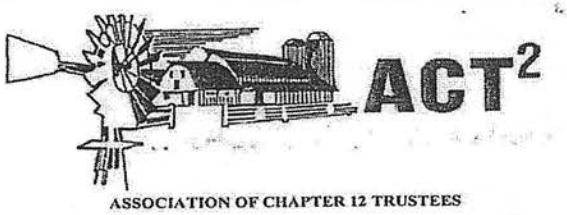

ASSOCIATION OF

CHAPTER 12 TRUSTEES

CHAPTER 12 CASE LAW UPDATE

March 2010 to August 2012

SUPPLEMENT TO THE ASSOCIATION'S CASE LAW COMPILATION

PRESENTED AT THE ASSOCIATION OF CHAPTER 12 TRUSTEE'S 22ND ANNUAL CONFERENCE
ATLANTA, GEORGIA
OCTOBER 11TH AND 12TH, 2012

PRESENTED BY:

NANCY J. WHALEY
STANDING CHAPTER 12 AND 13 TRUSTEE
NORTHERN DISTRICT OF GEORGIA

MATERIALS PREPARED BY
Annie Chan, 3rd Year Law Student, Emory University College of Law, Atlanta, Ga.
Chris Hoitnik, 3rd Year Law Student, John Marshall Law School, Atlanta, Ga.
Edited By:
Nancy J. Whaley

Chapter 12 Case Law Update: March 2010-Present

Contents

March 2010 —— to Sept. 2012

A. Eligibility

In re Sandifer, 448 B.R. 382 (Bankr. D.S.C. 2011): Debtors are eligible for chapter 12 relief because at least half of their income is attributable to their farming operation and they have regular income sufficient to make plan payments. Section 109(f) provides, "only a family farmer or family fisherman with regular annual income may be a debtor under chapter 12 of this title." Section 101(18) defines "family farmer" as an "individual or individual and spouse engaged in a farming operation whose aggregate debts do not exceed less than 50 percent of whose aggregate noncontingent, liquidated debts (excluding debt for the principal residence...), on the date the case is filed, arise out of a farming operation owned or operated by such individual or such individual and spouse, and such individual or individual and spouse *receive from such farming operation more than 50 percent of such individual's or such individual and spouse's gross income* for (i) the taxable year preceding; or (ii) each of the second and third taxable years preceding; the taxable year in which the case concerning such individual or such individual ands spouse was filed."

In re Woods, 465 B.R. 196 (B.A.P. 10th Cir. 2012): Debtors are eligible for chapter 12 relief because their debt arising from the construction of their homestead is considered to arise out of their farming operation. Although debts on a principal residence are typically excluded as debts arising out of a farming operation, here the house serves as the main office for the farm and is therefore directly connected to the debtor's farming activities.

In re Jones, No. 10-65478-fra12, 2011 Bankr. LEXIS 2982, 2011 WL 3320504 (Bankr. D. Or. Aug. 2, 2011): Debtor is not eligible for chapter 12 relief because in order to be considered a "family farmer" the debtor must be engaged in a "farming operation" and although the definition for "farming operation" is broadly construed, boarding and training horses does not fall under that definition.

In re Cooper, No. 10-66447-fra12, 2011 Bankr. LEXIS 3340, 2011 WL 3882278 (Bankr. D. Or. Sept. 2, 2011): Debtor is not eligible for chapter 12 relief because the majority of the gross income derived from the "farming operations" was from the purchase and sale of Christmas trees, as opposed to the cultivation of trees.

In re Marek, No. 11-21158-TLM, 2012 Bankr. LEXIS 2713, 2012 WL 2153648 (Bankr. D. Idaho June 13, 2012): Debtors are not eligible for chapter 12 relief because they do not meet the definition of "family farmer." The debtor's annual income for the taxable year preceding the filing of the chapter 12 case was incorrectly stated as the Debtors refused to produce credible and probative evidence supporting their claim that their gross income was primarily from "farming operations."

In re Meadows, No. 12-50510, 2012 Bankr. LEXIS 2916, 2012 WL 2411905 (Bankr. E.D. Ky. June 26, 2012): Debtors do not meet the eligibility requirements because their farming operation does not provide more than 50% of their gross income for the preceding taxable year or

each of the second and third preceding taxable years. Debtors sought to equate money received from livestock sales to "gross income" and the court held that "gross receipts" are not the same as "gross income."

In re Powers, No. 10-14557, 2011 Bankr. LEXIS 3180, 2011 WL 3663948 (Bankr. N.D. Cal. Aug. 12, 2011): Debtors are not eligible for chapter 12 relief because they did not produce enough income from cutting and selling the timber on their land to qualify as "family farmers" under § 101(18). Pursuant to § 109(f), only a family farmer with regular annual income may be a debtor under chapter 12. Section 101(18)(B) defines family farmer as an individual and spouse engaged in a farming operation with limited aggregate debts, not less than 50% of whose aggregate noncontingent, liquidated debts arise out of a farming operation owned or operated by such individual or couple, and such individual or couple receive from such farming operation more than 50% of the individual's or couple's gross income for either the taxable year preceding, or each of the second and third taxable years preceding the taxable year in which the case was filed. The court held that the occasional sale of timber from land acquired for other purposes did not make the debtor a family farmer.

In re Allen, No. 0:11-bk-15206-EWH, 2012 Bankr. LEXIS 1747, 2012 WL 1207233 (Bankr. D. Ariz. Apr. 10, 2012): Debtors do not qualify as "family fisherman." Section 101(19A) defines "family fisherman" as, "[a]n individual or individual and spouse engaged in a commercial fishing operation-(i) whose aggregate debts do not exceed $1,757,475 and not less than *80 percent* of whose aggregate noncontingent, liquidated debts . . . on the date the case is filed, arise out of a commercial fishing operation owned or operated by such individual or such individual and spouse; and (ii) who receive from such commercial fishing operation more than 50 percent of such individual's or such individual's and spouse's gross income for the taxable year preceding the taxable year in which the case concerning such individual or such individual and spouse was filed." Debtors have failed to show that "not less than 80%" of their "aggregate, noncontingent, liquidated debts" arise out of a commercial operation and they have failed to show that they "own or operate" a commercial fishing concern.

In re Schley, No. 10-03252 S, 2011 Bankr. LEXIS 1226, 2011 WL 1344595 (Bankr. N.D. Iowa Apr. 7, 2011): Not every activity must generate revenue to be a legitimate part of a farm operation. Despite off-farm employment at the school district, debtor was engaged in farming where she worked with animals, operated equipment, reviewed and executed loan documents, dealt with suppliers of goods and services, and handled bookkeeping. The fact that she was not paid for bookkeeping work was irrelevant.

A. Property of the Estate

In re Cady, 440 B.R. 16 (Bankr. N.D.N.Y. 2010): Property transferred to the debtor through a family trust is property of debtor's chapter 12 estate even though debtor is not in privity of contract with the creditor. Property of the estate includes all legally cognizable interests, including remainder interests, whether contingent or vested subject to divestment.

In re Highside Pork, LLC, 450 B.R. 173 (Bankr. N.D. Iowa 2011): Under Iowa law, chapter 12 debtors (Shulistas) and their creditor (Wells Fargo) were able to establish that the debtors took ownership of 5002 header of pigs from another chapter 12 debtor (HighSide). Under Iowa law, title passes to buyer upon physical delivery of the goods. Here, affidavits and invoices demonstrated that HighSide sold the pigs to the Shulistas before each filed for chapter 12 bankruptcy. In this case, Wells Fargo sought to show that the Shulistas bought the pigs prior to filing and that thus, the pigs were not subject to the liens asserted by another creditor of HighSide.

