



AGRICULTURAL FINANCE
2016 Case Law Update

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I. UCC REVISED ARTICLE 9.

A. Attachment.

1. Value Given to Debtor.

No updates.

2. Debtor has Sufficient Rights in the Collateral.

No updates.

3. Authenticated Security Agreement; Sufficient Description of Collateral.

Supplemental Revenue Assistance Payments Program (“SURE”) payments constitute government payments and not crop proceeds. G & K Farm was a North Dakota general partnership (the “Debtor”) that farmed in Texas. The Debtor was indebted to Choice Financial Group (the “Secured Creditor Choice”). The debt was secured by a security interest in the Debtor’s personal property including its government payments. The Secured Creditor Choice filed a UCC-1 in Texas; the state the crops were located. The Debtor was also indebted to PHI Financial Services, Inc. (the “Secured Creditor PHI”). The debt was secured by a security interest in the Debtor’s personal property including its general intangibles which referenced the certain government program payments. The Secured Creditor PHI filed a UCC-1 in North Dakota; the state the Debtor was located. The Secured Creditor Choice later filed a UCC-1 in North Dakota. The Debtor was insured under the Supplemental Revenue Assistance Payments Program (“SURE”) administered by FSA. The Debtor defaulted on its obligations to the Secured Creditor PHI and the Secured Creditor PHI obtained a \$7.5 million judgment. The Secured Creditor PHI attempted to collect its judgment against \$328,168 in crop insurance loss proceeds under SURE and commenced a legal action against the Secured Creditor Choice. The trial court entered judgment in favor of the Secured Creditor PHI. The Secured Creditor Choice appealed and argued that the SURE payments constituted the proceeds of crops and, therefore, the proper state to file a UCC-1 was Texas; the state the crop was located. The North Dakota Supreme Court disagreed and held that the SURE funds are similar to federal diversion and deficiency payments which, under the 8th Circuit decision in *In re Kingsley*, 865 F.2d 975 (8th Cir. 1989) applying North Dakota law, constitute general intangibles and not crop proceeds. *PHI Fin. Services, Inc. v. Johnston Law Office, P.C.*, 874 N.W.2d 910 (N.D. 2016).

Comment. There is a long history of cases that have examined the issue of whether the various federal program payments constituted crop proceeds, contract rights, accounts or general intangibles - of which many of the federal programs are now discontinued. See generally B. Peterson, *Secured Transactions: Government agricultural program payments as “proceeds” of agricultural products under UCC*

9-306, 79 A.L.R.4th 903 (1990). These cases have generally examined the structure of the respective federal programs in relation to whether the program is designed to supplement revenue based on historical production or based on specific crop loss in determining the proper collateral description. Although the North Dakota Supreme Court held that the SURE funds are similar to federal diversion and deficiency payments; the court did not analyze the structure of the SURE program in its decision. SURE provided benefits for farm revenue losses due to natural disasters. It would appear the court came to the proper decision in holding that the SURE payments do not constitute crop proceeds.

B. Perfection.

No updates.

C. Priority.

1. Competing Article 9 secured creditors.

No updates.

2. Purchase Money Security Interests (PMSI).

No updates.

3. Statutory Liens.

a. Agricultural Supplier/Service Provider Liens.

Feed supplier is required to file a UCC-1 every 31 days to maintain super-priority Iowa agricultural supply dealer lien; for livestock born at the producer's facilities, the "acquisition price" for purposes of calculating the lien amount was zero. Crooked Creek Corporation (the "Debtor") operated a farrow-to-finish hog farm. The Debtor was indebted to Primebank (the "Secured Creditor") and the debt was secured by a security interest in the hogs of the Debtor. The Debtor contracted with Oyens Feed Supply, Inc. (the "Feed Supplier") to supply feed. The Debtor was indebted to the Feed Supplier and the Feed Supplier filed an agricultural supply dealer lien under Iowa Code 570A. The Debtor filed a Chapter 12 bankruptcy. The Secured Creditor and Feed Supplier asserted priority liens in the escrowed proceeds from the sale of the hogs. In an earlier certified request to the Iowa Supreme Court, the Iowa Supreme Court held that the Feed Supplier was not required to give any notification to the Secured Creditor to have an enforceable super-priority agricultural supply dealer lien under Iowa Code 570A. *Oyens Feed Supply, Inc. v. Primebank*, 808 N.W.2d 186 (Iowa 2011). There remained unresolved legal issues as to whether: (a)

the agricultural supply dealer was required to file a new UCC-1 financing statement every thirty-one (31) days in order to maintain perfection of its agricultural supply dealer's lien as to feed supplied within the preceding thirty-one (31) day period; and (b) the “acquisition price” for purposes of calculating the lien amount was zero for livestock born in the producer's facility. Another certified request was made to the Iowa Supreme Court and the Iowa Supreme Court held that: (a) an agricultural supply dealer is required to file a new financing statement every 31 days in order to maintain perfection of its lien, and (b) the “acquisition price” for purposes of calculating the lien amount was zero for livestock was born in the producer's facility. The producer’s overhead costs and costs of production should not be considered because the status provides for “acquisition price” not “acquisition costs”. The Feed Supplier is entitled to a super-priority lien for the full extent of the value of feed consumed by the hogs without any reduction for any “acquisition price” of the producer. *Oyens Feed & Supply, Inc. v. Primebank*, 879 N.W.2d 853 (Iowa 2016).

Comment. This case should be read in conjunction with *Farmers Coop. Co. v. Ernst & Young Inc. (In re Big Sky Farms Inc.)*, 512 B.R. 212 (Bankr. N.D. Iowa 2014) and *In re Shulista*, 808 N.W.2d 186 (Iowa 2011) and 451 B.R. 867 (Bankr. N.D. Iowa 2011).

b. Producer Liens.

