

## CONTINUING TAX ISSUES

*Hall v. United States*, 566 U.S. \_\_\_\_, 132 S.Ct. 1882, 182 L.Ed. 2d 840 (2012)

In *Hall* the Supreme Court analyzed the provisions of 11 U.S.C. §1222(a)(2)(A) concerning governmental claims arising from the disposition of farm assets. Under 11 U.S.C. §1222(a)(2)(A), the IRS claims are stripped of priority status and downgraded to general unsecured claims that are dischargeable after less than full payment during the five year period of the debtor's plan. The exception was created, however, only to claims "entitled to priority under 11 U.S.C. §507." 11 U.S.C. §507(a)(2) covers administrative expenses allowed under 11 U.S.C. §503(b), which provides for treatment of "any tax... incurred by the estate." *See* 11 U.S.C. §503(b)(B)(i)

However, since the Chapter 12 filing does not create a separate taxable estate for the individual. *See* 28 U.S.C. §§1398 and 1399 The estate does not incur post-petition federal tax liability. Therefore, capital gain associated with the disposition of farm assets post-petition is not treated in the bankruptcy estate, is non-dischargeable and is not entitled to administrative priority. The only means the debtor may avail itself of the safety net of 11 U.S.C. §1222(a)(2)(A) is for the pre-petition sale of assets.

The next issue is whether a Chapter 12 debtor can split the taxable year under the provisions of 26 U.S.C. §1398. The answer is no. Post-petition income tax incurred by an individual in a Chapter 7 or Chapter 11 may split the taxable year into two years, the first the pre-petition period and the second the post-petition period. However, 26 U.S.C. §1398 does not apply in bankruptcy estates where a separate taxable entity is not created. *See* 26 U.S.C. §1399

Where a debtor is a corporation in a Chapter 7, Chapter 11 or Chapter 12, the debtor is not considered to have a separate existence from the bankruptcy estate. Therefore, post-petition taxes incurred by the corporate debtor during a Chapter 7 case, or incurred prior to confirmation in a Chapter 11 case, are claimable as an administrative expense of the estate.

Since there is no separate taxable estate in a Chapter 13 case or an individual Chapter 12 case, the Service does not file administrative expense claims for post-petition taxes. However, under 11 U.S.C. §1305 the IRS has the option to file a claim for post-petition taxes due from the debtor in a Chapter 13 case. The claim under 11 U.S.C. §1305 is treated as though it arose before the bankruptcy case was filed. The Bankruptcy Code does not contain a similar provision for Chapter 12 cases.

As a result, the Service does not have the option under the Bankruptcy Code for filing claims for post-petition taxes due from an individual debtor in a Chapter 12 case. Therefore, in a Chapter 12 case the individual debtor should sell assets subject to capital gain in the year preceding the filing of the Chapter 12 case and file a Chapter 12 bankruptcy in the following year. *See* Internal Revenue Manual 4.31.7 TEFRA

Prior to the Supreme Court decision in *Hall v. United States*, the Circuits were split on the issue. In *In Re Dawes*, 652 F.3d 1236 (10<sup>th</sup> Cir. 2011), the 10<sup>th</sup> Circuit held that post-petition income taxes incurred from the debtors' sale of farm assets during a Chapter 12 proceeding were not dischargeable.

*contra, Knudsen v. I.R.S.*, 581 F.3d 696, 710 (8<sup>th</sup> Cir. 2009) (post-petition taxes are dischargeable). *See also United States v. Hall*, 617 F.3d 1161, 1163 (9<sup>th</sup> Cir. 2010) *cert.*

*granted*, 79 U.S.L.W. 3421 (June 13, 2011) (No. 10-875) (post-petition taxes not dischargeable).

In a more recent case, *In Re Keith*, 2013 WL 3467315 (Bankr. D. Kan., July 8, 2013), the Kansas Bankruptcy Court was called upon to determine, post *Hall*, whether 11 U.S.C. §1222(a)(2)(A) applied only to the pre-petition sale of taxable farm capitalized assets or could apply to ordinary farm product sales such as grain or feeder or stock cattle. Secondly, the case addressed whether the unsecured portion of the debtors' pre-petition taxes should be determined by prorating the debtors' total tax liability by that portion of it generated by taxable gain, as opposed to the marginal basis.

In *Keith*, the debtors claimed that income from the sale of livestock and crops on Schedule F of their tax return should receive favorable treatment under 11 U.S.C. §1222(a)(2)(A). The debtors further argued that the IRS should have employed the marginal allocation method for calculating its priority tax claim.

The Court ruled that the proceeds from the sale of farming end products – feeder cattle and crops raised by the debtors and crop insurance – are not farm assets “used” in a farming operation and, therefore, are not entitled to the favorable tax treatment of 11 U.S.C. §1222(a)(2)(A). The Court, however, did find that 11 U.S.C. §1222(a)(2)(A) requires the government to employ the marginal allocation method in calculating the extent of its priority tax claim.