In re Oak Ridge Enterprises, Inc., No. 08-05828-8-JRL, 2011 Bankr. LEXIS 4585, 2011 WL 5909536 (Bankr. E.D.N.C. Sept. 23, 2011): Funds that the corporate debtor acquired prior to conversion of chapter 13 case to a chapter 7 case became part of the chapter 7 estate. Section 1207(a) provides that in addition to the property specified in § 541, property of the chapter 12 estate includes all property and earnings "that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7 of this title." 11 U.S.C. § 1207(a).

In re Smith, No. 12-10-11752 SL, 2010 Bankr. LEXIS 3917, 2010 WL 4483312 (Bankr. D.N.M. Nov. 1, 2010): Cattle owned by an individual debtor who maintains the herd for a corporation for which he is president is not property of the estate and therefore do not implicate the automatic stay on that property.

In re Evenson, No. 05-37920-svk, 2010 Bankr. LEXIS 3937, 2010 WL 4622188 (Bankr. E.D. Wis. Nov. 3, 2010): Debtors' farm is property of the estate because confirmation of their chapter 12 plan, the conversion to chapter 7, nor the full exemption of the farm from the estate served to remove it from the estate. Section 1227 states that confirmation vests property of the estate in the debtor, except as provided in the plan, § 348(f)(1)(A) applies only to remove property acquired after the initial filing and before the chapter 7 discharge, and finally, according to *Schwab v. Reilly*, even if the debtor's interest in the farm is fully exempt, the estate maintains its interest in the farm until the trustee sells or abandons it. Therefore, since the debtor's plan only provided that the exempt property be deemed owned free and clear upon confirmation, because debtors owned the farm on the date of filing the chapter 12 petition, and because the trustee had not sold or abandoned the farm, the farm remained property of the estate.

In re Shaw, No. 11-30032, 2012 Bankr. LEXIS 1552, 2012 WL 1190695 (Bankr. E.D. Ky. Apr. 9, 2012): The farm is property of the estate because transfer of real estate through a Deed in Lieu of Foreclosure does not divest the debtors of their possessory interest in the property. Section 541 provides that the estate is comprised of all legal and equitable interests of the debtor in property as of the commencement of the case. The bare possessory interest of the debtor was enough of an interest for the property to be considered property of the estate. But, regardless of this fact, the title never passed to the creditor because a deed must be accepted by the grantee in order for title to pass. A valid deed requires (1) the presence of a grantor and grantee; (2) a

delivery and an acceptance; and (3) a divesting of title by the grantor and a vesting of title in the grantee. There was a meeting of the minds between the debtor and creditor, but upon delivery of the Deed in Lieu of Foreclosure to the creditor, the creditor's actions did not evidence an intent to vest title in its own name. Therefore, title remained vested with the debtors and the farm was property of the estate.

B. Exemptions

In re Arnhoelter, 431 B.R. 453 (Bankr. E.D. Wis. 2010): Debtor could not claim as his homestead a home he lived in but was owned by his LLC. Under Wisconsin's homestead exemption statute, in order for the debtor to claim property as his exempt homestead, the property must be selected by a "resident owner and occupied by him." Here, the debtor lived at the property, but was not the title owner.

C. Contract / UCC Issues

In re Hatfield 7 Dairy, Inc., 425 B.R. 444 (Bankr. S.D. Ohio 2010): The Motion for Relief from Stay was denied because the debtor held title to the Silage at the time of filing for relief under chapter 12. Under the relevant Ohio UCC provision, title to Silage, which the debtor had contractual obligation to provide to lender in the future, did not pass until completed performance under the contract, which was the physical delivery of the goods to the lender.

In re Crumley, No. G11-20382-REB, 2011 Bankr. LEXIS 5248, 2011 WL 7068913 (Bankr. N.D. Ga. Aug. 10, 2011): Plaintiffs did not fail to state a claim upon which relief can be granted when it alleged that the debtors' actions in disposing of collateral and diverting proceeds to purposes contrary to debtors' known obligation as set forth in a security agreement were tortious. See Fed. R. Civ. P. 12(b)(6). Under § 523(b)(6), a "willful and malicious" injury must be done with an actual intent to cause injury and not only done intentionally with a result of injury. Section 523(b)(6) typically addresses torts and not contract actions; thus, a plaintiff alleging a breach of contract provision must show that the conduct rises to the level of tortuous conduct. The court also noted that "an act of conversion or sale of collateral out of trust, even if shown to have been done merely as part of an attempt to avoid further financial problems or save a business, *could* support a finding that such act was without just cause or excuse given a debtor's specific contractual legal duties."

In re Potts, 469 B.R. 310 (B.A.P. 8th Cir. 2012): Creditor had a right to funds for rent of the debtor's property when the rent check was made payable jointly to both. Creditor had a right to the funds by virtue of a contract that stipulated a right to apply proceeds to cure any existing default in the event that the debtor was not current on his obligations. The issue was one of state contract law, and creditor was entitled to payment under the plain language of the agreement.

In re Hering, No. 07-03512-8-JRL, 2010 Bankr. LEXIS 3855, 2010 WL 4366193 (Bankr. E.D.N.C. Oct. 28, 2010): Debtors could not establish violation of an agreement to pay for

agricultural products purchased on credit based on unwritten understandings and where debtors presented no evidence of a meeting of the minds. Parties testified to an agreement to divide profits from the sale of crops to third parties, not from a sale of crops from the debtors to the defendants. This evidence indicates that the business arrangement was more like a joint venture. The unwritten agreement failed to satisfy the statute of frauds. Debtors failed to establish contractual terms where they could not provide evidence of actual prices or accounting sheets.

In re Pilgrim's Pride Corp., No. 08-45664 (DML), 2011 Bankr. LEXIS 3314, 2011 WL 3799835 (Bankr. N.D. Tex. Aug. 26, 2011): Debtor's claims respecting damages she sustained as a result of broiler production company's overcharging her for chicken feed were best addressed by awarding her 7.5 cents per pound of overcharged or spilled feed. All other claims (e.g., negative effect on grower ranking, misrepresentation, fraudulent inducement, bad faith, antitrust violations, collusion, and so on) either failed or did not meet the burden of proof.

In re Del-Maur Farms, Inc., No. BK10-42168-TJM, 2011 Bankr. LEXIS 2736, 2011 WL 2847709 (Bankr. D. Neb. July 14, 2011): An agreement in the form of a lease of personal property was not a true lease but rather a disguised purchase agreement and security interest where the purchase option (approximately 9% of the total rent payments) was nominal additional consideration. See UCC § 1-203(b)(4). The court concluded that "[i]f the only economically sensible decision is for the lessee to exercise the purchase option, the additional consideration is considered nominal." In this case, the debtor would have paid $365.28 more over the next and faced the prospect of either losing the equipment or purchasing it at fair market value if it did not exercise the purchase option.

