AGRICULTURAL FINANCE
2018 Case Law Update

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I. UCC REVISED ARTICLE 9 [SECURED TRANSACTIONS].

A. Attachment.

No updates.

B. Perfection.

No updates.

C. Priority.

1. Statutory Liens.

Applicable law; The law of the state in which the goods were received is the applicable 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). *Fishback Nursery, Inc. v. PNC Bank, N.A.*, 2017 WL 6497802 (N.D. Tex. 2017).

Comment. Respective state law producer liens are discussed on pages 5-6.

Nebraska agricultural input lien requires strict compliance. Wade Hill ("Debtor") was indebted to Adams Bank & Trust ("Secured Lender") and the debt was secured by a security interest in the crops of the Debtor. The Secured Lender perfected its security interest by filing a UCC-1. The Debtor was also indebted to AG-Land Aviation, Inc. ("Crop Supplier") for crop inputs purchased on credit. The Crop Supplier asserted a Nebraska agricultural production input lien under Neb. Rev. Stat. Ann. § 52-1401. The Debtor filed a Chapter 7 bankruptcy. The Trustee commenced an action for a determination that the Secured Lender had priority over the Crop Supplier on the basis that the Crop Supplier failed to strictly comply with the Nebraska agricultural production input lien because the UCC-1 filed by the Crop Supplier failed to include the name and address of any lender, the dates of transaction, a signature of the person to whom the inputs were furnished, or the

supplier's tax identification number. The Court agreed and held that because the Nebraska statute requires strict compliance the Crop Supplier had an unperfected lien in the crops. Under UCC § 9-322 the perfected security interest of a secured lender takes priority over the unperfected lien of the crop supplier. *In re Hill*, 2018 WL 1916172 (Bankr. D. Neb. 2018).

North Dakota agricultural supply dealer's lien requires substantial compliance; lien only attaches to livestock owned by the debtor that incurred the debt. Kent McDougall ("Debtor") was indebted to Turtle Mountain State Bank ("Secured Lender") and the debt was secured by a security interest in the crops of the Debtor and its farm operating entity Twin Creed Ranch, LLC (the "Operating Entity"). The Secured Lender perfected its security interest by filing a UCC-1. The Secured Lender was owed $1,257,024.36. The Operating Entity was indebted to North Central Grain Cooperative ("Supplier") for petroleum, feed and seed supplies. The Supplier was owed $14,753.80. The Supplier asserted a North Dakota agricultural supplier's lien under NDCC §35-31-02 by filing a CNS statement against the Operating Entity – the entity in which the Supplier assumed benefitted from the supplies. The Secured Lender initiated an adversary proceeding seeking a determination that its security interest against the proceeds from the sale of livestock was a priority lien. The Secured Lender argued that: (1) the Supplier failed to substantially comply with the agricultural supplier's lien statute; and (2) although the Operating Entity was the purchaser of the agricultural supplies, the Secured Lender argued that the livestock were owned by Debtor (and not the Operating Entity) and, therefore, the proceeds were not subject to the lien of the Supplier. The Court held that an agricultural input lien must substantially comply with the statute by identifying the party that owned the livestock and that the lien filed by the Supplier failed to substantially comply with the statute as to any livestock owned by the Debtor. The court held that, based on the evidence presented, the livestock sold before the bankruptcy was filed was owned by the Operating Entity (and, therefore, was subject to the Supplier's lien) and the livestock sold after the bankruptcy filing was owned by the Debtor (and, therefore, not subject to the Supplier's lien). *In re McDougall*, 572 B.R. 239 (D. N. D. 2017).

Comment. The North Dakota agricultural supplier lien (NDCC §35-31-02) does not require the creditor to give written notice to the secured lender. The creditor only has to file a CNS statement within 120 days of providing the goods and/or services. NDCC §35-31-02 is unique in that the creditor does not file a UCC-1 with the North Dakota Secretary of State to perfect its agricultural lien. Instead, the creditor files a CNS statement.