Oregon producer lien does not require notice to creditors that properly filed a UCC-1 outside of Oregon. McKee Family Farms, Inc. (“Producer”) raised crops in Oregon and sold grain to a third party buyer (the “Buyer”). It appears the Buyer was a Pennsylvania corporation.¹ The Buyer was indebted to Northwest Bank (the “Secured Creditor”) and the debt was secured by the personal property of the Buyer. The Secured Creditor properly filed a UCC-1 in Pennsylvania; the state of incorporation of the Buyer. The Buyer did not pay the Producer and the Producer filed an Oregon producer’s lien. To perfect the super-priority producer lien Or. Rev. Stat. Ann. § 87.252 and 87.762(3) requires the producer to give notice to either: (a) any creditors registered with the State of Oregon or (b) any creditors who have filed UCC-1s with the Oregon Secretary of State. The Secured Creditor argued that it properly perfected its lien and for the producer to be entitled to the super-priority lien the court should require notice to given to properly perfected creditors. The Court disagreed and strictly construed the statute to only require notice to creditors for which filed

¹ The Court does not provide the factual background as to the relationship of the parties. The case summary makes certain assumptions as to those relationships.

the requisite notice in the State of Oregon for the producer to be entitled to a super-priority lien. *Nw. Bank v. McKee Family Farms, Inc.*, 2016 WL 2841205 (D. Or. May 12, 2016).

c. Grain Handler/Storage Liens.

No updates.

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

Secured creditor not limited by a grain buyer's contractual right of setoff. David Walker (the "Debtor") was a grain farmer and was indebted to Guaranty Bank & Trust Co. (the "Secured Creditor"). The debt was secured by a security interest in the crops and contract rights of the Debtor. The Secured Creditor filed a UCC-1 finance statement with the State of Mississippi. The Debtor had assumed several contracts to deliver grain to Agrex, Inc. (the "Buyer") which contained the contractual right of the Buyer to offset future deliveries against any unpaid debts. The Debtor failed to deliver on a few contracts and was indebted to the Buyer. The Debtor subsequently sold \$417,033 in grain to the Buyer and the Buyer contractually offset the \$417,033 in grain sales against the \$359,853 in earlier debts owed to the Buyer. The Secured Creditor commenced a legal action against the Buyer and the Buyer argued that it was entitled to the \$359,853 because the rights of the Secured Creditor are limited to the rights of the Debtor in the grain contracts. Because the rights of the Debtor are contractually limited by the right of offset in the grain contracts, the rights of the Secured Creditor were also contractually limited by the right of offset in the grain contracts. The District Court disagreed and the Buyer appealed. The 5th Circuit held that the Secured Creditor is not limited to its security interest in the contract rights of the Debtor. Although the Secured Creditor had a security interest in the contract rights of the Debtor, the Secured Creditor also had a security interest in the crops of the Debtor and, therefore as the 8th Circuit held in *Farm Credit Services of America, PCA v. Cargill, Inc.*, 750 F.3d 965 (8th Cir. 2014), the security interest takes priority over the contract rights of the Buyer. The court distinguished *Consolidated Nutrition, L.C. v. IBP, Inc.*, 669 N.W.2d 126 (S.D. 2003) on the basis that in the South Dakota case the secured creditor failed to file an effective financing statement with the State of Dakota and, therefore, the buyer purchased the crop free and clear of any liens of the secured creditor under the Food Security Act. As a result of the extinguished security interest, the buyer in *Consolidated Nutrition, L.C* was entitled to offset against unpaid debts owed to the buyer over the objection of the secured creditor. *Guar. Bank & Trust Co. v. Agrex, Inc.*, 820 F.3d 790 (5th Cir. 2016).

5. Statutory Trusts.

i. Life insurance policy funded with produce proceeds subject to PACA trust claim. Consumers Produce Company, Inc. of Pittsburg (“Seller”) sold produce to Fredericktown Produce Co., Inc. (the “Debtor”). Mike Giles (“Principal”), the principal of the Debtor, was indebted to Northwest Savings Bank (the “Secured Creditor”) and the debt was secured by an assignment of a life insurance policy on the life of the Principal (the “Insurance Policy”). The Debtor failed to pay the Seller and the Seller asserted a PACA trust claim against the Insurance Policy. The Secured Creditor argued that the Insurance Policy was outside the scope of the PACA trust and that the Secured Creditor was a bona fide purchaser having received the Title Policy for value. The court disagreed and held that the Insurance Policy was within the PACA trust because the Principal used proceeds from the sale of produce to fund the Insurance Policy and the Secured Creditor failed to qualify as a bona fide purchaser because the Debtor did not receive value for the assignment of the Insurance Policy. *Consumers Produce Co., Inc. of Pittsburg v. Fredericktown Produce Co.*, 2015 WL 728488 (W.D. Pa. Feb. 19, 2015).

ii. Sellers of produce are not exempt from the PACA notice requirements if the produce is marketed through a third party. Derek & Matthew Bissett Farms (“Seller”) contracted with Bissett Produce, Inc. (the “Debtor”) to store, cure, package and sell the sale of sweet potatoes. The Debtor was indebted to AgCarolina Farm Credit, ACA (the “Secured Creditor”) and the debt was secured by a security interest in the crops of the Debtor. The Debtor failed to pay the Seller. The Seller argued that it was entitled to a PACA trust claim as to the sale proceeds. Although the Court does not address, it appears the proceeds from the sale of sweet potatoes were in the possession and control of the Debtor at all relevant times. The court disagreed and held that the Seller failed to provide the requisite notice under 7 CFS § 46.46 to perfect the trust claim. The court held that notice is required even though the Debtor is acting as an agent for the Seller. No special status is provided to contract sellers that exempt the Seller from the PACA notice requirement. *In re Bissett Produce, Inc.*, 2015 WL 868029 (E.D.N.C. Feb. 2, 2015).