The debtors' 2009 tax return filed in July, 2010, reported a tax due of \$297,081 after an \$838 credit for tax payments. The IRS contended that it was entitled to a priority claim

in the amount of \$301,574.68 (\$297,081 tax and \$4,493.68 interest to the petition date) and an unsecured nonpriority claim of \$7,438.42 for a total claim of \$309,013.10. The debtors' tax return reported income from three components:

- 1) long-term capital gains of \$230,533;
- 2) ordinary gains of \$512,197 (sale of business property); and
- 3) net farming profit of \$283,662.

The parties stipulated that the capital gains and ordinary gains from the sale of business property were entitled to treatment under 11 U.S.C. §1222(a)(2)(A), but the IRS contended that the \$283,662 net farming profit was not entitled to treatment.

Utilizing the proportional tax method, the IRS contended that 71% of the debtors' gross income was attributable to gain on the sale of assets, while 29% of their gross income was attributable to other sources of income. The IRS therefore multiplied the total tax due, \$278,632, by .29 to arrive at non-gain, ordinary income of \$80,803. Then it added the debtors' self-employment tax of \$19,287 and deducted the amount of \$838 for prior tax payments, yielding a priority tax claim of \$99,252, adding it to a non-dischargeable tax claim.

The debtors applied the marginal method and performed two calculations. The first assumed the \$355,179 would be entitled to treatment under 11 U.S.C. §1222(a)(2)(A) and thus was excluded. The second calculation calculated the non-dischargeable portion of the tax claim by determining the tax on all remaining sources of income, allowing deductions for adjusted gross income for the standard deduction and personal exemption to arrive at

the taxable income of \$85,095. The tax on this amount, together with the recalculated self-employment tax, less tax payments, yielded a priority tax claim of \$26,433.

The Court ruled that income from the feeder cattle and crop sale did not qualify for treatment under 11 U.S.C. §1222(a)(2)(A), as it was the result of the farming operation, not assets “used” in the farming operation.<sup>1</sup>

The Court’s decision in *Keith* is at odds with the 8<sup>th</sup> Circuit decision in *Knudsen v. I.R.S.*, 581 F.3d 696 (8<sup>th</sup> Cir. 2009) which concluded that “farm assets” included “any asset related to farming operations, whether or not used in farming operations.” 581 F.3d at 712 -- thus broad enough to include grain sales and feeder cattle sales.

The Bankruptcy Court in *Keith*, however, determined that the marginal method measured the priority and unsecured claims better than the proportional method.

### **CONVERSION FROM CHAPTER 12 TO CHAPTER 7**

*In Re Colón*, 2016 WL 3548821 (Bankr. PR, June 21, 2016)

The Court denied a motion to convert from Chapter 12 to Chapter 11 citing *In Re Christy*, 80 B.R. 361, 364 (Bankr. E.D. Va. 1987) finding that 11 U.S.C. §1208 does not specifically authorize conversion from Chapter 12 to Chapter 11. The only options are conversion to a Chapter 7 or dismissal.

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<sup>1</sup> Query – if this was breeding stock, as opposed to feeder cattle, would the Court’s decision be the same?

*In Re Stumbo*, 301 B.R. 34 (Bankr. S.D. Iowa, 2002); *In Re Overacker*, 2002 Bankr. LEXIS 1928 at \*3 (Bankr. D. Idaho, 2002) (no right of conversion from Chapter 12 to Chapter 11).

**REVOCAION OF PRIOR APPROVAL OF FEE APPLICATION  
OF FORMER COUNSEL AND DISGORGEMENT**

*In Re Silva Dairy, LLC*, 2016 WL 3564361 (Bankr. D. Idaho, 2016)

Third party dairy cow feeder, Jack McCall, advances \$10,000 to the debtor's counsel for filing of Chapter 12 of Silva Dairy, LLC. McCall credits money on his feeder account with the debtor to a member of the limited liability company. The individual member delivers a check to the debtor's counsel. Debtor's counsel advised the client not to deposit the check from McCall into the operating account, as the debtor's creditors might seize the funds to apply to its debt. The individual member endorsed the check made payable to him directly over to the debtor's counsel, who took it for the retainer. The source of the funds was never disclosed.

In the bankruptcy case the debtor's counsel prepared agreements with the dairy cow feeder that were favorable to it. The debtor's counsel is also alleged to have forged the debtor member's signature on documents filed with the Court. The Court found that disclosures required under Rule 2006 and 11 U.S.C. §329 were not, in this case, made or satisfactory concluding disgorgement of the original retainer is appropriate.

## **ADEQUATE PROTECTION – CASH COLLATERAL**

*In Re B&D Pearson Farms*, 2016 WL 3435712 (Bankr. N.D. Tex., June 14, 2016)

The debtor proposed to use \$800,000 of cash collateral. The creditor asked that the stay be lifted against the cattle that are a part of a cow/calf operation. The Court denied the debtor's present motion to use cash collateral and denied lifting the automatic stay as to the cattle. The debtor's proposal regarding the use of cash collateral did not adequately protect the lender's interest. The post-petition lien offered on the debtor's crop was unrealistic and insufficient. Further, the debtor's proposal to repay the cash collateral over five years as part of the Chapter 12 Plan did not adequately protect the creditor's interest and was non-sustainable.