In re Hall, No. 06-40872, 2010 Bankr. LEXIS 1487, 2010 WL1730684 (Bankr. D. Kan. Apr. 28, 2010): A security interest in a commercial tort claim can only be created and perfected by specifically identifying it in the security agreement and financing statement. Thus, to the extent that the settlement proceeds were for release for liability for tort claims, those funds were not to be paid to the primary secured creditor's successor. To the extent that proceeds were commingled, the lowest intermediate balance rule applies. Proceeds of collateral that can be traced into a commingled fund are presumed to remain identifiable; thus, the security interest in them continues. The court then determined that the appropriate value of the proceeds from the bank's security interest in the equipment (skid loader) is its purchase price.

D. Automatic Stay

In re Benefield, 438 B.R. 706 (Bankr. D.N.M. 2010): Debtors were not entitled to the automatic stay because they had filed two previous chapter 12 cases which were dismissed within four months of this case. Under § 362(c)(4), the stay does not come into effect automatically "if two or more single or joint cases of the debtor were pending within the previous year but were dismissed." The court held that § 362(c)(4)(A)(i) was unambiguous on this issue.

In re Ellis, No. 11–30195, 2012, Bankr. LEXIS 3043, 2012 WL 2576552 (Bankr. N.D.N.Y.

July 3, 2012): Creditor was granted relief from the automatic stay because the debtor did not show that the creditor's interest in the property was adequately protected and because there was no reasonable possibility of a successful reorganization within a reasonable time. Pursuant to § 362(d)(1), the court may grant stay relief "for cause, including the lack of adequate protection of an interest in property." Additionally, pursuant to § 362(d)(2), the court may grant stay relief with respect to property where, "(A) the debtor does not have an equity in such property; and (B) such property is not necessary to an effective reorganization." Relief from the stay was granted because the debtor was paying less than the interest amount that the debtor proposed to pay creditor under the plan and the debtor did not have sufficient monies to fund a plan. Debtor also had more than enough time, because of extensions granted for the confirmation hearing, to propose a confirmable plan, but failed to do so.

In re James Fall Flowers & Produce, LTD, No. 12-30400, 2012 Bankr. LEXIS 934, 2012 WL 692130 (Bankr. N.D. Ohio Mar. 2, 2012): Creditor was granted relief from the automatic stay because 1) debtor would be unlikely to make payments to the creditor in the future, as is evidenced by the fact that the debtor had not made payments in over five years; 2) because debtor could not provide adequate protection to the creditor, and creditor's interest in the property is decreasing because of the lack of payment of property taxes; and 3) because debtor's history of dismissed bankruptcy cases casts doubt on the future success of this case. Section 362(d) provides four grounds under which a creditor may obtain relief from the automatic stay including "for cause, including the lack of adequate protection of an interest in property of such party in interest."

In re Niedzielski, No. DT 10-03272, 2010 Bankr. LEXIS 3962, 2010 WL 4627999 (Bankr. W.D. Mich. Oct. 28, 2010): Motion for relief from automatic stay was granted because the property was quit claimed to the ex-wife under the Judgment of Divorce prior to debtor filing the bankruptcy petition for relief, and debtor therefore had no interest in the farm on the petition date.

Graham v. Graham, No. CV409-128, 2010 WL 3894451 (S.D. Ga. Sept. 29, 2010): Bankruptcy court erred in awarding a chapter 12 debtor damages for lost profits as a result of a violation of the automatic stay where the debtor failed to provide: (1) detailed farm data on his personal farming experience, grounds for comparison regarding farming operations near debtor's farm, (3) sufficient information as to projected yields, and (4) required expenditures to produce the debtor's crop. Additionally, the debtor's actual crop yields indicated that a likelihood of profit was not "reasonably certain."

E. Adequate Protection / Cash Collateral

In re Moore, 465 B.R. 111 (Bankr. N.D. Miss. 2011): Debtors borrowed crop production funds and were unable to repay the loans after a crop disaster. Lender agreed to forebear from foreclosing by extending the maturity date of the loan so that debtors' could farm for the year. Debtors requested a determination that the lender had no lien on the balance of the proceeds

remaining from the crop. Recognizing that a security interest can include after-acquired property, the court found that the lien, perfected through security instruments, extended to the balance of the proceeds remaining from the crop. Therefore, the court held that the debtors had to demonstrate adequate protection under § 363(e) to use any of the proceeds in their ongoing farming operations.

In re Walker, No. 10-72459, 2011 Bankr. LEXIS 690, 2011 WL 839508 (Bankr. C.D. Ill. Mar. 7, 2011): Debtors' motion to use cash collateral was denied because their proposal did not offer the creditor adequate protection. Pursuant to § 363(c)(2) and (3), cash collateral may only be used with the consent of the creditor or by authorization from the court after a hearing at which the debtors establish that the value of the property to be used is adequately protected. Because cash collateral is used up, the standard for determining adequate protection is strict and case law does not generally support finding that a lien on crops to be grown in the future constitutes adequate protection for cash collateral. The court noted that while debtors presented a thorough and well-thought-out case, their numbers did not provide the creditor adequate protection in the form of a lien on the following year's crops.

F. Interest Rates

In re Woods, 465 B.R. 196 (B.A.P. 10th Cir. Feb. 27, 2012): The national prime interest rate plus an additional 2% risk factor was sufficient for confirmation of debtor's plan. Section 1325(a)(5) contains virtually identical language to § 1225(a)(5), making *Till* applicable in chapter 12 cases.

In re Prescott, No. 11-10789, 2011 Bankr. LEXIS 5332, 2011 WL 7268057 (Bankr. S.D. Ga. Dec. 21, 2011): Debtor's plan which proposed a 5% interest rate to be amortized over twenty-five years provided the creditor with the present value of its claim. Courts in chapter 11, 12 and 13 cases have given equal treatment to determining the value of cramdown interest rates, and the *Till* approach is therefore appropriate in chapter 12 cases. The creditor failed to carry its burden of showing that a 1.75% risk factor over a prime interest rate of 3.25% was insufficient.

G. Good Faith / Fraud

In re Bange, No. 08-40156-12, 2010 Bankr. LEXIS 1225, 2010 WL 1418410 (Bankr. D. Kan. Apr. 5, 2010): Debtor's actions of submitting counterfeit money orders to the trustee constituted fraud that justified converting the case to chapter 7. Section 1208(d) permits the court to dismiss or convert a case to chapter 7 upon a showing that the debtor has committed fraud in connection with the case. Fraud, under § 523(a)(2)(A), requires a showing of damage and reliance. The damage here encompassed damage to the bankruptcy process in the form of the inability of the court, the trustee, and the creditors to rely upon the accuracy of the debtor's schedules. Therefore, specific damages and reliance by the moving party is not required to permit a finding of fraud under § 1208(d).

In re Erickson, No. 11-20066, 2012 Bankr. LEXIS 1837, 2012 WL 1453967 (Bankr. D. Wyo. Apr. 26, 2012): Debtor's plan was not filed in good faith and failed the § 1225(a)(4) liquidation analysis because the debtor attempted to parse out 40 of 167 acres of a piece of real estate for payment of claims with the hopes that the unsecured creditors would realize a distribution. Section 1225(a)(4) provides that "the court shall confirm a plan if the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than that amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date." The real estate in question here was encumbered by a lien the creditor had on the property and was property of the estate, so the entire property should have been available for sale to insure that the plan was paid as proposed.

