. Davidoff, Case No. 1:13-cv-747, 2015 WL 328600 (W.D. Mich. Jan. 26, 2015).

Ninth Circuit

In re Cummings, Case No. 17-40043, 2018 WL 1061355 (Bankr. D. Idaho Feb. 23, 2018)

Post-confirmation, the debtors objected to the fee application filed by their former attorneys. Filing their objection *pro se*, the debtors complained of: (1) the attorney's lack of diligence, (2) his failure of communication, (3) his failure to follow instructions, (4) the quality of his advice, and (5) his errors in submissions to the court. The court found that the compensation and expenses seemed eminently reasonable in light of the complexities of the case, the value of the debtors' assets and the amount of their liabilities.

In re Silva Dairy, LLC, 552 B.R. 847 (Bankr. D. Idaho 2016)

The debtor filed a motion requesting that the court revoke its prior approval of the debtor's former counsel's fee application and require that he disgorge his fees. The debtor argued that the attorney: (1) did not make adequate disclosures regarding the source of his retainer (an endorsed

check from a creditor or related entity) and (2) forged the signature of the debtor's principal on several court documents and leases.

With respect to the forgery allegation, the court declined to infer that it was the debtor's attorney who forged the signatures. In relation to the source of his retainer funds, based on the attorney's testimony, the court found that the disclosure statements were at a minimum inaccurate because the attorney did not disclose the entity from which the funds originated. The court declined to require a disgorgement of all fees, but it did require the attorney to disgorge the retainer.

Bembey v. Olson (In re Bembey), Case No. NC-13-1253, 2014 WL 890473 (B.A.P. 9th Cir. Mar. 6, 2014)

The debtor objected to the fee application of his attorney on various grounds including billing for unauthorized tasks and legal work that were not beneficial to the debtor. The bankruptcy court approved the fee request in its entirety. The *pro se* debtor appealed, contending that he did not receive a fair hearing on the objection. The appellate panel affirmed the bankruptcy court, deferring to its factual conclusions and holding that it applied the appropriate legal standard to the fee application.

Tenth Circuit

In re Swenson, Case No. 09-41687, 2013 WL 3776318 (Bankr. D. Kan. Jul. 16, 2013)

The debtor's attorney did not file an application for employment under § 327. After the trustee moved to disburse funds on hand to unsecured creditors, the attorney objected requesting payment of his fee, as provided for in the plan. The question before the bankruptcy court was whether § 330(a)(4)(B) allowed for payment of the attorney's fee despite the lack of employment under § 327. After analyzing the structure of § 330 and legislative history, the court concluded that employment under § 327 is a requirement for debtor's counsel to receive payment from the estate.

Eleventh Circuit

Tippins Bank and Trust v. Jarriel (In re Jarriel), 518 B.R. 140 (Bankr. S.D. Ga. 2014)

A secured creditor requested that the cost of forced-place insurance be paid as an administrative expense, after the creditor inadvertently released its lien on its collateral prior to being reimbursed for the insurance. The debtor objected to the application for an administrative expense on various grounds, including necessity and collateral estoppel. The court allowed the expense, finding insurance necessary for the preservation of the estate and holding that the order approving the sale of property and the confirmed plan did not preclude the bank from seeking reimbursement for insurance when it failed to include those amounts in the payoff requested in relation to the sale of collateral.

Automatic Stay and Relief From

First Circuit

SRK Residential Communities, LLC v. Otero-Rivera, Case No. 15-1080, 2015 WL 4078107 (D. P.R. Jun. 30, 2015)

In this adversary proceeding, the bankruptcy court retained jurisdiction to adjudicate violations of the automatic stay after dismissal of the underlying bankruptcy case. The court found that the debtor's HOAs had willfully violated the stay and awarded actual damages, $100,000 in emotional damages and $100,000 in punitive damages. The HOAs filed a Rule 60 motion stating that they were unaware of the pending litigation because their attorneys failed to keep them informed. The bankruptcy court denied the motion, and the HOAs appealed. The district court affirmed the lower court, holding that counsel's failure to keep the client informed did not equate to excusable neglect in this case. The bankruptcy court opinion regarding the violations of the stay can be found at Rivera v. Lake Berkley Resort Master Assoc., 511 B.R. 6 (Bankr. D.P.R. 2015).

Third Circuit

U.S. v. Olayer (In re Olayer), 577 B.R. 464 (Bankr. W.D. Pa. 2017)

In this case, the FSA moved for relief from the stay arguing that: (1) the debtor was engaged in a scheme to hinder and delay his creditors based on 5 bankruptcy filings within 21 years and (2) the property was uninsured. The court determined that whether the current case was filed as a part of a scheme to hider and delay was dependent upon whether the prior case (the fourth case) was filed in bad faith. Despite a six-year time span and multiple amended plans, the debtor completed his fourth case, which suggested the current case was not a part of a scheme to hinder and delay. The court did, however, hold that the FSA was entitled to relief from the stay for cause because of lack of insurance on the property.

Fourth Circuit

In re Ollis, Case No. 18-04549, 2019 WL 1313397 (Bankr. D.S.C. Mar. 21, 2019)

In this case, a creditor had a blanket security lien on the debtor's cattle, crops, inventory and equipment. The creditor moved for relief from the stay. While the stay was pending, the debtor, in violation of a court order, sold his cattle and did not remit the proceeds to the creditor. The debtor also sold his hay and did not remit the proceeds to the creditor. The debtor's proposed plan valued the creditor's secured claim at $11,000 (the value of the transferred cattle) and listed as under-secured the remaining $1.6 million. In addition to opposing relief from the stay, the debtor objected to the creditor's proof of claim.

In response to the motion for relief from the stay, the debtor argued that the creditor's claim as to certain equipment was unperfected because the filed financing statement did not specifically list the equipment, including serial numbers. Additionally, the debtor argued that the creditor did not have an interest in his remaining hay because it was not a crop. The court rejected both

arguments, noting that regardless of whether the hay was a farming product or inventory, it was subject to the creditor's lien. The court granted relief from the stay because of the debtor's pre- and post-petition actions and because the debtor's filings did not indicate that the debtor would have sufficient income to make plan payments to protect the creditor's interests. See also Claims and Objections, Secured Claims, *infra*.

Fifth Circuit

In re B & D Pearson Farms, LLC, Case No. 16-50114, 2016 WL 3435712 (Bankr. N.D. Tex. Jun. 14, 2016)

Several related debtors sought to use approximately $800,000 of cash collateral. The creditor objected and moved for relief from the stay against certain livestock. Although the court found that the debtors had unrealistic projections of income and expenses, it declined relief from the stay because the court could not determine at this early stage whether the debtors could propose a viable chapter 12 plan. See also Case Administration, Use, Sale and Lease of Property, *infra.*

Sixth Circuit

In re Wilson, Case No. 17-10770, 2017 WL 5054314 (Bankr. W.D. Ky. Nov. 1, 2017)

In this case, the debtor transferred property to her son and retained a life estate. The son filed multiple petitions in bankruptcy which were dismissed prior to confirmation. During the second case, the creditor obtained *in rem* relief under § 362(d)(4). The creditor recorded the order, and a foreclosure sale was scheduled. The day before the sale, the debtor filed her petition for relief under chapter 12. The debtor argued that the *in rem* relief previously obtained did not apply to her interest in the property. The court entered a comfort order granting relief from the stay, but the court clarified that that the *in rem* relief order applied to the debtor's life estate, as an order entered pursuant to that section is binding in any other case filed in the next two years purporting to affect the same real property, and it applies to any other third party with an interest in the property seeking to obtain the benefit of the automatic stay.

In re Buckman, Case No. 15-32674, 2017 WL 943915, (Bankr. W.D. Ky. Mar. 9, 2017)

A secured creditor moved to lift the stay. It argued that it had an administrative claim and should be paid prior to disbursements to other creditors. The creditor and the debtor entered into a stipulation, and an order was entered approving the stipulation that provided that the creditor would be paid prior to the other creditors. However, a problem arose when the stipulation affected another secured creditor, CNH, who didn't have notice of the stipulation or order. As a result, CNH moved to lift the stay because the debtor was not able to make the payment that was required pursuant to confirmed plan. The court held that the stipulation and order settling the first lift stay motion could not impair CNH's treatment under the plan without notice. The court held that the debtor did not make the payment to CNH required under the plan. It granted CNH's motion to lift stay. The court also vacated and set aside the stipulation and order previously entered.

Hatcher v. Purdy, Case No. 1:13-cv-00113, 2014 WL 1319956 (W.D. Ky. Mar. 31, 2014)

The bankruptcy court assessed actual and punitive damages against a creditor for removing cows in violation of the automatic stay. The creditor appealed the decision stating that he was unaware of the filing and returned the cows immediately after meeting with counsel. The district court affirmed the bankruptcy court's award of punitive damages because there was a three-week delay between when the creditor learned of the filing and ultimately returned the cows. During that time, the creditor retained the proceeds of the milk produced by such cows.

Seventh Circuit

Schonscheck v. Deere &Co. (In re Schonscheck), 592 B.R. 679 (Bankr. E.D. Wis. 2018)

The debtors brought an adversary proceeding to invalidate a writ of replevin based on a post-petition default judgment and to recover damages for violation of the automatic stay. Specifically, the creditor filed a state court lawsuit against the debtors. Prior to a judgment in that case, the debtors filed for relief under chapter 12. Prior to learning of the chapter 12 filing, the state court issued a default judgment in favor of the creditor. The pending chapter 12 case was dismissed, as well as two of the debtors' later-filed bankruptcy cases. The state court then issued a writ of replevin based on the prior default judgment.

The debtors commenced the adversary proceeding alleging the writ was invalid because it was based on a default judgment obtained while the debtors were in bankruptcy, a violation of the stay. The bankruptcy court annulled the stay and co-debtor stay in effect at the time of the default judgment and denied the request for damages.

Eight Circuit

In re Meinders, Case No. 14-01459, 2016 WL 1599508 (Bankr. N.D. Iowa Apr. 18, 2016)

A secured creditor objected to the proposed plan because of the treatment of its claim and the lack of feasibility of the plan. The creditor also moved for relief from the stay. After denying confirmation, the court granted relief from the stay because the debtors could not propose a confirmable plan and evidence suggested that the debtors had sold collateral post-petition without court approval and without remitting funds to the creditor. See also Confirmation, Feasibility, *infra.*

In re Vander Vegt, 495 B.R. 433 (Bankr. N.D. Iowa 2013)

The debtor sought to use cash collateral for continuing operations and the replacement of dairy cows affected by stray voltage; the secured creditors objected and moved for relief from the stay. The court denied the motions for relief from the stay in regard to personal and real property actually used by the debtors, but the court granted the motions for the farm property not being utilized in the operations of the debtors. See also Case Administration, Use, Sale and Lease of Property, *infra.*

Ninth Circuit

Barcelos v. U.S. (In re Barcelos), 576 B.R. 854 (Bankr. E.D. Cal. 2017)

In this adversary proceeding, the debtor sought actual damages as well as attorneys' fees and costs for the IRS's violation of the automatic stay in seizing the debtor's tax refund. After the IRS returned the debtor's refund with interest, both parties moved for summary judgment regarding the debtor's other requested relief (attorneys' costs and fees and accountant fees).

After commencing the adversary proceeding, the debtor attempted informally to exhaust his administrative remedies by sending his legal and accounting bills to various IRS agents and U.S. Attorneys. The debtor, however, did not file a claim with the Chief of the Insolvency Unit, nor did the debtor ever properly serve his claim.

Although the United States has consented to suit for violations of the automatic stay, that consent is read narrowly. For compensatory damages for stay violations, there is no exhaustion of remedies requirement. For attorneys' fees and costs, however, there is a condition precedent – compliance with 26 U.S.C. §§7430(b)(1) and 7433(e)(2)(B)(i) and the regulations implementing those sections.

There was no dispute that the debtor failed to comply with these sections, so the court held that it lacked jurisdiction over the claim for attorneys' fees and costs because the debtor failed to exhaust his administrative remedies.

Neve v. Wells Fargo Bank, N.A. (In re Neve), Adv. Pro. 14-1022, 2014 WL 2118990 (Bankr. N.D. Cal. May 21, 2014)

In this case, the debtor and creditor entered a stipulation that the automatic stay would terminate upon confirmation of the plan, but the creditor would take no action to collect as long as the debtor was not in default under the plan. The bank sent loan statements for a "new loan" which were the result of the bank's internal need to account for the unsecured portion of its bifurcated claim. The debtor filed a complaint alleging violation of the stay. Other than the statements mentioned, no other actions to collect were alleged. The court noted that sending the statements violated neither the automatic stay nor the terms of the stipulations. The court dismissed the complaint.

Tenth Circuit

In re Hornung, Case No. 10-14263, 2018 WL 2148275 (Bankr. D. Kan. May 8, 2018)

The trustee moved to deem the chapter 12 plan complete and to issue a refund of an overpayment to the debtor. In response to that filing, a post-petition creditor filed a motion for relief from the stay or in the alternative an application for an administrative expense requesting immediate payment. Specifically, the movant alleged that post-petition it sold equipment to the debtor on credit, and the debtor failed to make the required payments. Unaware of the bankruptcy proceeding, the creditor filed a state-court collection action and participated in mediation to which the debtor appeared *pro se*. After the conclusion of the mediation, the debtor informed the creditor

of the bankruptcy proceeding. As a result, the state court stayed further action until relief from the stay was granted.

The debtor objected to the request for an administrative expense, challenged the amount owed and opposed the relief from the stay. Given the debtor's post-petition actions regarding the creditor and the fully administered plan, the bankruptcy court granted relief from the stay for the collection action to continue.

In re Fox, Case No. 12-32462, 2013 WL 653048 (Bankr. D. Colo. Feb. 21, 2013)

The debtor initially filed under chapter 7. A creditor filed a motion for relief from the stay; the debtor then converted to chapter 12. The bankruptcy court considered the motion before the debtor proposed a plan. The court granted stay relief, though it acknowledged that courts are reluctant to grant relief from the stay early in a reorganization case before the debtor has a chance to formulate a reorganization plan. The court granted relief for two reasons: (1) the property was not necessary for a successful reorganization and (2) the debtor had not demonstrated a realistic prospect of reorganization when the bulk of her income depended upon the goodwill of others.

Eleventh Circuit

In re Mountain Farms, LLC, Case No. 16-41682, 2017 WL 598489 (Bankr. N.D. Ala. Feb. 14, 2017)

In this chapter 12 case, the court granted relief from the stay for a creditor whose collateral had been transferred amongst various entities who each in turn filed for bankruptcy to frustrate the creditor's foreclosure of the property.

Use, Sale and Lease of Property (11 U.S.C. § 363)

Third Circuit

In re Thorpe, 540 B.R. 552 (E.D. Pa. 2015)

In this chapter 12 case, the plan provided for the sale of certain property in whole or in part by a date certain; if the property failed to sell privately, all of it was to be sold by public auction. The plan also contained a redemption provision by which the debtor could redeem the property and terminate any auction by selling a portion of the property or paying a sum certain to the secured creditor. The plan was silent as to whether the debtor or trustee had the obligation of subdividing the property. On the eve of the auction, the debtor obtained a contract of sale for a portion of the property and proposed a sixth modified plan which allowed for the sale of the portion. In the alternative, the debtor sought a determination that the contract of sale satisfied the redemption provisions of the confirmed plan. The court denied the motion to modify and refused to cancel the planned auction.

After the auction, the bankruptcy court also confirmed the auction sale, over the debtor's assertion of irregularities, namely: (1) the improper disclosure of the auction provisions of the confirmed plan while the property was being marketed for private sale; (2) auction marketing

materials which understated the number of homes which could be built on the property; and (3) the creditor's failure to bid the entire amount of its credit-bid authority. The bankruptcy court did not allow testimony regarding the debtor's first contention of irregularity and did not continue the hearing to allow additional collection of evidence.

On appeal, the district court found no error in the bankruptcy court's refusal to allow testimony on the debtor's alleged irregularities in the auction. Because of the value of the property being marketed and ultimately sold, it was unlikely that any developer-bidder would not conduct its own due diligence. Therefore, the claimed irregularities would have had a *de minimis* effect on the sale price obtained at auction. See also Motions to Modify, Timing and Appellate Issue, *infra.*

Fifth Circuit

In re B & D Pearson Farms, LLC, Case No. 16-50114, 2016 WL 3435712 (Bankr. N.D. Tex. Jun. 14, 2016)

In this case, several related debtors sought to use approximately $800,000 of cash collateral. The creditor objected and moved for relief from the stay against certain livestock. The debtors proposed to protect the interest of the creditor by providing a replacement lien in a post-petition cotton crop. The debtors valued this crop at over $1 million. The projection, however, was based on expenses that were significantly lower than historical averages. Based on that, the court held that the creditor was not adequately protected. Additionally, the debtors proposed repayment of the cash collateral over the life of the plan. Because of the debtors' unrealistic projections of expenses and income, the court declined use of the cash collateral. See also Case Administration, Automatic Stay and Relief From, *supra.*

Eighth Circuit

In re Vander Vegt, 495 B.R. 433 (Bankr. N.D. Iowa 2013)

In this case, the debtor sought to use cash collateral for continuing operations and the replacement of dairy cows affected by stray voltage; the secured creditors objected and moved for relief from the stay. The court found credible the evidence presented that replacing cows could make the dairy operation viable and that providing the creditor with replacement liens in better producing cows, combined with adequate protection payments sufficiently protected the interests of the bank. See also Case Administration, Automatic Stay and Relief From, *supra.*

Ninth Circuit

In re Benbrook, Case No. 11-60781, 2015 WL 672472 (Bankr. D. Or. Feb. 10, 2015)

The debtor moved to sell her property to her brother. The confirmed plan in the case provided for the sale of the property for an amount sufficient to pay all creditors in full. The plan also allowed the debtor to market the property for a certain period of time. The motion filed by the debtor to approve the sale was denied because the time period for the debtor to sell the property had ended. The ability to sell had passed to the trustee, and the purchase amount proposed by the

debtor was insufficient to pay the claim of the secured creditor. See also Claims and Objections, Claim Objections, *infra.*

Post-Petition Financing

Eighth Circuit

In re Dunn, Case No. 15-01552, 2018 WL 3655657 (Bankr. N.D. Iowa May 17, 2018)

In this case, debtors sought permission to incur debt to purchase grain in exchange for a lien on their upcoming crops. A secured creditor provided for in the plan opposed the motion, arguing that the debtors had not made a profit farming the prior two years and that they would be unable to afford to make their upcoming plan payment, which was almost double the amount of the prior annual payments. The court determined that the proposed financing was a sound business judgment and that no party appeared to oppose the debtors' assertion that they were unable to obtain unsecured financing. Finally, the court found that the debtors had proven that their farming operation was likely to be profitable during the year in question.

First Security Bank and Trust Co. v. Vander Vegt, 511 B.R. 567 (N.D. Iowa 2014)

The debtors requested permission to incur post-petition secured debt to construct facilities that would improve their dairy operation. The debtors proposed liens in favor of the lender on the debtors' real and personal assets which would be senior to the debtors' largest secured creditor. The creditor opposed the motion to incur debt and filed a motion to dismiss the case for the debtors' failure to file a plan within 90 days of filing for relief. The bankruptcy court conditionally granted the motion to incur new debt, finding that the proposed project would increase the value of the secured creditor's collateral, that once the project was complete the debtors would receive grants that would enable them to pay off the post-petition debt, and other various facts that reduced risk to the secured creditor. The bankruptcy court denied the motion to dismiss finding that the debtors should be granted more time in which to file a plan. The secured creditor appealed the denial of its motion and the granting of the motion to incur debt. On appeal, the district court affirmed the bankruptcy court on all issues.

Executory Contracts and Unexpired Leases (11 U.S.C. § 365)

Third Circuit

Chesapeake Appalachia, LLC v. Powell (In re Powell), Case No. 3:13-cv-00035, 2015 WL 6964549 (M.D. Pa. Nov. 10, 2015)

The bankruptcy court held that as a matter of state law an oil and gas lease fell within the purview of § 365 when no oil or gas had been produced under the lease, preventing the vesting of any property right. Despite this holding, the court denied the chapter 12 debtor's motion to reject the lease because the lease and its percentage of revenue and royalties were undervalued.

The lessee appealed the bankruptcy court's holding that the lease was executory in nature. The district court vacated the holding of the lower court by surveying state law to conclude that: (1) state law required oil and gas leases to be interpreted pursuant to their terms; and (2) such leases typically transferred property interests, rather than creating a landlord/tenant relationship. See also Appellate Issues, *infra.*

Fourth Circuit

Keith's Tree Farm v. Cox (In re Keith's Tree Farm), Adv. Pro. 13-07039, 2013 WL 6497956 (Bankr. W.D. Va. Dec. 11, 2013)

In this adversary proceeding. the bankruptcy court determined whether the lease agreement for the debtor's tree farm had expired prior to the petition date. Despite language in the lease agreement that stated the lease was void upon default, the bankruptcy court, relying upon state law, held that the lessor must make a demand for payment prior to termination of the lease. Therefore, despite payment defaults, the lease was not terminated prior to the petition for relief.

Eighth Circuit

In re Bradley, BR13–41138–TLS, 2013 WL 4498961 (Bankr. D. Neb. Aug. 21, 2013)

The chapter 12 debtor attempted to assume a lease contract with a purchase option, exercise the purchase option, and then sell the property immediately for a significant profit. The lessor claimed that the lease had been terminated prior to filing and sought relief from the stay to pursue state court litigation in relation to the termination. The bankruptcy court abstained from determining the termination issue, holding that it should be decided by the state court. Under the permissive abstention standard, the bankruptcy court found particularly compelling that a state action which provided for an expedited process had been commenced prior to the bankruptcy filing.

Ninth Circuit

In re Miller, Case No. 15-61159, 2016 WL 1316763 (Bankr. D. Mont. Apr. 1, 2016)

The chapter 12 debtor sought to assume several leases which he argued were necessary for a successful reorganization. A creditor objected arguing that the debtor had not produced the leases, proven the terms of the leases or that they had not expired. The debtor also had not explained how assumption of the leases was beneficial to the estate. The debtor's testimony was uncontroverted at the hearing on the motion to assume the leases. The court granted the motion to assume and noted that it should "approve the decision to assume the leases unless it finds that the [d]ebtor's conclusion that acceptance would be advantageous is so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, whim or caprice."

PROPERTY OF THE ESTATE

Debtor's Interest

Fourth Circuit

In re Ollis, Case No. 18-04549, 2019 WL 244452 (Bankr. D.S.C. Jan. 16, 2019)

The chapter 12 debtor was an individual with a 100% ownership in an LLC. The LLC had debt secured by certain equipment, and the debtor was a guarantor those debts. The proposed plan provided for surrender of some equipment and provided a valuation of the lien on the retained equipment. The secured creditor filed a motion for a comfort order that the automatic stay did not prevent the creditor from liquidating its collateral, as the collateral was not property of the estate. The debtor argued that his personal guaranty of the debts rendered the stay applicable. The bankruptcy court noted that under applicable state law, a member of an LLC owns only a distributional interest in the LLC, and therefore, the assets were not a part of the estate. For companion opinions in this case, see 2019 WL 236223 and 2019 WL 244378.

Seventh Circuit

In re Packer, Case No. 17-81746, 2018 WL 3493549 (Bankr. N.D. Ill. July 19, 2018)

The chapter 12 debtors were the sole owners of several LLCs, which had not filed for bankruptcy. The debtors moved the court for the entry of an order allowing them to use cash proceeds from the sale of crops owned by one of the debtors' LLCs. A secured creditor of one the LLCs argued that the cash sought to be used was not part of the debtors' bankruptcy estate. The debtors argued that the funds were property of the estate as, depositing the funds in the debtors' bank account was essentially a transfer. The debtors did not provide evidence that a transfer had actually taken place, that the debtors had the unfettered right to force such a transfer as the equity owners of the LLC, or even that the account into which the funds were deposited was owned by the debtors. Therefore, the court denied the motion for use of cash collateral holding that the funds were not property of the bankruptcy estate.

Eighth Circuit

Ferrell v. Ferrell (In Ferrell), Case No. 1:12-cv-1018, 2012 WL 5351865 (W.D. Ark. Oct. 29, 2012)

In this case, the bankruptcy court found that the estate did not have a legal or equitable interest in certain property, and it granted relief from the stay to the appellee-creditors to pursue certain state court litigation in relation to the property. The debtors had entered into contract for deed agreement, which transferred property to the debtors after eight annual installment payments. The contract for deed contained a default provision which allowed a 30-day cure period after notice of default. If the default was not cured, the creditor could elect to declare the contract void and treat all sums received as rent. The debtors defaulted on the agreement. Notice of default was sent to the debtors, but they failed to cure. Almost two years later, the debtors filed for bankruptcy

relief, and the creditor moved to relief from the stay. The bankruptcy court held that the estate had no interest in the property because the contract for deed was terminated prior to the bankruptcy filing and that the termination of the contract did not constitute an invalid forfeiture.

The debtors appealed this decision arguing that the creditor waived its right to enforce the default; that the contract was never terminated; and that the bankruptcy court's ruling constitutes an invalid forfeiture. The district court affirmed the bankruptcy court's decision that the contract was terminated prior to filing and that this was not an invalid forfeiture given the circumstances of the case where it was obvious the creditor had done everything to help the debtor.

Exemptions

Fifth Circuit

In re Pearson, 570 B.R. 237 (Bankr. N.D. Tex. 2017)

In this case, the debtors asserted a homestead exemption in 170 acres of a larger parcel of land under the Texas Property Code and the state constitution. The debtors also claimed an exemption in four vehicles. A creditor objected to the claimed exemptions arguing that the debtors had waived their exemptions because the vehicles, as well as the 170-acre tract, had been leased out, for a number of years, to an affiliated entity of the debtors.

With respect to the real estate, a partnership, consisting of the debtors and the father of one of the debtors, had continuously farmed the real estate for over a decade pursuant to an oral lease. The objecting creditor had the burden to show that the homestead had been terminated through death, abandonment or alienation. The court reviewed the control and intent of the debtors. The longstanding lease of the property with the stated intent to continue to lease the property weighed towards abandonment, but the intent of the debtors to relinquish control of the homestead was the dispositive factor. The court found that the short nature of the lease and the debtors' intent to regain control of the property at some point in the future (after the death of the debtor's father) indicated that the debtors had not abandoned their homestead, so the objection was overruled.

With respect to the trucks, the Texas statute provides an exemption for "farming or ranching vehicles." The bank argued that because the vehicles were always leased to the partnership, they were rental property to the debtors. The debtors argued that the exemption did not require proof of usage. The court recognized that prior cases interpreting that exemption had not required debtors to use the exempt farming equipment with sufficient regularity, but at some point in time, those claiming the exemption had used the equipment for farming purposes. In contrast, in this case, the debtors had never used the exempted vehicles – they had been purchased with the intent of renting them to the partnership and had never been used by the debtors personally. The court sustained the objection and disallowed the exemption.

Eighth Circuit

In re Seifert, 544 B.R. 670 (Bankr. D. Minn. 2016)

The bankruptcy court, after remand, determined that the debtor's claim of exemption under a state law garnishment statute in jointly payable checks for farm earnings was a valid exemption.

Tenth Circuit

In re Rudolph, Case No. 18-40423, 2018 WL 5733506 (Bank. D. Kan. Oct. 30, 2018)

Prior to filing, the debtors significantly reduced their farming operations, yet they claimed the full amount of the "tools of the trade" exemption. A creditor objected to the claimed exemption arguing that the debtors were not entitled to the exemption or, if so entitled, some of the items claimed exempt were not regularly and reasonable used to carry out the remaining farming operations.