Oregon producer lien; Notice of attachment of lien. Farmers Grain, LLC ("Grain Buyer") bought and sold grain. Various farmers delivered, stored and sold grain to the Grain Buyer ("Grain Farmers"). The Grain Buyer was indebted to Rabo Agrifinance ("Secured Lender") and the debt owed to the Secured Lender was secured by the grain inventory of Farmers Grain. The Secured Lender filed a UCC-

1 to perfect its security interest. The Grain Buyer filed a Chapter 11 bankruptcy, which was subsequently converted to a Chapter 7 in August 2017. In excess of $8,000,000 was owed to the Secured Lender at the time of the bankruptcy filing. The Grain Buyer commenced an adversary action for a determination as to the respective parties' rights in the grain inventory. The Grain Farmers argued that they had priority producer liens under Oregon Statute § 87.755(1). The Secured Lender argued that any lien held by the Grain Farmers was junior to the Secured Lender. Specifically, the Secured Lender argued that one grain producer, DC Land Operating Company, LLC ("DC Land"), failed to comply with Oregon Statute § 87.755(1) because DC Land failed to provide the Secured Lender with notice of its filing within the statutory required twenty days. Under Oregon Statute § 87.710(1) a lien holder has to give notice to attach a lien and file a UCC-1 to perfect its lien. The Court rejected the argument and held that although DC Land failed to give notice to the Secured Lender, the Secured Lender had actual notice of the lien within the twenty-day period because just three days after DC Land filed the lien with the Oregon Secretary of State, the Secured Lender filed a pleading attaching DC Land's lien filing. The court held that this was enough to satisfy the purpose of the statute's twenty-day requirement and found that DC Land's lien interest was superior in priority to the Secured Lender's security interest. *In re Farmers Grain, LLC*, 2018 WL 2223071 (Bankr. D. Idaho 2018).

Michigan producer lien; Lien statute requires the UCC-1 be filed in the correct name of the debtor. 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. For purposes of products delivered to Michigan, the Court held that the Nurseries failed to properly file the UCC-1 to perfect a producer's lien in Michigan because the UCC-1 had the incorrect debtor name. Michigan adopts the filing laws under Article 9. UCC § 9-301 requires a creditor to file a UCC-1 to perfect its lien. UCC § 9-502 requires the UCC-1 to list the name of the debtor. The court granted summary judgment in favor of the Secured Lender. *Fishback Nursery, Inc. v. PNC Bank, N.A.*, 2017 WL 6497802 (N.D. Tex. 2017).

Tennessee producer liens; Lien statute requires the UCC-1 be filed in the correct name of the debtor. 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. For purposes of products delivered to Tennessee, the Court held that the Nurseries failed to properly file the UCC-1 to perfect a producer's lien in Tennessee because the UCC-1 had the incorrect debtor name. Tennessee adopts the filing laws under Article 9. UCC § 9-301 requires a creditor to file a UCC-1 to perfect its lien. UCC § 9-502 requires the UCC-1 to list the name of the debtor. The court granted summary judgment in favor of the Secured Lender. The court granted summary judgment in favor of the Secured Lender. *Fishback Nursery, Inc. v. PNC Bank, N.A.*, 2017 WL 6497802 (N.D. Tex. 2017).

Oregon producer lien; UCC-1 needs to be filed within 45 days. 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. For purposes of products delivered to Oregon, and under Oregon Statute § 87.710(1), a lien holder has to give notice to attach a lien and file a UCC-1 to perfect its lien. The Court held that the Nurseries failed to properly perfect a producer's lien in Oregon because the Nurseries failed to file the UCC-1 within the required 45 days after final payment was originally due. The court granted summary judgment in favor of the Secured Lender. *Fishback Nursery, Inc. v. PNC Bank, N.A.*, 2017 WL 6497802 (N.D. Tex. 2017).

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

No updates.

3. Statutory Trusts.

PACA trust claim may be assigned; Principle liable for PACA claims. Joseph Guarracino ("Debtor") was the sole owner, shareholder and operator of GFP Distributors, Inc. ("PACA Merchant"), a PACA-licensed wholesale produce merchant. PACA Merchant purchased wholesale produce from Krisp-Pak Sales Corp. ("PACA Claimant"). PACA Claimant went out of business and PACA Merchant owed PACA Claimant $292,444.20 from unpaid invoices. PACA Claimant owed Alliance Shipper, Inc. ("PACA Assignee"), a national freight transportation company, approximately $370,000 for unpaid transportation services. PACA Assignee instituted an action and obtained a default judgment against PACA Claimant. The PACA claim was assigned to the PACA Assignee. The Debtor filed a Chapter 7 bankruptcy. The PACA Assignee filed a non-dischargeability complaint against the Debtor on the basis that a PACA trust existed between the PACA Merchant and the PACA Assignee (as the assignee of PACA Claimant), and that the Debtor owed a fiduciary duty to the PACA Assignee arising

from the PACA trust. The Debtor argued that a judgment creditor of a PACA claimant lacked standing to assert the claims of the PACA claimant. The Court disagreed and held that the assignee of a PACA claim has standing to assert the claims of the PACA claimant because there is no prohibition under PACA as to the assignment of a PACA claim and that, as a general trust law principle, a trust claim may be assigned. *See Nickey Gregory Co., LLC v. AgriCap, LLC,* 597 F.3d 591 (4th Cir. 2010). The Court also held that the Debtor was an individual officer and shareholder in a position of control of the PACA Merchant and, therefore, may be liable for the PACA claim. *In re Guarracino*, 575 B.R. 298 (Bankr. D. N.J. 2017).

