insolvency2020

Oct. 13, 2020, 3:30-4:50 p.m.

National Conference of Bankruptcy Judges: A Perfect Storm: Events, Issues & Trends in Agricultural Bankruptcies

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Hon. Anita L. Shodeen; U.S. Bankruptcy Court (S.D. Iowa)
Michael R. Stewart; Faegre Drinker Biddle & Reath LLP
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Educational Materials

94th Annual National Conference of Bankruptcy Judges
October 14-17, 2020 San Diego, CA
Was Cancelled due to COVID 19

This Program Was Presented as a Part of *Insolvency 2020*, the All Industry's Webinar Series Sept 16 - Oct 24, 2020 Developed by ABI in Response to the COVID 19 Cancellation of Live Conferences

The Perfect Storm . . .
Events, Issues & Trends in Agriculture and Bankruptcy

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The Perfect Storm . . .

Events, Issues & Trends in Agriculture and Bankruptcy

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SPECIALTY CROP SCENARIO

It is December 10, 2020, Pablo Gonzales, dba Gonzales Farms ("PG") grows alfalfa, hemp, almonds and lettuce. The almonds are sold to a financially distressed cooperative processor subject to a marketing order on which a substantial amount of assessments is owed by the processor. GF Farms on owned and leased land using ground water from wells and surface water from a federal reclamation district in California's San Joaquin Valley. PG also has a calf ranch on owned land where he raises heifers for dairymen. PG owes $5 million to Farmer Bank secured by a first deed of trust on the land and $4 million to Crop Bank secured by all personal property and a second deed of trust. Trade creditors are owed $500,000. PG has guaranteed his son's loan on which is owed $750,000. The lettuce is grown on owned land using water from wells on the leased land. Crop Bank has set a foreclosure of its real and personal property collateral on February 15, 2021. A foreclosure will result in a federal and state tax liability of $650,000 to Pablo. You have been asked to assist with a soon to be filed bankruptcy. What are some of the possible issues you must consider as borrower and as lender?

BORROWER:

- How do you time a filing on a biological operation?
- When does a crop come into existence for purposes of lien attachment? Is a permanent crop different from an annual crop?
- Does federal law prohibit use of bankruptcy for hemp growers?
- What state law statutory liens might apply? Do these liens get cut off due to Section 552?
- Can anything be done to help Pablo with the looming tax debt?

LENDER:

- Is this debtor eligible for Chapter 12?
- Does PACA apply to lettuce? Almonds? Co-op? Impact on lenders?
- Does Crop Bank have legal access to the wells or crops on the leased land? Does the lease allow use of the water on the owned land? Is the water real or personal property?
- How does Crop Bank deal with calf owners if it forecloses?
- Can Pablo's guarantee be enforced against him?

Pork Producer

Greg and Betty Farmer ("Farmers") operate a large-scale pork production agribusiness in Minnesota and Iowa. They sell 450,000 market hogs annually to a single packing plant ("Packer") in South Dakota under a long-term hog supply agreement, and also own 2,000 acres of farmland and rent an additional 3,000 acres where they grow corn and soybeans to feed to the hogs. Farmers own sows for farrowing purposes, along with boars and gilts. As is typical for a large pork production, Farmers have "grower contracts" with about 40 third parties who house, feed and care for many of the Farmers' animals – from birth to market. Greg Farmer has always operated on a handshake with his growers, and does not have written contracts with them.

Because of commodity price issues, input costs, pricing under the long-term hog supply agreement, and COVID-19 shutdown problems at Packer, the Farmers are seriously delinquent on payables, including to contract growers, feed suppliers, rent and equipment lenders. Due to liquidity issues, the Farmers have borrowed several million dollars from a few contract growers.

The Farmers started as a sole proprietorship, and continue to handle some of their business on that basis, but as operations have grown, they now have four different LLCs that own and operate (a) their farrowing and nursery operation, (b) their sows and breeding stock, (c) their finishing operation, and (d) a grain elevator they acquired a few years ago to help acquire feed necessary in the operation.

The Farmers have borrowed $40 million from a regional bank ("Bank"), secured by substantially all of the Farmers' personal property as well as some of the farmland. The loan has matured, and the Bank wants to exit the facility because of continuing liquidity, solvency and profitability problems. The Bank uses a consolidated borrowing base for all of the borrowers, and the Bank's loans currently exceed the borrowing base by $4 million.

Farmers have renegotiated their hog supply agreement with Packer to attain marginal profitability going forward, but there is not enough profitability for the Farmers to dig out of the hole they are in. Due to shutdowns in packing plants, there is a glut of market hogs, the spot price has plummeted, and some producers are euthanizing market hogs because there is no capacity for harvesting them.

Farmers want to continue in operation, and have come to you to ask for bankruptcy and restructuring advice. The Bank has also engaged a workout lawyer to consider its options. What are some of the possible issues?

FARMERS:

- Does bankruptcy provide the tools for the Farmers to reorganize?
- How to handle past due payables?
- If an investor can be found, would anti-corporate farming laws prohibit the investment?
- Cash collateral/liquidity issues in bankruptcy?
- Setoff rights of contract growers?

- Statutory lien rights of suppliers, growers and landlords?
- Suit against Packer for failure to take market hogs on time? Force majeure defense?
- Can a plan of reorganization be confirmed?
- If a bankruptcy is filed, can Packer terminate the hog supply agreement as a forward contract?
- Grain license issues with the elevator?

BANK:

- Practical problems in taking control of live animal operation, and inability to foreclose on and immediately sell live animals?
- Packer does not need to perform under the hog supply agreement if Bank takes over, and risk that Packer terminates agreement (whether in bankruptcy or not)?
- Single-action rules in light of both real and personal property collateral?
- Farmer-Lender Mediation Act restrictions on enforcement?
- Cash collateral erosion risks in bankruptcy?
- Statutory liens and setoff rights in favor of contract growers for unpaid amounts?
- No written contracts (or bailee acknowledgments and waivers) with growers?
- Statutory liens for various ag inputs and landlords?
- Fraudulent transfer issues due to consolidated borrowing base?
- Cramdown risks?

Agricultural Processor

Vegetable Processing Cooperative ("Coop") operates a large-scale vegetable processing and packaging business in the Pacific Northwest, selling to grocery distributors nationwide, under private label brands, and also packing for third-parties under long-term contracts. The Coop has over 1,000 members who supply vegetables and own equity in Coop and receive patronage dividends. Coop members have executed delivery contracts to supply vegetables upon harvest to the Coop. Coop also buys inventory from non-members. Coop owns processing, freezing and distribution centers in several states, but the facilities are old and inefficient. Due to a variety of factors, including competition, union contracts, operational problems and cost of product, Coop has been losing money for many years, and is now insolvent.

Coop is indebted to a bank group ("Bank Group") for $150 million, and the Bank Group has announced that it will not renew the line of credit. Coop has been unable to find a replacement lender, and has come to you to discuss bankruptcy. The Bank Group believes that it is oversecured based on the appraised value of the assets, but in light of economic conditions, the age of the facilities, and continuing profitability issues, it is not clear that the assets can be easily sold, or for how much.

What are the issues?

COOP:

- Cash collateral and DIP financing
- Statutory and PACA liens in favor of suppliers, but not Coop members?
- What bankruptcy tools are available to help the Coop achieve operating profitability?
- Dealing with the Coop members, who both own equity and are suppliers?
- Union issues?
- Is reorganization possible, or is this a Section 363 sale case?
- Do the members want to support Coop and to try to preserve their equity value, or do they have other outlets for their product?
- Fiduciary duty and conflict of interest issues for Board members, who are all Coop members?
- Can the Coop enforce delivery contracts with its members?
- If a Section 363 sale occurs, can the Coop assume and assign the delivery contracts in light of the related membership and patronage rights that the Coop provides to members?

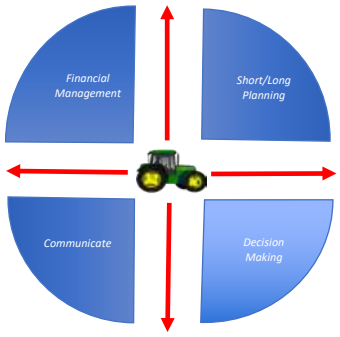
BANK GROUP:

- How to establish the value of the collateral in a bankruptcy case?
- Does it make sense to provide DIP financing in an attempt to control the case and establish sales and/or plan milestones?
- Carveouts?
- Priming DIP financing risk?

- Dealing with statutory and PACA lien claimants?
- Cost of bankruptcy case, including professionals for Coop, creditors' committee, and possible member committee?
- If a Section 363 sale should occur, recognition that the court will not want the estate to be left administratively insolvent?
- How to encourage Coop and members to run a sales process instead of pursuing a plan of reorganization?
- Preservation of credit bid rights?
- Cramdown risk? How to establish a market test for valuation purposes?

From the Borrower's Perspective

Farming skills are important but its only a part of the story.....



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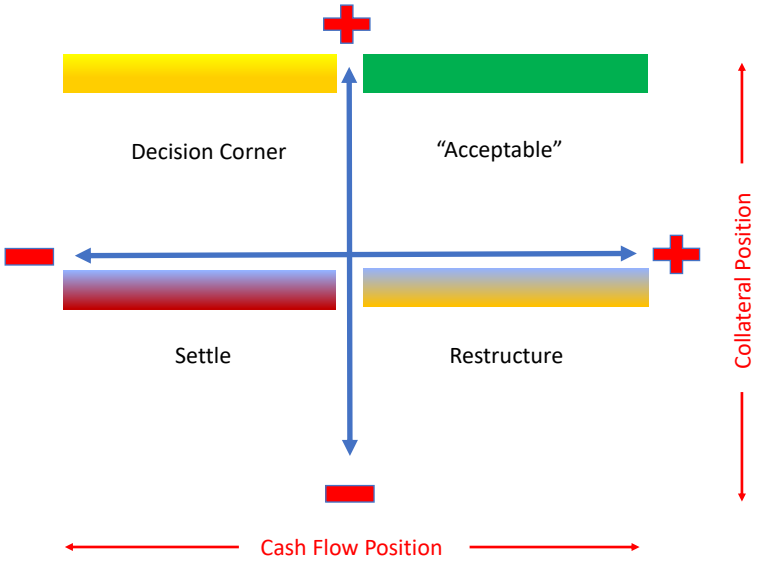
From the Banker's Perspective



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Pitfalls of Debt Restructure

Three Rules of a Successful (Failed?) Restructure

✓ Achievable

- Can the plan be achieved within a reasonable timeframe? (5 years or less)
- Does the plan reflect current economic conditions?

✓ Executable

- Can current management execute on the plan
  - Skill set
  - Discipline and Motives
  - Fight, Flight, or Freeze (which is the worst?)

✓ Return to Viability

- Sensitized
- Acceptable

3

PABLO GONZALES D/B/A GONZALES FARMS (GF)
(alfalfa/hemp/almonds/lettuce/raises dairy cattle for sale)

- GF farms on owned and leased land using ground water from a federal reclamation district
- PG owes Farmer Bank $5M secured by 1st deed of trust and all personal property
- PG owes Crop Bank $4M secured by 2nd deed of trust and all personal property
- PG owes Trade Creditors $500K
- PG guaranteed his son's loan of $750K
- Crop Bank is foreclosing generating a $650K tax liability

Greg and Betty Farmer
(large-scale pork production and row crop)

- Own sows, boars and gilts for farrowing operation; use third parties to house, feed and care for hogs under *informal* grower contracts.
- Annually sells 450K hogs to a single packing plant under a long term contract.
- Owns 2K acres and rents 3K acres to grow corn and soybeans for feed
- Obtained a grain elevator to acquire feed
- 4 LLC to operate the following:
  - Farrowing/nursery
  - Sows/breeding stock
  - Finishing operation
  - Grain elevator

Greg and Betty Farmer
(Obligations)

- Regional Bank has a consolidated loan for all borrowers and the balance exceeds the borrowing base by $4m. It wants to exit its $40M loan secured by personal property and some farmland.
- Payables are delinquent to growers, suppliers, landlords and equipment lessors – multiple millions owed
- Packing plant is shut down and there is a glut of market hogs

Greg and Betty would like to continue operating . . .

Agricultural Processor
(Vegetable Coop)

- Large scale packing business. Sells nationwide to grocers; also sells under a private label and packs for 3rd parties under long term contracts.
- 1,000 members supply product, own equity and are paid patronage
- Coop owes Bank Group $150 M the line of credit has expired and it will not be renewed.
- Coop believes its assets are worth more than the debt, but . . .
- A new lender has not been identified or located.

United States Department of Agriculture

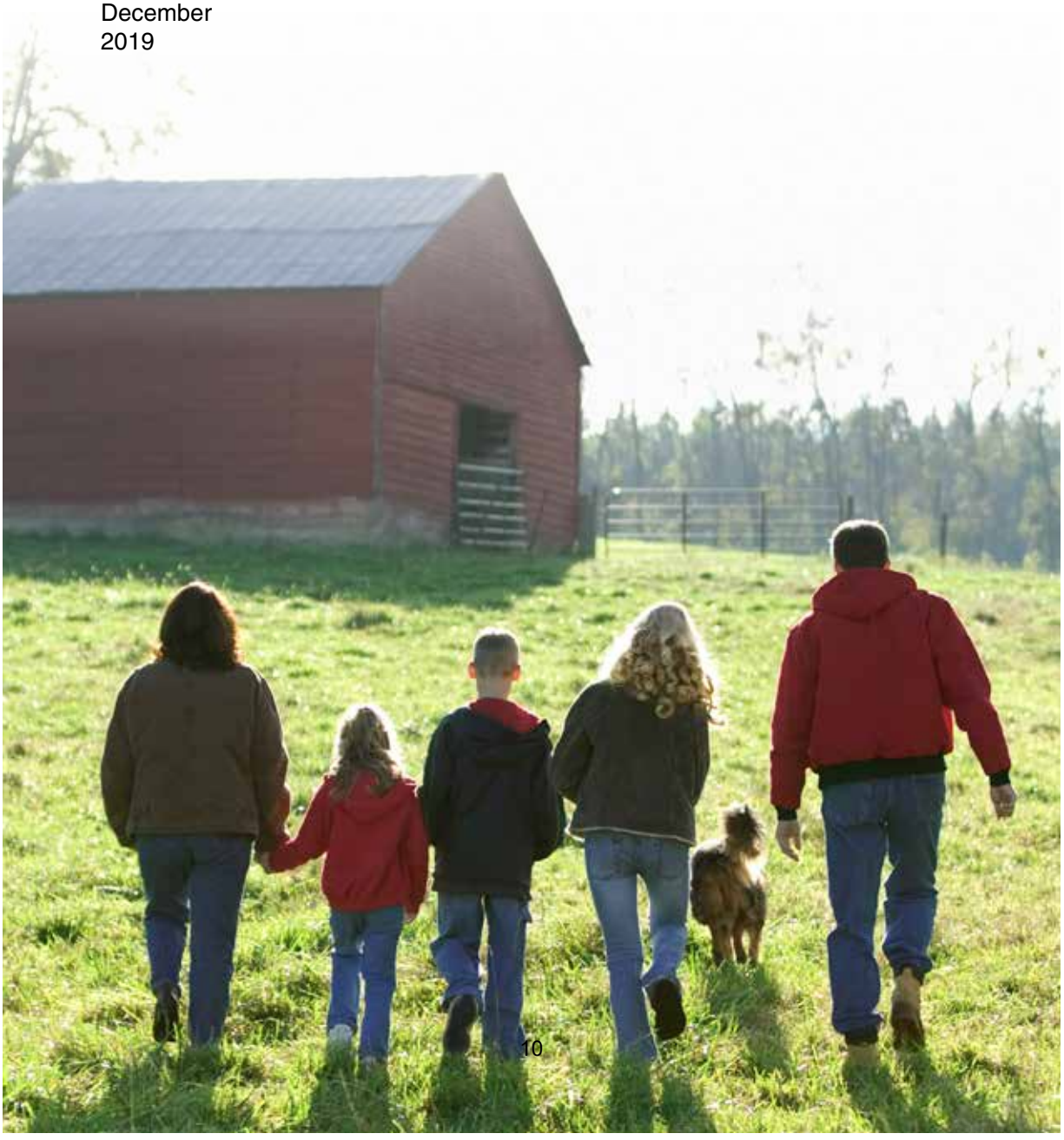
Economic Research Service

Economic Information Bulletin Number 214

December 2019

America's Diverse Family Farms

2019 Edition



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Errata

On March 13, 2020, the report *America's Diverse Family Farms: 2019 Edition* was revised to correct an error in the chart and related text in the Government Payments and Federal Crop Insurance section. The bar chart on page 19 incorrectly identified the percent of Conservation Reserve Program (CRP) payments received by each of the farm types. The original chart reported the share of all conservation payments received by each farm type, and not the share of CRP payments. In effect, retirement, off-farm occupation, and low-sales farms received 75 percent of CRP payments in 2018, and not 49 percent as originally reported.

Broad descriptions of farms based on U.S. averages can mask variation among the many sizes and types of farms. For example, in 2018, the average value of production on the 2 million U.S. farms amounted to $174,038. Few farms, however, are near the average; half of farms had production valued at $6,000 or less, while more than half of all production occurred on farms with at least $1 million of agricultural production.

This report uses a farm classification, or typology, developed by USDA's Economic Research Service (ERS) to categorize farms into more homogeneous groupings in order to better understand conditions across the Nation's diverse farm sector. The classification is based largely on the annual revenue of the farm, the main occupation of the farm's principal producer, and family or non-family ownership of the farm.

Farm Typology

The farm typology, developed by ERS, focuses primarily on the "family farm," or any farm where the majority of the business is owned by the principal operator—the person who is most responsible for making day-to-day decisions for the farm—and by individuals who are related to the principal operator. USDA defines a farm as any place that, during a given year, produced and sold—or normally would have produced and sold—at least $1,000 of agricultural products. USDA uses acres of crops and head of livestock to determine whether a place with sales of less than $1,000 could normally produce and sell that amount. Farm size is measured by gross cash farm income (GCFI), a measure of the farm's revenue that includes sales of crops and livestock, Government payments, and other farm-related income, including fees from production contracts.

Differences among farm types are illustrated in this report using 2018 data from the Agricultural Resource Management Survey (ARMS), an annual survey conducted by USDA's National Agricultural Statistics Service (NASS) and ERS. The analysis in this report is based on a sample of approximately 15,800 farms.

Small Family Farms (GCFI less than $350,000)

- **Retirement farms.** Small farms whose principal operators report having retired, though continuing to farm on a small scale (250,289 farms; 12.4 percent of U.S. farms in 2018).
- **Off-farm occupation farms.** Small farms whose principal operators report a primary occupation other than farming (819,208 farms; 40.5 percent of U.S. farms.
- **Farming-occupation farms.** Small farms whose principal operators report farming as their primary occupation.
  - **Low-sales farms.** Farms with GCFI less than $150,000 (640,223 farms; 31.7 percent of U.S. farms).
  - **Moderate-sales farms.** Farms with GCFI between $150,000 and $349,999 (102,708 farms; 5.1 percent of U.S. farms).

Midsize Family Farms (GCFI between $350,000 and $999,999)

- Farms with GCFI between $350,000 and $999,999 (111,486 farms; 5.5 percent of U.S. farms).

Large-Scale Family Farms (GCFI of $1,000,000 or more)

- **Large family farms.** Farms with GCFI between $1,000,000 and $4,999,999 (50,034 farms; 2.5 percent of U.S. farms).
- **Very large family farms.** Farms with GCFI of $5,000,000 or more (5,420 farms; 0.3 percent of U.S. farms).

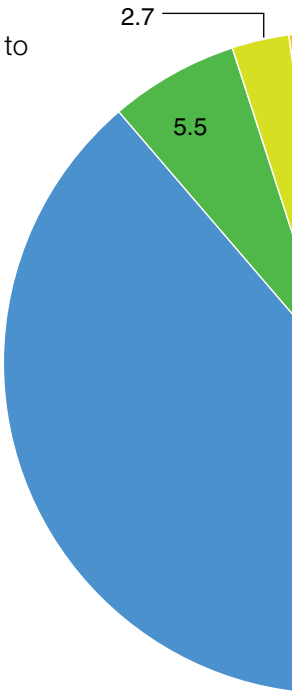
Nonfamily Farms

- Any farm where the principal operator and people related to the principal operator do not own a majority of the business (41,550 farms; 2.1 percent of U.S. farms).

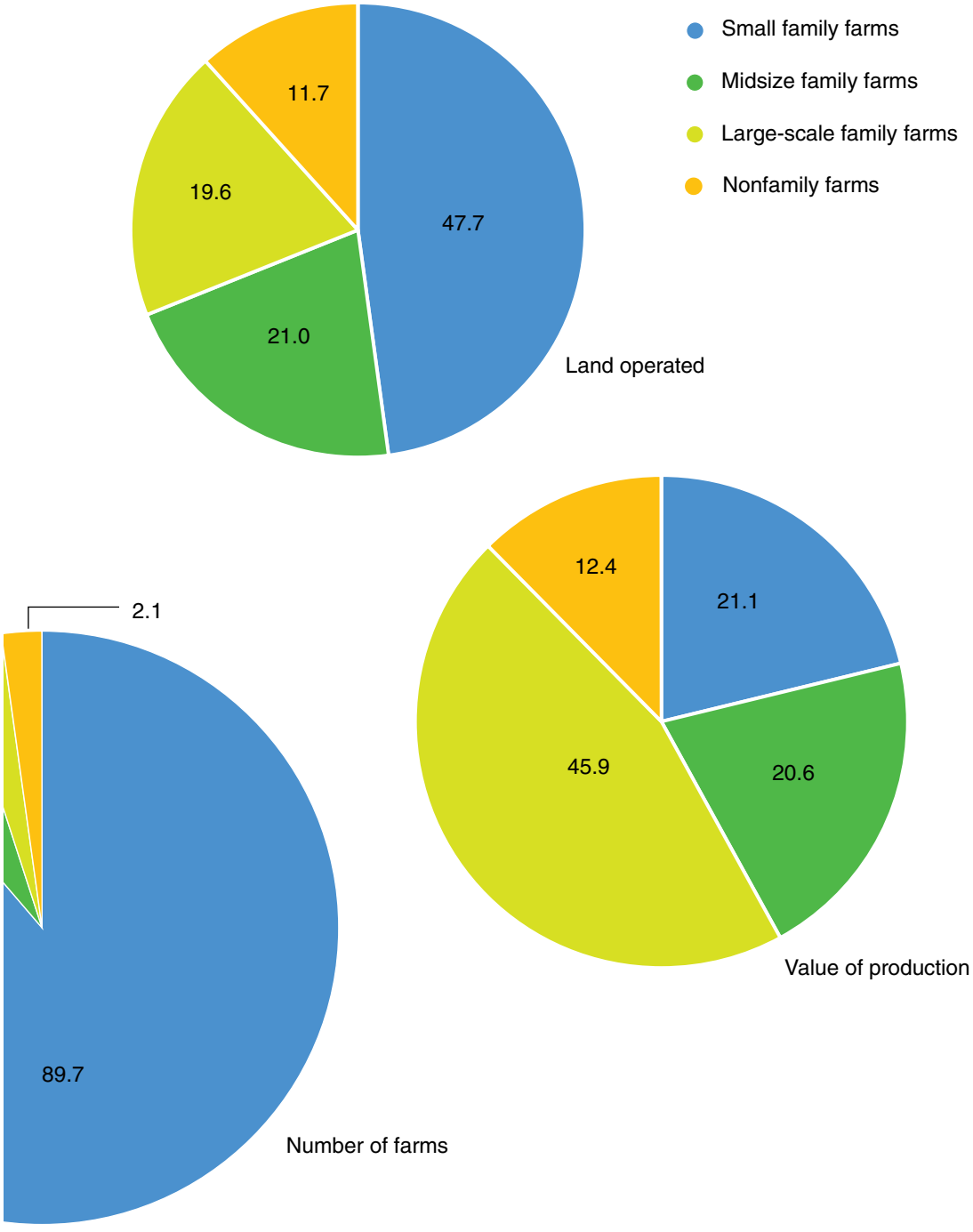
Farms, Production, and Farmland

Most U.S. farms are small; small farms operate almost half of U.S. farmland and account for 21 percent of production.

- Approximately 90 percent of U.S. farms are small. In 2018, small farms accounted for 48 percent of the land operated by farms.
- Large-scale family farms accounted for the largest share of production, at 46 percent.
- Family farms as a group, across type, accounted for 98 percent of farms and 88 percent of production in 2018.
- Nonfamily farms accounted for the remaining farms (2 percent) and production (12 percent). Fifteen percent of nonfamily farms had GCFI of $1 million or more. Such farms accounted for 87 percent of nonfamily farms' production. Examples of nonfamily farms include partnerships of unrelated partners, closely held nonfamily corporations, farms with a hired producer unrelated to the owners, and (relatively few) publicly held corporations.



Distribution of farms, land operated and value of production by farm type, 2018



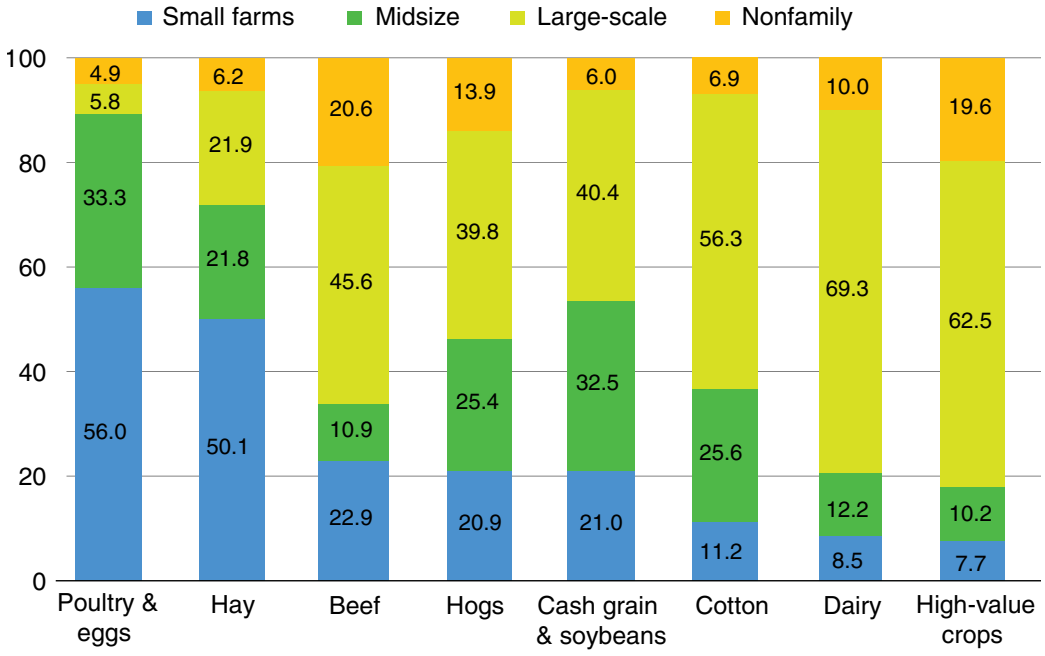
Source: USDA, Economic Research Service and USDA, National Agricultural Statistics Service, 2018 Agricultural Resource Management Survey.

Different types of farms account for the production of specific commodities.

- Large-scale family farms account for over two-thirds of dairy production, while large-scale family farms and nonfamily farms produce over 80 percent of high-value crops such as fruits and vegetables.
- Midsize and large-scale family farms dominate production of cotton (82 percent of production), cash grains/soybeans (74 percent), and hogs (66 percent).
- Small and large-scale farms together account for 69 percent of beef production. Small farms generally have cow/calf operations, while large-scale farms are more likely to operate feedlots.
- Small farms produce 56 percent of U.S. poultry and egg output and 50 percent of hay. Much of poultry production is done under production contracts, with a contractor paying a fee to a farmer who raises poultry to maturity.

Value of production for selected commodities by farm type, 2018

Percent of value of production



Note: High-value crops include fruits, vegetables, tree nuts, and nursery/greenhouse crops. Due to rounding, numbers may not add to 100.

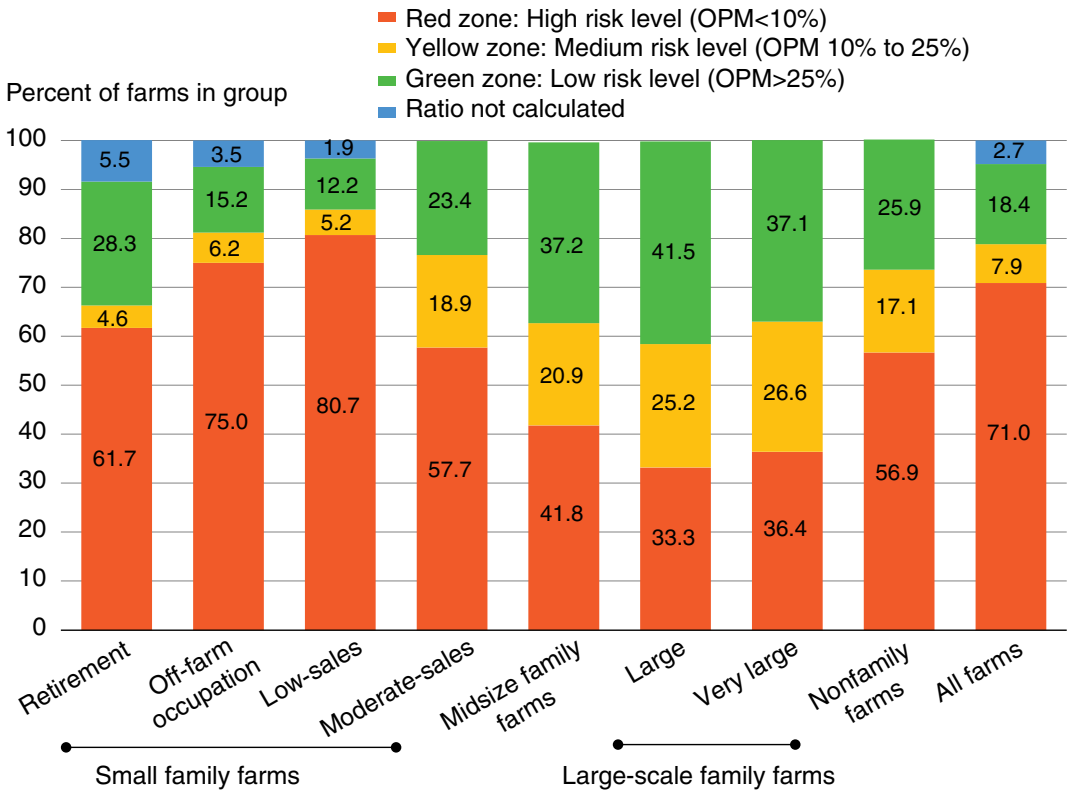
Source: USDA, Economic Research Service and USDA, National Agricultural Statistics Service, 2018 Agricultural Resource Management Survey.