## **DOMESTIC SUPPORT OBLIGATION**

*In Re Krier*, 2016 WL 2343038 (Bankr. D. Kan., Apr. 29, 2016)

Krier's Chapter 12 Plan treated his domestic support obligation as an allowed secured claim, rather than a "domestic support obligation" that must be repaid before his Plan could be discharged. He offered to repay the debt over twenty years, extending what was originally a fifteen year obligation in 2005 to one that would not be paid in full until 2036.

Krier's obligation to his former spouse is a fully secured claim that may be repaid over a stream of payments equal in value to that amount of the claim, but the Court concludes "she is not a bank."

The Court utilized the test in *In Re Sampson*, 997 F.2d 717 (10<sup>th</sup> Cir. 1993) to determine whether the financial obligation was in the nature of a domestic support obligation. The Court, in *Krier*, determined that the settlement agreement in the divorce decree was not in the nature of a domestic support obligation, but a property settlement. However, the Court questioned the good faith of the debtor in his Plan treatment and, therefore, did not comport with the provisions of 11 U.S.C. §1225(a)(5). Confirmation was denied.

## **CHAPTER 12 ELIGIBILITY**

*In Re Williams*, 2016 WL 1644189 (Bankr. W.D. Ky., Apr. 22, 2016)

The Court denies the motion to dismiss the debtor's Chapter 12 case on the basis of eligibility. The debtors were retired and testified at their meeting of creditors that they were last actively involved in a farming operation in 2013. The bankruptcy case was filed on October 12, 2015.

In 2013, the debtors' involvement consisted of obtaining a lease for farmland in Arkansas in which they contracted with their son to plant and harvest crops. Their son no longer engaged in the farming operation. The debtors testified at their meeting of creditors that they had no intention of ever returning to active farming.

The debtors' 2013 tax return showed the debtors purchased two farm tractors in 2011 and sold them in 2013 and showed expenses of \$1,299,899 on Schedule F and losses of \$307,125.



The trustee contended that the debtors were not eligible for Chapter 12 relief because they were not “engaged in a farming operation” at the time the bankruptcy was filed. The Court denied the motion finding that the tax return two years prior to the petition date show that the debtor Larry Williams had \$163,003 in income from “pension and farm income” and the debtor Sandra Williams listed her income as \$482,916 from “pension and farm income.”

The debtors established that they rented land and contracted with their adult son who did the physical planting and harvesting of the crops. The trustee contended that this was nothing more than a business transaction and did not constitute active engagement in the farming operation. Citing *In Re California Land and Equipment Leasing Co., Inc.*, 72 B.R. 1 (Bankr. E.D. Cal. 1984)

The Court, however, distinguished *California Land and Equipment Co.* finding that while they entered into a lease contract for their benefit, the debtors owned the farm equipment, purchased the seed, fertilizer and materials used in the operation and entered into insurance contract in their own names. The debtors made all decisions as to what crops would be planted and incurred all profits and losses in their own names. The debtors, thus, bore all risks as to whether the operation produced profits and sustained losses.

The Court found that the debtors may not have owned the land upon which the farming operation occurred, nor did they have to do all the physical labor involved in the operation. Citing *In Re Howard*, 212 B.R. 864 (Bankr. E.D. Tenn. 1997)

The Court utilized a totality of the circumstances test looking beyond simple financial statements.

*In Re Clark*, 550 B.R. 429 (Bankr. N.D. Ind., Apr. 13, 2016)

The creditor objected to the debtor's eligibility for Chapter 12 relief based upon the amount of the debtor's debt. The Court ruled that regardless of the debtor's good faith in filing his bankruptcy schedules, the Court could look beyond information contained in the schedules and could consider filed proofs of claim in deciding whether the aggregate amount of debt was such to render the debtor ineligible for Chapter 12 relief.

The debtor's claims in this case totaled \$4,141,861.74. The debtor could not dispute the amount of claims in order to satisfy eligibility requirements.

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

The debtor received at least 50% of his income in the year immediately preceding the date of filing. The debtor was not engaged in a "farming operation" on the petition date and thus did not qualify as a "family farmer" eligible for Chapter 12 relief. The Court had authority to grant a motion to convert the case to a case under a chapter other than Chapter 7.

Since the debtor was not a family farmer, the limitations of 11 U.S.C. §1208 did not apply and the debtor could converted to Chapter 13.

## **FEASIBILITY OF CHAPTER 12 PLAN**

*In Re Meinders*, 2016 WL 1599508 (Bankr. N.D. Iowa, Apr. 18, 2016)

The Court denies confirmation of the debtors' Plan and grants relief from stay finding that the debtors' Plan was not feasible. Under 11 U.S.C. §1225, the Court must: 1) ascertain probability of actual performance of the provisions of the plan as a factual determination; and 2) that the feasibility standard requires the Court to determine whether the plan offers a "reasonable prospect of success as workable." The Court found that the plan as submitted could not be carried out "as a practical matter under the facts." 2016 WL at \*4

The debtors' plan required them to have 55 to 57 cows. The debtors currently have 18 cows.