Comment. The Seller does not appear to have argued or the court does address whether the Debtor had sufficient rights in the sweet potato proceeds to grant a security interest to the Secured Creditor under UCC § 9-203. Although the absence of a security interest would not entitle the Seller to a PACA trust claim, it would increase the available funds to distribute to unsecured creditors including the Seller.

iii. Seller can waive prompt payment requirements (and PACA trust rights) in pre-default verbally agreement. Heeren, LLC dba Ridgeking Apple Packaging and Storage (the “Seller”) sold apples to Cherry Growers, Inc. (the “Buyer”) on credit. No written master supply agreement was used. As apples were ordered and delivered, the Seller would issue a bill of lading which included a

condition that payment was due in 10 days and the reserved the seller's PCA trust rights. The Buyer was continually late with payment and owed money to the Seller. The Seller verbally agreed to continue to deliver future apples with the understanding that payment for the apples would not be made for twelve to fourteen months. Buyer failed to pay the Seller under the verbally agreed terms. The Seller argued that the written bill of lading and 10 day payment terms controlled and, therefore, the Seller was entitled to a PACA trust claim. The court disagreed and relying on *Overton Distrib., Inc. v. Heritage Bank*, 340 F.3d 361 (6th Cir. 2003) held that the pre-default verbal agreement of the parties extended the payment terms outside the statutory 30 day prompt payment window requirement under 7 CFR § 46.46(e)(2) and, therefore, the Seller was not entitled to a PACA trust claim. A pre-default written agreement allowing for payment outside 30 days waives the Seller's PACA trust rights. *Heeren, LLC v. Cherry Growers, Inc.*, 2016 WL 3027194 (W.D. Mich. May 27, 2016).

iv. Produce seller waived PACA trust claims by agreeing to repayment terms outside 30 days. Spada Properties, Inc. dba United Salad Co. (the "Produce Seller") sold produce to Food Ventures 87, Inc. dba Food 4 Less (the "Buyer"). Each invoice required payment within ten days. Unified Grocers, Inc. (the "Non-Produce Seller") sold non-produce food to the Buyer under a retainer-owner grocery cooperative. Payments were made to the Non-Produce Seller from automatic deposits from the Buyer's bank accounts. The Buyer was in financial hardship and the Produce Seller agreed to convert a portion of the unpaid balance into a promissory note to be paid over two years. The promissory note was later paid off at which time the Buyer was eight months behind in payments. The Buyer subsequently filed a Chapter 11 bankruptcy. \$830,000 was owed to the Produce Seller. The Producer Seller commenced an adversary action in the bankruptcy and asserted, in part, that the automatic deposits accepted by the Non-Produce Seller were subject to the Produce Seller's PACA trust claims. The court disagreed and held that the Produce Seller had no trust claim against the Non-Produce Seller because the course of conduct between the Produce Seller and Buyer – in particular, their agreement that payments would be applied to the aged invoices – meant that their agreements did not in fact require payment within 30 days and waived the Produce Seller's PACA rights. *Spada Properties, Inc. v. Unified Grocers, Inc.*, 121 F. Supp. 3d 1070 (D. Or. Aug. 6, 2015).

v. Special PACA counsel retained to administer claims cannot be paid ahead of the trust claimants. Various producers (the "Sellers") sold produce to Delta Produce, L.P. and Superior Tomato (the "Buyers") on credit. The Buyers filed Chapter 11 bankruptcy. The Sellers filed their respective PACA claims with the bankruptcy court. The Buyers and some of the Sellers moved to appoint an attorney as special counsel to preserve and collect the PACA trust assets. The court granted the motion and allowed the special counsel to be paid from the PACA trust funds. Other trust beneficiary appealed and the court vacated the decision. Special counsel appealed on various grounds and the Fifth Circuit held that: (1) the

bankruptcy court could decide PACA issues with parties' consent; (2) the bankruptcy court's interim fee awards in favor of special PACA counsel were not "final orders," from which appeal would lie as of right; (3) the trust beneficiary was not "person aggrieved," with standing to appeal bankruptcy court's final fee award, except to extent of that small portion of fee award apportionable to beneficiary's interest in PACA trust; (4) special PACA counsel was the functional equivalent of PACA trustee and could not be paid from PACA trust assets prior to full payment of sums owing to all trust claimants; and (5) the district court did not abuse its discretion in finding that beneficiary was not estopped from objecting to fee award. *In re Delta Produce, L.P.*, 817 F.3d 141 (5th Cir. 2016).

vi. Statute of Limitations: Apply application state law. Flavor Pic Tomato ("Seller") sold and delivered produce to Anthony Gambino dba Creole R&R Flavored Produce ("Buyer") twelve times over the course of about ten months. For each sale the Seller issued an invoice that provided for 1 1/2 percent interest each month if the invoice was not paid within ten days. Approximately five years after the delivery of the produce the Seller commenced a lawsuit against the Buyer for unpaid invoices. Seller asserted the following causes of action: (1) enforcement of the PACA trust; (2) violation of PACA for failure to pay promptly; (3) breach of contract; and (4) breach of fiduciary duty. Buyer argued that the Seller's claims were time barred. The Court disagreed and held that: (1) there is no statute of limitations for enforcement of a PACA trust; (2) there is no statute of limitations for failure to pay promptly under PACA; (3) there is no limitation period for breach of contract claims under PACA but, instead, the court should look to applicable state law; and (4) there is no limitation period for breach of fiduciary duty claims under PACA but, instead, the court should look to applicable state law. Under Louisiana law, there is a ten-year breach of contract and breach of fiduciary duty statute of limitations and therefore, these respective claims have not extinguished. *Flavor-Pic Tomato Co., Inc. v. Gambino*, 2016 WL 1268359 (E.D. La. Mar. 31, 2016).