Comment. Non-dischargeability issues are discussed in on pages 12-13 below.

Damages must result from inadequate recordkeeping of merchant to be actionable under PACA; Commission may not be charged for benefit of marketing partner. Spring Lake Ratite Ranch, Inc. ("Seller") raised blueberries. Seller contracted with S&S Packing, Inc. ("Packager") to pack and market its 2010 blueberry crop. Packager sold the packaged blueberries of the Seller and other growers through a pooling arrangement to Sun Belle, Inc. ("Distributor"). The Packager distributed the sale proceeds proportionally to all of the growers that delivered blueberries for the respective week after deducting both the Packager's commission and the Distributor's commission. Seller filed a formal complaint with the United States Department of Agriculture and asserted: (i) the Packager incorrectly calculated packing charges and (ii) improperly charged Seller with two commissions. The USDA judicial officer concluded that Packager had failed to comply with various recordkeeping requirements of the Perishable Agricultural Commodities Act, 7 U.S.C. § 499a *et seq.* ("PACA"), including failing to produce sales tickets bearing serial numbers and that its treatment of "pooled losses" was in violation of PACA. Packager commenced an action in District Court to obtain review of the judicial decision. The District Court affirmed the judicial officer's decision and Packager appealed to the 11th Circuit. The 11th Circuit reversed the award of damages given by the District Court based upon the inadequacies in Packager's recordkeeping and invoices holding that PACA provides that an entity may be liable for failing to maintain proper accounts but that the liability is limited to "the full amount of damages . . . sustained *in consequence* of such violation." The 11th Circuit held that Seller did not allege that Packager's deficient recordkeeping caused it to suffer any damages, and therefore awarding damages was error. The 11th Circuit affirmed the District Court's ruling that Packager improperly deducted the Distributor's commission from the net sales receipts that the Packager passed on to the Seller. The 11th Circuit stated that under their contract, Distributor was a commission merchant, not a marketing partner as Packager had previously argued, and that in order to deduct the second commission, specific authorization from Seller was required. *S & S Packing, Inc. v. Spring Lake Ratite Ranch, Inc.*, 702 Fed.Appx. 874 (11th Cir. 2017).

Transfer of risk factors for determining enforceability of factoring agreement. Tanimura Distributing, Inc. ("Debtor") purchased and sold perishable agricultural products as a distributor. The Debtor purchased agricultural products on credit from S&H Packing & Sales Co. and others growers of agricultural products ("Growers"). The Debtor was indebted to AgriCap Financial ("Financier") and, in conjunction with the financing, the Debtor transferred the resulting accounts receivable to Financier through a purported factoring agreement (the "Agreement"). In addition to the transfer of accounts, the Debtor also granted a security interest in the accounts to Financier, authorized Financier to file a UCC-1 finance statement and provided recourse against the Debtor if Financier was unable to collect against the Debtor's accounts. The Debtor was unable to pay the Growers and the Growers commenced a legal action asserting trust claims under the Perishable Agricultural Commodities Act, 7 U.S.C. § 499a *et seq.* ("PACA"),. The Growers argued that the Agreement was not a true factoring agreement but, instead, was a secured lending arrangement and, therefore, all the accounts receivable and proceeds remained trust property under PACA. The District Court disagreed and held that the Agreement constituted a factoring agreement because the accounts receivable were labeled as a transfer and that the Debtor (as a PACA trust fiduciary) was allowed to remove assets from the PACA trust in any commercially reasonable way without breaching the PACA trust. The Growers appealed to the 9th Circuit. The 9th Circuit held that labeling an account receivable transfer, alone, does not ultimately determine whether the accounts receivable were actually sold for the purposes of applying the PACA statutory trust. Rather, a court is obligated to look behind the label and study the substance of the transaction, including whether the transferee assumed the risk of non-collection. The 9th Circuit cited the following factors for analyzing the transfer of risk: (1) the right of the creditor to recover from the debtor any deficiency if the assets assigned are not sufficient to satisfy the debt, (2) the effect on the creditor's right to the assets if the debtor were to pay the debt from independent funds, (3) whether the debtor has a right to any funds recovered from the sale of assets above that necessary to satisfy the debt, and (4) whether the assignment itself reduces the debt. The 9th Circuit vacated the decision and remanded the case back to the District Court to apply several factors in determining whether an agreement is a factoring agreement or a secured lending arrangement. *S & H Packing & Sales Co., Inc. v. Tanimura Distributing, Inc.,* 883 F.3d 797 (9th Cir. 2018).

