A Changing Farm Economy: Agricultural Bankruptcies

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A. Case Administration.

1. Standing to Asserts Claims of Debtor against Account Debtors. A secured creditor has standing to assert the claims of the debtor against third parties that owe money to the debtor upon entry of a stay relief order. Prior to stay relief, the trustee retains the right to collect the funds for the benefit of the estate (subject to the security interest of the secured creditor). *Agri-Best Holdings, LLC v. Atlanta Cattle Exchange, Inc.*, 2011 WL 3325847 (N.D. Ill. 2011).

2. Automatic stay extends to post-confirmation property vested with a debtor under his Chapter 12 plan. The debtor filed and confirmed a Chapter 12 plan that vested the property of the bankruptcy estate with the debtor at plan confirmation. The Chapter 12 plan provided that the debtor would receive his discharge upon completion of the payments under the plan. Post-confirmation, but before discharge, a creditor commenced a legal action against the debtor without obtaining stay relief. The creditor argued that the property was no longer property of the estate and, therefore, no stay was in effect. The Court disagreed and held that even though the property vested with the debtor in his Chapter 12 plan, under Code § 362(c)(5), the creditor was still stayed from taking legal action against property of the debtor. *In re Blankenship*, 2013 Bankr. LEXIS 1767 (Bankr. S.D. Ohio April 29, 2013).

3. A senior secured creditor must be adequately protected to subordinate the secured creditor to post-petition financing by an input supplier. The Bankruptcy Court ruled that the debtor's request in bankruptcy to subordinate the secured creditor to an input supplier under Code § 363(e) was not allowed because the secured creditor would not be adequately protected as a subordinated junior creditor. *In re Moore*, 2011 WL 2457343 (Bankr. N.D. Miss. 2011).

4. Post-petition financing subsidized by federal grant allowed. The debtors Herman and Hendrina Vander Vegt ("Debtors") were indebted to First Security Bank & Trust Company ("Secured Creditor") and the indebtedness was secured by a security interest in its equipment and farm products. The Secured Creditor properly filed a UCC-1. The Debtors filed a Chapter 12 bankruptcy. The Debtor filed a motion under 11 U.S.C. §364(d) to obtain post-petition financing from First National Bank ("New Lender") to build a modern manure facility. A condition of the financing was that the New Lender would receive a priority lien on the Debtor's equipment and farm products; effectively subordinating the lien of the Secured Creditor. The Debtors argued that the improvements to the property would improve the value of the Secured Creditor's collateral position. The Court agreed and held that the Secured Creditor would be adequately protected because the Debtors' project was short, result in additional revenue and the priming lien of the New Lender would be paid off upon completion of construction under a USDA grant. *In re Vander Vegt*, 499 B.R. 631 (Bankr. N.D. Iowa. Oct. 16, 2013). The Secured Creditor appealed and the District Court affirmed. *First Sec. Bank & Trust Co. v. Vander Vegt*, 511 B.R. 567 (N.D. Iowa May 27, 2014).

5. Preventing a dairy herd from going "dry" provided a quantifiable benefit to secured creditors and justified a surcharge to the lien claims of the secured creditors. The debtors Tollenaar Holsteins, Friendly Pastures and T Bar M Ranch (the "Debtors") are related dairy producers who filed Chapter 11 bankruptcy petitions. The cases were administratively consolidated. The Debtors were indebted to Bank of the West and Hartford Accidental and Life Insurance Company (the "Secured Creditors") and the debts were secured by the assets of the Debtors. The trustee requested a surcharge of the collateral of the Secured Creditors to pay the reasonable and necessary expenses incurred in preserving the estate under 11 U.S.C. § 506(c), specifically, for expenses incurred in keeping the debtors' dairy herd "wet" before the herd was sold. The Secured Creditors objected on the basis that the surcharge would not provide a quantifiable benefit to the Secured Creditors, the applicable test under 11 U.S.C. § 506(c). The Court disagreed and held that the payment of these expenses would prevent the loss of valuable permits if the dairy cows went dry. *In re Tollenaar Holsteins,* 538 B.R. 830 (Bankr. E.D. Cal. 2015).

B. Creditors, Debtors and the Bankruptcy Estate.

1. Property of the Bankruptcy Estate.

a. The delivery of corn under an agreement which provides that title will not transfer until the corn is processed by the buyer (and in which the corn is not segregated by the buyer) is property of the debtor (and therefore, property of the estate). Perdue BioEnergy sold corn to the debtor Clean Burn Fuels, an ethanol plant. The agreement provided that, even after the corn had been delivered to the debtor, the seller would retain title to the corn until the corn crossed a weighbelt for processing at the debtor's plant. The Chapter 7 trustee objected. The trustee argued that, although the contract allowed for title to transfer post-delivery, the act of delivery and the failure to identify the seller's corn while in the possession of the debtor caused title to pass and left the seller with only a reservation of a security interest in the corn under UCC § 2-501 and § 2-401(1). The Court agreed and held that the seller was only entitled to a reservation of a security interest under UCC § 2-401(1) and because the seller failed to perfect its security interest it failed to take priority to that of the bankruptcy trustee under its judgment creditor avoidance powers. *Clean Burn Fuels, LLC v. Perdue BioEnergy, LLC* (*In re Clean Burn Fuels, LLC*), 492 B.R. 445, 2013 Bankr. LEXIS 2009 (Bankr. M.D.N.C. 2013).

b. Pre-petition transfers made for adequate consideration are not property of the Estate. Debtor transferred funds from sale of grain, the proceeds of which were deposited in non-debtor entities' accounts controlled by the debtor which subsequently transferred the funds to another related limited liability company (LLC). The LLC transferred the funds to pay the personal obligations of the debtor. The transferee argued that the funds were not property of the estate at the time the bankruptcy petition was filed because the non-debtor entities and the

LLC were distinct legal entities and had dominion and control of the funds and, therefore, neither Code § 549 nor § 550 are applicable. The Court agreed with the transferee. The transferred funds were not property of the estate because the trustee was unable to show that the pre-petition transfers to the non-debtor entities were made without adequate consideration to the debtor. *Covey v. Peoria Speakeasy, Inc.* (*In re Duckworth*), 2013 Bankr. LEXIS 1396 (Bankr. C.D. Ill. Apr. 5, 2013).

c. The delivery of corn under an agreement which provides that title will not transfer until the corn is processed by the buyer remains property of the seller. Perdue BioEnergy ("Seller") sold corn to the debtor Clean Burn Fuels ("Debtor"); an ethanol plant. The agreement provided that, even after the corn had been delivered to the Debtor, the Seller would retain title to the corn until the corn crossed a weigh belt for processing at the Debtor's plant. A Chapter 7 bankruptcy was filed. The Chapter 7 trustee objected. The trustee argued that, although the contract allowed for title to transfer post-delivery, the act of delivery and the failure to identify the Seller's corn while in the possession of the debtor caused title to pass and left the seller with only a reservation of a security interest in the corn under UCC §2-501 and §2-401(1). The Court agreed and held that the Seller was only entitled to a reservation of a security interest under UCC §2-401(1) and, because the Seller failed to perfect its security interest, it failed to take priority to that of the bankruptcy trustee under its judgment creditor avoidance powers. *Clean Burn Fuels, LLC v. Perdue BioEnergy, LLC* (*In re Clean Burn Fuels, LLC*), 492 B.R. 445, 2013 Bankr. LEXIS 2009 (Bankr. M.D.N.C. 2013).

d. Trustee has burden to show pre-petition transfers were not made for adequate consideration. The debtor David Duckworth ("Debtor") was indebted to State Bank of Toulon ("Secured Creditor") and the indebtedness was secured by a security interest in its equipment and crops. The Debtor sold crops under the names of various entities affiliated with the Debtor to avoid the attachment of the security interest on the crop proceeds. The selling entities later transferred funds to a related entity ("Transferee"). The Transferee paid the personal obligations of the Debtor. The Debtor filed a Chapter 7 bankruptcy and the trustee sought the avoidance and recovery of the transfers. The Transferee argued that the funds were not property of the estate at the time the bankruptcy petition was filed because the non-debtor entities and the Transferee were distinct legal entities and had dominion and control of the funds and, therefore, neither Code § 549 nor § 550 are applicable. The Court agreed with the Transferee. The transferred funds were not property of the estate because the trustee was unable to show that the pre-petition transfers to the non-debtor entities were made without adequate consideration to the Debtor. *Covey v. Peoria Speakeasy, Inc.* (*In re Duckworth*), 2013 Bankr. LEXIS 1396 (Bankr. C.D. Ill. Apr. 5, 2013).

e. Appreciated proceeds from the post-confirmation sale of land are not property of the bankruptcy estate subject to distribution to creditors. David and Patricia Smith (the "Debtors") were crop farmers and confirmed a Chapter 12 plan. Post-confirmation the Debtors sold some crop land for $295,576 and sought to capture the difference between the sale price and the $100,000 value in the confirmed plan. Creditors and the Chapter 12 trustee objected on the basis that the proceeds from the post-confirmation sale should be characterized as "disposable income" and distributed to the creditors. The Court disagreed and held: (a) the property vested with the Debtors at plan confirmation and, therefore, the appreciated value is not property of the bankruptcy estate; and (b) appreciated assets are not disposable income. Appreciated proceeds cannot be considered regular income as it only occurs following the one-time sale of property and, therefore, falls outside of the disposable income definition which generally requires a steady stream of payments. *In re Smith*, 514 B.R. 464 (Bankr. N.D. Tex. 2014).

2. Administrative Claims.

Secured Creditor entitled to recover advances made to pay insurance as an administrative claim. Byron Jarriel (the "Debtor") was indebted to Tippins Bank & Trust (the "Secured Creditor"). The debt was secured by a security interest in various collateral including two pieces of equipment. In order to protect its interest, the Secured Creditor required the Debtor to obtain insurance on the collateral. The Debtor filed a Chapter 12 bankruptcy. The Debtor failed to maintain insurance. The Secured Creditor made a post-petition protective advance to pay the insurance. The Debtor elected to sell the collateral post-petition and pay off the Secured Creditor in full. The Secured Creditor failed to include the costs it incurred for the insurance in tis payoff and, subsequently argued that the Secured Creditor was entitled to reimbursement for these "administrative expenses." The Debtor argued that the Secured Creditor failed to prove that the insurance was a reasonable and necessary expense of the bankruptcy estate. The Court disagreed and held that Code Section 503 governs administrative expenses and gives such post-petition expenses priority over pre-petition claims. The Court applied a two-prong test and determined the Secured Creditor's claim qualified under § 503 as it (1) arose from a post-petition transaction between the Secured Creditor and the Debtor, and (2) was an actual and necessary expense to preserve the bankruptcy estate. Because the Secured Creditor acted in good faith and in the best interests of the estate, the Secured Creditor was entitled to an administrative claim for its post-petition advances to pay the insurance premiums. *Tippins Bank & Trust v. Jarriel (In re Jarriel),* 518 B.R. 140 (Bankr. S.D. Ga. 2014).