6. Miscellaneous.

No updates.

D. Enforcement.

1. Defenses.

No updates.

2. Notice of Liquidation / Commercially Reasonable Sale.

i. Failure of senior creditor to give notice of liquidation under Revised Article 9 does not harm junior creditor if no resulting value to junior creditor.

Greiner's Green Acres, Inc. (the "Senior Creditor") owned certain farm equipment (the "Equipment"). The Senior Creditor sold the Equipment to James Greiner (the "Debtor") and, in consideration, the Debtor executed and delivered a promissory note to the Senior Creditor and granted a security interest in the Equipment to secure the debt.² Subsequently, the Debtor incurred debt with Agri-Science Technologies, LLC (the "Junior Creditor") and to secure the debt granted the Junior Creditor a security interest in the Equipment. The Junior Creditor filed a UCC-1 financing statement. The Debtor defaulted on both loans and voluntarily surrendered the Equipment to the Senior Creditor. The Senior Creditor accepted the Equipment in satisfaction of the debt under UCC § 9-620. In liquidating the Equipment the Senior Creditor did not give any notice of liquidation to the Junior Creditor. The Junior Creditor commenced a legal action against the Senior Creditor alleging that the Senior Creditor violated the UCC when it disposed of collateral without notifying the Junior Creditor.³ The court disagreed and, in granting summary judgment, held that by virtue of the voluntary surrender in satisfaction of the debt under UCC § 9-620 the Junior Creditor's rights in the Equipment were extinguished. The Court of Appeals affirmed holding that the Senior Creditor had no obligation to give notice because, by virtue of the voluntary surrender of the Equipment in satisfaction of the Senior Creditor debt, the Junior Creditor no longer had an interest in the collateral. Furthermore, the failure to give notice did not harm the Junior Creditor because: (1) the Junior Creditor had a subordinate interest and (2) the sale did not generate a surplus to pay anything to the Junior Creditor. Therefore the Junior Creditor was not damaged for purposes of UCC § 9-625. *Agri-Sci. Techs., L.L.C. v. Greiner's Green Acres, Inc.*, 2016 WL 1072509 (Mich. Ct. App. Mar. 17, 2016).

ii. Article 9 notice of liquidation and requirement of commercial reasonable sale not applicable when collateral voluntarily sold by debtors.

Matthew and Susan Knight (the "Debtors") were indebted to the Bank of McCrory (the "Secured Creditor"). The debt was secured by a security interest in the crops and farm equipment of the Debtors. The Debtors defaulted on their loan to the Secured Creditor and the equipment was liquidated. The Debtors subsequently filed a Chapter 13 bankruptcy. The Secured Creditor filed a proof of claim (the "Claim") for the deficiency. The Debtors objected to the Claim asserting that the sale of collateral was not commercially reasonable because the Secured Creditor did not give Debtors written notice of the auction under UCC § 9-611(d) nor was

² The Court does not state whether the Senior Creditor had filed a UCC-1 financing statement to perfect its security interest in the Equipment. The decision implies a UCC-1 had been filed. Had a UCC-1 not been filed, the "Senior" Creditor would not have had a priority lien and, therefore, would not have been entitled to the sale proceeds.

³ The Court does not recite the legal argument asserted by the Junior Creditor.

there a waiver of notice by the Debtors. The Secured Creditor argued that the sale was a voluntary liquidated by the Debtors and therefore the notice of liquidation and commercially reasonable sale requirements did not apply. The court agreed and held that the Debtors voluntarily liquidated their collateral and, therefore, the requirements of notice of sale and commercial reasonableness under UCC § 9-610 and UCC § 9-611(d) did not apply. *In re Knight*, 544 B.R. 141 (Bankr. E.D. Ark. 2016).

E. Liabilities.

No updates.

II. UCC ARTICLE 2.

A. Warranties.

1. Scope/Disclaimer.

i. Existence and disclaimer of express warranties is a question of material fact. Alejandro Zendejas (the “Buyer”) contracted with a broker and purchased a championship caliber horse from Eugenie Redman (the “Seller”) for \$250,000. The bill of sale stated that the Buyer “agrees to purchase [the horse] as is,” that buyer is not relying on any representation “either oral or written, express or implied” made by the Seller, and the Seller has not made any representations or warranties with respect to the horse. The agent for the Buyer executed the bill of sale. The horse had medical issues and the Buyer demanded that the transaction be rescinded alleging breach of express warranties, breach of implied warranty for a particular purpose and breach of implied warranty of merchantability. The Seller argued at summary judgment that: (a) the bill of sale foreclosed any claims for breach of express warranties or breach of the implied warranty of merchantability and (b) the Buyer’s claim for breach of an implied warranty of fitness for a particular purpose fails because the Buyer failed to inspect the horse when given the chance and thus waived implied warranty. The court held on summary judgment and that: (a) there is a dispute of material fact as to the validity of the bill of sale (and the existence of the express warranties and implied warranty of merchantability) because of the lack of consent to the terms by the Buyer and (b) even if the Buyer had the chance to examine the horse, it was unclear whether the defects the Buyer complained of should have been revealed to the Buyer in the relevant circumstances. *Zendejas v. Redman*, 2016 WL 1242349 (S.D. Fla. Mar. 30, 2016).