II. UCC ARTICLE 2 [SALE OF GOODS].

A. Performance. (UCC § 2-501 *et seq.*)

No updates.

B. Remedies. (UCC § 2-501 *et seq.*).

Rejection of delivered goods; right to reject irrigation pump. Koviack Irrigation and Farm Services, Inc. ("Seller") sold irrigation systems. Maple Row Farms, LLC ("Buyer") purchase component parts for an irrigation system from the Seller for its farm, which included a pump for distributing water from a retention pond (the "Pump"). The Pump was delivered late in the harvest season, so Buyer waited until the following spring to install the Pump. When the next spring rolled around, Seller was unwilling to assist in installing the Pump because Buyer had not paid for the Pump or its operating panel. Buyer responded that it was unwilling to pay for the pump until Seller could confirm that they would work as intended with the irrigation system. Buyer hired a different irrigation specialist to install the Pump, determined that the Pump would not work with its retention pond, and subsequently purchased a different kind of pump. Seller commenced a lawsuit for payment on the Pump. The Buyer counterclaimed and asserted the Pump had been rejected under UCC § 2-602(1) and nothing was owed to the Seller. The court agreed and held that the Buyer properly rejected the Pump and its panel, and that Seller was not entitled to recover the sale price of the Pump. Seller appealed. On appeal the Michigan Court of Appeals affirmed and held that, under the circumstances, the Pump was timely rejected under UCC § 2-602(1) and UCC § 1-205 because the Pump was delivered late in the harvest season, so it was reasonable for Buyer to wait until the pump was installed before deciding whether or not to reject it. The Court also held that formal notice of rejection was not required. The Court held the Seller had notice that Buyer would not accept the pump until it was determined that the Pump would work as intended. *Koviack Irrigation and Farm Services, Inc. v. Maple Row Farms, LLC*, 2017 WL 4182409 (Mich. Ct. App. 2017).

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

The economic life of a dairy cow for purposes of a true lease analysis is that of the "dairy herd" not the original leased dairy cow. The debtor Lee Purdy ("Debtor") was indebted to Citizens First Bank ("Secured Lender") and the indebtedness was secured by a security interest in all livestock of the Debtor. The Debtor entered into lease agreements with Sunshine Heifers ("Lessor") for certain dairy cattle (the "Leases"). The Debtor filed a Chapter 12 bankruptcy. The Debtor asserted that the Leases were not true leases but, instead, a disguised security interests for purposes of UCC § 1-203, and, therefore, the Lessor only had a junior security interest in the dairy cows. The Court agreed and held that the economic life of a dairy cow was less than the 50-month Lease term and, therefore, the Leases were not true leases. The Court found that within 36 month, but certainly within

50 months, dairy cows are culled. The Lessor appealed and the District Court affirmed. *Sunshine Heifers, LLC v. Purdy*, 2013 U.S. Dist. LEXIS 137361 (W.D. Ky. Sept. 25, 2013). On appeal, the 6th Circuit held that the Leases required that the Debtor cull and replace the leased cows and, therefore, the applicable economic life determination is that of the dairy herd and not the original leased dairy cows. The 6th Circuit held "it is clear to us that the relevant 'good' is the herd of cattle, which has an economic life far greater than the lease term, and not the individual cows originally placed on [the Debtor's] farm. Accordingly, we hold that the contracts flunk the Bright-Line Test and are not per se security agreements." The 6th Circuit remanded the case back to the District Court to determine the factual issue as to what leasehold interest the lessor Sunshine had in the remaining dairy cows and young stock in the possession of the Debtor. *Sunshine Heifers, LLC v. Citizens First Bank (In re Purdy)*, 763 F.3d 513 (6th Cir. 2014). On remand the District Court held that the Lessor failed to satisfy its burden of identifying which cows were culled and, to maintain its leasehold interest in the replacement cows, that the replacement cows were acquired with proceeds identifiable with the proceeds from the original leased cows. The District Court ruled that the remaining cattle were subject to the security interest of the Secured Lender. Lessor appealed. On appeal the 6th Circuit affirmed the District Court decision that the Lessor was unable to prove that the proceeds of the original leased were used to purchase the dairy cattle in the possession of the Debtor and, therefore, the leasehold interest of the Lessor had been extinguished. The remaining cattle in the possession were therefore subject to the security interest of the Secured Lender. *In re Purdy*, 870 F.3d 436 (6th Cir. 2017).