3. Non-dischargeability actions.

a. Willful and malicious injury. Applying the clearly erroneous standard, none of the facts alleged by the creditor were sufficient to warrant a finding that the debts of the debtor were nondischargeable because of a willful and malicious injury. Code § 523(a)(6) excepts from discharge debts that the debtor entered into with the creditor, while knowing that the agreement is certain or almost certain to cause financial harm to the creditor. The creditor presented four pieces of evidence that it believed proved the debtor knew the agreement would harm the creditor. The Court agreed that the Bankruptcy Court's interpretation of the evidence was more plausible than the creditor's interpretation. Therefore, the Court upheld the Bankruptcy Court's decision that the creditor's debt was not excepted from discharge under Code § 523(a)(6). *In re Jeffrey Thoms (Van Daele Bros Inc. v. Thoms)*, 460 B.R. 749 (B.A.P. 8th Cir. 2012).

b. Sale of collateral without consent of secured creditor constitutes willful and malicious injury and is non-dischargeable. Mark and Tammy Shelmidine (the "Debtors") were married and owned and operated a dairy farm. The Debtors took out three loans from the Farm Service Agency (the "Secured Creditor") which were each secured by farm equipment, machinery, crops, and cattle (the "Collateral"). The Secured Creditor perfected its security interests and each of the security agreements required the Debtors to receive FSA approval before selling or otherwise altering the Collateral. The Debtor sold cattle without the Secured Creditor's authorization. The Debtors used the proceeds from these sales to pay off other creditors but never offered any of the proceeds to the Secured Creditor. The Debtor filed a Chapter 7 bankruptcy. The Secured Creditor filed an adversary action under 11 U.S.C.A. § 523(a)(6) asserting willful and malicious injury. The Secured Creditor argued that the Debtors' use of the cash proceeds from the unauthorized sale was willful and malicious under § 523(a)(6). The Debtors maintained that the close, "supervised credit" relationship between the Debtors and the Secured Creditor meant the sales were impliedly authorized by the Secured Creditor. The Court disagreed and found in favor of the Secured Creditor following a two-part analysis under § 523(a)(6) that required (1) willful injury and (2) malice. First, the court found the Debtors subjectively intended to injure the Secured Creditor when it sold the cattle and failed to apply the proceeds to any of the debt held by the FSA. Second, the Court found the Debtors used the proceeds from the collateral sales to elevate certain creditors over the Secured Creditor, which implied malice. The Court ruled that the debt held by the Secured Creditor was non-dischargeable. *United States v. Shelmidine (In re Shelmidine)*, 519 B.R. 385 (Bankr. N.D.N.Y. 2014).

c. Breach of duties under Perishable Agricultural Commodities Act (PACA) subjects debtor to non-dischargeability action. Stanley Yerges (the "Debtor") was the sole owner of a grocery store called the Red Onion LLC (the "Store"). The Debtor had a long career of working in the grocery industry and was experienced in buying, selling, and marketing produce. H. Brooks and Company, LLC (the "Producer Seller") was a Minnesota produce company that sold perishable agricultural commodities. Both parties had significant familiarity and experience with PACA and both held PACA licenses. During the operation of the Store, the Debtor made numerous purchases from the Producer Seller that involved perishable commodities protected by the PACA trust. The Store and the Debtor were indebted to National Exchange Bank (the "Secured Creditor"), a lender that held a security interest in nearly all the Store's assets. The Store incurred financial losses and the parties entered into a liquidation plan with the Secured Creditor. The plan almost completely favored the Secured Creditor, to the exclusion and detriment of all other creditors, including the Producer Seller. The plan also benefited the Debtor by reducing the individual debt obligations of the Debtor to the Secured Creditor. At the time the deal was reached with the Secured Creditor, the Store owed the Producer Seller $56,961.59. To recover this amount, the Producer Seller sued both the Store and the Debtor. The Producer Seller was successful against the Store, but the prior to a state court decision on the Debtor's individually liability, the Debtor filed a Chapter 7 bankruptcy. The Producer Seller filed an adversary complaint to except its PACA debt from discharge under 11 U.S.C.A. § 523(a)(4). The Court held that the debt was non-dischargeable on the basis that: (1) a fiduciary relationship existed between the parties when the debt occurred and (2) the debt was created by fraud or defalcation. The Court held the Debtor acted with knowledge that his conduct would violate his duties under PACA. The Debtor essentially pled ignorance saying he thought PACA's only role was preservation of food quality. The Court found this "a dubious and disingenuous plea of ignorance" and determined the Debtor's extensive experience in the industry made this defense untenable. *H. Brooks & Company, LLC v. Yerges (In re Yerges)*, 512 B.R. 916 (Bankr. W.D. Wis. 2014).

d. Sale of collateral without consent of secured creditor does not constitute larceny or embezzlement; may constitute willful and malicious injury. David and Kristen Pitz (the "Debtors") owned and operated a crop farm. The Debtors were indebted to Peoples Savings Bank (the "Secured Creditor"). The debt was secured by a security interest in the crops of the Debtors. The Debtors sold the crops and did not apply the crop proceeds against the loan. The Debtors filed bankruptcy. The Secured Creditor filed an adversary action asserting that the sale of crops constituted larceny, embezzlement, or a willful and malicious injury and, therefore, the debt should be non-dischargeable under 11 U.S.C. § 523(a)(4) and (6). The court dismissed the larceny and embezzlement claims under § 523(a)(4) because a security interest is not the property of another. The court held there was sufficient legal basis to proceed to trial on the willful and malicious injury claim under § 523(a)(6) because there was a factual issue as to whether the Debtors intended to defraud the Secured Creditor. *In re Pitz*, 2016 WL 1530003 (Bankr. N.D. Iowa 2016).

e. Misinformation used in the solicitation of investors constituted fraud; not embezzlement, larceny or willful and malicious injury. California Farms, Inc. and California Organics, LLC (the "Companies") sold gourmet organic salads to grocery stores. James Roberts (the "Debtor") formed and marketed the Companies to investors. Michael Barnes and California Farm Investors LLC (the "Investors") were investors of the Companies. The Debtor filed a Chapter 7 bankruptcy. The Investors brought an adversary proceeding to except from discharge the investments made by the Investors on account of the alleged fraud, embezzlement, larceny and willful and malicious injury committed by the Debtor in soliciting investors. The court agreed, in part, and held that: (a) the Debtor's conduct, when soliciting investors in the Companies, in failing to disclose that the Companies' executive manager was a disbarred California attorney who had been convicted of mail and wire fraud, was in nature of false representation, that he made with fraudulent intent, and on which investors justifiably relied to their detriment and was actionable under 11 U.S.C. § 523(a)(2)(A); (b) the debtor also committed actionable fraud under 11 U.S.C. § 523(a)(2)(B) in providing potential investors with offering materials which failed to disclose known risks, which boasted about the Companies 's experience when in fact it was just starting out, which falsely stated that Companies would be growing its own produce, and which contained wildly optimistic financial projections which the Debtor made no attempt to verify; (c) while Companies' purchases from PACA growers may have created an express trust relationship between the Debtor and unpaid growers, the purchases did not place the Debtor in trust relationship with the Investors for purposes of 11 U.S.C. § 523(a)(4); (d) the Investor failed to establish any "embezzlement" or "larceny," under 11 U.S.C. § 523(a)(4) in the Companies' use of funds solicited from the Investors either to purchase produce from PACA growers or to fund management draws; and (e) Debtor's conduct did not rise to level of "willful and malicious injury" under 11 U.S.C. § 523(a)(6). *In re Roberts*, 538 B.R. 1 (Bankr. C.D. Cal. 2015).

C. Chapter 7.

1. Failure to explain loss of assets. Bankruptcy Appellate Panel upheld Bankruptcy Court's decision that debtors failed to adequately explain the disappearance of 117 head of cattle; therefore, the debtors could not discharge their remaining debt to the creditor under Code § 727(a)(5). According to the Bankruptcy Appellate Panel for the Eighth Circuit this case "boil[ed] down" to credibility. Section 727(a)(5) provides that "the court shall grant the debtor discharge, unless . . . the debtor has failed to explain satisfactorily. . . any loss of assets . . . to meet the debtor's liabilities." Here, the burden shifted to the Debtors' to satisfactorily explain why their inventory of cattle depleted by 117 head within sixty-days. After reviewing the evidence presented in the record, the Court concluded that the Bankruptcy Court did not clearly err in finding the Debtors failed to adequately explain the disappearance of the 117 head of cattle. Therefore, the Debtors' could not discharge the debt. *In re Gilbert Calvin Vilhauer (Kay Lynn*

Vilhauer and Forrest C. Allred, Trustee v. Gilbert Vilhauer and Lynn Vilhauer), 458 B.R. 511 (B.A.P. 8th Cir. 2011).

2. **False oath.** Debtor could not discharge his secured creditor's debt under Code § 727(a)(4)(A) because the evidence supported the creditor's position that the Debtor made a false oath when completing his Schedules and Statements. Code § 727(a)(4)(A) provides, in part, that "the court shall grant the debtor discharge, unless . . . the debtor knowingly and fraudulently, in or in connection with the case . . . made a false oath or account." Further, the false statement must be both material and made with intent. Intent can be proved by circumstantial evidence. Here, the Bankruptcy Appellate Panel for the Eighth Circuit affirmed the Bankruptcy Court's decision that Debtor made a false oath; and therefore, he could not discharge the Secured Creditor's debt. The Court applied a "clearly erroneous" standard of review. *In re Jay Freese (Lincoln Savings Bank v. Jay Freese)*, 460 B.R. 733 (B.A.P. 8th Cir. 2011).

