AGRICULTURAL FINANCE
2019 Case Law Update

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I. UCC REVISED ARTICLE 9 [SECURED TRANSACTIONS].

A. Attachment.

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

B. Perfection.

1. UCC-1 Finance Statement Description: Serial numbers are not required to perfect security interest in equipment. Ollis Farms, LLC (the "LLC") was a farming operation that bought, raised, and fattened cattle to be sold. James Ollis ("Ollis") was the principal of the LLC. The LLC and Ollis were indebted to Rabo Agrifinance LLC ("Rabo"). The debt was secured by a security interest in all accounts, inventory, equipment, farm products and substitutes and replacements of the LLC and Ollis. Rabo filed a UCC-1 finance statement. Ollis filed a Chapter 12 bankruptcy. Rabo was owed $1,606,622.61. Ollis argued that Rabo's security interest in equipment was not perfected because the UCC-1 finance statement failed to list the serial numbers for the equipment. Rabo argued that the UCC-1 finance statement did not need to list the serial numbers to be effective under UCC §9-504. The Court agreed and held that Rabo's security interest was sufficient to perfect its lien in the equipment. *In re Ollis C/A No.18-04549-HB (Bankr. S.D. S.C. March 21, 2019).*

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

Comment 1. The case was limited to a federal bankruptcy filing. The argument of the objecting secured creditor may have weight if the insolvency action was commenced under state law (e.g. receivership, assignment for the benefit of creditors).

Comment 2. Bank A should still file a UCC-3 continuation statement. The bankruptcy code does not stay the filing of a UCC-3 continuation statement. See 11 U.S.C. 362(b)(3). A risk is that the bankruptcy is dismissed and the failure to file the UCC-3 continuation statement immediately un-perfects the security interest of the senior secured creditor. In some circumstances (namely, a Chapter 12 bankruptcy) the bankruptcy can be dismissed by the debtor without hearing and the consent of the court. Another risk is that the UCC-3 is not filed and a Chapter 11 plan is confirmed. The confirmation of the Chapter 11 plan (and the subsequent discharge order) would close the case and, arguably, cause the security interest to be unperfected.

C. Priority.

1. Statutory Liens.

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

b. Oregon producer lien; UCC-1 needs to be filed within 45 days. BNF Operations, LLC ("Debtor") was indebted to PNC Bank, N.A. ("Secured Lender") and the debt was secured by a security interest in the personal property of the Debtor. The Secured Lender properly filed a UCC-1 to perfect its security interest. The Debtor purchased agricultural products on credit from Fishback Nursery, Inc. and Surface Nursery, Inc. (the "Nurseries") for delivery to the Debtor locations in Oregon, Michigan and Tennessee. The Debtor failed to pay the Nurseries and the Nurseries filed producer liens in Oregon, Michigan and Tennessee. For purposes of products delivered to Oregon, and under Oregon Statute §87.710(1), a lien holder has to give notice to attach a lien and file a UCC-1 to perfect its lien. The Court held that the Nurseries failed to properly perfect a producer's lien in Oregon because the Nurseries failed to file the UCC-1 within the required 45 days after final payment was originally due. The court granted summary judgment in favor of the Secured Lender. The 5th Circuit affirmed the District Court. *Fishback Nursery, Inc. v PNC Bank, National Association*, 920 F.3d 932 (5th Cir. 2019).

c. Oregon agricultural lien only extends to the dairy cow and the proceeds of the dairy cow; not the milk of a dairy cow. Lost Valley Farm (the "Debtor") was a dairy in Oregon. The Debtor was indebted to Rabobank, N.A.(the "Lender") and the debt was secured by certain personal property including, but not limited to, the dairy cows, the milk and the proceeds of the milk. The Debtor sold milk to Columbia River Processing ("Milk Buyer"). The Debtor filed bankruptcy. The Lender was owed $7.8 million. The Debtor also had various trade creditors including $1.1 million in unpaid service providers. At the time of filing the bankruptcy the Milk Buyer owed the Debtor $1.2 million for sold milk. The unpaid service providers filed agricultural liens and asserted a lien priority for the unpaid milk proceeds under Oregon Revised Statute §87.226(1). The Lender disagreed and argued that Oregon Revised Statute §87.226(1) entitled the unpaid service providers to a lien in the dairy cows and the proceeds of the dairy cows; however, milk is not the "proceeds" of a dairy cow and, therefore, the unpaid service providers were not entitled to a lien in the milk proceeds owed to Debtor by the Milk Buyer. The Court agreed and held that the Oregon agricultural lien is limited to the dairy cow and not the milk of the dairy cow. *In re Te Velde, Case No. 18-11651-A-11 (Bankr. E.D. Cal. 2018).*