Comment. UCC § 1-203 provides that if a "lease" does not have a termination clause and the original term of the "lease" is equal or greater than the remaining economic life of the good, that the "lease" is not a lease, but a security interest. The reasoning is that to be a true lease, the leased good should have some value at the end of the lease term. The 6th Circuit decision in 2014 implies that any "good" that the lessee is contractually obligated to replace is not subject to the economic life analysis – and therefore the agreement would constitute a lease without consideration of the economic life of the original leased good. The 6th Circuit went as far as to state "whether the parties adhered to the terms of these leases in all facets, in our view, is irrelevant to determining whether the agreements were true leases or disguised security agreements." For drafting purposes, any lease for personal property should include a replacement provision to preserve the argument that the economic life analysis is not applicable (and the risk that the lease is deemed a subordinate security interest).

IV. OTHER STATE LAW.

Integrator breached contract for failing to deliver chicks. M&M Poultry, Inc. ("Grower") was a contract poultry grower. The Grower contracted with Pilgrim's Pride Corporation ("Integrator"), a poultry integrator, to raise poultry. Grower had signed numerous Broiler Production Agreements ("Contract(s)") with Integrator that provided the Integrator would provide feed, medication, veterinary services, technicians, and chicks to Grower. The Grower had trouble maintaining its bills for electricity and other utilities, which was required by the Contract, and the Grower was also underperforming at a significant rate as compared to its competition. Integrator terminated the Contract. Grower filed a lawsuit alleging breach of contract on the basis that the Integrator failed to deliver chicks under the terms of the Contracts. The Court agreed and held the Grower was entitled to $21,984.66 in damages. *M & M Poultry, Inc. v. Pilgrim's Pride Corporation*, 281 F.Supp.3d 610 (N.D. W.Va. 2017).

Comment. PSA claims are discussed on pages 16-17 below.

North Carolina statue of limitations as to past due payments. Mills International, Inc. ("Seller") owned and operated a farming and outdoor equipment dealership in North Carolina. Holmes Agribiz ("Buyer") met with Seller in 2006 to purchase tractors and farm equipment totaling $222,500.00. Buyer issued a cashier's check in the amount of $96,000 and gave the check to Seller as a down payment for the tractor and farm equipment. The tractor and farm equipment was delivered to the Buyer. Seller contacted Buyer several times, but did not receive any additional payment from Buyer after receiving the initial $96,000 down payment. Six years later, Seller received notice that the tractor and equipment were being auctioned by the Buyer. Seller commenced a legal action asserting breach of contract. The Seller argued that the parties had a contract for the sale of the tractor and equipment under an installment sale. The Buyer argued that the Seller was precluded from collecting the past due 2007 payment in the amount of $30,421.71 under the four-year North Carolina statute of limitations (N.C. Gen. Stat. §25-2-725(1)) and that the Buyer was entitled to the sale proceeds after satisfaction of the remaining past due payments. The Court agreed and held that the Seller was barred from recovery as to the past due 2007 payment under the North Carolina statute of limitations. *In re Mills International, Inc.*, 2017 WL 1026120 (Bankr. E.D.N.C. 2017).

V. BANKRUPTCY.

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

No updates.

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

Chapter 11 debtor entitled to use PACA trust proceeds as cash collateral; PACA trust claimant adequately protected. Cherry Growers, Inc. ("Debtor") purchased produce in conjunction with the Debtor's co-manufacturing and rental business. The Debtor

purchased produce from Farm Fresh First, LLC ("Grower") on credit. The Debtor filed a Chapter 11 bankruptcy and requested the use of the produce inventory and accounts receivable (i.e. "cash collateral") under 11 U.S.C. § 363(a) to operate its business during the Chapter 11. Grower objected on the basis that Grower had a PACA trust claim as to the produce and accounts receivable, that all revenue derived from the sale of produce during the Chapter 11 would constitute proceeds of the PACA trust (and not property of the bankruptcy estate) and, therefore, the Debtor was not authorized to use the PACA trust proceeds as cash collateral. The Court rejected Grower's argument and held that because the value of the bankruptcy estate property far exceeded the value of Grower's claim, the Grower was adequately protected for purposes of 11 U.S.C. § 363(a). The Court authorized the Debtor to continue to use its plant, property, and equipment, and the funds generated through operations, including the PACA trust proceeds. *In re Cherry Growers, Inc.*, 576 B.R. 569 (W.D. Mich. 2017).