3. **Pre-petition transfer of farm equipment did not constitute fraud; no basis to deny discharge.** Dean Borstead (the "Debtor") was indebted to Horizon Financial Bank (the "Secured Creditor"). The indebtedness was secured by a security interest in the equipment of the Debtor. The Debtor owed an anhydrous applicator and bat-wing mower with a neighbor (the "Joint Owner"). The Debtor transferred the anhydrous applicator and bat-wing mower to the Joint Owner in satisfaction of debts owed by the Debtor to the Joint Owner. The Debtor subsequently filed a Chapter 7 bankruptcy. The Chapter 7 trustee moved to deny discharge under 11 U.S.C. § 727 on the basis that the Debtor intended to defraud the bankruptcy estate by transferring the property to the Joint Owner. The court disagreed and held that the circumstances surrounding the transfers did not create an inference of fraud because the Debtor offered evidence substantiating the debts of the Joint Owner. *In re Borstad*, 550 B.R. 803 (Bankr. D.N.D. 2016).

D. Chapter 11.

1. **Code § 363 Credit Bids.** Debtor's Chapter 11 cramdown plan denied because it did not permit a secured creditor to credit-bid at the asset auction. The issue before the Supreme Court was "whether a Chapter 11 bankruptcy plan may be confirmed over the objection of a secured creditor pursuant to 11 U.S.C. § 1129(b)(2)(A) if the plan provides for the sale of collateral free and clear of the creditor's lien, but does not permit the creditor to 'credit-bid' at the sale." To succeed on a "cramdown" plan over the objection of a secured creditor, the debtor must meet one of § 1129(b)(2)(A)'s three requirements in order to be deemed "fair and equitable" with respect to the nonconsenting creditor's claim. The second provision provides that secured creditors can still credit-bid in an auction. The third provision provides the general guideline that "for the realization by such holders of the indubitable equivalent of such claims." The Court held that provision two is a subset of provision three. That is, the third provision applies to "all" cramdown

plans, which include all of the plans within the more narrow category described in provision two. Therefore, because credit-bidding must be allowed, the Debtor's plan could not be approved. *Radlax Gateway Hotel, LLC, et al. v. Amalgamated Bank*, 566 U.S. ___ (2012).

2. Cause to Appoint Trustee. A trustee is appropriate if during an involuntary Chapter 11 bankruptcy case the managing partner of the bankrupt entity remained embattled in lateral litigation involving fraud, engaged in self-dealing, and committed number delay tactics on account of mental illness and distress from litigation. The preponderance of the evidence showed that cause existed to appoint a trustee. The Court found most persuasive that the majority, if not all, of Debtor's creditors filed separate suits against him that alleges fraud. The Court also noted the fact that Debtor failed to pay market rent for the land he owned and farmed, and he refused to respond to a reasonable offer for the Texas land. The Court claimed Debtor, therefore, is engaging in self-dealing. *In re Keeley and Gradanski Land Partnership (Keeley and Grabanski Land Parnterhip v. John Keeley; Choice Financial Group)*, 455 B.R. 153 (B.A.P. 8th Cir. 2011).

E. Chapter 12.

1. Eligibility.

a. "Farming Operation" Requirement.

i. Debtor who owns farm equipment and farms 31 acres is engaged in farming operation for purposes of eligibility under Chapter 12. The debtor was a partner in a farming operation that dissolved in 2010. Although the debtor retained some farm assets, the debtor agreed to transfer substantially all of the farm assets to the other partner. The debtor filed a Chapter 12 bankruptcy and the IRS argued that the debtor was not eligible for Chapter 12 relief because the debtor was not engaged in a farming operation. The Court disagreed and held that the debtor because the retained some farm equipment and continued to farm 31 acres, the debtor was engaged in a farming operation. *In re Hemann*, 2013 Bankr. LEXIS 1385 (Bankr. N.D. Iowa Apr. 3, 2013).

ii. Tree farming is a farming operation only if there is an integrated operation. Debtor owned real estate and planted tree seedlings on the property for later harvest. The Chapter 12 trustee objected to confirmation of a debtor's plan on the basis that, under *In re Miller*, 122 B.R. 360 (Bankr. N.D. Iowa 1990), tree farming was not a farming operation under 11 U.S.C.S. § 101(21). The debtor argued that, under the expansive definition of a farming operation under *In re Sugar Pine Ranch*, 100 B.R. 28 (Bankr. D. Or. 1989), tree farming is a farming operation. The Court found that, unlike *In re Sugar Pine Ranch*, the debtor did not have an integrated farming operation because there were no tree management plan or ongoing income from the sale of trees and, therefore, the debtor was not eligible for Chapter 12 relief. *In re McMahon Family L.P.*, 2013 Bankr. LEXIS 2771, 58 Bankr. Ct. Dec. 51 (Bankr. E.D. Wis. July 10, 2013).

iii. A bird game farm is a "farming operation" for the purposes of eligibility. The debtor Marone Acee ("Debtor") owned and operated a bird game farm. The Debtor filed a Chapter 12 bankruptcy. Two creditors objected to the Chapter 12 plan on the basis that the Debtor was not eligible for Chapter 12 bankruptcy because a bird game farm is not a "farming operation." The Court disagreed and held, that under totality of the circumstances test, the Debtor was engaged in a farming operation because the Debtor fed, maintained, protected and released the game birds and experienced the traditional risks associated with farming such as risk of disease and death. *See In re Acee*, 2013 Bankr. LEXIS 4789 (Bankr. N.D.N.Y. Nov. 12, 2013).

iv. Cattle raised under a production contract constitutes a "farming operation" for the purposes of eligibility. The debtors Randy and Geneva Perkins ("Debtors") received social security benefits, raised 262 head of cattle under a production contract and raised and sold 37 head of cattle in their names. The Debtors filed a Chapter 12 bankruptcy. A creditor objected to the Chapter 12 plan on the basis that raising cattle under a production contract is not a "farming operation" for purposes of 11 U.S.C. §101(21). The Court disagreed and held that, under totality of the circumstances test, the Debtors were engaged in a farming operation because the Debtors performed the physical labor associated with raising cattle. *In re Perkins*, 2013 Bankr. LEXIS 4539 (Bankr. E.D. Tenn. Oct. 30, 2013).

v. Raising hay for others (and not for consideration) is not a "farming operation" for the purposes of eligibility. The debtor David McLawchlin ("Debtor") was previously a rice farmer but, because of a permanent disability, was limited to raising hay for relatives for no consideration. The Debtor filed a Chapter 12 bankruptcy. A creditor objected to the Chapter 12 plan on the basis that the Debtor was not eligible for Chapter 12 bankruptcy because his sole source of income was social security. The creditor asserted that raising hay that is gifted to relatives is not a "farming operation" for purposes of 11 U.S.C. §101(21). The Court agreed and held that, under the totality of the circumstances test, the Debtor only satisfied some of the relevant factors. The Court gave great weight to the fact that the Debtor's activities were not subject to the inherent risks of farming. *In re McLawchlin*, 511 B.R. 422 (Bankr. S.D. Tex. Jun. 5, 2014).

vi. Game farm constitutes a farming operation for purposes of Chapter 12 eligibility. Marone Acee (the "Individual Debtor") operated a bird game farm on the property of a related entity Boulder Meadows (the "Corporate Debtor"). The Individual Debtor and the Corporate Debtor filed for Chapter 12 bankruptcy. Two creditors objected to the Chapter 12 plan on the basis that the Individual Debtor was not eligible for Chapter 12 bankruptcy because a bird game farm is not a "farming operation" for purposes of 11 U.S.C.A. § 109(e) and § 101(21). The Bankruptcy Court disagreed and held, that under the totality of the circumstances test, the Individual Debtor was engaged in a farming operation because the Individual Debtor fed, maintained, protected and released the game birds and experienced the traditional risks associated with farming such to risk of disease and death. The Court held the Corporate Debtor was not eligible for Chapter 12 because the Corporate Debtor did not have this same involvement in the game farm. *United States Dist. Court N. Dist. of N.Y. Marone Acee v. Oneida Sav. Bank*, 529 B.R. 494 (N.D.N.Y. 2015).

vii. Contracting with a third party for the planting and harvesting of a crop constitutes farming. Larry and Sandra Williams (the "Debtors") rented farmland and contracted with their son to plant and harvest the crop on the rented farmland. The Debtors filed a Chapter 12 bankruptcy. The Chapter 12 Trustee moved to dismiss the bankruptcy arguing that the Debtors were not eligible to be debtors under Chapter 12 because they were not "engaged in a farming operation" for purposes of 11 U.S.C. § 101(18). The court disagreed and held that a Chapter 12 debtor does not have to own the land upon which the farming occurred nor does the debtor have to do all of the physical labor involved with farming. The Debtors entered into the lease contract with their son for their own benefit, owned the farm equipment, purchased the seed, fertilizer, and materials used in the operation, entered into insurance contracts in their own names, and made all of the decisions as to what crops would be planted and incurred all profits and losses. The court held that the Debtors were sufficiently involved with the farming operation to be engaged in a farming operation for purposes of Chapter 12 eligibility. *In re Williams*, 2016 WL 1644189 (Bankr. W.D. Ky. 2016).

b. 50% Farming Income Requirement.

i. Test for Gross Income is the federal tax code definition of "gross income." The Court adopted the majority view that the test for gross income, for purposes of Chapter 12 eligibility, is the federal tax code definition of "gross income." The minority case-by-case approach was rejected by the Court. *In re DeGour*, 2012 LEXIS 3884 (Bankr. C.D. Cal. Aug. 24, 2012).

ii. Gross Income of Debtors includes income from wholly owned S-corporation. The gross income derived from an S-corporation wholly owned by the debtor, instead of just the net income, should be considered gross income for purposes of Chapter 12 eligibility. Although no direct precedent, the Court considered a similar analysis for purposes of determining whether income from an S-corporation should be taken into account in determining whether the debtor is a "family farmer." Because income from an S-corporation passes through to the shareholders, the corporation's income is attributable to the debtor/shareholder. *In re DeGour*, 2012 LEXIS 3884 (Bankr. C.D. Cal. Aug. 24, 2012).