> *Comment 1. Distinguishing between the proceeds and the product of the original collateral is critical – and the interplay with the state agricultural lien statute.*
>
> *Proceeds of Original Collateral. Revised Article 9 does not require the security agreement to specifically state that the security interest attaches to the proceeds of the original collateral. See UCC § 9-315, Comment 9. However, Revised Article 9 defers to the state agricultural lien statute as to whether the agricultural lien attaches to the proceeds of the original collateral. See UCC § 9-315, Comment 9; Barley Clark, The Law of Secured Transactions Under the Uniform Commercial Code, Linda J. Rusch, Farm Financing Under Revised Article 9, The American Bankruptcy Law Journal, Volume 73, Winter 1999, 237. Vol. 2, Section 8.09, p. 8-121; Drew L. Kershen and Alvin C. Harrell, Agricultural Finance: Comparing the Current and Revised Article 9, Uniform Commercial Code of Law Journal, 169-224, 181-82. (Fall 2000). Some states have taken a more liberal interpretation to the scope of the state agricultural lien statutes. See Stockman Bank of Montana v. Mon-Kota, Inc., 180 P.3d 1125 (Mont. 2008) (acknowledging the legal issue but holding that proceeds held in check form are not proceeds); Oyens Feed Supply, Inc. v. Primebank, 808 N.W.2d 186 (Iowa 2011) (acknowledging the legal issue but holding that the Iowa legislative intended to include proceeds).*
>
> *Products of Original Collateral. Revised Article 9 requires the security agreement to specifically state that the security interest attaches to the products of the original collateral for the security interest to be enforceable. See generally, Barley Clark, The Law of Secured Transactions Under the Uniform Commercial Code 8.04[2][c]. However, as mentioned above, Revised Article 9 also defers to the state agricultural lien statute as to whether the agricultural lien attaches to the products of the original collateral. In re Te Velde correctly held that the state statute must specifically state that the ag lien attaches to the products of the original collateral. However, based on the decisions in Stockman*

Bank of Montana v. Mon-Kota, Inc., 180 P.3d 1125 (Mont. 2008) and Oyens Feed Supply, Inc. v. Primebank, 808 N.W.2d 186 (Iowa 2011), it would appear in Montana and Iowa a court may come to a different conclusion.

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

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

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

No updates.

3. Statutory Trusts.

a. Sale of goods is required under Article 2 for a "creditor" to be considered an unpaid seller of produce. Spiech Farms, LLC (the "Debtor") raised and sold produce. The Debtor was indebted to Chemical Bank (the "Lender") and the debt was secured by the produce and accounts of the Debtor. The Debtor and Produce Pay, Inc. ("Produce Pay") were parties to an involved distribution agreement that provided for a combination of the sale of produce to Produce Pay, the factoring of accounts receivable to Produce Pay and the consignment of produce to Produce Pay – which enabled the Debtor to obtain financing from Produce Pay. The Debtor became insolvent and filed a Chapter 11 bankruptcy. Produce Pay asserted a claim of more than $1 million against the Debtor under the Perishable Agricultural Commodities Act, 7 U.S.C. §499 *et seq.* ("PACA"). Produce Pay argued that it was an unpaid seller of produce because the Debtor sold the produce to Produce Pay, and then, the Debtor sold the produce to its customers <u>on behalf of Produce Pay</u>. The failure of the eventual buyers of the produce to pay Produce Pay (via the Debtor) entitled Produce Pay to the PACA claim. The Debtor and creditor disagree and argued that there was no transfer of title of the produce to Produce Pay

under UCC §2-403. The Court agreed and held that title did not pass to Produce Pay prior to title passing to the eventual buyers of the produce and, therefore, the Debtor did not own the produce at the time title was purportedly passed to Produce Pay. The Court concluded the arrangement constituted a financing arrangement and not a sale of goods. *In re Spiech Farms, LLC, 592 B.R. 152 (Bankr. W.D. Mich. 2018).*