In holding that the debtors were entitled to the exemption for most of the items they claimed, the court noted that the debtors need not use the equipment exempted to produce something for sale. The debtors were engaged in caring for cattle of others, which required some of the exempt equipment. It made no difference that the bulk of the debtors' income was from other sources.

Turnover and Avoidance

Fourth Circuit

Terry Properties, LLC v. Farm Credit of the Virginias (In re Terry Properties, LLC), Case No. 17CV00004, 2017 WL 3736772 (W.D. Va. Aug. 30, 2017)

In this adversary, the debtor brought a fraudulent transfer action against the creditor under § 548(a)(1)(B) based on a loan restructuring agreement between the defendant-creditor and the debtor and other related obligors, which included other corporate entities and a trust. The agreement provided that the trust would be dissolved and its assets and liabilities divided among the other obligors, with the debtor receiving certain property and assuming the obligations of the trust, including an explicit agreement to assume and perform all obligations of the trust under any of the loan documents to which the trust was a party. The restructuring documents did not increase the value of the amounts secured by the deeds of trust.

As a result of this agreement, the debtor obtained the trust's interest in real property subject to the deed of trust in favor of the creditor. According to the debtor, the loan restructuring agreement changed the definition of indebtedness, such that the property obtained from the trust became liable for two additional notes owed by related entities, not the debtor.

The bankruptcy court granted summary judgment to the creditor, and the debtor appealed to the district court. The district court affirmed the lower court, finding that prior to the modification, the trust was already obligated on the notes the debtor identified and that such notes were secured by the property pursuant to the pre-existing deed of trust. Therefore, there was no

transfer. Additionally, the debtor received reasonably equivalent value because it received title to the property, and even if a transfer had occurred, it did not make the debtor insolvent because at no time did the debtor own the property free and clear of the liens that already existed.

Godley v. Open Grounds Farm, Inc., 505 B.R. 192 (Bankr. E.D.N.C. 2014)

The debtors sought to avoid a statutory landlord lien and an unperfected consensual lien on crops and to recover funds for the value of the avoided liens under § 545(3) and § 544(a)(1), respectively. Pursuant to the debtors' agreement with their landlord, the crop processor sent all of the crop proceeds to the landlord, satisfying the obligations under the lease 7 months prior to the petition for relief. The court dismissed the claim under § 545(3) because that section prevents the fixing of a lien and does not contain a time period which would provide for the application of that section to prepetition, satisfied liens; likewise, the court dismissed the claim under § 544(a)(1) because there was no unperfected lien at the time of filing for the trustee to avoid.

Sixth Circuit

Joseph and David Johnsman Ltd. P'ship v. Egbert (In re Joseph and David Johnsman Ltd. P'ship), Adv. Pro. No. 13-3014, 2015 WL 4873014 (Bankr. N.D. Ohio Aug. 13, 2015)

In this adversary proceeding, the debtor sought a declaratory judgment that certain property was property of the estate, an accounting and turnover of property and the avoidance of post-petition transfers. The parties filed cross-motions for summary judgment. Although the essential elements of the claims on the avoidance of the post-petition transfer had been met, the defendant-transferee challenged the debtor's constitutional standing to bring the action because of a lack of injury to the estate. The court denied the motions for summary judgment as there remained an issue as to whether and to what extent the estate had suffered an injury in fact.

Seventh Circuit

First Financial Bank, N.A. v. Blake (In re Blake), Adv. No. 17-06006, 2018 WL 1182178 (Bankr. S.D. Ill. Mar. 6, 2018)

A secured creditor filed a complaint for the determination of the validity, priority and extent of its lien in certain payments to the debtors under the Agricultural Risk Coverage Program. The debtors counterclaimed to avoid any lien asserted by the plaintiff as a preference under § 547.

The parties agreed that the sole issue before the court was when the debtors acquired rights in the payments to trigger the transfer required by § 547(e)(3). The debtors argued that the date of the transfer was the date they received the funds; the creditor argued that the debtors had acquired contractual rights in the payments on the date they enrolled in the program, which was outside of the preference period.

To support their argument that a transfer did not occur until they received the payments, the debtors relied upon cases dealing with wage garnishments. Like wages, the debtors argued that a myriad of conditions might occur that would jeopardize their right to payment under the program. The court disagreed, holding that the debtors had a sufficient interest in the payments

for the creditor's interest to attach when the debtors signed up for the program, rather than the date of payment.

Eighth Circuit

Security Nat'l Bank v. Western Slopes Farms P'ship (In re Western Slopes Farms P'ship), Adv. Pro. 17-09047, 2018 WL 4348048 (Bankr. N.D. Iowa Sept. 10, 2018)

Prior to filing for bankruptcy, the chapter 12 debtor had conducted his farming operations through a series of entities. The entities and the debtor all obtained loans from a creditor and granted security interest in collateral. The entities and debtor were liable on all loans, and the loans were cross-collateralized. When the creditor began to collect on its state court judgments, the entities transferred to the debtor their assets for no consideration and the debtor filed for bankruptcy protection. The creditor brought a suit to void the transfer under state law. The bankruptcy denied the creditor's motion for summary judgment because, under state law, fully encumbered property was not an "asset" that could be "transferred."

First State Bank v. Caine, Case No. 1:12-cv-1012, 2014 WL 1332055 (W.D. Ark. Mar. 31, 2014)

In this appeal, the bank challenged the bankruptcy court's determination that its deed of trust was avoidable under § 544(a)(3) because of a legal description that did not close, although a search of the grantor/grantee index would have revealed the existence of the mortgage despite the defective description. The bankruptcy court also denied the bank's counterclaim for reformation of the deed.

On appeal the district court analyzed whether a creditor would have constructive notice of the mortgage which would defeat the strong arm powers of the debtor-in-possession. Under Arkansas law, an instrument that is filed but does not describe definite land does not provide constructive notice. The district court affirmed the bankruptcy court because the open calls of the legal description did not describe finite land.

Eleventh Circuit

Pierce v. Farm Bureau Bank (In re Pierce), 581 B.R. 912 (Bankr. S.D. Ga. 2018)

The debtor objected to the secured creditor's claim arguing that it was wholly unsecured because the creditor failed to provide the debtor's full name on the financing statement filed with the clerk of court. As an initial matter, the court determined that a chapter 12 debtor may exercise the avoidance power under § 544.

Under the Uniform Commercial Code, as adopted by Georgia, an individual's name on a financing statement is sufficient only if it is the name indicated on the debtor's driver's license. Georgia statutes provided that a financing statement that did not provide for the debtor's name as listed on his driver's license was seriously misleading. In this case, the driver's license was issued with the debtor's full name; the signature on the driver's license contained only a first and last name. The court determined that the printed name was controlling, and it sustained the objection to the claim.

Setoff (11 U.S.C. § 553)

Fourth Circuit

In re Farmer, Case No. 10-09353, 2012 WL 4905480 (Bankr. E.D.N.C. Oct. 15, 2012)

The debtor had loans with the FSA; he filed for relief in 2010. The debtor also participated in the Direct and Countercyclical Program of the USDA; he was entitled to receive funds from that program in 2012. The FSA requested to offset the funds and moved for relief from stay. The main issue before the court was whether the funds from the DCP were a pre- or post-petition asset. Although the DCP program began in 2002 it was extended through the 2012 crop year in 2008; farmers had to apply each year, but a farmer need not plant a crop in order to receive payments, and a farmer was eligible for payments if he either owned or rented the land.

In this case, the debtor owned some land and rented some of his farm land. In relation to the land the farmer owned, the court found that the FSA was obligated to make the payments under DCP beginning in 2008, pre-petition. In relation to the land leased by the debtor, that obligation arose post-petition. The court granted in part the motion to offset the funds associated with the land owned by the debtor at the time of the filing but denied the motion in relation to payments associated with rented land.

CONFIRMATION

Timing

Seventh Circuit

In re Gullicksrud, Case No. 16-11860, 2016 WL 5496569 (Bankr. W.D. Wis. Sept. 29, 2016)

The debtor filed a second motion to extend the deadline to file a plan because of a conflict with her retained attorney which required her to substitute another firm as counsel. The trustee objected to the motion but did not move to dismiss. The court reviewed the statute, 11 U.S.C. § 1221, and noted that Congress changed the law to make it more difficult to extend the deadline. Based on the circumstances of the case, however, which included a showing of good faith, the failure to timely file a plan was due to her prior counsel's conflict of interest. The court concluded that the filing deadline was not jurisdictional and that there were no motions to dismiss pending, so it granted debtor's motion to extend.

Good Faith

First Circuit

In re Hernandez, 549 B.R. 551 (Bankr. D.P.R. 2016)

In this case, the debtor proposed to pay an impaired creditor directly, rather than through trustee disbursement. The trustee objected to the payment provision, arguing that payment of an impaired creditor directly violated the good faith requirement of confirmation and did not comply

with the trustee's duties. The court overruled the trustee's objection and held that a chapter 12 debtor can make payments directly to an impaired creditor.

Fifth Circuit

In re Moore, Case No. 11-11850, 2013 WL 6614376 (Bankr. N.D. Miss. Dec. 19, 2012)

The court denied confirmation on a number of good faith grounds, including: (1) the debtor's proposal to pay the main creditor directly; (2) the debtor's failure to provide information about the value of his 100% owned corporation; and (3) the debtor's untrustworthy behavior during the case – such as ignoring court orders and attempting to have family members farm on his behalf. Other opinions in this case can be found in Claims and Objections, Secured Claims, *infra*.

Best Interest of Creditors

Fourth Circuit

In re Terry Properties, LLC, 569 B.R. 76 (Bankr. W.D. Va. 2017)

The trustee and two creditors objected to the proposed plan in this case based on the treatment of secured claims, lack of feasibility, the best interest of creditors, and good faith based on language in the plan that acted as an injunction against two pending lawsuits with commercial co-borrowers. The debtor owned the real property of a dairy operation conducted by a related entity. At the time of the filing, the farm was transitioning from dairy to growing cherry trees for a start-up botanical company. The cherries harvested were not for consumption but use in the start-up's product which had an unknown market.

With respect to the best interest of creditors, the court had to determine the value of the debtor's real estate. The court discounted the valuation placed on the property by the creditor's appraiser based on the appraiser's comment that at the time of the hearing, sales prices had declined. Additionally, the farm had converted from a dairy farm to a cherry farm, and the sales approach assumed continued dairy operations. The court ultimately concluded that the debtor had undervalued its real estate, and it denied confirmation, with leave to amend based on the court's findings. See also Confirmation, Treatment of Secured Claims and Miscellaneous, *infra*.

Seventh Circuit

In re Blake, 585 B.R. 539 (Bankr. S.D. Ill. 2018)

The debtors were allowed to use cash collateral consisting of crop proceeds and government payments. A secured creditor and unsecured creditor objected to confirmation of the debtors' first amended plan. The basis for the objections included the treatment of secured claims, the best interest of creditors and feasibility.

With respect to the treatment of unsecured claims, the plan anticipated no payments to unsecured creditors. Although the debtors' determined that there was equity in their residence, they believed that their tax liability for the tax year in which they filed for bankruptcy relief would exceed this value. The creditors argued that the debtors grossly undervalued certain equipment

and real estate, and additionally, the debtors owned unencumbered personal property which would be available. Although the court was unable to determine an exact liquidation value, it determined it was above the $0 proposed in the amended plan. Confirmation was denied. See also Confirmation, Treatment of Secured Claims and Feasibility, *infra*.

In re CF Beef & Grain, LLC, 590 B.R. 849 (Bankr. E.D. Wis. 2018)

The debtor's liquidation analysis determined that there would be no distribution to unsecured creditors in a chapter 7 liquidation. One of the debtor's unsecured creditors testified that the calculation was erroneous. The court determined that the creditor's assessment was much more credible. On its own motion, the court dismissed the case based on this liquidation objection and other feasibility issues. See also Confirmation, Feasibility, *infra.*

Tenth Circuit

In re Graves Farms, Inc., Case No. 18-10893, 2019 WL 1422891, (Bankr. D. Kan. Mar. 28, 2019)

The debtor in this case filed a plan which contemplated a family member of the owners assuming operations of the farm as a farm manager. The plan proposed liquidating certain assets and retaining certain assets. The debtor's largest creditor objected to the proposed plan based on the best interest of creditors, treatment of secured claims and the feasibility of the plan.

With respect to the best interest of creditors, the debtor proposed to sell certain encumbered equipment to reduce the claim of the objecting creditor and retain certain equipment. The court held that the creditor's equipment was valued greater than the amount provided for by the debtor in the plan; therefore, the plan did not meet the best interest of creditors because it denied the creditor the value of its collateral. See also Confirmation, Feasibility and Treatment of Secured Claims, *infra*.

In re Schuckenbrock, Case No. 10-42327, 2012 WL 5360997 (Bankr. D. Kan. Oct. 29, 2012)

In this case, the bankruptcy court had to determine the appropriate discount rate to be applied to the general unsecured class so that the best interest of creditors test was satisfied. The trustee argued for a *Till* rate whereas the debtors argued for the riskless interest rate of U.S. Treasury securities. The court rejected the debtors' argument that a riskless interest rate was appropriate.

Unfair Discrimination

Eighth Circuit

In the Matter of Hook Cattle and Farms, LLC, Case No. BK17-40497, 2018 WL 1684296 (Bankr. D. Neb. Mar. 8, 2018)

An objection to the amended plan argued that the plan unfairly discriminated within the unsecured creditor class. Specifically, the amended plan proposed to pay an under-secured creditor in full (including the unsecured portion of its claim) while paying minimal payments to the remainder of the unsecured class. The under-secured creditor had previously filed a motion for

relief from stay. The debtor and creditor resolved that motion by a stipulation that provided that the entirety of the creditor's claim would be paid in full over the life of the plan. After that agreement, the debtor filed the amended chapter 12 plan with the proposed discrimination. The debtor could not carry its burden for confirmation when it did not appear that there was any reasonable basis for the discrimination. Although the court had agreed to the stipulation between the under-secured creditor and the debtor, that approval was not advance approval of the debtor's plan as to the treatment of other creditors.

Feasibility

Second Circuit

In re Chickosky, 498 B.R. 4 (Bankr. D. Conn. 2013)

The proposed plan provided for the cram down of the debtors' secured creditors and eliminated the main creditor's cross-collateralization clause, which allowed the debtors to separate the debt owing on their principal residence, farm real estate and personal property. The major secured creditor objected as to the feasibility of the plan, the treatment of its crammed down claims and the elimination of the cross-collateralization clause.

Addressing feasibility, the court found that the debtors must provide reasonable assurance that the plan can be effectuated. In this case, the debtors' farming operation had not been profitable for a number of years. At the confirmation hearing, the debtors testified that their new operations were promising, and provided copies of invoices covering a period of 90 days to substantiate this claim. The debtors did not, however, provide evidence to correlate invoices with payments, nor did they provide cash flow or income statements to put those sales in perspective with expenses. The court found that the debtors did not carry their burden of showing feasibility, especially where the success of the plan required the debtors' income to double over the next few years. See also Confirmation, Treatment of Secured Claims, *infra.*

Fourth Circuit

In re Akers, 594 B.R. 362 (Bankr. W.D. Va. 2019)

The debtor filed numerous proposed plans, none of which were confirmable on multiple grounds, including feasibility. At the hearing on the confirmation of the fourth amended plan, the bankruptcy court denied confirmation and did not grant leave to further amend, dismissing the case. Specifically, the debtor had failed to provide reliable income, expense and operating information such that the trustee and creditors could evaluate the feasibility of the plan. Because of the vastly varying projections, projections that were overly optimistic and the mistakes in the debtor's financial records and filed reports, the bankruptcy court denied leave to amend and dismissed the case because of unreasonable delay or gross mismanagement that was prejudicial to creditors.

In re Keith's Tree Farm, Case No. 15-71262, 2016 WL 1086758 (Bankr. W.D. Va. Mar. 18, 2016)

The debtor had filed multiple recent chapter 12 filings which were ultimately dismissed on multiple grounds. Although this case was filed within a month of the appellate court affirming the dismissal of the prior case (see below), the court found that the debtor had made significant progress in its business practices but that ultimately a feasible plan could not be proposed. Because the debtor had numerous prior filings and could not propose a confirmable plan, the court denied leave to amend the plan and dismissed the case with a bar to refiling for one year.

Keith's Tree Farms v. Grayson Nat'l Bank (In re Keith's Tree Farms), 535 BR 647 (W.D. Va. 2015)

The bankruptcy court dismissed this chapter 12 case on motion of a creditor, after denying confirmation of the debtor's third amended plan and denying the debtor's request for leave to file a fourth amended plan. On appeal, the district court affirmed the bankruptcy court's denial of confirmation noting that the court need not blindly accept the debtor's testimony regarding feasibility. As to the denial of leave to amend, the district court did not find that the lower court had abused its discretion. The bankruptcy court decision can be found at In re Keith's Tree Farms, 519 B.R. 628 (Bankr. W.D. Va. 2014).

Fifth Circuit

In re Morris, 590 B.R. 753 (Bankr. N.D. Miss. 2018)

Several creditors and the trustee objected to the proposed plan because of lack of feasibility. Although the debtor testified as to expected gross income and anticipated expenses, the court held that the debtor had not met his burden for confirmation. Specifically, the debtor provided no specific information or documentary evidence to support his position that his farming operation grossed approximately $200,000 a year.

Sixth Circuit

In re Jubilee Farms, Case No. 18-30080, 2018 WL 6841352 (Bankr. E.D. Ky. Dec. 28, 2018)

The bankruptcy court denied confirmation of the proposed plan because the debtor could not show that the plan was feasible beyond the first payments required under the plan. Specifically, the debtor's projections for revenue were unsupported by the record. Once an adjustment was made for reasonable projections, the debtor did not have sufficient income to make the plan feasible. The bankruptcy court found that: (1) the debtor's projections for crop yield were almost 10 bushels per acre greater than the historical yield and (2) the projected price per bushel was overly optimistic.

In re Perkins, 581 B.R. 822 (B.A.P. 6th Cir. 2018)

The bankruptcy court confirmed the debtor's chapter 12 plan over the objection of the creditor, and the creditor appealed. The BAP affirmed the bankruptcy court's decision. There

were two primary issues: (1) whether the debtor was over the debt limit; and (2) whether the plan was feasible.

The feasibility issue centered on whether the debtor could include her own income plus the income from two other entities, a farm partnership and a subchapter S corporation. The debtor's adult son and debtor's husband were involved in running the two entities. The court held that it was not limited to looking only at income earned from the farming operation that was being reorganized. Feasibility is a factual question. A chapter 12 debtor does not have to provide a guarantee of success but a reasonable assurance of success by providing a realistic and workable frame for reorganization. See also Eligibility, Farming Income and Debt Test, *supra.*

In re Penick, Case No. 17-20178, 2017 WL 3772620 (Bankr. E.D. Ky. Aug. 28, 2017)

A creditor objected to confirmation of the debtors' plan. It also moved to lift the stay. In regard to the motion to lift stay, the court granted the motion for relief from stay stating that feasibility is more than "high hopes for success." The court held an evidentiary hearing during which the debtors did not provide evidence of the income increase that was necessary for the success of the plan. The debtors did not offer any monthly operating reports to explain and support their projected income and expenses. See also Eligibility, Farming Operations, *supra.*

Seventh Circuit

In re Johnson, 581 B.R. 289 (Bankr. W.D. Wis. 2018)

The debtor proposed to pay all of his creditors in full. A secured creditor objected to the plan based on the lack of feasibility and the treatment of the creditor's secured claim.

With respect to feasibility, the court found the debtor's projections were unpersuasive and lacked credibility. The debtor's projections showed an increase in profit while reducing expenses. Additionally, the debtor was not eligible for crop insurance, so the fact that there were no contingency plans for failed crops did not work in the debtor's favor. See also Confirmation, Treatment of Secured Claims, *infra.*

In re Blake, 585 B.R. 539 (Bankr. S.D. Ill. 2018)

The debtors were allowed to use cash collateral consisting of crop proceeds and government payments. A secured creditor and unsecured creditor objected to confirmation of the debtors' first amended plan. The basis for the objections included the treatment of secured claims, the best interest of creditors and feasibility.

With respect to feasibility, the court held that the debtors' projections were much more optimistic than any historic performance suggested. Further, the non-farming income the debtors had claimed was not actually available during the period of the plan. Even if the court accepted the debtors' projections, once the payments under the plan were adjusted based on the value of the secured creditor's collateral and the best interest of creditors, the debtors did not have sufficient income to fund the plan. See also Confirmation, Best Interest of Creditors, *supra*, and Treatment of Secured Claims, *infra*.

In re CF Beef & Grain, LLC, 590 B.R. 849 (Bankr. E.D. Wis. 2018)

In this case the court scrutinized the debtor's projected income and expenses. The court found that nearly one-half of the required plan payments of at least $297,979 had to come from related entities (members of the LLC who both filed for relief under chapter 7). Those individual members could not pay their own mortgage and their property was in foreclosure. In addition, the debtor's projections were overly optimistic. The court held that the debtor did not have income to fund the plan and dismissed the case *sua sponte*. See also Confirmation, Best Interest of Creditors, *supra.*

Eighth Circuit

In re Meinders, Case No. 14-01459, 2016 WL 1599508 (Bankr. N.D. Iowa Apr. 18, 2016)

A secured creditor objected to the proposed plan because of the treatment of its claim and the lack of feasibility of the plan, and the creditor moved for relief from the stay. The plan was contingent upon the debtors selling certain property at a price high enough to enable them to buy dairy cows whose milk, combined with certain crops, would fund the plan. The creditor argued that the debtors would be unable to sell the property for a sufficient price and also that they would be unable to obtain a dairy license. The court determined, based on the debtors' testimony about the cost of additional cows and lack of licensing, that the plan was not feasible and denied confirmation. See also Case Administration, Automatic Stay and Relief From, *supra.*

Tenth Circuit

In re Graves Farms, Inc., Case No. 18-10893, 2019 WL 1422891, (Bankr. D. Kan. Mar. 28, 2019)

The debtor in this case filed a plan which contemplated family member of the owners assuming operations of the farm as a farm manager. The plan proposed liquidating certain assets and retaining certain assets. The debtor's largest creditor objected to the proposed plan based on the best interest of creditors, treatment of secured claims and the feasibility of the plan.

With respect to the feasibility of the proposed plan, the debtor's projected cash flow was heavily dependent upon a successful cotton crop -- a crop the debtor had almost no experience raising. The court ultimately held that the lack of historical performance evidence prohibited confirmation on feasibility grounds, especially where the debtor's projections of crop yields were greatly in excess of the average historical yield for the county. See also Confirmation, Best Interest of Creditors, *supra*, and Treatment of Secured Claims, *infra*.

In re Furman, Case No. 17-10790, 2017 WL 6520721 (Bankr. D. Kan. Dec. 18, 2017)

A creditor objected to the proposed plan based on lack of good faith, feasibility and the treatment of the secured claims. Specifically, the objections were based on the debtors' proposed treatment of a particular piece of equipment.

The debtors initially proposed to sell the equipment to a relative in exchange for that relative assuming payments. When the secured creditor objected, the debtors amended their plan

and proposed a lease arrangement to the relative with the secured creditor's claim being paid with the lease payments over a 7-year period, which was beyond the original loan term.

The court found that the useful life of the equipment extended beyond the proposed payment term such that at no point would the creditor be under-secured. Additionally, the plan proposed a higher interest rate than the contract between the creditor and the debtor. Despite a good faith proposal to lease the equipment to a relative, the debtor did not notice such lease to creditors, and there was no evidence provided that the relative-lessee could afford to make the lease payments for the equipment. Given the overwhelming evidence that the debtors themselves could not make the payment to the creditor without income from the lease, the court held that the plan was not feasible.

In re Bright Harvesting, Inc., Case No. 15-11178-tr12, 2015 WL 7972717 (Bankr. N.D.N.M. Dec. 4, 2015)

The debtor-corporation and debtor-shareholders each filed for chapter 12 relief. The main creditor objected to the plans based on feasibility because the debtor-corporation failed to make the payments under the cash-collateral agreement pending confirmation. The creditor also objected on good faith and the payment in full of its over-secured claims. In looking at feasibility, the court viewed the feasibility of the operation of the debtor-corporation and the debtor-shareholders together, even though the cases were neither jointly administered nor substantively consolidated. Ultimately, the court concluded the plan was feasible, based on reasonable projections grounded in fact. In regard to the payments to the secured claim, the court approved confirmation subject to certain amendments and modifications to the proposed plan.

Disposable Income

Fourth Circuit

TD Bank v. Burkhalter, Case No. 1:12-cv-099, 2013 WL 653234 (W.D.N.C. Feb. 21, 2013)

The creditor filed an objection to confirmation of the debtor's proposed plan based on lack of feasibility and the best interest of creditors. The creditor also argued that the plan was not fair and equitable. At the confirmation hearing, the creditor focused mainly on whether the plan provided for the payment of the debtor's disposable income in the three-year period of the plan. The bankruptcy court confirmed the plan, specifically finding that it provided for the payment of the debtor's disposable income. The creditor appealed to the district court, and the debtor argued that the creditor had not properly objected on disposable income and that any potential objection had been waived.

The district court analyzed the notice necessary to preserve an objection to confirmation. The court noted that the creditor had filed a lengthy objection and that in the objection the creditor reserved the right to assert additional objections. The court concluded as a matter of law that the creditor's objection was sufficient to put the debtor on notice as to the disposable income objection because the creditor's written objection included a challenge to the fairness and equity of the plan.

That language should have put the debtor on notice that he would have to show compliance with § 1225(b)(1).

Additionally, the district court noted that the filing of an objection is facially sufficient to require the bankruptcy court to make a determination as to whether the plan meets the requirements of confirmation. Because the district court could not identify the basis of the bankruptcy court's conclusion that the plan should be confirmed, the court reversed and remanded the issue to the bankruptcy court.

Treatment of Priority Claims

Seventh Circuit

In re Ferguson, Case No. 10-81401, 2013 WL 28694 (Bankr. C.D. Ill. Jan. 2, 2013)

After *Hall*, the debtors proposed a plan which provided for payment in full of the post-petition tax liability incurred on the sale of their farm assets. The court denied confirmation relying on *Hall*'s comments that tax liability incurred personally by the debtors post-petition cannot be paid from assets of the estate.

Eighth Circuit

In re Pedersen, 593 B.R. 785 (Bankr. N.D. Iowa 2018)

In this case, the court had to determine whether a state tax claim arising out of the payment of a crop insurance policy was entitled to priority treatment under § 507, in light of § 1232, the priority-stripping provision of chapter 12. Specifically, prior to filing, the debtors received a payout from crop insurance of approximately $66,000 which resulted in a tax liability. The state taxing authority filed an objection to confirmation because, if the tax claim was entitled to priority treatment, the proposed plan was not feasible. Although the court found that the tax liability was not a result of the sale of the crops, the court did find that the crop insurance policy was "used in" the debtors' farming operation. The court held that the insurance payout was a transfer of the insurance policy, so § 1232 applied to the transaction.

Tenth Circuit

In re Krier, Case No. 14-12439, 2016 WL 2343038 (Bankr. D. Kan. Apr. 29, 2016)

The debtor proposed a plan which treated his domestic support obligation as a secured claim and proposed to pay it over 20 years. Prior to filing, the debtor and his former spouse entered into a settlement agreement that did not delineate between property settlement and the support obligation, but the settlement required the debtor to make a lump sum payment in a matter of months. Because the settlement did not delineate between the types of debt, the debt was stripped of its support obligation status. Days before his lump sum payment was due, the debtor filed for relief under title 11 and proposed a plan that paid the debt owed under the settlement agreement over a term of 20 years.