iii. Income incurred through a dissolved partnership may be considered for purposes of the 50% income eligibility requirement. The debtor was a partner in a farming operation that dissolved in 2010. Although the debtor retained some farm assets, the debtor agreed to transfer substantially all of the farm assets to the other partner. The debtor filed a Chapter 12 bankruptcy and the IRS argued that the debtor was not eligible for Chapter 12 relief because the less than 50% of the debtor's income was related to the debtor's current farming operation being reorganized. The Court disagreed and held that the debtor could include the income related to the earlier farming partnership because 101(18)(A) does not limit the income to the income related to the farming operation to be reorganized and the income had "some connection" to the debtor's farming operation. *In re Hemann*, 2013 Bankr. LEXIS 1385 (Bankr. N.D. Iowa Apr. 3, 2013).

iv. CRP payments and strawberry and game farm proceeds are farm income for the purposes of eligibility. The debtor Marone Acee ("Debtor") owned and operated a bird game farm. The Debtor filed a Chapter 12 bankruptcy. Two creditors objected to the Chapter 12 plan on the basis that the Debtor was not eligible for Chapter 12 bankruptcy because the Debtor failed to have sufficient farm income for purposes of 11 U.S.C. §101(18). The Court disagreed and held that because over 50% of the Debtor's gross income was as a result of CRP payments, a strawberry crop and product proceeds, and pheasant-related income the

Debtor did qualify. *See In re Acee*, 2013 Bankr. LEXIS 4789 (Bankr. N.D.N.Y. Nov. 12, 2013).

v. A settlement payment from a lawsuit that arose from farming activities can qualify as farming income. The debtor David McLawchlin ("Debtor") was previously a rice farmer but, because of a permanent disability, had limited mobility. The only source of farm income was $30,000 from the settlement of a lawsuit for crop loses in 2006, 2007 and 2008. The Debtor filed a Chapter 12 bankruptcy. A creditor objected to the Chapter 12 plan on the basis that the Debtor was not eligible for Chapter 12 bankruptcy because the Debtor failed to have sufficient farm income for purposes of 11 U.S.C. §101(18). The Court disagreed and held that the settlement proceeds arose out of a farming operation and were sufficient to meet the farm income requirements, even though the conduct that gave rise to the settlement occurred many years before. *In re McLawchlin*, 511 B.R. 422 (Bankr. S.D. Tex. Jun. 5, 2014).

c. 50% Farming Debt Requirement.

i. Debt "Arising out of Farming Operation." A debt "arises out of a farming operation" must have some connection to the debtor's farming activity. According to the Court, to meet the third independent requirement of Code § 101(18)(A), the debtors must only demonstrate that their debt had some connection to their farming operation. The Bankruptcy Court found the debtors' home constituted an essential part of their farming operation because it provided an administrative epicenter for the farming operation and close proximity to the land that enabled better farm management. Therefore, the Court concluded, the farmhouse's nexus to the farming operation was strong enough so its household debt could be calculated into the debtors' total farming debt. *In re Reson Lee Wood (First National Bank of Durango v. Reslon Lee Woods et al.)*, 465 B.R. 196 (B.A.P. 10th Cir. 2012).

ii. Debt incurred through a dissolved partnership may be considering for purposes of the 50% debt eligibility requirement. The debtor was a partner in a farming operation that dissolved in 2010. Although the debtor retained some farm assets, the debtor agreed to transfer substantially all of the farm assets to the other partner. The debtor filed a Chapter 12 bankruptcy and the IRS argued that the debtor was not eligible for Chapter 12 relief because the less than 50% of the debtor's debt was related to the debtor's current farming operation being reorganized. The Court disagreed and held that the debtor could include the debt related to the earlier farming partnership because 101(18)(A) does not limited the debt to the debt related to the farming operation to be reorganized and the debt had "some connection" to the debtor's farming operation. *In re Hemann*, 2013 Bankr. LEXIS 1385 (Bankr. N.D. Iowa Apr. 3, 2013).

iii. "Direct use" test is appropriate test for determination of farming debt in the 10th Circuit. The debtors Reson and Shuan Woods ("Debtors") owned and operated a hay farming operation. The Debtors filed a Chapter 12 bankruptcy. A creditor objected to the Chapter 12 plan on the basis that the Debtors were not eligible for Chapter 12 bankruptcy because the Debtors failed to have sufficient farm debt for purposes of 11 U.S.C. §101(18). The 10th Circuit agreed and held that a home construction loan that was used to pay off a loan for the purchase of their farmland was not excluded from the debt total because it arose from the farm operations. The bankruptcy court had applied the "some connection" test to the Debtors' farming activities, and concluded that the presence of the farming operation's office and records in the residence, and its proximity to the farm resulted in the construction loan being connected to the farming activities. The creditor appealed and the 10th Circuit held the bankruptcy court applied the wrong test, and remanded for a determination under the "direct use" test whether the Debtors' loan "arises out of" their farming operation. The court explained that the "direct use" test is most proper because it is singularly focused on whether the loan proceeds were directly applied to or used in a farming operation, and best embodies the "direct-and-substantial" standard for connection between the loan and the farming operations. *First Nat'l Bank v. Wood (In re Woods)*, 743 F.3d 689 (10th. Cir. 2014).

iv. Presumption that the home mortgage note secures non-farm debt. The debtor Acee ("Debtor") owned and operated a bird game farm. The Debtor filed a Chapter 12 bankruptcy. Two creditors objected to the Chapter 12 plan on the basis that the Debtor was not eligible for Chapter 12 bankruptcy because the Debtor failed to have sufficient farm debt for purposes of 11 U.S.C. §101(18). The Court agreed and held that because the home mortgage debt did not secure farm debt the home mortgage debt was not farming debt for purposes of Chapter 12 eligibility *See In re Acee*, 2013 Bankr. LEXIS 4789 (Bankr. N.D.N.Y. Nov. 12, 2013). The Debtor appealed and the District Court affirmed on the basis that 11 U.S.C.A. §101(18)(A) creates a presumption that residential debt is not farm-related debt. Although the presumption can be overcome with evidence of a connection between the residential debt and the farming operation, there was no evidence present in this case. *In re Acee*, 2014 Bankr. LEXIS 89 (Bankr. N.D.N.Y. Jan. 10, 2014).

v. When the debtor secured by the principal residence does not arise from the farming operation, the amount of principal residence debt is excluded entirely from the Chapter 12 eligibility calculation. Marone Acee (the "Individual Debtor") operated a bird game farm on the property of a related entity Boulder Meadows (the "Corporate Debtor"). The Individual Debtor and the Corporate Debtor filed for Chapter 12 bankruptcy. Two creditors objected to the Chapter 12 plan on the basis that the Individual Debtor was not eligible for Chapter 12 bankruptcy because less than 50% of the debtor's aggregate, noncontingent, liquidated debts arose out of the farming operation, as required by 11 U.S.C.A. § 109(e) and § 101(18). The Bankruptcy Court agreed and held that the Individual Debtor failed to prove his personal residence should be included in the calculation (i.e. prove it arose out of the farming operation) and, as a result, he did not reach the 50% threshold. The Individual Debtor appealed. The District Court overruled and held, in reliance on *In re Woods*, 743 F.3d 689 (10th Cir. 2014), that because the principal residence debt was not farm related, it should be completely excluded from the debt calculation. *United States Dist. Court N. Dist. of N.Y. Marone Acee v. Oneida Sav. Bank*, 529 B.R. 494 (N.D.N.Y. 2015).

vi. For Chapter 12 eligibility purposes, all claims enforceable against either the debtor or its property are allowed. Carolyn Davis (the "Debtor") owned a ranch and other properties in California. The Debtor filed for Chapter 7 in July 2010 and received a discharge that released her from personal liability for the unsecured claims associated with her properties. Then, in March 2011, the Debtor filed a Chapter 12 bankruptcy. At the time of her filing, her properties were valued at $1.6 million. The liens on those properties totaled $4.1 million, $2.5 million of which was unsecured. The Bankruptcy Court dismissed her petition on the basis that the $4.1 million was over the $3,792,650 aggregate debt limit on eligibility for filing Chapter 12. The Debtor appealed, arguing that the unsecured portions of her secured creditor's claims should not be included in her aggregate debt total for Chapter 12 eligibility purposes. The Bankruptcy Appellate Panel disagreed and affirmed the bankruptcy court's decision dismissing the Chapter 12. It stated that the aggregate debt calculation, as required by 11 U.S.C.A. § 109(e) and § 101(18), includes all obligations enforceable against the Debtor's property, even if such obligations were not enforceable against the Debtor personally or if there was sufficient value in the property. The Ninth Circuit affirmed this decision and explained that a creditor's claim is still a "debt" if it is enforceable against either the debtor or the debtor's property. Therefore, regardless of the Debtor's Chapter 7 discharge, the "aggregate debt" still includes the full amount of all creditors' claims against the property of the debtor for purposes of calculating Chapter 12 eligibility. *In re Davis*, 778 F.3d 809 (9th Cir. 2015).