Farm Financial Performance

Financial performance varies across farm size. Most small farms have an operating profit margin (OPM) in the red zone—indicating a higher risk of financial problems—while most midsize, large, and very large farms operate in a lower financial risk zone. ***(See the figure for definition of OPM.)***

- Between 58 and 81 percent of small family farms—depending on the farm type—had an OPM in the high-risk red zone. Many small farms, however, have operators who do not consider farming to be their primary occupation, and who receive little or no income from farming. Instead, these small farms receive substantial income from off-farm sources. These earnings are not reflected in their OPM.
- Between 9 and 25 percent of small farms operate in the low-risk green zone, as do between 37 and 41 percent of midsize, large, and very large farms.
- The share of midsize and large-scale family farms with an OPM in the green zone declined between 2017 and 2018. Net cash income for farm businesses fell from $81,639 per farm in 2017 to $76,788 in 2018, with declining net cash incomes shifting some farms into the high-risk zone. Lower commodity prices played a substantial role, negatively affecting the OPM of many midsize, large and very large farms, depending on the farm's commodity mix.

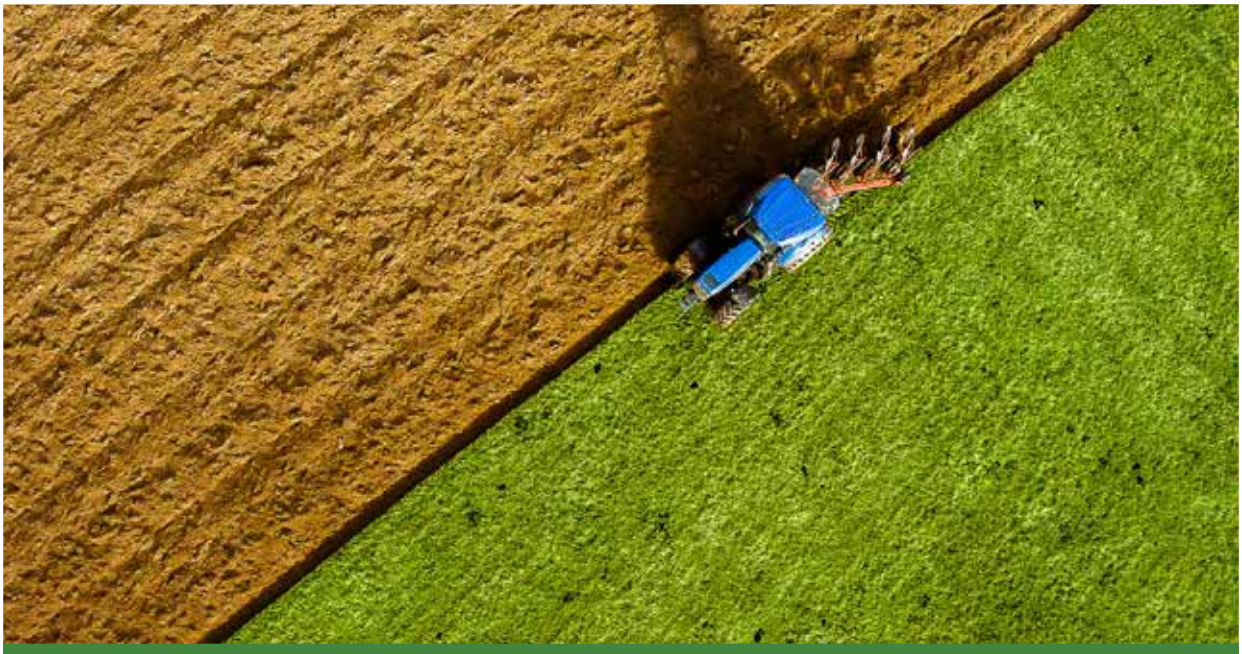
Farms by operating profit margin (OPM) and farm type, 2018



OPM = operating profit margin

Notes: Due to rounding, sums may not add to 100 percent. Operating profit margin (OPM)=100 X (net farm income + interest paid - charges for unpaid labor and management)/gross farm income.

Source: USDA, Economic Research Service and USDA, National Agricultural Statistics Service, 2018 Agricultural Resource Management Survey.

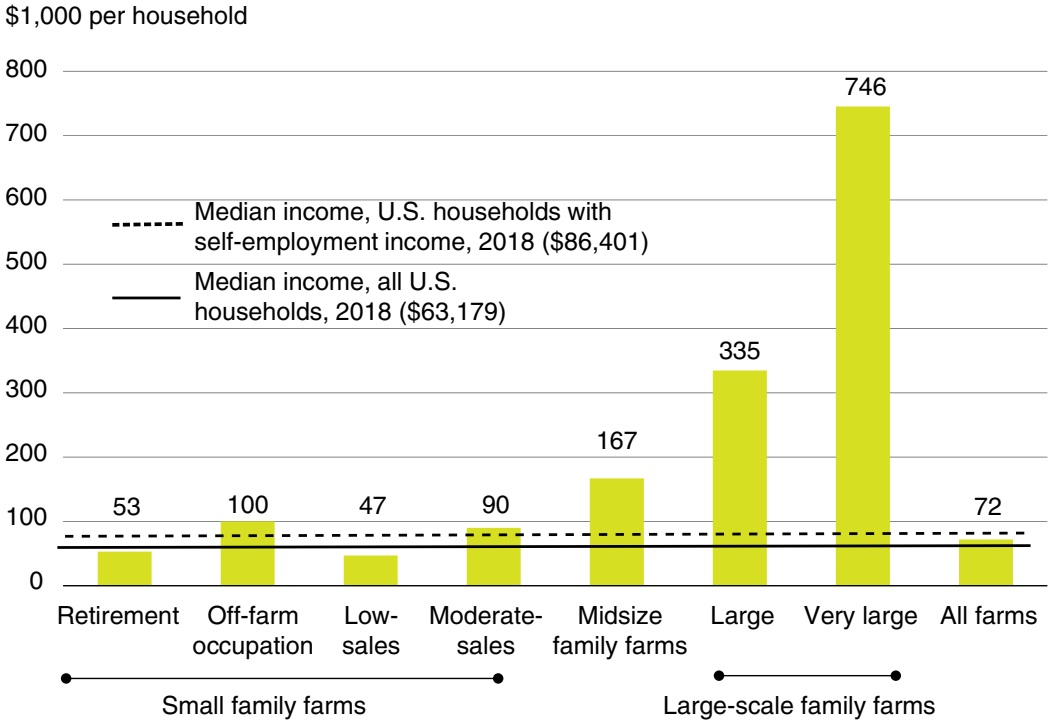


Farm Operator Household Income and Wealth

Farm households in general are not low-income or low-wealth when compared with all U.S. households.

- In 2018, 57 percent of farm households received an income at or above $63,179, the median for all U.S. households. Median household income in five out of seven farm types exceeded both the median U.S. household income and the median income for U.S. households with self-emplyment income.
- The median income for all family farm households is lower than the median among all U.S. households with self-employment income.

Median operator household income by farm type, 2018



Notes: Operator household income includes both farm and off-farm income received by household members. Half of all households have incomes above the median, and half have incomes below the median.

Sources: USDA, Economic Research Service and USDA, National Agricultural Statistics Service, 2018 Agricultural Resource Management Survey for farm households. U.S. Department of Commerce, Bureau of the Census, 2019 Current Population Survey, March supplement for all U.S. households.

- Only 3 percent of farm households overall had lower wealth than the median U.S. household.
- Farm households often use off-farm income to cover farm expenses and fund farm operations. While self-employment and wage/salary jobs are the main sources of off-farm income for farm households, public and private pensions, interest and dividend payments, asset sales, Social Security payments, and other sources of income provide a significant share of off-farm income, particularly for retirement farms.
- Operators of small farms—especially retirement, off-farm occupation, and low-sales farms—often report losses from farming. For tax-reporting purposes, some producers who report losses write off farm losses against other income.

Farm households with income or wealth below the median for all U.S. households, 2018

	Farm households with...	
	Income below U.S. median ($63,179)	Wealth below U.S. median ($99,352)
	Percent of farm households	
Small family farms		
Retirement	58.0	0.3
Off-farm occupation	25.0	3.2
Low-sales	65.0	4.3
Moderate sales	37.7	4.3
Midsize family farms	25.4	3.0
Large-scale family farms		
Large	20.0	2.8
Very large	21.9	4.1
All family farms	42.6	3.2

Notes: Operator household income and wealth are not estimated for nonfamily farms. U.S. median wealth was adjusted to 2018 dollars using the Gross Domestic Product chain-type price index.

Source: USDA, Economic Research Service and USDA, National Agricultural Statistics Service, 2018 Agricultural Resource Management Survey. U.S. Department of Commerce, Bureau of the Census, 2019 Current Population Survey.

Farm operator household income by source and farm type, 2018

Farm type	Mean total income	Income from farming		Mean income from off-farm sources		
		Mean amount	Is negative	Total	Earned	Unearned
	Dollars per household		Percent of households	Dollars per household		
Small family farms						
Retirement	67,144	2,865	56.1	64,279	29,818	34,461
Off-farm occupation	131,126	-4,392	70.9	135,518	113,406	22,112
Low-sales	57,626	-4,205	61.9	61,830	28,685	33,146
Moderate sales	108,053	40,057	23.9	67,995	34,090	33,905
Midsize family farms	197,016	118,024	18.4	78,992	50,381	28,611
Large-scale family farms						
Large	413,485	355,269	14.2	58,216	37,480	20,735
Very large	1,335,135	1,290,377	16.1	44,758	21,004	23,753
All family farms	112,210	18,425	59.1	93,786	65,596	28,190

Notes: Operator household income is not estimated for nonfamily farms. Earned income comes from off-farm self-employment or wage/salary jobs. Unearned income includes interest and dividends, benefits from Social Security and other public pensions, alimony, annuities, net income of estates or trusts, private pensions, etc.

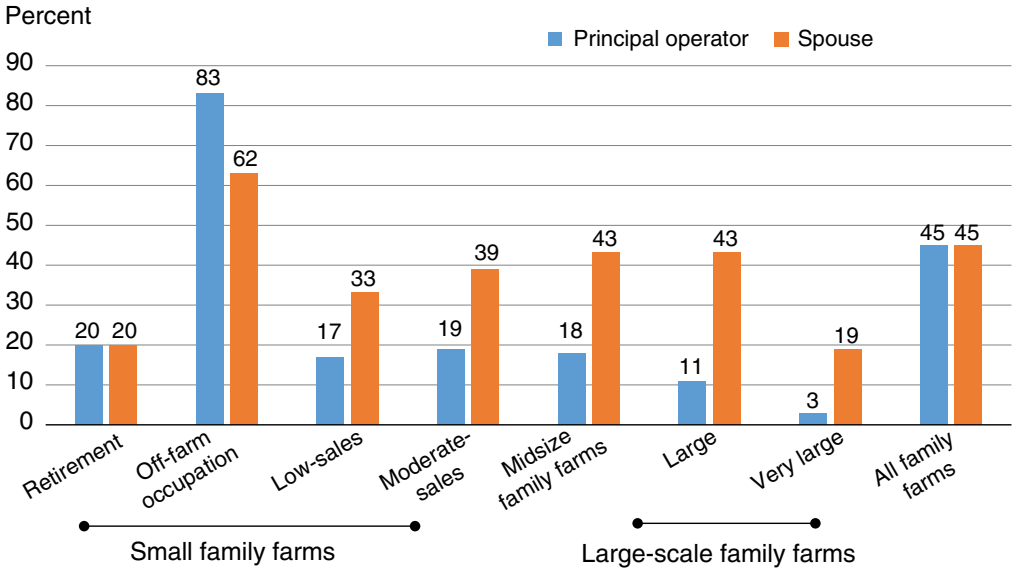
Source: USDA, Economic Research Service and USDA, National Agricultural Statistics Service, 2018 Agricultural Resource Management Survey.

Off-Farm Work by Principal Operators and Their Spouses

Many family farm households combine farm and off-farm work to generate income and other benefits for the household.

- Overall, 45 percent of principal operators work off the farm.
- Over 41 percent of U.S. family farms fall in the "off-farm occupation" typology class (whose principal operators declare an occupation that is not farming).
- Over 80 percent of those operators work off the farm, as do 62 percent of their spouses.
- Off-farm work is important in other typology classes as well. Among principal operators of retirement farms, small "farming-occupation" farms (low and moderate-sales), and midsize farms, 17 to 20 percent also hold jobs off-farm.
- Principal operators of large-scale family farms are less likely to work off the farm than are operators of small and midsize family farms. Eleven percent of principal operators of large farms and three percent of those at very large farms also hold jobs off the farm.
- Overall, 45 percent of the spouses of principal farm operators of family farms work off the farm; relatively few spouses on retirement farms and on very large farms hold jobs off the farm.
- Where the spouses of principal operators held jobs off the farm, a majority reported that "health care benefits" was one reason for working off the farm, while principal operators, particularly of large-scale farms and farming-occupation small farms, were less likely to cite health care benefits as a reason for working off the farm.

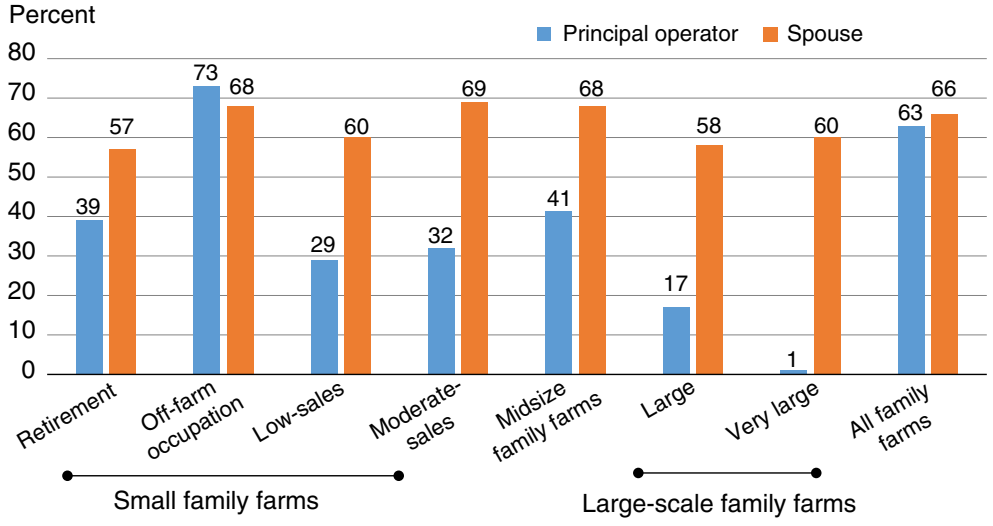
Percent of principal operators and spouses who work off the farm, 2018



Note: Spouse percents are calculated among those households with a spouse present.

Source: USDA, Economic Research Service and USDA, National Agricultural Statistics Service, 2018 Agricultural Resource Management Survey.

Share of farm households who work off-farm that do so for health care benefits, by farm type, 2018



Note: Of those with off-farm employment, the share who cite “health care benefits” among the reasons for off-farm work. Spouse percent are calculated among those households with a spouse present.

Source: USDA, Economic Research Service and USDA, National Agricultural Statistics Service, 2018 Agricultural Resource Management Survey.

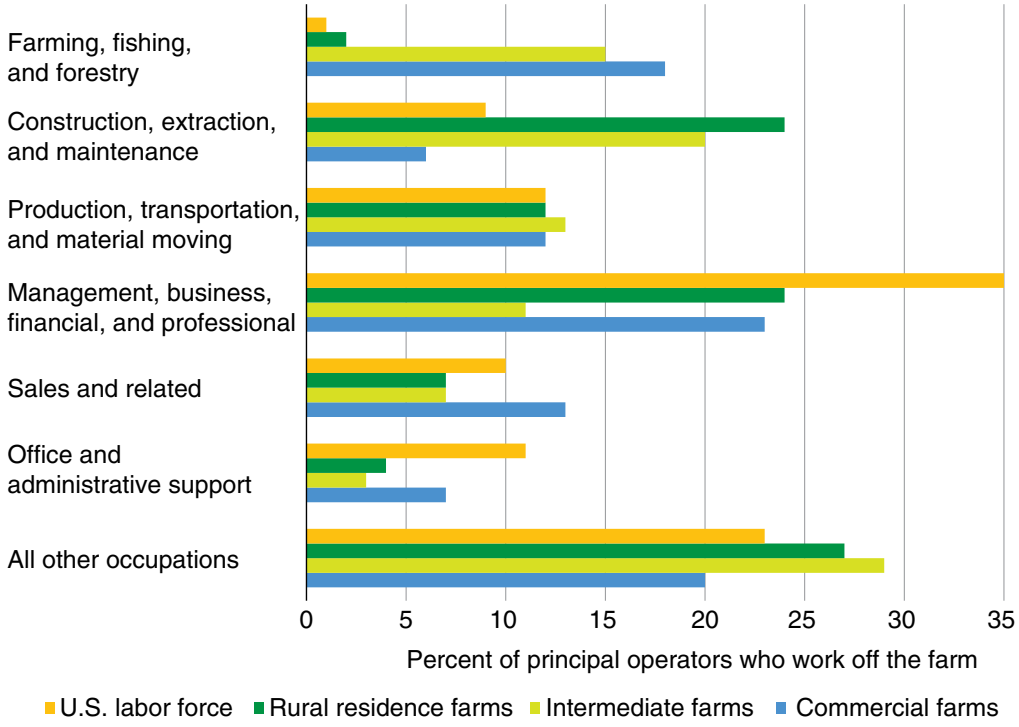
We use a compressed farm typology in this section. Commercial farms include midsize family farms, large-scale family farms, and nonfamily farms. Rural residence farms include retired and off-farm occupation farms, while intermediate farms include small family farms whose operators cite farming as a principal occupation (low- and moderate-sales small family farms).

Off-Farm Occupations of Principal Farm Operators

The occupations of farm operators who work off the farm differ from those of the general U.S. workforce.

- Among operators of commercial and intermediate farms who also hold off-farm jobs, 15 to 18 percent work in farming, fishery, or forestry occupations, compared to about 1 percent of the U.S. workforce.
- Among intermediate farm operators who also work off their farms, 20 percent work in construction, extraction, or maintenance occupations, while 24 percent of rural residence farm operators who also work off their farms work in those occupations. Among the U.S. workforce generally, only 9 percent work in those occupations.
- Farm operators are less likely to work in management and professional service occupations if they work off the farm, but this group of occupations is still among the largest categories of occupation of principal farm operators. Farm operators are less likely than those in the general workforce to work in office and administrative support positions.
- In general, farm operators are more likely to work in goods-producing occupations and are less likely to work in service occupations. These occupational choices may reflect location, with goods-producing activities more likely to be in rural areas.

Off-farm occupational choices of principal farm operators who work off the farm, 2018



Source: USDA, Economic Research Service and USDA, National Agricultural Statistics Service, 2018 Agricultural Resource Management Survey; and U.S. Department of Commerce, Bureau of the Census, 2019 Current Population Survey.

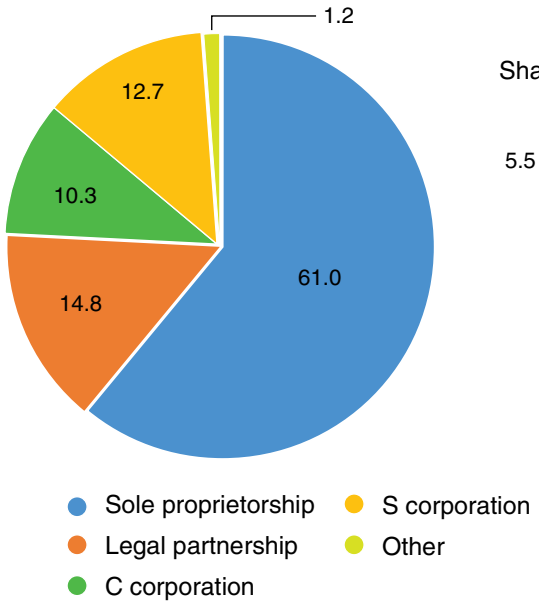
Farm Legal Organization

The vast majority of family farms (about 90 percent) are operated as sole proprietorships owned by a single individual or family. They account for close to 61 percent of the value of production.

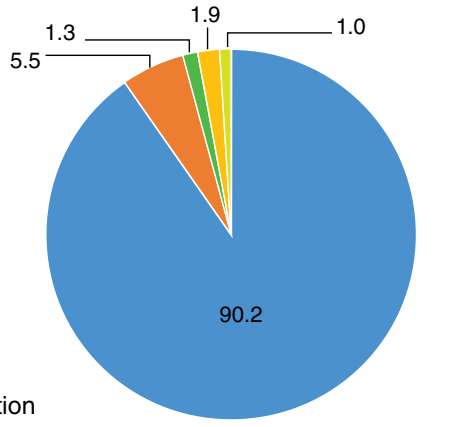
- Sole proprietorships are the most common form of legal organization across the farm typology. Ninety-two percent of small family farms and seventy-four percent of midsize farms are organized as sole proprietorships.
- Relatively few farms—1 percent—are organized as C corporations (or "regular" corporations), and they account for 10 percent of the value of agricultural production.
- Approximately 98 percent of family farms are organized as pass-through entities (sole proprietorships, partnerships, or S corporations); pass-through entities account for 88.5 percent of production.

Most family farms are organized as sole proprietorships, and they account for most production.

Share of family farm production by legal organization



Share of family farms by legal organization



Note: "Other" includes estates, trusts, cooperatives, grazing associations, etc.
Source: USDA, Economic Research Service and USDA, National Agricultural Statistics Service, 2018 Agricultural Resource Management Survey.

Legal Organization of Family Farms

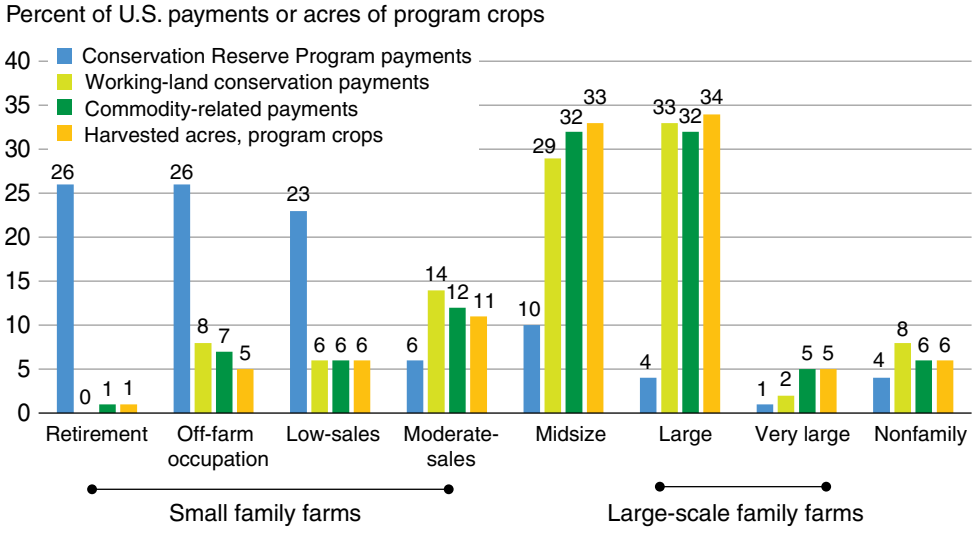
The legal organization of a family farm determines how its income is taxed. Farms that are sole proprietorships, partnerships, and Subchapter S corporations are pass-through entities, meaning any profit or loss from them is passed to the owner/partner/shareholder, and tax is paid at the individual level on their personal income tax returns. Farms may choose to organize as Subchapter C corporations, and such corporations are liable for corporate income taxes; any dividends paid to their shareholders may be subject to individual income taxes as well.

Government Payments and Federal Crop Insurance

Recipients of Government payments differ by program.

- Commodity-related program payments generally reflect acreage in crops historically eligible for support. Seventy-six percent of these payments went to moderate-sales, midsize, and large family farms in 2018, roughly proportional to their 78-percent share of acres in program crops.
- Thirty-three percent of working-land conservation payments went to large family farms, another 29 percent went to midsize family farms, and 28 percent went to small family farms.
- USDA's Conservation Reserve Program targets environmentally sensitive cropland for removal from production. In 2018, retirement, off-farm occupation, and low-sales farms received 75 percent of these payments.
- Seventy-one percent of all farms (71 percent of farm land) received no farm-related Government payments in 2018.

Distribution of government agricultural program payments, and harvested acres of program crops, 2018

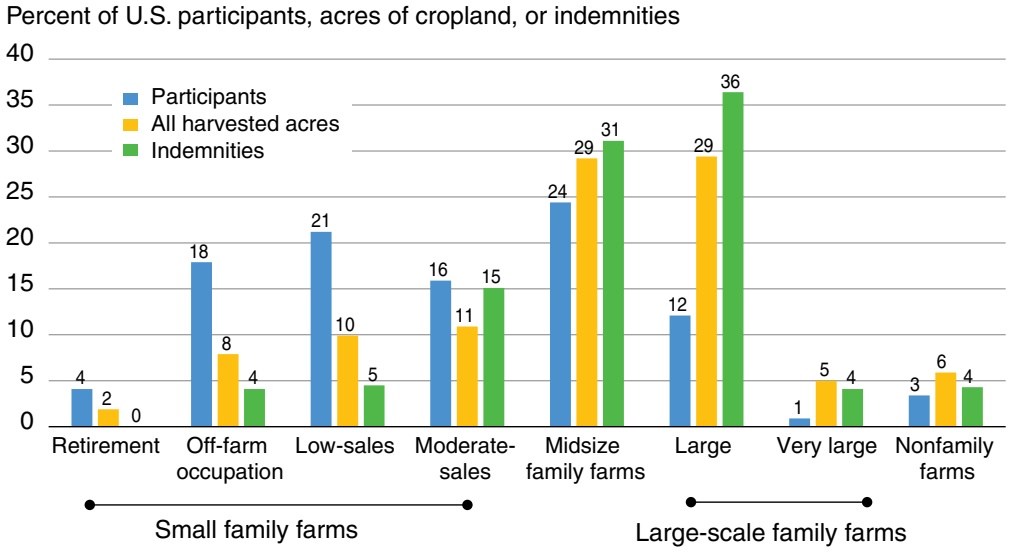


Note: Program crops include barley, corn, dry edible beans/peas/lentils, oats, peanuts, rice, sorghum (grain), soybeans and other oilseeds, canola, and wheat.
Source: USDA, Economic Research Service and USDA, National Agricultural Statistics Service 2018 Agricultural Resource Management Survey.

Indemnities from Federal crop insurance are roughly proportional to acres of harvested cropland.

- Midsize and large family farms together received 67 percent of indemnities from Federal crop insurance in 2018.
- Midsize and large farms' share of indemnities reflects their commodity mix and their high participation in Federal crop insurance. About two-thirds of midsize farms and three-fourths of large farms participated in Federal crop insurance, compared with only one-sixth of all U.S. farms. While midsize and large family farms were 8 percent of all U.S. farms, they accounted for 24 and 12 percent of crop insurance participants, respectively, and 58 percent of all harvested cropland acres.
- Grain and oilseed farms—the most common specialization among midsize and large family farms—accounted for 65 percent of all participants in Federal crop insurance and 65 percent of all harvested cropland in 2018.

Federal crop insurance participants, harvested cropland, and indemnities, by farm type, 2018



Note: Indemnities are payments from insurance to compensate for losses and will depend on variation in weather and other events that result in loss. Participants are farms paying crop insurance premiums.

Source: USDA, Economic Research Service and USDA, National Agricultural Statistics Service, 2018 Agricultural Resource Management Survey.

Conclusions and Implications

- **Farming is still overwhelmingly comprised of family businesses.**
  Ninety-eight percent of U.S. farms are family farms, and they account for 88 percent of farm production.
- **Small family farms make up 90 percent of the farm count and operate almost half of the farmland.**
  The largest share of the value of farm production (46 percent), however, occurs on large-scale family farms. Small farms account for over half the value of poultry and hay production.
- **The share of farms with an operating profit margin (OPM) in the green zone varied by farm size in 2018.**
  Between 58 and 81 percent of small farms have an OPM in the high-risk zone—depending on the farm type—compared with 35 to 44 percent of midsize and large-scale farms. Some small farms in each type operate in the low-risk zone, as do more than 35 percent of midsize, large, and very large farms.
- **Farm households in general are neither low-income nor low-wealth.**
  Median farm household income in 2018 exceeded that for all U.S. households, but was lower than the median among all U.S. households with self-employment income. In 2018, about 43 percent of farm households had income below that of the median for all U.S. households, and 3 percent had wealth less than the U.S. median.
- **Off-farm work is an important source of income for farm households, especially for small and midsize family farms.**
  Farm spouses who work off the farm cite health care benefits as an important reason for off-farm work.
- **Conservation Reserve Program (CRP) payments go to different farms than other Government payments.**
  CRP payments target environmentally sensitive cropland, with most payments going to retirement, off-farm occupation, and low-sales farms. In contrast, commodity-related and working-land payments go to family farms with gross cash farm income (GCFI) of $150,000 or more. Most U.S. farms, however, do not receive Government payments and are not directly affected by them, although they may be affected indirectly by changes in land values and rents.