*In Re Keith's Tree Farm*, 2016 WL 1086758 (Bankr. W.D. Va., Mar. 18, 2016)

After four failed attempts to confirm a Chapter 12 plan in a prior case, the debtor refiled this new Chapter 12 proceeding. The Court denied confirmation upon the basis of feasibility.

The 2015 performance and available cash flow are insufficient to demonstrate that the debtor can make proposed plan payments under the plan. Any upward adjustment in property valuation (which the Court has already required under prior hearings) or shortening of the amortization period or increase in interest rate, will threaten the debtor's ability to make a proposed plan payment based upon past cash flow. The debtor did not provide a budget or cash flow projections going forward to show that it even has a reasonable basis for what it purports to be able to accomplish.

The Court denies confirmation, denies leave to amend and dismisses the case for abuse, including a bar to refile any new bankruptcies for 365 days.

Feasibility is a fact question requiring the Court to determine that:

1. The debtor will be able to make all payments under the plan and comply with the plan;
2. The debtor's historical performance and current condition substantiate feasibility;
3. The projections are not visionary promises;
4. The projections are probable, not merely possible or hopeful; and
5. The debtor can actually pay the restructured debt and perform all obligations of the plan.

The Court should give the benefit of the doubt regarding the issue of feasibility when the debtor's plan projections use reasonable data in light of the current economic climate.

*In Re Bright Harvesting, Inc.*, 2015 WL 7972717 (Bankr. D. NM, Dec. 4, 2015)

The debtor Bright Harvesting, Inc. is a custom harvester. The debtor's, Gary and Gennifer Bright, own Bright Harvesting, Inc. and also own a wheat and sorghum farm in the Colvis, New Mexico area.

In determining feasibility the Court must analyze both farming operations. Although the bankruptcy cases are neither jointly administered, nor substantively consolidated, there is a substantial overlap of creditor liability and use of assets and the operations are treated by the debtor as combined for planning purposes. The Court,

therefore, finds that analyzing the feasibility of both operations concurrently and jointly makes the most sense. The Court, therefore, looked at combined plan payments.

The Court denies confirmation finding that the debtor's plan needs to be modified under 11 U.S.C. §1225. The Court informs the debtors of the modification efforts necessary and provided a draft order confirming the plan of reorganization consistent with the Court's required modifications.

*In Re Tucker Brothers, L.L.C.*, 2014 WL 6435817 (Bankr. D. Kan., Nov. 13, 2014)

The Court denies confirmation of the plan as the plan uses inaccurate values for the amounts of the bank's secured claim. The plan treatment does not satisfy 11 U.S.C. §1225(a)(5)(I)(ii), as even assuming the debtor's inaccurate valuation numbers, negative amortization occurs to deny confirmation under 11 U.S.C. §1225.

Feasibility is further not demonstrated and the Chapter 12 plan for retention of an equitable subordination cause of action post-confirmation under 11 U.S.C. §510(c) will not be approved.

*In Re Howe Farms LLC*, 2014 WL 6911395 (Bankr. N.D. NY, Oct. 16, 2014)

The Chapter 12 plan must provide payments to the creditor with a reasonable interest rate providing for the present value of the creditor's secured collateral.

The Court must take into consideration depreciation and risk of loss in determining feasibility, present value and appropriate interest rate. Confirmation was denied.

## ASSUMPTION OR REJECTION OF LEASE

*In Re Miller*, 2016 WL 1316763 (Bankr. D. Mont., Apr. 1, 2016)

The Bankruptcy Court, in determining whether to approve or disapprove an assumption of lease, does not adapt the “more probing standard” required under *In Re GI Industries, Inc.*, 204 F.3d 1276, 1282 (9<sup>th</sup> Cir. 2000). The Court undertakes its analysis concerning assumption or rejection as a:

“summary proceeding that involves only a cursory review of a trustee’s decision to reject [or accept] the contract.” 2016 WL at \*6

“The Court should approve the decision to assume the lease unless it finds that the Debtor’s conclusion that acceptance would be advantageous is so manifestly unreasonable that it could not be based on sound business judgment, but only on back faith, whim or caprice.” *Citing Yellow Mountain Club*, 210 WL 5071354 at \*2 (D. Mont.) *aff’d* 486 F. App’x 720 (9<sup>th</sup> Cir. 2012)

## FAMILY FISHERMAN

*In Re Victorious, LLC*, 545 B.R. 815 (Bankr. D. Vt., Feb. 17, 2016)

Secured creditor moved to dismiss Chapter 12 case of the debtor limited liability company that owned a fishing vessel used for commercial fishing purposes. The Bankruptcy Court held that the debtor was not a “family fisherman” and thus ineligible for Chapter 12 relief, nor was the debtor “a family fisherman with regular annual income” and thus ineligible for Chapter 12 relief.