2. **Dismissal/Conversion.**

a. **The debtor failed to show substantial possibility of success to stay foreclosure pending an appeal.** The debtor filed a Chapter 12 bankruptcy to stay a scheduled foreclosure sale. It was the debtor's second Chapter 12 filing. The first Chapter 12 was dismissed because the debtor was unable to demonstrate that her plan was feasible. The second bankruptcy was also dismissed because the debtor, again, failed to demonstrate her second bankruptcy was feasible and the debtor appealed. The debtor motioned the Court to stay the foreclosure pending the appeal. The Court denied the motion because the debtor failed to establish a substantial possibility of success on the merits of the appeal. The debtor failed to demonstrate that there were any changes in circumstances to find her plan was feasible. *Ellis v. NBT Bank, N.A.*, 2013 WL 140405 (N.D.N.Y Jan. 11, 2013).

b. **Several bankruptcy filings and misrepresentation of facts is cause to dismiss a Chapter 12.** The debtor filed three Chapter 12 bankruptcies in 29 months, misrepresented of the facts for the debtor's scheduled debt, filed the third bankruptcy to avoid state court litigation, and the debtors failed to comply with the Court's orders in aid of discovery for a motion to value collateral; all of which constitute a bad faith filing and cause to dismiss the bankruptcy under Code § 1208(c). *In re Cabral*, 2013 Bankr. LEXIS 2382 (Bankr. E.D. Cal. June 3, 2013).

c. **Filing proposed plan after 90 day deadline is not absolute right to dismiss.** The debtors Herman and Hendrina Vander Vegt ("Debtors") were indebted to First Security Bank & Trust Company ("Secured Creditor") and the indebtedness was secured by a security interest in its equipment and farm products. The Secured Creditor properly filed a UCC-1. The Debtors filed a Chapter 12 bankruptcy. The Debtors did not file a Chapter 12 plan within the 90 days required under 11 U.S.C. §1221. The Secured Creditor moved to dismiss. The Court held that §1221 was not an absolute deadline and the delays were caused by "the creditor's resistances to the Debtor's motions and the bankruptcy court's issuance of orders". *In re Vander Vegt*, 499 B.R. 631 (Bankr. N.D. Iowa. Oct. 16, 2013). The Secured Creditor appealed and the District Court affirmed holding that the Debtor may have additional time to file a plan if the delay was not the debtor's fault. *First Sec. Bank & Trust Co. v. Vander Vegt*, 511 B.R. 567 (N.D. Iowa May 27, 2014).

d. **Chapter 12 bankruptcy case dismissed after Debtor engaged in acts that negatively impacted the estate and destroyed value for his creditors.** Charlie Dickenson (the "Debtor") filed for Chapter 12 in August 2013. The Chapter 12 Trustee filed a motion to dismiss under § 1208 and the Court granted on the basis that the Debtor (1) failed to fully disclose on his petition schedules, (2) failed to mention sales/exchanges he entered into immediately preceding (and even immediately following) his bankruptcy filing, (3) failed to identify his business partnerships, (4) made incorrect property valuations, (5) transferred encumbered assets, and (6) failed to develop a confirmable plan. *In re Dickenson*, 517 B.R. 622 (Bankr. W.D. Va. 2014).

e. Debtor's Chapter 12 case was dismissed because the Debtor failed to show a reasonable likelihood of success. Keith's Tree Farms, a general partnership (the "Debtor") grew and sold trees. The Debtor filed for Chapter 12 bankruptcy. The Debtor proposed four Chapter 12 plans. Upon filing the fourth Chapter 12 plan, the Trustee moved to dismiss the bankruptcy under Code Section 1208(c)(5). The Court agreed and held the Debtor was unable to confirm a feasible plan based on the Debtor's historical performance as well as the current condition of the Debtor's business. The Court found testimony from the general partners regarding the partnership's financials to be unreasonably optimistic and containing no reasonable data or projections to support confirmation of a Chapter 12 plan. *In re Keith's Tree Farms*, 519 B.R. 628 (Bankr. W. Dist. Va. 2014).

f. Stay relief motion must have been filed in first bankruptcy to disqualify debtor in second bankruptcy; stipulation granting stay relief is not sufficient to dismiss second bankruptcy. Craig and Lynda Herremans (the "Debtors") were indebted to American Farm Mortgage Company (the "Secured Creditor"). The Debtors filed a Chapter 12 bankruptcy and confirmed a Chapter 12 plan (the "First Bankruptcy"). In conjunction with the confirmed Chapter 12 plan, the Debtors agreed that if the Debtors failed to make payment to the Secured Creditor that the Secured Creditor would be entitled to stay relief after filing an affidavit with the court. The Debtors failed to make a payment and the Secured Creditor filed the affidavit. The Debtors dismissed the First Bankruptcy and subsequently filed another bankruptcy (the "Second Bankruptcy"). The Secured Creditor moved to dismiss arguing that the combination of the right to stay relief in the First Bankruptcy and the filing of the Second Bankruptcy disqualified the Debtors from Chapter 12 under the serial filing restrictions under 11 U.S.C. § 109(g)(2). The court disagreed and held that § 109(g)(2) is only effective if "a request for relief" or stay relief motion has been filed in the first bankruptcy. In this case, the Secured Creditor never filed a stay relief motion in the First Bankruptcy. Instead, the Debtors just consented to stay relief in the First Bankruptcy in the event of a payment default. The filing of the affidavit was not a "request for relief" for purposes of § 109(g)(2). *In re Herremans*, 532 B.R. 701 (Bankr. W.D. Mich. 2015).

3. Plan.

a. Administration Claims.

i. Treatment of Capital Gains. Income taxes recognized from the sale of a farm during Chapter 12 bankruptcy are not dischargeable and must be paid by the debtor. In a 5-4 decision authored by Justice Sotomayor (joined by C.J. Roberts, Scalia, Thomas, and Alito), the Supreme Court held that a federal income tax liability recognized from a farm sale during Chapter 12 bankruptcy proceedings is not incurred by the bankruptcy estate and therefore is not dischargeable. Under Code § 1222(a)(2)(A), certain governmental claims resulting from the disposition of farm assets are reduced to unsecured, general claims that may be discharged after incomplete satisfaction. That rule, however, only applies to claims in the debtor's plan that are "entitled to priority under section 507." Section 507 lists ten categories of claims—two of which relate to taxes. The pertinent exception here is Code § 507(a)(2). That provision covers "administrative expenses allowed under section 502(b)." Code § 502(b) includes "any tax incurred by the estate." Therefore, for post-petition taxes to be entitled to priority under section 507 and eligible for the section 1222(a)(2)(A) exception, the taxes must be "incurred by the estate." *Lynwood D. Hall, ET UX. v. United States*, 132 S. Ct. 1882, 182 L. Ed. 2d 840 (2012).

ii. Priority Stripping of Tax Claims. The claims of the IRS and Iowa Department of Revenue were subject to the priority-stripping effect of Code § 1222(a)(2)(A). The debtor was a partner in a farming operation that dissolved in 2010. Although the debtor retained some farm assets, the debtor agreed to transfer substantially all of the farm assets to the other partner. The debtor filed a Chapter 12 bankruptcy and the IRS argued that the debtor was not eligible for the benefits of Code § 1222(a)(2)(A) because the Supreme Court decision in *Hall* applied to the pre-petition transfer of farm assets by the debtor through the dissolution of the farming partnership. The Court disagreed and held that *Hall* was limited to the sale of post-petition assets and, therefore, the debtor was entitled to treat the resulting tax liability from the transfer of the partnership assets as a unsecured claim. *In re Hemann*, 2013 Bankr. LEXIS 1385 (Bankr. N.D. Iowa Apr. 3, 2013).

iii. Debtor Can Not Use Estate Assets to Pay Post-Petition Capital Gains Taxes. The debtor proposed to use the equity from the sale of 48 acres to pay post-petition capital gains incurred by the debtor from the earlier sale of equipment. The objecting creditors and Chapter 12 trustee argued that, under the U.S. Supreme Court decision in *Hall*, estate assets cannot be used to pay post-petition capital gains taxes. The debtor argued that *Hall* was not applicable; arguing that *Hall* only limited the debtor from categorizing capital gains as a general unsecured claim for purposes of plan confirmation. The Court disagreed and held that *Hall* was more expansive than just the treatment of capital gains taxes and prohibited to use of estate assets to pay post-petition capital gains taxes because the tax obligations were not tax obligations of the bankruptcy estate; and instead, are tax obligations of the individual. *Hall* held that post-petition taxes are outside Section 503(b) and, therefore, the taxes are not an allowed claim that may be treated within a Chapter 12 plan. *In re Ferguson*, 2013 Bankr. LEXIS 6 (Bankr. C.D. Ill. Jan. 2, 2013).

iv. Proceeds of livestock and crops are not farm assets "used in a farming operation" and, therefore, the debtor was not eligible to treat the related tax liability as an unsecured claim. The debtor raised crops and finished cattle. The debtor filed a Chapter 12 bankruptcy and argued that the sale of crops, cattle and the crop insurance proceeds received by the debtor were farm assets "used in the debtor's farming operations" and, therefore, under Code § 1222(a)(2)(A) the debtor was entitled to treat the related tax liability as a general unsecured claim. The Court disagreed and held that, although the proceeds from the sale of farm products and crop insurance proceeds were farm assets, the proceeds were not "used in the debtor's farming operation" and, therefore, the debtor was not eligible for beneficial treatment under Code § 1222(a)(2)(A). *In re Keith*, 2013 Bankr. LEXIS 2802 (Bankr. D. Kan. 2013).

v. The marginal method (as opposed to the proportional method) is the appropriate calculation of the Code § 1222(a)(2)(A) claims. The debtor raised crops and finished cattle. The debtor filed a Chapter 12 bankruptcy and the IRS argued, for purposes of Code § 1222(a)(2)(A), the Court should apply the proportional method to calculate the resulting unsecured claim of the IRS. The Court disagreed and held that the marginal method adopted by *Knudsen* and *Ficken* (and not overturned by the Supreme Court in *Hall*) represent the proper calculation. *In re Keith*, 2013 Bankr. LEXIS 2802 (Bankr. D. Kan. 2013).

b. Secured Claims.

i. 15 year amortized term loan on cropland at prime plus 2.5% is customary and provides a sufficient risk factor to the secured creditor. The debtor proposed a 15 year amortization term loan on cropland at prime plus 2.5%. The secured creditor objected arguing that it is customary for loans secured by crop land to mature within five years and that the customary interest rate would be 6.25% to 8%. The Court disagreed and held in favor of the debtor on the basis that to preserve the farming operation a 15 year term is required. Prime plus 2.5% provides a sufficient risk factor under the U.S. Supreme Court decision in *Till*. *In re Wise*, 2013 Bankr. LEXIS 2299 (Bankr. D.S.C. June 3, 2013).

ii. 25 year amortized term loan on ranch property is not reasonable. The debtors owned a 900 acre ranch. The debtors filed a

Chapter 12 bankruptcy and proposed to pay the secured creditor over 25 years. The secured creditor objected on the basis that the terms were not reasonable. The Court agreed and held that a 25 year term was not reasonable under current market conditions for purposes of Code § 1225(a)(5)(B). *In re Standley*, 2013 Bankr. LEXIS 1114 (Bankr. D. Mont. Mar. 22, 2013).

iii. Prime plus 1.25% is customary and provides a sufficient risk factor to the secured creditor. The debtors owned a 900 acre ranch. The debtors filed a Chapter 12 bankruptcy and proposed to pay the secured creditor over 25 years at prime plus 1.25%. The secured creditor objected on the basis that the interest rate was not reasonable. The Court disagreed and held that prime plus 1.25% is reasonable for purposes of Code § 1225(a)(5)(B). *In re Standley*, 2013 Bankr. LEXIS 1114 (Bankr. D. Mont. Mar. 22, 2013).