ii. Seller statements as to racehorse did not constitute an express warranty. Gary Bizantz (the “Buyer”) purchased a racehorse from Stephens Thoroughbreds (the “Seller”) for \$175,000. The Buyer later discovered a preexisting medical issue with the racehorse. The Buyer commenced a legal action against the Seller alleging breach of an express warranty under UCC § 2-313 on the

basis that the Seller made promises as to the condition of the racehorse. The court disagreed and held that statement from the seller that he “liked [the racehorse] a lot,” did not create an express warranty under UCC § 2-313 that the racehorse had no significant problem impacting her ability to train or race. The statements of the Seller were just sales talk or the Seller’s own expression of opinion rather than a positive affirmation commenting on the horse’s physical condition, ability to race and athletic prowess. *Biszantz v. Stephens Thoroughbreds*, 620 Fed. Appx. 535 (6th Cir. 2015).

iii. Disclaimer of implied warranty of merchantability was not ineffective because of failure to explicitly disclaimer; disclaimer of implied warranty of fitness for a particular purpose was conspicuous and effective. Timothy and Deanna Rorick (the “Buyers”) purchased an agricultural sprayer (the “Sprayer”) manufactured by HARDI (the “Manufacturer”). The owner’s manual included a disclaimer of any implied warranties. The rear wheel axle and wheel assembly of the Sprayer broke. The Buyers commenced a legal action and asserted a breach of the implied warranties of merchantability and fitness for a particular purpose. The Manufacturer argued that it properly disclaimed any implied warranties. The Court held: (1) the warranty disclaimer was ineffective to disclaim the implied warranty of merchantability under UCC § 2-314(2) because the disclaimer in the manual failed to explicitly disclaim “merchantability”; but (2) the disclaimer was effective under UCC § 2-314 to disclaim the implied warranty of fitness for a particular purpose because although the manual consisted of over one hundred pages the disclaimer was still conspicuous for purposes of UCC § 2-201. *Rorick v. Hardi N. Am. Inc.*, 2016 WL 777575 (N.D. Ind. Feb. 29, 2016).

2. Reasonable Notice of Claim.

i. Reasonable notice requirement of implied warranties of merchantability and fitness for a particular purpose. Paul Halderson and others (the “Buyers”) were dairy farmers and purchased livestock minerals from Star Blends, LLC (the “Seller”). The livestock had declining health and test results showed high levels of heavy metals. The Buyers contacted the Seller by phone. Buyer later commenced a legal action against the Seller asserting breach of the implied warranties of merchantability and fitness for a particular purpose under UCC § 2-607(3). At issue was whether the Buyers contact with the Seller constituted reasonable notice. On summary judgment the Court held that a genuine issue of material fact existed as to whether a Buyers’ telephone call to the Seller, in which the Buyers informed the Seller that necropsies of some of the Buyers’ cows had revealed high concentrations of heavy metals in their tissue, and asking if the Seller had retained any samples of the feed to determine if “there was a problem,” was sufficient to satisfy the reasonable notice requirement under UCC § 2-607(3). *Halderson v. Star Blends, LLC*, 876 N.W.2d 179 (Wis. Ct. App. Jan. 12, 2016).

ii. **Issue of timely notice is a material fact that precludes summary judgment.** Steve and Diane Foley dba Rainbow Creek Farms (the “Buyer”) purchased straw bales from Gro-Green Farms, Inc. (the “Seller”). The Buyer had a barn fire and made a claim on their insurance policy with Fremont Insurance Company (the “Insurance Underwriter”). The Insurance Underwriter asserted that spontaneous combustion caused the fire as a result of the defective wet straw bales provided by the Seller and, as a result, the Seller was liable under tort law or, in the alternative, it breached certain implied warranties under the UCC. The Seller argued that the economic loss doctrine precluded tort liability and, as to the implied warranty, the Buyer failed to give notice of the claim within a reasonable time under UCC § 2-607(3). Just over two weeks passed between delivery of the straw and the Buyers notifying the Seller of the alleged breach, whereas just over one week passed between Buyer noticing the wet straw and the notification of the breach. The Court held on summary judgment that the economic loss doctrine did preclude tort liability, but that a material fact existed as to whether the Buyer responded timely after discovering the wet bales and reported the damage caused by the fire. Given the short amount of time that passed, the nature of the goods in question, and the large amount of product delivered, the court did not agree that Buyers’ notice was unreasonable as a matter of law. *Fremont Ins. Co. v. Gro-Green Farms, Inc.*, 2016 WL 1072191 (Mich. Ct. App. Mar. 17, 2016).

3. **Statute of Limitations.**

Four year statute of limitations for breach of implied warranties of merchantability and fitness for a particular purpose claim. DeYoung Farmland (the “Producer”) contracted with Farmer Boy Ag Systems, Inc. (the “Contractor”) to build a hog barn using building trusses manufactured and supplied by Borkholder Building & Supply, LLC (the “Manufacturer”). The building trusses later failed and the hog barn roof collapsed. A claim was filed on the Producer’s Farm Bureau Insurance Company of Michigan (the “Insurance Underwriter”) policy. The Insurance Underwriter paid on the claim and became subrogated to the rights of the Producer. The Insurance Underwriter commenced a legal action against the Manufacturer and asserted both a tort and commercial contract breach of the implied warranties of merchantability and fitness for a particular purpose claim under UCC § 2-314. The Manufacturer argued and the Court agreed that the economic loss doctrine precluded the tort claim because the damages were sustained by a commercial business (hog farming), the product at issue was purchased for commercial purposes (construction of the hog building), and the losses are economic in nature. The court further held that the UCC provides the exclusive remedy, including its four-year statute of limitations and, therefore, the claim was time barred. *Farm Bureau Mut. Ins. Co. of Michigan v. Borkholder Buildings & Supply, LLC*, 2015 WL 5682729 (W.D. Mich. Sept. 25, 2015).