The Court adopts the following syllogism to determine that the debtor is not a family fisherman:

1. Chapter 12 relief is only available to an individual or entity which is owned by one family; and

2. The debtor is neither an individual, nor an entity which is owned by one family and therefore the debtor is not eligible for Chapter 12 relief.

The debtor further has failed to establish a regular annual income. The record reflects that since the debtor filed for bankruptcy relief it has had no operating income, nor has it had any annual income for the two years prior to filing.

The debtor's schedules, statements and operating reports refute any assertion that the debtor has sufficient, stable and regular income to make the plan payments. The filing was not in good faith. The debtor's plan provides for a sale of the vessel. The Court grants the motion to dismiss.

#### **PERMISSIVE ABSTENTION UNDER 28 U.S.C. §1334(c)**

*In Re Turner Grain Merchandising, Inc.*, 545 B.R. 261 (Bankr. E.D. Ark., 2016)

In this Chapter 11, as opposed to Chapter 12 case, the Court was required to determine whether permissive abstention is appropriate. The Bankruptcy Court examined the following factors:

1. Effect or lack thereof on efficient administration of the estate;
2. Extent to which state law issues predominate;
3. Difficult or unsettled nature of the law;
4. Presence of related proceeding commenced in state court or other non-bankruptcy court;
5. Existence of federal jurisdictional basis, if any, other than the debtor's bankruptcy filing;

6. Degree of relatedness or remoteness of the proceeding to the main bankruptcy case;
7. Substance rather than form of an asserted “core” proceeding;
8. Feasibility of severing state law claims;
9. Burden on the bankruptcy court’s docket;
10. Likelihood of forum shopping;
11. Existence of a right to a jury trial;
12. Presence in the proceeding of non-debtor parties.

*See* 28 U.S.C. §1334(c)

In this case grain sellers brought a state court action against the debtor and other non-debtor parties alleging breach of oral contract, violation of the Arkansas Deceptive Trade Practices Act and declaratory judgment relating to freezing of the debtor’s bank account and dishonoring checks payable to sellers. Subsequently the debtor filed a Chapter 11 proceeding and removed the state court action to the bankruptcy court. Sellers filed a motion requesting the Bankruptcy Court sever and abstain from hearing the state law claims against non-debtor parties and remand those to state court. The Court denied mandatory abstention and argument of the plaintiff grain sellers, but permissively abstained from hearing the case.

**STRIPPED AND DISCHARGED LIEN CREDITORS DENIED STATUS AS  
CREDITORS IN SUBSEQUENT CHAPTER 13 CASE**

*In Re Free*, 542 B.R. 492 (9<sup>th</sup> Cir. BAP 2015)



In this Chapter 13 the debtors, who previously obtained a Chapter 7 discharge of their liability to creditors, filed for Chapter 13 relief in an effort to “strip off” creditors’ wholly unsecured junior liens, and creditors objected on the theory that the debtors’ obligation to them had to be included in their unsecured debt for purposes of asserting eligibility for Chapter 13 relief.

The Bankruptcy Appellate Panel held, as a matter of first impression, wholly unsecured junior lienholders, whose liens were unsupported by any equity in the Chapter 13 debtors’ property, and to whom the debtors had been relieved of any personal liability as a result of their prior Chapter 7 discharge, did not hold unsecured claims against the debtors, of kind that would have to be considered in deciding whether the amount of the debtors’ unsecured debt was such to render them ineligible for Chapter 13 relief.

### **LATE FEES ASSESSED TO PLAN PAYMENTS**

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

The Court allowed the creditor’s assessment of contractual late fees when the debtors failed to make timely plan payments. Thus, the late post-confirmation payments on their mortgage debt were subject to late penalties.

The plan did not modify the creditor’s right to impose fees for late monthly payments. Because all of the debtors’ plan payments were made late, the debtors must pay late fees as assessed.

### **POST-PETITION CREDITOR FEES IN CHAPTER 12**

*In Re Henry A. Sarafin Testamentary Trust*, 2015 WL 5738234 (Bankr. D. Mass., Sept. 30, 2015)

The bank's claim for attorney's fees and expenses are allowed and are "capitalized" in the bank's secured claim.

The debtor sought a determination that the remaining balance, including attorney's fees of the secured claim asserted by the bank, was limited to the amount set forth in the debtor's confirmed Chapter 12 plan. The bank argued that its attorney's fees are not limited by the provisions of the plan and are reasonable as necessary by the nature of the case and the debtor's habitual payment arrearage.

Under 11 U.S.C. §1227 the provisions of a confirmed Chapter 12 plan bind the debtor and each creditor to its treatment, but not with respect to the amount of the claim. (2015 WL 5738234 at \*3)

The Court finds that the bank's attorney's fees are reasonable under the lodestar approach and allows such fees.