The mission of USDA's Economic Research Service is to anticipate trends and emerging issues in agriculture, food, the environment, and rural America and to conduct high-quality, objective economic research to inform and enhance public and private decision making. ERS shapes its research program and products to serve those who routinely make or influence public policy and program decisions.

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ALL THINGS AG[1]

A Chapter 12 Primer

Hon. Catherine J. (Cate) Furay
United States Bankruptcy Court, WD Wisconsin

Table of Contents

[1] Thanks to Judge Michael Ridgway(MN) and to Attorneys James Loden and Brittany S. Ogden for portions of the information and materials incorporated into this outline.

PART I: CHAPTER 12 BANKRUPTCY AND MARKET TRENDS

I. Chapter 12 Bankruptcies: An Upward Trend

Once an anomaly, the chapter 12 bankruptcy petition is commonplace. But in recent years, such bankruptcies have been trending upward throughout the nation. Some districts that had not had any chapter 12 cases in years past are beginning to have them on the docket.

In comparison, the total number of other bankruptcies filed between 2012-2017 generally decreased.

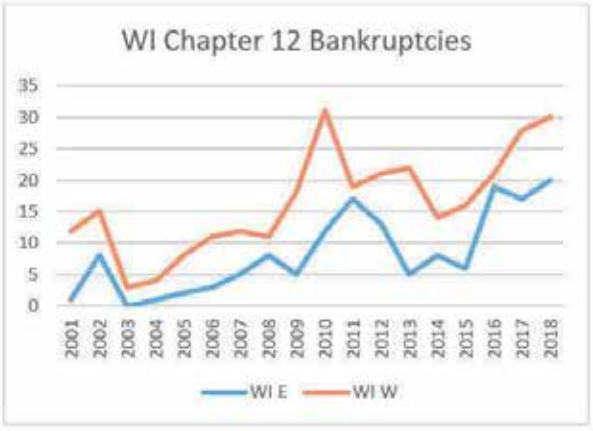
Year	Total	Chapter 7	Chapter 11	Chapter 12	Chapter 13
2012	1,221,091	843,545	10,361	512	366,532
2013	1,071,932	728,833	8,980	395	333,626
2014	936,795	619,069	7,234	361	310,061
2015	844,495	535,047	7,241	407	301,705
2016	794,960	490,365	7,292	461	296,655
2017	789,020	486,347	7,442	501	294,637
2018	773,418	475,575	7,095	498	290,146
2019*	191,744	117,951	1,912	130	71,734

*Through March 31, 2019

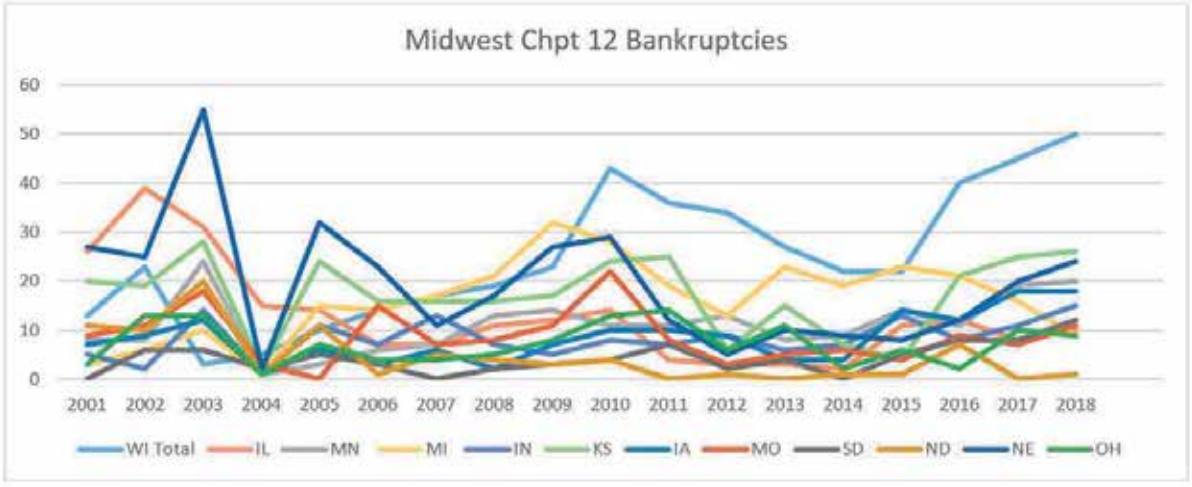
Source: U.S. Courts, Table f-2, U.S. Bankruptcy Courts, Cases Commenced By Chapter of the Bankruptcy Code

http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables

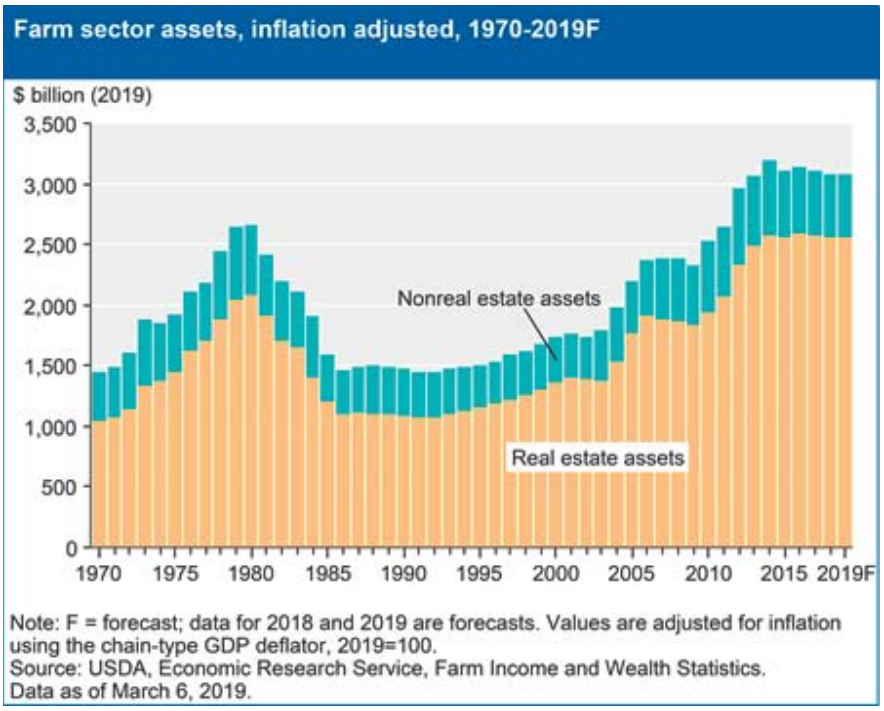
Of the 2018 filings, more than 50% were in the 2nd, 7th, 8th and 10th circuits. Nonetheless, with the exception of the DC Circuit, chapter 12 cases have been filed in every circuit in 2018.

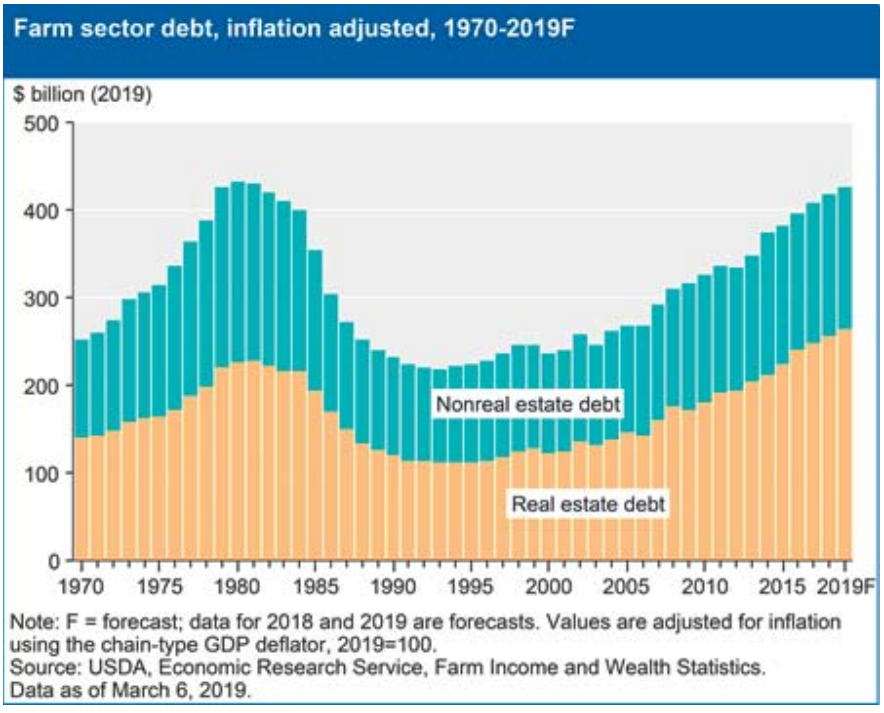


When compared to the other states in the Midwest (Illinois, Indiana, Minnesota, Michigan, Kansas, Iowa, Missouri, South and North Dakota, Nebraska and Ohio), Wisconsin has consistently been higher since 2009.



While there was a neglible decrease in the number of chapter 12 cases in 2018, the USDA does not project improvements in solvency and liquidity ratios. It projects the debt-to-asset ratio to climb 13.86 percent – the highest since 2009. USDA, Economic Research Service, Farm Income and Wealth Statistics.





II. Why the Upward Trend? There are a number of factors.

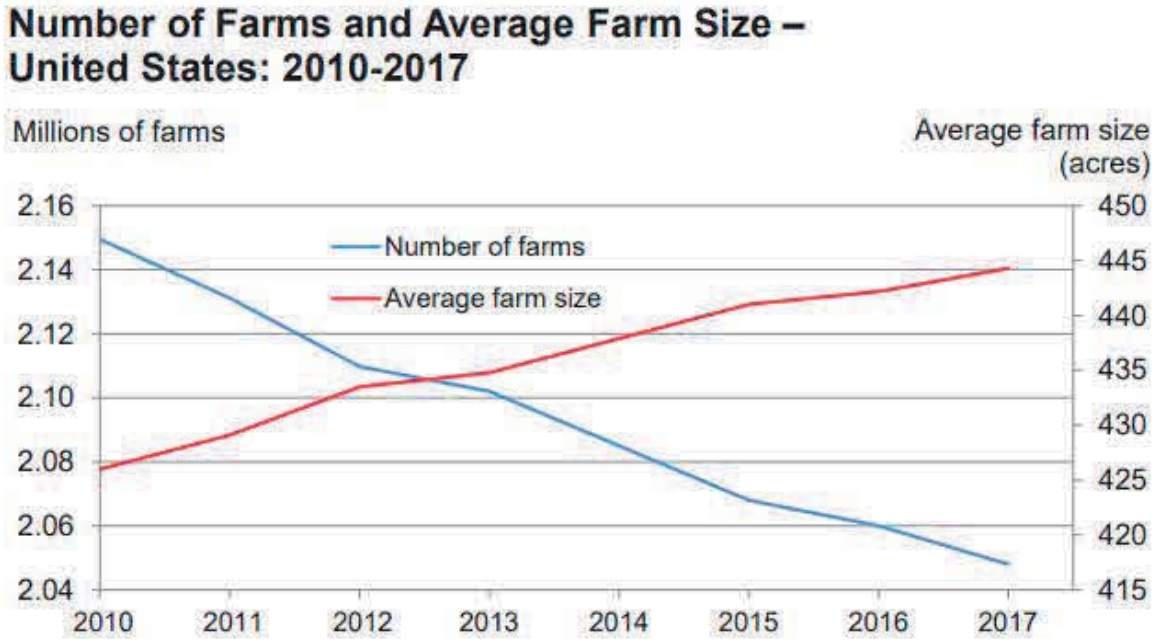
At a national level, the well-being of US Farms is often assessed by the national farm income. According to the recently updated outlooks, the 2018 net

farm income forecast is said to be below the 10-year average. (See, Randy Schnepf, Specialist in Agricultural Policy, Congressional Research Service, *U.S. Farm Income Outlook for 2018,* citing to USDA's Economic Research Service, September 21, 2018.) Research indicates that this number is down because of a number of factors. One set of factors includes weak prices for commodities and livestock. While another set of factors includes flat exports, attributed to increased competition and supply. *Id*

The type of farming certainly varies throughout the country. And the approach to payment to the farm can differ greatly based on the enterprise.

From a practical viewpoint, a farm's potential is based on the ability to debt-service or pay bills while still finding some profit. High commodity prices enjoyed (high corn prices, cattle prices etc.) are no longer generally enjoyed. Nevertheless, the prices for input that went up (i.e. seed, repair costs, land prices and rent, etc.) when commodity prices were high, did not decrease at the same pace when commodity prices dropped.

The size of farms are increasing, but the number of farms are decreasing. US net farm incomes are forecasted to decline in 2018, and most farmers receive off-farm income, but small-scale farmers depend on it. Farmland values have been declining since 2011. Recently majority of the investors in or purchasers of such land are speculators or developers and not farmers.



III. Differences in Farm Crisis 80's vs 2019

- Chapter 12 Filings
  - 1987 5,788
  - 2018 498
- Differences – 2019 compared to 1980s
  - ✓ 5 to 7% vs. 18-20% interest rates
  - ✓ Several years of cash build up
  - ✓ Land values currently stable vs. 1% per month or more drop
  - ✓ Robust crop insurance program
  - ✓ Liquidity/working capital vs balance sheet problems

PART II: NON-BANKRUPTCY CONSIDERATIONS

I. Farming is a way of life for many people.

A. Many of the family farmers going out of business are multi-generational farms.

B. Many farmers do not farm solely for money.

II. Payment for Commodities

A. *Dairy Farmers* - Milk is normally sold to dairies, like Foremost, Saputo, and Grassland. Payment is twice per month by milk check. For example, the 16th and 26th of each month are common payment dates.

1. Typically, famers arrange to have payments to creditors automatically withdrawn from their milk checks to pay creditors, like PMSI lenders and the main secured lenders. Often, creditors will require that debtors grant an assignment of their milk proceeds, making it difficult to stop automatic withdrawals in the immediate post-petition period.

2. Prices are determined, in part, by market forces and, in part, by complex USDA regulations. Futures prices are posted on the Chicago Mercantile Exchange & Chicago Board of Trade (CME) website.[2]

B. *Grain Farmers* - Annually or semi-annually. Wheat is planted in the fall and harvested in the spring/summer. Field corn and soy are planted in the spring and harvested in the fall. Those two crops comprise the majority of crops grown in Wisconsin, though farmers grow other crops, like lima beans, sorghum, sweet corn, oats, and others.

Grain is usually sold through futures contracts. The farmer typically opts to contract a portion of his expected harvest out at a set price early in the year. If he cannot fulfill the contract, he must cover by buying grain to deliver.

Example: Farmer expects to harvest 20,000 bushels of corn. He decides to contract to sell 10,000 at $3.50 per bushel. The remaining grain can be sold directly to other farmers as feed or the co-op. There is a difference between the commodity price on the CME and what farmers receive from

[2] CME Group, Class III Milk Futures Quotes, https://www.cmegroup.com/trading/agricultural/dairy/class-iii-milk.html

selling the grain through the coop.[3] The coop price is lower because of costs to the coop, such as shipping.

III. Financing the Operations.

A. *Main lender* - Typically will have a mortgage and blanket security interest in all personal property of the debtor.

B. *Purchase-Money Security Interest (PMSI) creditors* - Financed equipment. They finance the purchase of equipment and have superior liens to the main lender, and the main lender will take a secondary lien by virtue of its blanket security interest. To maintain perfection, the PMSI creditor generally must file a UCC-1 within 20 days. See UCC § 9-324 (governing priority of (PMSIs) and UCC § 9-310 (stating general requirement to perfect by filing).

C. *The Farm Product Exception* – UCC § 9-320 (former 9-307) – Buyer in the ordinary course of business takes free of a security interest created by the buyer's seller, even if perfected and the buyer knows of its existence

"Other than a person buying farm products from a person engaged in a farming operation"

BUT – Congress addressed this issue

Food Security Act of 1985 7 U.S.C. § 1631 protects buyers and trumps 9-320. It eliminates the farm products exception so the buyer takes free and clear unless:

- The secured party provided notice to the buyer of its security interest within 1 year before the sale OR
- In states with a Central Filing System, the secured party filed an Effective Financing Statement (EFS)
- And buyer fails to perform payment obligation (lender name on the check

D. *Production-Money Security Interests (PrMSI)* - Loans to finance the production of crops. If properly perfected, they take priority over conflicting security interests. The benefit for lenders is clear. If they lend

[3] Country Visions Cooperative, Cash Bids, https://www.countryvisioncoop.com/Grain/Cash-Bids

money to produce crops, then they can expect payment first.

Priority and perfection rules are different than PMSIs. C.f Wis. Stat. § 409.324(1) and Wis. Stat.§ 409.3245 (detailing requirements to obtain super-priority status for production money security interests).

To obtain super-priority status as a purchase-money security interest, the creditor must (1) finance the purchase of collateral and (2) perfect by filing within 20 days thereafter.

To obtain super-priority status as a PrMSI, the creditor must take the following steps

File a UCC-1.

Provide new value to enable the debtor to produce crops.

Send a signed "notification by certified mail to the holder of the conflicting security interest not less than 20 or more than 30 days before the productions money secured party first gives new value to enable the debtor to produce the crops if the holder had filed a financing statement covering the crops before the date of the filing made by the production-money secured party."

Ensure the notification states that the lender has or expects to have a PrMSI in crops, a description of the crops, and other information.

E. *Leased equipment* - Rather than purchase equipment, farmers can lease equipment. Check for maximum hour clauses, restrictions on assignments, and buy-out provisions.

F. *Land leases* - Normally semi-annual payments with spring and fall payments. Often done on handshake deals or with minimal documentation.

G. *"Leased" animals* - Often disguised security agreements. Check UCC-1 filings before bankruptcy. See, for example, Wis. Stat. § 401.203 (comparing leases and security agreements); see also Wis. Stat.§ 409.324(4) (dealing with the priority of PMSIs in livestock).

H. *Unsecured trade creditors* - For example, custom hire, equipment repair, parts, bedding, feed. It often occurs that after filing for

bankruptcy, trade creditors operate on a cash-only basis.

I. *Cooperative Patronage*[4] - Under the Internal Revenue Code, cooperatives may elect to refund a portion of their profits to cooperative members. See 26 U.S.C. § 1381 - 1388. Under section 1382, cooperatives receive a tax deduction for the patronage. The amount paid to the member is determined by (1) the "quantity or value of business done with or for such patron" and (2) "by reference to the net earnings of the organization from business done with or for its patrons."

Therefore, if a farmer's cooperative decides to pay dividend to its members, the amount of the dividend will go up in relation to the cooperative's net earnings and how much business the farmer does at the cooperative.

Given the amount of money farmers spend on inputs and other services, patronage checks can be substantial.

IV. Selected Terminology

A. *Livestock*

1. Cattle

Bovine - the scientific name for cattle

Calf - a sexually immature young bovine

Heifer - a young female bovine which has not yet had a calf

Bred heifer - self-explanatory

Springing heifer - A bred heifer ready to calve; milk production is typically higher on the first lactation cycle.

Cow - a mature female bovine

Dry Cow - A cow that is no longer lactating.

Wet -A cow that is lactating.

Fresh Cow - A cow that has recently given birth;

[4] A great reference is USDA Rural Development, Income Tax Treatment of Cooperatives, http://www.uwcc.wisc.edu/pdf/cir45-8.pdf

Heifer – a young female before she has had a calf of her own and is under 3 years old

Springer – a cow or heifer close to calving

Steer - a castrated male bovine

Bull - a sexually mature male bovine

Breeds - Ex.: Holstein - Stereotypical black and white spotted cows. Typically known for higher production; Jersey- This breed produces higher butterfat and protein; Brown Swiss; Guernsey.

2. Pigs

Shoat – young pig, especially one which is newly weaned

Feeder pig – young pig (around 8 weeks old)

Suckling pig – a piglet slaughtered for its tender meat

Porker – pig between 66 and 119 lb dressed weight

Baconer – pig between 143 and 180 lb dressed weight

Butcher hog – pig of approximately 220 lb. In some markets the weight can be up to 400 lb and those have hind legs suitable to produce cured ham

Farrowing – giving birth

Hogging – a sow when in heat

Trotters – the hooves of pigs

Ark – low semi circular field shelter for pigs

Curtain-barn – a long, open building with curtains on the long sides. This increases ventilation on hot, humid summer days.

B. *Production-related Terminology*

Milk Components - Located in the DHIA reports and the final milk check. Somatic Cell Count - An indicator of pathogens, often an indication of mastitis. High cell count levels can result in a reduction

in the mailbox price or a refusal of a dairy to accept the milk.

Protein and Butterfat Content - The portion of the liquid milk that contains protein and fat used in butter, cheese, and whey production.

Milk Urea Nitrogen (MUN) - Possible indicator of suboptimal diet.

Hundredweight (CWT) - One-hundred pounds of milk. The unit used to measure milk.

Mailbox Price - Price paid per hundred weight when accounting adjustments for milk quality, such as protein and butterfat content.

Herd Average - the average milk production of cows in a herd. Ex: 80 lbs/day. Rolling Herd Average - average amount of milk produced by the average cow in the herd over the last 365 days.

Cull Cows - When cows stop producing at desirable levels, typically after a few lactation cycles, they are culled from the herd. Often, farmers will sell the cows to stockyards often based on the weight of the animals. Example companies include Richland Cattle Center, Equity Co-op, Booth Brothers.

DHIA Reports - Reports used to analyze metrics about the quality of milk, herd production, and other metrics. These are normally obtained through third-party providers. Examples in Wisconsin include AgSource

Cooperative, Dairy Lab Services, and Northstar Cooperative.

Sileage - Fermented high-moisture plant matter fed to cattle. The large white bags often visible on country roads contain sileage.

Haylage - Partially dried and ensiled plant matter fed to cattle.

Hay - Dried grass that is baled and fed to cattle.

Supplements - In addition to feed grown on the farm or purchased from other farmers, farmers often purchase supplements to enhance milk production.

Nutrient Management -Farmers should have plans to deal with manure and artificial fertilizers to maintain soil and water quality. See any state agriculture regulations for legal requirements. In Wisconsin, ATCP Chapter 50 is an example. County DNR offices can be helpful with questions and providing information.

C. *Other Terminology*

Custom work - Rather than plant and harvest themselves, farmers can contract with third-parties to do the work. Custom work can be contracted on an hourly or per acre basis.

Actual Production History (APH) - An historical record of a farmer's actual yields. APH records are necessary for crop insurance, and lenders will require these records to verify income.

D. *Glossary Sources for Farm Terminology*

https://nationalaglawcenter.org/ag-law-glossary/

https://agclass.nal.usda.gov/glossary_az.shtml Collection of agricultural terms that includes over 5000 definitions in alphabetic, searchable order

https://www.macmillandictionary.com/us/thesaurus-category/american/general-words-for-farming-and-types-of-farming A collection of common, general words for farming and types of farming

https://www.farm-equipment.com/articles/11645-glossary-of-industry-terms A glossary of Farm Equipment Industry terms

https://www2.kenyon.edu/projects/farmschool/addins/glossary.htm A sort list of common terms

V. Common Farm Service Agency (FSA) Programs

FSA's mission is to

> provide supervised credit and management assistance to eligible farmers to become owners or operators, or both, of family farms, to continue such operations when credit is not available elsewhere, or to return to normal farming operations after sustaining substantial losses as a result of a designated or declared disaster. The programs are designed to allow those who participate to transition to private commercial credit or other sources of credit in the shortest period of time practicable through the use of supervised credit, including farm assessments, borrower training, market placement, and borrower graduation requirements. These regulations apply to loan applicants, borrowers, lenders, holders, Agency personnel, and other parties involved in making, guaranteeing, holding,

servicing, or liquidating such loans.

7 C.F.R. § 761.1(c).

FSA is involved in a large number of farm-related insolvencies due to direct or guaranteed loans to farmers, as well as other programs farmers may have utilized. A good resource to understand the nuances of FSA's decision-making process are the FSA handbooks and federal regulations.

A. *Pre-collection mediation* - For direct loans, FSA must send farmers a number of notices of the availability of loan servicing options and engage in good faith mediation before proceeding to collection remedies. See 7 C.F.R. § 766.103;7 C.F.R. § 780.9(d); see also FSA Handbook, Direct Loan Servicing Special, 5- (FLP. If FSA is the farmer's main concern, it behooves farmers to engage FSA. Bankruptcy is much more expensive, time consuming, and may not provide farmers with better relief than what FSA would provide voluntarily.

B. *FSA Loan Guarantees* - Loan guarantees are meant to allow farmers to obtain credit who would normally be ineligible to obtain standard loans. See FSA Handbook, Guaranteed Loan Making and Servicing, 2-FLP. In the event of default, the lender is paid a portion of the loan balance.

C. *Market Risk Programs* - These are executory contracts that must be assumed or rejected, so make sure to address them if a bankruptcy is filed. In my experience, FSA is generally amenable to assumption and will notify debtor's counsel after bankruptcy filing. Both programs have on-going compliance requirements.

Agriculture Risk Coverage (ARC) - Provides protection against losses in revenue. This program may be based on the county level (ARC-CO) or on the individual level (ARC-IC)

Price Loss Coverage (PLC) - Provides payments when commodity levels drop below set levels.

D. *Conservation Programs* -These are also executory contracts that· should be assumed or rejected in the event of a bankruptcy.

Conservation Reserve Program (CRP) - Annual payments in exchange for not farming certain land and to plant certain plant species.

Conservation Reserve Enhancement Program (CREP) - Similar to

CRP, but administered with the state.

E. *Margin Protection Program (MPP-Dairy)* - Premium-based program meant to mitigate fluctuations in milk prices. Payments are calculated based on the so-called national dairy production margin, or the difference between milk prices and average feed costs. Coverage begins when the margin is less than $4.00/cwt, but producers may pay premiums for higher margins up to $8.00/cwt.

F. *Crop Insurance* - Federally subsidized program sold through third-party insurance agents meant to mitigate the risk of (1) poor yields (x bushels/acre) and (2) poor revenue (yield x price).6 There are a number of other crop insurance policies available to farmers. This is meant to be a brief introduction.

1. Yield Insurance - Payments are triggered when the farmer's yield dips below a certain percentage of actual production history (APH) at a pre-determined price/bushel based on futures contracts. Example: farmer chooses to insurance against yields below 75% of APH. If her yield is 80% of APH, she does not receive an insurance payment.

2. Revenue Insurance - Payment is made if actual revenue per acre is less than expected revenue. Actual revenue is the actual harvested yield multiplied by the actual harvest price. Expected revenue is APH multiplied by expected harvest price, which is the futures price in the month after harvest. Like yield insurance, revenue insurance is based on a percentage. But in this case, it is a percentage of expected revenue. In that sense it protects against a drop in yield as well as price, since revenue = yield x price.

G. *Security Interests in Crop Insurance* - Generally, lenders can obtain a perfected security interest in crops by obtaining a signed security agreement and filing. Under Article 9, this a security interest in crops provides a security interest in identifiable proceeds. Wis. Stat.§ 409.315 (providing a continuing security interest in identifiable proceeds.

However, the Federal Crop Insurance Act preempts Article 9 as it pertains to crop insurance proceeds.

Claims for indemnities under this subchapter shall not be liable to attachment, levy, garnishment, or any other legal process before payment to the insured or to deduction on account of the indebtedness of the insured or the estate of the insured to the United States except claims of the United States or the Corporation arising under this

subchapter.

7 U.S.C. §1509.

Courts have held that this provision means that, in general, creditors do not have a security interest in crop insurance proceeds before the farmer is paid. In re Rees, 216 B.R. 551 (N.D. Tex. 1998); In re Cook, 169 F.3d 271 (5th Cir. 1999). But by the terms of the statute, the FCIA does not preclude a lien after payment to the farmer.

To grant a lien in crop insurance, the farmer must comply with federal regulations. See, e.g. 7 C.F.R. § 457.8.

VI. Selected Agricultural Liens

Each state has a variety of statutory liens that apply in an agricultural context. Subject of such liens may include:

Mechanics liens
Liens of Livery Stable or Boarding Stable Keeper, Agister or Garage Keeper
Animal Breeder liens (including semen and stud fees)
Threshing, Husking or Bailing liens
Landlord lien for unpaid rent
Custom planting, tilling, harvesting
Input liens for seed, chemical, fertilizer to raise crops
Input liens for livestock production inputs
Veterinarian liens
Timber
Transportation of commodities
Animal finders lien

VII. Consider tax issues.

Primarily because of the capital-intensive nature of farming, farmers' tax attributes can add a level complexity not present in many businesses or in individual debtor cases. That said, under chapter 12, family farmers have tax relief options unavailable to other debtors. As a result, attorneys should be familiar with certain concepts to be able to spot tax issues and consult tax professionals. The information here is a brief overview and should is not a replacement for consulting with a tax professional.

A. *Ordinary Income vs. Capital Gain Ordinary Income*

For purposes of this subtitle, the term "ordinary income" includes any gain from the sale or exchange of property which is neither a capital asset nor property described in section 1231(b). Any gain from the sale or exchange of property which is treated or considered, under other provisions of this subtitle, as "ordinary income" shall be treated as gain (from the sale or exchange of property which is neither a capital asset nor property described in section 1231(b). 26 U.S.C. § 64.

B. *Capital Gain*

The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized. 26 U.S.C. § l001(a).