b. Agreement did not constitute a factoring agreement because the seller remain obligated to the creditor on the customer accounts. Spiech Farms, LLC (the "Debtor") raised and sold produce. The Debtor was indebted to Chemical Bank (the "Lender") and the debt was secured by the produce and accounts of the Debtor. The Debtor and Produce Pay were parties to an involved distribution agreement that provided for a combination of the sale of produce to Produce Pay, the factoring of accounts receivable to Produce Pay and the consignment of produce to Produce Pay – which enabled the Debtor to obtain financing from Produce Pay. The Debtor became insolvent and filed a Chapter 11 bankruptcy. Produce Pay argued that the agreement was a factoring agreement and Produce Pay purchase the accounts of the Debtor free of any security interests. The Debtor and committee argued that Produce Pay did not purchase the accounts of the Debtor because the Debtor retained the risk of loss associated with the accounts under the "transfer-of-risk" test articulated by the Second, Third, Fourth, Fifth and Ninth Circuit. *See S & H Packing & Sales Co., Inc. v. Tanimura Distributing, Inc.*, 883 F.3d 797, 808 (9th Cir. 2018), *Nickey Gregory Co., LLC v. AgriCap, LLC*, 597 F.3d 600-603 (4th Cir. 2010), *Reaves Brokerage Co., Inc. v. Sunbelt Fruit & Vegetable Co., Inc.*, 336 F.3d 410 (5th Cir. 2003). The Court agreed and held that under the distribution agreement the Debtor remained obligated to Produce Pay even if the Debtor's customers failed to pay on for the produce. *In re Spiech Farms, LLC, 592 B.R. 152 (Bankr. W.D. Mich. 2018).*

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

d. Right of setoff under Bankruptcy Code does not extend to PACA claims. Lenny Perry's Produce Inc. (the "Debtor") routinely purchased and sold produce to Genecco Produce Inc. (the "Buyer"). Due to the relationship, the Debtor and Buyer routinely setoff their respective debts as against each other. The Debtor filed a Chapter 7 bankruptcy – and at the time of the bankruptcy filing – the Buyer owed the Debtor $204,774.88 and the Debtor owed the Buyer $263,061.92. The creditors of the Debtor commenced a legal action against the Buyer and asserted the Debtor was entitled to a $204,774.88 trust claim under the Perishable Agricultural Commodities Act, 7 U.S.C.

§499 et seq. ("PACA"). The Buyer disagreed and held that the Buyer was entitled to setoff – resulting in a net $58,287.04 claim against the Debtor. The Buyer relied on the general principal under 11 U.S.C. §553 of the Bankruptcy Code that allows for the setoff of mutual debts. The District Court held, and the Second Circuit affirmed, that the Buyer was not entitled to set-off the debt because the produce held by the Debtor was held in trust for the benefit of the creditors of the Debtor and was not property of the bankruptcy estate. *PACA Trust Creditors of Lenny Perry's Produce, Inc. v. Genecco Produce Inc., 913 F.3d 268 (2nd Cir. 2019).*

II. UCC ARTICLE 2 [SALE OF GOODS].

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

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

B. Remedies. (UCC § 2-701 *et seq.*).

No updates.

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

No updates.

IV. OTHER STATE LAW.

A. Cause existed under Iowa law to appoint receiver of crop farm. Dale and Danna Braaksma, their son Jesse Braaksma, and Braaksma Grain Farms, Inc. (the "Debtors") farmed 800 acres. The Debtors were indebted to Sibley State Bank (the "Lender") and the debt was

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

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

> *Comment. The court reasoned that a debt resulting from an intentional tort is not a "debt on agricultural property". Minn. Stat. §550.366 does not address intentional torts. The court carved out this exception. It will be seen if judgment creditors argue that any non-farm related debts are also excluded from Minn. Stat. §550.366.*

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

D. Transfer of encumbered assets not a fraudulent transfer under Iowa law. Western Slopes Farm Partnership (the "Debtor") and BJM, Inc. ("Co-Debtor") were controlled and owned by Frank White. The Debtor and Co-Debtor were indebted to Roger Rand (the "Lender") and the debt was secured by certain personal property of the Debtor and Co-Debtor. The Lender died. The personal representative of the Lender (for purposes of this summary, also the "Lender") commenced a legal action to replevin the personal property. The Co-Debtor transferred its

personal property to the Debtor and the Debtor filed bankruptcy on the same day. The Lender filed an adversary action for a determination that the transfer of equipment was voidable under the Uniform Voidable Transfer Act; Iowa Code §684.4 and §684.5 ("UVTA"). The Debtor argued that the UVTA was not applicable because the transfer was not made with the intent to defraud its creditors (but, instead, to avoid the need for the Co-Debtor to file bankruptcy) and the equipment remains subject to the security interest of the Lender. The Court agreed and held that fully encumbered assets are not "assets" for purposes of the UVTA and, therefore, the transfer is not avoidable. *In re Western Slopes Farm Partnership, Adv. No. 17-09047 (Iowa Bankr. 2018).*