## **LESSOR vs. SECURED CREDITOR/RIGHTS IN THE COLLATERAL**

*In Re Purdy*, 2015 WL 5176580 (Bankr. W.D. Ky., Sept. 2, 2015)

The issue before the Court was whether 415 head of cattle sold at auction by the trustee were cattle subject to dairy cow leases or cattle were owned outright by the debtor and thus subject to the bank's security interest.

The Court finds that the dairy cow leases of the lessor were "true leases." However, the parties did not comply with the terms of the leases which constituted material breaches of the leases. Had lessor simply followed the terms of the dairy cow leases that it drafted, particularly those terms related to culling, branding, sales of culled cattle and replacement cattle, the lessor could have reliably traced what it owned under the leases. The lessor could have required the debtor to set up a separate bank account used solely for the deposit of funds received from the sale of culled cows and calves and funds used to purchase replacement cows subject to its leases. This would have prevented the commingling of funds in the bank's account. Finally, the lessor could have registered its brand with the state prior to placing the brand upon any cattle supplied under the leases. As between the lessor and the bank, the lessor could have prevented the problems now facing the Court by simply following the terms of its own leases and insisting on the debtor's compliance.

The Court concludes that the debtor acquired rights in the new cattle at the time funds were used out of the bank's account (and subject to the bank's lien) for its purchase, regardless of the fact that the funds were later reimbursed by the lessor.

"[I]t is the debtor's rights of ownership and control in the collateral that determines whether attachment of the security interest is effective and not

whether title to the collateral rests in another party.” 2015 WL 5176580 at \*14

## OFFSET

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

Chapter 12 debtors file motions for an order to show cause and for sanctions against the IRS for allegedly violating the terms of their confirmed plan by retaining post-petition tax refunds.

This plan was confirmed prior to the Supreme Court decision in *Hall v. United States*, 566 U.S. \_\_\_\_, 132 S.Ct. 1882, 182 L. Ed 2d 840 (2012), plus the 8<sup>th</sup> Circuit opinion in *Knudsen v. IRS*, 581 F.3d 696 (8<sup>th</sup> Cir. 2009).

Under the holding of *Knudsen*, the IRS as a governmental entity had a post-petition claim for capital gains taxes arising from the sale of the debtors’ farm equipment and was bound by the debtors’ plan. The post-petition claims asserted by the IRS were the same as the claims addressed and treated in the plan for *res judicata* purposes. Therefore, the IRS was in contempt of the Bankruptcy Court order confirming the plan.

*In Re Barefoot*, 2014 WL 1053601 (Bankr. E.D. NC, Mar. 18, 2014)

The debtor’s objection to the amended claim of Farm Service Agency is sustained. Farm Service Agency failed to file a motion for relief from automatic stay to permit it any right of post-confirmation offset by Farm Service Agency of the Commodity Corporation Check.

## DISMISSAL UNDER 11 U.S.C. §109(g)(1)

*In Re Bryngelson*, 2015 WL 4127179 (Bankr. N.D. Iowa, July 8, 2015)

The creditor sought a dismissal of the pending Chapter 12 case under the provisions of 11 U.S.C. §109(g)(1). The current bankruptcy case was filed less than 180 days after the dismissal of the debtor's prior bankruptcy case for:

“willful failure to abide orders of the Court, or to appear before the Court in proper prosecution of the case.” 11U.S.C. §109(g)(1)

In a prior Chapter 12 case the pro se debtor was delinquent in filing pleadings and submitting amendments to the schedules or providing requested information to creditors. At an evidentiary hearing and the debtor's absence, the Court dismissed the bankruptcy case. Subsequent to the dismissal of the case, the debtor retained new counsel and filed a motion and order to vacate the order of dismissal and requested reinstatement of the case. The Court denied the motion to reinstate. Three weeks later the debtor filed the current Chapter 12 bankruptcy case.

The Court concludes that the debtor's dilatory action in the prior bankruptcy case constituted willful failure to follow Court orders and otherwise to prosecute his case and thus fell within the elements of 11 U.S.C. §109. The case was dismissed.

*In Re Haffey*, 2015 WL 3546975 (Bankr. E.D. Ky., June 5, 2015)

The case dismissed for the debtors' failure to timely present a confirmable plan. The debtors demonstrated an ongoing pattern of delay and failure to cooperate with discovery. The delay prejudiced creditors and mandates dismissal.

Dismissal further was further justified by continuing losses to the estate. Detailed factual chronologies support the decision.

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

The trustee moved to dismiss the debtor's Chapter 12 case on the ground that the debtor was not a "family farmer." The Court held the fact that the debtor gardened and raised some animals did not qualify her as a "family farmer." The debtor could not qualify under 11 U.S.C. §109(f).

The debtor's efforts produced neither crops nor commercial livestock, for sale or otherwise. The debtor has not recorded any gross income from farming operations in either the taxable year preceding the filing or the second and third year preceding filing. Thus the debtor does not satisfy 50% of farm income required under 11 U.S.C. §101(18)(A).