C. *Basis* - The starting point for determining the gain or loss from the disposition, not just a sale, of property. 26 U.S.C. §§ 1011. In general, the basis is the cost of property. § 1012. However, a taxpayer can adjust the basis, often by taking a depreciation deduction. 26 U.S.C. § 1016. If the disposition of property results in income that is greater than the basis, the taxpayer has realized a capital gain. If the disposition results income that is less than the basis, there is a capital loss.

> Example: Debtor buys 40 acres of land for $100/acre and cannot depreciate it. Debtor sells the same 40 acres for $10,000/acre. Debtor has a capital gain of $9,900/acre, or $396,000. But see 26 U.S.C. § 1252 (relating to dispositions of certain farmland).

D. *Depreciation* - The Internal Revenue Code allows taxpayers to claim a deduction based on a schedule for categories of property used in a taxpayer's trade or business. 26 U.S.C. §§ 167, 168(a). In general, property can be depreciated on a 3- to 50-year schedule. In the case of farming equipment, the applicable recovery period is 5 or 7 years, depending on when the property was placed into service. § 168(e).

E. However, other provisions can allow for accelerated depreciation of some property. See§§ 168, 179. See also, Internal Revenue Service, New rules and limitations for depreciation and expensing under the Tax Cuts and Jobs Act, FS-2018-9, April 2018, https://www.irs.gov/newsroom/new-rules-and-

limitations-for-depreciation-and-expensing-under-the-tax-cuts-and-jobs-act

F. *Depreciation Recapture* -Generally, depreciation recapture occurs when a taxpayer claims depreciation deductions for property and then sells the property for more than the adjusted basis. See 26 U.S.C. § 1245 (a) (l). The gain in excess of the basis is treated as ordinary income, not a capital gain.

> Example: Debtor buys a tractor, 7-year property, for $70,000 and claims a depreciation deduction for three years. Her adjusted basis is $40,000. If she sells the tractor for $50,000, she will realize ordinary income of $10,000.

G. *Net Operating Losses (NOLs)* - An NOL occurs when business deductions exceed gross income. See 26 U.S.C. § 172. Under the new tax law, a deduction is allowed for the lesser of the following:

> 1) the aggregate of the net operating loss carryovers to such year, plus the net operating loss carrybacks to such year, or
>
> 2) 80 percent of taxable income computed without regard to the deduction allowable under this section.
>
> § 172(a).

NOLs can no longer be carried back, but can be carried forward indefinitely to offset income in future tax years. § 172(b) (1) (A). ·

Farming losses, however, can be carried back for the two prior tax years. § 172(b) (1) (B).

H. Employment-Related Tax Issues.

Given the dischargeability issues and priority issues surrounding employment-related taxes, determining whether clients have outstanding tax issues is important. Ensure, at a minimum, that they have filed their personal returns as other required forms, such as the following:

- Form 940 Employer's Annual Federal Unemployment Tax Return
- Form 941 Employer's Quarterly Federal Tax Return
- Form 943 Employer's Annual Tax Return for Agricultural Employees

I. Pass-Through Income. Pass-through income refers to income earned by a company, but treated as if the individual earned it. This happens when a person owns an interest in an entity for instance an S-corp., an LLC, or a partnership.

> A business entity with two or more members is classified for federal tax purposes as either a corporation or a partnership. A business entity with only one owner is classified as a corporation or is disregarded; if the entity is disregarded, its activities are treated in the same manner as a sole proprietorship, branch, or division of the owner.

26 C.F.R. § 301.7701-2(a).

> (c) Gross income of a shareholder-(1) In general. Where it is necessary to determine the amount or character of the gross income of a shareholder, the shareholder's gross income includes the shareholder's pro rata share of the gross income of the S corporation. The shareholder's pro rata share of the gross income of the S corporation is the amount of gross income of the corporation used in deriving the shareholder's pro rata share of S corporation taxable income or loss (including items described in section 1366(a) (1) (A) or (B) and paragraph (a) of this section). For example, a shareholder is required to include the shareholder's pro rata share of S corporation gross income in computing the shareholder's gross income for the purposes of determining the necessity of filing a return (section 6012{a)) and the shareholder's gross income derived from farming (sections 175 and 6654(i)).

26 C.F.R. § 1.1366-l(c)(l) (emphasis added).

> (c) Gross income of a partner. (1) Where it is necessary to determine the amount or character of the gross income of a partner, his gross income shall include the partner's distributive share of the gross income of the partnership, that is, the amount of gross income of the partnership from which was derived the partner's distributive share of partnership taxable income or loss (including items described in section 702(a) (1) through (8)).

26 C.F.R. § 1.702-l(c) (1).

- In the Seventh Circuit, "gross income" is given the same meaning it has under the Internal Revenue Code. *In* re

Wagner, 808 F.2d 542, 547 (7th Cir. 1986) ("Yet, on balance, the interpretation that will best carry out Congress's purposes in the Bankruptcy Code is that gross income for purposes of the farmer's exemption has the same meaning as in the Internal Revenue Code.") (ruling on a farmer's exemption from involuntary proceedings).

- *In* re *Perkins,* 581 B.R. 822 (B.A.P. 6th Cir. 2018). Holding that income received from partnerships and an S-corp that engaged in farming were considered a debtor's gross income, thereby making her eligible for chapter 12.

- *In* re *Sandifer,* 448 B.R. 382 (D. S.C. 2011}. Holding that gross income of LLC had to be considered in deciding whether debtor derived at least 50% of his income from a farming operation.

- *In* re *Lamb,* 209 B.R, 759 (Bankr. M.D. Ga. 1997). Holding that partner's pro rata share of partnership's gross income was to be used to determine eligibility.

PART III: CHAPTER 12 PRACTICALITIES

I. Eligibility.

Because chapter 12 debtors enjoy the unique combination of advantages of chapter 11 debtor-in-possession, chapter 13 and the ability to treat certain tax debts as general unsecured claims, eligibility for chapter 12 is limited.
11 U.S.C. § 109{f) - "Only a family farmer ... with regular annual income may be a debtor under chapter 12 ...."

Is the Debtor a "Family Farmer?"

Two-Part Test for Individuals under§ 101(18)(A).

1. **Debts:** Aggregate debts cannot exceed $4,153,150, with at least 50% of the debt being attributable to the farming operation (excluding the debt for a principal residence).
2. **Income:** At least 50% of the individual's gross income in the last tax year or the second and third prior years before the last tax year must be derived from a farming operation.

Three-Part Test for Corporations and Partnerships under§ 101(18)(B).

1. **Ownership Requirements.** At least 50% of company is (1) owned by one family or by one family and the relatives of that family and (2) the family or relatives operate the farming operation.
2. **Asset requirements.** At least 80% of the value of the assets are related to the farming operation.
3. **Non-publicly traded stock.** If the corporation has stock, it cannot be publicly traded.

Does the debtor have regular annual income under§ 101(19)?

The debtor's income must be "sufficiently stable and regular to enable such family farmer to make payments under a [chapter 12 plan]."

Note the difference between section 101(19) and chapter 13's requirement that a debtor have "regular income." Section 101(19), therefore, provides flexibility for farmers whose income is often sporadic. *See* 2 Collier on Bankruptcy P 101.19.

II. Plan Considerations and Potential Issues

Classification and treatment of claims.

Just like chapters 11 and 13, chapter 12 claims may be classified. However, there are some notable differences.

> **Secured Claims.** Usually the primary source of peril for the family farmer, a bank or other financial institution with liens on most {or all) farm assets will need to be satisfied in order for the operations to continue.
>
> While chapter 11 includes complex provisions for treatment of secured claims, such as§ 1111{b) and the absolute priority rule (see §1129{b) (2){B) (ii)), the treatment of secured claims in chapter 12 is more similar to that in chapter 13. Claims may be bifurcated, stripped down to the value of collateral, defaults cured, and amortizations extended. Chapter 12 does not share some of chapter 13's restrictions on treatment of secured claims, such as the 910-day rule, or the anti-modification clause of §1322(b) (2). More on treatment of secured claims below.
>
> **General Unsecured claims.** Treatment of unsecured claims in a chapter 12 is similar to that in a chapter 13. The "best-interests-of-the-creditors" or "liquidation analysis" test is the same: unsecured creditors must do as well or better than they would in a chapter 7 liquidation. § 1225 (a) (4).

Environmental issues may also come into play. The DNR increasingly regulates manure and wastewater handling, but long-time owners may be "grandfathered" into older, less-restrictive rules. A potential new buyer may have to bring an existing farm into compliance within a certain period of time. The buyer must budget for any environmental consulting and constructing, which could cost hundreds of thousands of dollars. This will depress the market for such property. A comprehensive liquidation analysis should account for any environmental compliance issues which are relevant to the property.

Finally, **tax issues** may be paramount in a liquidation analysis. As noted above, depending upon the length of time a farmer has owned significant assets, such as land, buildings and large pieces of equipment, the basis in those assets may be low, resulting in significant taxable capital gains at a sale. In a hypothetical chapter 7 liquidation, the appointed trustee is obligated to file

and pay taxes for administration of the estate, including the sale of assets. Therefore, the debtor should have a tax professional prepare an estimate of the taxes due on the hypothetical sale of assets.

Farmers often have many leases. As equipment prices rise, **equipment leases** are increasingly popular. As always, equipment lease documents should be examined to determine whether they are true leases, or disguised financing arrangements. The latter should be classified and treated as secured claims.

Many farmers also have **land leases** for crop cultivation. These leases range in complexity from verbal per-acre leases renewed annually, to complicated crop sharing arrangements, which may require crop rotations, soil maintenance, and bonuses to be paid if certain yields are exceeded.

As with other chapters of bankruptcy, chapter 12 debtors may take advantage of§ 365 powers to assume or reject leases, allowing farmers to shed expensive equipment leases or unprofitable crop land leases.

Feasibility.

To confirm a chapter 12 plan, the debtor must show that "the debtor will be able to make all payments under the plan and to comply with the plan." § 1225(a) (6). This provision is often referred to as the "feasibility" requirement.

The burden is on the debtor to demonstrate the plan's feasibility, based on projected income and expenses of the farm operation. "At the confirmation stage, it is the Debtor's burden to show the projections are reasonably possible." - *In re Johnson,* 581 B.R. 289, 297 (Bankr. W.D. Wis. 2018). Farmers projecting increased revenue and/or decreased expenses must have reasonable explanations for those anticipated changes-a court will not confirm a plan based on projections that reflect "mere wishful thinking." *Id.*

Along with valuation of collateral, feasibility is among the most fact-intensive and oft-litigated issues in chapter 12. It is important to review past budgets, and if they do not support the ability to make plan payments, any increases in income or decreases in expenses must be supported by evidence.

Consider the experience of the debtor when listening to testimony

related to feasibility. What is the experience of the debtor? Who is best qualified to testify regarding yield/acre or input costs in the specific case?

Modification of Secured Claims in Chapter 12.

A debtor in chapter 12 may propose a plan that writes-down a secured claim to the value of collateral, adjust interest according to the *Till* formula, and extend the term of repayment.

Valuation.

Chapter 12 contains no provision analogous to Sec.1111(b), applicable in chapter 11 cases, which means a debtor can compel the bifurcation of a secured creditor's claim under Sec. 506, and treat as a secured claim only that portion of the claim to the extent of the value of collateral. And chapter 12 allows a debtor to pay secured claims beyond the maximum 5-year plan term (see §1222(a) (9)). This allows farmers to take advantage of chapter 12 to write-down long-term secured loans, with a significant savings on debt service. By contrast, a significant limitation of chapter 13 is that a first-lien mortgage on real estate cannot be written down to the value of real estate, unless the claim is paid in full within the 60- month maximum allowed for a chapter 13 plan-an unlikely prospect for most debtors.

Another benefit of proving that a secured creditor's claim is underwater is that it cuts off the creditor's ability to add their attorneys' fees (and other fees) to the balance due. See§ 506(b). All bank loan documents provide that the debtor will pay attorneys' fees incurred in connection with enforcement of the loan. Over-secured creditors are entitled to collect those fees under Sec. 506(b). Depending on the nature of the case, lender's fees can range into the six-figures. So, demonstrating that a secured creditor's claim is underwater by even a slight margin may prove worthwhile by forcing the lender to bear its own legal costs.

Most courts prefer or require that any motions to determine secured status under Sec. 506 be resolved in advance of a final hearing on confirmation. Therefore, a debtor needs to quickly file its motion under Sec. 506, and be prepared to support the valuation with an appraiser's expert testimony at an evidentiary hearing.

***Till* and interest on secured claims.**

Interest on secured claims in chapter 12 is governed by the reasoning of *Till v. SCS Credit Corp.,* 541 U.S. 465 (2004). While *Till* involved a chapter 13, most courts apply *Till*s reasoning to interest on secured claims in chapter 12 cases.

The "formula approach" begins with the prime rate, and is adjusted by adding an additional risk factor of 1-3%. The most common *Till* rate is prime plus 1.5%.

Unlike most elements of confirmation, where the debtor has the burden of proof, *Till* instructs that creditors bear the burden to prove the correct risk factor to add to prime, under the formula approach.

In our view, any information debtors have about any of these factors is likely to be included in their bankruptcy filings, while the remaining information will be far more accessible to creditors (who must collect information about their lending markets to remain competitive) than to individual debtors (whose only experience with those markets might be the single loan at issue in the case). Thus, the formula approach, which begins with a concededly low estimate of the appropriate interest rate and requires the creditor to present evidence supporting a higher rate, places the evidentiary burden on the more knowledgeable party, thereby facilitating more accurate calculation of the appropriate interest rate.

Till v. SCS Credit Corp., 541 U.S. 465, 484-85, 124 S. Ct. 1951, 1964 (2004).

Lenders sometimes call their own employees or officers as witnesses in order to meet their burden under the *Till* analysis. Because the formula approach requires presentation of evidence about appropriate risk adjustments, the lender's witness may be qualified to testify, but the court may give less weight to testimony on account of the witness' inherent bias, especially if the risk analysis is presented only from the viewpoint of the lender. See, e.g., *In re Terry Properties, LLC,* 569 B.R. 76 (Bankr. W.D. Va. 2017).

Terms and payments.

A chapter 12 plan must last at least 3 years, and the court may allow a plan as long as 5 years (§ 1222 (c)), but this time limit is not applicable to secured claims (§ 1222(b) (9)). This provision applies not only to

long-term debts, but also to debts with terms less than 3-5 years, or that have matured pre- petition. *In re Elk Creek Salers, Ltd.,* 286 B.R. 387, 390-91 (Bankr.W.D.Mo.2002).

While the Code does not specifically limit the repayment period, the present value requirement of §1225 (a) implies that the repayment period must be commercially reasonable. When considering length of loan term, the court can base a ruling on such facts as the preexisting contract length and the customary length of repayment for similar loans. *In re Torelli,* 338 B.R. 390,397 (Bankr. E.D. Ark. 2006).

The type of collateral significantly impacts the reasonable repayment period. Over-secured real estate loans may qualify for 20 or 25-year amortization, though loan terms of that length are less common-they usually come with a maximum five-year balloon, with annual balloons common in distressed scenarios. Equipment loans generally do not exceed 7 years, although terms of 10 years may be possible in situations where loan- to-value ratios are favorable to the lender. Again, shorter balloon periods are common. Crop input loans secured by crops at harvest are usually restricted to one season or a year at most, with steep interest if not paid at maturity.

Finally, there is no rule in chapter 12 about when plan payments must commence. By contrast, chapter 13 requires plan payments to commence within 30 days of case filing, regardless of when the plan is confirmed. This allows some flexibility in scheduling payments based on the farm operation and income cycle. For example, crop farmers generally pay debts annually in December or January, when crops have all been harvested and sold. Dairy farmers may pay monthly or twice monthly based on milk checks.

Treatment of Taxes and Other Priority Claims

As noted above, chapter 12 includes unique provisions that give a farmer- debtor significant advantages in dealing with tax claims.

Taxes Due to the Sale of Farm Property

As noted above, taxes on disposition of farm assets can be significant, given that farm operations often involve large assets such as expensive equipment and vast tracts of land. For years after its enactment, as significant hurdle to confirmation of many chapter 12 plans was that, after selling assets to scale- down or "right size" a farm operation, the farmer-debtor was then faced with having to pay the significant capital

gains taxes within the 3-5 year period of the plan.

In response, the 2005 BAPCPA included§ 1222(a) (2), which provided that a priority claim held by a governmental unit arising from the sale, transfer, exchange, or other disposition [such as a deed-in-lieu-of-foreclosure] of any farm assets used in the debtor's farming operation," would essentially be treated as an unsecured claim.

In 2012, the Supreme Court's *Hall v. United States* decision held that the relief afforded by§ 1222 (a) (2) only applied to taxes actually due when the case was filed. The application of *Halls* reasoning meant that a farmer liquidating assets must wait to file a chapter 12 case until at least January 1 of the year following the liquidation in order to have an opportunity to discharge the associated tax claims (assuming the farmer's tax year follows a calendar year, as most do).

In response to the *Hall* decision, Congress amended chapter 12 to add§ 1232 effective as of October 26, 2017, to provide that tax claims from the sale of farm assets would be treated as general unsecured claims, as long as the claim arises before the discharge under § 1228. This new provision allows distressed farmers to immediately seek relief and protection in bankruptcy, and then liquidate assets in the course of the bankruptcy and/or as part of a plan, and obtain a discharge of the associated capital gains taxes.

Sec. 1232(d) provides specific steps to have a post-petition tax claim resulting from a disposition of farm assets included and treated in the plan as a prepetition unsecured claim:

1. The taxing authority may file a proof of claim for such a claim.
2. The debtor shall file a notice of any such claim related to tax return that is filed post-petition on the governmental unit charged with responsibility for collection of the tax, at the address provided by § 505(b) (1) (which requires the bankruptcy clerk to maintain a list of taxing authority addresses for service).
3. The taxing authority has 180 days after service of the notice to file a proof of claim. If the government doesn't file a proof of claim, then the trustee or debtor can file a proof of claim consistent with the notice.
4. Once a proof of claim is filed, it is determined and allowed or disallowed pursuant to 502(a)-(e) as if the claim had arisen immediately before the date of the filing of the

petition.

Priority Tax Claims.

Farmers may owe pre-petition priority taxes that didn't arise from the sale or other disposition of farm assets, such as income taxes. Chapter 12 affords some flexibility in repaying priority tax claims, similar to the provisions of chapter 13. Chapter 12 generally requires that priority tax claims be paid in full(§ 1222(a) (2)) within 3 to 5 years from confirmation(§ 1222(c)).

By comparison, in chapter 11, priority tax claims must be paid in full within 5 years of the filing of the case. See § 1129(a) (9). Also, chapter 11 requires interest on priority tax claims not paid in full at confirmation (§ 1129(a) (9) (C)), whereas chapter 12 contains no similar requirement to pay interest on priority claims. See, e.g., *In re Mitchell,* 210 B.R. 978, 982 (Bankr. N.D. Tex.1997), *aff'd and remanded,* 241 B.R. 393 (N.D. Tex. 1997).

Secured Tax Claims.

Non-consensual secured tax claims (e.g., "tax liens") must be treated and paid the same as consensual liens. And just like consensual liens, tax liens can be written down to the equity in the debtor's assets, and paid beyond the term of the plan. That means that, in chapter 12, if a tax claim is secured instead of priority, the debtor may have an advantage in that the claim can be paid beyond the maximum 5-year term of the plan, albeit with interest, whereas as priority claim must be paid within the plan term.

"Chapter Choices for Farm Debtors"

Presented to Farm & Ranch Seminar, Lubbock, Texas
October 23 & 24, 2008
Revised July, 2019

Hon. Robert E. Nugent III,
United States Bankruptcy Court, District of Kansas

I. Overview: Comparison of Chapters 11 and 12 for Farmers.[1]

Through the years, farm debtors have not always had the choice of Chapter 11 or Chapter 12 due to the sporadic availability of Chapter 12. Chapter 12 was first enacted in 1986 in the midst of the national farm crisis. It was intended as a temporary emergency chapter to provide relief for farmers and was originally scheduled to sunset October 1, 1993. It was intermittently available after 1993 due to several extensions of Chapter 12 by Congress. Effective July 1, 2005 Congress made Chapter 12 a permanent part of the Bankruptcy Code when it re-enacted Chapter 12 through BAPCPA.[2] In 2017, Congress added new § 1232 to treat priority claims arising from capital gains on disposition of farm assets. Now that Chapter 12 is here to stay, farm debtors should consider whether they are best served by a bankruptcy in Chapter 11 or Chapter 12. This presentation is intended to give farmers and bankruptcy attorneys considerations that should be contemplated in making this choice.

II. Eligibility Provisions

A. Chapter 11: These are set out in § 109(d) which provides that anyone or any entity who can file for chapter 7 relief, *see* § 109(b), except a stockbroker or commodity broker or an insured depositary institution, may be a debtor. This would include nearly any farmer doing business in any format.

1. Small business debtors, § 101(51C) and (51D):

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[1] Unless otherwise indicated, all statutory references are to the Bankruptcy Code enacted as title 11 of the United States Code, and as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).

[2] Pub. L. No. 109-8, 119 Stat. 23, § 1001(a) (Apr. 20, 2005). *See generally* 11 U.S.C. § 1201, Historical and Statutory Notes for legislative history of Chapter 12.

A small business case is simply a chapter 11 case in which the debtor is a small business debtor. Criteria for small business debtors are: engaged in commercial or business activities, aggregate noncontingent liquidated secured and unsecured debts of ≤ $2,725,625, no unsecured creditors committee (or committee is not sufficiently active), and no member of group of affiliated debtors has aggregate noncontingent liquidated secured and unsecured debts > $2,725,625.

2. Real estate excluded: A person whose primary business activity is owning or operating real property cannot be a small business debtor.

3. Credit counseling: *Individual* debtors are required to obtain pre-petition credit counseling within the 180 day period prior to filing, unless they obtain a temporary waiver or permanent exemption from the requirement. § 109(h)(1), (3) and (4). *See In re Hedquist*, 342 B.R. 295 (8th Cir. BAP 2006) (dismissal of debtors' chapter 11 case for failure to comply and rejecting equal protection argument that individuals and corporations were being treated differently).

B. Chapter 12: The eligibility guidelines for chapter 12 are considerably more detailed and limited. Section 109(f) provides that only a "family farmer" may be a debtor in chapter 12. Note: BAPCPA added "family fisherman" as an eligible debtor under chapter 12, but these materials will focus on the family farmer.

1. Unlike in chapter 11, there is no separate "small business debtor" provision in chapter 12.

2. Credit counseling: Individual family farmer debtors must comply with the pre-petition credit counseling requirement. Section 109(h) makes no distinction under which bankruptcy chapter of title 11 a debtor files. Nor does it expressly limit the credit counseling requirement to consumer debtors. On its face, § 109(h) applies to all individual debtors in all chapters. *See In re Timmerman*, 379 B.R. 838 (Bankr. N.D. Iowa 2007) (debtors who had not obtained credit counseling were ineligible to be chapter 12 debtors).

3. "Family farmer" is a defined term in § 101(18) that provides:

a. as to *non-incorporated* entities, an individual or individual and

spouse engaged in a farming operation whose aggregate debts do not exceed $$4,411,400[3] and not less than 50 percent of whose aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such individual and spouse unless such debt arises out of a farming operation), on the date the case is filed, arise out of a farming operation owned or operated by such individual or such individual and spouse, and such individual or such individual and spouse receive from such farming operation more than 50 percent of such individual's or such individual and spouse's gross income for–
(i) the taxable year preceding; or
(ii) each of the 2d and 3d taxable years preceding;
the taxable year in which the case concerning such individual or such individual and spouse was filed; § 101(18)(A)

See In re Bircher, 241 B.R. 11 (Bankr. S.D. Iowa 1999) (capital gain from sale of 50 acre tract of real estate was "farm income" for purpose of chapter 12 eligibility where tract had been part of farming operation for several years, sale was conscious decision to downsize farming operation, and net sale proceeds serviced debt of farming operation; the true nature of income rests upon the extent to which the income bears a relation to farming activities.); *In re Dawes,* Unpublished Op., 2008 WL 718304 (Bankr. D. Kan. Mar. 14, 2008) (applying the totality of the circumstances test rather than the gross income reported on the tax returns in determining whether rental income was farm income); *In re Nelson*, 73 B.R. 363 (Bankr. D. Kan. 1987) (income test determined from face of the federal tax return); *In re Grey*, 145 B.R. 86 (Bankr. D. Kan. 1992) (income eligibility test determined by examination of debtor's federal tax return); *In re Sharp*, 361 B.R. 559 (10th Cir. BAP 2007) (discussing two tests for determining whether debtor's income was from a farming; debtor satisfied both tests under facts of case); *In re Woods*, 743 F.3d 689, 704-705 10th Cir. 2014)(applying objective test to determining when debt for a principal residence "arises out of" the farming operation and requiring a direct and substantial connection between debt and farming).

b. as to *incorporated entities or partnerships*, the definition is slightly different, but follows the same themes:

a corporation or partnership in which more than 50 percent of the outstanding stock or equity is held by one family, or by one

[3] Per § 104(b), the dollar amount was most recently adjusted as of April 1, 2007 with the next dollar adjustment scheduled to occur April 1, 2010 and every three years thereafter.

> family and the relatives of the members of such family, and such family or such relatives conduct the farming operation, and
> (i) more than 80 percent of the value of its assets consists of assets related to the farming operation;
> (ii) its aggregate debts do not exceed $3,544,525 and not less than 50 percent of its aggregate noncontingent, liquidated debts (excluding a debt for one dwelling which is owned by such corporation or partnership and which a shareholder or partner maintains as a principal residence, unless such debt arises out of a farming operation), on the date the case is filed, arise out of the farming operation owned or operated by such corporation or such partnership; and
> (iii) if such corporation issues stock, such stock is not publicly traded. § 101(18)(B).

Other terms or phrases within the definition of "family farmer" or used in chapter 12 are further defined by the Code.

4. What is a "farming operation?" – § 101(21)

The term "farming operation" includes 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. *See In re Glenn*, 181 B.R. 105 (Bankr. E.D. Okla. 1995) (timber operation was a farming operation; timber operation was subject to inherent risks of farming and location of timber operation was in a traditional farm setting). Many cases deal with when farmers are not farmers for chapter 12 purposes or when the debtor engages in non-traditional farming activities. Examples include dog breeding, sale of former farm tracts for development, and breeding and raising of non-food animals. *See In re Cluck,* 101 B.R. 691 (Bankr. E.D. Okla. 1989) (horse breeding, training and boarding facility was not a farming operation). *Cf. In re McKillips,* 72 B.R. 565 (Bankr. N.D. Ill. 1987) (horse breeding operation for the purpose of selling the horses was a farming operation; training and showing aspect of business were not); *In re Maike,* 77 B.R. 832 (Bankr. D. Kan. 1987) (raising pheasants and running game farm and puppy kennel were farm operation); *Matter of Burke*, 81 B.R. 971 (Bankr. S.D. Iowa 1987) (discussing tests for interpreting "farming operation").

5. What is a "family farmer with regular income?" – § 101(19)

The term "family farmer with regular annual income" means family farmer whose annual income is sufficiently stable and regular to enable such family farmer to make

payments under a chapter 12 plan. *In re Van Fossan*, 82 B.R. 77 (Bankr. W.D. Ark. 1987) (debtors lacked income sufficiently stable or regular to fund a chapter 12 plan). *But see, In re Sorrell*, 286 B.R. 798 (Bankr. D. Utah 2002) (debtors qualified as family farmers with regular income even though they realized a profit of only $19/month from their farming operation and the plan would be funded almost exclusively from non-farm income; Code does not required that chapter 12 plans be primarily or substantially funded from farming operations).

Case law concerning the "regular income" requirement as required for chapter 13 eligibility, § 109(e), may also be persuasive. Section 101(30) defines the phrase "individual with regular income" in the context of chapter 13 in the same fashion as chapter 12's "family farmer with regular income," meaning an individual with income "sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13." *See In re Brock*, 365 B.R. 201 (Bankr. D. Kan. 2007) (Debtor's reliance on elderly mother's gratuitous contributions to fund plan was not a "regular income" absent evidence that the source of the contribution is stable, the amount is significant, regular, and likely to continue over the life of the plan); *In re Heck*, 355 B.R. 813 (Bankr. D. Kan. 2006) (debtor did not have sufficient stable and regular income to fund plan where debtor relied on boyfriend's contributions of housing and food and part of plan payments and boyfriend was under no legal obligation to pay).

III. Trustee v. No Trustee. Whether the case can bear the expense and the scrutiny of a trustee may be a significant consideration in deciding which chapter is best for your debtor or creditor client.

A. Chapter 11: Ordinarily, a chapter 11 debtor is the debtor-in-possession (DIP) and is vested with many of the powers of a trustee. However, should the DIP falter, the Court may appoint a chapter 11 trustee under § 1104(a) for cause or if such an appointment is in the best interest of creditors.

1. The creditors may seek to elect a trustee by requesting an election be convened within 30 days of the Court's appointment of a trustee. § 1104(b)(1).

2. Tactical Concerns: Unless the Court appoints one, there is no case trustee or disbursement agent in a chapter 11 case. Moreover, once the plan is confirmed and a final decree issues, the assets revest in the reorganized debtor who operates without any supervision other than whatever his creditors can maintain under the terms of their debt contracts. In the absence of a chapter 11 trustee or a creditors'

committee (rare in a farm case), the only real supervision over a farmer is done by individual creditors or, in some cases, the United States Trustee (UST).

3. DIP: Under § 1107, the debtor retains many of the powers of a chapter 11 trustee and, under § 1108, the DIP is authorized to operate the business.

4. Post-confirmation: After the plan is confirmed, all of the estate's assets revest in the debtor free and clear of all liens and claims except as provided for in the plan or unless the Court orders otherwise. § 1141(b) and (c).