The court, however, denied confirmation because the proposed plan did not meet the good faith requirement or the requirements regarding secured claims under § 1225(a)(5) because it greatly extended the term of the original obligation – both the original DSO obligation and the negotiated settlement prior to the bankruptcy filing.

In re Keith, Case No. 10-12997, 2013 WL 3467315 (Bankr. D. Kan. Jul. 8, 2013)

In this case, filed before *Hall*, the confirmed plan reserved the issues of: (1) whether the income tax debt could be treated as unsecured rather than priority under § 1222(a)(2)(A); and (2) the method of calculating that tax debt. The court concluded that the proceeds of sales of farming end products and crop insurance proceeds were not assets "used" in a farming operation and were not entitled to the unsecured treatment provided for under § 1232. The court also held that the IRS should use the marginal allocation method for calculating its priority tax claim.

Treatment of Secured Claims

Second Circuit

In re Chickosky, 498 B.R. 4 (Bankr. D. Conn. 2013)

The proposed plan provided for the cram down of the debtors' secured creditors and eliminated the main creditor's cross-collateralization clause, which allowed the debtors to separate the debt owing on their principal residence, farm real estate and personal property. The major secured creditor objected to the lack of feasibility of the plan, the treatment of its crammed down claims and the elimination of the cross-collateralization clause. The bankruptcy court held that seeking to eliminate a cross-collateralization clause without the creditor's agreement was a modification of the lien that is not permitted by the bankruptcy code. See also Confirmation, Feasibility, *supra*.

In re Howe Farms LLC, Case No 13-61601, 2014 WL 6911395 (Bankr. N.D.N.Y. Oct. 16, 2014)

The creditor challenged the proposed treatment of its claim. The debtor provided for repayment over 7 years with a balloon payment after the 7th year and an interest rate of 6%. Specifically, the creditor noted that the repayment term was significantly longer than the original loan term and the interest rate was far below the rate the market would impose in similar circumstances. The court considered both the preexisting contract and customary practices to hold that the treatment under the plan was not reasonable.

Third Circuit

In re Mortellite, Case No. 17-21818, 2018 WL 388966 (Bankr. D.N.J. Jan. 11, 2018)

In this case, objections were filed based on lack of feasibility, valuation and whether a creditor was entitled to the payment of an allowed administrative claim. With respect to valuation, the debtor proposed a value based on the land without taking any operational aspect of the farm into consideration. The secured creditor offered a value based on the land and the matured

blueberry trees (permanent plantings) on the property, as an operating farm. The court determined that it had to look at what a willing buyer in the debtor's business would pay to obtain the property. The court adopted a value closer to the value proposed by the secured creditor. The plan was not feasible once the secured claim value was adjusted.

Fourth Circuit

In re Terry Properties, LLC, 569 B.R. 76 (Bankr. W.D. Va. 2017)

The trustee and two creditors objected to the proposed plan in this case based on the treatment of secured creditors, lack of feasibility, the best interest of creditors, and good faith based on language in the plan that acted as an injunction against two pending lawsuits with commercial co-borrowers. The debtor owned the real property of a dairy operation conducted by a related entity. At the time of the filing, the farm was transitioning from dairy to growing cherry trees for a start-up botanical company. The cherries harvested were not for consumption but use in the start-up's product which had an unknown market.

With respect to the treatment of the secured claims, the debtor proposed an interest rate 1.75% above prime with a 15-year amortization and a 9-year balloon on debt secured by real property. The secured creditor argued that this bump in interest rate was not sufficient given the transition from dairy to cherry trees exclusively for the use of the start-up, whose own corporate viability was challenged. The court, however, found the creditor's expert testimony regarding the appropriate *Till* rate was "unhelpful at best and lacking in credibility" when he proposed a 16% increase. The court determined that a 2.5% increase over prime with a 7-year balloon was appropriate given the transition in business operations. Confirmation was denied with leave for the debtor to amend to incorporate the court's findings. See also Confirmation, Best Interest of Creditors, *supra*, and Miscellaneous, *infra.*

In re Wise, Case No. 12-07535, 2013 WL 2421984 (Bankr. D.S.C. May 31, 2013)

The creditor objected to the debtor's plan based on the fifteen-year amortization of its secured claim and the lack of feasibility of the plan. The debtor based his financial projections on two years of tax return data. The bank presented financial information for a longer period, which indicated that the plan was not practicable. The court found the plan feasible and the debtor's treatment of the secured claim reasonable, especially given the equity cushion in the collateral.

Sixth Circuit

In re Perkins, Case No. 13-31277, 2013 WL 5863732 (Bankr. E.D. Tenn. Oct. 30, 2013)

In addition to challenging the debtor's eligibility in this case, the secured creditor objected to the treatment of its claim, arguing that the plan did not allow it to retain its liens and did not adequately provide for present value of its claims. The secured creditor's collateral secured its claim with only an equity cushion of $11,000, not including the secured creditor's attorney's fees. The plan provided for a ten-year amortization at 4.5% interest with a substantial balloon payment. The debtor did not propose adding more collateral to secure the creditor's claim. The court

determined the secured creditor was not receiving the present value of its claims and that the plan was infeasible. See also Eligibility, Farming Income and Debt Test, *supra*.

Seventh Circuit

In re Johnson, 581 B.R. 289 (Bankr. W.D. Wis. 2018)

In this case, the debtor proposed to pay all of his creditors in full. A secured creditor objected to the plan based on the lack of feasibility and the treatment of the creditor's secured claim.

With respect to the treatment of the secured claim, the court found the interest rate proposed did not adequately reflect prime plus the risk, where the debtor significantly increased the term of repayment in comparison to the original loans. The payment amount proposed by the debtor appeared to be simply what the debtor could afford, rather than what the creditor was entitled to under applicable law. See also Confirmation, Feasibility, *supra.*

In re Blake, 585 B.R. 539 (Bankr. S.D. Ill. 2018)

The debtors were allowed to use cash collateral consisting of crop proceeds and government payments. A secured creditor and unsecured creditor objected to confirmation of the debtors' first amended plan. The basis for the objections included the treatment of secured claims, the best interest of creditors and feasibility.

With respect to the secured claim, the plan provided for a secured value treatment to which the creditor objected. The parties provided proof of the value of the collateral -- the debtor testifying based on his years of farming experience, and the creditor providing an appraiser. The court found that the appraiser's valuation more credible. The court noted that the appraiser had examined each piece of equipment with the debtor and took into consideration the debtor's comments about its condition in his appraisal. Because the court accepted the higher appraised value, the plan did not pay the creditor the value of its claim as of the effective date of the plan. See also Confirmation, Best Interest of Creditors and Feasibility, *supra*.

Eighth Circuit

In the Matter of Elkhorn Crossing, LLC, Case No. 16-80782, 2016 WL 6875893 (Bankr. D. Neb. Nov. 21, 2016)

A secured creditor challenged the 15-year repayment term and the interest rate applicable to its claims under the proposed plan. The bankruptcy court denied confirmation because: (1) a 15-year term for the repayment of loans secured by personal property and crops, where the original loan terms were one year and five years was unreasonable; and (2) the repayment terms for the real estate loan, for which 15 years was not unreasonable, did not provide for a mechanism by which the interest rate could be adjusted over the life of the loan.

In re Whitten, Case No. BK10-43548, 2012 WL 4839119 (Bankr. D. Neb. Oct. 10, 2012)

The creditor objected to its fully secured treatment in the debtors' proposed chapter 12 plan. The creditor argued that it was over secured and entitled to have its attorneys' fees paid. Additionally, the creditor challenged the reasonableness of annual payments and a 10-year balloon payment and the feasibility of the plan. The court found the creditor's appraiser more credible than the valuations for personal property provided by the debtors, and it allowed the creditor to include its fees in its claim. The court held that the creditor, whose claim was secured by real estate and a significant amount of personal property, should not be forced to accept a 25-year amortization with a 10-year balloon payment where the initial loans were of much shorter duration. Confirmation was denied.

Tenth Circuit

In re Graves Farms, Inc., Case No. 18-10893, 2019 WL 1422891, (Bankr. D. Kan. Mar. 28, 2019)

The debtor in this case filed a plan which contemplated a family member of the owners assuming operations of the farm as a farm manager. The plan proposed liquidating certain assets and retaining certain assets. The debtor's largest creditor objected to the proposed plan based on the best interest of creditors, treatment of secured claims and the feasibility of the plan.

With respect to the treatment of secured claims, the bankruptcy court determined that the debtor's proposed valuation of the real estate was adequate because some of the comparable sales used by the creditor's appraiser were based on property with water frontage or sales which did not close. The plan proposed repayment of the real estate debt over 30 years; the creditor did not offer any evidence regarding its usual terms for real estate loans. Because of the intrinsic value of farm land, the bankruptcy court held that a 30-year term was not inappropriate. The court also held that the 7-year amortization for the equipment claim was not unreasonable. The debtor did not, however, offer any evidence regarding the appropriateness of its proposed interest rate, so the bankruptcy court found that it could not confirm the plan. See also Confirmation, Feasibility and Best Interest of Creditors, *supra*.

In re Tucker Bros. L.L.C., Case No. 13-22462, 2014 WL 6435817 (Bankr. D. Kan. Nov. 13, 2014)

A secured creditor challenged the cramdown of its claim secured by the debtor's real estate and personal property. The bankruptcy court found the creditor's appraiser to be more credible and denied confirmation on the cram down issue. Additionally, even if the plan provided for payment of the value of the collateral, the plan proposed to pay the creditor only adequate protection rent payments during the first three years of the plan. That proposed payment schedule reduced neither principal nor interest, and it resulted in negative amortization and did not capitalize deferred interest. The court found this treatment also fatal to confirmation. Further, the plan also proposed to reserve the debtor's right to bring equitable subordination actions against any creditor, which the court found inappropriate.

Eleventh Circuit

Wells Fargo Fin. Leasing Inc. v. Grigsby, Case No. 1:13-cv-1821, 2014 WL 117262 (N.D. Ala. Jan. 10, 2014)

The bank appealed the confirmation order of the debtor's amended plan challenging the repayment terms for its secured claim as commercially reasonable. Namely the bank argued that the term of repayment was unreasonable and the proposed method of direct payment by the debtor rather than by the prior proceeds assignment was unreasonable. The evidence presented at trial included affidavits from individuals stating usual terms, testimony from the debtor that he could not find a willing lender and copies of mortgages on similar property with terms ranging from 11 to 23 years. The bankruptcy court found the affidavits not relevant due to the nature of property at issue, and, after evaluating fairness to the creditor and the needs of the debtor, it confirmed the plan.

The bank also argued that the collateral would depreciate well before the repayment term. However, like the affidavits, the evidence provided did not take into account the other real estate and residence collateral. Because the bank did not present evidence that it would become under-secured in relation to the collateral, as a whole, during the repayment term, the bankruptcy court did not err in confirming the plan. The appellate court also rejected the bank's position that the provisions of the plan which altered the terms of the proceeds assignment deprived it of its lien.

Effect of Confirmation

Second Circuit

In re Simpson, Case No. 17-10442, 2018 WL 1940378 (Bankr. D. Vt. Apr. 23, 2018)

The debtors' motion for a stay pending an appeal of an order granting relief from the stay was denied. However, the debtors continued with the chapter 12 case, and they were able to confirm a plan. Even though the creditor had relief from the stay, the subsequent confirmation order trumped the earlier § 362 order. The creditor was bound by the confirmed plan and could no longer pursue its foreclosure. The decision confirming the plan was not a written decision. See also Appellate Issues, *infra*.

Fifth Circuit

In re Smith, 514 B.R. 464 (Bankr. N.D. Tex. 2014)

Post-confirmation, the debtors sold some of their real estate at a price greatly in excess of the value established at the time of the confirmation of the debtors' plan. The motion to sell was unopposed, and it did not contain any provision about the disbursement of funds after the costs of sale and other expenses. Two secured creditors wanted their claims paid with the proceeds; the trustee wanted to bring the secured claims current and disburse the remaining funds to unsecured creditors, and the debtors' wanted to pay off one secured claim and retain the balance. The bankruptcy court determined, by reference to chapter 13, that the proceeds were not property of

the estate, nor were they disposable income subject to distribution to creditors. The confirmed plan provided that property of the estate vested in the debtor free and clear of the claims of creditors provided for in the plan. Therefore, the appreciation of the real estate was not property of the estate.

Eighth Circuit

In re Legassick, 534 B.R. 362 (Bankr. N.D. Iowa 2015)

The confirmed plan in this case provided for the sale of assets which would give rise to post-petition tax obligations. The plan classified those post-petition obligations as unsecured and provided for their treatment and discharge pursuant to In re Knudsen, 581 F3d 696 (8th Cir. 2009). After confirmation, the IRS retained the debtors' tax refunds and offset them against the tax obligations incurred because of the sales contemplated in the confirmed plan. The debtors filed a motion for sanctions and for monetary relief against the IRS. Initially the bankruptcy court, relying on Hall v. U.S., 566 U.S. 506 (2012), denied the debtors' request. On a motion to alter and amend, the bankruptcy court reversed its prior decision and held that confirmation occurred before the decision in *Hall*, so the IRS could be bound by the confirmed plan which provided for the treatment of post-petition tax claims. The prior opinion and order of the bankruptcy court can be found at In re Legassick, 528 B.R. 777 (Bankr. N.D. Iowa 2015).

Operating Reports

Ninth Circuit

In re Broersma, Case No. 18-01036-FLK12, 2018 WL 4054625 (Bankr. E.D. Wash. Aug. 22, 2018)

Farm Service Agency objected to confirmation because the debtor failed to provide any monthly operating reports. The bankruptcy court overruled the objection and waived the reporting requirement because the debtor's plan called for the liquidation of the debtor's family farm.

MOTIONS TO MODIFY

Sixth Circuit

In re Welling, Case No. 16-62225, 2018 WL 6584773 (Bankr. N.D. Ohio Dec. 12, 2018)

To resolve an objection to confirmation, the objecting creditor and debtors entered into an agreed order that was served on all parties. The debtors failed to make their first full plan payment, which resulted in a partial distribution to another creditor. That creditor filed a motion to enforce the plan. The debtors acknowledged the short payment, but they disputed the amount remaining due, arguing that the terms of the agreed order had modified the plan and reduced the plan funding obligation in relation to unsecured creditors.

Although the bankruptcy court recognized that agreed orders could modify plans, it held that the language of this agreed order was not sufficiently clear to modify the plan in relation to the moving creditor.

Timing

Third Circuit

In re Thorpe, 540 B.R. 552 (E.D. Pa. 2015)

In this chapter 12 case, the plan provided for the sale of certain property in whole or in part by a date certain; if the property failed to sell privately, all of it was to be sold by public auction. The plan also contained a redemption provision by which the debtor could redeem the property and terminate any auction by selling a portion of the property or paying a sum certain to the secured creditor. The plan was silent as to whether the debtor or trustee had the obligation of subdividing the property. On the eve of the auction, the debtor obtained a contract of sale for a portion of the property and proposed a sixth modified plan which allowed for the sale of the portion. In the alternative, the debtor sought a determination that the contract of sale satisfied the redemption provisions of the confirmed plan.

The debtor argued that redemption had occurred because funds could be delivered to the trustee, and the delivery of title documents could occur once the property was subdivided. The bankruptcy court denied the motion to modify because it did not have discretion to waive the 21-day notice period of Rule 3015(g) and Rule 9006(c)(2). The court also determined that the debtor had not redeemed the property and that cancellation of the auction was inappropriate because redemption required the "closing" of the sale of by the unconditional delivery of the redemption amount and an actual conveyance of the property. The debtor appealed the court's decision, but the debtor was unable to obtain a stay on the auction. On appeal, the district court affirmed the lower court's determination that it did not have authority to shorten the notice period for a modified plan. See also Case Administration, Sale, Use and Lease of Property, *supra*, and Appellate Issues, *infra.*

Tenth Circuit

In re Couchman, 477 B.R. 807 (Bankr. D. Kan. Aug. 20, 2012)

In this case, the creditor objected to the proposed modified plan because it sought to extend the time for the debtor to make certain payments that were memorialized in an agreed order for stay relief which also contained a drop-dead provision in relation to the automatic stay. At the time the proposed modified plan was filed, there were no pending notices of default pursuant to the previous agreed order, so the bankruptcy court overruled the creditor's objection to confirmation.

Plan Duration

Third Circuit

In re LaRosa Greenhouse, LLP, 565 B.R. 304 (Bankr. D.N.J. 2017)

The debtor moved to modify its confirmed plan to provide for a longer duration solely to pay its attorney the additional fees requested. The trustee objected and argued that the additional fees were not permitted because they would impact the unsecured creditors. The bankruptcy court noted that the confirmation order created some confusion because it stated that the unsecured creditors would receive the difference between allowed attorneys' fees and $136,500. The court considered (1) whether the attorney was entitled to compensation for post-confirmation services and (2) whether the debtor could modify post-confirmation to provide for fees and expenses to its attorney. The court decided both questions in the affirmative and allowed the attorney's fee.

Fifth Circuit

In re Stone, Case No. 14-31692, 2018 WL 878895 (Bankr. S.D. Tex. Feb. 12, 2018)

The debtor filed a motion to modify his chapter 12 plan to extend the duration beyond five years. The debtor asserted that he had a change of circumstance because of medical issues and the inability to sell real property. The court denied the modification holding that under the plain language of the code, "[a] modified [c]hapter 12 plan cannot provide for any payments to secured or priority claims to be made over a period that expires after 5 years." However, there are cases permitting extensions beyond 5 years. See *In re Hart*, 90 B.R. 150, 151 (Bankr. E.D.N.C. 1988).

Substantial and Unanticipated Change

Third Circuit

In re LaRosa Greenhouse, LLP, Case No. 15-30672, 2017 WL 3835168 (Bankr. D.N.J. Aug. 31, 2017)

The question before the court on this motion to modify the confirmed plan was whether the debtor had to show special, unusual or unanticipated circumstances to modify the amount or duration of payments to a particular class. Specifically, after a negotiated confirmation, the debtor defaulted in payments due under the plan and sought a modification to remedy the default. Creditors and the trustee objected to the modification. The court held that change in circumstances need not be proven by the debtor in order to modify, but any proposed modified plan must meet the requirements of §§ 1222(a) and (c), 1223(c) and 1225(a).

Fourth Circuit

In re Gardner, 522 B.R. 137 (Bankr. W.D.N.C. 2014)

The debtor sought to modify her plan to extend the time period to allow her to sell encumbered property. The bankruptcy court rejected the debtor's contention that the expiration of

historic tax credits that affected the marketability of the property was a substantial and unanticipated change such that modification of the plan was appropriate.

Eleventh Circuit

In re Hudson, Case No. 3:09-bk-07857, 2014 WL 837490 (Bankr. M.D. Fla. Feb. 28, 2014)

Post-confirmation, the debtors received grant funds from the pre-petition closure of their farming operations. Additionally, the debtors received settlement funds which were committed to the plan. The debtors did not disclose the receipt of any of these funds. When the trustee learned of the distributions, he filed a motion to modify to capture the grant funds for the benefit of creditors.

The debtors opposed the motion to modify arguing that § 1229(d)(2) prevented the trustee from modifying the plan to increase their plan payment as a result of a one-time payment. The court rejected that argument and modified the plan.

Feasibility and Good Faith

Fifth Circuit

In re Daniels, 531 B.R. 134 (Bankr. W.D. La. 2015)

Both an unsecured creditor and the debtor filed motions to modify the confirmed plan to address defaults. Both plans proposed the sale of a part of the farm, although at different price points. Ultimately, the court approved an auction, at which the farm parcel brought a higher price than either of the proposed plans. Both the creditor (who was the winning bidder) and the debtor (who sought to sell the parcel to an associate) amended their proposed plans to first meet and then exceed the winning bid of the auction. The court ultimately confirmed the creditor's proposed plan which provided for an immediate and significant payment to unsecured creditors; whereas the debtor's plan provided for a smaller payment to unsecured creditors overtime and was contingent upon the debtor's optimistic operating projections.

DISMISSAL AND CONVERSION

Default

Second Circuit

In re Milky Way Organic Farm, LLC, Case No. 12-10742, 2017 WL 598473 (Bankr. D. Vt. Feb. 14, 2017)

Two creditors and the trustee moved to dismiss the debtor's case based on the debtor's default under a stipulation and the terms of the confirmed plan. The debtor opposed the motions to dismiss and, at the same time, moved to modify. It was the debtor's position that it should be given the opportunity to modify to reflect the operational transition of reducing the farming operation from a full–time diary but augmenting income through Airbnb and other non-farm

income. After an 8-hour hearing, the trustee withdrew his motion. The debtor, with the support of the trustee, also argued that the debtor should be given a chance to succeed.

The court reviewed the standards for dismissal pursuant to 11 U.S. C. § 1208(c). The court noted that the stipulation between the debtor and creditors was the foundation of the debtor's reorganization. As a result, the default in that stipulation constituted cause for dismissal. The debtor had also failed to provide operating reports, and there was a material default under the terms of the plan. The court found that there was no reasonable likelihood of rehabilitation, therefore, it granted the motions to dismiss. The court rejected the trustee and debtor's "a wait and see proposal." Because the court granted the motion to dismiss there was no need to address the motion to modify in detail.

Ninth Circuit

In re P&M Samra Land Investments, LLC, Case No. 15-29136, 2019 WL 453508 (Bankr. E.D. Cal. Feb. 4, 2019)

In this case, the debtor proposed to modify its plan to provide for the sale of real estate while a motion to dismiss was pending. The court ultimately denied confirmation of a modified plan and continued the motion to dismiss. One day prior to the second hearing on the pending motion to dismiss, the debtor filed a motion to sell its principal real estate asset. The motion did not seek approval of a sale – in fact, no offer was pending at the time of the motion. Based on the default in payments under the confirmed plan and the debtor's inability to modify the plan, the court dismissed the case.

Lack of Good Faith

Second Circuit

In re Rogers, Case No. 17-21187-PRW, 2018 WL 576750 (Bankr. W.D.N.Y. Jan. 25, 2018)

The trustee moved to dismiss this case shortly after the meeting of creditors because 2100 head of cattle and over $500,000 worth of collateral disappeared immediately prior to the debtor filing his bankruptcy. The bankruptcy court granted the motion based on bad faith. The court reviewed the factors for assessing bad faith in chapter 12. The court barred the debtor from filing for bankruptcy relief under chapter 7 for 180 days and barred the debtor from filing under chapter 11, 12 or 13 for one year.

Ellis v. NBT Bank, N.A., Case No. 5:12-cv-01803, 2013 WL 140405 (N.D.N.Y. Jan. 11, 2013)

In this appeal, the debtor challenged the bankruptcy court's: (1) dismissal of her second case as an abuse of process and (2) the pre-emptive denial of her request for stay pending appeal. The district court found that the appellant had not established a substantial likelihood of success when her first bankruptcy case was dismissed for inability to propose a confirmable plan and her second case was filed five days after the dismissal of the first case, as an impermissible collateral attack to the prior decision.

Fourth Circuit

In re Carter, 570 B.R. 500 (Bankr. M.D.N.C. 2017)

The debtor and her husband owned some real property which was encumbered. On the eve of the foreclosure sale, the debtor's husband and then the debtor filed for relief under chapter 13. Each case was dismissed, the final one with the court's finding that the debtors were dishonest in their schedules and were willfully violating court orders. As foreclosure began on their real estate, several entities connected to the debtors made bids in such a manner so as to extend the foreclosure. On the last day that a bid could be made in the foreclosure sale, the debtor filed her emergency petition under chapter 12. Three creditors filed motions to dismiss arguing that the debtor was not a family farmer and that she had filed her case in bad faith.

With respect to lack of good faith, the debtor argued that chapter 12 does not impose a statutory duty that the case be filed in good faith, unlike chapter 13. Rather, she argued that in chapter 12, only the plan need be filed in good faith. As a result, according to the debtor, the parties seeking dismissal for lack of good faith must meet a higher legal standard of proving bad faith. Additionally, the debtor argued that she had made a good faith payment to cover administrative costs well before a plan was due. The court noted that the debtor's brief and testimony indicated that the debtor made that payment, but the statement of financial affairs indicated that a third party made such payment to the debtor's attorney, who was holding the funds for attorneys' fees and filing fees. The court specifically stated that "until the trustee is holding payments to distribute post-confirmation, there have been no 'good faith payments into the case.'" Given the egregious pre-filing conduct, the court dismissed the case with a one-year bar to refiling. See also Eligibility, Farming Income and Debt Test, *supra*.

In re Fisher, 570 B.R. 500 (Bankr. M.D.N.C. 2017)

Although the court dismissed this debtor's chapter 12 petition due to ineligibility, the court also dismissed the petition due to bad faith with a bar to refiling within a year. The debtor and her husband had engaged in successive filings in chapter 13, which cases had been dismissed. Based on the debtor's prepetition conduct, the lack of change in circumstances and the debtor's lack of honesty and candor, the court held that the debtor had filed in bad faith. The court specifically found that the debtor's bankruptcy filings were solely to delay and hinder the creditor and to increase the creditor's costs. See also Eligibility, Farming Operations, *supra.*

In re Dickenson, 517 B.R. 622 (Bankr. W.D. Va. 2014)

In this case, the court granted the trustee's motion to dismiss on the basis of inappropriate post-petition conduct. The court found the debtor had failed to disclose assets, engaged in tactics to delay creditors and failed to abide by court orders and directives.

In re Strickland, Case No. 12-07110, 2013 WL 865542 (Bankr. D.S.C. Mar. 7, 2013)

Several creditors filed motions to dismiss after the debtor filed numerous amendments to motions to value security interests and several amended plans, which prevented the case from proceeding. The bankruptcy court granted the motions to dismiss on the basis of unreasonable

delay, lack of feasibility and bad faith. First, because of the timing of the debtor's filings, the case had been pending for eight months without a significant resolution of issues, resulting in an almost two year delay since the debtor's creditors had received a payment; the court also found that evidence available indicated that the debtor could not propose a confirmable plan; and finally, because of abusive police and UCC filings, as well as the debtor's failure to list a major creditor, the court found the case should be dismissed because of the debtor's bad faith.

Sixth Circuit

In re Pertuset, 485 B.R. 478 (B.A.P. 6th Cir. 2012) (table opinion)

In this appeal, the debtors' challenged the bankruptcy court's denial of confirmation, dismissal of their case with prejudice with a bar to refiling, and denial of a request to continue the hearing. The BAP affirmed the bankruptcy court. The BAP noted that debtors may appear *pro se* or through counsel, but not both, so the lower court did not err in ignoring the *pro se* filings of the debtors while they were represented by counsel.

Seventh Circuit

In re Valentine Hill Farm, LLC, 580 B.R. 815 (Bankr. S.D. Ind. 2018)

Members of the LLC-debtor transferred property to the debtor shortly before it filed for relief under chapter 12. The individual members had filed multiple bankruptcies under their own names prior to the chapter 12 filing. The members set up the debtor-LLC, transferred property to it and then had it file for chapter 12 relief all on the same day. The trustee moved to dismiss and asked that the dismissal include a 180-day bar to refiling.

The court dismissed the case on its own motion without the bar to refiling. Therefore, the case was reinstated so that the trustee's motion could be heard on the bar to refiling. At that point, the debtor filed its own motion to dismiss and maintained that it had an absolute and unconditional right to dismiss without any bar to refiling. The court reviewed the term "bad faith" and held that the debtor's primary motive was to hinder and delay foreclosure of its property. The court dismissed the case with a bar to refiling for 180 days based on the debtor's motion to dismiss, holding that it had the ability to condition the debtor's voluntary dismissal.