iv. Proposed interest of 2.5% does not adequately address the risk of loss. The debtors Randy and Geneva Perkins ("Debtors") were indebted to Farm Credit ("Secured Creditor") and the indebtedness was secured by a security interest in the farm products of the Debtor. The Secured Creditor objected to the proposed Chapter 12 plan because the 2.5% fixed interest rate did not adequately address the risk of loss of the Secured Creditor under *Till v. SCS Credit Corp*, 541 U.S. 465 (2004). The Court agreed and held the appropriate interest rate on a secured claim was 2% over the prime rate of interest or 5.75%. *In re Perkins*, 2013 Bankr. LEXIS 4539 (Bankr. E.D. Tenn. Oct. 30, 2013).

v. Plan confirmation denied because treatment of secured claim was not commercially reasonable and inconsistent with customary lending practices and market rates. Richard and Mark Howe (the "Individual Debtors") and Howe Farms, LLC (the "LLC Debtor") filed Chapter 12 bankruptcies. NBT Bank (the "Secured Creditor") was an secured creditor which held a first priority, perfected security interest in the Debtors' personal property, including accounts, livestock, and farm equipment. The Debtors' plan proposed a twelve-year amortization period at 6% interest with a balloon payment after seven years. Secured Creditor objected to this plan on the basis that the terms were not commercially reasonable and it would not receive the present value of its claims under 11 U.S.C.A. § 1225(a)(5)(B). The Court agreed and held for a loan secured only by livestock and farm equipment, the customary lending term ranged from five to seven years. Additionally, for high-risk borrowers like the Debtors here, the interest rate should range between 9% and 10%. As a result, the plan failed to meet the requirements of cram down and plan confirmation was denied. *In re Howe Farms LLC*, 2014 Bankr. LEXIS 4385 (Bankr. N.D.N.Y. 2014).

c. Unsecured Claims.

i. Priority Stripping of Tax Claims. The claims of the IRS and Iowa Department of Revenue were subject to the priority-stripping effect of Code § 1222(a)(2)(A). The tax claims arose from the pre-petition dissolution of the debtor's 50% interest in a partnership set up for a farming operation. The disposition of debtor's farm partnership interest was a farm asset used in the debtor's farming operation. The Court held that the tax claims were subject to priority stripping under Code § 1222(a)(2)(A) because the tax claim arose from the result of a sale or other disposition of a farm asset used in the debtor's farming operation. The tax claim was therefore treated as an unsecured claim not entitled to priority under Code § 507. *In re Hemann*, 2013 Bankr. LEXIS 1385 (Bankr. N.D. Iowa Apr. 3, 2013).

ii. Treatment of Capital Gains. Postpetition tax liabilities from the post-confirmation sale of a farm. Debtor's postpetition tax liability was not an allowable administrative expense. The Court found that a postpetition income tax liability incurred by a debtor, personally, is not an allowable prepetition claim under § 502 of the Bankruptcy Code. Further, the Court held that it was settled that a debtor's postpetition income tax liability is not allowable as an administrative expense under either Code § 1222(a)(2)(A) or § 503(b)(1)(B). *In re Ferguson*, 2013 Bankr. LEXIS 6 (Bankr. C.D. Ill. Jan. 2, 2013).

d. Feasibility.

i. Debtor filed Chapter 12 bankruptcy and proposed a plan to repay a debt over a 15 year period. The Court determined the plan must be confirmed if it meets the requirements of Code § 1225. Additionally, the Court must determine the feasibility of the plan for the ability of the debtor to make the payments called for in the plan and to otherwise comply with the plan. The Court noted that although feasibility is never certain, the Debtor's projections supported a finding that the plan was feasible. The Court found the extension of time for repayment of the debt was satisfactory and met the requirements of the Code. Similarly, the interest rate was sufficient, if not high, to compensate the creditor. *In re Wise*, 2013 Bankr. LEXIS 2299 (Bankr. D.S.C. June 3, 2013).

ii. Tree Farm Operator unable to make proposed plan payments. Debtor owned real estate and planted tree seedlings on the property. The tree seedlings had not matured and the debtor had no income from the sale of trees. The Chapter 12 trustee objected to confirmation of a debtor's plan on the basis that the debtor had no actual or expected income to fund its Chapter 12 plan under Code § 1225(a). The debtor argued that mature trees were available for harvest; although the debtor was unable to prove any market or interested buyer for the mature trees. The Court found that the debtor had not proved that it could make the proposed payments under the plan as required by Code § 1225(a)(6). *In re McMahon Family L.P.*, 2013 Bankr. LEXIS 2771, 58 Bankr. Ct. Dec. 51 (Bankr. E.D. Wis. July 10, 2013).

iii. Past financial history provides no reasonable probability that the plan terms will be satisfied. The debtors Randy and Geneva Perkins ("Debtors") were indebted to Farm Credit ("Secured Creditor") and the indebtedness was secured by a security interest in the farm products of the Debtor. The proposed Chapter 12 plan proposed to make a significant balloon payment at the end of the plan term. The Secured Creditor objected to the proposed Chapter 12 plan because the plan was not feasible and there was no reasonable probability that the plan terms will be satisfied. The Court agreed and held the Debtor did not have the ability to sustain and fund the plan based on their financial history. *In re Perkins,* 2013 Bankr. LEXIS 4539 (Bankr. E.D. Tenn. Oct. 30, 2013).

iv. Partial liquidation of farming operation did not result in feasible plan. Bruce and Stacie Meinders (the "Debtors") were dairy farmer and were indebted to State Savings Bank (the "Secured Creditor"). The indebtedness was secured by mortgages on farmland. The Debtors filed a Chapter 12 Plan (the "Plan") that proposed to sell a robotic milking machine and use the proceeds to purchase fifty (50) additional dairy cows. The Secured Creditor objected and the court agreed that the proceeds from the robotic milker would not be enough to purchase the minimum number of the cows needed to support the Plan and, therefore, the Plan was not feasible. *In re Meinders,* 2016 WL 1599508 (Bankr. N.D. Iowa 2016).

v. Failure to propose a feasible Chapter 12 plan is cause to dismiss. Keith's Tree Farm (the "Debtor") was a tree farm. The Debtor is indebted to Grayson National Bank (the "Secured Creditor"). The debt is secured by the real property of the Debtor. The Debtor filed a series of five Chapter 12 bankruptcy cases; with the Debtor unable to confirm a plan in the first four cases. In filing the fifth bankruptcy the Debtor changed its management and liquidated certain assets. The Secured Creditor filed a motion to dismiss arguing that even with the change in management and liquidation of assets the proposed Chapter 12 plan was not feasible, as required by 11 U.S.C. § 1225, and the case should be dismissed. The court agreed and held that the record establishes that the Debtor would not be able to make all payments under the plan or otherwise comply with the plan, that the Debtor had failed to show any reasonable likelihood of reorganization, and that the unreasonable delay in proposing a confirmable plan to the court the Debtor's gross mismanagement in failing to provide accurate financial information constituted cause to dismiss under 11 U.S.C. § 1208. *In re Keith's Tree Farm*, 2016 WL 1086758 (Bankr. W.D. Va. 2016).

vi. Chapter 12 plan was feasible even though projected revenue and expenses were optimistic. Bright Harvesting, Inc. (the "Debtor") was a custom harvester company and farmed some cropland. The Debtor is indebted to Farm Credit of New Mexico (the "Secured Creditor"). The debt is secured by the real property of the Debtor. The Debtor filed a proposed Chapter 12 plan. The Secured Creditor objected and argued that that the proposed Chapter 12 plan was not feasible, as required by 11 U.S.C. § 1225. The court disagreed and held that although the projected revenue and expenses were generally optimistic there was enough evidence in the record after modification of the plan terms by the court to find that the plan had a reasonable likelihood of success. *In re Bright Harvesting, Inc.*, 2015 WL 7972717 (Bankr. D.N.M. 2015).

e. Post-Confirmation.

i. Motion to modify confirmed plan may not void "drop dead" stay relief order. A debtor may not "modify" a confirmed Chapter 12 plan under Code § 1229 of the Bankruptcy Code to void a "drop dead" stay relief order. Code § 1229 only allows a debtor to modify a confirmed Chapter 12 plan. Code § 1229 does not allow the modification of other Chapter 12 orders. Because the stay relief order was subsequent to, and separate from, the confirmed plan, Code § 1229 does not provide any relief to the debtor. *In re Couchman*, 2012 LEXIS 3845 (Bankr. D. Kan. Aug. 20, 2012).

ii. Motion to modify was proposed in good faith even though the debtor was in default of an earlier "drop dead" stay relief order. A debtor may modify a confirmed Chapter 12 plan under Section 1229 of the Bankruptcy Code even if the debtor is in default of an earlier "drop dead" stay relief order because the default was unenforced by the secured creditor at the time the motion to modify was filed. Had the secured creditor moved to enforce the default under the conditional order prior to the motion to modify, the Court may have held that modification was not proposed in good faith; as required for modification of a Chapter 12 plan. *In re Couchman*, 2012 LEXIS 3845 (Bankr. D. Kan. Aug. 20, 2012).

iii. Post-Confirmation Financing. The plain language of the post-confirmation credit agreement entitled the creditor to certain lease payments jointly payable to the creditor and the debtor. The debtor filed a Chapter 12 bankruptcy, and the court confirmed his plan. Debtor agreed to pay the creditor $111,800 plus interest to be paid in four annual installments of $35,950.88 under the plan. The agreement provided in part, if the debtor was in default of the agreement, and debtor rented certain portions of his real estate, the creditor may retain sufficient funds from rent proceeds to cure the default. The debtor leased a portion of his real property. The lessee remitted payment of $54,000 and made the check payable to both the debtor and the creditor. The debtor defaulted on his obligations to the creditor and the creditor received the check from the lessee. The creditor executed the check and delivered the check to the debtor for signature. The debtor argued that when the creditor surrendered the lessee's check to the debtor, the creditor became an unsecured creditor and waived any claim to the rent proceeds. The Court interpreted the plain language of the agreement to require the debtor to pay the creditor from rent proceeds if he was in default of the agreement. Therefore, the Court held, the agreement entitled the creditor to the lease payment. *In re Steven Christopher Potts (Potts v. Gary Guilford)*, 469 B.R. 310 (B.A.P. 8th Cir. 2012).