5. Individual discharge delayed: After BAPCPA, the chapter 11 discharge in an individual debtor's case is withheld until the court finds that all plan payments have been made and that the debtor is not someone covered under § 522(q), i.e. a felon. § 1141(d)(5). If the debtor is unable to complete all the payments, a hardship discharge is available. § 1141(d)(5)(B).

   a. Nevertheless, the assets still vest in the debtor who uses them without meaningful supervision other than creditor vigilance. The only real threat is that the debtor will be denied a discharge because he has not completed his payments.

6. Corporate discharge immediate: As § 1141(d) specifies, a corporate debtor receives a discharge at confirmation unless the plan is one of liquidation, the debtor does not engage in business post-confirmation, and the debtor would be ineligible for a discharge under § 727. § 1141(d)(3).

B. Chapter 12: Depending on your point of view, chapter 12 trustees provide many useful administrative benefits in chapter 12 cases or they interfere unduly with the debtors' operation of their business. Trustees who perceive that a debtor is not properly conducting his business may seek to operate it themselves.

1. Duties of the Standing Trustee: Under § 1202(b), a chapter 12 trustee has all of the reporting and supervisory duties of a chapter 7 trustee as set out in the following subsections of § 704(a):

a. Account for estate's assets, § 704(a)(2)
b. Assure that debtor performs intentions under § 521(a)(2)(B) (*i.e.* retention or surrender of property, claim exemption, redemption of property, or reaffirmation of debts). § 704(a)(3)
c. Examine and object to proofs of claim, § 704(a)(5)
d. Oppose discharge if advisable, § 704(a)(6)
e. Furnish information to creditors and parties in interest, § 704(a)(7)
f. Make a final report and final accounting, § 704(a)(9)

2. Additional, optional duties: If the court directs for cause, the trustee may also exercise certain chapter 11 trustee powers. § 1202(b)(2). He may investigate the acts and assets of the debtor, § 1106(a)(3), and file a statement concerning that investigation particularly as it relates to fraud, gross incompetence, mismanagement, or irregularity in the debtor's affairs, § 1106(a)(4).

3. Additional powers and duties: The chapter 12 trustee may also appear and be heard on confirmation of the plan, matters affecting estate property, and sales. § 1202(b)(3).

   a. The trustee conducts any asset sales of farmland and farm equipment under § 1206.

   b. If the debtor is removed as debtor in possession (§ 1204), the trustee assumes operation of the business and succeeds to other chapter 11 trustee powers consistent with that role, § 1202(b)(5).

4. Plan payments: After confirmation, the trustee shall ensure that plan payments be made timely. § 1202(b)(4). The debtor is to submit all future income to the supervision and control of the trustee under § 1222(a)(1), guaranteeing that the trustee is in the game until the plan is completed.

5. Motions to dismiss: Like a chapter 13 trustee, the 12 trustee is authorized to seek dismissal under § 1208(c) in the event of a variety of occurrences that constitute "cause." This is the trustee's "hammer" to assure timely payments and reporting.

6. Trustee Fees: Plan payments bear a trustee's fee, nominally 10 per cent in most jurisdictions. § 1226(a)(2), 28 U.S.C. § 586. This is a substantial fee load in a farm case.

7. Summary: Chapter 12 is much more highly supervised than chapter 11. While this has obvious advantages to the creditors, it may also afford some structure and oversight to a debtor lacking in management and organization skills. Whether the debtor can afford to pay the 10 per cent trustee's fee in a chapter 12 case is an additional consideration.

IV. Property of the Estate:

A. Chapter 11: Section 541 defines the ambit of property of the chapter 11 estate, except as to individuals. New § 1115, enacted by BAPCPA, augments § 541 in *individual* cases to add to all property held by debtor on the date of filing, all property acquired after commencement and before closing of the case as well as earnings for services performed post-petition and pre-closing, dismissal, or conversion. Section 1115 parallels property of the estate as defined in a chapter 13 case, § 1306.

B. Chapter 12: Similarly, § 1207 augments § 541 by including as estate property, all property acquired after commencement and prior to closing or conversion of the case and personal service earnings of the debtor after the commencement and prior to closing of the case.

V. Administrative Issues and Differences

A. Adequate protection: Chapters 11 and 12 rely on differing definitions of adequate protection. Congress attempted to tailor a specific provision in chapter 12 to equate adequate protection with measures of usage and deterioration of value applicable to agriculture and, in doing so, made § 361 inapplicable to chapter 12. § 1205(a).

1. Section 361 provides the Code's general definitions of adequate protection:

a. Providing creditors with periodic cash payments for the decrease in value of collateral the debtor retains during the case;

b. Providing creditors with replacement liens in other assets to

compensate for decreases in value; and

c. Providing creditors with the realization of the "indubitable equivalent" of their collateral.

2. Section 1205 is similar, but not identical. It provides creditors with slightly different forms of relief.

a. Creditors may receive cash compensation for diminution of the value of their collateral;

b. Creditors may receive a replacement lien for same;

c. As to real estate, a creditor may receive as adequate protection the customary and reasonable rental value of the farmland; and

d. Creditors may receive "such other relief" in order to "protect the value of property" securing the claim, which sounds like the indubitable equivalent test.

3. There is probably no real difference between the two chapters in adequate protection terms.

B. Co-debtor stay: Chapter 12 has an explicit co-debtor stay provision, § 1201, that is identical to that found in chapter 13. This protects non-debtor spouses who may be liable on consumer debt. It also protects guarantors. That stay protection only extends to the co-debtor when the debtor agrees to pay the debt under the plan, the spouse or guarantor did not retain the direct benefit of the debt, or the creditor's interest would not be irreparably harmed. § 1201(c). Chapter 11 has no co-debtor stay provision and guarantors are only protected if the court grants § 105 relief.

C. Plan Deadlines: In general, chapter 12 is designed to bring a plan to confirmation more quickly than chapter 11. While this is initially unattractive to many farm debtors, it does place a premium on promptly determining how to proceed in a plan and can prevent the debtor "drifting"that often occurs in chapter 11 cases.

1. Chapter 11 deadlines:

a. Non-Small Business Debtors: Regular chapter 11 debtors have no deadline per se, but do have 120 days in which they may exclusively file a plan; this exclusivity period may be extended up to 18 months from the date the order for relief is entered. § 1121(b) and (d).

b. Small Business Debtors: These debtors have a 300 day outside limit in which to file their plans and an exclusive right to file a plan during the first 180 days after the order for relief is entered. § 1121(e). The plan must be confirmed 45 days after the plan is filed under § 1129(e).

(1) These deadlines may only be extended if the debtor can show by a preponderance of the evidence that it is more likely than not that a plan will be confirmed within a reasonable time. The court must impose a new deadline at that time and that order must be entered before the existing deadline has expired. § 1121(e)(3).

2. Chapter 12 deadlines: A debtor has 90 days after the date of the order for relief to file a plan. This deadline may be extended by the court only if the debtor's inability to file a plan is the result of causes for which the debtor can not justly be held accountable. § 1221. The 90-day rule serves one of the original purposes of Chapter 12–accelerating the reorganization process for farmers and preventing their languishing in bankruptcy. *In re Bentson*, 74 B.R. 56, 58 (Bankr. D. Minn. 1987)(motions not be granted routinely; "Chapter 12 cases are clearly not to become Chapter 11 like proceedings"). *Bentson* lists factors a court might consider including length of case before original denial of confirmation, debtor's motivations, likelihood of confirmation if the time is extended, etc. *Id.*

a. The court must *conclude* a confirmation hearing not later than 45 days after the plan is filed. Relief from this deadline is only available for cause shown. § 1224. The "cause" standard is less stringent than the "justly held accountable" rule in § 1221 and can include convenience of the court and parties. Continuing confirmation till an adversary proceeding is complete is not sufficient cause. *In re Thao*, 2006 Bankr. Lexis 4057 (Bankr. W.D. Mo. 2006).

D. Reporting Duties: Debtors in both chapters have significant reporting requirements; the chapters differ in the length of time that debtors are required to report.

1. Chapter 11: New § 308 requires small business debtors to file reports dealing with profitability, projections, receipts and disbursements, comparisons to projections, compliance with the Code and Rules, and compliance with all required government filings, including tax returns. Section 308 goes into effect January 30, 2009. Proposed Rule 2015(a)(6), which becomes effective December 1, 2008, implements this by requiring debtors to file new Official Form 25C each month, a form operating report. This duty ends on the effective date of the confirmed chapter 11 plan.

2. Small business debtors have additional reporting requirements and obligations at the commencement of a case under § 1116, a new section added by BAPCPA.

3. Regular Chapter 11 debtors are required to file quarterly reports of receipts and disbursements with the UST so that quarterly fees may be calculated. They are also required to keep a receipt and disbursement record and to file all reports and summaries required of a trustee under § 704(a)(8)–periodic financial and tax reports. This duty ends when the duty to pay fees ends, usually when the final decree is entered. Fed. R. Bankr. P. 2015(a).

4. Chapter 12 debtors are required to file periodic reports, usually monthly, of receipts, disbursements, and taxes paid and payable as well as an inventory of their property. Fed. R. Bankr. P. 2015(b). This duty only ends when the case is completed.

E. What if I picked the wrong chapter?

1. Chapter 11 to Chapter 12: A chapter 11 case may only be converted to chapter 12 if the debtor requests it, the debtor has not been discharged under § 1141(d), and if the conversion "is equitable." See § 1112(d). *See In re Hill*, 84 B.R. 623 (Bankr. E.D. Mo. 1988) (debtors were operating under a confirmed chapter 11 plan and then filed a chapter 12 case; court held that debtors may not simultaneously be a debtor in two

bankruptcy cases under separate chapters and to the extent the commencement of the chapter 12 case was an attempt to convert the pending chapter 11 case to a case under chapter 12, it would be denied); *In re Cobb,* 76 B.R. 557 (Bankr. N.D. Miss. 1987) (chapter 11 case that was pending on effective date of 1986 Family Farmer Bankruptcy Act could convert to chapter 12 case provided that conversion was equitable; here conversion would be denied where debtors had discontinued farming operation since they filed for chapter 11 relief and merely leased farmland to son); *In re Reppert*, 84 B.R. 37 (Bankr. E.D. Pa. 1988) (conversion would be denied as inequitable where chapter 11 case was nearly 5 years old, debtor had filed a plan, substantial activity had occurred in the chapter 11 case, and debtor did not file a motion to convert until 5 years after filing chapter 11 petition).

A chapter 11 case may not be converted to chapter 12 unless the debtor is eligible to be a debtor in chapter 12. § 1112(f). *See In re Ridgely*, 92 B.R. 683 (Bankr. E.D. Mo. 1988) (chapter 12 eligibility determined at time debtor filed chapter 11, not at time it sought conversion). A debtor's petition date is not altered by conversion. *See* § 348.

2. Chapter 12 to Chapter 11: There is no provision permitting or prohibiting conversion of a chapter 12 case to chapter 11, but the Code does specify that a chapter 12 case may not be converted to another chapter under which the debtor is ineligible for relief. § 1208(e). Thus a 12 to 11 conversion is possible. *See In re Orr,* 71 B.R. 639 (Bankr. E.D. N.C. 1987); *In re Lawless*, 79 B.R. 850 (W.D. Mo. 1987) (Decision to allow debtor to convert Chapter 12 case to one under Chapter 11 is matter resting in court's discretion; no abuse where request to convert came after deadline to file chapter 12 plan.). *But see In re Stumbo*, 301 B.R. 34 (Bankr. S.D. Iowa 2002) (Because § 1208 does not specifically permit conversion from chapter 12 to chapter 11, the court concluded that conversion was not allowed, even though the equities in the case would permit conversion).

VI. Taxation: The tax aspects of chapters 11 and 12 are also different. Particularly where a debtor either has sold or surrendered low basis property or contemplates doing so, counsel need to consider these differences, briefly treated below.

A. Chapter 11 Estate; Separate Taxable Entity: When an individual files a chapter 11 case, the estate is a separate taxable entity. Title 26, U.S.C. (I.R.C.) § 1398.

This enables the individual to file a short year return that effectively separates the filing year into two tax years and allows the debtor (as opposed to the estate) to capture any tax attributes he may need to absorb as realized capital gains or recapture in the pre-bankruptcy year. Highly summarized, this has the effect of rendering any gains-related tax debt a priority claim in the bankruptcy, as opposed to an administrative claim, and gives the debtor a chance to use any accumulated loss or other attributes to minimize that claim. Moreover, the claim is payable over five years from the order for relief. § 1129(a)(9)(C).

1. If the debtor does not, or cannot split the tax year, the attributes go into the estate and can be used to absorb income of the estate. But, if the debtor surrenders low-basis land or depreciated equipment, or the lenders recover it via stay relief and foreclosure, the realized gain on this forced disposition will be taxable and the tax will be an administrative claim, payable at confirmation.

B. Chapter 12 Estate; Not a Separate Taxable Entity: A chapter 12 estate is not a separate taxable entity. Consequently, until BAPCPA was enacted, the timing of a chapter 12 debtors's disposition of assets, forced or unforced, only determined whether the resulting tax claims were priority or administrative. The debtor retained whatever tax attributes he had at filing and, presumably, could employ those attributes to lessen the impact of any high-gain transfers he might make.

1. Section 1222(a)(2)(A) Safe Harbor: BAPCPA included a new provision in § 1222 that provides a chapter 12 plan must provide for payment in full of § 507 priority claims unless the claim is for tax generated by the sale or disposition of a farm asset. In that case, the claim is treated as a general unsecured claim, but only if the debtor receives a discharge. In other words, the debtor will be absolved of paying whatever portion of the tax debt remains unpaid after he has completed the plan and that debt will be discharged. Is it a sale of a farm asset used in the farming operation? *See In re Knudsen,* 389 B.R. 643 (N.D. Iowa 2008) (slaughter hogs qualified as farm assets used in the debtors' farming operation; farm assets not limited to capital assets but included products or inventory of farming operation).

2. Case law controversy: After BAPCPA, the bankruptcy courts were divided on the issue of whether this safe harbor applied only to sales

pre-petition or to sales or dispositions occurring post-petition. *See Knudsen*, *supra* (disposition of farm assets did not have to occur prepetition in order to treat attendant tax liability as unsecured debt dischargeable in bankruptcy; statute's reference to disposition of farm assets used in farming operation means debtor's farming operation under the Chapter 12 plan, not as it existed before debtor's reorganization); *In re Schilke*, 379 B.R. 899 (Bankr. D. Neb. 2007) (allowing debtor to treat capital gains tax debt as general unsecured debt arising from postpetition sale of farm assets used to fund chapter 12 plan); *In re Dawes*, 382 B.R. 509 (Bankr. D. Kan. 2008) (capital gains taxes incurred postpetition were accorded administrative expense second priority and may be treated as unsecured and dischargeable under § 1222(a)(2)(A)). *Contra, In re Hall*, 376 B.R. 741 (Bankr. D. Ariz. 2007) (Section 1222(a)(2)(A) treatment unavailable for tax liability generated by postpetition sale of farm asset; because chapter 12 estate is not a separate taxable entity, it cannot "incur" a capital gains tax liability from a postpetition sale). That division ended when the Supreme Court issued *Hall v. United States*, 566 U.S. 606 (2012), affirming *Hall*, *supra*, and holding that only priority claims arising out of pre-petition sales of assets were subject to § 1222(a)(2)'s favorable treatment.

3. Congress Abrogates *Hall*,§§ 1222(a)(5) and 1232: In 2017, Congress amended § 1222(a)(5) to provide that a plan may provide for treatment of a governmental unit's claims of a kind described in § 1232. New § 1232 abrogated the Supreme Court's decision in *Hall* and provides that any government claim arising from the sale, before or after the petition date, of "any property used in the debtor's farming operation" shall be treated as a an unsecured claim that may be discharged. Capital gains tax claims from such sales no longer hold priority status and only participate in the distribution of the debtor's disposable income. What remains of those debts at the completion of the plan is discharged like other unsecured debts. This is a very important attribute of chapter 12 because many farmers need to down-size their operations; making those dispositions taxable on a priority basis could defeat the salutary purpose of the chapter.

VII. Plan Provisions and Confirmation: Along with the tax safe harbor contained in § 1222(a)(2), the plan drafting requirements between the two chapters are different. Confirmation requirements are somewhat similar, with the glaring exception of the

absolute priority rule present in chapter 11, § 1129(b)(2)(B)(ii).

A. Section 1123 and Chapter 11 Plans:

1. Plan implementation: The plan must provide adequate means for its implementation. Section 1123(a)(5) lists a variety of acceptable means, without limitation. Among those are the debtor's retention of the property, as well as the transfer or sale of the same.

2. Separate Classification: Section 1123(a)(4) provides that the same treatment must be given to each member of a particular class of debt. Section 1122 requires that only substantially similar debts may be classified together. This serves to limit gerrymandering of classes to secure acceptances at confirmation.

3. Individual debtor: An individual debtor's plan must provide for the submission of all the debtor's personal service earnings after commencement of the case. § 1123(a)(8).

4. DSOs: Individual debtors must have paid all DSOs that first became due after filing in order to obtain confirmation. § 1129(a)(14).

5. Form Plan for Small Business Debtors: New Official Form 25A, to become effective December 1, 2008 is a form plan for use in small business cases. *A copy of Official Form 25A is attached at the end of these materials.*

B. Chapter 11 Disclosure Statements: A chapter 11 debtor must also file a disclosure statement that provides adequate information to the creditors to enable them to determine whether to accept or reject the plan. § 1125. In a small business case, a debtor need not provide a separate disclosure statement if the court deems the plan to contain adequate information. § 1125(f). In a small business case, the court is expressly authorized to conditionally approve a disclosure statement and permit balloting on that statement as well as a combined disclosure statement adequacy hearing and confirmation hearing. § 1125(f)(3).

1. Form Disclosure Statement for Small Business Debtors: Official Form 25B goes into use after December 1, 2008 and outlines the necessary content. *A copy of Official Form 25B is attached at the end of these*

materials.

C. Chapter 12 Plan Drafting: Chapter 12 plan requirements parrot those of chapter 13. Section 1222(a) and (b) set out mandatory and discretionary requirements, respectively, that include:

1. Provisions for submission to the trustee of all future earnings necessary to execute the plan, § 1222(a)(1);

2. Provisions allowing the modification of secured claims or unsecured claims and for waiving and curing defaults, 1222(b)(2) and (3);

3. Provisions for the maintenance of payments and curing of defaults on claims on which the last payment is due after the plan's last payment is due, § 1222(b)(5);

4. Provisions to pay allowed secured claims over periods in excess of the three to five year time limit imposed by § 1222©, § 1222(b)(9).

5. Individual debtors must have paid all DSOs that first became due after filing in order to obtain confirmation. § 1225(a)(7).

6. Provisions for the payment of any claim from the debtor's property, § 1222(a)(7), and the sale of any property or distribution of any property among those having an interest in it. § 1222(a)(8).

7. Limitation of payment of interest on nondischargeable claims only is debtor has sufficient disposable income to pay all other claims in full. § 1222(a)(11).

D. Confirmation differences:

1. Secured Claims: Both chapter 11 and chapter 12 treat allowed secured claims in similar fashion. Both require that the holder of the claim accept the plan, that the holder retain its lien, and that value of the distribution to the creditor be equal to allowed secured claim as of the effective date of the plan, requiring the payment of *Till* interest. Compare § 1129(b)(2)(A) with § 1225(a)(5).

2. Priority Claims: In order to confirm a chapter 12 plan, the court must

find that priority claims be paid in full in deferred cash payments, § 1222(a)(2) and § 1225(a)(1). Compare this to the more stringent requirements of chapter 11: with respect to most priority claims, the debtor may offer deferred cash payments, but if the class of creditors objects, the debtor must pay the claims in cash in full *at the effective date*. § 1129(a)(9)(A) and (B).

a. With respect to tax priority claims in chapter 11, those must be paid, with interest over a period of five years after the order for relief. § 1129(a)(9)(C).

b. Chapter 12 tax priority claims are to be paid in deferred cash payments, § 1222(a)(2). The lack of reference in this provision to interest or to the payments being valued at the effective date suggests that tax claims do not bear interest in chapter 12. This may be a significant advantage to farm debtors that weighs toward filing chapter 12.

3. Unsecured Claims: In general, the unsecured creditors must receive an amount equal to their claim, or, if they consent, to an amount equal to what they would receive in chapter 7. § 1129(a)(7) and § 1225(a)(4).

a. Absolute priority rule: This is the crucial difference between chapters 11 and 12. Many farm debtors find themselves with substantial deficiencies owed to a small number of secured creditors. As a result, these creditors can dominate the unsecured creditor class in chapter 11 cases and defeat the plan. Even more daunting is the presence of the absolute priority rule, § 1129(b)(2)(B), giving these creditors absolute veto power over plans. Section 1129(b)(2)(B) provides that no junior class of claims or interests may receive anything of value in a case unless all senior claims or interests are paid in full, unless those classes consent to the junior's receipt or retention of property. Thus, a farmer in chapter 11 can be precluded from retaining his land and other assets if he does not contrive to pay his unsecured creditors in full. *See Norwest Bank Worthington v. Ahlers,* 485 U.S. 197 (1988) (rejecting argument that absolute priority rule is not violated where the property or interest retained by the debtor farmer has no value). No analog to this provision exists in chapter 12. *See In re McCann*, 202 B.R. 824 (Bankr.

N.D.N.Y. 1996) (discussing differences between chapter 11 and chapter 12 provisions and farmers' difficulty in complying with chapter 11 provisions); *In re Jones*, 152 B.R. 155 (Bankr. E.D. Mich. 1993) (describing § 1129(b)(2)(B) and § 1111(b)(2) as "insurmountable obstacles" to a farmer's ability to strip down liens and keep their farms).

b. BAPCPA's change to the absolute priority rule: BAPCPA amended § 1129(b)(2)(B)(ii) to permit *individual* debtors to retain property included in the estate under § 1115 (§ 541 property and post-petition earnings and property) so long as debtors have paid DSOs as required by § 1129(a)(14). *See In re Tegeder*, 369 B.R. 477 (D. Neb. 2007). Even though this exception allows individual debtors to retain estate property (including post-petition earnings), they must still pay objecting unsecured creditors their projected disposable income over a minimum period of 5 years. *See* § 1129(a)(15). There remains considerable dispute among the courts whether this enactment is an "exception" to the absolute priority rule for individual chapter 11 debtors and, if it is, whether that exception extends to all of the property of the estate or only that property accumulated or earned by the debtor post-petition. *See* 7 *Collier on Bankruptcy*, ¶ 1129.04[d].

c. Chapter 12 unsecured creditors can only expect to receive their ratable share of the debtor's projected disposable income after priority and secured debt is paid. § 1225(b)(1). The only requirement is that the anticipated distribution over the life of the claim yield the equivalent of what these creditors would receive in a chapter 7 case. § 1225(a)(4). Mercifully, BAPCPA did not inject the chapter 7 means test into the disposable income calculation for chapter 12, leaving the "not reasonably necessary for support" language intact. *See* § 1225(b)(2).

4. Section 1111(b)(2) Election: In chapter 11, a secured creditor can elect to be treated as fully secured, waiving his unsecured claims, but demanding to be paid in full. This requires the debtor to make a stream of payments to the creditor that has a present value at the effective date equal to the value of the collateral retained, but which has a total value equal to the claim itself. *See In re 680 Fifth Ave. Associates*, 156 B.R.

726 (Bankr. S.D.N.Y. 1993). The only alternative this leaves debtors is surrender of the property to the creditor. Be careful what you wish for.

VIII. Scope of Discharge:

A. Chapter 11 Individuals: Section 1141(d)(1) and (2) discharges an individual debtor of all debts arising before the date of confirmation unless the debt could be excepted from the debtor's discharge under § 523. Where debtor is an individual, however, this discharge is conditioned on completion of the payments under the plan. § 1141(d)(5)(A). Recall that these payments come from the debtor's dedication of all post-petition earnings to the payment of the plan. § 1123(a)(8). A debtor cannot secure a discharge if § 522(q) applies to him. § 1141(d)(5)(C).

B. Chapter 12: Like a chapter 13 debtor, a chapter 12 farmer gets a discharge if he completes his payments. His discharge only covers debts provided for under the plan. § 1228(a). He must certify that all domestic support obligations (DSOs) have been paid, § 1228(a), and that § 522(q) does not apply to him, § 1228(f). All of the § 523 exceptions apply. § 1228(a)(2).

IX. Post Confirmation Administration and Court Involvement

A. Chapter 11: The court retains jurisdiction of the debtor and the estate to the extent provided for in the plan (jurisdiction retention language is key), but arguably loses jurisdiction of the case once the final decree is entered. Thus, a creditor's only means of enforcement is to seek his contractual remedies for breach of the plan at state law. The automatic stay likely detaches at discharge unless the court specifically orders otherwise. *See* § 362(c). In any event, the stay is lifted when the court loses jurisdiction of the case.

1. Remember that an individual debtor does not receive a discharge until the plan is completed and arguably the Court retains jurisdiction, at least for that purpose, until that occurs. It remains to be seen how courts will extend the ambit of this jurisdiction.

B. Chapter 12: The court retains jurisdiction while the plan is paying out. Unless the plan provides or the court orders otherwise, the property of the estate revests in the debtor under § 1227(b). In chapter 13 cases, this means that the debtor remains accountable for disposable income and plan payments, but that he may not be protected by the stay. On the other hand, if vesting is delayed

by court order, as in many chapter 13 cases, the stay remains in effect until the plan is complete.

X. Conclusion: What chapter is best for your debtor or creditor is largely dependent on the individual circumstances of the case. While expenses in a chapter 11 case may be higher, trustee's fees in chapter 12 may be equally prohibitive. The remedies are similar, but the means of securing them are very different. Practitioners should carefully analyze which chapter is best for their clients one case at a time.

Summary Comparison of U.S. Bankruptcy Code Chapters 11, 12, & 13
Prepared by Mary Jo Heston's Chambers
(Updated August 5, 2020)

SUBSTANTIVE Categories	Ch. 11	Subchapter V of Ch. 11 (effective 2/19/2020) (amended by the CARES Act on 3/27/2020)	Ch. 12	Ch. 13
Eligibility Requirements	Ch. 11: Anyone or any entity that can file for ch. 7 relief, except a stockbroker, commodity broker, or an insured depository institution, may be a debtor. § 109(d).[1] No debt limit or income requirement. Small Business Debtors: Person engaged in commercial or business activities (includes any affiliate that is also a debtor and excludes a person who primary activity is the business of owning single asset real estate or operating real property or conducting services incidental to the real property) person whose primary activity is business of owning or operating real property). § 101(51D). The CARES Act permanently excludes a debtor from small business eligibility if it is "an	At least 50% of small business debtor's debt is from commercial or business activities. Aggregate noncontingent, liquidated, secured and unsecured debts of not more than $7,500,000 (will return to $2,725,625 on 3/28/2021). § 101(51D); § 104; § 1113, CARES Act. Small business debtors must opt in to subchapter V by checking appropriate box in Item 13 of voluntary petition. § 1182(1) and (2); amended § 101(51D)(A); new § 103(i); BR 1020(a). No committee of creditors unless the court orders for cause. § 1102(a)(3).	For individuals: 1) family farmer with regular income and aggregate debts up to $10,000,000, and 50% of the aggregate noncontingent, liquidated debt arises from a farming operation, § 101(18); or 2) family fisherman with regular income and aggregate debts below $2,044,225 of which 80% constitutes debt from commercial fishing activities, § 101(19A)(i). § 109(f). For corporations or partnerships, 50% of stock or equity is held by one family and/relatives who conduct the farming operation, more than 80% of asset value relates to farming operations, and aggregate noncontingent, liquidated debts are below $10,000,000 with at least 50% of the debt arises from farming	Individual (or individual and spouse) with regular income that owes noncontingent, liquidated, unsecured debts of less than $419,275 and noncontingent, liquidated, secured debts of less than $1,257,850. Determined as of the petition date. Excludes stockbrokers and commodity brokers. A corporation or partnership may not be a debtor under ch. 13. § 109(e). CARES Act excludes coronavirus-related payments from the definition of income; this provision sunsets 3/28/2021. § 101(10A)(B)(ii); § 1113, CARES Act.

[1] Unless otherwise indicated, all chapter, section and rule references are to the Federal Bankruptcy Code, 11 U.S.C. §§ 101- 1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

	affiliate of an issuer" under § 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c). § 101(51D)(B)(iii); § 1182; § 1113, CARES Act. Aggregate noncontingent, liquidated, secured and unsecured debts of $2,725,625 or less. No member of a group of affiliated debtors has aggregate noncontingent, liquidated secured and unsecured debts over $2,725,625. § 101(51D). No unsecured creditors committee (or committee is sufficiently inactive). Status as a "small business debtor" hinges, at least in part, upon whether a creditor's committee is appointed, and on how much that creditor's committee participates in the bankruptcy. A party in interest under § 1102(a)(2) may compel the appointment of a creditor's committee thereby extinguishing debtor's small business status. The UST appoints any such committee. *Id.* Debtor must indicate it is a small business debtor by checking appropriate box in Item 13 of voluntary petition. FRBP 1020.		activities. § 101(18)(B). Family farmer must be engaged in a farming operation, including "farming, tillage of the soil, dairy farming, ranching, production of raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state." § 101(21).	

Filing Fees	$1,717 paid when petition is filed. 28 U.S.C. § 1930.	Ch. 11 filing fee is paid when petition is filed. No separate fee is due for electing subchapter V.	$275. Individual filers may pay the fee in installments. Fee must be paid in full no later than 120 days after the petition is filed.	$310. Fee may be paid in installments within 120 days after the petition is filed.
UST Quarterly Fees	UST quarterly fees are based on a sliding scale formula in 28 U.S.C. § 1930(a)(6). Minimum amount is $325 for disbursements up to $15,000. Code does not define "disbursements." Failure to pay UST quarterly fees is "cause" for dismissal. § 1112(b)(4)(K).	None. Subchapter V debtors are exempt from paying UST quarterly fees. 28 U.S.C. § 1930(a)(6)(A).	UST Fees for ch. 12 debtors shall not exceed 10% of the first $450,000 paid under the plan, and 3% of any payments in excess of $450,000. 28 U.S.C. § 586(e)(1)(B). 28 U.S.C. § 586(e)(2) further curtails the standing trustee's salary and estimated expenses. Excess funds are to be deposited in the U.S. Trustee System Fund.	No UST fees.
Reports	Must file monthly/quarterly operating reports. Must file all reports and summaries required of a trustee under § 704(a)(8). Duty ends when duty to pay fees ends, usually when final decree is entered. BR 2015(a). Small Business Debtors: Must file reports dealing with profitability, projections, receipts, disbursements, etc. § 308, BR 2015(a)(6). Duty ends on effective date of confirmed plan. Additional reporting requirement under § 1116.	No separate rule.	Must file monthly/quarterly operating reports. Duty ends only when case is completed. BR 2015(b).	No monthly operating reports required by ch. 13 debtors not engaged in business.