In re Nichols, 447 B.R. 97 (Bankr. N.D.N.Y. 2010): Farmer did not act with fraudulent intent to shield assets from creditors when he established a limited liability company as an estate planning tool, transferring farm equipment and other assets subject to a lender's lien to the LLC without prior notice to the lender. See § 1208(d). In determining whether the debtor committed fraud, the bankruptcy court compared his conduct with that of other debtors. "[O]nly the most severe transgressions can support an involuntary conversion." Debtor made his arrangements on the advice of trusted professionals. Although his faith may have been "blind," blind faith does not necessarily equate to bad faith. Other factors that the court considered included: (1) the debtor's long history of honoring his obligations to his creditors, (2) the fact that the debtor did not intentionally conceal assets or transfers, and (3) credible testimony that the debtor believed the creditor's rights were unimpaired.

H. Claims

In re McElwee, 469 B.R. 566 (Bankr. M.D. Pa. 2012): The court held that under *Stern v. Marshall*, the bankruptcy court has the authority to render a final judgment on a claim objection including a counterclaim because the defensive counterclaim was necessarily resolved by ruling on the allowability of the claim. The counterclaim sought to reduce the amount debtors owed to the claimant, in contrast to the *Stern* case, in which the bankruptcy estate sought affirmative monetary relief from a claimant. The bankruptcy court went on to conclude that the debtors failed to prove contract damages under Pennsylvania law, thus allowing the claim and overruling the claim objection.

In re Eckberg, 446 B.R. 909 (Bankr. C.D. Ill. 2011): Administrative priority claims are narrowly construed because such claims disadvantage other creditors and hinder reorganization efforts. Administrative expenses have two characteristics: (1) expense and right to payment after the filing of bankruptcy, and (2) consideration for right to payment provides a *benefit* to the estate. Debtors have the option to reject a contract to avoid incurring additional administrative expenses that do not benefit the estate. Here, "forward" executory contracts, containing a delayed pricing provision, were rejected by the estate and thus provided no possibility of a future benefit. Therefore, the contract damages were not eligible for administrative priority treatment. Damages from the rejection of an executory contract are classified as nonpriority unsecured claims.

In re Colvin, No. 11-51241-C, 2012 Bankr. LEXIS 1396, 2012 WL 1123055 (Bankr. W.D. Tex. Apr. 3, 2012): Creditor filed a proof of claim, then an amended proof of claim within the 90 day time limit. Over a month later, creditor filed a second amended proof of claim. The debtor argued that: (1) the creditor failed to seek leave to amend its proof of claim pursuant to Rule 7015, and (2) creditor's proof of claim failed to include sufficient supporting materials under Rule 3001. While parties generally ask for leave to amend, courts may grant leave sua sponte. Thus, granting leave to file a second amended proof of claim was appropriate. On the question of sufficiency and validity, the court held that the creditor's proof of claim was deficient because it did not attach the real estate contract on which the claim was based. Where the proof of claim is deficient in supporting documentation, it is deprived of prima facie validity and creditor has the burden of demonstrating validity by a preponderance of the evidence.

In re Idacrest Farms, Inc., No. 09-03735-JDP, 2010 Bankr. LEXIS 2442, 2010 WL 2926145 (Bankr. D. Idaho July 26, 2010): Creditor had adequate notice of the bankruptcy case and did not timely file its proof of claim where the creditor could not overcome the presumption that the § 341 meeting notice was mailed to and received by the creditor. Here, the debtor's counsel also mailed other notices to the creditor's official mailing address, and creditor was aware of the bankruptcy filing and the deadline for filing claims.

In re Spresser, No. 08-41067-12, 2011 Bankr. LEXIS 1862, 2011 WL 2083964 (Bankr. D. Kan. May 19, 2011), aff'd, In re Spresser, No. 08-41067, 2012 WL 124885 (D. Kan. Jan. 17, 2012): The informal proof of claim doctrine is applicable in chapter 12 proceedings. Although the doctrine lessens the weight of formalities, the timeliness requirement of Rule 3002 still applies. In the Tenth Circuit, a proof of claim must meet a five-prong test in order to qualify as an informal proof of claim: (1) the proof of claim must be in writing; (2) the writing must contain a demand by the creditor on the debtor's estate; (3) the writing must express an intent to hold the debtor liable for the debt; (4) the proof of claim must be filed with the bankruptcy court; and (5) based on the facts of the case, it would be equitable to allow the amendment. The court balances the equities when considering the fifth factor. Factors that weigh against equity may include: (1) failure to file a proof of claim after receiving notice, (2) failure to follow statutory requirements, and (3) a negative effect on other unsecured creditors who fully complied with requirements.

I. Lien Priority

In re Crooked Creek Corp., 427 B.R. 500 (Bankr. N.D. Iowa 2010): Under Iowa law, in a priority dispute between the holder of an Article 9 security interest and the holder of an agricultural supply dealer's lien (statutory lien), the holder of the agricultural supply dealer's lien, to obtain either equal or priority status, must first make a certified request to the holder of the Article 9 security interest. Prior to a sale, an agricultural supply dealer considering selling farm supply on credit may make a certified request to a bank with a security interest in the farmer's collateral. The bank shall issue a memorandum stating whether the farmer has sufficient net worth or line of credit to assure payment of the purchase price. A "positive assessment" is an

"irrevocable and unconditional letter of credit" benefitting the dealer for a certain period. If the bank issues a "negative assessment," it must provide the dealer with the farmer's relevant financial history. The agricultural dealer is then left to decide on its own whether to make a credit sale. If the bank does not respond or provide the relevant information, the dealer may make a credit sale and receive equal priority status. See Oyens Feed & Supply, Inc. v. Primebank.

Oyens Feed & Supply, Inc. v. Primebank, 808 N.W.2d 186 (Iowa 2011): Under Iowa law, an agricultural supply lien may have priority over a bank's prior perfected security interest. The superpriority provision for feed suppliers allows feed suppliers to trump perfected secured lenders to the extent that the acquisition value of the livestock is exceeded by the livestock's value at the time the lien attaches or its ultimate sale price. Thus, the feed supplier's superpriority corresponds to the livestock's increase in value resulting from consuming feed, or new value created. Requiring serial certified requests would be impractical.1 See In re Crooked Creek Corp.

In re Shulista, 451 B.R. 867 (Bankr. N.D. Iowa 2011): Super priority is allowed under Iowa law only insofar as the agricultural supply dealer has perfected its lien. A perfected agricultural lien on collateral has priority over a conflicting security interest or another agricultural lien if the statute creating the agricultural lien provides for priority. Iowa's agricultural supply lien statute provides a 31-day "lookback" period for the dealer to file a financing statement and thus acquire a superpriority lien. However, the lien only applies to the value of feed supplied from the date of purchase to the filing of the financing statement. The agricultural supply dealer argued that because its feed increased the value of the bank's collateral (pigs), awarding the bank priority would be "fundamentally unfair." Given this argument, the court set a hearing to determine whether the supply dealer was entitled to an equitable lien that might give it priority over the bank.

In re Buchanan Land & Cattle, Inc., No. 10-50299-RLJ-7, 2012 Bankr. LEXIS 2107, 2012 WL1658296 (Bankr. N.D. Tex. May 11, 2012): Bank that held a security interest in debtor's USDA entitlement interests was entitled to the proceeds of checks issued by the USDA less the trustee's commission, notwithstanding the fact that the bank blankly endorsed the checks and turned them over to the trustee. The bank's property interest in the entitlement program was initiated before the bankruptcy filing. The bank did not waive or release its lien, and the trustee knew that the bank was a secured creditor whose security interest covered the USDA payments.