5th bankruptcy filing was not intended to delay, hinder or defraud creditors; sufficient collateral equity to deny motion for stay relief. James Olayer ("Debtor") owned a 110 acre farm. The Debtor was indebted to the U.S. Department of Agriculture Farm Service Agency ("Secured Lender"). The debt was secured by the farmland and residence of the Debtor. Secured Lender was owed $65,712.54. The collateral was worth $246,573. The Debtor filed a Chapter 12 bankruptcy petition. The bankruptcy filing was the 5th bankruptcy filing by the Debtor in the past twenty-one years. Secured Lender filed a motion for stay relief and argued that the 5th bankruptcy filing was intended to delay, hinder or defraud the Secured Lender and the Secured Lender was entitled to stay relief under 11 U.S.C. § 362(d)(4)(B) or, in the alternative, cause existed to grant stay relief under 11 U.S.C. § 362(d)(1). The Court disagreed and held the 5th bankruptcy filing was not intended to delay, hinder or defraud his creditors under 11 U.S.C. § 362(d)(4)(B) on the basis that the Debtor achieved plan confirmations and a discharges in earlier bankruptcies. The court then turned to the Secured Lender's claim for relief for cause under 11 U.S.C. § 362(d)(1) and held that there was a sufficient equity cushion of 66% in its collateral to adequate protect the Secured Lender pending a Chapter 12 plan confirmation. *In re Olayer*, 577 B.R. 464 (W.D. Pa. 2017).

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

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

Debts arising from the actions of a principle of PACA merchant were non-dischargeable. Joseph Guarracino ("Debtor") was the sole owner, shareholder and operator of GFP Distributors, Inc. ("PACA Merchant"), a PACA-licensed wholesale produce merchant. PACA Merchant purchased wholesale produce from Krisp-Pak Sales Corp. ("PACA Claimant"). PACA Claimant went out of business and PACA Merchant owed PACA Claimant $292,444.20 from unpaid invoices. PACA Claimant owed Alliance Shipper, Inc. ("PACA Assignee"), a national freight transportation company, approximately $370,000 for unpaid transportation services. PACA Assignee instituted an action and obtained a default judgment

against PACA Claimant. The PACA claim was assigned to the PACA Assignee. The Debtor filed a Chapter 7 bankruptcy. The PACA Assignee filed a non-dischargeability complaint against the Debtor and asserted that a PACA trust existed between the PACA Merchant and the PACA Assignee (as the assignee of PACA Claimant), that the Debtor owed a fiduciary duty to the PACA Assignee arising from the PACA trust, that the actions of the Debtor constituted defalcation and, therefore, the PACA claims against the Debtor were non-dischargeable under 11 U.S.C. § 523(a)(4). The Debtor argued that the actions of the Debtor did not constitute defalcation and were dischargeable under the Chapter 7 bankruptcy. The Court disagreed and held that the Debtor was an individual officer and shareholder in a position of control of the PACA Merchant, that the actions of the Debtor constituted defalcation while acting in a fiduciary capacity and, therefore, were non-dischargeable under 11 U.S.C. 523(a)(4). *In re Guarracino*, 575 B.R. 298 (Bankr. D. N.J. 2017).

Comment. PACA trust claims are discussed on pages 6-7 above.

Failure to explain missing collateral was basis for non-dischargeability. Bobby Adkins ("Debtor") owned and farmed three farms. The Debtor was indebted to Quality Car and Truck Leasing, Inc. ("Secured Lender") and the debt was secured by the Debtor's personal property totaling eight-seven (87) items. The Debtor filed a Chapter 7 bankruptcy petition and failed to schedule or disclose thirty-seven (37) missing pieces of collateral. Secured Lender filed an adversary action to have the debt non-dischargeable under 11 U.S.C. § 523(a)(5) on the basis of the missing collateral. Secured Lender moved for summary judgment and the Court granted the motion holding that the Debtor was unable to provide any explanation as to thirty-seven (37) missing pieces of collateral and, therefore, the related debt was non-dischargeable under 11 U.S.C. § 523(a)(5). *In re Adkins*, 578 B.R. 382 (S.D. W. Va. 2017).