Automatic Stay & Co-Debtors	Unlike chs. 12 and 13, ch. 11 does not provide an explicit co-debtor stay and guarantors are only protected if the court grants § 105 relief.	No separate rule.	Same co-debtor stay as in ch. 13. Upon filing, the automatic stay extends only to co-debtors on consumer debts and not to debts incurred in the ordinary course of business. § 1201. Section 1201 is identical to the co-debtor provision applicable to ch. 13. *See* § 1301. Cases from either chapter are thus instructive. Courts have held that certain debts from farming operations are not consumer debt. See *In re SFW, Inc.* 83 B.R. 27 (Bankr. S.D. Cal. 1988) (guarantees given by ch. 12 debtor's shareholders for commercial loans for family farm were not related to consumer debt so co-debtor stay did not apply).	Upon filing, the automatic stay extends only to co-debtors on consumer debts and not to debts incurred in the ordinary course of business. § 1301. The term "consumer debt" is defined in § 101(8).
Trustees	Generally, a trustee is only appointed under § 1104(a) for cause or if the appointment is in the best interest of creditors; this is done if the Debtor in Possession (DIP) falters. Creditors may seek to elect a trustee by requesting an election be convened within 30 days after the court orders the appointment of a trustee. § 1104(b)(1). Unless a court appoints a trustee, there is no disbursement agent for a ch. 11 case. DIP: under § 1107, the DIP retains	A disinterested trustee is appointed in every subchapter V case. § 1183(a). The trustee has a role similar to a ch. 13 trustee. The trustee is also authorized to operate the debtor's business if the debtor is removed as a DIP. § 1183(b)(5). The trustee makes all payments to creditors under the confirmed plan. Trustee may make adequate protection payments to secured creditors prior to confirmation. § 1194.	A disinterested trustee is appointed in every ch. 12 case. § 1202. Ch. 12 cases are more supervised than ch. 11 cases. This provides additional oversight of the debtor but it comes at a cost of usually 10% in most jurisdictions. A ch. 12 trustee has all the reporting and supervisory duties of a ch. 7 trustee set out by § 704(a). The trustee also shall appear and be heard on confirmation of the plan, matters affecting estate	A disinterested trustee is appointed in every ch. 13 case. § 1302. A ch. 13 trustee has all the reporting and supervisory duties of a ch. 7 trustee set out by § 704(a). The trustee shall appear and be heard on plan confirmation and modification, and property values. The trustee must ensure plan payments are made timely. § 1302(b). If the debtor is engaged in

	many of the powers of the trustee; under § 1108, the DIP retains the power to operate the business.	The trustee must appear at mandatory status conference; facilitate development of a consensual plan; and perform duties generally consistent with § 1302. § 1183(b). If confirmation is consensual, the trustee's role is terminated upon "substantial consummation" of the confirmed plan. § 1183(c). If confirmation is contested, the trustee serves until completion of payments under the plan confirmed under § 1191(b), unless plan or confirmation order provide otherwise.	property, and sales. If the court directs for cause, the trustee shall also exercise some ch. 11 trustee powers, like investigating the acts and assets of the debtor. § 1202(b)(1)-(3). The trustee conducts any asset sales of farmland and farm equipment. § 1206. If the debtor is removed as DIP, the trustee assumes operation of the business and succeeds to other ch. 11 trustee powers. § 1202(b)(5). Post-confirmation, the trustee must ensure plan payments are made timely. § 1202(b)(4). Debtor must submit all future income to the supervision and control of the trustee, § 1222(a)(1), guaranteeing the trustee is in the game until the plan is completed. The ch. 12 trustee may seek dismissal under § 1208(c) for "cause."	business, the trustee also shall perform the ch. 11 trustee duties in § 1106(a)(3) and (4). § 1302(c). The ch. 13 trustee may seek dismissal under § 1307(c) for "cause."
Trustee Fees	No rule.	Standing trustee is paid like current ch. 12/13 trustees under 28 U.S.C. § 586(e)(1); if no standing trustee, then the trustee is paid under 11 U.S.C. § 330.	Plan payments bear a trustee's fee; nominally 10% in most jurisdictions. § 1226(a)(2), 28 U.S.C. § 586(e)(1). This may be a large fee load in farm cases.	Plan payments bear a trustee's fee. Fee cannot exceed 10% of all payments under the plan. 28 U.S.C. § 586(e)(1).

Estate Property	Section 541 defines estate property except as to individuals. For individuals, § 1115 augments § 541 to add all property held by debtor on the filing date, all property acquired after commencement and before closing of the case, and all earnings for services performed post-petition and prior to closing. Section 1115 parallels property of estate defined in ch. 13 cases, § 1306.	Section 1186 augments § 541 and parallels § 1115 in ch. 11.	Section 1207 augments § 541 and parallels § 1115 in ch. 11.	Section 1306 augments § 541, and parallels § 1115 in ch. 11.
Estate Property Post-confirmation	Post-confirmation, except as provided in the plan or confirmation order, all the estate's property revests in the debtor free and clear of all liens. § 1141(b) & (c).	No separate rule.	Post-confirmation, except as provided in the plan or confirmation order, all the estate's property revests in the debtor free and clear of all liens. § 1227 (b) & (c).	Post-confirmation, except as provided in the plan or confirmation order, all the estate's property revests in the debtor free and clear of all liens. § 1327(b) & (c).
Adequate Protection	Section 361 applies. Adequate protection may be provided by 1) cash or periodic cash payments for diminution in the value of the entity's interest in the property; 2) replacement liens; or 3) "such other relief" as will result in the realization of the indubitable equivalent of the entity's interest in the property. § 361.	Section 361 applies. After notice and a hearing, the court may authorize the trustee to make preconfirmation adequate payments to the holder of a secured claim. § 1194(c).	Section 361's general definition of adequate protection does NOT apply to a ch. 12 case. § 1205(a). Adequate protection may be provided by 1) cash or periodic cash payments for diminution of the value of the collateral; 2) replacement liens; 3) reasonable rental value for the use of farmland; 4) "such other relief" to adequately protect the value of	Section 361 applies. The debtor is required to make preconfirmation adequate protection payments to holders of claims secured by a purchase money security interest in personal property. § 1326(a)(1)(C). The amount of periodic payments on a secured claim under a plan must also provide adequate protection payments to the holder of a claim secured by

			property securing the claim (like the indubitable equivalent test). § 1205(b).	personal property. § 1325(a)(5)(B)(iii)(II).
Avoidance Powers	Pursuant to § 1107, the ch. 11 DIP is the proper party to assert ch. 5 avoidance actions unless removed as DIP, and a trustee is appointed pursuant to § 1104. There is some disagreement as to whether examiners appointed under § 1104 also have the authority to pursue avoidance actions under § 1106. Many courts have also ruled that bankruptcy courts have the power to authorize a creditors committee to bring an avoidance action on behalf of the estate. A ch. 11 plan may also provide for the transfer of avoidance powers to a representative of the estate appointed in the confirmation order. § 1123(b)(3)(B).	Subject to certain limitations, the debtor has all rights of a trustee under § 1184, and therefore presumably has standing to bring ch. 5 avoidance actions unless removed as a DIP pursuant to § 1185.	The ch. 12 DIP has exclusive standing to bring ch. 5 avoidance actions unless removed as a DIP pursuant to § 1204. § 1203.	The ch. 13 standing trustee is authorized to pursue avoidance actions. § 554(a). Courts are divided over whether a ch. 13 debtor also has standing to assert the estate's avoiding powers. Unlike chs. 11 and 12, there is no provision in ch. 13 expressly conferring on debtors the powers of a trustee.
Plan Exclusivity	Regular ch. 11 debtors and Small Business Debtors have a 120-day exclusivity period to file a plan.	Only the debtor can file a plan. § 1189(a).	Only the debtor can file a plan. § 1221.	Only the debtor can file a plan. § 1321.
Plan Deadlines	Ch. 11: No deadline for filing the plan per se, but ch. 11 debtors have 120 days to exclusively file a plan. This period may be extended up to 18 months from the date the order for relief is entered. § 1121(b) & (d).	Similar to ch. 12, the plan must be filed within 90 days of the order for relief, but this period may be extended if it is shown that the need for the extension is due to circumstances for which the debtor should not justly be held accountable. § 1189(b).	The debtor must file a plan within 90 days of the order for relief. To extend the 90-day period, debtor must clearly demonstrate that the inability to file a plan was due to circumstances beyond the debtor's control. § 1221.	The debtor must file a plan within 14 days after the petition is filed, and such time can only extend for cause shown and on notice as the court may direct. BR 3015(b).

	Small Business Debtors: Debtors have 180 days to exclusively file a plan. This period may be extended up to 20 months from the date the order for relief is entered. § 1121(d)(2)(B) & (e). The plan must be confirmed 45 days after filed unless the time period has been extended. §§ 1121(e)(3), 1129(e).			
Disclosure Statement	Ch. 11: The debtor must file a disclosure statement that provides adequate information to creditors. § 1125. The court must approve the disclosure statement prior to the debtor's ability to solicit votes. Small Business Debtors: A Small Business Debtor does not need to file a separate disclosure statement if the court deems the plan to contain adequate information. § 1125(f). Acceptances/rejections of a plan may be solicited based on conditionally approved disclosure statements. § 1125(f).	None required unless otherwise ordered by the court. § 1181(b).	None required.	None required.
Status Conference	None required.	Subchapter V adds a new requirement unique to this subchapter requiring the court to hold a status conference no later than 60 days after the order for relief. § 1188(a). This period may be extended	None required.	None required.

		for circumstances for which the debtor should not justly be held accountable. § 1188(b). No later than 14 days prior to such conference the debtor is to file a report detailing its efforts to attain a consensual plan. § 1188(c).		
Commencement of Plan Payments	Ch. 11 debtor commences making plan payments on the date the first payment is due under the confirmed plan.		Ch. 12 debtor has no obligation to make payments to the trustee before confirmation. § 1226; 8 Collier on Bankruptcy P 1226.01 (16th 2019).	Ch. 13 debtor must commence making payments no later than 30 days after the date of filing the plan or order for relief, whichever is earlier. § 1326(a)(1).
Plan Content	Plans *must*: 1) designate classes of claims/interests; 2) specify impaired/unimpaired claims; 3) specify treatment for each unimpaired claim; 4) provide the same treatment for each claim/interest; 5) provide sufficient means of implementing the plan; 6) if applicable, include provision barring the issuance of nonvoting equity securities; 7) contain provisions consistent with the public interest; and 8) in an individual case, provide for debtor's future income to fund plan payments. § 1123.	Plans *must*: 1) provide a brief history of the business operations of the debtor; 2) provide a liquidation analysis; 3) provide projections with respect to the ability of the debtor to make payments under the proposed plan; and 4) provide for the submission of all or such portion of the future earnings of other future income of the debtor as is necessary for the execution of the plan. § 1190(1) & (2).	Mirrors those of ch. 13. ch. 12 plans *must*: 1) provide future earnings or future income to the trustee; 2) provide all priority claims under § 507 are paid in full; 3) provide the same treatment of all claims if the plan classifies claims and interests; and, 4) if all the debtor's projected disposable income for a 5-year period is committed to the plan, then the plan may provide for less than full payment of amounts owed under § 507(a)(1)(B). § 1222.	Plans *must*: 1) provide future earnings or future income to the trustee; 2) provide all priority claims under § 507 are paid in full; 3) provide the same treatment for each claim within a particular class; and 4) if all the debtor's projected disposable income for a 5-year period is committed to the plan, then the plan may provide for less than full payment of amounts owed under § 507(a)(1)(B). § 1322.
	Plans *may*: 1) impair or leave unimpaired secured/unsecured claims; 2) assume/reject leases & executory contracts; 3) settle/adjust any	Plans *may*: 1) modify the rights of the holder of a claim secured only by a security interest in real property that is	Under § 1222(b)(1)-(12), the plan *may* designate classes, modify rights of secured claims, cure defaults, pay	Under § 1322(b)(1)-(11), the plan *may* designate classes, modify rights of secured claims, cure defaults, pay

	claim/interest of debtor or the estate; 4) designate a convenience class of claims; 5) sell estate property; 6) modify secured claims except secured interests in a principal residence; and, 7) "include any other provision consistent with § 1123." Cannot modify consensual liens on a principal residence.	the principal residence of the debtor if the new value received in connection with granting the security was i) not used primarily to acquire real property; and (ii) used primarily in connection with the small business of the debtor. § 1190(3).	unsecured creditors, assume leases and executory contracts, and provide for the sale or distribution of property. Ch. 12 allows modification of home mortgages, § 1222(b)(2), and discharge of taxes arising from sale of farming assets, § 1232.	unsecured creditors, and assume leases and executory contracts. Unlike ch. 12, § 1322 does not contain a provision authorizing the sale of property in the plan. Cannot modify consensual liens on a principal residence.
Sales Free and Clear of Liens	Ch. 11 *debtors in possession* may sell assets, other than in the ordinary course of business, free and clear of liens under § 363(f) after notice and a hearing. § 1107(a). Sales free and clear of liens require satisfying one of the following grounds: 1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; 2) the interest holder consents; 3) the property's sale price is greater than the aggregate value of all liens on the property; 4) the interest is in bona fide dispute; *or* 5) the interest holder could be compelled in a legal or equitable proceeding to accept a money satisfaction for the claim. § 363(f)(1)-(5).		Ch. 12 debtors in possession *and* trustees retain the right to sell property free and clear of liens under § 363(f). §§ 1203, 1206. In addition, § 1206, which applies only in ch. 12, allows *trustees* under § 363(b) and (c) after notice and hearing to sell farmland, farm equipment, or any property used to carry out a commercial fishing operation (including a commercial fishing vessel) free and clear of third-party interests even if none of the grounds in § 363(f) are satisfied. Section 1206 "modifies [§] 363(f) to allow family farmers or fishermen to sell assets not needed for the reorganization prior to confirmation without the consent of the secured creditors, subject to approval of the court." 8 Collier on Bankruptcy P 1206.01 (16th	Ch. 13 *debtors* may sell assets, other than in the ordinary course of business, free and clear of liens under § 363(f) after notice and hearing. § 1303. Sales free and clear of liens require satisfying one of the following grounds: 1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; 2) the interest holder consents; 3) the property's sale price is greater than the aggregate value of all liens on the property; 4) the interest is in bona fide dispute; *or* 5) the interest holder could be compelled in a legal or equitable proceeding to accept a money satisfaction for the claim. § 363(f)(1)-(5).

			2019). But proceeds of such sales are still subject to those third-party interests. § 1206.	
Special Tax Provisions for Chapter 12			Because ch. 12 plans typically sell property to reorganize, to avoid hard tax consequences, § 1232(a) "reclassifies" these government claims as unsecured claims arising before the petition date that shall not be entitled to § 507 priority status and discharged under § 1228. Section 1232 was signed into law on October 26, 2017. Public Law 115-72 provides that the amendments apply to any bankruptcy case pending, but not confirmed, on the effective date of the act. Ch. 12 debtors must include § 1232(a) unsecured claims in their plans. If there is a post-confirmation sale, transfer, exchange, or other disposition on farm property, and a subsequent government unit claim arises, then it will be necessary for the trustee to adjust payments accordingly. Possible plan language: The ch. 12 plan should include language to the effect that any potential claim within the	

			scope of § 1232(a) arising post-petition, but before discharge, shall be included in the class of general unsecured claims. 8 Collier 1232.03. The plan language should account for the trustee's need to include tax claims in the unsecured creditor pool and should time any disbursements to the unsecured creditors only after the tax claims have been filed to avoid a potentially unequal (i.e., not *pro rata*) distribution amongst unsecured claimants.	
Plan Confirmation Requirements	Ch. 11: After notice, the court shall hold a hearing on confirmation. 28-days' notice required. BR 2002(b). To be confirmed, plans must satisfy 16 requirements of § 1129(a). Chief among the requirements are feasibility and the best interest of the creditors tests. If all other requirements under § 1129(a) are met but for (a)(8), the debtor may seek to "cram down" the plan over the objections of its creditors. § 1129(b). Absolute priority rule applies. As a component of a § 1129(b) cram down, plans must satisfy the absolute priority rule. At least one court has found the absolute	To be confirmed, plan must satisfy the requirements of § 1129(a). § 1191. No consenting impaired class needed for confirmation if 1) plan satisfies § 1129(a) [other than (a)(8), (a)(10), and (a)(15)]; 2) plan does not discriminate unfairly; and 3) plan is fair and equitable, as to each impaired, nonconsenting class. §§ 1181(a), 1191(b). A plan is "fair and equitable" if 1) § 1129(b)(2)(A) is satisfied; 2) it provides for application of all debtor's projected disposable income	Except for cause, confirmation hearing shall be concluded not later than 45 days after the filing of the plan. 21-days' notice required. BR 2002(a)(8). Plans must satisfy all Code requirements, be proposed in good faith, and pay all admin fees. In addition, the court must find that the debtor's plan is feasible and in the best interest of creditors. With respect to secured claims, § 1225(a)(5) provides three avenues of treatment: 1) the creditor has accepted the plan; 2) the secured creditor	Confirmation hearing must be scheduled not earlier than 21 days but not later than 45 days after the 341 meeting of creditors. 28-days' notice required. BR 2002(b). Plans must satisfy all Code requirements, be proposed in good faith, and pay all admin fees. In addition, the court must find that the debtor's plan is feasible and in the best interest of creditors. With respect to secured claims, § 1325(a)(5) provides three avenues of treatment: 1) the creditor has accepted the plan; 2) the secured creditor

	priority rule applies in individual ch. 11s. *In re Rogers*, 2016 WL 3583299 (Bankr. S.D. Ga. June 24, 2016). Creditors must object to the plan or risk forfeiting their objection. BR 3015(f). Small Business Debtors: Section 1129(e) directs the court to confirm a plan not later than 45 days after the date it was filed. Small business plans follow the same confirmation requirements as their larger ch. 11 counterparts.	for 3 years beginning on date first payment is due (or up to 5 years, as ordered) to plan payments; and 3) debtor will be able to make all plan payments or there is a reasonable likelihood debtor will be able to make all plan payments. § 1191(c). The absolute priority rule does not apply. § 1181(a).	retains its lien and receives property having a value, as of the effective date, not less than the allowed amount of the secured claim, i.e., "cramdown;" and 3) debtor surrenders the property. Cramdown for ch. 12 purposes depends on the amount of the claim. § 506(a) and (b). Permissible plan duration is up to 5 years. No "means test" for disposable income. Creditors do not have an opportunity to vote on ch. 12 plans but may object to the plan or risk forfeiting their objection. BR 3015(f).	retains its lien and receives property having a value, as of the effective date, not less than the allowed amount of the secured claim, i.e., "cramdown;" and 3) debtor surrenders the property. Creditors do not have an opportunity to vote on ch. 13 plans but may object to the plan or risk forfeiting their objection. BR 3015(f).
Plan Modifications	The plan proponent may modify a plan any time before confirmation. § 1127(a), (c). After confirmation, the plan proponent or reorganized debtor may modify the plan prior to substantial consummation of the plan. Plan modifications must comply with § 1125. § 1127(b), (c).	The debtor may modify the plan at any time prior to confirmation. §1193(a). After confirmation and before substantial consummation, the debtor may modify the plan as long as it complies with §§ 1122 and 1123, confirms the modified plan, *and* finds that circumstances warrant the modification. § 1193(b). After confirmation and	Debtor may modify the plan at any time before confirmation. § 1223. Plans may be modified after confirmation but only before debtor has completed payments under such plan. Plans may be modified by the debtor, trustee, or holder of an allowed unsecured claim. § 1229. Plans may be modified only	Debtor may modify the plan at any time before confirmation. § 1323. Plans may be modified after confirmation but only before debtor has completed payments under such plan. Plans may be modified by the debtor, trustee, or holder of an allowed unsecured claim. § 1329. Plans may be modified only

		substantial consummation, the debtor may modify the plan at any time within 3 years, or up to 5 years as fixed by the court, but the modified plan must comply with § 1121(b), *and* the court must find that circumstances warrant the modification. § 1193(c). A consensually confirmed plan may only be modified by consent. § 1193(b).	to: 1) increase/decrease payments; 2) extend/reduce the time for payments; 3) alter the amount of distribution; or 4) provide payment on a § 1232(a) claim. § 1229. Plan may NOT be modified by anyone except the debtor in the last year of the plan to require payments leaving the debtor with insufficient funds to operate the farm. § 1229(d)(3).	to: 1) increase/decrease payments; 2) extend/reduce the time for payments; 3) alter the amount of distribution; or 4) reduce amounts paid under plan by the actual amount expended by debtor to purchase healthcare. § 1329. The CARES Act allows a debtor to modify a plan confirmed prior to 3/27/2020 and extend payments up to seven years from the time of the first payment if a debtor is experiencing or has experienced a material financial hardship directly or indirectly related to COVID-19. § 1329(d)(1); § 1113, CARES Act. This provision sunsets 3/28/2021. § 1113, CARES Act.
Conversion	A ch. 7 debtor may convert to ch. 11 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. *Id.* A ch. 11 debtor may convert a case to ch. 7 unless: 1) the debtor is not a DIP; 2) the case was commenced as an involuntary case; or 3) the case was converted to a ch. 11 case other than on the debtor's request. § 1112(a).	No separate rule.	A ch. 7 debtor may convert to ch. 12 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. *Id.* A ch. 12 debtor may convert a case to ch. 7 any time. § 1208(a). The court may only convert to ch. 7 on the request of a party in interest, after notice and a	A ch. 7 debtor may convert to ch. 13 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. *Id.* A ch. 13 debtor may convert a case to ch. 7 at any time. § 1307(a). The court may only convert to ch. 7 on the request of a party in interest, after notice and a

	The court may only convert to ch. 7 on the request of a party in interest, after notice and a hearing, and for cause. The court will convert or dismiss, whichever is in the best interest of creditors. § 1112(b). The court may not convert to ch. 7 if the debtor is a farmer or a corporation that is not a moneyed, business or commercial operation unless the debtor requests the conversion. § 1112(c). A ch. 11 case may be converted to ch. 12 or ch. 13 only if: 1) the debtor requests it; 2) the debtor has not been discharged under § 1141(d); and 3) conversion is equitable. § 1112(d).		hearing, upon a showing the debtor committed fraud. § 1208(d). The applicable law and debtor's eligibility for ch. 12 on the petition date, not the conversion date, governs conversion to ch. 12. *See In re Campbell*, 313 B.R. 871 (B.A.P. 10th Cir. 2004), *and see In Re Ridgely*, 93 B.R. 683 (Bankr. E.D. Mo. 1988); *but cf. In re Feely*, 93 B.R. 744 (Bankr. S.D. Ala. 1988) (determining eligibility for conversion to ch. 12 based on the motion date, not the petition date). There is no specific provision permitting or prohibiting the conversion of a ch. 12 case to ch. 11 or ch. 13.	hearing, and for cause. The court will convert or dismiss, whichever is in the best interest of creditors. § 1307(c). At any time before confirmation, the court may convert a case to ch. 11 or ch. 12, on the request of a party in interest or the U.S. Trustee. § 1307(d). The court may not convert a ch. 13 case to ch. 7, 11 or 12 if the debtor is a family farmer unless the debtor requests the conversion. § 1307(f).
Debtor Discharge	A confirmed plan binds: 1) the debtor; 2) any entity acquiring property under the plan; and 3) any creditors, among others, whether or not the entities have accepted the plan. § 1141(a). For a non-individual ch. 11 debtor, discharge occurs at confirmation, except as otherwise provided in the plan or confirmation order. This discharges the debtor from any debt	If a plan is consensually confirmed, then the general discharge provisions under §1141(d)(1) – (4) shall apply. Thus, in a non-liquidating subchapter V case, discharge will occur on confirmation. If a plan is non-consensually confirmed, then the timing provision for discharge under § 1141(d) shall not apply.	Two types of discharge available: 1) debtor completes all plan payments, other than payments to long-term secured creditors; and 2) debtor qualifies for a "hardship discharge" whether or not debtor has completed all payments. § 1228. To receive a hardship discharge, the debtor's failure	Two types of discharge available: 1) full compliance discharge; and 2) hardship discharge. § 1328. To receive a hardship discharge, the debtor's failure to complete plan payments must be due to circumstances beyond the debtor's control, creditors must have received at least as much under the plan as

	that arose prior to the date of confirmation and eliminates all equity interests in the debtor that are provided for in the plan. Debts set forth in § 1141(d)(6) are not discharged (certain debts owed to government units). For an individual ch. 11 debtor, unless ordered otherwise, confirmation does not discharge any debt provided for in the plan until the court grants a discharge upon completion of all payments under the plan. An individual debtor is not discharged from any debt excepted under § 523. Section 1141(d)(3) applies to non-individual and individual debtors, barring a discharge if the plan liquidates all of debtor's assets, the debtor suspends business, and the debtor would be denied a discharge under § 727(a). A claim is discharged regardless of whether the creditor filed a proof of claim. § 1141(d)(1)(A). But the plan may supersede § 1141(d) and pay creditors that have not filed a proof of claim. § 1141(d)(1). An individual debtor who has not completed payments under the plan may receive a hardship discharge if the requirements of § 1141(5)(B) are met.	Rather, discharge will be entered after completion of all payments due within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix. § 1192. Because § 1141(d)(5) does not apply to a case under subchapter V, there is no provision for a hardship discharge in an individual case.	to complete plan payments must be due to circumstances beyond the debtor's control, creditors must have received at least as much under the plan as they would in a ch. 7 liquidation, and modification of the plan under § 1229 is not practicable. § 1228(b). Ch. 12 allows discharge of taxes arising from the sale of farming assets. § 1232.	they would in a ch. 7 liquidation, and modification of the plan under § 1329 is not practicable. § 1328(b). With some exceptions, the "full compliance" discharge under § 1328(a) discharges a wider swath of debts than its sister chapters. For example: 1) some willful and malicious torts; 2) fines and penalties; 3) marital property settlement debts; 4) debts that were denied discharge in an earlier bankruptcy. Debts excepted from discharge include: debts provided for under § 1322(b)(5); tax claims under § 507(a)(8)(C); tax claims under § 523(a)(1)(B); debts incurred under false pretenses or misrepresentation; unscheduled debts; debts for fraud or defalcation while in a fiduciary capacity, embezzlement or larceny; domestic support obligations; student loans unless undue hardship; or debts incurred by debtor's operation of a motor vehicle while under the influence. § 1328.

AGRICULTURAL FINANCE
2019-2020 Case Law Update

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Table of Contents

I. UCC REVISED ARTICLE 9 [SECURED TRANSACTIONS].

A. Attachment.

Collateral Descriptions: Hay is a farm product. Ollis Farms, LLC (the "LLC") was a farming operation that bought, raised, and fattened cattle to be sold. James Ollis ("Ollis") was the principal of the LLC. The LLC and Ollis were indebted to Rabo Agrifinance LLC ("Rabo"). The debt was secured by a security interest in all accounts, inventory, equipment, farm products and substitutes and replacements of the LLC and Ollis. Rabo filed a UCC-1 finance statement. Ollis filed a Chapter 12 bankruptcy. Rabo was owed $1,606,622.61. Ollis argued, although with no legal authority, that Rabo's security interest was limited to the cattle because the hay was not a crop. Rabo argued that hay is a "farm product" for purpose of UCC §9-102(34). UCC §9-102(33) The Court agreed and held that Rabo's security interest was sufficient to perfect its lien in the hay. *In re Ollis C/A No. 18-04549-HB (Bankr. S.D. S.C. March 21, 2019).*

B. Perfection.

1. UCC-1 Finance Statement Description: Serial numbers are not required to perfect security interest in equipment. See *In re Ollis C/A No.18-04549-HB (Bankr. S.D. S.C. March 21, 2019).*

2. Bankruptcy filing preempts requirement to file timely UCC-1 continuation statement. Essex Construction, LLC (the "Debtor") was indebted to Industrial Bank ("Bank A") and Firstrust Bank ("Bank B"). The Bank A debt was secured by a security interest in the assets of the Debtor. Bank A filed a UCC-1 in 2012. The Bank B debt was secured by a security interest in the same assets of the Debtor. Bank B filed a UCC-1 in 2014. On November 4, 2016, the Debtor filed chapter 11 bankruptcy. Bank A did not file a UCC-1 continuation statement in 2017. Bank B argued that by virtue of UCC §9-515 (i.e. the requirement to file a UCC-1 continuation statement every 5 years), the UCC-1 filed by Bank A lapsed in 2017. Bank B relied on the argument that revised Article 9 did not carry forward UCC §9-403(2) which specifically allowed a pre-insolvency lien to remain perfected during the insolvency action – and the state legislative intent was to require the filing of continuation statement during the insolvency action. Bank A disagreed and argued that the filing of the Chapter 11 bankruptcy froze the priority of its security interest. The Court agreed and, relying on UCC §9-515 cmt. 4 which defers whether the UCC-3 continuation to the Bankruptcy Code and the Supreme Court decision in *Isaacs v. Hobbs Tie & Timber Co.*, 282 U.S. 734, 738 (1931), held that the determination of lien priority is determined as of the bankruptcy filing and the failure to file a UCC-1 continuation statement post-bankruptcy filing does not un-perfect the security interest. *In re Essex Construction, LLC, 591 B.R. 630 (Bank. Md. 2018).*

> *Comment 1. The case was limited to a federal bankruptcy filing. The argument of the objecting secured creditor may have weight if the insolvency action was commenced under state law (e.g. receivership, assignment for the benefit of creditors).*
>
> *Comment 2. Bank A should still file a UCC-3 continuation statement. The bankruptcy code does not stay the filing of a UCC-3 continuation statement. See 11 U.S.C. 362(b)(3). A risk is that the bankruptcy is dismissed and the failure to file the UCC-3 continuation statement immediately un-perfects the security interest of the senior secured creditor. In some circumstances (namely, a Chapter 12 bankruptcy) the bankruptcy can be dismissed by the debtor without hearing and the consent of the court. Another risk is that the UCC-3 is not filed and a Chapter 11 plan is confirmed. The confirmation of the Chapter 11 plan*

(and the subsequent discharge order) would close the case and, arguably, cause the security interest to be unperfected.