J. Valuation

In re McElwee, 449 B.R. 669 (Bankr. M.D. Pa. 2011): The "intended use of the property" method is the appropriate method to use in determining value of collateral securing a claim. The court relied on *Rash,* which noted that under § 506(a), the proposed disposition or use of the collateral is of "paramount importance" to the valuation question. Where the debtor retains the collateral, the replacement value standard is appropriate. The Supreme Court went on to note that the replacement value "is the cost the debtor would incur to obtain a like asset of the same '*proposed . . . use.*'" While the Supreme Court in *Rash* ruled on a chapter 13 case, many courts

have relied on *Rash* in determining the value of a creditor's collateral. In determining the value of property it is necessary to 1) discern the debtor's proposed disposition of the property under the plan and 2) consider the evidence to determine the applicable value of the debtor's properties.

In re Riessen, No. 10-03433 S, 2011 Bankr. LEXIS 2894, 2011 WL 3320526 (Bankr. N.D. Iowa July 29, 2011): The court used the income approach to determine the value of debtor's property and equipment used in his depreciating farrow-to-finish swine operation. Debtor had not farmed in over three years and filed for chapter 12 relief in an effort to save his homestead. Debtor claimed his homestead acreage and most of his farm machinery and equipment as exempt and creditor objected to the valuation of these assets.

Farmers & Merchants Bank v. Southall, No. 7:11-cv-119 (HL), 2012 WL 2886419 (M.D. Ga. July 13, 2012): Under *Rash*, the "proposed disposition or use" of collateral must be consideration in valuation. See § 506(a). ~~Debtor's~~ Creditor's appraisal was not suitable for consideration by the court where it failed to consider "proposed disposition or use."

In re Kasbee, 466 B.R. 719 (Bankr. W.D. Pa. 2010): Bank's allegation of value of real estate property in a motion for relief was not a binding judicial admission because the bank timely repudiated its allegation of value and withdrew its motion. Debtors did not suffer prejudice and the court never relied on the original value asserted. Because the court made no determination of value for any purpose, judicial estoppel did not apply. The court decided that the true value of the property should be decided on the merits, with both parties presenting evidence to the court.

In re JMJ Land, No. BK11-40267-TLS, 2011 Bankr. LEXIS 4891, 2011 WL 6260345 (Bankr. D. Neb. Dec. 15, 2011): Under 11 U.S.C. § 1225(a)(5), if the holder of a secured claim has not accepted the plan and the plan does not propose to surrender the property to the secured creditor, then the value of the property to be distributed under the plan as of the effective date must not be less than the allowed amount of the claim. In this case, the debtors and creditor were involved in litigation prior to the debtors filing chapter 12. After the bankruptcy was filed, creditor filed an adversary proceeding objecting to the amount of the claim. The court determined that the creditor's feasibility objection could be satisfied at that stage by a showing that the debtor would be able to fund the interest-only payments until determination of the claim amount.

K. Feasibility

In re Bain, No. BK09-41473-TJM, 2011 WL 1496324 (Bankr. D. Neb. Apr. 19, 2011): Debtor's plan was not feasible because her management practices over the previous couple of years indicated loss of collateral and the inability to pay a feed debt incurred in the ordinary course of business. The cattle necessary for the raising and selling of calves and the horses necessary for the breaking and training business had been declining and there was no evidence of debtor's ability to maintain those practices.

In re Hudson, No. 208-09480, 2011 Bankr. LEXIS 1010, 2011 WL 1004630 (Bankr. M.D.

Tenn. Mar. 16, 2011): Debtors' plan was feasible because, although they couldn't guarantee success, they would be able to continue to be productive due to financing for necessary improvements and were likely able to obtain necessary financing in the future because of the probable increase in equity in the farm.

In re Melcher, No. BK09-40653, 2010 WL 1431187 (Bankr. D. Neb. Mar. 15, 2010): Amended plan was not feasible where it failed on three points: (1) proposal in good faith, (2) ability of debtor to make all plan payments and to comply with the plan, and (3) payment of all required domestic support obligations. See § 1225. Debtor never made payments under a divorce judgment while his ex-wife complied with the decree. Because the plan did not meet the requirements of § 1225, it was unconfirmable.

L. Fees

In re Parreira, 464 B.R. 410 (Bankr. E.D. Cal. 2012): In determining reasonableness of fees under § 506(b), the bankruptcy court makes an independent evaluation under federal law. This independent evaluation consists of objective and subjective inquiries. Objectively, the court must ascertain that the legal work performed was consistent with services performed for similarly situated creditors. The value of the legal services must be consistent with the cost for similar work. Subjectively, the court must ask whether the professionals made prudent billing judgments when engaging the legal services, assigning work, and in the manner the work was performed. In the Ninth Circuit, courts customarily determine the reasonableness of attorney's fees by using the "lodestar" calculation, which multiplies the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate. In rare cases, the court may adjust the figure if it determines that it is unreasonably high or low. See Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975). The court has considerable discretion. In this case, both law firms employed competent experienced attorneys who regularly appeared in the court representing similar clients in similar kinds of cases. The hourly rates appeared to be the customary fee for comparable services in that community. Thus, the court concluded that the fees were reasonable and necessary.

In re Brooks, No. 08-72073, 2010 Bankr. LEXIS 1471, 2010 WL 2044933 (Bankr. C.D. Ill. May 24, 2010): Compensation was denied for fees billed to legal assistants who did not have the education, experience, training, or expertise to perform legal services. Section 330(a)(3) provides that in evaluating fee applications, a court must consider the "nature, the extent and the value" of the legal services rendered. Here, the court allowed the attorney to keep the retainer which had already been paid to the attorney, solely because the debtor did not object, but refused to grant the attorney the additional compensation requested for the work of the unqualified legal assistants. The court noted that the quality of the legal services performed by the attorney was insufficient to justify the compensation requested also, but because the debtor did not object, the court did not hold it necessary for the attorney to return any of the $12,500 retainer.

In re Melcher, No. BK09-40653-DTJM, 2010 Bankr. LEXIS 1926, 2010 WL 2403081

(Bankr. D. Neb. June 10, 2010): Ex-wife was not entitled to recover attorney's fees from husband-debtor because Nebraska statute was not broad enough to cover fees for efforts to collect a property settlement or pursue a claim in the bankruptcy proceeding. Under § 506(b), "the creditor must establish that . . . (3) the agreement or state statute giving rise to the claim provides for attorneys' fees." Here, the state statute only provided for fees to the extent that they were included in court orders concerning the dissolution action. The court also rejected the argument that the debtor's actions were "vexatious, wanton, or oppressive" because the debtor had made payments to his ex-wife.

In re Tamcke, No. 09-60833-12, 2011 Bankr. LEXIS 857, 2011 WL 841223 (Bankr. D. Mont. Mar. 8, 2011): Fees and costs for filing and prosecuting a motion to modify stay are not reasonably necessary for the protection of a secured claim were the creditor exercises "excessive caution or overzealous advocacy." See § 506(b). Here, the creditor was significantly oversecured and the debtor did not challenge the creditor's claim. In addition, a two-month delay by the debtor in fixing an eligibility issue was not unreasonable.

In re Graham, No. 07-40427, 2011 WL7658757 (Bankr. S.D. Ga. Feb. 25, 2011): Pursuant to § 362(k), attorneys' fees are actual damages and are mandatory when a stay is willfully violated.