Ninth Circuit

In re M.P.I Ltd Trust, Case No. 17-00245, 2017 WL 3588623 (Bankr. D. Haw. Aug. 17, 2017)

In this case, the trustee filed a motion to dismiss because the debtor was not a business trust eligible to be a debtor, the debtor failed to timely file a plan, and the debtor's principal failed to cooperate with the trustee. The court declined to decide the eligibility issue because it had cause to dismiss the case on other grounds. Namely: the debtor had not timely filed a plan and had not asked for an extension for time to file a plan; the principal refused to answer the trustee's questions at the meeting of creditors because the trustee was represented by counsel; and the court had already granted relief from the stay on the debtor's most important asset, and no timely proofs of claim were filed, so reorganization served no purpose.

In re Cabral, Case No. 13-10132, 2013 WL 2422686 (Bankr. E.D. Cal. Jun. 3, 2013)

In this case, the creditor moved to dismiss with a bar to refiling the debtors' third chapter 12 filing. Although the debtors were over the debt limit, they argued that a receiver was holding funds from a pre-petition auction and that those funds should be credited against their debt, bringing them within the debt limit. The court disagreed and dismissed the case with a bar to refiling based on bad faith because of the numerous cases, the misrepresentation of debt, and the pending state court action.

In re Cabral, Case No. 12-12050, 2012 WL 8441317 (Bankr. E.D. Cal. Oct. 10, 2012)

In this case, the creditor moved to dismiss the debtors' second chapter 12 filing, filed a month after the voluntary dismissal of their first case after a substantial default. In this second case, the debtors greatly reduced their valuations of the creditor's collateral seeking to bifurcate and strip off a sizeable portion of the creditor's secured claim; the prior case provided for payment in full to the creditor. The court found that the debtors lacked good faith because of the vastly different treatment of the secured creditor. In essence, the second case was filed to accomplish something that was not available to the debtors in the first case and to avoid the preclusive effect of confirmation in the first case.

Eleventh Circuit

Hill v. Suwannee River Management (In re Hill), 583 Fed. App'x 894 (11th Cir. 2014)

In this case, the bankruptcy court held that the debtor filed his case not to reorganize his debts but to stay foreclose proceedings and invalidate state judgment liens encumbering his property. The court dismissed the case; the appellate court affirmed the bankruptcy court.

Prejudicial Delay

Fourth Circuit

Keith's Tree Farms v. Grayson Nat'l Bank (In re Keith's Tree Farms), 535 BR 647 (W.D. Va. 2015)

The bankruptcy court dismissed the case on motion of a creditor, after denying confirmation of the debtor's third amended plan and denying the debtor's request for leave to file a fourth amended plan. On appeal, the district court held that it was not error for the court to consider the creditor's motion to dismiss which had not been set on 21 days' notice. The district court noted that the rules of procedure allow a court to shorten the notice period on a motion to dismiss, with or without a motion requesting so. The bankruptcy court decision can be found at In re Keith's Tree Farms, 519 B.R. 628 (Bankr. W.D. Va. 2014).

In re Pressley, 518 B.R. 867 (Bankr. D.S.C. 2014)

The court granted a motion to dismiss with prejudice to the refiling of a case under title 11 for a period of 9 months when: (1) the debtor had filed three successive chapter 12 cases which were grossly infeasible and (2) there was no reasonable belief of successful reorganization.

In re Dickenson, 517 B.R. 622 (Bankr. W.D. Va. 2014)

In this case, the court granted the trustee's motion to dismiss for unreasonable delay where the debtor had filed deficient schedules that prevented the court from confirming any of the proposed plans because neither the trustee nor the creditors could evaluate the proposed plans.

In re Pressley, 502 B.R. 196 (Bankr. D.S.C. 2013)

After a prior unsuccessful bankruptcy filing, the debtor again filed for relief under chapter 12 to prevent the foreclosure of his assets. Several creditors and the trustee opposed confirmation for lack of feasibility and moved the bankruptcy court to dismiss the case. Evidence at the confirmation hearing suggested that the debtor had not made a profit while farming in the past five years and that he had been unable to pay secured creditors their interest, increasing the overall debt. Although the court granted the motions to dismiss, it declined to do so with prejudice finding that this case did not rise to the level of egregious conduct.

Sixth Circuit

Haffey v. Crocker (In re Haffey), 576 B.R. 540 (B.A.P. 6th Cir. 2017)

In this case, the debtor appealed the bankruptcy court's dismissal of his case on an expedited basis. The lower court found that the debtor had proposed an unconfirmable plan and that the debtor was generally dilatory in the case which had been pending for a year. The bankruptcy court set the hearing on the motion to dismiss and mailed notice of the hearing to the debtor. The mailed notice of hearing, however, did not provide sufficient notice to the debtor as to the issues to be discussed.

Although the appellate panel found that the bankruptcy court had violated the debtor's due process because of the expedited hearing, the panel found that the lack of proper notice was not prejudicial to the debtor. The bankruptcy court decision can be found at In re Haffey, Case No. 14-20824, 2015 WL 3546975 (Bankr. E.D. Ky. Jun. 5, 2015).

In re Carroll, Case No. DG 13-08930, 2014 WL 3571535 (Bankr. W.D. Mich. Jul. 12, 2014)

After a series of filings under title 11, the debtors filed a joint chapter 12 case. Confirmation was denied because of the debtors' conceded inability to extricate their finances from their limited liability company. Twenty days after denial of confirmation, the trustee filed a motion to dismiss because of delay prejudicial to creditors.

While the case was pending, the debtors had filed an adversary proceeding, and they argued in response to the motion that the filing of another plan would not be possible until the resolution of the adversary proceeding. Based upon the debtors' prior filings, the lack of any meaningful distribution to creditors during that period and the status of the case pending before the court, the case was dismissed.

In re Jenkins, Case No. 13-40793, 2014 WL 268688 (Bankr. W.D. Ky. Jan. 23, 2014)

The court granted the creditor's motion to dismiss when the debtors failed to disclose assets, farm income and filed their operating reports, which contained inaccuracies, several months

late. At the hearing on both the motion to dismiss and confirmation, the debtors were unable to adequately explain the discrepancies and omissions.

Ninth Circuit

Davis v. U.S. Bank N.A. (In re Davis), Case No. 16-1390, 2017 WL 3298414 (B.A.P. 9th Cir. Aug. 2, 2017)

A *pro se* debtor filed a motion to extend the deadline for the filing of a plan. The court granted the extension. On the last day of that extension, the debtor filed another motion to extend. The debtor argued that she needed the additional extension because of a family medical emergency. The court, unpersuaded by the emergency because of the debtor's failure to comply with the first extended deadline, dismissed the case.

The debtor appealed to the BAP, which reviewed the dismissal under the abuse of discretion standard. The BAP held that it did not know what legal standard the bankruptcy court had applied. The BAP stated that the debtor's applications were compelling and that the bankruptcy court, in the second application, made no findings. As a result, the BAP vacated the lower court's dismissal and remanded the case.

In re Standley, Case No. 11-62373, 2013 WL 6385265 (Bankr. D. Mont. Dec. 6, 2013)

The confirmed plan in this case required the debtor to sell certain property by a given date. A stipulation entered into with a secured creditor gave the creditor certain options upon failure of the sales to close by the specified time. When the sales did not close by the deadline, the creditor did not exercise any of its options under the stipulation but instead chose to file a motion to dismiss. The debtor responded and also filed a motion for sanctions, arguing that the stipulation did not provide for the remedy of dismissal. The debtor also argued that the motion to dismiss was frivolous as the final sale was pending and the debtor had funds necessary to complete the plan. The court denied both the motion to dismiss and the motion for sanctions, noting that the stipulation did not prevent the creditor from filing a motion to dismiss. However, in its motion to dismiss, the creditor failed to show how the debtor's delay in completing terms of the plan was prejudicial. Opinions relating to the debtors' other proposed plans can be found at 2013 WL 1191261.

Fraud in Connection with the Case

Sixth Circuit

In re Parker, 560 B.R. 732 (Bankr. E.D. Tenn. 2016)

In this case, a creditor and the chapter 12 trustee moved the court to convert the case to a case under chapter 7 because of fraud in connection with the case. The debtor then filed a motion to voluntarily dismiss his case. The court held that the debtor has an absolute right to dismiss a previously unconverted case, but the court could place conditions on that dismissal.

Seventh Circuit

In re Packer, 586 B.R. 274 (Bankr. N.D. Ill. 2018)

A creditor sought to convert the chapter 12 case to one under chapter 7 for fraud in connection with the case. The debtors owned several LLCs through which their farming operations were managed. At one point they filed a cash collateral order to use the crop proceeds of one of their LLCs for the ongoing operations of the estate. A creditor moved to convert the case to chapter 7 for fraud based on the debtors' misstatements and inconsistent positions regarding what assets were part of the estate and what belonged to their entities. The creditor claimed that the debtors were holding its collateral hostage through these misstatements, especially in light of the assertions in the debtors' motion for use of cash collateral which included information about anticipated crop proceeds that were actually owned by entities other than the debtors.

The court held that the movant had not proven fraud in connection with the case under a preponderance of the evidence standard, but the court declined to decide whether preponderance of the evidence was the appropriate standard. Throughout the schedules and statements filed in the case, the misstatements identified by the creditor were instances where the debtors had engaged in over-inclusiveness and attempted to make corporate designations, rather failing to disclose material assets.

Eighth Circuit

In re Loganbill, 554 B.R. 871 (Bankr. W.D. Mo. 2016)

The trustee and a creditor moved to dismiss or convert this case based on the debtors' pattern of omission, inconsistencies and falsities, as well as the debtors' failure to commit their full disposable income to the plan. Specifically, the debtors failed to disclose a pre-petition transfer and several bank and investment accounts. Post-petition, the debtors: incurred secured debt for the purchase of vehicles without court approval and paid those creditors in full; paid funds to their children; and failed to disclose post-petition insurance assets. The court converted the case to a case under chapter 7 and denied the debtors' request for a discharge.

Ninth Circuit

Clark v. DeVries (In re Clark), 652 Fed App'x 543 (9th Cir. 2016)

The debtor moved to voluntarily dismiss his case; the court denied the motion and converted the case because it found that the debtor had committed fraud in connection with the case when, post-petition, the debtor had contracted to sell property that he was legally incapable of selling as determined by prior state court orders. The district court affirmed the lower court, and the court of appeals also affirmed, rejecting the debtor's argument that he had an absolute right to dismiss his case. The district court opinion can be found at In re Clark, Case No. 13-01278, 2014 WL 835824 (D. Idaho Mar. 4, 2014).

Tenth Circuit

Bange v. Klaassen (In re Bange), Adv. Pro. 11-7050, 2012 WL 2887227 (Bankr. D. Kan. July 16, 2012)

In this case, the bankruptcy court found that the debtor had committed fraud in connection with the case (submitted a fraudulent money order to the trustee) and had filed and pursued the case to simply delay creditors. The court converted the case to chapter 7; the debtor convinced the court to allow a reconversion, and thereafter, the debtor entered into settlements with his major creditors and confirmed a plan.

At the time of the settlement and plan confirmation, the debtor was also pursuing an action in state court against his former attorney for alleged losses of $750,000 for the attorney's failure to return his calls. The bankruptcy court learned of this undisclosed state-court action when the attorney removed the matter to bankruptcy court. Because of this non-disclosure coupled with the debtor's apparently willful failure to make plan payments, the case was again converted to chapter 7.

After the conversion, the debtor's former attorney moved for summary judgment on the removed state court action; the court granted summary judgment on the grounds of judicial estoppel, as the debtor had knowledge of the claim before his first proposed chapter 12 plan, before the conversion, the reconversion and the ultimately confirmed plan, but the cause of action was never disclosed.

Conversion to Chapter 11

First Circuit

In re Colón, Case No. 16-0060, 2016 WL 3548821 (Bankr. D.P.R. Jun. 21, 2016)

A creditor moved to dismiss this case based on the debtor's ineligibility. The debtor did not contest the motion to dismiss; instead he filed a motion to convert to chapter 11. The court denied the motion to convert and dismissed the case because the bankruptcy code did not specifically provide that a conversion from chapter 12 to chapter 11 was permitted. Section 1208 provides for conversion to a chapter 7 but is silent as to a conversion to chapter 11 or 13. The court stated that the omission of specific language was conspicuous, so the omissions must have been intentional. But see In re Cardwell, *infra*.

Fifth Circuit

In re Cardwell, Case No. 17-50307, 2018 WL 4846520 (Bankr. N.D. Tex. Oct. 3, 2018)

The debtor filed a chapter 12 but when a creditor moved to dismiss due ineligibility, the debtor moved to convert to chapter 11. The court noted that the bankruptcy code did not explicitly prohibit a chapter 12 debtor from converting to chapter 11. The court recognized that there was a split among the courts on whether a chapter 12 debtor may convert to a chapter 11. In this case, if the case was dismissed the debtor could file a case under chapter 11. There was no evidence of

bad faith. The court noted that there was no benefit to any party by dismissing and forcing the debtor to refile, so it permitted the debtor to convert to chapter 11. But see In re Colón, *supra*.

CLAIMS AND OBJECTIONS

Secured Claims

Second Circuit

Miller v. Bank of America, N.A. (In re Miller), Adv. Pro. 12-1005, 2014 WL 2860985 (Bankr. D. Vt. Jun. 23, 2014)

The creditor bank filed a proof of claim which contained a copy of a mortgage and an assignment of the mortgage but did not attach a copy of the note. The debtor filed an adversary proceeding challenging the creditor's right to collect on the note and seeking to invalidate the mortgage. The bank filed a motion for summary judgment, which included an affidavit about the possession of the note and its subsequent loss. The court held that the affidavit was insufficient to show that the bank had standing to file the proof of claim because of its vague and conclusory statements, and the court denied the motion for summary judgment.

Fourth Circuit

In re Ollis, Case No. 18-04549, 2019 WL 1313397 (Bankr. D.S.C. Mar. 21, 2019)

In this case, a creditor had a blanket security lien on the debtor's cattle, crops, inventory and equipment. The creditor moved for relief from the stay. While the stay was pending, the debtor, in violation of a court order, sold his cattle and did not remit the proceeds to the creditor. The debtor also sold his hay and did not remit the proceeds to the creditor. The debtor's proposed plan valued the creditor's secured claim at $11,000 (the value of the transferred cattle) and listed as under-secured the remaining $1.6 million. In addition to opposing relief from the stay, the debtor objected to the creditor's proof of claim.

In response to the motion for relief from the stay, the debtor argued that the creditor's claim as to certain equipment was unperfected because the filed financing statement did not specifically list the equipment, including serial numbers. Additionally, the debtor argued that the creditor did not have an interest in his remaining hay because it was not a crop. The court rejected both arguments, noting that regardless of whether the hay was a farming product or inventory, it was subject to the creditor's lien. The court granted relief from the stay because of the debtor's pre- and post-petition actions and because the debtor's filings did not indicate that the debtor would have sufficient income to make plan payments to protect the creditor's interests.

The debtor also objected to the claim of the creditor because it failed to include the value of the property that secured its interest on the official claim form. The court overruled the objection. See also Case Administration, Automatic Stay and Relief From, *supra*.

Crop Production Srvcs v. SCBT, N.A., Case No. 5:13-02841, 2014 WL 1796345 (D.S.C. May 6, 2014)

A junior secured creditor appealed the bankruptcy court's determination that the dragnet clause in the mortgage of the senior creditor included debt for which only one the mortgagors was obligated. In reaching that determination, the bankruptcy court allowed testimony as to the intent of the senior creditor and the debtor in regard to the mortgage at issue, the inclusion of which evidence the junior creditor also appealed. The district court affirmed the holding that mortgage secured the prior debt because of the plain language of the instrument. The bankruptcy court opinion can be found at Davis v. SCBT, N.A., Adv. Pro. 12-80190, 2014 WL 3965295 (Bankr. D.S.C. July 31, 2013) and 490 B.R. 221 (Bankr. D.S.C. 2013).

Fifth Circuit

Regions Bank v. Penick Produce Co. (In re Moore), Adv. Pro. 12-01012, 2013 WL 2154383 (Bankr. N.D. Miss. May 17, 2013)

This adversary proceeding was brought by the bank to enforce its lien on crops grown by the debtor and sold to the defendant. The debtor farmed in 3 different counties; the bank's filed UCC statement did not list one of the counties, so the bank did not have an enforceable interest against the purchaser in the crops from that unreferenced county.

The bank's lien was perfected in the farm products that were directly traceable to the counties which its UCC filing referenced. The bulk of the farm products were purchased from the debtor's processing company, and the physical source of those products were not known. The court declared that the bank did not have a lien on the farm products of unknown origin because the bank failed to carry its burden of proof, and the court declined to mathematically divide the amount based on the known number of acres farmed and an estimate of the bushels per acre.

The bank attempted to argue that its lien attached to all farm products acquired by the debtor in those particular counties, no matter where such crops were grown. The bankruptcy court rejected this argument because the bank's UCC filing listed specific parcels, so the lien was perfected only as to crops grown on those parcels.

Sixth Circuit

Edmonton State Bank v. Smith (In re Smith), Adv. No. 17-1010, 2017 WL 6372471 (Bankr. W.D. Ky. Dec. 6, 2017)

In this case, one creditor held a perfected first mortgage on the debtor's real property. Another creditor held a security interest in all of the debtor's farm equipment and business machinery. The controversy in this adversary was the relative rights of the creditors to the insurance proceeds of the pole barns that were constructed on the real property. The court held that the overwhelming weight of the testimony supported the position that once pole barns were erected, they could not be removed without being destroyed, therefore they were subject to the mortgage as permanent improvements on the realty.

Sunshine Heifers, LLC v. Citizens First Bank (In re Purdy), 763 F.3d 503 (6th Cir. 2014)

In this appeal, Sunshine Heifers challenged the lower court's determination that its cattle lease with a chapter 12 debtor was a disguised security agreement rather than a true lease, and, as a result, that disguised lease was junior to the prior perfected interest of the bank in the debtor's livestock.

The court applied first the bright-line test and then the economics of the transaction test, as required by Arizona law. The appellate court disagreed with the bankruptcy court's determination that the lease duration exceeded the economic life of the cattle based on the debtor's testimony that he culled 30% of the herd a year, which would result in the entire herd being turned over in 40 months. The appellate court held that the bankruptcy court should not have focused on the economic life of the individually leased cows, but instead should have focused on the economic life of the herd.

In reaching that conclusion, the appellate court focused on the terms of the lease documents, which required the return of the same number of cattle as initially leased with a guaranteed residual value, not the return of the same cattle actually leased. Given those provisions, the appellate court determined that the relevant "good" was the herd not the individual cattle. Because the economic life of the herd was greater than the lease term, the lease was not *per se* a security agreement.

Under the economics of the transaction test, the appellate court determined that the only relevant question was whether the lessor retained a meaningful reversionary interest. The court determined that the lessor did retain a meaningful interest as the herd sold for over $300,000 at auction. Because the appellate court determined that the bank had failed to carry its burden regarding the lease, the court reversed. For further proceedings in this case, see Miscellaneous, *infra.*

Agri-Max Financial Srvcs. v. Springfield State Bank (In re Smith), Adv. Pro. 13-3004, 2013 WL 4525175 (Bankr. W.D. Ky. Aug. 27, 2013)

In this case, the bankruptcy court had to determine the priority between two competing security interests in the debtor's livestock and its proceeds. Although one of the creditors claimed a purchase money security interest in certain cattle, that creditor had not sent the authenticated notice required under state law to perfect an interest in the livestock superior to the interest of a prior, blanket security interest holder, so its claim was junior.

Seventh Circuit

In re Toppmeyer, Case No. 11-30698, 2012 WL 3629048 (Bankr. S.D. Ill. Aug. 21, 2012)

In this case, a creditor obtained a judgment against the debtors' son, who owned a 1/3 interest in the property. After a judgment lien was recorded, the son transferred the 1/3 interest to the debtors, who owned the remaining 2/3. The property was also encumbered by a prior mortgage. Subsequently, the debtors filed for bankruptcy relief and tried to assert a homestead exemption in the property. The creditor objected, maintaining that the homestead exemption was junior to the creditor's 1/3 judgment lien. The debtors argued that the judgment lien was junior to

the prior mortgage and any claim to contribution that they may have against their son for the payment of the prior mortgage. As such, the debtors sought to strip the judgment lien, and the court had to determine the value if any of the creditor's secured claim.

The court determined the value of the property at the filing of the case determined the value of the secured claim and whether it could be stripped off. Both parties provided expert appraiser testimony; however, the court adopted the county tax appraisal and valued the creditor's secured claims at $34k, which was one third of the value of the home minus the prior mortgage.

Eighth Circuit

Turtle Mountain State Banks v. McDougall (In re McDougall), 572 B.R. 239 (Bankr. D.N.D. 2017)

A creditor filed this adversary proceeding seeking a determination that its lien in proceeds of livestock sales were senior to agricultural supplier liens. Specifically, the creditor had made loans to the debtors and filed appropriate financing statements in the name of the debtors. Thereafter, the debtors formed an LLC which they used as an operating entity for their ranching operations. That entity had a line of credit with an agricultural supplier who billed the LLC for petroleum and various feed and seed supplies for livestock which the supplier assumed was owned by the LLC. When the LLC defaulted, the supplier filed an agricultural supplier's lien and listed the LLC as the entity to which the supplies were provided. The debtors had also rented pastureland and failed to make payments on that lease. Although the lease was signed by one of the debtors, the agricultural lien listed the LLC as the entity to which the land had been leased.

Despite doing business in the name of the LLC and selling some cattle in the name of the LLC, the debtors never transferred livestock to the LLC. Some of the proceeds checks for the cattle, however, listed the LLC as the payee.

The court granted the feed and seed supplier the superior lien in the proceeds checks that listed the LLC as the payee prior to the filing of the bankruptcy petition. With respect to sales after the petition, even if the proceed checks listed the LLC as the payee, the court determined that the debtor owned the livestock, so the creditor's lien was superior. With respect to the land rent, the landlord did not timely comply with state law to assert a supplier's lien, so the creditor's interest was superior.

In re Crooked Creek Corp., Case No. 09-02352, 2017 WL 943907 (Bankr. N.D. Iowa Mar. 9, 2017)

In this procedurally complex adversary, two secured creditors claimed an interest in hogs owned by the chapter 12 debtor. In prior decisions of the case, the Iowa Supreme court determined that the bank had a superior interest in the hogs to the extent of the purchase price of the hogs, whereas the feed supplier had a superior interest in the appreciation of the hogs after they were acquired by the debtor.

After remand, the bankruptcy court determined the value of each secured creditor's interest. The parties again appealed to the district court, which certified a question to the state supreme court: whether a feed supplier had to file a financing statement every 31 days to maintain

perfection of its lien under state law. The state court answered in the affirmative, and the case was remanded to the bankruptcy court to determine the extent of the supplier's secured claim and the value of the bank's secured claim. After those proceedings, the supplier objected to the bank's amended unsecured claim, stating that the total value of the claim had been litigated in the prior proceedings. Applying res judicata, the court agreed and disallowed the amended unsecured claim of the bank.

Schley v. Peoples Bank, 565 B.R. 655 (Bankr. N.D. Iowa 2017)

In this case, the feed supplier and bank who each claimed an interest in livestock had a dispute over the extent of the feed supplier's priority lien in sales proceeds when only 49% of the herd was sold. The bank argued that the feed supplier's interest in the proceeds should be limited to the amount of feed supplied to the livestock sold, whereas the feed supplier argued that its interest should be the full amount of its claim. Looking at state law, the court determined that the statute was unambiguous and the priority interest of the feed supplier was the full amount owed on its claim. A prior decision in this case holding that the feed supplier's lien continues in the proceeds of livestock can be found at 509 B.R. 901 (Bankr. N.D. Iowa 2014).

Ninth Circuit

In re Standley, Case No. 11-62373, 2012 WL 6091267 (Bankr. D. Mont. Dec. 7, 2012)

In this case, the debtors filed a motion to value a security interest. The debtors' appraisal used the agricultural use as its basis, whereas the creditor's valuation expert used the property's highest and best use. Other valuation testimony considered the agricultural use but increased the market value for such due to the presence of recreational amenities. The court rejected the debtors' proposition that the value of the property should consider only the agricultural aspects with no value given to the recreational amenities. Other issues in this case can be found at Dismissal and Conversion, Prejudicial Delay, *supra*.

Tenth Circuit

First Nat'l Bank and Trust v. Novak, Adv. No. 17-5152, 2018 WL 4177831 (Bankr. D. Kan. Aug. 27, 2018)

In this case, the bank filed an adversary proceeding to determine the priority of its secured interest in the debtors' personal property and insurance proceeds. The court held that the bank held the senior position where the junior creditor allowed its financing statement to lapse prior to the filing of the petition.

Eleventh Circuit

Coffee Farmers Cooperative, Inc. v. Smith (In re Smith), Adv. Pro. No. 18-1068-WRS, 2019 WL 404200 (Bankr. M.D. Ala. Jan. 29, 2019)

This adversary proceeding determined the priority between a mortgage executed by the debtor and his wife and a judgment lien obtained solely against the debtor. Prior to filing for

bankruptcy, the debtor had several loans secured by mortgages with the defendant bank. At some point, the debtor renewed and combined his outstanding loans into a single note and executed another mortgage. Three years after that mortgage, the plaintiff obtained a judgment lien against the debtor's assets. Three years after the judgment lien was recorded, the bank renewed the note with the debtor through the execution of another note.

The judgment lien holder argued that it had a more senior lien: it argued that the note which the debtor executed after the judgment lien was a future advance, not a renewal. The court examined the factual circumstances surrounding the note and held that it was a renewal of the debtor's prior debts and not a future advance, so the bank did not lose its senior lien position.

Non-Dischargeable Debt

Third Circuit

Crossroads Bank v. Charles (In re Charles), Adv. Pro. 14-1084-TPA, 2015 WL 4100362 (Bankr. W.D. Pa. Jul. 6, 2015)

The bank filed this adversary proceeding seeking to enforce a settlement agreement signed by the debtors in their prior case which recognized a certain portion of the debt owed to the bank as non-dischargeable. On the bank's motion for summary judgment, the debtors argued on several grounds why the agreement which had been approved by the court should not be enforced. The bankruptcy court granted the bank's motion for summary judgment, rejecting the debtors' collateral attack.

Fifth Circuit

Jasek v. Antolik (In re Antolik), Adv. Pro. 12-01079, 2012 WL 5384179 (Bankr. W.D. Tex. Nov. 1, 2012)

In this adversary, the plaintiff sought to have its debt declared non-dischargeable under § 523(a)(2),(4) and (6). Prior to filing, the debtor and his ex-brother-in-law had reached a settlement regarding the ownership interest and sweat equity in a family run business. The agreement transferred ownership shares to the debtor in exchange for cash payment and the transfer of two lots to the plaintiff. After the agreement was signed, the attorney for the plaintiff sent a letter to the debtor stating that a meeting of the minds had not occurred and raised several issues with the purported settlement. Thereafter, the debtor transferred the two lots to a different entity. The plaintiff then filed suit in state court and received a judgment against the debtor. The debtor then filed for chapter 12 relief. The plaintiff filed a non-dischargeability suit based on the representations in the settlement agreement that the debtor would transfer the plaintiff the two lots.

Because of the later communication by the plaintiff's attorney, the court declined to find that at the time of the settlement the debtor's statements were false. Rather, the court found that the debtor believed he no longer had a settlement and was free to sell the property. Likewise, because of this belief, the debtor's conduct in selling the lots was not willful and malicious under either the objective or subjective test.