III. **UCC ARTICLE 1.**

1. **Lease distinguished from security interest.**

The 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).

Comment. The Sixth Circuit decision implies that any “good” that the lessee is contractually obligated to replace is not subject to the economic life analysis. The Sixth Circuit went as far as to state “whether the parties adhered to the terms of these leases in all facets, in our view, is irrelevant to determining whether the agreements were true leases or disguised security agreements.” For drafting

purposes, any lease for personal property should include a replacement provision to avoid a later economic life analysis.

Comment. See also *Sunshine Heifers, LLC v. Moohaven Dairy, LLC*, 2014 U.S. Dist. LEXIS 52294 (E.D. Mich. Apr. 16, 2014) (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).

IV. OTHER STATE LAW.

A. Fraudulent Transfers.

Evidentiary burden on creditor to show “alter ego” and actual fraud. Roger Jones (the “Father”) was indebted to TransPecos Banks (the “Secured Creditor”) under various loans. The debts were secured by 220 acres of farmland (the “Farmland”) owned by Jodi Strobach (the “Daughter”). To refinance the debt, the Daughter formed a corporation (the “Corporation”) and deeded the mortgaged Farmland to the Corporation. The Secured Creditor made new loans to the Father and Corporation which continued to be secured by the Farmland. The Corporation failed to make payment and the Secured Creditor commenced a legal action. The Secured Creditor alleged the Daughter was personally liable to the Secured Creditor as the “alter ego” of the Corporation; in that the Daughter disregarded the corporate formalities and used the Corporation for her personal use. The court disagreed and held that the Secured Creditor failed to assert that the Daughter committed actual fraud when she obtained the loan on the Corporation’s behalf and therefore the Secured Creditor was precluded from asserting the claim. *TransPecos Banks v. Strobach*, 487 S.W.3d 722 (Tex. Ct. App. March 23, 2016).

B. Exemptions.

1. Leased greenhouse can constitute an exempt homestead for purposes of the Vermont homestead exemption. Richard Rommer (the “Debtor”) filed a Chapter 7 bankruptcy and moved to avoid certain liens on a 3.69 acre parcel that contained his home, a garage and a greenhouse on the basis that the property was his exempt homestead under Vermont law. A judgment lien creditor and the trustee objected arguing that the greenhouse was leased to a third party to operate a wheatgrass business and, therefore, cannot be claimed exempt as his homestead. The court disagreed and held that Debtor’s leasing of detached garage and greenhouse for commercial use did not preclude exemption of that part of the real property under the Vermont homestead exemption, given that the garage and greenhouse were used in connection with the homestead and the Debtor’s livelihood was dependent on the leasing of the commercial greenhouse, as the greenhouse contained a well that was the sole source of water for the Debtor and his dwelling, the greenhouse stored all of the Debtor’s crops and all of Debtor’s earned income was derived from farming operations conducted at the greenhouse. *In re Rommer*, 549 B.R. 72 (Bankr. D. Vt. 2016).

2. Leasing of property may constitute abandonment of property for purposes of the leasing debtor's homestead exemption. Steven and Melissa Crump (the "Debtors") owned certain farmland ("Farmland"). Debtors leased the farmland to a third party. Debtors filed a Chapter 7 bankruptcy and claimed the Farmland exempt as their homestead. Chapter 7 trustee objected and argued that by virtue of the long term crop share lease the Debtors had abandoned the Farmland and, therefore, the Farmland could not be claimed as their exempt homestead. The Court agreed and applying the test under *In re Perry*, 345 F.3d 303, 319 (5th Cir. 2003) the Court held that the Farmland had been abandoned because: (i) the terms of the lease demonstrated the Debtors' intent not to resume control of the property, (ii) the lease provided for significant alteration of the Farmland, (iii) the nature of the accommodation was for the lessee's business (not the Debtors' agricultural purposes), (iv) the Farmland was subject to a lengthy thirty year lease and (v) only the lessee had the right to surrender the lease. *In re Crump*, 533 B.R. 567 (Bankr. N.D. Tex. 2015).

C. Miscellaneous.

1. Fraud.

Actions of lender to force "refinancing" of discharged debt constituted fraudulent inducement. Brad Stabler and Brenda Stabler (the "Debtors") were indebted to First State Bank of Roscoe (the "Secured Creditor") under the terms of a guaranty. The indebtedness was secured by certain real property. A portion of the collateral was liquidated and approximately \$350,000 was owed after sale proceeds were applied against the debt. The Debtors filed bankruptcy and obtained a discharge order. The *in personam* debt was discharged, but the *in rem* lien in the real property remained. Subsequent to the bankruptcy discharge, the Secured Creditor proposed and the Debtors and the Debtors' parents agreed to "refinance" the discharged debts. The Debtors and the Debtors' parents later commenced a legal action to compel the discharge of the refinance debt asserting the Secured Creditor and its president fraudulently induced the Debtors' parents to sign a promissory note and collateral real estate mortgage. The trial court agreed and the Secured Creditor and its president appealed arguing that: (a) any representation made was as to a legal issue and there could not be actionable fraud because fraud requires a misrepresentation of fact, (b) Debtors should not have been allowed to pursue emotional distress damages as part of the fraud and conspiracy claims, and (c) award of exemplary damages should have been allowed. The Supreme Court of South Dakota held that: (a) the Debtors were within their rights to pursue a fraud claim under tort law, (b) although emotional distress damages are allowed in tort actions, the Debtors did not offer any evidence of either intentional or negligent infliction of emotional distress and (c) exemplary damages were warranted because of the fraudulently inducement by the Secured Creditor. *Stabler v. First State Bank of Roscoe*, 865 N.W.2d 466 (S.D. 2015).