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

F. Existence of farming partnership is a question of fact. Richard Solberg (the "Debtor") was indebted to Bremer Bank (the "Lender") and the debt was secured by the farm equipment and crops of the Debtor. Zaitz Trust LLP ("Landlord") owned and leased 3,277 acres to "Solberg Farms – Rick Solberg" (the "Lease"). Solberg Farms granted the Landlord a security interest in the crops grown on the leased cropland. The Debtor filed a Chapter 11 bankruptcy. The Landlord argued that the farming partnership owned the crop. The Lender argued the Debtor owned the crop and, therefore, the Lender had a priority security interest in the crop. The Bankruptcy Court agreed and granted summary judgment. The Landlord appealed and the Bankruptcy Appellate Panel held that whether a farming partnership existed is a material question of fact and remanded the case back to the Bankruptcy Court. *Zaitz Trust, LLP v. Bremer Bank (In re Solberg), 2019 WL 3806242 (BAP. 8th Cir. 2019).*

V. BANKRUPTCY.

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

No updates.

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

No updates.

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

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

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

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

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

Comment. This is inconsistent with earlier case summarized in 2016. H. Brooks & Company, LLC v. Yerges (In re Yerges), 512 B.R. 916 (Bankr. W.D. Wis. 2014) held that a PACA trust claim was non-dischargeable under §523(a)(4) as to the principals of the produce seller 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.

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

c. Missing collateral did not constitute willful and malicious injury under 11 U.S.C. §524(a)(6). Connor Freeman and Trace Freeman (the "Debtors") were indebted to Citizens Bank (the "Lender") and the debt was secured by certain farm equipment. Craig Freemen (the "Co-Debtor"), their father, also executed the promissory notes. The Debtors filed a Chapter 7 bankruptcy and the Co-Debtor failed to make the payments. The Debtors were not in possession of the farm equipment and were unable to explain why the farm equipment was missing. The Lender filed an adversary action for a determination that the debt owed to the Lender was non-dischargeable under 11 U.S.C. §524(a)(6) alleging the Debtors' actions were willful and malicious. The Debtors argued that the loan was made with the understanding of the parties that the Co-Debtor was going to make the payments. The court agreed and held that the Lender could not justifiably rely on any alleged false representations by Debtors. The disappearance of collateral did not provide a basis to except debtor's debts because the

Lender was willful and malicious injured. *In re Freeman, 598 B.R. 839 (Bankr. S.D. Miss. 2019).*

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

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

No updates.

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

No updates.

5. Right of Setoff. (11 U.S.C § 553)

Right of setoff under Bankruptcy Code does not extend to PACA claims. Lenny Perry's Produce, Inc. (the "Debtor") routinely purchased and sold produce to Genecco Produce, Inc. (the "Buyer"). Due to the relationship, the Debtor and Buyer routinely setoff their respective debts as against each other. The Debtor filed a Chapter 7 bankruptcy – and at the time of the bankruptcy filing – the Buyer owed the Debtor $204,774.88 and the Debtor owed the Buyer $263,061.92. The creditors of the Debtor commenced a legal action against the Buyer and asserted the Debtor was entitled to a $204,774.88 trust claim under the Perishable Agricultural Commodities Act, 7 U.S.C. §499 et seq. ("PACA"). The Buyer disagreed and held that the Buyer was entitled to set-off – resulting in a net $58,287.04 claim against the Debtor. The Buyer relied on the general principal under 11 U.S.C. §553 of the Bankruptcy Code that allows for the setoff of mutual debts. The District Court held, and the Second Circuit affirmed, that the Buyer was not entitled to set-off the debt because the produce held by the Debtor was held in trust for the benefit of the creditors of the Debtor and was not property of the bankruptcy estate. *PACA Trust Creditors of Lenny Perry's Produce, Inc. v. Genecco Produce Inc., 913 F.3d 268 (2nd Cir. 2019).*

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

Failure to explain missing records and collateral is basis to deny discharge. Derek and Chelsey Tingle (the "Debtors") were indebted to Farm Credit Mid-America, PCA (the "Lender")

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

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

No updates.

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

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

2. Chapter 12 plan denied because of lack of testimony as to the reasonable interest rate. Graves Farms (the "Debtor") was indebted to RCB Bank (the "Lender") and the debt was secured by farmland and farm equipment. The Debtor filed a Chapter 12 bankruptcy. The Chapter 12 plan proposed to sell and lease certain assets. The Lender objected on the basis that the plan did not comply with the treatment of secured claims under 11 U.S.C. §1225(a)(5)(B) because the Debtor failed to provide testimony that the proposed 5.75% interest rate was reasonable. In light of a prime rate of 5.5%, for which the court took judicial notice, the court agreed. *In re Graves Farms, Case No. 18-10893 (Bankr. Kan. 2019).*

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

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

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

No updates.

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

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

V. OTHER FEDERAL LAW.

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

No updates.

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