Seventh Circuit

Deere and Co. v. Grabowski (In re Grabowski), Adv. Pro. 16-04000, 2016 WL 3884817 (Bankr. S.D. Ill. May 16, 2016)

In this case, the secured creditor filed an untimely complaint to have certain debt declared non-dischargeable because it learned that the debtor had transferred its property. The debtor moved to dismiss the complaint, and the creditor argued that equitable tolling should apply. Although the court acknowledged that equitable tolling had been applied where a party was misled or evidence had been concealed, it declined to do so here where it did not appear that the creditor had taken all available actions to preserve its rights. The court declined to determine whether the bankruptcy court even had authority to apply the doctrine given the rules and the language of *Law v. Seigel*.

Claim Objections

First Circuit

In re Henry A. Sarafin Testamentary Trust, Case No. 12-30221-HJB, 2015 WL 5738234 (Bankr. D. Mass. Sept. 30, 2015)

In this case, the debtor objected to the claim of a secured creditor, arguing that the remaining amount of the secured creditor's claim, including attorney' fees, was limited to the amount provided for in the confirmed plan. The debtor also challenged the reasonableness of the creditor's attorney's fees. The confirmed plan provided for a portion of the creditor's claim to be paid with the sale proceeds and the remainder to be paid over 15 years at a set interest rate. The plan contained language that any objection to the amount of the claim to be amortized over 15 years must be filed within 30 days of the order of confirmation.

The creditor never filed a proof of claim, but it sought relief from the stay, asserting an outstanding balance $11,000 in excess of the remainder balance listed in the debtor's plan. The debtor objected and asserted that the amount claimed by the creditor was the result of unreasonable or unnecessary legal fees. Specifically, the debtor argued that the creditor was over-secured and, therefore, the multiple relief from stay filings of the creditor were unnecessary. The debtor also argued that the bank's recovery is limited by the amount and language in the confirmed plan.

Addressing the alleged cap on the creditor's claim, the court noted that confirmation does have a preclusive effect regarding the treatment of a claim; it does not have that same preclusive effect as to the amount of the claim. In this particular case, the creditor's claim was to be paid a lump sum from proceeds and then receive payments over time. The court held that the plan could not be preclusive in regard to the amount of the balance claim, as at the time of confirmation that amount could not have been determined. Additionally, the court held the language in the plan that purportedly set a cap on the amount of an over-secured creditor's claim was not effective in regard to fees.

Fourth Circuit

In re Barefoot, Case No. 12-02160-8, 2014 WL 1053601 (Bankr. E.D.N.C. Mar. 18, 2014)

The debtor owed secured debt to the FSA; prior to the petition, a government program made payment to the FSA on the debtor's account. The FSA filed a claim that reflected this payment. Post-confirmation, the FSA refunded an overpayment of benefits from the government program to the debtor and filed an amended claim, increasing the amount of its secured debt. The FSA maintained that the payment to the debtor should be endorsed to the government program to reimburse it for its initial overpayment under the right of setoff. The debtor opposed the amended claim and maintained that the government program may have an unsecured claim in its case, but that the FSA should be permitted a secured claim only in the originally filed amount.

The bankruptcy court sustained the objection as the plan was confirmed almost a year prior to the amended claim, and neither the FSA or the other government entity had sought relief from the stay for setoff or properly pled setoff in its proof of claim.

Sixth Circuit

In re Meggitt, Case No. 17-30029, 2018 WL 1630887 (Bankr. N.D. Ohio Mar. 30, 2018)

The debtor and affected creditor had a business relationship where the debtor would purchase seed from the creditor and after harvest sell crops back to the creditor. The debtor had the option of taking the sale proceeds in cash or having a portion of it applied to his outstanding accounts. The debtor objected to the creditor's proof of claim on that grounds that prior to bankruptcy the creditor wrongfully rejected wheat delivered pursuant to a purchase contract between the creditor and debtor. The debtor then had to sell the wheat at a substantially lower price elsewhere; therefore, the debtor asserted a counterclaim and an offset of the amount owed.

At the evidentiary hearing on the objection, there was an issue regarding marginalia contained in the price confirmation sheet which memorialized the crop, price and amount to be delivered under the grower contract. The creditor asserted that the contract it proposed was for beans not wheat. The marginalia changing the crop to wheat was not initialed by the parties, so the court held that there was no enforceable contract between the parties regarding wheat that would support the debtor's setoff request.

In re Meggitt, Case No. 17-30029, 2018 WL 1614735 (Bankr. N.D. Ohio Mar. 30, 2018)

The debtor objected to the county treasurer's proof of claim which asserted a substantial amount of agricultural use valuation recoupment fees. Under Ohio law, there is a special provision which allows property taxes to be assessed against real property based on the value of the land at its current agricultural use rather than its best use/highest market value. In order to maintain this lower taxable value, property owners must continually renew their application for agricultural use. If they fail to do so, the county will assess taxes based on value of the property at its best use. Additionally, when there is a change in use or a failure to renew, the county has the authority to recoup the tax savings from the prior three tax years. The county sent a notice of the proposed fees to the debtor (although not in the manner compliant with the governing statute), but the notice

was returned unclaimed, and properties were taxed at their true market value and fees for the prior savings were assessed. The debtor failed to renew his application until several years later. The debtor then filed for chapter 12 relief and objected to the proof of claim which included the recoupment fees.

The debtor objected to the proof of claim, highlighting the county's failure to provide notice in conformity with the governing statute. Relying on the Tax Injunction Act and § 505(a), the court determined that the fees arose in connection with an ad valorem tax on real property of the estate. Thus, the court had no authority to determine the legality of those fees if the time to contest them under state law had expired – which time period had passed in the case.

In re Meggitt, Case No. 17-30029, 2018 WL 401224 (Bankr. N.D. Ohio Jan. 12, 2018)

The debtor objected to the creditor's claim on the grounds that it included charges for products never received by the debtor and improper financing charges. Notice of the objection and the time period for response was sent to the creditor and its attorney. No response was filed, and the court sustained the objection. Although the objection and notice were properly served on the creditor and its attorney, the creditor filed a motion to reconsider stating that the attorney had mistakenly failed to respond to the objection. The creditor conceded that the finance charges were improper; the creditor maintained that the product charges were correct. Applying § 502(j), the bankruptcy court first determined whether there was cause for reconsideration and then whether the equities of the case dictated for allowance or disallowance. Looking towards Rule 60(b) of the Federal Rules of Civil Procedure, the court determined that there was excusable neglect and granted the motion for reconsideration.

Seventh Circuit

In re Wulff, Case No. 17-31982-bhl, 2019 WL 548530 (Bankr. E.D. Wis. Feb. 11, 2019)

In this case, a secured creditor filed an untimely proof of claim because the debtor did not provide a valid address for the creditor in his matrix and schedules. As soon as the creditor was aware of the bankruptcy filing, it filed a proof of claim, which was 17 days after the bar date. After confirmation of the plan, the trustee objected to the proof of claim as untimely filed. In response, the debtor and secured creditor each moved to extend the deadline for the filing of the proof of claim.

The court declined to enlarge the time period for the filing of a proof of claim because the language of Rule 3002(c)(6) applied only where the debtor failed to file a list of creditors timely, not where the debtor filed the list but provided for an incorrect address. The court, however, overruled the trustee's objection to the claim, holding that the confirmed plan was binding on all parties, and it provided for payment of the creditor's claim.

Eighth Circuit

In re Meyer, 563 B.R. 708 (Bankr. N.D. Iowa 2017)

The debtor objected to the claim of a lessor because he had made improvements to the leased land and facilities that offset the claim. The lessor argued that the lease did not provide for use of equipment and facilities and that the offset was barred by the statute of limitations. The debtor argued pursuant to the terms of the oral lease that he was authorized to use the facilities and equipment and that he would be reimbursed for any repairs made. According to his testimony, several years before filing for bankruptcy, the lessor stopped reimbursing him. Based on the debtor's calculations, he was owed an amount in excess of the rent claim filed by the lessor.

Under Iowa law, certain claims for recoupment are not barred by the statute of limitations. Here the court held that the debtor's claims were not barred by the state statute of limitation. The court found that the oral lease between the parties provided for reimbursement. Therefore, the court sustained the objection to the proof of claim, finding that the debtor had established his right to setoff.

Ninth Circuit

Bullseye Holdings, LLC v. IRS (In re Bullseye Holdings, LLC), Adv. No. 16-ap-00449, 2018 WL 4998089 (Bankr. D. Ariz. Oct. 15, 2018)

In this adversary proceeding, the debtor sought a declaratory judgment as to the status of an IRS lien against certain property for tax debt owed by a related entity. The IRS asserted multiple theories of recovery, including state fraudulent transfer and alter ego status. The bankruptcy court engaged in a brief choice of law analysis and held that the law of the situs of the property at issue regarding a fraudulent transfer should apply.

Ultimately, the court determined that the IRS did not establish by a preponderance of the evidence that the transfer was fraudulent. The court did hold, however, that the IRS has established that the debtor was the alter ego of the tax payer, so the tax liens encumbered the transferred property.

In re Yett, 540 B.R. 445 (Bankr. D. Idaho 2015)

The debtors objected to the mortgage creditor's proof of claim, which reflected liability for post-confirmation late fees. Under the plan, payments to the trustee were made pursuant to a milk assignment. From these payments, the trustee was to make the disbursements on the debtor's mortgage. The plan was confirmed in November, the milk assignment was finalized in December, and the trustee made the first plan payment to the mortgage company on January 11. From January through the life of the plan, the trustee received and disbursed payments in approximately monthly intervals.

During the plan, the debtors received a notice that they were being assessed fees because the plan payments to the mortgage creditor were consistently late. The trustee was unable to resolve the issue with the mortgage creditor, and no changes were made to the plan to address any

alleged late payment issues. According to the mortgage company, at the completion of the plan, the debtors had accrued over $5,000 in late fees.

The confirmed plan in the case provided that payments to the mortgage creditor would commence on December 1, and that payments to be made by the trustee would commence approximately 30 days after the effective date of the plan. The plan also specifically stated that "all remaining terms in the contract [with the mortgage company] shall be unaltered." The note governing the loan provided for the assessment of a late fee in the form of an increased interest rate on the late payment.

Interpreting the provisions of the plan, the bankruptcy court held that the plan did not modify the mortgage creditor's right to assess late fees, so the debtors were responsible for payment of the late fees assessed.

In re Benbrook, Case No. 11-60781, 2015 WL 672472 (Bankr. D. Or. Feb. 10, 2015)

The plan proposed in this case provided for the sale of property and installment payments to the secured creditor pending the sale. To overcome the creditor's objection to the plan, the installment payment amount and interest rate in the plan was increased. The plan also specifically stated the amount listed in the creditor's proof of claim, which was filed prior to confirmation. The plan also provided, however, that the arrears and total amount of secured debt shown in a timely filed and allowed secured claim would control over the estimates listed in the plan. Three years after confirmation, the debtor objected to the value of the secured creditor's claim. The court overruled the objection to the claim because of inexcusable delay.

In re Hess, Case No. 13-00015, 2014 WL 2565906 (Bankr. D. Idaho Jun. 6, 2014)

In this case, the creditor filed an amended proof of claim which asserted an administrative expense claim and a claim entitled to priority under § 507(a)(4) for unpaid wages. The creditor had an oral employment agreement with the debtor; the creditor received payment in cash and was provided housing. The debtor purposefully omitted the creditor in his bankruptcy filings, and post-petition the debtor made significant undisclosed payments to the creditor, which the debtor maintained satisfied any outstanding back wages.

After determining the wages owed for various years, the bankruptcy court was left with the task of allocating payments that had occurred, which, according to the debtor resulted in only a general unsecured debt, rather than the administrative and priority status asserted by the creditor. Neither party to the objection provided evidence of allocation of payments, so the court turned to the Restatement (Second) of Contracts for direction in the application of payments to matured debts. Under the standard provided there – that generally payments should be applied to the oldest matured debt first – the court allowed both a priority and administrative claim.

Tenth Circuit

In re Swenson, Case No. 14-40173-12, 2015 WL 3745307 (Bankr. D. Kan. Jun. 12, 2015)

The secured creditor filed a claim after the bar date in this case. The debtors objected arguing the claim should be disallowed as untimely filed. In the proposed chapter 12 plan, the

debtors treated such claim as disallowed and proposed to make no payments on the claim during the life of the plan, but they recognized that the creditor would retain its lien. The creditor argued that the appearance of counsel prior to the bar date should act an informal proof of claim. The court held that the appearance of counsel and related filing did not meet the requirements of an informal proof of claim, as defined by the Tenth Circuit, and disallowed the claim.

Eleventh Circuit

In re Belcova, Case No. 3:13-bk-7570-JAF, 2015 WL 5438844 (Bankr. M.D. Fla. Sept. 11, 2015)

The debtor, the trustee of a Florida land trust, filed a motion for the valuation of the secured creditor's claim. The narrow issue before the court on this matter was the land-trust trustee's standing to offer her opinion as to the value the property which secured the creditor's claim. Because, under Florida state law, a trustee of a land trust is vested with all legal and equitable interest in the real estate, the trustee had standing to value the property of the trust.

APPELLATE ISSUES

Second Circuit

In re Simpson, Case No. 17-10442, 2018 WL 1940378 (Bankr. D. Vt. Apr. 23, 2018)

The court granted two motions for relief from the stay, and the debtor appealed. The debtor filed a motion for stay pending appeal arguing that it had a substantial possibility of success on the appeal and would suffer irreparable harm if there was no stay. One creditor objected to the motion. The court held that the debtor failed to establish that it was entitled to a stay pending appeal.

This was the debtor's second chapter 12. Between the first case and the second filing there was protracted and aggressive litigation regarding a foreclosure action. The parties entered into a settlement, but the debtor defaulted. The debtor filed a second chapter 12 case four days prior to the scheduled foreclosure. The court, after considering the totality of the evidence, held that the debtor did not meet the burden of demonstrating a reasonable possibility of a successful reorganization.

The court pointed out that the debtor's income streams and proposed plan were highly speculative. Although the court recognized that the debtor would be irreparably harmed, that finding alone was insufficient to grant a stay pending appeal. See also Confirmation, Effect of Confirmation, *supra*.

In re Magnale Farms, LLC, Case No. 17-61344, 2018 WL 1664849 (Bankr. N.D.N.Y. Apr. 3, 2018)

In this case, the debtor sought a stay pending appeal of an order granting a motion for relief from the automatic stay. The debtor argued that it would be irreparably harmed if there was not a stay pending appeal because the creditor would conduct a foreclosure sale which would result in the cessation of the debtor's operations. Further, the debtor argued that there was a substantial

possibility it would succeed on appeal, as it had paid property taxes, obtained insurance and was in the process of obtaining replacement financing with a new lender.

The opposing creditors argued that the debtor had multiple unsuccessful cases, and although equity existed in the property, that did not relieve the debtor from timely complying with its obligations under the bankruptcy code.

The court held that a stay pending appeal was to maintain the status quo, not to give the debtor a second opportunity to accomplish something it should have already done. Therefore, the debtor's argument that it could get a replacement lender was unpersuasive. Based on the lack of a substantial likelihood of success, the court declined to impose a stay pending appeal.

Third Circuit

Chesapeake Appalachia, LLC v. Powell (In re Powell), Case No. 3:13-cv-00035, 2015 WL 6964549 (M.D. Pa. Nov. 10, 2015)

A chapter 12 debtor filed a motion to reject an oil and gas lease. Although the bankruptcy court ultimately denied the motion, it did hold that the lease at issue was subject to § 365, as it was an executory contract. The oil and gas leaseholder appealed, but the debtor challenged the leaseholder's standing to pursue the matter, given that the motion to reject the lease was denied.

The district court held that the leaseholder had standing to pursue the matter, and the issue was ripe because the lower court's determination that the leasehold was an executory contract affected the property rights of the leaseholder and could have res judicata effects as the law of the case. See also Case Administration, Executory Contracts and Unexpired Leases, *supra.*

In re Thorpe, 540 B.R. 552 (E.D. Pa. 2015)

In this chapter 12 case, the plan provided for the sale of certain property in whole or in part by a date certain; if the property failed to sell privately, all of it was to be sold by public auction. The plan also contained a redemption provision by which the debtor could redeem the property and terminate any auction by selling a portion of the property or paying a sum certain to the secured creditor. The plan was silent as to whether the debtor or trustee had the obligation of subdividing the property. On the eve of the auction, the debtor obtained a contract of sale for a portion of the property and proposed a sixth modified plan which allowed for the sale of the portion. In the alternative, the debtor sought a determination that the contract of sale satisfied the redemption provisions of the confirmed plan. The court denied the motion to modify and rejected the debtor's assertion that she had redeemed the property. The debtor appealed.

The district court affirmed the bankruptcy court's determination that the debtor had not redeemed the property, noting that in questions of plan interpretation the Third Circuit "accords great weight to the Bankruptcy Court's construction of an order with which it is familiar by virtue of its direct involvement in the proceedings." Although the plan was ambiguous as to what was needed for the redemption transaction to "close," the district court deferred to the bankruptcy court's reasonable interpretation which required the actual conveyance of property and the unconditional delivery of the redemption amount – not merely the payment of funds to the trustee

with the actual conveyance to follow once subdivision of the property was obtained. See also Motions to Modify, Timing, and Case Administration, Use, Sale and Lease of Property, *supra.*

Fifth Circuit

Colvin v. Amegy Mortg. Co., 537 B.R. 310 (W.D. Tex. 2015)

In this appeal, the debtor filed his notice of appeal but referenced only the order dismissing one count of his underlying complaint, rather than the first dismissal order which covered the other counts. The notice of appeal did not contain a copy of either dismissal order. Sixteen days after the entry of the final dismissal order, the debtor amended the notice of appeal to reference the first dismissal order and to attach a copy of the order. The appellee filed a motion to dismiss for lack of subject matter jurisdiction under Rule 8003. The district court held that the amended notice was outside of the time period and could not be considered. The court, however, recognized that notices of appeal are to be liberally interpreted and the lack of an attachment to the first notice was not fatal. The court, however, found that it could not be fairly inferred from the first notice that the debtor intended to appeal the first dismissal order. Therefore, the court exercised its discretion to dismiss the appeal. For other decisions related to this case, see Miscellaneous, *infra.*

Eighth Circuit

Seifert v. Carlson (In re Seifert), 533 B.R. 265 (B.A.P. 8th Cir. 2015)

The debtor appealed the bankruptcy court's determination that the objection to his claim of exemption in a number of jointly payable checks for farm earnings was moot because the joint checks were relinquished to an over-secured creditor. The appellate court remanded, holding that the turnover of the funds to the creditor did not resolve the best interest of creditors issue that was unresolved in the case and resolution of that issue was dependent upon the validity of the debtor's claimed exemption. For the bankruptcy court decision after remand, see Property of the Estate, Exemptions, *supra.*

MISCELLANEOUS

Second Circuit

In re Simpson, Case No. 17-10042, 2019 WL 516449 (Bankr. D. Vt. Feb. 8, 2019)

In this case, the court entered a conditional dismissal order which provided for dismissal of the case upon the debtor's second default under the plan in a calendar year. The confirmed plan provided for the sale of various pieces of equipment by stated deadlines. Those deadlines were adjusted in a subsequent stipulation, which seemed to imply that the debtor's failure to sell both pieces of equipment by the stated deadline would result in two defaults that would enable the creditor to seek automatic dismissal. After the debtor failed to sell the equipment by the stated deadlines, the creditor filed a notice of default and the court dismissed the case without notice or a hearing.

The trustee and debtor moved the court to reconsider the entry of the dismissal order, arguing that the previously entered stipulation contained an ambiguity and that a misunderstanding resulted in the entry of the dismissal order. The trustee and debtor maintained that the stipulation should be read to create a single default for failure to sell all of the equipment by the stated deadlines, triggering the cure provision, rather than the automatic dismissal provision.

Based on the positions of the parties, the bankruptcy court determined that the language of the stipulation was ambiguous. Rather than vacate the stipulation for a lack of a meeting of the minds, the court relied on traditional contract principles to interpret the order and provide any missing terms. The court held that the stipulation created only a single default, enabling the debtor to seek modification of the plan to cure the default. Therefore, the court vacated the dismissal order.

In re Boerderij de Veldhoek, LLC, Case No. 12-31657, 2012 WL 5296118 (Bankr. N.D.N.Y. Oct. 25, 2012)

The bankruptcy court granted the creditor's motion to change the venue of this case. The debtor owned a large farm with residences in New York and also a farm in Iowa. The debtor filed in New York, claiming it as the principal place of business for the LLC and also where associated individual debtors resided. Evidence at the hearing suggested that the New York farm land had no active operations and the residences were uninhabitable and had no apparent residents. Additionally, in its organizational documents, the LLC listed Iowa as its principal place of business. None of the creditors were located in New York, and the bulk of the debtor's income and expenses were related to Iowa operations. The court transferred the case to Iowa.

Third Circuit

In re Thorpe, Case No 13-15267, 2019 WL 262197 (Bankr. E.D. Pa. Jan. 17, 2019)

In this case, the confirmed plan provided that the debtor would make direct payments on the debt secured by her residence. Near the end of the plan, the debtor filed an objection to the creditor's claim as it related to her ongoing, post-confirmation maintenance payment. The bankruptcy court held that it lacked subject matter jurisdiction over the dispute between the debtor and creditor because: (1) the confirmed plan provided that the debtor would pay the debt pursuant to contract terms directly and (2) resolution of that dispute would have no impact on the outstanding case administration issues.

Fourth Circuit

In re Terry Properties, LLC, 569 B.R. 76 (Bankr. W.D. Va. 2017)

The trustee and two creditors objected to the proposed plan in this case based on the treatment of secured claims, lack of feasibility, the best interest of creditors, and good faith based on language in the plan that acted as an injunction against two pending lawsuits with commercial co-borrowers. The debtor owned the real property of a dairy operation conducted by a related entity. At the time of the filing, the farm was transitioning from dairy to growing cherry trees for

a start-up botanical company. The cherries harvested were not for consumption but use in the start-up's product which had an unknown market.

With respect to the injunction against pursuing the co-borrowers on the commercial notes, the court held that the debtor did not meet its burden of showing irreparable harm, probability of success on the merits (interpreted to mean a 100% payout to creditors in the bankruptcy), balance of harm, and the public interest. See also Confirmation, Best Interest of Creditors and Treatment of Secured Claims, *surpa*.

M&M Independent Farms, Inc. v. Rural Community Ins., Adv. Pro. 10-00277, 2012 WL 3428802 (Bankr. E.D.N.C. Aug. 15, 2012)

The debtor brought this adversary proceeding against the insurer for: (1) breach of a crop insurance policy for failure to indemnify; (2) unfair claim handling practices pursuant to state law; and (3) unfair or deceptive trade practices pursuant to state law. These claims were based on the insurer's denial of claims related to crop failure. The insurer denied any wrongdoing and asserted that the arbitration clause in the applicable policy prevented litigation in the bankruptcy court.

The court interpreted the policy to cover only those loses directly attributable to excessive rainfall. Based on the evidence presented, the crops and fields at issue did not receive excessive rainfall. The debtor had experienced loss because he diverted harvesting activities from the fields at issue to another county to reduce loss because of excessive rain in that county. The court held that the losses in the fields at issue were not directly attributable to excessive rainfall in the county in which the fields were located.

Fifth Circuit

Artho v. Happy State Bank (In re Artho), Adv. No. 17-02002, 2018 WL 4631761 (Bankr. N.D. Tex. Sept. 24, 2018)

After dismissal of the complaint discussed *infra*, the defendants filed a motion for sanctions against the debtor and his attorneys for the filing of the dismissed adversary. Prior to the motion for sanctions, the defendants sent multiple letters requesting that the complaint be withdrawn. Additionally, they took the plaintiff's deposition during discovery and learned that the debtor had no grounds, factually or legally, to support his adversary. The defendants again requested that the complaint be withdrawn. It was not.

Granting the motion for sanctions, the bankruptcy court required one of the debtor's attorneys to disgorge his fee in full and required the other one to disgorge an amount proportionate to his level of involvement in the underlying adversary. The court also awarded monetary sanctions against the debtor for the filings he made without the assistance of counsel.

One over-secured defendant also sought recovery of its fees for the adversary proceeding. The court declined to deviate from the American Rule because: the contract between the parties did not provide for the award of fees in this instance and pursuant to the plan, the creditor had received its payment in full prior to the proceeding.

Artho v. Happy State Bank (In re Artho), 587 B.R. 866 (Bank. N.D. Tex. 2018)

The debtor filed an adversary proceeding against a secured creditor and others based on fraud and conspiracy. Although the debtor's confirmed plan and an order approving sale provided for the sale of all of the debtor's assets by public auction, the debtor alleged that he negotiated a deal with the secured creditor that his real property sale would be delayed so that the debtor could obtain alternate financing. The debtor alleged that the secured creditor had obtained information from him regarding the property and that the property was worth more than $15 million. The property was ultimately sold for less than $4 million. The debtor alleged that the secured creditor and buyer conspired in the sale. The creditor moved to dismiss the complaint.

Any allegation of fraud must comply with Rule 9(b) and must state with particularity the circumstances of the fraud. The court dismissed the complaint and held that the oral discussions did not modify the existing agreements based on the statute of frauds. The court also held that the debtor's bare recitation that the defendants conspired was devoid of any allegation related to an agreement to commit any conspiracy.

Hoffman v. HSPCA (In re Hoffman), Adv. No. 16-03222, 2017 WL 727543 (Bankr. S.D. Tex. Feb. 23, 2017)

In this case, the debtor's herd was impounded because of animal neglect, and a state court terminated the debtor's ownership in the horses and transferred them to the HSPCA. The debtor filed for chapter 12 relief and initiated an adversary proceeding several months later claiming that the state court judgment was void.

The debtor argued that the state court judgment was void *ab initio* to avoid the implications of the *Rooker-Feldman* doctrine. In Texas, a judgment is void *ad initio* if the rendering court lacks subject matter or personal jurisdiction, lacks jurisdiction to enter the judgment or lacks the capacity as a court to act. After review of the relevant statutes, the bankruptcy court determined the rending court had jurisdiction and capacity to enter its judgment, therefore it was not subject to collateral attack in federal court.

Baker v. Baker (In re Baker), 593 Fed. App'x 416 (5th Cir. 2015)

The purchaser of property from a bankruptcy estate moved the bankruptcy court to amend the deed transferring the property to reflect the court's order approving the sale. The chapter 12 debtor was divorced, and pursuant to a divorce decree all interest in the property was to be vested in the debtor. The deed transferring the property to the debtor actually reserved mineral and oil rights in the former spouse.

Prior to the bankruptcy estate sale, the bankruptcy purchaser received a title commitment that noted the reservation of oil and mineral rights in the former spouse. The order approving the sale directed the estate to execute a general warranty deed, including the estate's surface and mineral rights. After the sale closed, the purchaser requested that the court reform the deed of sale to transfer the entire mineral interest without any reservations. The court declined to do so, stating that the deed had conveyed the estate's full interest. The purchaser's concern about what should

have been conveyed pursuant to the divorce decree was a state law issue and was not reached by the bankruptcy court. On appeal, the circuit court affirmed the bankruptcy court.

Colvin v. Amegy Mortg. Co., 507 B.R. 915 (W.D. Tex. 2014)

In this case, the debtor appealed the bankruptcy court's denial of his Rule 60 motion which sought to vacate the dismissal of the debtor's adversary proceeding to create an easement across property foreclosed by a creditor during the debtor's bankruptcy case. The district court held that the Rule 60 motion should have been denied on lack of subject matter jurisdiction because the bankruptcy court did not have jurisdiction to adjudicate the state law easement claim. A prior decision relating to this case and subject matter jurisdiction over the debtor's various post-confirmation claims can be found at 507 B.R. 169 (W.D. Tex. 2014). For other opinions in this case, see Appellate Issues, *supra.*

Sixth Circuit

Meggitt v. Neema, LLC (In re Meggitt), Adv. No. 17-3014, 2018 WL 1121585 (Bankr. N.D. Ohio Feb. 27, 2018)

This adversary proceeding related to whether there was a binding contract for the sale of debtor-plaintiff's real estate to the defendant and counter-claims related thereto. Several discovery disputes were before the court, including the plaintiff's requests for admission, interrogatories and requests for production.