M. Jurisdiction

In re Graham, No. CV411-090, 2012 U.S. Dist. LEXIS 45671, 2012 WL 1099886 (S.D. Ga. Mar. 30, 2012): The bankruptcy court has discretion to retain jurisdiction over an adversary proceeding even when it has dismissed the underlying bankruptcy petition. See In re Morris, 650 F.2d 1531, 1534 (11th Cir. 1992) ("[T]he dismissal of an underlying bankruptcy case does not automatically strip a federal court of jurisdiction over an adversary proceeding which was related to the bankruptcy case at the time of its commencement.").

In re Hayhook Cattle Co., No. 10-41257, 2010 Bankr. LEXIS 4691, 2010 WL 5289004 (Bankr. D. Kan. Dec. 20, 2010): Whether a voluntary petition was properly authorized is determined by applicable state law because it is not a matter addressed by the Bankruptcy Code.

N. Taxes

In re Smith, 447 B.R. 435 (Bankr. W.D. Pa. 2011): Debtors are not entitled to treat a capital gains tax obligation that arose from debtor's post-confirmation sale of farm assets as a general unsecured claim.

In re Dawes, 652 F.3d 1236 (10th Cir. 2011): Post-petition income taxes incurred from debtors' sale of a farm asset during chapter 12 proceedings were not dischargeable.

In re Fuentes, No. 6:10-bk-2091DS, 2011 WL 6294489 (C.D. Cal. Dec. 16, 2011): For eligibility purposes, Social Security benefits retain their ordinary tax code meaning. The Internal

Revenue Code states that gross income includes Social Security benefits. Certain "qualified military benefit[s]" are excluded from gross income. See 26 U.S.C. § 134(a). No other benefit is excludable. See 26 U.S.C. § 134(b)(2).

United States v. Hall, 617 F.3d 1161 (9th Cir. 2010), aff'd, Hall v. United States, 132 S. Ct. 1882 (2012): A chapter 12 estate cannot "incur a tax" under the Internal Revenue Code. Because the chapter 12 estate is not a taxable entity, it cannot receive the benefit of § 1222(a)(2)(A) providing that tax on gain from sale of a farm during bankruptcy is dischargeable and payable in less than full. The trustee is not associated with any taxes.

Hall v. United States, 132 S. Ct. 1882 (2012), abrogating Knudsen v. IRS, 581 F.3d 696 (2009): The federal income tax liability resulting from petitioners' postpetition farm sale is not "incurred by the estate" under § 503(b) and thus is neither collectible nor dischargeable in a chapter 12 plan. Chapter 12 is modeled on chapter 13. Chapter 13, in which postpetition income taxes are not incurred by the estate, bolsters this outcome. To hold otherwise in chapter 12 would disturb established understandings in chapter 13 cases.

O. Trustee Powers

In re Wiest & Sons, Inc., 446 B.R. 441 (Bankr. D. Mont. 2011): The chapter 12 trustee may request modification of a confirmed plan pursuant to § 1229(a). However, modification is warranted only when an unanticipated change in circumstances affects implementation of the plan as confirmed. Here, the confirmed plan substantively consolidated three estates, omitting sixteen unsecured creditors. The court rejected the trustee's argument that the unsecured creditors should be treated the same, and that the plan should be modified to pay all unsecured creditors.

In re Colvin, No. 11-51241, 2012 Bankr. LEXIS 2280, 2012 WL 1865562 (Bankr. W.D. Tex. May 22, 2012): Under § 1203, a chapter 12 debtor in possession has the authority to bring chapter 5 avoidance actions. However, a chapter 12 trustee does not have standing to bring chapter 5 causes of action to avoid a corrected deed of trust as a preferential or fraudulent transfer. See 11 U.S.C. §§ 1202, 1203.

In re West, No. 06-10482-DWH, 2012 Bankr. LEXIS 2561, 2012 WL 2050819 (Bankr. N.D. Miss. June 6, 2012): Trustee could not assert § 544(a) strong arm powers or power to avoid post-petition transfers under § 549(a) where barred by the two-year statute of limitations in § 546(a). Where time-barred, a trustee cannot use 502(d), "disallow[ing] any claim of any entity from which property is recoverable," defensively. Section 502(d) is designed to be used only after a creditor has been "adjudicated" to turn over amounts belonging to the estate. In addition, a trustee cannot use § 542(a) when he or she has no underlying right to recover the post-petition transfer. Section 544(a) is not self-effectuating. Because the trustee is not technically an "individual," but a representative of the estate, it is doubtful that he or she can file a cause of action under § 362(k) to recover actual damages, costs, and fees.

P. Preferential Transfers / Avoidance

In re Miller, 428 B.R. 437 (Bankr. N.D. Ohio 2010): Because a transfer is defined broadly in bankruptcy law, re-perfection of a security interest in debtor's property, after the original perfection has lapsed, potentially constitutes a preferential transfer avoidable under § 547(b). Representations of solvency at the time of filing defeat the necessary requirement for a preference as set forth in § 547(b)(5) and 547(b)(3). The fact that the debtors here were solvent raised a genuine issue of material fact, precluding entry of summary judgment in debtors' favor on the issue of a § 547(b) preference. Because the secured creditor in this case was unable to meet the burden of showing that the aggregate value of the property transferred was less than the statutory threshold under § 547(c)(9), it too was precluded from summary judgment in its favor.

In re Caine, 462 B.R. 688 (Bankr. W.D. Ark. 2011): Pursuant to § 544, a defective description in a real estate mortgage does not provide required notice. Because the description was defective, the chapter 12 debtor-in-possession qualified as a bona fide purchaser, allowing it to avoid the mortgage lien. The court denied the bank's request to reform the mortgage with the correct description, arguing that reformation would prejudice the debtor-in-possessions rights as a bona fide purchaser.

In re Shaw, No. 11-30032, 2012 Bankr. LEXIS 1552, 2012 WL 1190695 (Bankr. E.D. Kent. Apr. 9, 2012): Title to farm property remains vested in debtors where the creditor has not accepted a deed in lieu of foreclosure. A deed in lieu of foreclosure eliminates the need for a lawsuit because the grantor voluntarily transfers ownership of the property to the secured party. In addition, the court held that: (1) debtors have standing to pursue an avoidance claim under § 544 by virtue of their powers as debtors in possession under § 1203, and (2) the court may exercise subject matter jurisdiction to determine whether a transfer may be avoided even where the interest in question is a "bare possessory interest."

Q. Conversion / Dismissal / Denial of Discharge

In re Pertuset, 438 B.R. 354 (B.A.P. 6th Cir. 2010): A chapter 12 case may be dismissed for failure to timely file a plan or for continuing loss to the estate and no reasonable likelihood for rehabilitation. Section 1208(c)(3) provides that on request of a party in interest, the bankruptcy court may dismiss a case under chapter 12 for failure to file a plan timely under § 1221. Section 1208(c)(9) provides that on the request of a party in interest, the bankruptcy court may dismiss a chapter 12 case for cause, including "continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation." Debtor filed an insufficient plan almost two months late and did not present any evidence that he had any prospects for securing and generating regular income in his timber harvesting business.