*In Re Pressley*, 518 B.R. 867 (Bankr. D. SC, 2014)

The debtors successive filing of three Chapter 12 petitions to halt foreclosure proceedings while only making a single interest payment over the six year period of those three successive cases was sufficient to warrant dismissal of the case for "unreasonable delay" prejudicial to creditors. Dismissal was appropriate, therefore, under 11 U.S.C. §1208(c)(1). Further, dismissal with prejudice was warranted barring the debtors from filing another petition for another bankruptcy action for a period of 270 days.

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

The Chapter 12 debtors' repeated failure to provide accurate schedules, failure to confirm a plan, post-petition misconduct, including the failure to comply with various orders of the Court, warranted dismissal of the case for cause under 11 U.S.C. §1208(c) and 11 U.S.C. §1208(d). This was a "bad faith" dismissal based upon the totality of the circumstances, the failure to disclose, the failure to comply with Court orders and terms and provisions of the Bankruptcy Code and prejudicial delay.

*In Re Jenkins*, 2014 WL 268688 (Bankr. W.D. Ky., Jan. 23, 2014)

Cause exists for dismissal under 11 U.S.C. §1208(c). The debtors failed to comply with numerous orders of the Court, failed to adequately disclose assets, failed to file operating reports and failed to establish a DIP account. The case was dismissed.

The Court further solicited the parties to file "an appropriate pleading seeking recovery of the compensation paid to Debtors' counsel."

*In Re Acee*, 2014 WL 98757 (Bankr. N.D. NY, Jan. 10, 2014)

There is an insufficient relationship between the debtors' residential debt and farming operation. The Court concluded that residential debt did not arise out of his farming operation and thus the debtor did not qualify for Chapter 12.

## ORDERS IN PRIOR BANKRUPTCY PROCEEDINGS

*In Re Charles*, 2015 WL 4100362 (Bankr. W.D. Pa., July 6, 2015)

This case involved a determination as to whether an order in the debtor's prior bankruptcy approving a settlement that provided the debt would be non-dischargeable was binding in a subsequent filed Chapter 12 case.

In the earlier bankruptcy case a settlement agreement had been entered which provided for a reduced liquidated debt or judgment amount and that the debtor agreed that the debt to the lender would be deemed non-dischargeable in an earlier case, any conversion thereof to Chapter 7 or any future bankruptcy case filed by either of the debtors. Several years later the instant case was filed.

In the current bankruptcy case the debtors argued that they were misled as to the nature of the settlement agreement and the underlying guaranties and misled by various third parties. Finally, the debtors argued that the settlement agreement violated public of the Bankruptcy Code

“that debtors can never waive a potential future right of discharge that they may have in a future bankruptcy filing.” 2015 WL 4100362 at \*5

The Court found that waiver of non-dischargeability in the prior bankruptcy action was *res judicata* in any subsequent bankruptcy action and not a violation of public policy. Citing *In Re Lichtenstein v. Barbanel*, 161 Fed. Appx. 461 (6<sup>th</sup> Cir. 2005); *In Re Laing*, 31 F.3d 1050 (10<sup>th</sup> Cir. 1994); and *In Re Martinelli*, 96 B.R. 1011 (9<sup>th</sup> Cir. BAP 1988)



## **LATE-FILED PROOFS OF CLAIM**

*In Re Swenson*, 2015 WL 374537 (Bankr. D. Kan., June 12, 2015)

The creditor bank did not timely file a proof of claim. The debtors objected to the untimely filed proof of claim arguing that it should be disallowed under 11 U.S.C. §502(b)(9). Citing *In Re Greenig*, 152 F.3d 631, 633-36 (7<sup>th</sup> Cir. 1998), the Court in *Swenson* found that the Court has no power to allow late filed proofs of claim on equitable grounds.

The Court considered the informal proof of claim doctrine espoused in *In Re Boucek*, 280 B.R. 533, 535-36 (Bankr. D. Kan. 2002) and *In Re Spresse*, 2011 WL 2083964 (Bankr. D. Kan., May 19, 2011). The informal proof of claim doctrine requires that there was no written claim against the debtors, no statement of the amount of any such claim, any demand against the estate and any intent to hold the debtors liable for any debt in the case.

## **STIPULATION CONTROLS**

*In Re Seifert*, 533 B.R. 265 (8<sup>th</sup> Cir. BAP, 2015)

Under Minnesota state law the debtor attempts to claim exemption to the proceeds of a number of checks made jointly payable to himself and the Farm Services Agency. Payments were made under a stipulation between the parties. The five checks were paid to Farm Services Agency. The debtor claimed \$91,258 of the five checks valued at \$134,661 as farm earnings exempt under Minnesota Statute §550.37(13). The matter was determined as moot.

On appeal the Court ruled that the matter was not moot. The payment to Farm Services Agency did not operate to override the parties' stipulation and did not constitute a determination of what amount would be paid to unsecured creditors.