Although by operation of the rules of procedure requests to admit are deemed admitted, the Sixth Circuit has recognized that a party can take additional actions to withdraw or amend those admissions. Here the defendant belatedly responded, and the court accepted that response because the plaintiff was not prejudiced by any withdrawal or amendment to the admissions.

The plaintiff challenged the sufficiency of the defendant's belated response. The court examined each alleged deficient response to the requests, finding that the defendant had added statements that were simply argumentative which ultimately seemed to cloud the response. Therefore, the court accepted the late filed response to the requests to admit but directed the defendant to file an amended response which removed any argumentative or conflicting language.

Sunshine Heifers, LLC v. Citizens First Bank (In re Purdy), 870 F.3d 436 (6th Cir. 2017)

In a prior opinion in this case, the Sixth Circuit determined that Sunshine Heifers held a true lease in certain cattle sold at auction during a chapter 12 case. The appellate court remanded the case back to the bankruptcy court to apportion the proceeds from the sale of the herd between the lessor and the secured creditor. Unfortunately, a number of the cattle had both the lessor's brand and the ear tag belonging to the secured creditor. The lower court determined that all of the cows sold at auction were subject to the bank's security interest and denied the lessor any share of the auction proceeds. The lessor appealed the decision arguing that the appellate court had implicitly determined the ownership issue and that it was error for the bankruptcy court to hold an evidentiary hearing on ownership. The appellate court affirmed the lower court, which determined

ownership based on the comingling of the funds used to purchase the cows at issue. For prior decisions regarding this case, see Claims and Objections, Secured Claims, *supra.*

Paradise Productions, LLC v. Chalin, Adv. Pro. 12-5051, 2013 WL 1969310 (Bankr. E.D. Ky. Apr. 29, 2013)

The debtor filed this adversary seeking damages for the breach of a pre-petition sale and lease agreement under state law. The debtor-plaintiff and defendant each filed a motion for summary judgment.

To avoid a foreclosure sale, the debtor entered into a purchase and sale contract with the defendant. The contract allowed for a 5-day inspection period, after which the purchaser could void the contract. The contract also required that the lien holder on the property approve the sale. Five days after the signing of the contract, counsel for the debtor informed the lien holder that the purchaser had voided the contract. The debtor then filed for chapter 12 relief.

The debtor filed this adversary proceeding arguing that the purchaser under the contract could only void the contract by providing a copy of an inspection report that identified a latent defect. The court held that the inspection provision of the form contract did not impose that requirement on the purchaser, so the court granted the defendant's motion for summary judgment.

Seventh Circuit

In re Heft, 564 B.R. 389 (Bankr. C.D. Ill. 2017)

The debtor sought authorization to make payments to secured creditors directly, in contravention of the proposed plan in his case. Although no plan had been confirmed, all iterations of the debtor's plan proposed a liquidation of his equipment with the sales proceeds to be forwarded to the trustee for distribution. Prior to confirmation, and after the bar date, the debtor auctioned his equipment. When the debtor was notified that no claim had been filed for a secured creditor, he proposed making payments directly to the creditor. The trustee opposed the motion.

The court denied the motion, recognizing that the debtor had already filed several plans to address deficiencies. Further, granting the motion to pay direct would require an amendment to the currently pending plan. The court held that all creditors had to timely file proofs of claim to be paid by trustee disbursement, and the current motion was simply an attempt to overcome the fact that the debtor could have filed a claim for the creditor but failed to do so.

Great Lakes Agri-Services, LLC v. State Bank of Newburg (In re Enright), 474 B.R. 854 (Bankr. E.D. Wis. 2012)

A junior creditor sought to require a senior creditor to marshal assets; specifically, it sought to require the senior creditor to liquidate collateral owned by non-debtors prior to executing on the property of the debtor. The non-debtors had executed a limited guaranty for the debtor's debt, and they secured that guaranty with real estate. The junior creditor argued that the debtor and non-debtors were principals of the same business; the senior creditor argued that the elements for marshalling had not been met, as the assets of the debtor and non-debtors were not two funds of a

common debtor. The court declined to require marshalling because the two exceptions to the "common debtor" element of marshalling were not present in this case.

Eighth Circuit

In re Western Slopes Farms P'ship, Case No. 17-00699, 2018 WL 1886102 (Bankr. N.D. Iowa Apr. 18, 2018)

In this discovery dispute, the debtor sought information from a creditor regarding the amount owed to the creditor. The creditor moved to quash arguing that a state replevin action had already determined the amount of the claim, presenting issue preclusion. Although the state court specifically determined the amount of the debt owed, the bankruptcy court held that, under state law, the state court need have only determined whether the amount owed equaled or exceeded the collateral. The specific amount owed was not necessary or essential to the replevin judgment, so issue preclusion did not apply.

Crooked Creek Corp. v. Primebank (In re Crooked Creek Corp.), 533 B.R. 274 (Bankr. N.D. Iowa 2015)

In this procedurally complex adversary, a feed supplier filed a motion for sanctions against a bank for failure to disclose information regarding the bank's dealings with the guarantors of the debtor. The bankruptcy court found that the failure to disclose was not simply a mistake and that the feed supplier was harmed in the form of additional attorneys' fees. The court awarded the feed supplier its fees for the willful failure to comply with the court's prior orders. For additional discussion regarding the opinions in this case, see Claims and Objections, Secured Claims, *supra*.

Fischer v. Great Western Bank (In re Fischer), 501 B.R. 346 (B.A.P. 8th Cir. 2013)

In this bankruptcy case, the creditor and debtors entered into a stipulation approved by the bankruptcy court which provided that the creditor would file an amended financing statement releasing its security interest in livestock and crops after the debtors sold certain assets and distributed the proceeds. The court approved the stipulation with a generic order which did not incorporate the terms of the stipulation.

The debtors satisfied their obligations under the stipulation, but the bank did not immediately file the amended financing statement causing the debtors to be unable to get crop financing. The creditor eventually filed the amended statement, but the debtors filed a motion for contempt. The bankruptcy court denied the motion, finding that the creditor's negligence did not rise to the level of contempt. The debtors appealed, asserting that bankruptcy court improperly applied the legal standard, as negligence is not a factor in contempt proceedings. The appellate panel affirmed the decision of the bankruptcy court on the grounds that the order did not impose any operative commands or express prohibitions on the parties.

Ninth Circuit

Bradford v. Bank of Eastern Oregon (In re Bradford), Case No. 1:18-cv-00397, 2019 WL 96221 (D. Idaho Jan. 3, 2019)

In this case, the debtors filed for relief in chapter 12 but failed to confirm a plan; the bankruptcy court *sua sponte* scheduled a dismissal hearing shortly thereafter. While the case was pending, the debtors filed an adversary proceeding against their main creditor alleging various state law grounds for recovery. They also moved the district court to withdraw the reference to the bankruptcy court under both mandatory and permissive withdrawal.

With respect to mandatory withdrawal under 28 U.S.C. § 157(d), the district court held that withdraw was required only where there were issues under title 11 and other *federal law*. The debtors' complaint was based in state law. With respect to the bankruptcy court's constitutional authority to hear the state law claims, the district court held that the bankruptcy court lacked the authority to hear the adversary. That holding, however, did not require immediate withdrawal of the reference. Rather, the district court could delay withdrawal of the reference until the bankruptcy court certifies that the case is trial-ready.

With respect to permissive withdrawal, the district court found that the bankruptcy court should retain the reference to promote the efficient use of judicial resources because of "the familiarity the bankruptcy court had with the debtor, the bankruptcy estate, and the debtor's relationship and dealings with the defendant."

In re Va Bene Trist, LLC, Case No. 2:17-bk-00993, 2017 WL 4862743 (Bankr. D. Ariz. Oct. 26, 2017)

In this motion for relief from stay, the court had to determine whether an Arizona statute of limitations was tolled during the debtor's first bankruptcy case. The court determined that the SOL was tolled during the prior case, so the relief from stay should be granted.

The court recognized that state and federal courts differ on the interpretation of § 108(c)(1) when the SOL runs before a bankruptcy stay is lifted – some courts consider that provision to provide for a day-for-day tolling, while others interpret it as providing a 30-day grace period. Because the Ninth Circuit interpreted that provision as providing only for a 30-day grace period, the bankruptcy court had to determine whether other state law provided an independent basis for tolling. Under state law, SOLs are tolled day for day during the period in which a bankruptcy stay is in place. The court denied a motion to alter or amend this ruling at 2018 WL 770357, noting that even if the SOL had run, it would only bar collection of the interest only charges and payments due after six years after the first acceleration of the note, not collection of the underlying debt.

Kimmes v. D.L. Evans Bank (In re Kimmes), 528 B.R. 436 (D. Idaho 2015)

In this adversary, the debtor appealed the bankruptcy court's denial of his motion to amend his complaint and the factual findings of the bankruptcy court. The appellate court affirmed the lower court, agreeing that the debtor's motion to amend his complaint to expand the relief requested on the first day of trial was properly denied because of prejudice to the other party.

Additionally, the appellate court found no error in the bankruptcy court's factual findings regarding whether the bank breached an oral agreement promising certain financing.

In re Ricks, Case No. 12-02091, 2012 WL 4017952 (Banks. D. Idaho Sept. 12, 2012)

In this case, a creditor moved to have the bankruptcy case re-assigned to a judge that had presided over the debtor's prior cases and adversaries to promote judicial economy and the best interest of creditors and the estate. The court declined to reassign the case because neither of the generally accepted exceptions to random assignment of cases applied in this case.

Beal v. USDA, Case No. CV-10-0257, 2012 WL 3113181 (E.D. Wash. Jul. 31, 2012)

The debtors brought an action against the USDA in district court to reduce the amount owed to the USDA because of the USDA's failure to assist the debtors in maximizing the income-generating potential of their farmland. The district court dismissed the action holding that the bankruptcy court should hear the claims associated with the debtor's inability to comply with their chapter 12 plan and the court of federal claims should hear the other claims of the debtors.

Tenth Circuit

In re Duensing, Case No. 18-10201, 2019 WL 937159 (Bankr. D. Kan. Feb. 22, 2019)

The debtors in this case proposed a chapter 12 plan which provided that payments made on their student loans during the plan would be applied to principal rather than interest. The court held that such a modification of the student loans was permissible under § 1222(b). The court, however, specifically stated that the debtors would be personally liable for all post-petition interest.

The proposed plan also provided that after making payments on secured and unsecured claims through the trustee for five years, the assets of the estate would be transferred into a creditors' trust from which the debtors would make payments on unsecured debt for another five years. At the end of this period, the assets of the trust would revert to the debtors. The debtors proposed the creditors' trust because they were required to pay all creditors in full but were unable to do so within the five years provided for in the bankruptcy code. Although the court held that nothing in chapter 12 or title 11 prevented the creation of a creditors' trust, the effect of the creditors' trust was to extend the plan term beyond five years, so the plan could not be confirmed.

Eleventh Circuit

In re Petrano, Case No. 13-10052, 2013 WL 6503672 (Bankr. N.D. Fla. Apr. 16, 2013)

In this case, the bankruptcy court determined that the Federal Rules of Bankruptcy Procedure allowed the appointment of a guardian ad litem only where a debtor was incompetent and not otherwise represented. Given the facts of this case: namely, the debtor's participation in the case and the presence of a co-debtor, the court declined to find the debtor incompetent. Instead, the court stayed the current case to allow the debtors an opportunity to seek a finding of incompetence in a more appropriate court.

THE AUTHORS OF "INTRODUCTION TO CHAPTER 12 PRACTICE" AND "UNDERSTANDING GENERAL PRINCIPLES OF FARM ECONOMICS OPERATIONS: BUSINESS PLAN AND PROJECTIONS FOR A CONFIRMABLE CHAPTER 12 PLAN " HAVE ALSO GRANTED THE PANELISTS PERMISSION TO USE AND DISSEMINATE THEIR MATERIALS FOR "TOO MUCH FARM DEBT? A PRIMER IN CHAPTER 12 BANKRUPTCY."

INTRODUCTION TO CHAPTER 12 PRACTICE

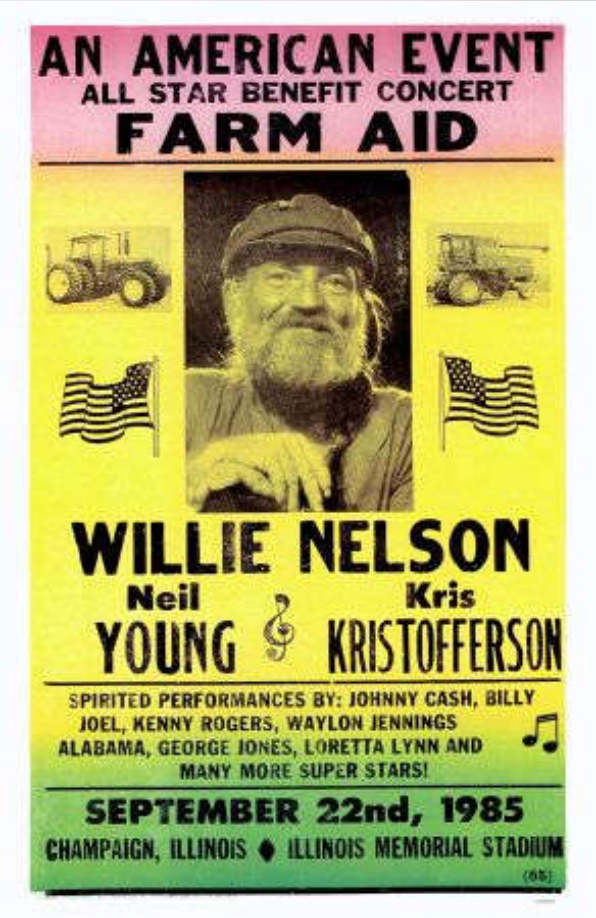
MODERATOR- JAN M. SENSENICH, CHAPTER 12 TRUSTEE, DISTRICT OF VERMONT

NICHOLAS HAHN, GODFREY & KAHN, SC, GREEN BAY, WI

BRITTANY S. OGDEN, QUARLES & BRADY, MADISON, WI

HISTORY OF CHAPTER 12 BANKRUPTCY

- The farm crisis of the late 1980s gave birth to chapter 12 of the Bankruptcy Code.
- Falling land values and grain prices combined with soaring interest rates and tightening credit gave rise to one of the worst farm crises of the 20th century.
- Farmers responded by driving their tractors to Washington, D.C.
- Congress responded in 1986 by giving farmers a reorganization tool of unprecedented power and efficiency, and in 2005 made chapter 12 a permanent part of the Bankruptcy Code



THE NEW FARM CRISIS

DOWNWARD CYCLE IN FARMING

- Farming income reached high levels in 2010-2011.
- But from 2012-2016 farming income fell 34 percent, more than $50 billion, after adjusting for inflation.
- Farm-sector debt has reached levels near the peak levels of the late 1970s and early 1980s.
- Rising interest rates coupled with reduced income and increased debt suggests that some farmers might not be able to repay debt in future years.

THE NEW FARM CRISIS

FEDERAL RESERVE WARNING

- In November 2018 the Federal Reserve Bank of Minneapolis warned of rising Chapter 12 bankruptcies, used by family farmers to restructure debt.
  - "Over the 12 months ending in June 2018, 84 farm operations in Ninth District states had filed for chapter 12 bankruptcy protection—more than twice the level seen in June 2014."
  - The Fed said that the strain of low commodity prices compounded by recent tariffs "is starting to show up not just in bottom-line profitability, but in simple viability."
  - Obtained at https://www.minneapolisfed.org/publications/fedgazette/chapter-12-bankruptcies-on-the-rise-in-the-ninth-district.

CHAPTER 12: SIMPLER AND MORE POWERFUL THAN EITHER CHAPTER 11 OR 13

- Chapter 12 and 13 similarities
  - ✓ Usually administered by standing trustee.
  - ✓ Proceeds under trustee supervision until completion of the plan.
  - ✓ Can restructure secured debts using the *In re Till* interest rate.
  - ✓ Debtor receives a discharge upon completion of the plan.

CHAPTER 12: SIMPLER AND MORE POWERFUL THAN EITHER CHAPTER 11 OR 13

- Chapter 12 Advantages over chapter 13
  - ✓ Tax advantages: § 1232 allows a deprioritization of taxes due on the sale of assets as part of a confirmed plan, allowing farmers to "right-size" their operations and avoid large capital gains taxes that would otherwise be due.
  - ✓ Can modify mortgages on principal residences by bifurcating undersecured claims under § 506 of the Bankruptcy Code, adjusting interest rates, and even re-amortizing mortgage loans beyond a 30-year period.
    - Compare 1222(b)(2) to 1322(b)(2):
      - 1222(b)(2) "the plan may--modify the rights of holders of secured claims, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims."
      - 1322(b)(2) "the plan may--modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

CHAPTER 12: SIMPLER AND MORE POWERFUL THAN EITHER CHAPTER 11 OR 13

- Chapter 12 Advantages over chapter 13
  - ✓ Can modify secured debts with much greater flexibility. Compare 1225(a)(5) to 1325(a)(5):

REQUIREMENTS	CHAPTER 12	CHAPTER 13
Secured creditor options: accepts plan, cram down or surrender	Yes	Yes
Hanging paragraph with 910 and 365 day restrictions on cram down	No	Yes
Distributed through plan via equal monthly amounts	No	Yes
Monthly amounts must be enough to provide adequate protection	No	Yes
Lienholder retains lien until PMT in full or discharge	No	Yes

CHAPTER 12: SIMPLER AND MORE POWERFUL THAN EITHER CHAPTER 11 OR 13

- Chapter 12 Advantages over chapter 13
  - ✓ Plan is not due until 90 days after the case is filed.
  - ✓ Plan payments not due until after confirmation.
  - ✓ Plan payments can be structured around farm's cash flow cycles.
  - ✓ Confirmation must occur within a specific time frame.
    - ✓ Concluded no later than 45 days after the filing of the plan. See 11 U.S. Code § 1224.

CHAPTER 12: SIMPLER AND MORE POWERFUL THAN EITHER CHAPTER 11 OR 13

- Chapter 12 Advantages over chapter 13 BIG POINTS SUMMARY
  - Chapter 12 allows the repayment of secured creditors, if appropriate, over a period longer than the life of the chapter 12 plan even though the original indebtedness is not so amortized.
    - See11 U.S.C. § 1222(b)(9)
  - Chapter 12 allows modification of the rights of holders of security interests in all real and personal property without regard to its residential nature, so that secured creditors collateralized by the farmstead can be reamortized without the need for cure of default.

ELIGIBILITY

- Pursuant to § 109 (f), "Only a family farmer or family fisherman with regular annual income may be a debtor under chapter 12 of this title."
- Farming: Activities involving the tillage of soil and raising of crops, raising of livestock or poultry, or livestock products in an unmanufactured state

TESTS FOR ELIGIBILITY

FAMILY FARMER (INDIVIDUAL)

- Debts are not over $4,153,150 (as of 2018);
- At least 50 percent of debt is farm-related debt (not including home mortgage, unless the mortgage is a farm mortgage); and
- More than 50 percent of the debtor's income is from farming (measured by the previous tax year or the two tax years before the previous tax year)

FAMILY FARMER (CORPORATION)

- At least 50 percent of shares owned by one family or by one family and farming relatives;
- More than 80 percent of the value of the corporate assets consists of assets related to farming;
- Debts are not over $4,153,150 (as of 2018);
- At least 50 percent of debt is farm-related debt; and
- Corporation is not publicly traded;

TESTS FOR ELIGIBILITY

FAMILY FISHERMAN

- Debts are not over $1,924,550.00 (as of 2018);
- Must consist of commercial fishing operation.
- Similar to requirements for Family Farmers.

ELIGIBILITY

- Definitions found at:
  - "Family farmer" in § 101(18),
  - "Family fisherman" in § 101(19A),
  - "Family farmer with regular annual income" in § 101(19),
  - "Family fisherman with regular annual income" in § 101(19B),
  - "Farming operation" in § 101(21).

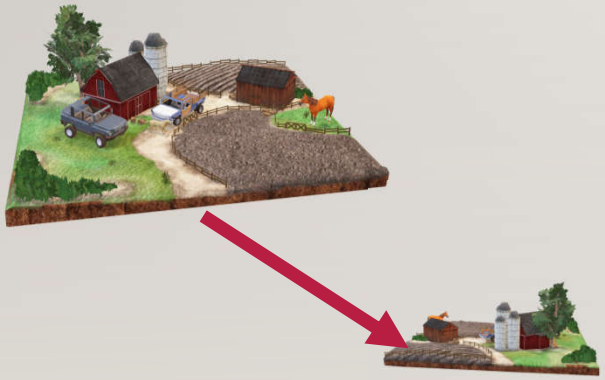
DIFFERENT TYPES OF CHAPTER 12 PLANS

- Traditional reorganization

- Goals:
  - Preserve farm's nature and scale
  - Reduce debt service
  - Increase efficiency
  - Return to profitability
- Need stems from a specific event that disrupts finances
- Questions
  - Is the farm still viable with reorganization?
  - What is production cost vs market price?

DIFFERENT TYPES OF CHAPTER 12 PLANS

- Downsizing and conversion



- Goals:
  - Reduce scale of operation
  - Converting to a different or more diverse production base
    - E.g. Dairy farm to a crop farm
  - Return to profitability
- Carefully assess resources of the farm and what changes can reduct debt and increase profitability.
- Questions
  - Will the surrender of unnecessary equipment, land or livestock increase profitability?
  - Will changing from a strictly wholesale market (like milk) to a more diversified market (like a farmer's market) be effective?

DIFFERENT TYPES OF CHAPTER 12 PLANS

- Sale

- Goals:
  - Save the home but sell farmland, property, livestock
  - Debtor maintains control over marketing and sale
  - Take advantage of special tax rules on capital gains
- Debtor no longer wishes to work the farm
- Question
  - Will the plan be better than a liquidation in a chapter 7?

THE MOST POWERFUL — YET MOST UNDERUTILIZED — CHAPTER OF THE CODE

- According to the 2012 census of agriculture, there were approximately 2 million farms in the U.S.,yet for the 12-month period ending Sept. 30, 2018, only 468 chapter 12 cases were filed.
- Why?
  - Many farmers and fisherman don't know chapter 12 exists.
  - Most bankruptcy attorneys tend to avoid chapter 12 and try to shoehorn the case into a 7 or 13.

THE MOST POWERFUL — YET MOST UNDERUTILIZED — CHAPTER OF THE CODE

- If you can do a chapter 13 you can also file a chapter 12.
- Discuss chapter 12 options with local FFA or other groups to get the word out that there are options for farmers and fishermen.
- Attorneys fees may be significantly higher than found in chapter 7 or 13 cases.

Understanding General Principles of Farm Economics Operations: Business Plan and Projections for a Confirmable Chapter 12 Plan

Jan M. Sensenich
Chapter 12 Standing Trustee
District of Vermont
P.O Box 1326
Norwich, Vermont 05055

Ronda J. Winnecour
Chapter 12 Standing Trustee
Western District of Pennsylvania
P.O. Box 2587
Pittsburgh, PA 15222

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The Fundamentals of Farm Economics

A Look at the Basic Economics of Farm Plan Feasibility in the Context of Chapter 12 Reorganizations

Jan M. Sensenich
Chapter 12 Standing Trustee
District of Vermont
P.O. Box 1326
Norwich, Vermont 05055

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The Fundamentals of Farm Economics

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Introduction

Perhaps one of the greatest challenges to discussing the economics of farming is the boundless diversity and variety of farms. The Bankruptcy Code defines "*farming operation*" as including: "farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock and production of poultry or livestock products in an unmanufactured state."[1] Both this somewhat awkward definition (which includes the defined word "farming" twice) and the general notion of what a farm is allows for a breathtaking array of different types of operations ranging from a tiny herb farm to a sprawling cattle ranch. Even in the little district of Vermont, a small state to begin with which is over 80% forested, this trustee has seen a diversity of farm cases ranging from mostly dairy farms to trout farms, Christmas Tree Farms, vegetable farms, fruit orchards and farms raising everything from alpacas to zucchinis. Some farms have regular income cycles which produce income over the year (such as dairy farms) while other farms have production cycles that only produce income seasonally. The extreme example of the latter is the Christmas tree farm which essentially produces all of its income in the few weeks following Thanksgiving, while expenses of the operation extend throughout the year. With this broad range of businesses we call farms, how does one distill any useful approach to discussing farm economics and plan feasibility? As I see it, the heart of this task is to look beyond the specifics of farms to find the unifying principles which apply to all farming operations regardless of size, seasonality or geography.

Projecting Inputs and Outputs

What are these unifying principles? Let's start with the basics. All farms produce something. Whether it is milk, apples, beef, nursery stock, grain, fiber, vegetables or livestock there is some output which will have to be marketed and which will generate income. That income will be half of the feasibility equation and calculating that income will be based on two factors which a plan will have to project. Those factors are quantity and price. In some cases there is a third factor- quality. In dairy farming for example the price for a specific load of milk may also be based on its butterfat or protein content or other variables that a dairy may measure. Generally however the primary variables are production and price.

[1] 11 U.S.C. § 101 (21)

The other thing that all farms have in common is that there are costs associated with producing its products. Those include the fixed costs are independent of the amount of production and variable costs such as labor, energy, feed, fertilizer, repairs and veterinary bills to name a few, will vary in some proportion to the level of production. Obviously those costs become very industry specific depending on the type of farm. A dairy farm is going to have entirely different costs than a stock farm or an orchard, although they will all have costs for labor and energy. Farms raising crops will have expenses for fertilizer and seed, while farms raising livestock will have costs for feed, typically grain and some mixture of hay or silage. Some farms may raise their own feed, such as hay and corn while for other farms feed is purchased.

Inputs-

One of the key challenges in evaluating any farm reorganization plan is to understand how the farm is operated and what its inputs are. Once the inputs are identified, the next step is to determine how much of each input will be needed to support the farm's projected output and then determine what the projected price of that input will be. So the key functions here are to *identify, quantify* and determine a *cost* for each input.

Identifying the inputs for a farm requires a close look at its expense records. What has the specific farm been spending money on during its operation? Obviously the fact that a farm is in Chapter 12 may raise some questions whether the farm has been properly funding its inputs. For example- has a particular dairy herd been properly fed and had sufficient veterinary care? Or are these areas where shortcuts have been taken? The health of the herd and milk production records will be revealing here. If the cull rate is low and average per cow production is good that would seem to indicate a healthy herd. On the other hand, high cow losses to disease and low production numbers may indicate that nutrition may not have been optimal or veterinary care may have been insufficient or both. What a farmer has been spending on inputs is a starting point for the inquiry but may not be conclusive as to what the optimal levels are. What can shed additional light on issues such as this is whether a farmer has professional advice on decisions like herd nutrition and whether the farmer follows a professionally developed nutrition plan for the herd. Certainly if a farmer has a professionally prescribed nutrition plan, and can demonstrate that historic feed expenses are based on that nutrition plan, then there is some useful evidence of what the appropriate quantity of feed is, assuming the herd size remains constant. Dairy herd nutrition is a great example of both how important *and* how complex evaluating inputs can be. First, feed, specifically grain, is one of the costliest inputs a dairy farmer has. How much grain a farmer is proposing to use and the cost of that grain is critical. Even once the quantity is determined, projecting a price for that grain years into a plan is necessary to support an argument for plan feasibility. The commodity futures market is one source for making predictions on future cost of commodities both on the input side (like grain and fuel for dairy farmers) as well as for farm outputs (which may also be grain for a wheat farmer and milk for a dairy farmer).