2. Credit Agreements.

i. Agreement to forgive debt must be memorialized in written agreement to be enforceable. The Araz Group, Inc. (the “Debtor”) was indebted to NJK Holding Corporation (the “Creditor”). For tax purposes, the Creditor wrote off the debt as uncollectible in 2001. The loan matured in 2002. Sporadic payments were subsequently made by the Debtor. In 2012 the Creditor commenced a legal action to collect the debt. The Debtor argued that, by its actions, the Creditor had forgiven the debt obligation. The court disagreed and held that, under Minn. Stat. § 513.33, any debt forgiveness was required to be memorialized in a written agreement to be enforceable. Although Minn. Stat. § 513.33 only references the modification of a debt, the scope of the statute is broad enough to include the agreed forgiveness of debt as well. *NJK Holding Corp. v. Araz Group, Inc.*, 878 N.W.2d 515 (Minn. Ct. App. May 2, 2016).

ii. Filing IRS Form 1099-C [Cancellation of Debt] creates a material fact for trial as to whether the debt was released by the creditor. James Hofer (the “Debtor”) was indebted to Reynolds State Bank (the “Creditor”). The parties discussed the cancellation of the debt. Subsequently the Creditor issued an IRS Form 1099-C [Cancellation of Debt] and sent a copy of the IRS form to the Debtor. In reliance on the IRS form, the Debtor included the cancelled amount in his taxes as additional income. The Debtor died. The Creditor filed a probate claim. The Debtor’s estate objected to the claim arguing that the debt had been cancelled and that the issuance of the IRS Form 1099-C evidenced the cancellation of debt. The Creditor argued that it made a clerical error, that the debt had not been cancelled, and that it was entitled to a probate claim. The court held that the issuance of the IRS form was not, alone, the release of the debt and that whether the debt had been cancelled was an issue of material fact for trial. *In re Estate of Hofer*, 42 N.E. 3d 480 (Ill App. 2015).

Comment. It is unclear whether the Illinois Credit Agreements Act (815 ILCS 160/2) is a defense to the claims of the Debtor. Consistent with the NJK case summarized above, under most state credit agreement acts any agreement to cancel debt requires a written agreement of the parties.

iii. Illinois Credit Agreements Act does not bar economic duress claims. Royalty Properties, LLC (the “Debtor”) intended to buy a 400 acre horse farm for \$19,350,000. The Debtor applied for, and Amcore Bank, N.A. (the “Secured Creditor”) tentatively approved, the loan application. In reliance, the Debtor escrowed \$1,935,000 as a security deposit. The Secured Creditor was slow to finalize the loan documents. By the time the Secured Creditor finalized the loan documents, the Debtor’s argued that they had little leverage to negotiate the terms and accepted the terms to avoid losing its security deposit. The debt was secured by a mortgage on the 400 acre horse farm. The Debtor defaulted on the loan and the Secured Creditor commenced a foreclosure action. The Debtor contested and argued that the Debtor executed the loan documents under economic duress. The

Secured Creditor argued that the debt was for commercial purposes and the Illinois Credit Agreements Act (815 ILCS 160/2) bars economic duress claims. The court disagreed and held that even if the loan was for commercial purposes, the Illinois Credit Agreements Act does not bar economic duress claims. *BMO Harris Bank, N.A. v. Royalty Properties, LLC*, 2016 IL App 151338-U (2016).

3. Grain Dealer Statutes.

Jurisdiction and related claims under Nebraska Grain Warehouse Act and the Grain Dealer Act. Pierce Elevator (the “Elevator”) operated a grain elevator in Pierce, Randolph and Foster, Nebraska. The Elevator was indebted to Citizens State Bank (the “Creditor”). The Creditor conditionally extended a line of credit to the Elevator in reliance on financials provided by the Elevator. The Creditor elected to not renew the line of credit and the Elevator went insolvent. The Nebraska Public Service Commission (the “Commission”) commenced a legal action to determine claims under the Nebraska Grain Warehouse Act and the Grain Dealer Act. Producers with stored grain with the Elevator filed claims under the Nebraska Grain Warehouse Act (Neb. Rev. Stat. § 88-526) and the Grain Dealer Act. Sufficient grain was in storage to pay off stored grain claims. The Commission sought to resolve claimed related to other business transaction including loans made to the Elevator, delayed price contracts, and sold grain for which the sale proceeds had not yet been delivered to the producer or for which were not honored by the Elevator. The court held that (1) the Commission did not have jurisdiction to address claimant’s equitable claim that he was fraudulently induced into executing a delayed-price contract to sell grain; (2) the “issuance” of check triggering five-day recovery period under Grain Warehouse Act means first delivery of check by the maker or drawer; (3) a delayed-price contract for sale of grain transferred title when contract was signed; (4) a customer could recover as an owner of grain in storage for grain in third-party grain terminals; (5) undelivered checks did not confer status of “qualified check holder” entitled to protection under Grain Warehouse Act; and (6) customers lacked standing to argue that a loan to the warehouseman should not have been classified as a sale or forward contract giving rise to a right to recovery under Grain Dealer Act. *In re Claims Against Pierce Elevator*, 868 N.W.2d 781 (Neb. 2015).