In re Bange, No. 08-40156-7C, 2010 Bankr. LEXIS 3176, 2010 WL 3829632 (Bankr. D. Kan. Sept. 23, 2010): Debtor whose case was previously converted from chapter 12 to chapter 7 can reconvert to chapter 12 under § 707(a). Section 707(a) provides that "the debtor may convert

a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208 or 1307 of this title." Section 707(a) does not place any restriction on the *court's* authority to convert a case; rather, it is a restriction on the *debtor's* ability to convert a case. Courts are split on this issue, but this court holds that a case previously converted to chapter 7 may nevertheless be reconverted to a reorganization chapter.

In re Graham, No. 07-40427, 2010 Bankr. LEXIS 6360, 2010 WL 8545151 (Bankr. S.D. Ga. Aug. 18, 2010): Prepetition conduct can be considered in a Motion to Convert or a Motion to Dismiss for fraud. Section 1208(d) provides that "[o]n request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter or convert a case under this chapter to a case under chapter 7 of this title upon a showing that the debtor has committed fraud in connection with the case." Section 1230, on the other hand, provides that "on request of a party in interest at any time within 180 days after the date of the entry of an order of confirmation under section 1225 of this title, and after notice and a hearing, the court may revoke such order if such order was procured by fraud." While there is a time limitation on revocation of an order of confirmation, no such time limitation exists on an order of dismissal or conversion. Therefore, because no time limitation is enunciated in § 1208(d), that section should not be read so narrowly as to bar the admission of pre-confirmation evidence of fraud.

In re P & J Resources, Inc., No. 10-70470, 2011 Bankr. LEXIS 3884, 2011 WL 4729809 (Bankr. E.D. Ky. Oct. 5, 2011): Debtors were denied a discharge pursuant to § 727(a)(2) and (a)(4) because they intentionally misrepresented their assets and liabilities on the schedules and their subsequent disclosures were only made in reaction to the discovery of undisclosed assets by the trustee and creditors. Section 727(a)(2) provides that the court shall grant a discharge unless "the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property . . . has transferred, removed, destroyed, mutilated, or concealed . . . (B) property of the estate, after the date of the filing of the petition." Section 727(a)(4) provides that the court shall grant a discharge unless "the debtor knowingly and fraudulently . . . (A) made a false oath or account . . . (D) withheld from an officer of the estate entitled to possession . . . any recorded information . . . relating to the debtor's property or financial affairs." The court therefore granted a motion to convert to chapter 7 pursuant to § 1208(d).

In re Colvin, No. 11-51241, 2012 Bankr. LEXIS 2948, 2012 WL 2562490 (Bankr. W.D. Tex. June 28, 2012): The court denied the trustee's motion to reconsider its order granting dismissal for lack of standing after the trustee failed to timely respond to the mortgage company's motion to dismiss. See Rules 9023, 9024. Furthermore, the court affirmed its holding that a chapter 12 debtor-in-possession has the exclusive authority to bring chapter 5 causes of action under § 1203. Denial of the motion to reconsider constituted a dismissal of the adversary proceeding.

In re Yates, 429 B.R. 675 (Bankr. E.D. Miss 2010): Discharge was denied to debtor because debtor intentionally transferred, removed, destroyed, mutilated and/or concealed, or permitted to be transferred, removed, destroyed, mutilated or concealed, its cattle and equipment with the intent to hinder, delay and/or defraud a creditor pursuant to § 727(a)(2)-(6). Because of the harsh

penalty of § 727, the trustee had to prove each element of § 727 by a preponderance of evidence.

R. Exceptions to Discharge / Non-Dischargeable Debts

In re Schilke, No. BK06-41813-TLS, 2011 Bankr. LEXIS 199, 2011 WL 132957 (Bankr. D. Neb. Jan. 14, 2011): Discharge was denied because the plan was internally inconsistent by providing that unsecured creditors would be paid a pro rata share of any disposable income, then providing a separate exhibit which provided specific dollar amounts to be paid to each unsecured creditor on certain dates. The plan did not state anywhere that those specific dollar amounts were merely projections or estimates that were dependent upon whatever the debtor's actual disposable income was. Because the debtor had no disposable income, the plan payments could not be made according to the separate exhibit.

In re Schnuelle, 441 B.R. 616 (B.A.P. 8th Cir. 2011): Creditor's claim was excepted from discharge because debtor intentionally submitted materially false documents to the creditor for the purpose of causing the creditor to grant him financing. Under § 523(a)(2)(B), to except a debt from discharge, a creditor must prove that the debtor obtained the money by (1) use of a statement in writing that was materially false; (2) that pertained to his or his business's financial condition; (3) on which the creditor reasonably relied; and (4) that the debtor made with the intent to deceive the creditor. By knowingly providing the creditor with inaccurate balance sheets and collateral worksheets in order to obtain the loan from the creditor, debtor met all elements of §523(a)(2)(B) and the claim was therefore excepted form discharge.

In re Marklin, 429 B.R. 880 (Bankr. W.D. Ky. 2010): Debtor's intentional action of using crop proceeds that were to be used to repay a loan met the standards for willful and malicious injury to the creditor and the debt was therefore non-dischargeable under § 523(a)(6). Section 523(a)(6) provides that a debt for willful and malicious injury by the debtor to another entity or to the property of another entity is not dischargeable. Debtor knew the crops served as security to repay the loan but placed them in his personal bank account and used the funds as his own anyway.

In re Marek, 468 B.R. 406 (Bankr. D. Idaho 2012): Issue preclusion applied to a judgment entered against chapter 12 debtors in a prepetition fraud action in a subsequent fraud-based nondischargeability proceeding. The bankruptcy court accorded full faith and credit to the state court's judgment. Any argument that the state court made an error should be made on direct review through appellate channels, and will not be considered by the bankruptcy court on collateral attack. Thus, the fraud portion of the state judgment was excepted from discharge under § 523(a)(2)(A).

In re Schnuelle, No. BK07-42289-TJM, 2010 Bankr. LEXIS 936, 2010 WL 1440520 (Bankr. D. Neb. Apr. 9, 2010): Debtor's failure to tell lender that he was feeding corn subject to a first lien by the lender to his cattle was a false representation rendering the debtor's debt non-dischargeable under § 523(a)(2)(A). Despite the debtor's assumption, lender was aware of the dissipation of its collateral.

S. Default Judgments

In re Mathis, 465 B.R. 325 (Bankr. N.D. Ga. 2012): Debtors may be entitled to have default judgments set aside for excusable neglect, serving the judicial policy of adjudicating cases on their merits. See Fed. R. Civ. P. 60(b). Whether the preference for adjudication on the merits outweighs the need for finality is within the discretion of the court. Factors to consider when determining whether neglect is excusable include: (1) whether the nonmoving party is prejudiced; (2) the length of the delay and its effects on judicial proceedings; (3) the reason for the delay; and (4) whether the moving party acted in good faith. The Eleventh Circuit requires a movant to show (1) a meritorious defense that might affect the outcome; (2) a lack of prejudice to the nonmoving party; and (3) a good reason for the default. The court may set aside a judgment denying debtors' discharge if all three conditions are met.