### **DILATORY CONDUCT OBJECTING TO CLAIM**

*In Re Benbrook*, 2015 WL 672472 (Bankr. D. Or., Feb. 10, 2015)

The debtor proposed to sell real estate to her brother at a sum less than the claim of the secured creditor. The debtor did not challenge the secured creditor's claim at the time of confirmation of the plan. Three years after confirmation of the plan the debtor objects to the claim arguing that interest, late fees and statutory trustee fees were incorrectly calculated. The Court ruled that there was an inexcusable delay of the debtor's known right to object to the claim.

The debtor's plan provided that she would market her real property for 36 months in order to produce funds to pay all of her creditors in full. Subsequent sale of the property failed to comply with terms of the confirmed plan. The debtor's claim objection is denied.

### **MODIFICATION OF CONFIRMED PLAN/*RES JUDICATA***

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

The Chapter 12 debtor filed a motion to modify her confirmed plan to afford additional time to market and sell encumbered real estate and pay creditors. The Court denied the debtor's request to modify the confirmed plan and that reinstating the automatic

stay, reconsidering prior consent decrees relating to the sale of the property and affording injunctive relief were not warranted.

The doctrine of *res judicata* prevents modification of the confirmed Chapter 12 plan unless the parties seeking modification demonstrates that the debtor experienced a “substantial” and “unanticipated” post-confirmation change in his financial condition. A change is unanticipated if the debtor’s present financial condition could not have been reasonably anticipated at the time the plan was confirmed.

### **DISINTERESTEDNESS/DISQUALIFICATION OF COUNSEL**

*In re Hall*, 520 B.R. 116 (Bankr. D. Kan., 2014)

In this Chapter 11 the law firm was not disqualified from representing individual Chapter 11 farmer/debtor, merely because it had represented the debtor pre-petition and had claim to be paid for such pre-petition services.

The Court would not preapprove a contingent fee request requested by the law firm designed to recoup its pre-petition fees. The Court, however, would approve a general employment provision subject to review for reasonableness. The rate offered was in excess of the rate in Wichita and was in the nature of a rate payable in Kansas City, thus practically allowing counsel to recover its unpaid pre-petition fees.

## POST-PETITION AVOIDANCE OF TRANSFER UNDER 11 U.S.C. §549

*In Re Johnsman Limited Partnership*, 2015 WL 4873014 (Bankr. N.D. Ohio, Aug. 13, 2015)

The debtor sought judgment for an unauthorized post-petition transfer under 11 U.S.C. §549. Three elements underpin a §549(a) claim for avoidance of a transfer:

- 1) The property must have been transferred;
- 2) The transfer must have occurred after the commencement of the case;
- 3) The transfer must not have been otherwise authorized by the Court or the Bankruptcy Code.

The plaintiff has the burden of proving the first and second element. The defendant has the burden of proving the validity of the transfers.

The plaintiff may recover either the property transferred or the value of such property. The defendant argues, however, that the debtor lacks standing to pursue the claims under 11 U.S.C. §549 and §550 since the plaintiff's bankruptcy estate suffered no injury as a result of the transfers. The defendant thus argued that the jurisdiction of the federal courts was limited to "Cases" and "Controversies" under Article III of the U.S. Constitution.

Citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), the defendant argued the "irreducible constitutional minimum" requirements for standing are:

1. The plaintiff must have suffered an injury in fact;
2. There must be a causal connection between the injury and the conduct complained of; and

3. It must be likely that the injury will be redressed by a favorable decision.

The defendant argues that the plaintiff has failed to establish an injury in fact.

In *Johnsman*, the plaintiff voluntarily transferred livestock and farm equipment to the defendant in exchange for approximately \$245,000 that was used to extinguish secured debt owed by the plaintiff. After the transfer, the defendant asserted that the property transferred was no longer property of the bankruptcy estate and the defendant's continued possession of the property or the proceeds from the sale or disposition of the property initially transferred by the debtor to the defendant does not constitute conversion of the plaintiff's possessory interest in the property.

The Court denied the plaintiff's motion for summary judgment finding that the plaintiff has failed to show as to whether the transfers to the defendant resulted in a diminution to the bankruptcy estate. The debtor's argument that the transfers impugned the integrity of the Court and the bankruptcy process did not constitute sufficient standing.

### **COST OF INSURANCE AS ADMINISTRATIVE EXPENSE**

*In Re Jarriel*, 518 B.R. 140 (Bankr. S.D. Ga., 2014)

The bank was entitled to an administrative claim for forced place insurance on equipment for post-petition coverage.

The fact that the creditor was greatly over-secured did not mean that the cost which the creditor incurred in force placing insurance was not a necessary cost and thus entitled to administrative priority under 11 U.S.C. §503(b)(1)(A).

**POST-CONFIRMATION SALE OF PROPERTY –  
PURCHASE PRICE IN EXCESS OF CONFIRMED VALUE**

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

Claims of creditors were determined by the terms of the plan, which were *res judicata* revesting in the debtors upon confirmation provided that surplus sale proceeds were in excess of the value of the claim. The debtors' property post-confirmation appreciation was not disposable income and did not have to be devoted to creditors under the plan. The debtors cannot be compelled to use the proceeds to pay creditors pursuant the plan.