C. Priority.

1. Statutory Liens.

a. Oklahoma landlord lien requires the landlord to file an action to enforce the lien. Keith Milacek (the "Debtor") was indebted to Bank of Kremlin (the "Bank"). The debt was secured by a security interest in the Debtor's crops. The Bank properly perfected its security interest. ARA, LP (the "Landlord") owned certain crop land. The Landlord leased the cropland to the Debtor and the Debtor planted a [crop]. The Debtor passed away and, as allowed by the lease, the Landlord took possession of the cropland, harvested and sold the crops, and applied the crop proceeds against the unpaid cropland lease. The Bank objected and commenced a legal action for conversion. The Landlord argued a landlord lien under 41 O.S. 2011 §28. The Bank disagreed and argued the Landlord failed to properly perfected its landlord lien because the Landlord never commenced a legal action. The Oklahoma Court of Appeals affirmed the trial court finding that the Landlord failed to properly perfect its landlord lien because the Landlord never commenced a legal action under the Oklahoma landlord lien statute and, therefore, the actions of the Landlord to sell the crop constituted conversion of the Bank's priority security interest. *Bank of Kremlin v. ARA, L.P., 2020 OK CIV APP 30 (Okla. Civ. App. 2020).*

b. Iowa harvester entitled to lien for services contracted for by related party. Thomas Kohn (the "Father") and his son Anthony Kohn (the "Son") farm over 14,000 acres; acres which are either owned or leased by the Father or the Son. As to the Son's cropland ("Son's Cropland"), the Father provides the farming service and, in consideration, the Son provides labor as to the Father's cropland. Father contracted with Joseph Muhr (the "Harvester") to harvest the corn on Son's Cropland and deliver the grain to an elevator in the name of the Father. The Father later transferred title to the grain to the Son. The Harvester was not paid and filed a harvester lien against the Father under Iowa 571.1B. The Father argued he was not the "person for whom the harvester renders such harvesting services" and, therefore, the lien filing as against the Father was not warranted and the Harvester should be liable for the damages caused by the UCC-1 filing. The Harvester argued the Father conducted the negotiations with the Harvester, directed all of the Harvester's harvesting and delivering activities, and directed the Harvester to deliver significant amounts of grain under the Father's name or to the Father's grain facilities and, therefore, the Father was not merely an agent but more akin to a contractor. The Court of Appeals agreed and held the Harvester properly perfected its lien and was not liable for and damages incurred by the Father as a result of the UCC-1 filing. *Kohn v. Muhr, Case No. 18-2059 (Iowa App. 2019).*

c. The equitable remedy under a finding of alter ego is to award a priority lien to a non-filing creditor. Scott Day ("Day") farmed, in 2014, under three partnerships (the "2014 Entities"). Day made the financial decisions of the 2014 Entities. The 2014 Entities were indebted to Regions Bank ("2014 Bank") and to secure the debt the 2014 Entities granted the 2014 Bank a security interest in the 2014 Entities' crops. The 2014 Entities failed to pay the 2014 Bank $1.87 million. Due to the carryover debt the 2014 Bank would not finance the 2015 crop. AgriFund, LLC (the "2015 Bank") agreed to finance the 2015 crop but, initially, required the 2014 Bank to subordinated its liens to the 2015 Bank in the 2015 crop. The 2014 Bank would not subordinate its liens, and upon the advice of the 2015 Bank, Day created the 2015 Entities and obtained financing from the 2015 Bank without the requirement of a subordination agreement and to secure the debt the 2015 Entities and Day granted the 2015 Bank a security interest in the 2015 Entities' crops. The 2015 Entities also never paid certain landlord rent for which the 2015 Entities leased from a subtenant of the land owners (the "Landlords"). The 2015 Entities eventually owed $6 million to the 2015 Bank secured by only $2.9 million of crops for which the 2014 Bank, the 2015 Bank and the Landlord asserted a priority lien in the 2015 crop. The trial court held the various entities had "no relevance", were "merely alter egos of Scott Day used to qualify for government payments and to move credit around", the substitution of the 2015 Entities was a sham, that the 2015 Bank participated in the sham, that the Landlords held a valid lien under Ark. Code Ann. §18-41-101(a) even though the Landlords did not own the cropland and; therefore, the Landlords held a first lien, the 2014 Bank a second lien, and the 2015 Bank a third position lien. On Appeal the Arkansas Supreme Court held: (1) as between the 2014 Bank and the 2015 Bank, the Court affirmed: (a) that because the various partnerships were alter egos of Day that the 2014 Bank lien was the priority lien, (b) that even though the 2015 Bank was the only creditor with a security interest from Day, individually, the Court affirmed that the equitable principles of piercing the corporate veil (and the action of the 2015 Bank) did not warrant a finding that the 2015 Bank's lien was superior, and (c) the 2015 Bank was not entitled to some equitable relief because the 2014 Bank did not contribute to the 2015 crop; and (2) as to the landlord liens under Ark. Code Ann. §18-41-101(a), the party asserting the landlord lien does not need to be the property owner only the party for which had the contractual right to lease the cropland to the debtor. *AgriFund, LLC v. Regions Bank*, 2020 Ark. 246 (Ark. 2020).

d. Consequential damages awarded as a result of meritless defenses of lien creditor. True Blue Holsteins (the "Debtor"), a partnership of Kevin Ihm and Gerald Ihm (the "Partners"), as indebted to CHS Capital, LLC (the "Creditor"). The debt was secured by the Debtor's and the Partners' crops. Hellenbrand Farms, LLC (the "Lien Claimant") performed custom harvesting for the Debtor. The Debtor failed to pay $143,573,90 to the Lien Claimant and the Lien Claimant filed an agricultural lien under Wis. Stat. § 779.50, which provides that "[t]he lien created by this section shall be preferred to all other liens and encumbrances" (the

"Ag Lien"). The Debtor sold $256,778.82 in crops and the Creditor made demand on the grain buyer to make the check jointly payable to the Debtor, the Creditor and the Lien Claimant. CHS alleged that the Ag Lien was not recorded in the office of the register of deeds where the services were performed within 15 days from the date of the completion of the service as required by Wis. Stat. § 779.50, subd. (3). The Lien Claimant asserted that Wis. Stat. § 779.50, subd. (3) could only be invoked as a defense by "an innocent purchaser for value" – for which the Creditor was not. The Creditor subsequently asserted that the Lien Claimant failed to enforce its lien within the six month requirement under the Wisc. Stat. § 779.50, subd. (3). The Creditor commenced a legal action seeking a declaration action that the Creditor had a first and priority lien in the crop proceeds. The Lien Claimant disputed and the Court agreed that the Creditor was not an innocent purchaser for value and the Wisc. Stat. § 779.50, subd. (3) states an ag lien claimant may commence the action within 6 months. The Court also awarded the Lien Claimant (as against the Creditor) 5% interest during the period in which the Creditor refused to endorse the checks, its legal costs and expenses and potentially three times its actual damages. *CHS Capital, LLC v. Hellenbrand Farms, LLC, 420 F.Supp.3d 872 (W.D. Wis. 2019).*

e. Applicable law: The law of the state in which the goods were received is the applicable law as to statutory agricultural liens. BNF Operations, LLC ("Debtor") was indebted to PNC Bank, N.A. ("Secured Lender") and the debt was secured by a security interest in the personal property of the Debtor. The Secured Lender properly filed a UCC-1 to perfect its security interest. The Debtor purchased agricultural products on credit from Fishback Nursery, Inc. and Surface Nursery, Inc. (the "Nurseries") for delivery to the Debtor locations in Oregon, Michigan and Tennessee. The Debtor failed to pay the Nurseries and the Nurseries filed producer liens in Oregon, Michigan and Tennessee. The Nurseries argued that Oregon law should determine who has the senior lien because of the Oregon choice of law provision in the contract between the Debtor and the Nurseries. The Court disagreed and held that under UCC §9-302 the law of the state in which the products are located is the applicable law. The Oregon choice of law provision is enforceable as to the contract parties, but not as to the Secured Lender nor as to agricultural products under UCC §1-301(c). The 5th Circuit affirmed the District Court. *Fishback Nursery, Inc. v PNC Bank, National Association*, 920 F.3d 932 (5th Cir. 2019).

f. Oregon agricultural lien only extends to the dairy cow and the proceeds of the dairy cow; not the milk of a dairy cow. Lost Valley Farm (the "Debtor") was a dairy in Oregon. The Debtor was indebted to Rabobank, N.A.(the "Lender") and the debt was secured by certain personal property including, but not limited to, the dairy cows, the milk and the proceeds of the milk. The Debtor sold milk to Columbia River Processing ("Milk Buyer"). The Debtor filed bankruptcy. The Lender was owed $7.8 million. The Debtor also had various trade creditors including $1.1 million in unpaid service providers. At the time of filing the bankruptcy the Milk Buyer owed the Debtor $1.2 million for sold milk. The unpaid service providers filed agricultural liens and asserted a lien priority for the unpaid milk proceeds under Oregon Revised Statute §87.226(1). The Lender disagreed and argued that Oregon Revised Statute §87.226(1) entitled the unpaid service providers

to a lien in the dairy cows and the proceeds of the dairy cows; however, milk is not the "proceeds" of a dairy cow and, therefore, the unpaid service providers were not entitled to a lien in the milk proceeds owed to Debtor by the Milk Buyer. The Court agreed and held that the Oregon agricultural lien is limited to the dairy cow and not the milk of the dairy cow. *In re Te Velde, Case No. 18-11651-A-11 (Bankr. E.D. Cal. 2018).*

Comment 1. Distinguishing between the proceeds and the product of the original collateral is critical – and the interplay with the state agricultural lien statute.

Proceeds of Original Collateral. Revised Article 9 does not require the security agreement to specifically state that the security interest attaches to the proceeds of the original collateral. See UCC § 9-315, Comment 9. However, Revised Article 9 defers to the state agricultural lien statute as to whether the agricultural lien attaches to the proceeds of the original collateral. See UCC § 9-315, Comment 9; Barley Clark, The Law of Secured Transactions Under the Uniform Commercial Code, Linda J. Rusch, Farm Financing Under Revised Article 9, The American Bankruptcy Law Journal, Volume 73, Winter 1999, 237. Vol. 2, Section 8.09, p. 8-121; Drew L. Kershen and Alvin C. Harrell, Agricultural Finance: Comparing the Current and Revised Article 9, Uniform Commercial Code of Law Journal, 169-224, 181-82. (Fall 2000). Some states have taken a more liberal interpretation to the scope of the state agricultural lien statutes. See Stockman Bank of Montana v. Mon-Kota, Inc., 180 P.3d 1125 (Mont. 2008) (acknowledging the legal issue but holding that proceeds held in check form are not proceeds); Oyens Feed Supply, Inc. v. Primebank, 808 N.W.2d 186 (Iowa 2011) (acknowledging the legal issue but holding that the Iowa legislative intended to include proceeds).

Products of Original Collateral. Revised Article 9 requires the security agreement to specifically state that the security interest attaches to the products of the original collateral for the security interest to be enforceable. See generally, Barley Clark, The Law of Secured Transactions Under the Uniform Commercial Code 8.04[2][c]. However, as mentioned above, Revised Article 9 also defers to the state agricultural lien statute as to whether the agricultural lien attaches to the products of the original collateral. In re Te Velde correctly held that the state statute must specifically state that the ag lien attaches to the products of the original collateral. However, based on the decisions in Stockman Bank of Montana v. Mon-Kota, Inc., 180 P.3d 1125 (Mont. 2008) and Oyens Feed Supply, Inc. v. Primebank, 808 N.W.2d 186 (Iowa 2011), it would appear in Montana and Iowa a court may come to a different conclusion.

Comment 2. In re Te Velde held that milk is the product of a dairy cow. It is worth noting that under bankruptcy law there is mixed case law as to whether milk is the product of a cow for purposes of severing post-petition liens under 552 of the Bankruptcy Code. See In re Lawrence, 41 B.R. 36, 37 (Bankr. D. Minn) (pre-petition security interest does not extend to post-petition milk); but see In re Underbakke, 60 B.R. 705, 706 (Bankr. N. D. Iowa 1986); In re Wiegmann, 95 B.R. 90, 91 (Bankr. S.D. Ill. 1989) (pre-petition security interest extends to post-petition milk); In re Aspen Dairy, 2005 WL 2547111 (Bankr. D. Neb. Feb. 14, 2005); and In re Purdy, 490 B.R. 530, 532 (Bankr. W.D. Ky. 2013).

g. Lack of knowledge is not a defense to a lien waiver. Perry and Laurie Duden (the "Debtors") operated a cattle farm. The Debtors were indebted to PLCC (the "Lender") and the debt was secured by certain personal property including, but not limited to, the cattle of the Debtors. In May 2016, the Debtors moved about 240 head of cattle to a feedlot owned by Benedict Weiland (the "Feedlot Owner"). The Lender obtained a lien waiver from the Feedlot Owner. The Debtors failed to pay the Feedlot Owner. The Feedlot Owner filed an agricultural lien under Minnesota statute § 514.966, subdivision 4 and argued that the waiver was invalid because the Feedlot Owner lacked the requisite knowledge to waive his interest in cattle. The Lender asserted the waiver was effective. The Court agreed and held that the Feedlot Owner had constructive knowledge to waive his statutory feeder's lien and, therefore, had no interest in the proceeds of the sale of cattle. *Producers Livestock Credit Corporation v. Benson; Case A18-0654 (Minn. March 11, 2019).*

2. Buyer of Farm Products (Federal Food Security Act).

No updates.

3. Statutory Trusts.

a. Sale of goods is required under Article 2 for a "creditor" to be considered an unpaid seller of produce. Spiech Farms, LLC (the "Debtor") raised and sold produce. The Debtor was indebted to Chemical Bank (the "Lender") and the debt was secured by the produce and accounts of the Debtor. The Debtor and Produce Pay, Inc. ("Produce Pay") were parties to an involved distribution agreement that provided for a combination of the sale of produce to Produce Pay, the factoring of accounts receivable to Produce Pay and the consignment of produce to Produce Pay – which enabled the Debtor to obtain financing from Produce Pay. The Debtor became insolvent and filed a Chapter 11 bankruptcy. Produce Pay asserted a claim of more than $1 million against the Debtor under the Perishable Agricultural Commodities Act, 7 U.S.C. §499 *et seq.* ("PACA"). Produce Pay argued that it was an unpaid seller of produce because the Debtor sold the produce to Produce Pay, and then, the Debtor sold the produce to its customers on behalf of Produce Pay. The failure of the eventual buyers of the produce to pay Produce Pay (via the Debtor) entitled Produce Pay to the PACA claim. The Debtor and creditor disagree and argued that there was no transfer of title of the produce to Produce Pay under UCC §2-403. The Court agreed and held that title did not pass to Produce Pay prior to title passing to the eventual buyers of the produce and, therefore, the Debtor did not own the produce at the time title was purportedly passed to Produce Pay. The Bankruptcy Court concluded the arrangement constituted a financing arrangement and not a sale of goods. *In re Spiech Farms, LLC, 592 B.R. 152 (Bankr. W.D. Mich. 2018).* The Court of Appeals affirmed. *In re Spiech Farms, LLC*, Case No. 18-CV-1366 (W.D. Mich. Dec. 17, 2019)

b. Agreement did not constitute a factoring agreement because the seller remain obligated to the creditor on the customer accounts. Spiech Farms, LLC (the "Debtor") raised and sold produce. The Debtor was indebted to Chemical

Bank (the "Lender") and the debt was secured by the produce and accounts of the Debtor. The Debtor and Produce Pay were parties to an involved distribution agreement that provided for a combination of the sale of produce to Produce Pay, the factoring of accounts receivable to Produce Pay and the consignment of produce to Produce Pay – which enabled the Debtor to obtain financing from Produce Pay. The Debtor became insolvent and filed a Chapter 11 bankruptcy. Produce Pay argued that the agreement was a factoring agreement and Produce Pay purchase the accounts of the Debtor free of any security interests. The Debtor and committee argued that Produce Pay did not purchase the accounts of the Debtor because the Debtor retained the risk of loss associated with the accounts under the "transfer-of-risk" test articulated by the Second, Third, Fourth, Fifth and Ninth Circuit. *See S & H Packing & Sales Co., Inc. v. Tanimura Distributing, Inc.*, 883 F.3d 797, 808 (9th Cir. 2018), *Nickey Gregory Co., LLC v. AgriCap, LLC*, 597 F.3d 600-603 (4th Cir. 2010), *Reaves Brokerage Co., Inc. v. Sunbelt Fruit & Vegetable Co., Inc.*, 336 F.3d 410 (5th Cir. 2003). The Court agreed and held that under the distribution agreement the Debtor remained obligated to Produce Pay even if the Debtor's customers failed to pay on for the produce. *In re Spiech Farms, LLC, 592 B.R. 152 (Bankr. W.D. Mich. 2018).* The Court of Appeals affirmed. *In re Spiech Farms, LLC*, Case No. 18-CV-1366 (W.D. Mich. Dec. 17, 2019).

c. Sweet potatoes seller failed to timely give notice of PACA trust claim. Wayne Bailey, Inc. (the "Debtor") was a sweet potato grower, packer and shipper. The Debtor was indebted to SP Funding, LLC (the "Lender") and the debt was secured by the sweet potatoes and accounts of the Debtor. The Debtor purchased sweet potatoes from Southern Roots Farming Company, LLC (the "Seller") on credit. The Debtor filed a Chapter 11 bankruptcy. The Seller was owed $1,882,944.67 and argued it was entitled to a trust claim under the Perishable Agricultural Commodities Act, 7 U.S.C. §499 *et seq*. ("PACA") because payment was not made within 30 days of sale as required under the grower agreements. The Seller argued that title passed to the Debtor when the sweet potatoes were packaged by the Debtor. The Debtor and the Lender disagree and argued that title to the sweet potatoes passed at harvest by the Seller and, therefore, title passed in excess of the 30 days. The Court agreed and held that the Seller was not entitled to a PACA claim. *In re Wayne Bailey, Inc., 598 B.R. 389 (Bankr. E.D. N.C. 2019).*

d. Right of setoff under Bankruptcy Code does not extend to PACA claims. Lenny Perry's Produce Inc. (the "Debtor") routinely purchased and sold produce to Genecco Produce Inc. (the "Buyer"). Due to the relationship, the Debtor and Buyer routinely setoff their respective debts as against each other. The Debtor filed a Chapter 7 bankruptcy – and at the time of the bankruptcy filing – the Buyer owed the Debtor $204,774.88 and the Debtor owed the Buyer $263,061.92. The creditors of the Debtor commenced a legal action against the Buyer and asserted the Debtor was entitled to a $204,774.88 trust claim under the Perishable Agricultural Commodities Act, 7 U.S.C. §499 et seq. ("PACA"). The Buyer disagreed and held that the Buyer was entitled to setoff – resulting in a net $58,287.04 claim against the Debtor. The Buyer relied on the general principal under 11 U.S.C. §553 of the Bankruptcy Code that allows for the setoff of mutual debts. The District Court held, and the Second Circuit affirmed, that the Buyer was not entitled to set-off the debt because the produce held by the Debtor was held in trust for the benefit of the creditors of the Debtor and was not property of the bankruptcy estate. *PACA*

Trust Creditors of Lenny Perry's Produce, Inc. v. Genecco Produce Inc., 913 F.3d 268 (2nd Cir. 2019).

II. UCC ARTICLE 2 [SALE OF GOODS].

A. Title, Creditors and Good Faith Purchasers. (UCC § 2-401 *et seq.*)

Violation of express warranty voids contract. Greenway Equipment, Inc., is a farm-equipment dealer (the "Dealer"). Boyce Johnson is a farmer (the "Buyer"). The Buyer asked the Dealer for a used tractor with no more than 500-550 hours on the engine, and the Dealer sold the Buyer a tractor for which the purchase order stated "500-600 hours." When the Dealer delivered the tractor, the tractor had 886 hours. The Buyer refused to take possession and commenced a legal action when the Dealer made demand on the Buyer to take possession of the tractor. The Buyer asserted damages in excess of $96,000 for lost profits because of reduced yields. The Dealer argued that there was no express warranty and the hours were just sales talk. The Court disagreed and held that pursuant to Arkansas Code Annotated section 4-2-313, a seller who makes any affirmation of fact or promise to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise and, therefore, the Buyer had no obligation to accept deliver of the tractor; however, the Buyer was not entitled to any monetary damages based on speculative damages. *Greenway Equip., Inc. v. Johnson, 2020 Ark. App. 336 (Ark. App. 2020).*

Comment. UCC 2-313 relates is a post-delivery remedy; in that the buyer discovers after accepting the good that the good does not conform to the discussions as between the buyer and seller; and, therefore, the buyer is entitled to return the goods based on the seller's breach of its express warranty. However, in this case, the Buyer never accepted the tractor. The result may be appropriate, but the legal issue is one of offer (e.g. to buy a tractor with less than 500 hours) and acceptance (e.g. the failure to deliver a tractor that satisfies the offer) under UCC 2-206; not as to a breach of any warranties.

B. Remedies. (UCC § 2-701 *et seq.*).

No updates.

III. UCC ARTICLE 1 [GENERAL PROVISIONS], ARTICLE 2 [LEASES], ARTICLE 3 [NEGOTIABLE INSTRUMENTS] AND ARTICLE 7 [DOCUMENTS OF TITLE].

No updates.

IV. OTHER STATE LAW.

A. Buyer of farm products may not deduct costs against encumbered farm products. Justin Harker and his spouse Ashley Harker are corn and soybean farmers (the "Debtors"). The Debtors were indebted to MidWestOne Bank (the "Bank") and the debt was secured by the crops of the Debtors. The Debtors harvested delivered and later sold (in some cases, years later) corn and soybeans to Heartland Coop (the "Grain Buyer"). Iowa is a direct notice state and the Bank properly gave the Grain Buyer notice of its security interest. The Grain Buyer issued the grain checks jointly payable to the Debtors and the Bank after deducting its costs of drying and storing the grain; which totaled $79,895.68. The Bank made demand on the Grain Buyer for the deducted costs. The Grain Buyer argued that the statute of limitation to assert the claim for conversion was two years and the affirmative defense of unjust enrichment. *MidWestOne Bank v. Heartland Co-op*, 941 N.W.2d 876 (Iowa 2020).

B. Louisiana Credit Agreement Statute precludes action for breach of oral promises. SMI Companies Global, Inc. (the "Borrower"), an equipment fabricator, and its president and loan guarantor, Vaughn S. Lane ("Guarantor") had two loans with Whitney Bank (the "Bank"); a $1,500,000 ("Loan 1") and $900,000 ("Loan 2") revolving line of credit. Loan 2 was issued in anticipation of a certain $2,000,000 project of the Borrower that required the Borrower have additional credit to complete. The project was delayed – and in the time being - Loan 2 matured. The default on Loan 2 triggered a default on Loan 1. The projected was eventually canceled. The Bank commenced a legal action. The Borrower and Guarantor asserted several counterclaims against the Bank for breach of the loan agreements, negligent misrepresentation, and tortious interference with its business relations as a result of the allegations that the Bank failed to fund Loan 2 through completion of the project. The trial court ruled in favor of the Borrower as to Loan 2 and in favor of the Bank as to Loan 1. The Bank appealed to the 5th Circuit. On appeal, the 5th Circuit reversed the trial court on the basis that any oral promises to fund the loan through the completion of the project is inconsistent with the Louisiana Credit Agreement Statute (La. Rev. Stat. 6 §1121 *et seq*.), is not enforceable as against the Bank and, therefore, reversed the breach of contract and negligent misrepresentation rulings as against Note 2. Furthermore, there was no evidence of malice to support the judgment for tortious interference by the Bank. The 5th Circuit upheld the trial court ruling that the Bank could not collect its legal fees as against the Borrower and Guarantor on the basis of the discretion afforded the trial court. *Whitney Bank v. Smi Cos. Global, 949 F.3d 196 (5th Cir. 2020).*

C. Actions of financial institutions to handle converted borrower funds may constitute fraud, conspiracy to commit fraud, racketeering, unfair trade practices and conversion. Radar Ridge Planting Company, Inc. and Dickenson Ag(collectively the "Borrowers") were indebted to Agrifunds, LLC (the "Lender") and the indebtedness was secured by a security interest in the crops of the Borrowers. The Borrowers sold the harvested crops, converted the sale proceed checks into cashier's checks issued by Franklin State Bank and Trust Company, Commercial Capital Bank and Caldwell Bank and Trust Company (collectively the "Banks") to individuals related to the Borrowers. The cashier's

checks were subsequently deposited into accounts with various financial institutions for which the payees on the cashier's checks withdrew the funds. The Lender commenced a legal action and asserted causes of action for fraud, conspiracy to commit fraud, racketeering, unfair trade practices and conversion. The trial court dismissed the various actions and, on appeal, the Louisiana Court of Appeals reversed and remanded back to the trial court the cause of action for conversion. The Court of Appeal held that the Lender did not need to show that the Banks knew or intentionally benefited from the crop proceeds but; instead, that the Banks exercised dominion or control over the proceeds. *Agrifund, LLC v. Radar Ridge Planting Co.,* 278 So.3d 1025 (La. App. 2019). The Louisiana Supreme Court affirmed, in part, and reversed, in part, the Court of Appeals, and reserved, in full, the trial court; effectively preserving all of the causes of action alleged by the Lender. *Agrifund, LLC v. Radar Ridge Planting Co.,* 283 So.3d 492 (La. App. 2019). The Louisiana Supreme Court opinion was limited and did not address any substantive issues in detail.

D. Cause existed under Iowa law to appoint receiver of crop farm. Dale and Danna Braaksma, their son Jesse Braaksma, and Braaksma Grain Farms, Inc. (the "Debtors") farmed 800 acres. The Debtors were indebted to Sibley State Bank (the "Lender") and the debt was secured by a mortgage on certain cropland. The Debtors failed to make payment to the Lender. The Lender commenced a foreclosure action and requested the appointment of a receiver under Iowa Code §680.1 because of the risk that the rents and profits of the cropland were in danger of being lost or materially injured or impaired. The Lender asserted that the Debtors used poor farming practices which deteriorated the condition of the farmland and resulted in yields well below local production averages. The Debtors elected not to harvest the earlier 2016 crop in the fall of 2016 – resulting in the Lender advancing funds for a third party to harvest the crop. The Debtors disputed the appointment of a receiver. The Court disagreed and held that the appointment of the receiver is a benefit to both parties by maximizing the value of the land. *Sibley State Bank v. Braaksma, 922 N.W.2d 105 (Iowa 2018).*

E. Minnesota three-year statute of limitation not enforceable as to non-farm related debts. Greg Kellen ("Kellen") and John Green ("Green") shared farming equipment. In 2012 the parties ended the relationship. Green sued Kellen for numerous reasons, including conversion of farm equipment, trespass on his cornfields, and defamation for spreading rumors. Green alleged that these rumors hurt his business among the farming community, causing him to lose land which he was leasing. The Court agreed and awarded Green damages in the amount of $88,840. Green began efforts to collect his judgment against the agricultural property of Kellen. Kellen filed a motion to stop the sale of his property because the sale was outside the three-year limitation on the execution on agricultural property under Minn. Stat. §550.366. Minn. Stat. §550.366 deviates from the ten-year statute of limitation to collect a debt; providing for a three-year statute of limitation for unpaid "debts on agricultural property". The Court disagreed and held that "debt on agricultural property" is limited to farm related debts. The judgment related to intentional torts. The Court held debts related to intentional torts are excluded from the three-year statute of limitations. *Green v. Kellen, 921 N.W.2d 768 (Minn. App. 2018).*

Comment. The court reasoned that a debt resulting from an intentional tort is not a "debt on agricultural property". Minn. Stat. §550.366 does not address intentional torts. The court

carved out this exception. It will be seen if judgment creditors argue that any non-farm related debts are also excluded from Minn. Stat. §550.366.