iv. Chapter 12 trustee is not entitled to compensation from the sale of farm property. The debtors Kenneth and Melissa McLendons ("Debtors") own and operate a sod farm. The Debtors filed a Chapter 12 bankruptcy and, in conjunction with the filing, sold certain property. The sale was not contemplated by the Chapter 12 plan. The Debtors sought to apply the proceeds of the sale to a secured claim. The Trustee objected and argued that he was entitled to a statutory 10% fee from the proceeds. The Court disagreed and held that the trustee was not entitled to the statutory 10% fee on the proceeds of the sale because additional compensation was not allowed under 11 U.S.C. §326. The Trustee is only entitled to fees only for payments made under a confirmed plan. Because the sale of the farm was not contemplated in the confirmed Chapter 12 plans the Trustee was not entitled to his compensation. *In re McLendon*, 506 B.R. 243 (Bankr. N.D. Miss. Oct. 18, 2013).

v. A change in law does not satisfy the substantial or unforeseeable change in circumstances requirement necessary to modify a confirmed Chapter 12 plan. Victoria Gardner (the "Debtor") owned various parcels of real estate including property jointly owned by her and her husband, as well as property that included a historic residence listed on the National Register of Historic Places. The Debtor filed a Chapter 12 bankruptcy and confirmed a Chapter 12 plan (the "Plan"). The Plan required, among other things, that the Debtor sell the historic property within twenty-seven (27) months after the Plan's confirmation. If the sale did not take place within that time frame, one of the junior priority lien holders (the "Junior Creditor") would be allowed to commence a legal action to foreclose its lien. Upon expiration of the allowed time, the Debtor moved to modify the Plan, claiming she was unable to sell the property within the allocated period due to the expiration of a state tax credit for historic sites that was critically important to a sale. The Junior Creditor objected and the Court agreed on the basis that a change in the law (1) was not a change in the

Debtor's financial circumstances, (2) was reasonably foreseeable, and (3) was not a substantial change. To modify a confirmed Chapter 12 plan under 11 U.S.C.A. § 1229, the modification statute, the Court required the Debtor to show the Debtor experienced a substantial and unanticipated change in financial condition post-confirmation. Based on this test, the Court found that the change in law did not impact the Debtor's financial circumstances and, even if it had, it was not a substantial or unforeseeable impact and a modification was unjustified. *In re Gardner*, 522 B. R. 137 (Bankr. W.D.N.C. 2014).

vi. Chapter 12 plan modification is only allowed upon satisfaction of 11 U.S.C.S. § 1229(b). Colby Daniels (the "Debtor") filed for Chapter 12 bankruptcy and confirmed a Chapter 12 plan (the "Plan"). Subsequently, the Debtor proposed plan modifications under § 1229(b) to sell certain farmland. The Chapter 12 Trustee objected and the Court held that the sale price should be settled via auction. The Court eventually found that the Debtor failed to meet his burden with regard to the feasibility of his modified plan and, therefore, failed to meet the burden to modify a confirmed Chapter 12 plan under 11 U.S.C.A. § 1229(b). *In re Daniels*, 2015 Bankr. LEXIS 1609 (Bankr. W.D. La. 2015).

F. Avoidance Actions.

1. Preferential Transfers.

a. Bailor has burden to trace proceeds from the bailment. The debtor Mississippi Valley Livestock ("Debtor") had an arrangement with J&R Farms ("Cattle Owner") in which the Debtor would sell cattle for the Cattle Owner. The Debtor sent seven checks to the Cattle Owner and shortly after filed a Chapter 7 bankruptcy. The Trustee sought to recover the funds represented by the checks as preferential transfers under 11 U.S.C. §547. The Trustee argued that the Debtor had an interest in the funds because the funds were commingled with the Debtor's general operating account, and thus avoidable as preferences. The Court disagreed and held the relationship was a bailment and, therefore, not preferential because the Debtor never had an ownership interest in the cattle. The Trustee appealed and the 7th Circuit reversed and remanded because the Court was unable to determine whether the Debtor had an interest in the property. For the Cattle Owner to establish a constructive trust over the cattle proceeds the 7th Circuit held that the Cattle Owner must prove and trace its interest in the funds. *In re Miss. Valley Livestock, Inc.*, 745 F.3d 299 (7th. Cir. 2014).

b. Transfers were not made in accordance with the standard practice between the parties and not made in accordance with industry norms and, therefore, are preferential transfers. Clean Burn Fuels, LLC (the "Debtor") owned and operated an ethanol plant, entered into a contract with Sampson-Bladen

Oil Company, Inc. (the "Seller") in September 2010 for the purchase and delivery of gasoline to use in the ethanol manufacturing process. The gasoline came in two shipments; one occurred in fall of 2010 and the other in early 2011. The first shipment was paid in full in a timely manner. The second shipment was paid after the parties negotiated an agreement. In accordance with the agreement, the Debtor paid the Seller $193,534.92 on March 9, 2011 (the "March 9 Transfer") and $481.72 on March 22, 2011 (the "March 22 Transfer"). The Debtor filed for Chapter 11 on April 3, 2011, and the case was converted into a Chapter 7 in September 2012. The Chapter 7 Trustee (the "Trustee") then commenced an action against the Seller to recover the payments as preferential transfers under 11 U.S.C.A. § 547. The Court held that the March 9th Transfer was not made in accordance with the standard practice between the parties or in accordance with industry norms. The Court also found that none of the evidence on the record showed that the Debtor's payment to the Seller on March 9th was a "recurring, customary credit transaction" that occurred according to ordinary business terms. The court ruled that the March 9 Transfer was a § 547 preferential transfer for which the Trustee could recover against the Seller. However, as to the smaller March 22 Transfer, the Court held that the March 22 Transfer was made in accordance with the standard practice between the parties and in accordance with industry norms. *Conti v. Sampson-Bladen Oil Co. (In re Clean Burn Fuels, LLC)*, 2014 Bankr. LEXIS 2877 (Bankr. D.N.C. 2014).

c. Trustee failed to show the transferee was an insider of the debtors to recover transferred assets. Tom and Evelyn Floyd (the "Debtors") were the sole members of Action AG, LLC (the "LLC"). The LLC was engaged in farming. The LLC purchased feed, leased crop land and employed Kevin Rowley (the "Transferee") in the LLC's farming operation. The LLC owed the Transferee money and the Debtors guaranteed the debt. The Debtors transferred $75,000 in property and granted $10,000 in liens to the Secured Creditors outside the 90 day preference window, but during the one year insider preference window under 11 U.S.C. 547, in payment on the guaranteed debt. The trustee asserted that the Transferee was an insider of the Debtors and, therefore, the transfers were recoverable preferences. The court disagreed and held that the testimony of the parties evidenced that the Debtors and the LLC maintained a business relationship and the LLC was not an insider of the Debtors for purposes of an avoidable insider preferential transfer. *In re Floyd*, 540 B.R. 747 (Bankr. D. Idaho 2015).

2. Fraudulent Transfers.

a. Heightened pleadings requirements for constructive fraud. The Trustee sought to avoid as fraudulent transfers payments made by the debtor to secured creditors of a principal of the debtor on six lines of credit secured by the debtor's crops and livestock. The **C**ourt held that the complaint failed to establish the heightened pleadings requirement of constructive fraud, with the exception of payments made by the debtor for the benefit of the principle of the debtor on the sixth line of credit. *In re Tanglewood Farms*, 2013 Bankr. LEXIS 1443 (Bankr. E.D.N.C. Apr. 8, 2013).

b. The setoff or withholding of payments constitute a "transfer" for purposes of Code § 548. The debtor was indebted to the creditor for soybean seeds. The debtor sold soybeans to the creditor at harvest and the creditor applied a portion of the sale proceeds against the account payable. The Trustee sought to recover from the creditor the funds applied against the earlier debt as a constructively fraudulent transfer. The creditor argued the setoff was not a transfer. The Court disagreed and held that the setoff constituted a transfer for purposes of Code § 548. *Angell v. Montague Farms, Inc.* (*In re Tanglewood Farms, Inc.*), 2013 Bankr. LEXIS 1543(Bankr. E.D.N.C. Apr. 15, 2013).

c. Good faith defense. Debtor transferred funds from sale of grain, the proceeds of which were deposited in non-debtor entities' accounts controlled by the debtor which subsequently transferred the funds to another related limited liability company (LLC). The LLC transferred the funds to pay the personal obligations of the debtor. The trustee argued that the funds were avoidable as an unauthorized post-petition transfer under Code § 549 and, therefore, the trustee was entitled to a judgment against the transferee under Code § 550. The transferee argued that the transfers were protected under the good faith exception to Code § 549 because the transferee gave adequate value for each transfer, in good faith, and without knowledge of the bankruptcy and possible avoidance claims. The Court agreed with the transferee. The transferee gave adequate value for each transfer, in good faith, and without knowledge of the bankruptcy and possible avoidance claims. *Covey v. Peoria Speakeasy, Inc.* (*In re Duckworth*), 2013 Bankr. LEXIS 1396 (Bankr. C.D. Ill. Apr. 5, 2013).

d. Payments made by a joint obligor constitute "reasonably equivalent value" to the joint obligor. The debtor Tanglewood Farms ("Debtor") was the operating entity for farm property owned by James Winslow ("Property Owner"). The Property Owner was the sole owner and principal of the Debtor. Craft Air ("Crop Duster") provider crop dusting services for the Debtor. The Crop Duster billed the Debtor and the Property Owner. The Property Owner paid for the vast majority of the services, but the Debtor paid the Crop Duster $60,000 ("Payments"). The Debtor filed a Chapter 7 bankruptcy. The Trustee sought to avoid and recover the Payments arguing that the Payments were made by the Debtor for services received solely by the Property Owner and, therefore, the Debtor received less than the reasonably equivalent value under 11 U.S.C. §548. The Court disagreed and held that the Debtor did receive a reasonably equivalent value for the payments because both the Debtor and the Property Owner were liable on the account. *Angell v. Craft Air Servs., LLC (In re Tanglewood Farms, Inc.)*, 2014 Bankr. LEXIS 2317 (Bankr. E.D.N.C. May 28, 2014).