4. Equitable Relief.

i. Relying on defective preliminary title commitment does not warrant equitable subordination of senior mortgage lien. Christian and Deana Bussmann (the “Debtors”) were indebted to Sterling Savings Bank (“First Loan”). The Sterling Bank Loan was secured by a mortgage on their home and 10 1/2 acres of cranberry bogs (the “Real Estate A”). The Debtors subsequently borrowed funds from the USDA, FSA (“FSA”) (the “Second Loan”). The FSA Second Loan was secured by a second mortgage on Real Estate A and a first mortgage on an additional 54 acres of real estate (“Real Estate B”). The F.J. Boresek Trust (the

“Trust”) purchased the Sterling Bank loan and, in doing so, borrowed additional funds to the Debtors secured by Real Estate A and Real Estate B (the “Third Loan”). Due to a defective preliminary title report, the Trust was not aware of the FSA Second Loan when the additional funds were borrowed. The Trust believed that it had a first mortgage on Real Estate A and Real Estate B. The Debtors failed to make payment and defaulted on the loans. The Trust argued that, under Oregon law, the FSA Second Loan should be equitably subordinated to the Third Loan because the Trust reliance on the preliminary title report was commercial reasonable and excusable negligence. The court disagreed and held that upon payoff of the First Loan, the FSA Second Loan took priority over that of the Trust Third Loan. The Trust’s ignorance of the FSA Second Loan was due to inexcusable negligence. The reliance on a defective preliminary title report was not commercially reasonable and equitable subrogation would unfairly prejudice the FSA. *Boresek v. U.S. Dept. of Agric.*, 109 F. Supp. 3d 1338 (D. Or. June 9, 2015).

Comment. Any other conclusion by the court would have had a ripple effect in real estate financing. Although the Court does not address, it appears: (1) the Trust did not argue that the Third Loan was a renewal of the First Loan so as to allow the Trust the step into the first mortgage up to the amount of the original principal amount of the first mortgage and (2) that the Trust did not have a lender’s title policy issued when it extended the Third Loan. A lender’s title policy would have provided the Trust a remedy against the title company.

ii. Marshaling requires two sources of recovery by the senior secured creditor and the failure to object to the liquidated and application of the proceeds from one source defeats the later marshaling argument. Jerry and Julie Ferguson (the “Debtor”) were indebted to First Community Bank (“Senior Secured Creditor”) and West Central FS, Inc. (“Junior Secured Creditor”). The indebtedness owed to the Senior Secured Creditor was secured by a mortgage on certain farmland (the “Farmland”) and a security interest in the equipment and crops of the Debtors (the “Equipment/Crops”). The indebtedness owed to the Junior Secured Creditor was only secured by a security interest in the Equipment/Crops. The Debtors filed a Chapter 12 bankruptcy and sold the Equipment/Crops. The Junior Secured Creditor argued that the court should marshal Farmland lien and apply the Equipment/Crop proceeds against the Junior Secured Creditor. The bankruptcy court disagreed and allowed the proceeds to be applied against the Senior Secured Creditor debt. The Debtors later converted from Chapter 12 to Chapter 7. The Debtors moved to sell the Farmland, pay off the Senior Secured Creditor and distribute the excess to the unsecured creditors. The Junior Secured Creditor (now without a lien claim) argued that the court should impose an equitable lien on the Farmland. The court agreed on the basis that its earlier order was interlocutory as to the distribution of the Equipment/Crops to the Senior Secured Creditor and marshaled the assets by imposing an equitable lien on the Farmland. The District Court disagreed and held that marshaling was not appropriate because: (1) at the time marshaling was ordered, the Equipment/Crops

had already been sold, leaving only one source of recovery to the Senior Secured Creditor; and (2) at the time of the marshaling the claim of the Junior Secured Creditor was an unsecured. *Ferguson v. W. Cent. FS, Inc.*, 2015 WL 5315612 (C.D. Ill. Sept. 11, 2015).

Comment. The critical issue is that the Junior Secured Creditor did not object to the distribution of the Equipment/Crops proceeds to the Senior Secured Creditor. By not objecting, the Junior Secured Creditor effectively consented to the distribution and removal of the proceeds out of the bankruptcy estate. Had the funds been retained by the bankruptcy estate, the marshaling argument may have been justified.

5. Statute of Limitations.

No updates.

V. BANKRUPTCY.

A. General.

No updates.

B. Case Administration.

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).

C. Creditors, Debtors and the Bankruptcy Estate.

1. Property of the Bankruptcy Estate.

No updates.

2. Administrative Claims.

No updates.

3. Federal Exemptions.

No updates.

4. Non-dischargeability actions.

i. 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).

ii. 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' 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).

D. Chapter 7.

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).

E. Chapter 11.

No updates.

F. Chapter 12.

1. Eligibility.

a. "Farming Operation" Requirement.

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.

No updates.

c. 50% Farming Debt Requirement.

No updates.

2. Dismissal/Conversion.

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. Secured Claims.

No updates.

b. Feasibility.

1. 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).

2. 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).

Comment. It is not entirely clear why the Secured Creditor allowed five Chapter 12 bankruptcies to be filed and elected not to file a motion for stay relief in an earlier bankruptcy. Had stay relief order been entered in an earlier bankruptcy, 11 U.S.C. § 109(g)(2) restricts the debtor from filing a later Chapter 12.

3. Chapter 12 plan was feasible eventhough 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).

4. Post-Confirmation.

No updates.

G. Chapter 13.

No updates.

H. Avoidance Actions.

1. Preferential Transfers.

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.

No updates.

3. Lien Avoidance.

No updates.

4. Miscellaneous.

No updates.

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