Some input costs which are common to almost any farm and beyond labor costs (which may be zero for a very small family farm that is run by family members) are the costs of energy-typically fuel and electricity. The starting inquiry for how much energy a farm uses would be historic records. Is there any reason to believe a farm's costs for fuel will go up or down? Is production projected to increase? If so, is a commensurate increase in fuel consumption factored into that increase? Are there new efficiencies planned such as the acquisition of more efficient equipment? How are changes in fuel and electricity projected? Once again, the futures market may give some insight into whether petroleum products such as diesel fuel are expected to rise or be stable at least over the short run.

The same type of analysis as described above would apply to all of the farm's input costs, whether seed, fertilizer, pesticides or supplies. For each one there should be some historic evidence of quantity used and a history of the price paid. Whether projected costs for each of these items is reasonable will depend on whether a farmer is projecting higher levels of production.

Outputs

Getting a handle on a farm's inputs and their projected costs is only half of the feasibility equation. The other half is projecting the farm's production and prices that the production is likely to bring. The first question of course is how much? What is the farmer projecting to produce and is that projection reasonable? Once again, the place to start would be historic records. Is the farmer's estimate close to what has been produced in the past? If it is greater is there an explanation of why production will increase? Are more acres being planted? Will more cows be milked or is there a reason to believe average per cow production will increase in the future? The burden here would be on the farmer to show what is being changed to increase production. If more acres are being planted or more cows being milked are the variable costs associated with that production also being increased? If more cows are being milked then are veterinary costs and feed costs increased proportionately? If more acres are being planted are seed, fertilizer, pesticide and fuel costs being increased proportionately?

Once there is a quantity calculated for farm production a price needs to be projected to turn that production into farm income. Whether that product is milk, beef, poultry, pork, soybeans, wheat or other commodity, the futures market would provide a starting point for determining whether the projected price is reasonable. However pork is not always just pork and what prices a particular farmer may get for a particular product has to do with particulars of the product and where and when it is marketed. Pork is a great example of this. There is the futures market for pork which is essentially based on a wholesale market for a commodity and then there is what price a farmer might get in a particular retail market to which she may have access. Clearly, a Vermont farmer selling Vermont organic, grass fed pork at a New York City-Greenwich Village farmers' market is going to get a price that will not only vastly exceed any wholesale price, but also most retail supermarket prices for pork. So in order to assess what a reasonable price is, one has to know both the specific product (organic vs. conventional) and the specific market- wholesale, retail, specialized, farmers' market, etc. Some farmers may even direct-market frozen meat by mail order, internet or local farmer's market. Once again, how the farmer has marketed the product and what prices have been is a starting place and may be the best indication of price when the products are specialized and locally marketed. Products that are more generic, perishable and on a competitive wholesale market, such as bulk milk, are going to be dictated by a competitive and often fluctuating wholesale market price.

Accessing and Assessing the Information

In a sense, most Chapter 12 cases are not substantially different than complex Chapter 13 business cases. To be sure, there are significant advantages for debtors, such as the vastly greater flexibility in Plans, both in terms of when plans must be filed, when payments start and how secured debt, such as farm mortgage debt may be modified. Yet farm cases do have unique challenges stemming from how diverse farms can be- some producing income all year, some once a year and some falling in between those extremes. Due to this, there is no substitute for a trustee to be proactive in learning the specifics of each farm as soon as a case is filed. The sources of that information are the obvious tax return, but beyond that, specific types of farms should have more detailed records showing production levels and expenses over the years. Becoming familiar with each type of farm and each farming operation is necessary if the trustee is going to be in any position to evaluate a Chapter 12 Plan.

Most trustees have some type of standard questionnaire they use to gather some of that information. There is a standardized version that U.S. Trustee offices sometimes furnish when a case is filed along with monthly report forms. This questionnaire combined with the last several years of tax returns is a starting point. Beyond that each type of farm will likely have its own expense and production records which should to some degree tell the story of how the debtor arrived in Chapter 12. Sometimes there is a clear, precipitating cause- disease or a stray voltage problem in a dairy herd, weather induced crop failure for a crop farmer or the costs of transition from conventional to organic. Sometimes the prices a debtor gets for what the farm produces is simply below the costs of production. Some farms can weather such a situation for a period of time, but eventually that situation will force a farmer to undertake some kind of reorganization.

Once a trustee has had a chance to review the history of the farm and get a sense of how it came under enough financial stress to necessitate the filing of the case, the obvious question is what will change going forward? Has the root cause or causes of financial stress been addressed? Is it likely to repeat? Have there been changes in how the farm is managed that will help minimize such problems going forward? If the problem is stray voltage is it repaired and is the herd recovering? If there was a disease problem has it been addressed and has the farm implemented procedures to avoid a recurrence? If there were issues in diet or feed have they been addressed? Generally most good Chapter 12 Plans provide some background as to what factors led to the filing and provide some information of why operations going forward will be more successful. The challenge for the trustee is to be able to test the validity of that information using the historical information and the projections provided to support the plan.

Emerging Trends

The early 21st century has seen the emergence of new alternatives to the traditional model of how farms market their products. Some of these alternatives to the traditional model of farmers only selling wholesale to distributors or stores involve marketing directly to the public either by direct sales or through farmers markets or by using the Community Supported Agriculture model. The rise of demand for organically produced food has also been a factor in the growth of these alternatives as more consumers take an interest in how their food is produced. In addition to these alternatives the concept of agritourism has emerged as a way for tourists interested in learning about food production and farm life to have a unique vacation experience while providing supplementary income to a farm family.

Community Supported Agriculture and the Farm-to-Table Movement

In many parts of the country there is a renewed interest in the value of locally produced food. Both restaurants and retail food sellers are offering food which is locally sourced and either organically or sustainably grown. This trend provides opportunities for farmers to partner with restaurants and food retailers desiring to market food which is locally grown. Food which is locally sourced tends to be fresher than food shipped great distances. Restaurants and stores interested in marketing locally produced food can provide an alternative market for farmers.

Local farmer's markets also provide opportunities for small farmers to directly market their produce. While the farmers market is by no means a new concept, it is growing in many urban areas and small towns. Being part of a local food movement may provide alternative markets for farmers to provide value added products as opposed to only selling to food wholesalers.

Part of the local food movement has seen the growth in what is generally referred to as ***community supported agriculture (CSA).*** This concept was introduced into the U.S. from Europe in the mid-1980s. It seems to have originated in Switzerland and Japan in the 1960s. The concept behind the CSA is that consumers sign up to provide a specific amount of support to a farm and in return will receive, over a growing season, a share of the farm's production. This has many advantages to the farmer as well as the share-holder, consumer. It helps the farmer by providing needed cash at the commencement of the planting season when costs are high for labor, seed and supplies to get planting underway and before there are any crops to sell. This timing allows farmers to get planting and early season work done without having to borrow against future crops- helping cash flow. It also helps farmers by allowing them to tailor what they provide to their shareholders based on how crops perform. With a CSA share, a mix of produce is provided but not necessarily a specific quantity of any one item. Thus if a variety of tomato does not do well and another provides a bumper crop, more of the plentiful one can be provided. This allows the farmer to satisfy her or his commitment based on how each of the crops actually perform. Shareholders may get more kale and less spinach one year and more spinach and less kale the next depending on growing conditions. This way the consumer shareholder also shares a degree of the risk inherent in farming. This arrangement also allows consumers to get a steady supply of fresh vegetables or meat at a generally better than market price while having a connection with the farm on which the food is grown.

Agritourism

The concept behind agritourism is that there is a market for more than just the food that farms grow. Many consumers are interested in becoming involved in how their food is grown. This involvement can take many shapes from the simple pick-your-own vegetable or berry farm or fruit orchard to farms which host and feed guests from an overnight stay to a longer vacation. This concept has been around in many countries for a long time but seems to be a growth industry in the U.S., Canada and Australia.

Some farmers provide lodging on the farm at a particular rate and then allow guests to reduce their bill up to a certain maximum by working on the farm. A November, 2007 New York Times article, *Down on the Farm With Your Sleeves Rolled Up* is included in these materials and provides more detail and some examples of how agritourism is providing recreational and educational opportunities to consumers at the same time as it helps to diversify family farm incomes.

Local extension services are excellent resources for information on local developments in all of these new trends. An example of this, the University of Vermont Extension Service has a Vermont Agritourism Collaborative which provides educational materials to assist farmers in evaluating their potential for exploring agritourism. This resource may be found at www.vm.edu/vtagritourism .

From agritourism to community supported agriculture there are growing opportunities for farmers to tap into consumer's interest in how their food is grown. For some family farms these developments may provide opportunities to diversify farm income.

Conclusion

The economics behind farming is as diverse as the staggering array of farms. Farming is really a range of distinct industries ranging from small cottage industries to commercial agri-business. What farms have in common, large and small, is that they consume labor, energy and raw materials to produce things we eat and use. One of the central tasks of evaluating farm feasibility is gaining an understanding of the nature of a farm's inputs and outputs and finding a way to evaluate how those factors are being estimated, what costs and prices are being used in plan projections and to evaluate whether those estimates are reasonable. There is a wide variety of publicly available resources, notably government statistics and futures markets that can provide a starting point for this evaluation. However, ultimately what estimates will be reasonable for any one farm may be uniquely based on exactly what it is producing and how, when and where it will be marketed. Gaining a grasp of that information is the first step for a trustee to be able to make an informed recommendation on confirmation of a farm reorganization plan.

The times we are living in are seeing both challenges and opportunities for family farms. Often, the wholesale prices farmers have to live with dip below the costs of production, making it difficult for small farms to survive, let alone thrive. At the same time, the 21st century is seeing an increase in consumers' interest in how our food is produced. From organically grown crops to humanely and sustainably raised meat, consumers are paying greater attention to where food comes from and how it is raised. This local food/ farm-to-table movement has the potential, through direct marketing and niche marketing, to give small family farms an edge. From offering CSA farm shares to the public, inviting consumers to invest in a farm, to providing opportunities for agritourism or direct marketing value added products, small farms can take advantage of this new market to diversify their incomes and widen their markets.

Farm Economics and the Web

Ronda J. Winnecour'
Chapter 12 Trustee
Western District of Pennsylvania
P.O. Box 2587
Pittsburgh , PA 15222

Farm Economics and the Web

Ronda Winnecour, Chapter 12 Case Trustee, Western District of Pennsylvania

Links that may help:

https://www.nass.usda.gov/

This is the United States Department of Agriculture National Agricultural Statistics Service.

http://www.ers.usda.gov/data-products/farm-income-and-wealth-statistics/data-files-us-and-state-level-farm-income-and-wealth-statistics.aspx

This is the latest data concerning the farm income forecast, including the forecasts for the income projection for the U.S. farm sector, value added, cash receipts and value of production, government payments, farm production expenses, and the balance sheet. Included are historical U.S. and State-level farm income and wealth statistics. The Historical/State data covers the topics of net value added and net farm income, net cash income, cash receipts and value of production, government payments, farm production expenses, and the balance sheet.

This data is released three times a year: in February, August, and November. The U.S.-level calendar-year forecast is first provided in February, and is updated in August and November. The August release converts the prior year's farm income and balance sheet forecasts to estimates, adds State-level farm income estimates, and revises previous years' estimates. The November release updates the current year's forecast.

http://www.ers.usda.gov/data-products/farm-income-and-wealth-statistics/documentation-for-the-farm-sector-financial-ratios.aspx

The Economic Research Service’s Farm Sector Financial Ratios report includes a series of financial ratios designed to measure the financial standing of the agricultural sector. Consistent with the Farm Income and Wealth Statistics data product, ratios are calculated using aggregated sector level data. (We use aggregate sector-level data rather than reporting summary statistics for farm-level data. For a discussion of the differences, see Ahrendsen and Katchova, 2012) The ratios can be used to conduct financial analysis of the agricultural sector in order to examine the sector’s present financial position and the sector’s financial performance over time. Financial position refers to the sector’s financial standing at a given point in time and compares asset, debt, and equity values. In contrast, financial performance refers to how well the sector utilized its assets during a given time period. Financial performance measures include data from the income statement and balance sheet. Since solvency ratios only include data from the balance

sheet, they are measures of the sector's financial position at a point in time. The efficiency, liquidity, and profitability ratios are used to analyze the sector's financial performance for a calendar year.

In order to report financial ratio statistics consistent with those commonly used in the financial profession, ERS' Selected Financial Ratios report uses Farm Financial Standards Council (FFSC) financial ratio definitions unless otherwise noted. The FFSC report includes recommendations on "Universal Financial Criteria and Measures," which covers the estimation and use of financial ratios for agribusiness. The FFSC standards outline definitions, formulas, interpretations, and limitations of many widely used financial measures. By following industry standards, the sector financial ratio calculations can be used for both historical analyses at the sector level, and as a benchmark for comparing farm businesses to the sector, where applicable.

The financial ratios reported by ERS are calculated using data from the balance sheet of the agricultural sector and the farm sector's income statement. For further information on the sources and methodology used to create these data, please see the Farm Income and Wealth Statistics general documentation and documentation for the farm sector balance sheet.

This documentation includes the estimation methodology used and background information on the financial ratios calculated as part of the Financial Ratios report. There are four main sections corresponding to the primary groups of financial ratios recommended by the FFSC and reported by the Farm Financial Ratios report—Efficiency Ratios, Liquidity Ratios, Profitability Ratios, and Solvency Ratios. Each section provides a brief overview of the aspect of farm sector financial position and/or performance being measured, the specific methodology and data used, and any limitations in interpreting the resulting financial ratios.

http://www.ers.usda.gov/publications.aspx

This is a list of useful sources sorted by topic, author, date, and publication.

http://www.ers.usda.gov/data-products/commodity-costs-and-returns.aspx

Cost and return estimates are reported for the United States and major production regions for corn, soybeans, wheat, cotton, grain sorghum, rice, peanuts, oats, barley, milk, hogs, and cow-calf. The history of commodity cost and return estimates for the U.S. and regions is divided into three categories: Current, Recent, and Historical estimates. Cost-of Production Forecasts are also available for major U.S. field crops.

http://www.ers.usda.gov/data-products/farm-household-income-and-characteristics.aspx

This data product presents the latest household income forecast and estimates for principal operators of U.S. family farms. The forecast was updated February 9, 2016. For a

discussion of the current conditions and trends in farm household income, see the Farm Household Well-being topic.

Tables also cover data pertaining to beginning, socially disadvantaged, and limited-resource farmers. For a discussion of the current conditions and trends concerning these groups, see the Beginning & Disadvantaged Farmers topic.

http://www.ers.usda.gov/data-products/arms-farm-financial-and-crop-production-practices/arms-data.aspx

This is the Economic Research Service (ERS) Agricultural Resource Management Survey (ARMS) Tailored Reports. Tailored Reports allow the public user to view and download a variety of statistics summarizing the ARMS data. The user can select from several menus to create custom reports on topics ranging from the farm balance sheet to pesticide application methods. A text-specific data dictionary is provided. The tailored reports tool is segmented in two broad sections:

- Farm Structure and Finance
    - Structure and financial status and performance of U.S. farm operators, their households, and farm businesses. Data was last updated December 1, 2015, adding data from the latest ARMS survey (2014) and revising the 2013 data available in the reports.
- Crop Production Practices
    - Status and trends in crop production practices for several field crops. Data was last updated April 23, 2015 reflecting the 2013 survey.

ERS Data Products Relying on ARMS Data:

- Costs and Returns Reports
    - Production costs and returns for major field crop and livestock enterprises.
- Farm Household Income and Characteristics
    - Statistics on the finances and characteristics of the households of principal operators of family farms.
- Farm Income and Wealth Statistics
    - Farm sector income, including net value added, net cash income, cash receipts, government payments, farm production expenses, and the balance sheet.
- ERS Special Tabulations of ARMS Data

NASS Summary Tables and Charts:

- Agricultural Chemical Usage reports
- Farm Production Expenditures Annual Summary report

- Farm Production Expenditures charts
- NASS Special Tabulations of ARMS Data
- QuickStats for ARMS (example)

https://www.nass.usda.gov/Charts_and_Maps/Agricultural_Prices/

This is a compilation of indexes of agricultural prices:

- All Farm Annual Average Index by Year, US
- Crop Farm Index by Quarter, US
- Livestock Farm Index by Quarter, US

Prices Paid:

- Indices for All Items and Production Items by Month, US
- Indices by Farm Type and Month, US
- Indices, Annual Averages for Production, Interest, Taxes, and Wages by Year, US
- Indices by Origin and Month for All Production Items, US
- Indices by Non-farm Origin and Month for Chemicals, Fertilizer, and Fuels, US
- Indices by Non-farm Origin and Month for Machinery & Supplies and Repairs, US
- Indices by Farm Origin and Month, US

Prices Received:

- Indices for Agricultural, Crop, and Livestock Production by Month, US
- Indices for Fruit & Tree Nut and Vegetable & Melon Production by Month, US
- Indices for Feed Grains, Food Grains, and Oilseed Production by Month, US
- Indices for Dairy, Meat Animal, and Poultry & Egg Production by Month, US
- Poultry Prices Received by Month, US
- Cattle Prices Received by Month, US
- Corn Prices Received by Month, US
- Cotton Prices Received by Month, US
- Hog Prices Received by Month, US
- Milk Prices Received by Month, US
- Soybean Prices Received by Month, US
- Wheat Prices Received by Month, US

http://www.ctre.iastate.edu/marketsize/

The U.S. Food Market Estimator is designed to help users determine the potential demand, by county in the United States, for more than 200 different food items. This is an expansive tool, using data collected each year by the U.S. Department of Agriculture's Economic Research Service (ERS).

The tool provides information for 204 food products, including various dairy and meat products, fruit, vegetables and grains. Users select how they want results to be shown: by number of servings, pounds produced, truckloads transported, even cubic feet of warehouse space needed to store a particular product. Products can be shown individually, or as groups of products at key stages of the food supply chain. Results can be adjusted to reflect a particular market share, or the unit of measure changed from pounds to other units in order to suit a variety of needs such as number of servings, truckloads per day or cubic feet of warehousing needed each week.

http://www.start2farm.gov/categories/learn-how

This site has resources on how to start a farm plan, farm management, effective marketing, how to expand a farm, and information for people new to farming. Each topic has its own category with multiple resources listed.

http://www.ffsc.org/

In January 1989 a "Farm Financial Standards Task Force" was created with the mandate to develop and publish standardized Financial Guidelines for Agricultural Producers. The Farm Financial Standards Task Force was incorporated in March 1993, as a "Nebraska non-profit corporation" and on November 12, 1994, the corporate name was changed to Farm Financial Standards Council to reflect more appropriately a permanent organization. The guidelines can be purchased here.

http://www.beginningfarmers.org/

This site is primarily for beginning farmers, but also has various resources on the topics of production resources (including composting, organic seed sources, pest management, pasturing and grazing, and managing drought), farming magazines, produce and market directories, marketing resources, farm policy, and agricultural politics.

http://farmfutures.com/ffQuotesDaily.aspx

Farm Futures can be used to check futures prices for commodities, including prices on grains, livestock, oil, gasoline, natural gas, ethanol, dairy products, etc. based on month and year.

http://www.agweb.com/markets/futures/

The Commodity Markets Center can be used to check futures prices for commodities, including prices on grains, livestock, oil, gasoline, natural gas, ethanol, dairy products, etc. based on month and year.

The Cash Prices/Cash Grain Bids chart can be used to find cash bids and basis levels for grain based on zip code.

The New York Times

Escapes

Down on the Farm With Your Sleeves Rolled Up

By EMILY BIUSO NOV. 23, 2007

AT an early morning hour most vacationers would spend unconscious, a few intrepid city dwellers outfitted in borrowed boots hunch over a creek full of watercress, carefully cutting the plants with kitchen scissors.

For their hosts, farmers in the Blue Ridge Mountains of western North Carolina, it's the start of a regular workday. But for the visitors, it's a delicate balance between learning on the fly and trying to be of use on a working farm.

Hoeing, seeding and picking may not sound like a holiday, yet the appeal of agritourism is gaining in the United States. More and more people want to see where their food comes from, and the same drive that leads them to visit farmers' markets or join community-supported agriculture farm-share programs draws them to the farm itself.

"I shop at the farmers' market, but I didn't really know how these people operate or how a farm functions," said Elizabeth Schafer, who works for a visual-effects company in Los Angeles and decided to visit Maverick Farms in Valle Crucis, N.C., after a year of working 50-to-60-hour weeks. "It definitely made me appreciate what needs to be accomplished to put food on the table."

The arrangement at Maverick Farms is simple: vacationers pay $120 a night to stay in a room in the hosts' beautiful two-story, 125-year-old farmhouse, and they are also invited to work at harvesting, seeding and other chores. For each hour of labor, $7 is deducted from the bill. Up to 25 percent of the bill can be worked off. At night, the farmers cook dinner from food they grew, and the guests/laborers are encouraged to join them. At the end of the stay, visitors can, if they like, leave a donation for the food they've eaten.

Agritourism includes a wide variety of farm activities. Though most visitors simply spend an afternoon picking fruit or feeding animals, others remain several days, contributing labor to tasks ranging from planting crops to building greenhouses.

In Vermont, income from agritourism totaled $19.5 million in 2002, nearly twice the amount in 2000, according to the United States Department of Agriculture. Though there are no similar statistics for more recent years, agritourism leaders in the state say the figures continue to rise. In North Carolina, 46 percent of agritourism operators surveyed by the state Department of Agriculture reported an increase in income in 2004 from 2003. And in Tennessee, agritourism enterprises directly added about $17 million to the economy in 2006 and bring in more than three million visitors a year, according to the state agritourism coordinator.

“It’s grown because more farmers are finding out it’s an important avenue to bring in revenue and stay on the farm,” said Rich Pirog, associate director of the Leopold Center for Sustainable Agriculture at Iowa State University in Ames. “Secondarily, it’s increasing because we’ve moved to an experience economy. People want to have a farm experience.”

Melissa Gunderson is a chef and caterer in Norcross, Ga. She, her husband, Eric, and their two young sons, Sam and Benjamin, visited Maverick in September. Since their stay, Ms. Gunderson has noticed a new appreciation of eggs by 3-year-old Sam. When she cracks one open for a recipe, he remembers seeing them up close in Maverick’s chicken coop. “I’m so shocked he remembers that experience,” she said.

MAVERICK FARMS is a working farm that was started by five novices in 2004, all friends in their 20s and 30s. Three had grown up on farms, but none had experience running one. They began it to help preserve family land from development, and important components of the farm’s daily practices are reducing waste, saving energy and fostering local involvement whenever possible. Boarding tourists who want to learn about farming has always been part of the business model.

“Agritourism is an incredible education tool,” said Tom Philpott, a co-founder and co-director of Maverick who also writes about food and farming for the environmental Web site Grist.org. “This is a way to come and do a typical afternoon on a farm. Maybe somebody does this, and it sparks something.”

Mr. Philpott was first exposed to farming when he traveled around Italy and stayed at agriturismos. In Italy, such projects have been supported by the government since 1985, and farmers receive tax breaks to play host to visitors. It’s a much more robust industry there and elsewhere in Europe, and many American farmers and educators have traveled abroad to see what methods can be imported from the Europeans.

Beth Kennett, the owner of Liberty Hill Farm in Rochester, Vt., accompanied Senator Patrick Leahy on a 1998 trade mission to Ireland and saw how agritourism was done there.

“In Ireland, they consider this economic development,” she said. “It put a whole other spin on it for me. I thought: ‘This is real. This is a business model. We can emulate this in Vermont.’”

In the mid-1990s, Ms. Kennett, other local farmers and the University of Vermont Extension Service formed the Vermont Farms! Association to organize agritourism in the state. After the trip with Senator Leahy, the association received an agritourism grant from the Department of Agriculture, according to Ms. Kennett, who is now the association’s chairwoman. Today, it offers training, support and marketing to farmers and provides guidance to associations in other states.

Jill Adams of Adams Farm in Wilmington, Vt., and secretary of Vermont Farms!, is a fifth-generation farmer on her family’s land but not the first to welcome paying guests. In the 1880s, her ancestors put up families from New York who sought a retreat from city life. Her

parents, William and Sharon Adams, closed off the farm to concentrate on dairy farming in the early 1970s, but in 1980 they decided to diversify and bought a team of Belgian draft horses to pull sleighs filled with visitors around the farm.

The popularity of the rides and interest in the farm led the Adamses to take the government's offer to buy their whole herd of cattle as part of a federal program in 1986. The family was no longer in dairy farming, and they began to focus on agritourism and marketing their maple syrup and other products directly to consumers. In 1992, Jill Adams reopened the farm to the public. She now has more than 10,000 visitors a year. In addition to the sleigh rides, visitors can milk goats, gather eggs from the chicken coop, watch sheep herding and see yarn being spun.

Duncan Hilchey, an agriculture development specialist at Cornell University in Ithaca, N.Y., attributes the growth of agritourism to globalization and urbanization.

"Farmers are realizing that food can be produced elsewhere cheaper," he said. "Adding education is a way to stay in business. As cities gobble up farmland, you're going to have to produce things that have more value."

For many visitors, part of the draw is giving money directly to small farmers.

"I think people are starting to realize what they lost," said Ms. Kennett of Liberty Hill Farm. "Here in our little valley of six towns, 11 farms were shipping milk 28 years ago. Now we're the last one."

More than 1,000 overnight guests stayed at Ms. Kennett's farmhouse last year. If guests at Liberty Hill want to pick up a hoe they may, though most just want a way to interact with the animals a bit, perhaps by feeding a calf. "Part of it is nostalgia," she said. "But part of it is 'Wait a minute, what's going on here?' People are starting to think about their food choices. Food politics has become a huge topic of conversation around my dinner table."

This is also true at Maverick, where the dinner discussions ranged from globalization to community-supported agriculture programs to building infrastructure for local farms. "It's so much more than farming," said Alyssa Rudolph, the farm manager at Maverick. "It's a lot about the conversation."

But being an agritourist isn't all social responsibility and education. It's also about the pleasure of eating food you plucked from the vine, the satisfaction of getting your hands dirty and the joy of spending so much time outdoors.

Jill Adams sees the transformation in city-weary travelers who visit Adams Farm. "One of the things we get is: 'Oh my God, look at the stars.'"

MORE INFORMATION

Adams Farm 15 Higley Hill Road, Wilmington, Vt. (802-464-3762, www.adamsfamilyfarm.com), about 130 miles northwest of Boston.

Rates: No overnight stays. A visit to the indoor livestock barn is $6.95 for adults and $5.95 for children age 2 to 12. Sleigh rides are $18 for adults and $9 for children age 4 to 12.

Schedule: Open year-round, with sleigh rides beginning mid-December.

LIBERTY HILL FARM 511 Liberty Hill Road, Rochester, Vt. (802-767-3926, www.libertyhillfarm.com), about 160 miles northwest of Boston.

Rates: $90 a night for each adult, $70 for teenagers and $50 for children 12 and under. Dinner and breakfast are included.

Schedule: Open year-round.

MAVERICK FARMS 410 Justus Road, Valle Crucis, N.C. (828-963-4656, www.maverickfarms.org), about 110 miles northwest of Charlotte.

Rates: $120 per room a night, with an opportunity to work off up to 25 percent of the bill at $7 an hour.

Schedule: February through November.

Family Farm Reorganizations Under the U.S. Bankruptcy Code

A Basic Introduction to Chapter 12

Jan M. Sensenich
Chapter 12 Standing Trustee
District of Vermont

What is Chapter 12?