e. Various debtor controlled entities were not alter-egos of the debtor and the transfers made between the entities were not recoverable. The debtor David Duckworth ("Debtor") owned and controlled several entities including Power Trading, LLC ("Power Trading") and Peoria Speakeasy, Inc. ("Speakeasy"). The Debtor filed a Chapter 7 bankruptcy. Post-petition the Debtor transferred funds to certain entities which, then, transferred the funds to Power Trading which, then, transferred the funds to Speakeasy. The Trustee sought to avoid and recover the Payments arguing that that the various entities were alter-egos of the Debtor and, therefore, the funds were property of the bankruptcy estate and recoverable from Speakeasy under 11 U.S.C. §548. The Court disagreed and held the funds transferred were not property of the estate because they were held by a separate entity. The court based its decision on the fact that the entities were distinct legal entities which had "dominion and control" over the funds, and that the Trustee could not prove that the transferred funds were property of the Debtor's estate, even though Debtor controlled all of the entities. *Covey v. Peoria Speakeasy, Inc. (In re Duckworth),* 2013 Bankr. LEXIS 1396 (Bankr. C.D. Ill. Apr. 5, 2013).

f. Transfers between family members and their closely-held businesses constituted actual and constructive fraud under bankruptcy law. James Nielsen (the "Debtor") was involved in various business activities as an individual and through his closely-held family businesses. In December 2009, the Debtor filed a Chapter 11 bankruptcy. While in the Chapter 11, the Debtor and his wife, through a corporate entity, engaged in various activities that involved transferring sizable amounts of ownership interest from the Debtor to his wife, resulting in her owning 97% of the company. His wife was able to effectuate these transactions using money that the Debtor gave her. The Debtor then dismissed the Chapter 11. The Debtor then filed a Chapter 7 bankruptcy. The Chapter 7 Trustee filed an adversary proceeding against both the Debtor and his wife, alleging the Debtor's transfer of 97% of the company to his wife was both an actual and constructively fraudulent transfer under 11 U.S.C.A. §§ 548(a)(1)(A)-(B) and 544(b). To prove actual fraud under § 548(a)(1)(A) and § 544(b), the Trustee had to establish three factors: (1) the Debtor transferred an interest in his property, (2) the transfer occurred within two years of the Chapter 7 petition date, and (3) the transfer was made with an actual intent to hinder, delay, or defraud present or future creditors. The Court found such badges of fraud existed as at no point in the case was the Debtor or his wife truthful. Additionally, the Debtor and his wife failed to establish a legitimate supervening purpose for the transfer other than purely trying to hide money from the estate. Therefore, the Court ruled the Debtor's transfer was clearly fraudulent under the Code. Next, to prove constructive fraud under § 548(a)(1)(B) and § 544(b), the Trustee had to establish that the Debtor transferred an interest in his property within two years of filing for Chapter 7 for less than reasonably equivalent value at a time the Debtor was either insolvent or caused to be insolvent by the transfer. The only issue for the Court's review under these factors was the company's actual value when the transfers were made. The Court considered the facts going to the company's value and determined that the Trustee had proved reasonably equivalent value was not paid by the wife and, therefore, the transfer also constituted constructive fraud. *Allred v. Nickeson (In re Nickeson)*, 2015 Bankr. LEXIS 1789 (Bankr. D.S.D. 2015).

3. Lien Avoidance.

A judgment lien on exempt homestead property can be avoided under 11 U.S.C.A. § 522(f) if the homestead was established prior to the attachment of the lien. Chad Monson (the "Debtor") and his ex-wife JoAnn Monson (the "Debtor's Ex-Wife") were divorced in 2012 and entered into a property settlement whereby the Debtor was required to make eight payments of $205,000 each to the Debtor's Ex-Wife. In August 2013, the Debtor defaulted on the settlement terms and, on August 26, 2013 the Court entered a $1,590,000 judgment lien against all the Debtor's property in favor of the Debtor's Ex-Wife. Following his divorce, the Debtor spent most of his time living between two properties. One was a farmhouse where he kept most of his personal belongings, did his laundry, and stayed when he had custody of his children, which was fifty percent of the time (the "Farmhouse"). The other property was a piece of recreational land his family owned where he kept a camper that he had borrowed from a friend (the "Recreational Land"). The Debtor filed for Chapter 7 bankruptcy in July 2014 and claimed a homestead exemption for the recreational land that he claimed began in July 2013. The Debtor claimed the Debtor's Ex-Wife's lien impaired his homestead exemption while the Debtor's Ex-Wife claimed the lien attached before the homestead was established and thus could not be avoided under § 522(f). The Court held that the Debtor had not established his homestead in the Recreational Land before the attachment of the Debtor's Ex-Wife's lien and, therefore, the Recreational Land was not exempt from all creditors, including the Debtor's Ex-Wife. While the Debtor owned the land at issue, he did not own the dwelling. He had borrowed the camper from a friend. Also the Recreational Land was not his permanent residence as he still spent over half his time at the farmhouse. Because the ownership and occupancy factors both failed, the court rejected any consideration of the Debtor's intent and determined the Debtor failed to establish the recreational property as his homestead. As a result, he could not avoid the attachment of the Debtor's Ex-Wife's lien to the property. *Stermer v. Monson (In re Monson)*, 2015 Bankr. LEXIS 1054 (Bankr. D. Minn. 2015).

G. Miscellaneous.

a. Trustee may not assert equitable remedy of unjust enrichment to void a transfer by debtor. Bankruptcy trustee's unjust enrichment claims failed because the action exceeded the scope of Code § 542(b). The trustee sued the transferees on an unjust enrichment theory. The Bankruptcy Court found for the transferees because it believed the trustee failed to establish all of the essential elements for an unjust enrichment claim. The Bankruptcy Appellate Panel for the Eighth Circuit affirmed on the more fundamental ground that the relief sought by the trustee exceeded the scope of Code § 542. The Court held Code § 542(b) governs actions to collect debts owed to a bankruptcy estate. Further, Code § 542(b) only applies to debts that are "matured, payable on demand, or payable on order." South Dakota permits claims for unjust enrichment where by implication a contract existed, i.e., one "party conferred a benefit upon another party who accepts or acquiesces in that benefit and it is inequitable to receive that benefit without paying." The Court held South Dakota's definition unjust enrichment "defies characterization" as "matured, payable on demand, or payable on order." Thus, the trustee's action exceeded the scope of Code § 542(b). *In re Alvin James Falzerano (John S. Lovald, Trustee v. Alvin James Falzerano et al.),* 454 B.R. 81 (B.A.P. 8th Cir. 2011).

b. A Chapter 7 Trustee cannot avoid the transfers made by an earlier Chapter 11 Debtor-in-Possession. The debtor operated a granary. The debtor filed a Chapter 11 in 2010 and continued to operate his business as the debtor-in-possession including making payments to post-petition creditors. The bankruptcy was converted in 2011 and the Chapter 7 trustee moved to avoid the transfers made by the debtor-in-possession. The Court dismissed the action because the Chapter 7 Trustee is bound by the actions the debtor took while it acted as debtor-in-possession, including actions approved by the Court. *Angell v. Meherrin Agric. & Chem. Co.* (*In re Tanglewood Farms, Inc.*), 2013 Bankr. LEXIS 1849 (Bankr. E.D.N.C. May 1, 2013).

c. Lease distinguished from security interest

1. The economic life of a dairy cow is more than 48 months and, therefore, the 48 month lease for dairy cows is a true lease. The debtor Moohaven Dairy, LLC ("Debtor") was a dairy farmer and filed a Chapter 11 bankruptcy. Subsequent to the bankruptcy filing the Debtor entered into lease agreements with Sunshine Heifers ("Lessor") for certain dairy cattle. The Debtor later asserted that the leases were not true leases but, instead, a disguised security interests under UCC §1-203. The Court disagreed and held that the economic life of dairy cattle was more than the 48 month term and, therefore, the leases were true leases. The Court found that only 20.6% of cows are culled after 48 months. *Sunshine Heifers, LLC v. Moohaven Dairy, LLC*, 2014 U.S. Dist. LEXIS 52294 (E.D. Mich. Apr. 16, 2014).

2. The applicable economic life is that of the "dairy herd" <u>not</u> the original leased dairy cows; lessor has the factual burden to prove that the replacement cows were purchased from the sale of leased cows for the Lessor to retain an ownership interest in the replacement cows. The debtor Lee Purdy ("Debtor") was indebted to Citizens First Bank ("Secured Creditor") and the indebtedness was secured by a security interest in the livestock of the Debtor. The Debtor entered into lease agreements with Sunshine Heifers ("Lessor") for certain dairy cattle. The Debtor filed a Chapter 12 bankruptcy and asserts that the leases were not true leases but, instead, a disguised security interests. The bankruptcy court agreed and held that the economic life of the dairy cattle fell below the term of the leases and therefore the leases were not true leases. The Court found that likely within 36 months, but certainly within 50 months, dairy cows are culled. Sunshine 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 Sixth Circuit reversed and held that the leases required that the lessor cull and replace the leased cows and, therefore, the applicable economic life determination is that of the herd and not the original leased dairy cows. The Sixth 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 Purdy's farm. Accordingly, we hold that the contracts flunk the Bright-Line Test and are not *per se* security agreements." The Court remanded back for a determination as to what leasehold interest the Lessor 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. Aug. 14, 2014). On remand the court held that the Lessor could not prove that the cattle were his property because: (i) the Debtor used one bank account to conduct its dairy operations, commingling proceeds of owned cattle with proceeds of leased cattle, and then using those commingled proceeds to acquire replacements for leased cattle culled from the herd; (ii) the Lessor knew that the Debtor was not complying with the terms of the lease obligating the Debtor to notify the Lessor of any sales and remit the proceeds to the Lessor; (iii) the Lessor paid for the cattle after they were delivered to the Debtor; and (iv) the Debtor put the Lessor's brand on cattle regardless of whether the cattle were acquired with funds from the commingled account or from suppliers paid by the Lessor. In contrast, the Secured Creditor's security interest in the Debtor's existing and after-acquired cattle attached to all of the cattle. Consequently, the court held that the Secured Creditor, not the Lessor, was entitled to the proceeds of the cattle. *In re Purdy*, 2015 WL 5176580 (Bankr W.D. Ky. 2015).