F. Loan renewal adequately maintains mortgage lien priority. Edward D. Smith and Jan Smith Dale (the "Debtors") were indebted to Troy Bank (the "Lender") and the debt was secured by a mortgage on farmland. The debt was evidenced by two promissory notes executed in 2002. In 2006, the notes were consolidated into a single promissory note (the "Note"). In 2009, Coffee Farmers (the "Judgment Creditor") obtained a money judgment against the Debtors in the amount of $183,780.20 (the "Judgment"). The Debtors and the Lender subsequently "renewed" the Note secured by the mortgage in 2012. The Judgment Creditor argued that the 2012 renewal was not a renewal but, instead, a future advance for which subordinated the Lender's mortgage to the Judgment Creditor's judgment lien. The Court disagreed and held that the renewal was, in fact, a renewal and, therefore, the Lender maintained its lien priority as against the mortgaged farmland. *In re Smith, 596 B.R. 902 (Bankr. M.D. Ala. 2019).*

G. Transfer of encumbered assets not a fraudulent transfer under Iowa law. Western Slopes Farm Partnership (the "Debtor") and BJM, Inc. ("Co-Debtor") were controlled and owned by Frank White. The Debtor and Co-Debtor were indebted to Roger Rand (the "Lender") and the debt was secured by certain personal property of the Debtor and Co-Debtor. The Lender died. The personal representative of the Lender (for purposes of this summary, also the "Lender") commenced a legal action to replevin the personal property. The Co-Debtor transferred its personal property to the Debtor and the Debtor filed bankruptcy on the same day. The Lender filed an adversary action for a determination that the transfer of equipment was voidable under the Uniform Voidable Transfer Act; Iowa Code §684.4 and §684.5 ("UVTA"). The Debtor argued that the UVTA was not applicable because the transfer was not made with the intent to defraud its creditors (but, instead, to avoid the need for the Co-Debtor to file bankruptcy) and the equipment remains subject to the security interest of the Lender. The Court agreed and held that fully encumbered assets are not "assets" for purposes of the UVTA and, therefore, the transfer is not avoidable. *In re Western Slopes Farm Partnership, Adv. No. 17-09047 (Iowa Bankr. 2018).*

H. Decrease in eggs prices is not a force majeure event nor does it make the contract commercially impractical. Rembrandt Enterprises, Inc. ("Seller") agreed to sell 3,240,000 cage-free eggs per week to Rexing Quality Eggs ("Buyer") under a supply agreement (the "Contract"). The consumer price for eggs declined and the Buyer refused to accept delivery of the eggs. The Buyer argued that: (1) the Seller sourced eggs from unapproved locations and the actions of the Seller were in breach of the Seller's obligations under the Contract; (2) the decrease in consumer demand for eggs (and the resulting decrease in egg prices) was a force majeure event under the Contract; and (3) the decrease in consumer demand excused performance on the grounds of commercial impracticability and frustration under UCC §2-615(1) (as adopted under Iowa Code §554.2615(1)). The Court disagreed and held that under Iowa law: (1) the alleged sourcing of eggs by the Seller did not excuse the Buyer's obligations under the Contract and the Buyer was not entitled to damages if eggs were sourced from other locations; (2) the decrease in consumer demand for eggs (and the resulting decrease in egg prices) was not a force majeure event; and (3) the decrease in consumer demand did not excuse performance on the grounds of commercial impracticability or frustration because the decrease in consumer demand for eggs was foreseeable. *In re Rexing Quality Eggs v. Rembrandt Enterprises, Inc., 360 F. Supp. 3d 817 (S.D. In. 2018).*

I. Existence of farming partnership is a question of fact. Richard Solberg (the "Debtor") was indebted to Bremer Bank (the "Lender") and the debt was secured by the farm equipment and crops of the Debtor. Zaitz Trust LLP ("Landlord") owned and leased 3,277 acres to "Solberg Farms – Rick Solberg" (the "Lease"). Solberg Farms granted the Landlord a security interest in the crops

grown on the leased cropland. The Debtor filed a Chapter 11 bankruptcy. The Landlord argued that the farming partnership owned the crop. The Lender argued the Debtor owned the crop and, therefore, the Lender had a priority security interest in the crop. The Bankruptcy Court agreed and granted summary judgment. The Landlord appealed and the Bankruptcy Appellate Panel held that whether a farming partnership existed is a material question of fact and remanded the case back to the Bankruptcy Court. *Zaitz Trust, LLP v. Bremer Bank (In re Solberg), 2019 WL 3806242 (BAP. 8th Cir. 2019).*

V. BANKRUPTCY.

A. General. (11 U.S.C. § 101 *et seq*.).

No updates.

B. Case Administration. (11 U.S.C. § 301 *et seq*.).

No updates.

C. Creditors, Debtors and the Bankruptcy Estate. (11 U.S.C. § 501 *et seq*.).

1. Discharge Injunction. (11 U.S.C. § 524).

Violation of Discharge Injunction; Damages/Sanctions. Brad and Brenda Stabler (the "Debtors") were indebted to First State Bank of Roscoe (the "Lender") and the debt was secured by crop land and farm equipment. The Debtors filed a Chapter 7 bankruptcy and the discharge order was entered. Upon entry of the discharge order, the Lender was entitled to foreclose its mortgage and replevin the farm equipment. The amount owed to the Lender exceeded the value of its collateral. An agreement was reached in which the Debtors agreed to a new $650,000 promissory note – an amount that exceeded of the value of the collateral – leaving the Debtors with a potential deficiency if payment was not made. The Debtors failed to make the new loan payments and the Lender commenced a state court foreclosure and replevin action – and asserted the right to collect any deficiency. The Debtors argued that the actions of the Lender violated the bankruptcy discharge injunction. The Lender argued that it acted in good faith and that the new promissory note was in consideration for the Lender not initially foreclosing its loan (e.g. a post-discharge forbearance agreement). The state court disagreed, and the South Dakota Supreme Court affirmed, that the structure of the post-discharge transaction warranted the rescission of the $650,000 note and $142,908.27 in sanctions, but the Lender may enforce the loan against the Debtors. *Stabler v. First State Bank of Roscoe*, 865 N.W.2d 466, 469 (S.D. 2015). Not finished, the Debtors moved the bankruptcy court for its attorneys' fees and sanctions. The bankruptcy court imposed a $25,000 sanction on both parties and joint and several liability of $159,605.77 in legal fees. On appeal, the 8th Circuit affirmed and held that the structure of the post-discharge transaction, the loan officer's participation in the bankruptcy, the post-discharge transaction and the demand for the deficiency demonstrated a lack of good faith and warranted a finding holding the Lender and its president in contempt for violating the discharge injunction and the bankruptcy court did not abuse its discretion in imposing sanctions and attorneys' fees. *First State Bank of Roscoe v Stabler, 914 F.3d 1129 (8th Cir. 2019).*

2. Non-dischargeability actions. (11 U.S.C. § 523)

a. Intent not Established. Agrifund provided funding for the farming operations of White River and Central Midwest (Borrowing Entities), which were among the Stephenson's multitude of entities. The Borrowing Entities never owned or leased any farming equipment, land, or livestock, and instead utilized equipment, farm labor, and other resources owned or controlled by Crossroads GP, also owned by the Stephensons. Crossroads conducted their own farming operations parallel to the operations of the Borrowing Entities on other rented farm ground. Agrifund was fully aware of these facts at the time that the Agrifund lending agreements were executed and implemented. The Borrowing Entities incurred the expense of performing tillage on the land included in the Security Agreements in preparation for farming for 2017 for 4,589 acres. However in 2017 the Borrowing Entities farmed and received income from crops grown on approximately 1,667 acres. It is unclear when the Stephensons became aware that they were farming many fewer acres than they had anticipated, but they did not become fully aware until Agrifund had advanced most, if not all, of the loan proceeds. Agrifund filed Complains in each of the Stephenson's bankruptcies under §§ 523(a)(2)(A), 523(a)(2)(B), and 523(a)(6). At trial the Court ultimately found that Agrifund failed to carry its burden to prove than any of the funds should be excepted from Discharge because: 1) the individual decisions of landlords to rent or not rent were not known to the Stephensons at the time relevant time; 2) no evidence was presented that the Stephensons converted the funds for personal use; 3) no evidence was presented to show the Stephensons used the funds to satisfy Crossroads obligations; and 4) Agrifund failed to show the Stephensons took any action with intent to conceal or dispose of the property. *Agrifund, LLC v. Stephenson (In re Stephenson), slip op.,2020 WL 3422344 (Bankr. S.D. Ind. June 19, 2020 (J. Carr).*

b. Criminal conviction established materially false statement for purpose of summary judgment. Debtor obtained a line of credit in the amount of $4,000,000 from the Bank to be used for the Debtor's farming business. This loan was subsequently replaced and increased each year. In each instance, the Debtor executed a promissory note in favor of Busey Bank that was secured by, among other things, the Debtor's inventory and crops. Debtor later obtained an additional loan from the Bank in the amount of $475,000 for the stated purchase of 250 heifers never purchased the cattle with these proceeds. Before the Debtor the initial $4,000,000 line of credit he prepared and submitted a materially false financial statement. He submitted subsequent incorrect statements Debtor which grossly misstated the amount of acreage farmed. Debtor was criminally charged and in his plea agreement in the criminal case, the Debtor admitted that the false financial statements discussed above were part of a "scheme to defraud Busey Bank and obtain money from the business loans." The Bank, asserting it is owed nearly $3,000,000 sought its debt to be nondischargable pursuant to 11 USC §§ 523(a)(2)(A), 523(a)(2)(B), 523(a)(4) and 523(a)(6). During the course of the adversary proceeding Debtor was sentenced to 36 months' imprisonment, 60 months of supervised release, and ordered to pay restitution to Busey Bank in the full amount

of its damages of $2,963,841.54. Despite this criminal judgment and the Debtor's purported acceptance of responsibility at the time of sentencing, the Debtor elected to continue to defend this caseThe Court granted summary judgment on the Bank's claim of non-dischargeability under 11 U.S.C.S. § 523(a)(2)(B) because debtor's criminal conviction established that debtor made a materially false written statement about his financial condition with the intent to deceive and nothing on the face of the financial statements would have alerted the bank that debtor was misrepresenting his financial condition or that there was a need for further investigation. *Busey Bank v. Cosman (In re Cosman), 616 B.R. 358 (Bankr. N.D. Ill. 2020).*

c. PACA trust claim as to principals of PACA Buyer are dischargeable. Robert Anthony Arthur and Kalaivani Arthur ("Debtors") owned and operated Sunrise International, LLC ("Sunrise"). Sunrise purchased and sold wholesale produce under the trade name Sunrise Fresh Produce. Coosemans Miami, Inc. ("Supplier") sold produce to Sunrise on credit. Sunrise and the Debtors filed Chapter 7 bankruptcy petitions. The Supplier filed an non-dischargeability complaint under U.S.C.A. 11 USC §523(a)(4) for breach of fiduciary duties alleging violations under the Perishable Agricultural Commodities Act, 7 U.S.C. §499 et seq. ("PACA"). The Supplier argued that, as trustees of a PACA trust, the Debtors defalcated while acting in a fiduciary capacity by causing Sunrise to default on payments due. The Debtors argued that a PACA trust claim is not actionable under section §523(a)(4). The Court agreed and held that a PACA trust does not satisfy the requirements for two reasons: (1) the PACA trust does not require segregation of assets unless and until a court orders it; and (2) the PACA trust assets may be used for non-trust purposes. To that end, a PACA trust is not a "technical trust," which is required to place a debtor in a fiduciary capacity to a creditor. *In re Arthur, 589 B.R. 761 (Bankr. S.D. Fla. 2018).*

d. Sale of farm equipment without consent of secured creditor may be non-dischargeable under 11 U.S.C. §524(a)(6). Patricia Reid ("Debtor") was indebted to FSA and the debt was secured by all of the Debtor's farm equipment. Certain farm equipment was sold without the consent of FSA – including farm equipment sold by the Debtor's boyfriend. The Debtor filed a Chapter 7 bankruptcy. FSA commenced a legal action for a determination that the debt owed to FSA was non-dischargeble under 11 U.S.C. §524(a)(6) because of the sale of farm equipment was without the consent of FSA and caused willful and malicious injury to FSA. The Debtor argued that she lacked the requisite intent to harm the FSA under 11 U.S.C. §524(a)(6). The Court agreed that the Debtor lacked the requisite intent as to the equipment sold by the Debtor's boyfriend; however, the Debtor intentionally sold $7,000 of equipment and the debt related to that equipment was non-dischargeable. *In re Reid, 598 B.R. 674 (Bankr. S.D. Ala. 2019).*

e. Missing collateral did not constitute willful and malicious injury under 11 U.S.C. §524(a)(6). Connor Freeman and Trace Freeman (the "Debtors") were indebted to Citizens Bank (the "Lender") and the debt was secured by certain farm equipment. Craig Freemen (the "Co-Debtor"), their father, also executed the promissory notes. The Debtors filed a Chapter 7 bankruptcy and the Co-Debtor failed to make the payments. The Debtors were not in possession of the farm equipment and were unable to explain why the farm equipment was missing. The Lender filed an adversary action for a determination that the debt owed to the Lender was non-

dischargeable under 11 U.S.C. §524(a)(6) alleging the Debtors' actions were willful and malicious. The Debtors argued that the loan was made with the understanding of the parties that the Co-Debtor was going to make the payments. The court agreed and held that the Lender could not justifiably rely on any alleged false representations by Debtors. The disappearance of collateral did not provide a basis to except debtor's debts because the Lender was willful and malicious injured. *In re Freeman, 598 B.R. 839 (Bankr. S.D. Miss. 2019).*

f. Renewal of loan was made with intent to deceive. Bryan Grigsby (the "Debtor") was indebted to First Commercial Bank of CCB (the "Lender") and the debt at issue was secured by the farm equipment and crops of the Debtor. The loan was originally made in 2011 and renewed annually. The Debtor filed a Chapter 7 bankruptcy. The Lender filed an adversary action for a determination that the debt owed to the Lender was non-dischargeable under 11 U.S.C. §524(a)(2)(B) alleging the Debtor incurred the renewal debt with the intent to deceive the Lender. The Debtor's 2015 financial statements misrepresented the assets, liabilities and liens of the Debtor. The Debtor argued that the Lender should have discovered the missing liabilities and liens in its credit review; relying on *First National Bank of Stuttgart v. Owens (In re Owens),* 322 B.R. 411 (Bankr. E.D. Ark. 2005). The court disagreed and held that the Lender established enough evidence to show the Debtor materially falsified his financial statements, that the Lender did not have actual knowledge of the prior liens, and a secured creditor has no obligation to separately verify the financials of a debtor. *In re Grigsby, 598 B.R. 606 (E.D Ark. 2019).*

3. Preferential Transfers. (11 U.S.C. § 547)

No updates.

4. Fraudulent Transfers. (11 U.S.C. § 548)

No updates.

5. Right of Setoff. (11 U.S.C § 553)

See *PACA Trust Creditors of Lenny Perry's Produce, Inc. v. Genecco Produce Inc., 913 F.3d 268 (2nd Cir. 2019).*

6. Unauthorized Post-Petition Transfer (11 U.S.C. §549)

A material issue of fact exists as to whether a crop tenant obtained any benefit or profit as to an unauthorized post-petition lease because of depressed crop prices. Morrison Family Trust (the "Landlord") leased 110 acres of farmland to McMartin Family Partnership under a lease with a five-year term, 2013 through 2018. McMartin Family Partnership was reorganized and renamed McM, Inc (the "Debtor"). On February 2, 2017, Ronald G. McMartin, Jr., a principal of Debtor, wrote a $22,000 personal check to the Landlord for the 2017 land rent under the lease. On February 10, 2017, McM, Inc. filed a Chapter 7 bankruptcy. On March 22, 2017, the Landlord and Elkhorn Farms, LLC (the "New Tenant") entered a two-year (2017 and 2018) lease for the same land Debtor leased from the Landlord. On April 26, 2017, the New Tenant paid the Debtor $22,500, issuing a check notated

"Land Rent Reimbursement." The trustee asserted that the post-petition lease of the cropland by the Debtor to the New Tenant was an authorized transfer under 11 U.S.C. § 549. The trustee moved for summary and the court denied the motion on the basis that there was a material issue of fact as to whether the New Tenant obtained any benefit or profit as to the lease because of depressed crop prices. *Ahlgren v. Morrison (In re MCM, Inc.),* 609 B.R. 511 (Bankr. N.D. 2019).

D. Chapter 7. (11 U.S.C. § 701 *et seq*.).

1. Legal fees of lender not chargeable against Debtor in 11 U.S.C. 727 action. Wyatt Livestock, Inc. (the "Borrower Livestock") and Wyatt Feeding LLP ("Borrower Feeding") were indebted to Banner Bank (the "Lender") and the debt was secured by the livestock of the Borrowers. Borrower Livestock was wholly owned and controlled by Wells Wyatt (the "Debtor"). Borrower Feeding was partially owned by the Debtor. The Debtor filed a Chapter 7 bankruptcy. The Lender commenced an adversary action, in relevant part, under 11 U.S.C. 727 to have the Chapter 7 dismissed. The court agreed and dismissed the case after finding the Debtor committed fraud. The Lender then moved for the Court to award its legal fees and costs totaling $138,985.00. The Court declined to award legal fees to the Lender on the basis that the bankruptcy code and applicable law does not allow for fee shifting under 11 U.S.C. 727. *In re Wyatt*, 609 B.R. 530 (Bankr. Idaho 2019)

2. Failure to explain missing records and collateral is basis to deny discharge. Derek and Chelsey Tingle (the "Debtors") were indebted to Farm Credit Mid-America, PCA (the "Lender") and the debt was secured by the equipment, livestock and crops of the Debtors. The Debtors initially filed a Chapter 13 and then converted to Chapter 7. The Lender filed an adversary action to deny discharge under 11 U.S.C. § 727(a)(3) and (a)(5). The Lender asserted that the Debtors failed to explain a decrease in pre-bankruptcy farm equipment, the losses related to the cattle operation, and the losses related to the tobacco operation and have failed to provide financial records. The court agreed and denied discharge. *In re Tingle, 594 B.R. 396 (Bankr. E.D. Ky. 2018).*

E. Chapter 11. (11 U.S.C. § 1101 *et seq*.)

No updates.

F. Chapter 12. (11 U.S.C. § 1201 *et seq*.)

1. Appropriate interest rate under *Till*. Key Farms, Inc. (the "Debtor") raised and sold apples, cherries, alfalfa, seed corn and other crops. The Debtor was indebted to HomeStreet Bank (the "Bank") and the debt was secured by certain real estate and its crops. The Debtor filed a Chapter 12 bankruptcy and proposed to pay or cramdown the claim of the Bank over twenty years at an interest rate of 4.50%

(the prevailing "prime" rate of 3.25% plus 1.25%). The Bank objected to the proposed interest rate and asserted the interest rate fails to adequately account for the credit risk under the U.S. Supreme Court decision in *Till v. SCS Credit Corporation*, 541 U.S. 541 (2004). The Court agreed and held that 1.25% did not adequately account for the credit risk and the interest rate should be at least 1.75% over the prime rate. *In re Key Farms, Inc. (Bankr. E.D. Wash. 2020).*

2. Denied confirmation based on plan feasibility. Dale Acker (the "Debtor") is a produce and livestock producer. The Debtor is indebted to the Farm Service Agency ("FSA"), Skyline National Bank ("Skyline"), and Farm Credit of the Virginias, A.C.A ("Farm Credit") and the debt is secured by the livestock of the Debtor. The Debtor is in a general partnership with his son, Ryan Akers (the "Son") in which the partnership buys and sells cattle. The Debtor filed a Chapter 12 bankruptcy. The Court denied the Chapter 12 plan based on feasibility under 11 U.S.C. 1225 and that his "records and projected revenue and expenses [were] inaccurate and unpersuasive such that they [did] not demonstrate the Debtor's probable compliance with the plan terms." *Akers v. Micale*, 609 B.R. 175 (W.D. Va. 2019)

3. Pre-petition fraud is not basis to convert Chapter 12. Hunter Olson (the "Debtor") started farming in 2017. The Debtor was indebted to Farm Service Agency ("FSA") under a beginning farmer program and the debt was secured by a security interest in the personal property of the Debtor including 14 items of farm equipment. The loan agreement required approval by FSA prior to making any capital purchases. In March 2018 the Debtor, and FSA agreed to subordinate its security interest to Western bank of Wold Point (the "Bank") for an operating loan. It was discovered the Debtor violated the loan by selling and purchasing farm equipment without the consent of FSA. The Debtor also subsequently deposited by mobile deposit into its operating account with the Bank several crop checks made payable to the Debtor, the Bank and FSA with, what appeared to be forged signatures of FSA. The Debtor filed a Chapter 12 bankruptcy. FSA moved to convert the Chapter 12 to Chapter 7 on the basis of fraud and a bad faith filing under 11 U.S.C. §1208. The Court disagreed and held that the actions of the Debtor were not made in connection with the bankruptcy (but, instead, were pre-bankruptcy actions). *In re Olson, 609 B.R. 339 (Bankr. Mont. 2019).*

4. Chapter 12 plan not in best interest of creditors. Graves Farms (the "Debtor") was indebted to RCB Bank (the "Lender") and the debt was secured by farmland and farm equipment. The Debtor filed a Chapter 12 bankruptcy. The Chapter 12 plan proposed to sell and lease certain assets. The Lender objected on the basis that the plan does not fulfill the best interest of creditors test under 11 U.S.C. §1225(a)(4) because the plan failed to pay the Lender the full value of its farm equipment collateral. The Court agreed. *In re Graves Farms, Case No. 18-10893 (Bankr. Kan. 2019).*

5. Chapter 12 plan denied because of lack of testimony as to the reasonable interest rate. Graves Farms (the "Debtor") was indebted to RCB Bank (the "Lender") and the debt was secured by farmland and farm equipment. The Debtor filed a Chapter 12 bankruptcy. The Chapter 12 plan proposed to sell and lease certain assets. The Lender

objected on the basis that the plan did not comply with the treatment of secured claims under 11 U.S.C. §1225(a)(5)(B) because the Debtor failed to provide testimony that the proposed 5.75% interest rate was reasonable. In light of a prime rate of 5.5%, for which the court took judicial notice, the court agreed. *In re Graves Farms, Case No. 18-10893 (Bankr. Kan. 2019).*

6. Chapter 12 plan was not historically feasible. Graves Farms (the "Debtor") was indebted to RCB Bank (the "Lender") and the debt was secured by farmland and farm equipment. The Debtor filed a Chapter 12 bankruptcy. The Chapter 12 plan proposed to sell and lease certain assets. The Lender objected on the basis that the plan was not historically feasible under 11 U.S.C. §1225(a)(6) due to the undocumented tenant relationship believed farm leases and the lack of crop production data. The Court agreed. *In re Graves Farms, Case No. 18-10893 (Bankr. Kan. 2019).*

7. Chapter 12 plan was not feasible. Jubilee Farms and Quickert Farms, LLC (the "Debtors") were indebted to Farm Credit Mid-America, FLCA and Farm Credit Services of America, PCA (the "Lenders") and the debt was secured by the Debtors' crops, chemicals, supplies and equipment. The Debtors filed a Chapter 12 bankruptcy. The Lenders objected on the basis that the one-year income and expense projections are limited and unrealistic compared to historical income and expenses that, therefore, the plan was not feasible under 11 U.S.C. §1225(a)(6). The Court agreed and held that the soybean yield and price projections were unrealistic and the one-year of projections did not contemplate the anticipated sale of farmland proposed in the plan. *In re Jubilee Farms, 595 B.R. 546 (Bankr. E.D. Ky. 2018).*

G. Chapter 13. (11 U.S.C. § 1301 *et seq*.)

No updates.

H. Judicial Procedure (28 U.S.C. § 151 *et seq*.)

Post-petition payments from loan advances constitute disbursements for purposes of calculating the UST Fees. Cranberry Growers Cooperative (the "Debtor") was indebted to CoBank (the "Lender") and the debt was secured by certain assets including the cranberries owned by the Debtor. The Debtor filed a Chapter 11 bankruptcy. The Debtor and the Lender agreed to post-petition debtor-in-possession (DIP) financing which allowed the Debtor to continue to operate while in the Chapter 11 (the "DIP Loan"). The DIP Loan required the proceeds from the sale of cranberries to be applied against the pre-petition line of credit and allowed the Debtor to request advances for post-petition operating expense. The United States Trustee (UST) argued that the post-petition advances were "disbursements" and, therefore, should be considered for purposes of calculating the Debtor's quarterly fee. The Court agreed, in part, that the advances were "disbursements" under 28 U.S.C. §1930(a)(b), but that it would be inequitable to apply the UST fees to the advances to pay the UST fees (e.g. apply the UST fees on top of the paid UST fees). *In re Cranberry Growers Cooperative, 592 B.R. 325 (Bankr. E.D. Wis. 2018).*

V. OTHER FEDERAL LAW.

A. Packers and Stockyard Act. (7 U.S.C. § 192 *et seq*.)

No updates.

Faculty

Curt Covington is the senior director of Institutional Lending at AgAmerica Lending LLC in Washington, D.C., having joined the team in March 2020. He assists with credit analysis and production personnel on large agricultural loans. Mr. Covington's major initiatives include building customizable products and developing efficiencies for the large loan process as the company continues to evolve. He began his career in ag finance in 1979 as an agriculture banker for 42 years. Prior to AgAmerica, he was the executive vice president and chief credit officer of Farmer Mac and was senior vice president at Bank of the West for nearly 12 years. He also taught ag finance and ag accounting for 26 years at California State University, Fresno's School of Agricultural Economics. Mr. Covington also is the owner and operator of The Agricultural Lending Institute, headquartered in Fresno, Calif. He has been a keynote speaker for various ag conferences for more than 25 years and is a board member for Porterville Citrus, Inc., the largest citrus packer and shipper in the Sunkist Coop System, as well as an advisory board member for Proterra Investment Partners in Denver. In addition, he was the former chairman of both the American Bankers Association's Ag and Rural Banking Committee and the Risk Management Associates Ag Credit Roundtable. Mr. Covington grew up farming in California and was a member of Future Farmers of America. He received his B.S. in finance from the University of Southern California and his M.B.A. in agribusiness from Santa Clara University.

Hon. Anita L. Shodeen is a U.S. Bankruptcy Judge for the Southern District of Iowa in Des Moines, appointed in 2009. She also serves on the Eighth Circuit Bankruptcy Appellate Panel and teaches bankruptcy and debt collection as an adjunct professor at Drake University Law School. Prior to her appointment to the bench, Judge Shodeen was in private practice in Des Moines, where she focused on bankruptcy, debtor/creditor and transactional issues. She served as a chapter 7 trustee and chapter 12 trustee for the Southern District of Iowa. Judge Shodeen has been appointed as a member of the Judicial Resources Committee of the Judicial Conference, is a Fellow in the American College of Bankruptcy, and is a member of ABI, the National Conference of Bankruptcy Judges and the Federal Bar Association. She is currently serving as a member of the Executive Committee of the Federal Trial Judges of the ABA Judicial Division, and she actively participates in a number of CLE presentations on the topics of bankruptcy, insolvency and debtor/creditor rights. Judge Shodeen received her J.D. in 1985 from Drake University.

Michael R. Stewart is a partner at Faegre Drinker Biddle & Reath LLP in Minneapolis, where he is the leader of its Finance & Restructuring Group. He also leads the agribusiness finance and bankruptcy segment of the firm's Food & Agriculture industry team and serves on the steering committee for the firm's Financial Services industry team. Mr. Stewart practices primarily in the areas of bankruptcy, secured transactions, creditors' rights and banking law, representing lenders in all aspects of structuring, documenting and collecting commercial and DIP loans. He has significant experience in workouts and chapter 11 bankruptcies on a national basis, with a particular focus on agribusiness loans. Mr. Stewart is a Fellow and Eighth Circuit Regent in the American College of Bankruptcy and is listed in *The Best Lawyers in America*. He also is a past-president of the Upper Midwest Chapter of the Turnaround Management Association, and the former chairman and vice-chairman of the Bankruptcy Law Section of the Minnesota State Bar Association. In addition, he is a member of ABI, the Turnaround Management Association, the American Bar Association, the Commercial Finance

Association and the Minnesota State Bar Association, and he served on the national board of directors of the Turnaround Management Association and on the Minnesota Receivership Statute Committee. Mr. Stewart is a frequent lecturer and a contributing author to *Successful Partnering Between Inside and Outside Counsel*, published by Thomson Reuters; *Debtor Creditor Handbook*, published by Minnesota Continuing Legal Education; and *The Art of Grain Merchandising*, published by Stipes Publishing Co. He also is a co-editor of *Bankruptcy Practice in Minnesota*, a deskbook published by Minnesota Continuing Legal Education. Mr. Stewart received his undergraduate degree from Cornell College in 1977 and his J.D. from Harvard Law School in 1980.

Riley C. Walter is an attorney with Wanger Jones Helsley PC in Fresno, Calif., and has focused on restructuring, insolvency and reorganization matters since 1980. He specializes in chapter 11 reorganization cases representing debtors and chapter 9 cases involving governmental entities. Mr. Walter has handled all types of cases, including but not limited to large farms, dairies, wineries, canneries, developers, retail businesses, gold mines, hospitals and hospital districts. He also has authored numerous articles on insolvency and bankruptcy and is a frequent speaker to business, legal, agricultural and financial groups, including presentations at the National Conference of Bankruptcy Judges, Farmers and Ranchers Tax Conference, Central California Bankruptcy Institute, Eastern District Judicial Conference and the Agricultural Lending Institute. Mr. Walter is Board Certified in Business Bankruptcy Law by the American Board of Certification and is a Fellow of the American College of Bankruptcy, Class XIII. He has been recognized as a "Top 100" *Super Lawyer* for Northern California seven times since 2011 and annually as a *Northern California Super Lawyer* beginning in 2004. He has been AV-rated by Martindale-Hubbell since 1995. Mr. Walter was a lawyer representative to the Ninth Circuit Judicial Conference and is past chair of the Eastern District Judicial Conference Committee. He also is a former co-chair of the Business Law Section of the Fresno County Bar Association, a past president of the Central California Bankruptcy Association, past president of the San Joaquin Valley Chapter of the Federal Bar Association, past director of the California Bankruptcy Forum and California Receiver's Forum, past chair of the Agricultural Law Section of the Fresno County Bar Association, and past co-chair of the Agribusiness Committee of the Business Law Section of the California State Bar. Previously, he was an associate professor of agricultural business management at Cal Poly Pomona and a lecturer at Cal Poly San Luis Obispo, and he has taught agricultural law at San Joaquin College of Law and entrepreneurship at Fresno State. Mr. Walter is admitted to practice before all California courts, the U.S. District Courts for the Northern, Eastern Central and Southern Districts of California, and the U.S. Supreme Court. He received his B.A. in 1973 and his M.A. in 1974 from California Polytechnic State University, San Luis Obispo, and his J.D. in 1980 from Western State College of Law, Fullerton.