Chapter 12 is a specific part of the U.S. Bankruptcy Code enacted by Congress in the mid-1980s in response to the financial crises confronting farmers[1]. During the 1980s farmers across the country were caught between falling land values and the inability to borrow money to finance their farming operations. As land values fell, lenders refused to extend credit to farmers whose land values had fallen to the point where it provided insufficient equity to secure existing loans. The situation made it impossible for many farmers to finance needed equipment purchases or even the planting of crops. Many farms were going out of business as a result of this credit crunch. This put pressure on Congress to find a remedy to help farmers reorganize. At that time none of the available forms of bankruptcy relief were very helpful to small farmers. Chapter 11, designed for large, corporate reorganizations was cumbersome, complex, very expensive and ill-suited to the needs of farm debtors. Chapter 13 was simpler and less costly, but most farm operations exceeded the debt limits of Chapter 13 and Chapter 13 was too restrictive to be much help to farmers, being designed primarily for wage earners.

[1] The text of Chapter 12 is found at 11 U.S.C. §1201 through §1231.

The purpose behind the creation of Chapter 12 was to provide a bankruptcy reorganization process customized for the specific needs of small farmers. It needed the flexibility of Chapter 11 without the high costs and complexity of Chapter 11. It needed to offer the greater simplicity of Chapter 13, but not be constrained by the lower debt limits or many of the other restrictions of Chapter 13, most notably the prohibition on mortgage loan modification. In enacting Chapter 12 in 1986, Congress created a reorganization chapter specifically tailored to the needs of small farming operations. In doing so it took the reorganizing power of bankruptcy to its constitutional limits, providing farm debtors with more power to modify loans, including farm mortgages, than any other Chapter of the Bankruptcy Code. Combining that power with unprecedented flexibility in the formulation and confirmation of plans, it gave small farmers a formidable tool to use in re-structuring farm debt and save financially struggling farms.

How Does Chapter 12 Work?

As under all forms of bankruptcy relief, Chapter 12 debtors must complete a bankruptcy petition, schedules and statements disclosing in great detail information on assets, debts, income and expenses, as well as information specific to the debtors farming operation. The debtor must also propose a plan of reorganization detailing payments to creditors over the three to five year term of the plan. A Chapter 12 trustee is appointed to review the debtor's petition, schedules and plan and investigate the feasibility of the debtor's plan and make recommendations to the bankruptcy court on confirmation. If the plan is confirmed by the bankruptcy court, the plan is binding on the debtor and all creditors. Over the three to five year term of the plan, the debtor makes payments to the trustee who then disburses payments to creditors. After a debtor completes all of the payments to the trustee over the term of the plan, the debtor receives a discharge of any unsecured debts not paid under the plan. Often plans call for direct payments of secured debts, such as mortgage debt after the conclusion of the plan, which the debtor then pays directly.

Who is Eligible to be a Chapter 12 Debtor?

Title 11 of the U.S. Code at Section 109 (f) states: "Only a family farmer or family fisherman with regular annual income may be a debtor under chapter 12 of this title". Section 101 (18) and (19A) of Title 11 contain the definition of "family farmer" and "family fisherman". Sections (19) and (19B) contain the definition of "family farmer with regular annual income" and "family fisherman with regular annual income. Subsection (21) of that section also includes a definition of "farming operation". A reliable determination of whether a specific individual, individual and spouse or corporation is eligible to file Chapter 12, requires a careful look at each of the above definitions. That said, the requirements essentially come down to the following:

(1) Farming – activities involving the tillage of soil and raising of crops, raising of livestock or poultry or livestock products in an unmanufactured state;
(2) Family Farmer Test (Individual or Individual and Spouse)-
    (a) Debts not over $4,031,575 (as of 2016);
    (b) At least 50% of debt is farm related debt (does not include home mortgage, unless the mortgage is a farm mortgage);
    (c) More than 50% of debtor's income is from farming (measured by the previous tax year ***or*** the two tax years before the previous tax year).
(3) Family Farmer Test (Corporation)-
    (a) 50% of shares owned by one family or by one family and farming relatives;
    (b) Over 80% of the value of the corporate assets consist of assets related to farming;

(c) Debts not over $4,031,575 (as of 2016);

(d) At least 50% of debt is farm related debt;

(e) Corporation is not publicly traded.

The test for a “family fisherman” is similar except for the operation must consist of a commercial fishing operation and the aggregate debts cannot exceed $1,868,200 (2016).

The above analysis is a simplification of the statutory language, however the definitions and meeting them is critical for a debtor needing relief under Chapter 12. Because Chapter 12 is a powerful tool and one that can force creditors to accept reorganization terms that they would frequently not agree to voluntarily, creditors often have an incentive to litigate Chapter 12 eligibility whenever eligibility seems like a close issue. For this reason anyone considering filing for Chapter 12 relief, or any counsel representing them, must take a close look at each of the definitions and make sure the debtor can prove eligibility.

How do Chapter Plans Reorganize Farm Debt?

Chapter 12 Plans provide a tremendous amount of flexibility in addressing secured farm debts such as equipment loans and mortgages. First, plans to not necessarily require monthly payments (as Chapter 13 does). Chapter 12 plans may be funded by annual payments, semi-annual payments, quarterly payments or monthly payments. This generally depends to the type of farming operation. Farms with regular monthly income such as dairy farms typically provide for monthly payments. Farms with annual crops, such as orchards, Christmas tree farms, maple sugaring operations or other farms with annual crops typically call for annual payments corresponding to the timing of the sale of the annual harvest. There are also other options, such as variable monthly payments based on a farm’s projected annual cash flow.

Chapter 12 Plans provide at least three different options for reorganizing farm debt, each of which help to reduce the required monthly debt service on farm loans. These options are: (1) reduction of the loan balance to the value of the

collateral; (2) re-writing the terms of the loan to extend the repayment period and re-amortize the debt; (3) reduction of the interest rate. Each of these modification options has the power to significantly reduce the monthly payment on a loan and the farmer's overall monthly debt service. When used in combination to restructure several loans, the impact can be fairly dramatic.

(1) Reduction of Loan Balances (cram-down)

The concept behind this approach is that if a loan is under secured (meaning the collateral is worth less than the amount outstanding on the loan secured by it), the loan should be re-written for a principal balance of no greater than the value of the collateral. For example, if a tractor is collateral for a $40,000 loan, and the tractor is only worth $30,000, the loan should be re-written as a $30,000 loan. In this case, the debtor would save $10,000, plus the interest on that sum, over the life of the loan. In cases where the value of the real estate is less than the amount due on the mortgages secured by the farm land, farm mortgages can be re-written in this manner with the result of the farm operation saving hundreds of thousands of dollars.

(2) Extension of the Loan's Repayment Term

This concept allows a farmer to re-write the outstanding balance of a loan, as if it were a brand new loan, for a term which would be reasonable considering the nature of the collateral and its remaining useful life. With respect to real estate loans, this can potentially allow a debtor to re-amortize a mortgage that may be half way through its term, to a full mortgage term. For example, if a 30 year mortgage is half way through its payment term, the outstanding balance could be re-written for another fully 30 year (or perhaps even longer) term. This approach is sometimes available with respect to equipment loans and cattle loans, but since the term of the re-written amortization is limited to the useful life of the collateral, those loans are not typically longer than the 5 year term of a Chapter 12 plan.

(3) *Reduction of the Interest Rate*

Probably the simplest way to reduce debt service on a loan is to merely reduce the interest rate on the outstanding balance. Under the U.S. Supreme Court decision *Till v. SCS Credit Corp.*, 541 US 465 (2004), the applicable interest rate for a

reorganization plan may well be less that the contract rate which a debtor is obligated to pay under the promissory note. Under the *Till* case, the debtor may have the interest rate reduced to the prime rate plus a 1-3 % risk factor, with the actual interest rate being determined by the facts of each case. Very often the *Till* rate is less than the contract or note rate, although this is not always the case.

Combined Impact

Although each of these three approaches to loan restructuring could be used independently, the most common approach is to use all of them. This allows the debtor to re-write loan obligations to significantly lower periodic payments. For example, if a mortgage loan in the original amount of $600,000 has an outstanding balance of $400,000, and the collateral securing it is only worth $300,000, the Chapter 12 plan will require the debtor to repay only $300,000, not $400,000. Additionally, if the original loan was to be paid over a 30-year term and was taken out 15 years ago, the remaining (now crammed down) balance of $300,000 could be re-amortized out to 30 years. Finally, although the promissory note interest rate may have been 7%, the debtor may re-compute the interest rate and amortize the $300,000, over 30 years, with a lower, interest rate, perhaps as low as 4.5%. The combined impact of these three changes is to take a loan that had monthly payments based on a $600,000 original loan, amortized at 7% and re-write it into a new 30 year loan for $300,000 at 4.5%. Needless to say the combined impact of such a modification can be significant.

How are Priority Unsecured Debts Treated?

In addition to secured debt, some farms have debts which are classified by the Bankruptcy Code as priority unsecured debts. Such debts must be paid in full in Chapter 12 Plans even though they are not secured by any lien or collateral. The most common of these are state and federal tax debts. Typically, a Chapter 12 Plan will pay priority unsecured debts over the life of the Plan along with secured claims.

How are Unsecured Non-priority Debts Treated?

Finally, debts which are neither secured by collateral nor classified as priority debts are referred to as general unsecured debts. This category includes credit card debt, repair bills, feed bills or credit card debt. Whether or how much the debtor must pay to the holders of unsecured debts depends on the debtor's income and expenses, as well as the value of the debtor's non-exempt assets.

The Bankruptcy Code allows debtors to "exempt" certain assets, and those assets are not included in the computation of the dividend a debtor must pay to the holders of general unsecured claims. In the event the debtor claims most of the equity in his or her assets as exempt, the dividend the debtor would be required pay to the unsecured creditors would be a small percentage of what is owed, with the balance of the claims being discharged at the end of the case. By only paying part of the total of the unsecured claims, the Plan can enable debtors to obtain relief from crushing unsecured debt loads while simultaneously significantly reducing the required monthly payment on secured debt, and get the "fresh start" the Bankruptcy Code offers.

Illustration

The attached chart demonstrates the combined impact of the modification of several secured farm loans, including several mortgages, equipment and cattle loans. In this example the pre-bankruptcy debt service on all secured loans and payments on unsecured debt (spread over 3 years) was over $17,000 per month. After the loans are modified by a Chapter 12 Plan, a modest dividend to unsecured creditors is added (15%) and the Chapter 12 Trustee fees are added in, the monthly debt service drops to below $8,000 per month, a savings of nearly $10,000 per month, $120,000 per year or potentially $600,000 over the life of a 5 year plan.

What Can Chapter 12 Do? And What Can it Not Do?

Chapter 12 is not a government program nor is it charity. It is a legal tool which is part of the U.S. Bankruptcy Code designed to help financially struggling small farmers reorganize their debt in order to keep farms in business. Keeping well managed and productive farms in business is good for our country, our state and our community. The farm economy is a crucial component of the national and local economies and even more important- all of us that are fed by what farms produce.

What Chapter 12 cannot do is turn a poorly run or mismanaged farm into an efficient, productive farm. The mere reorganization of debt is no guarantee of success for farms that have serious management issues or lack the productive resources to farm efficiently. Evaluating whether Chapter 12 is the right choice for a farm in need of financial reorganization requires a careful assessment of whether a farm has sound management and the necessary resources, (productive land, equipment and labor) to perform under a Chapter 12 reorganization plan. Chapter 12 is probably not the answer for every struggling farm, but when a farming operation needs a financial second chance, it can serve as a unique and powerful tool to reorganize farm debt and provide a financial fresh start.

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Table 1

IMPACT OF CHAPTER 12 PLAN ON FARM DEBT SERVICE

	PRE- BANKRUPTCY				CHAPTER 12 PLAN TREATMENT			
TYPE OF LOAN	PRE-PETITON BALANCE	AMOUNT SECURED (based on value of collateral)	INTEREST RATE	**MONTHLY PAYMENT**	TOTAL TO BE PAID	TERM (IN YEARS)	INTEREST RATE	**MONTHLY PAYMENT**
SECURED DEBT								
MORTGAGE 1	$ 700,000.00	$ 700,000.00	7%	**$ 6,653.02**	$ 700,000.00	30	4%	**$ 3,341.91**
MORTGAGE 2	$ 400,000.00	$ 200,000.00	8%	**$ 3,668.82**	$ 200,000.00	30	4%	**$ 954.38**
MORTGAGE 3	$ 150,000.00	$ 0.00	7%	**$ 1,330.60**	$ 0.00			**$ 0.00**
EQUIPMENT LOAN	$ 80,000.00	$ 60,000.00	8%	**$ 1,753.32**	$ 60,000.00	5	5%	**$ 1,132.27**
CATTLE LOAN	$ 140,000.00	$ 100,000.00	9%	**$ 2,703.83**	$ 100,000.00	5	5%	**$ 1,887.12**
TOTALS	$ 1,470,000.00	$ 1,060,000.00		**$ 16,109.59**	$ 1,060,000.00			**$ 7,315.68**
UNSECURED DEBT	$ 40,000.00			**$ 1,666.67**				
UNDERSECURED DEBT	$ 410,000.00							
TOTAL UNSEC.	$ 450,000.00				$ 36,000.00	5		**$ 600.00**
		TOTAL MONTHLY DEBT SERVICE		**$ 17,776.26**				**$ 7,915.68**
					ADDITIONAL COSTS			
					ATTORNEYS FEES ($6,000.00 @ $100.MO)			**$ 100.00**
NOTES:					TRUSTEE'S FEES (@10%)			**$ 843.22**
MORTGAGE 1 is based on a 30 year loan in the original amount of $1,000,000.00						**TOTAL PLAN PAYMENT**		**$ 8,858.90**
MORTGAGE 2 is based on a 30 year loan in the original amount of $500,000.00								
MORTGAGE 3 is based on a 30 year loan in the original amount of $200,000.00								
EQUIPMENT LOAN is based on a 6 year $100,000 loan in the amount of $100,000								
CATTLE LOAN is based on a 6 year loan in the original amount of $150,000.00								
UNDERSECURED DEBT = Amount due on secured loans less actual value of collateral								
The $36,000 dividend to unsecured creditors represents an 8% dividend to the unsecured claims (including underscored claims)								

Enclosure No. 1

CHAPTER 12 CASE

SUMMARY OF OPERATIONS - FAMILY FARMER

(This report must be filed with the Chapter 12 Trustee 5 days before the first meeting of creditors.)

NAME OF DEBTOR(S): _____

CASE NO.: _____

I. CURRENT NUMBER OF ACRES

Owned: _____

Leased: (List by Parcel)	Amount or % of rent received by debtor(s)
_____	_____
_____	_____
_____	_____

Total owned and leased by debtor(s) from others: _____

Total leased to others: _____

Tillable acreage: _____

Set aside acreage: _____

II. CURRENT LIVESTOCK

Kind	No.	Weight	Market Value
Hogs			
Feeder Pigs			
Sows			
Boars			
Calves			
Stock Cows			
Steers			
Heifers			
Bulls			
Dairy Cows			
Lambs			
Ewes			
Rams			
Foals			
Mares			
Stallions			
Chickens			
Turkeys			

III. PRIOR YEAR'S OPERATION

A. Livestock (list by kind)

Kind	No.	Weight Per Animal	Amount Kept For Farm Use	Amount Sold	Sales Price	Total Dollar Sales

B. Crops (list by kind)

Kind	No. of Acres Planted	Yield Per Acre	Amount Kept For Farm Use	Amount Sold	Sales Price	Total Dollar Sales

C. Raw Products (e.g. wool, eggs, milk, fish)

Kind	Weight or Number	Amount Kept for Farm Use	Amount Sold	Sales Price	Total Dollar Sales

B. Crops (list by kind)

Kind	No. of Acres Planted	Yield Per Acre*	Amount Kept For Farm Use	Amount Sold	Sales Price**	Total Dollar Sales

C. Raw Products (e.g., wool, eggs, milk, fish)

Kind	Weight or Number	Amount Kept for Farm Use	Amount Sold	Sales Price	Total Dollar Sales

D. Other Farm Enterprises (e.g., custom farming, custom feeding) — Total Amount Received

E. Government Payments — Total Amount Received

---

* Assuming normal moisture and growing conditions.

** State your estimate of market price per unit or government support (loan) price if you are eligible for government support program.

F. SUMMARY OF PROJECTED YEAR'S INCOME

1. Total crop/livestock income _____

2. Total raw products income _____

3. Total other farm income _____

4. Total government payments _____

5. Non-farm income _____

6. Total income _____

G. Estimated Expenses For Current Year

Expenses	Amount
Fuel	_____
Seed	_____
Feed	_____
Fertilizer	_____
Herbicides, Pesticides, or other Chemicals	_____
Equipment Rental	_____
Electric and Phone Bills	_____
Repairs	_____
Crop Insurance	_____
Other Insurance	_____
Real Estate Taxes	_____
Cash Rent	_____
Hired Labor	_____
Machine Hire	_____
Drying	_____
Other	_____
	_____
	_____
	_____

Projected Total Operating Expenses _____

Projected Family Living Expenses _____

Projected Total Expenses _____

H. Profit or Loss

Total Income (IV F 6) _____

Total Expenses (from Page 7) _____

Profit/Loss _____
(Subtract total expenses from total income.)

I. Estimated Crop Expenses Breakdown:

	Corn Cost per Acre	Soybeans Cost per Acre	Oats Cost per Acre	Hay/Alfalfa Cost per Acre
Seed				
Nitrogen				
Phosphate				
Potash				
Lime				
Herbicide				
Insecticide				
Crop Insurance				
Other Insurance				
Real Estate Taxes				
Cash Rent				
Combining				
Hauling				
Drying				
Handling				
Hired Labor				
Fuel				
Other Machine Rental				
Miscellaneous				
TOTAL:				

J. Estimated Livestock Expenses Breakdown:

Costs	Swine Cost per____	Beef Cost per____	Sheep Cost per____	Dairy Cost per____
Corn				
Supplement				
Feed Additives				
Alfalfa-brome				
Corn Silage				
Haylage				
Salt				
Milk Replacer				
Minerals				
Veterinary				
Machinery and Equipment				
Electric				
Water				
Labor				
Marketing				
Miscellaneous				
Purchase Livestock				
Other				
TOTAL:				

NOTE: If your particular livestock operation does not fit these categories make appropriate adjustments.

If you have an operating loan for the current or proposed crop season, state amount $_____ and name and address of lender _____

and security given or pledged _____

_____.

Enclosure No. 2

CHAPTER 12 MONTHLY REPORT

NAME OF DEBTOR(S): _____

CASE NO.: _____

For Month Ending _____

MONTHLY CASH RECEIPTS AND DISBURSEMENTS

(Report on a cash basis, unless you keep financial records on an accrual basis.)

I. CASH RECEIPTS

A. FARM INCOME

	MONTH	YEAR TO DATE
Grain Sales		
#bu._____ corn at $_____	_____	_____
#bu._____ beans at $_____	_____	_____
#bu._____ oats at $_____	_____	_____
#bu._____ milo at $_____	_____	_____
#bu._____ wheat at $_____	_____	_____
Livestock Sales		
#hd____ feeder pigs at _____	_____	_____
#hd____ hogs at $_____ per/lb.	_____	_____
#hd____ calves at $_____ per/lb.	_____	_____
#hd____ cattle at $_____ per/lb.	_____	_____
#hd____ lambs at $_____	_____	_____
Eggs _____	_____	_____
Poultry _____	_____	_____
Milk _____	_____	_____
Other _____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
Miscellaneous Farm Income		
Contract payments	_____	_____
Contract payments	_____	_____
Contract payments	_____	_____
Rent payment	_____	_____
Rent payment	_____	_____
Government payment	_____	_____
PIK and Roll proceeds	_____	_____

	MONTH	YEAR TO DATE
Custom farming income		
Custom feeding payments		
Other farm income		
(please specify source)		
_____		
_____		
_____		
_____		
New loans (specify source)		
_____		
_____		

B. WAGES FROM OUTSIDE WORK

Husband		
Wife		

C. OTHER RECEIPTS

Social Security		
Other: _____		
_____		
_____		
_____		
Total Cash Receipts		

II. EXPENSES PAID

A. HOUSEHOLD (Use more pages if necessary.)

Payee	Date	Amount	Purpose

TOTAL _____

B. FARM EXPENSES (Use more pages if necessary.)

Payee	Date	Amount	Purpose

TOTAL _____

C. TOTAL PAYMENTS MADE TO CHAPTER 12 TRUSTEE _____

TOTAL EXPENSES FOR MONTH _____

CASH PROFIT (LOSS) FOR MONTH [TOTAL INCOME minus TOTAL EXPENSES] _____

OTHER NON-CASH LOSSES:

LOSS DUE TO CROP FAILURE OR DAMAGE $_____

LOSS DUE TO DEATH OR DISEASE OF LIVESTOCK OR POULTRY $_____

III. CASH RECONCILIATION:

Cash and Bank Accounts Balance at Beginning of Month: $_____

Profit (or Loss) During Month $_____

Cash and Bank Account Balance at End of Month $_____

IV. EXPENSES CHARGED BUT NOT PAID DURING MONTH (itemize):

Expense	Amount $

I CERTIFY UNDER PENALTY OF PERJURY THAT I HAVE READ THE FOREGOING STATEMENT, AND IT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

_____ _____

DATE DEBTOR(S) / OFFICER OF DEBTOR(S)

INSTRUCTIONS FOR

TAX DEPOSIT STATEMENT

The tax accounts for Federal Withholding Tax, FICA and Sales Tax are all computed in the same manner.

The statement for the first month following the filing of the petition should show the Beginning Tax Payable as zero. After the first month's statement, the beginning tax payable would be the prior month's ending tax payable.

Withheld or Accrued

The amount of taxes that were withheld or accrued during the month should be listed even if they were paid during the month.

Disbursements to Tax Account

Give the dollar amounts that were paid to the tax accounts. List the deposit receipts numbers (if possible send copies of the deposit slips) and/or the check numbers for each deposit.

Ending Tax Payable

This figure is derived by taking the beginning tax payable and adding to it the amounts withheld or accrued and subtracting the amounts paid.

If there are other tax accounts that your company is liable for, please include them on a separate exhibit in the same manner as described above.

The Tax Deposit Statement must be signed by the debtor, if an individual, or by an officer of the company.

Evidence of Payment

When the taxes are paid, a copy of the documentation is to be provided to the Chapter 12 trustee

Enclosure No. 4

TAX DEPOSIT STATEMENT

NAME OF DEBTOR: _____

CASE NO.: _____

Month or Period Ending _____, 19 _____

SUMMARY

FEDERAL WITHHOLDING TAX

Beginning Withholding Tax Payable _____

Withheld or Accrued _____

Disbursements to Tax Account _____

Deposit Receipt and/or check numbers _____

Ending Withholding Tax Payable _____

FICA WITHHOLDING TAX (include both employer and employee share)

Beginning FICA Tax Payable _____

Withheld or Accrued _____

Disbursements to Tax Account _____

Deposit Receipt and/or check numbers _____

Ending FICA Tax Payable _____

SALES TAX

Beginning Sales Tax Payable _____

New Sales Tax Payable _____

Disbursements to Tax Account _____

Deposit Receipt and/or check numbers _____

Ending Sales Tax Payable _____

I CERTIFY UNDER PENALTY OF PERJURY THAT I HAVE READ THE FOREGOING STATEMENT, AND IT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

_____ _____

DATE DEBTOR/OFFICER OF DEBTOR

IN THE UNITED STATES BANKRUPTCY COURT

IN RE: § CASE NO.
§
§ CHAPTER 12
§
DEBTOR (S) §

LIQUIDATION ANALYSIS

ASSET	MARKET VALUE	AMOUNT LIEN(S)	AMOUNT EXEMPT	NON-EXEMPT EQUITY
REAL ESTATE				
TR 1	$_____	$_____ 1st $_____ 2nd	$_____	$_____
Secured Party(ies): _____				
Description: _____				
TR 2	$_____	$_____ 1st $_____ 2nd	$_____	$_____
Secured Party(ies): _____				
Description: _____				
TR 3	$_____	$_____ 1st $_____ 2nd	$_____	$_____
Secured Party(ies): _____				
Description: _____				
TR 4	$_____	$_____ 1st $_____ 2nd	$_____	$_____
Secured Party(ies): _____				
Description: _____				

ASSET	MARKET VALUE	AMOUNT LIEN(S)	AMOUNT EXEMPT	NON-EXEMPT EQUITY

EQUIPMENT

Group 1 $_____ $_____ 1st $_____ $_____
$_____ 2nd
Secured Party(ies): _____
Description: _____
_____

Group 2 $_____ $_____ 1st $_____ $_____
$_____ 2nd
Secured Party(ies): _____
Description: _____
_____

Group 3 $_____ $_____ 1st $_____ $_____
$_____ 2nd
Secured Party(ies): _____
Description: _____
_____

VEHICLES

Group 1 $_____ $_____ $_____ $_____
Secured Party: _____
Description: _____

Group 2 $_____ $_____ $_____ $_____
Secured Party: _____
Description: _____

Group 3 $_____ $_____ $_____ $_____
Secured Party: _____
Description: _____

LIVESTOCK

Group 1 $_____ $_____ $_____ $_____
Secured Party: _____
Description: _____

Group 2 $_____ $_____ $_____ $_____
Secured Party: _____
Description: _____

Group 3 $_____ $_____ $_____ $_____
Secured Party: _____
Description: _____

ASSET	MARKET VALUE	AMOUNT LIEN(S)	AMOUNT EXEMPT	NON-EXEMPT EQUITY

CASH COLLATERAL

Group 1 $_____ $_____ $_____ $_____
Secured Party: _____
Description: _____

Group 2 $_____ $_____ $_____ $_____
Secured Party: _____
Description: _____

Group 3 $_____ $_____ $_____ $_____
Secured Party: _____
Description: _____

CROPS

Group 1 $_____ $_____ $_____ $_____
Secured Party: _____
Description: _____

Group 2 $_____ $_____ $_____ $_____
Secured Party: _____
Description: _____

Group 3 $_____ $_____ $_____ $_____
Secured Party: _____
Description: _____

OTHER

Item 1 $_____ $_____ $_____ $_____
Secured Party: _____
Description: _____
Item 2 $_____ $_____ $_____ $_____
Secured Party: _____
Description: _____
Item 3 $_____ $_____ $_____ $_____
Secured Party: _____
Description: _____
Item 4 $_____ $_____ $_____ $_____
Secured Party: _____
Description: _____

TOTAL NON-EXEMPT EQUITY IN PROPERTY $_____

EST. PRIORITY & EXP. OF ADM. (SCHEDULE 1 HERETO) $(_____)
$ AVAILABLE FOR GENERAL UNSECURED $_____

TOTAL SCHEDULED UNSECURED (SCHEDULE 2 HERETO) $_____
TOTAL DEFICIENCY CLAIMS (SCHEDULE 3 HERETO) $_____
TOTAL GENERAL UNSECURED $_____

% AVAILABLE FOR GENERAL UNSECURED _____%

MONTHLY OPERATING REPORT FOR CHAPTER 12 CASES

Debtor's name

_____

Case No. _____

Month _____ Year _____

Gross receipts for month: _____

(If more than one source, list each) _____

_____

TOTAL GROSS RECEIPTS: $_____

Business expenses paid:

Description	Amount
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

TOTAL EXPENSES: $_____

NET PROFIT OR (LOSS) FOR MONTH: $_____

Reports for each month are due by the 15th day of the following month and should be mailed to:
Chapter 13 Trustee, U.S. Steel Tower, Suite 3250, 600 Grant Street, Pittsburgh, PA 15219

USE ADDITIONAL SHEETS IF NEEDED