Failure to show Debtor intended to violate loan covenants at the time of the financing defeated non-dischargeability claim. Jonathan Thompson ("Debtor") was indebted to Bank of Gravett (the "Secured Lender") and the debt was secured by personal and agricultural property including livestock. The loan documents included several standard covenants and representations, including that Debtor would not sell the livestock outside the ordinary course of business, that the Debtor would remit all livestock sale proceeds to the Secured Lender, and that the Debtor would provide the Secured Lender with a written schedule of livestock buyers. The Debtor failed to disclose the livestock buyers to the Secured Lender and used the sale proceeds to buy additional livestock. The Debtor filed a Chapter 13 bankruptcy petition. The Secured Lender filed a non-dischargeability complaint to find the debt owed to the Secured Lender non-dischargeable under 11 U.S.C. § 523(a)(2)(A) on the basis that the Debtor knowingly made false representations to the Secured Lender. The Debtor argued that any misrepresentations were not made prior to or contemporaneously with the Debtor obtaining the financing with the Secured

Lender and were made without knowledge by the Debtor that the representation were false. The Court agreed and held that 11 U.S.C. § 523(a)(2)(A) did not prohibit a discharge because the Debtor as inexperienced with livestock at the time of obtaining the financing and at the time the Debtor obtained the financing the Debtor did not know that he was going to violate the loan covenants and representations. *In re Thompson*, 581 B.R. 300 (W.D. Ark. 2017).

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

Affirmative defenses; Late payment for delivered grain was not ordinary practice between parties nor is it the ordinary practice in the grain industry. Turner Grain Merchandising, Inc. ("Debtor") purchased wheat from M-Real Estate LLC ("Seller"), and after receiving the wheat, issued a later check in the amount of $18,545.84 several weeks after the delivery of the wheat. The Debtor filed a Chapter 7 bankruptcy. The Chapter 7 trustee ("Trustee") sought to recover the $18,545.84 payment as a preferential transfer under 11 U.S.C. § 547(b). Seller asserted several affirmative defenses including that it was the ordinary course of business between Debtor and Seller to issue later checks for grain, that it is the ordinary business terms in the industry, and that the payment was made in contemporaneous exchange for new value. The Court rejected the ordinary course of business defenses on the basis that the documentation for the transactions relating to the valid check, and the parties' transactions were outside the preference period provided insufficient evidence to determine whether the transfer was inconsistent with the parties' standard practice. The Court also rejected the ordinary business terms defense on the basis that Seller never provided evidence identifying the "industry in which the parties' transaction was to be compared, and testimony on behalf of Seller on industry standards was self-serving, imprecise, and inconsistent. Finally, the court also denied the affirmative defense of contemporaneous exchange for new value. The court said that Seller did not meet any of the elements (the parties intended an exchange, the exchange was contemporaneous, and the exchange was for new value) and therefore failed to meet its burden of proof. The court then found in favor of the Trustee and determined the $18,545.84 an avoidable transfer recoverable by the Trustee from the Seller. *In re Turner Grain Merchandising, Inc.*, 2018 WL 1956182 (Bankr. E.D. Ark. 2018).

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

No updates.

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

No updates.

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

No updates.

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

Chapter 12 eligibility: Aggregate debts based on bankruptcy schedules. Tony Perkins ("Debtor") operated a farm on 200 acres in southern Kentucky, which expanded to cultivate 9,500 acres in various partnerships with her son. The partnerships filed Chapter 11 bankruptcies in 2015, but the cases were eventually dismissed after the partnerships liquidated substantially all of the partnerships' assets. In 2016, the Debtor filed a Chapter 12 bankruptcy. A secured lender objected to confirmation of the plan on the ground that the Debtor was not a "family farmer" eligible for Chapter 12 relief because the aggregate debts of the Debtor exceeded the statutory Chapter 12 eligibility limits at the time of $4,012,980. The secured lender argued that the tax liabilities of the partnerships, the filed proofs of claim, and the scheduled debts for which no proofs of claim were filed should be aggregated for purposes of determine the total debts of the Debtor. The court disagreed and held that it would not be equitable to use the proofs of claim and the scheduled amount for which no proofs of claim were filed. The Bankruptcy Appellate Panel of the 6th Circuit affirmed, holding that, absent a showing of bad faith, the debt amounts in the schedules should determine the aggregate amounts for Chapter 12 eligibility. *In re Perkins*, 581 B.R. 822 (B.A.P. 6th Cir. 2018).

Treatment of secured claims; amortizing claim secured by real estate over 15 years at 1 3/4% over prime with 10 year balloon was not appropriate treatment of secured claim; 2 1/2% over prime and 7 year balloon was reasonable. Terry Properties, LLC ("Debtor") owned 677 acres of farmland in Virginia. Terry Dairy LLC ("Operating Entity") owned the personal property and served as the operating entity. The Operating Entity was converted from a dairy farm to a cherry farm. The Debtor filed a Chapter 12 bankruptcy. The plan proposed to pay Farm Credit of the Virginias ("Secured Lender") over 15 years at 1 3/4% over prime with 10 year balloon. The Secured Lender objected. Farm Credit argued that the interest rate proposed fell below the requirements of *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004), and that term of repayment was not reasonable. The court agreed and held that that a 2.5% upward adjustment as well as 7-year balloon would be more appropriate because there is no known market for cherries, and therefore no reliable way to project a revenue stream into the future. The court denied confirmation but allowed the Debtor an opportunity to file an amended plan consistent with the appropriate claim treatment. *In re Terry Properties, LLC*, 569 B.R. 76 (W.D. Va. 2017).

Treatment of secured claims; an interest rate of 5 1/2% was inadequate for purposes of repayment of a secured claim under a Chapter 12 plan. Mark Johnson ("Debtor") raised corn and soybeans. Debtor filed a Chapter 12 petition. The Chapter 12 plan proposed to pay Hiawatha National Bank ("Secured Lender") at 5 1/2% interest. The Court

held 5 1/2% was inadequate for purposes of repayment of a secured claim under a Chapter 12 plan because the Secured Lender would have been subject to a significant degree of risk under the plan. *In re Johnson*, 581 B.R. 289 (W.D. Wis. 2018).

Chapter 12 plan confirmation; Plan projections provided reasonable assurance of success for purpose of plan feasibility. Tony Perkins ("Debtor") operated a farm on 200 acres in southern Kentucky, which expanded to cultivate 9,500 acres in various partnerships with her son. The partnerships filed Chapter 11 bankruptcies in 2015, but the cases were eventually dismissed after the partnerships liquidated substantially all of the partnerships' assets. In 2016, the Debtor filed a Chapter 12 bankruptcy. A secured lender objected to confirmation of the plan on the ground that her proposed plan was not feasible. The court disagreed. The Court also affirmed that the plan was feasible on the basis that the plan projections were based on average yields and obtainable prices, and that while the plan does guarantee success, it need only to provide a reasonable assurance of success, and that the proposed plan met that burden. *In re Perkins*, 581 B.R. 822 (B.A.P. 6th Cir. 2018).

Chapter 12 plan confirmation; Chapter 12 plan not feasible. Mark Johnson ("Debtor") raised corn and soybeans. Debtor filed a Chapter 12 petition and a Chapter 12 plan. Hiawatha National Bank ("Secured Lender") objected to the plan on the basis that the plan was not feasible. The court agreed and held that the plan projections were not credible, there was no explanation for increased revenue, there were no projections for crop loss on account that the Debtor was not eligible for crop insurance, and the yield projections were not realistic. *In re Johnson*, 581 B.R. 289 (W.D. Wis. 2018).

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

No updates.

V. OTHER FEDERAL LAW.

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

Poultry Integrator did not engage in unfair, unjustly discriminatory or deceptive trade practices in violation of the PSA. M&M Poultry, Inc. ("Grower") was a contract poultry grower. The Grower contracted with Pilgrim's Pride Corporation ("Integrator"), a poultry integrator, to raise poultry. Grower had signed numerous Broiler Production Agreements ("Contract(s)") with Integrator that provided the Integrator would provide feed, medication, veterinary services, technicians, and chicks to Grower. The Contract detailed that Grower would be ranked against other growers on a "tournament system" and paid based on how the Grower performed when compared to growers who settled flocks of birds the same week as the Grower. The Grower had trouble maintaining its bills for electricity and other utilities, which was required by the Contract, and the Grower was also underperforming at a significant rate as compared to its competition. Integrator terminated the Contract. Grower filed a lawsuit alleging breach of covenant of good

faith and fair dealing in violation of 7 U.S.C. § 192 of the Packers and Stockyard Act ("PSA"). The Court held that the Integrator did not engage in unfair, unjustly discriminatory or deceptive trade practices because the reason the Grower was constantly at the bottom of the tournament system was not due to any form of unreasonable preference or advantage given to a person, or due to any unfair, unjustly discriminatory, or deceptive practices, but rather due to the age, condition, and obsolescence of its broiler houses, as well as poor management practice on the part of its operators. *M & M Poultry, Inc. v. Pilgrim's Pride Corporation*, 281 F.Supp.3d 610 (N.D. W.Va. 2017).

Comment. Breach of contract claims are discussed on page 11 above.

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