T. Confirmation Issues

In re Gray-Bailey, 427 B.R. 536 (Bankr. D. Idaho 2010): Debtor's plan could not be confirmed because allowing the creditor to foreclose on the property while retaining title, possession, and control of the property, during the state redemption right period, did not amount to "surrender" as provided for in § 1225(a)(5)(C). Section 1225(a)(5) provides that to be confirmed, a chapter 12 plan must either be (A) accepted by a secured creditor; (B) the creditor must retain its lien and the value of its allowed secured claim must be paid to the creditor in deferred payments; or (C) the debtor must relinquish possession and control of the collateral to the creditor so it may enforce its security interest under applicable law. The court looked to chapter 13 cases involving the identical language of § 1325(a)(5)(C) to determine that the term "surrender" was contemplated by Congress to mean a return of property and a relinquishing of possession or control to the holder of the claim. Here, because of the state's one year right of redemption period on foreclosed property, debtor was not relinquishing possession or control of the property, and was therefore not in compliance with § 1225(a)(5)(C).

In re Sandifer, No. 11-00095-DD, 2011 Bankr. LEXIS 1926, 2011 WL 2118863 (Bankr. D.S.C. May 25, 2011): The bankruptcy court held that the plan did not meet the confirmation requirements of § 1225 where the debtors' failed to commit all disposable income to their plan. The court determined that the debtors' proposed retention for operating expenses was excessive. The debtor's suggested retention would have allowed the debtors to earn enough gross income to satisfy operating expenses and have a significant amount left to pay their creditors.

In re Hall, No. 06-40872, 2010 Bankr. LEXIS 1487, 2010 WL1730684 (Bankr. D. Kan. Apr. 28, 2010): A confirmation hearing was not required where the amended plan was (1) accepted by the trustee and creditors, and (2) did not adversely affect the treatment of classes of creditors who did not affirmatively approve changes. "Modification of a plan before confirmation is addressed by § 1223, but it contains no requirement for notice or hearing. There is no bankruptcy rule applicable to preconfirmation amendments in Chapter 12 cases. Rule 3019, which in subsection

(a) requires the court after hearing on notice to determine if the modification adversely affects the treatment of the claim of any creditor or equity holder who has not accepted the modification in writing, does not apply to Chapter 12 cases."

U. Marshaling

In re Snyder, 436 B.R. 81 (Bankr. C.D. Ill. 2010): Direct and circumstantial evidence of intent supported a finding that debtor-wife owned half of the crop proceeds being held by the chapter 12 trustee. On one schedule, debtors declared a number of items of personal property as individually owned by either the husband or wife, but on another schedule, all of the farm assets were listed as jointly owned. Because "grain grows on land, the presumption of equal ownership of jointly titled real estate applies to the grain grown on that real estate." After deciding that the crop proceeds were jointly held under Illinois law, the court held that the assignee of a senior lienholder, a bank, acquired the assigned claim subject to the junior lienholder's marshaling rights against the assignor. Because the court could find no rule or guidance on whether a claim assignment "may operate to shed an equitable right of marshaling held by a third party," it decided to consult state law and "general equity jurisprudence." The court reasoned that because it is undisputed that an assignee takes a claim subject to the equities of third persons against the assigned rights where he has knowledge of these equities, the senior lienholder here, because it had full knowledge, acquired the claim subject to the junior lienholder's marshaling rights.

In re Ferguson, No. 10-81401, 2011 Bankr. LEXIS 4581, 2011 WL 5910659 (Bankr. C.D. Ill. Nov. 28, 2011): Marshaling is grossly inequitable where it forces the holder of a first priority blanket lien to forego the immediate payment from equipment proceeds being held by the trustee for a long-term secured claim treatment under the debtors' plan. Here, the holder of a second priority lien sought the equipment proceeds under the doctrine of marshaling, while asking the court to have the senior lender look to its real estate mortgage to satisfy its debt. Rejecting the request, the court explained that marshaling "is most appropriate when all of the senior creditor's collateral is being liquidated and the proceeds distributed, thus eliminating the uncertainties and risks relating to value, process and delay." As a fallback, the junior creditor proposed a settlement agreement between itself and the senior lender. However, marshaling is an either/or proposition; "modified marshaling" is unjustified.

V. Effect of Confirmation / Res Judicata

In re Day, No. 09-01418-8-JRL, 2010 WL 785800 (Bankr. E.D.N.C. Mar. 3, 2010): Negotiated settlements must be given effect. If a party is unable to meet negotiated terms, then they face the consequences of the order. Here, debtors' moved to modify their chapter 12 plan after falling behind on payments, claiming that a severe drought decreased their yield by 85%. Creditor (the Farm Service Agency) countered that no disaster declaration had been made for the debtors' county, and the chapter 12 trustee argued that the circumstances were not extraordinary enough to overturn a final order. The court agreed, noting that the debtors acknowledged a substantial default which could not be cured in a short period.

In re W.M. Hall's Farm, Inc., No. 04-12556 JTL, 2010 Bankr. LEXIS 2359, 2010 WL 2836826 (Bankr. M.D. Ga. July 16, 2010): The court will vacate confirmed sales only when compelling equities outweigh the interest in finality. Here, the debtor argued that the auction sale of its residence by the trustee constituted a tremendous loss. The loss of equity in the house did not meet the high threshold of outweighing the interest in finality of a sale order. Additionally, the debtor's recent acquisition of a commitment for loaned funds did not qualify it for relief under Rule 59(e) because the evidence did not exist at the time of the entry of the order.

In re Steelman Enterprises, LLC, Nos. 4:09-bk-33960-JMM, 4:09-bk-33962-JMM, 4:09-bk-33963-JMM, 2011 Bankr. LEXIS 23, 2011 WL 13540 (Bankr. D. Ariz. Jan. 3, 2011): The terms of a confirmed plan are binding upon the debtor and each creditor. Here, the plan left the contractual rights of the parties unaltered. Creditor bank elected not to renew a lease held by the debtor, and the court had no authority to extend an assumed lease terminated according to its own terms.

In re Hall, No. 06-40872, 2010 Bankr. LEXIS 1487, 2010 WL1730684 (Bankr. D. Kan. Apr. 28, 2010): An approved settlement agreement between the debtor and his creditor, as a contract, was outside the scope of Rule 9010. Debtor's plan incorporated the terms of a settlement agreement between the debtor and his primary secured creditor concerning the distribution of funds from the debtor's recovery on a prepetition claim against another party. Debtor became dissatisfied with the distribution of these proceeds after he was unable to timely make payments and gain access to the proceeds, with attorney's fees receiving priority. The court held that a confirmed plan is res judicata and binding.

W. Executory Contracts

In re French, No. 09-60937-12, 2011 Bankr. LEXIS 3964, 2011 WL 4850250 (Bankr. D. Mont. Oct. 12, 2011): Once a court has confirmed a chapter 12 plan, the parties may not unilaterally depart from the terms of the plan to cure any mistakes made prior to confirmation. Secured creditor filed its proof of claim based on a "true lease" not assumed by the debtors within the time limits prescribed by § 365(p)(1). Creditor argued that the lease was thus rejected, and moved to adjust its allowed secured claim down. However, in a chapter 12 case, § 365(d)(2) provides that "the trustee may assume or reject any executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease." Here, the creditor did not request the court to order the debtors to assume or reject the lease within a specified time period. The court concluded that the parties were bound by the plan.

X. Miscellaneous

Chapter 12 Payment Period:

In re Tognini, No. 10-20157-SSM, 2011 Bankr. LEXIS 2629, 2011 WL 2650598 (Bankr. E.D. Va. July 6, 2011): The chapter 12 plan could provide for payment of a "crammed down" mortgage loan over a period exceeding the maximum five-year plan period. If this had been a chapter 13 case, the plan would not have been able to pay the restructured mortgage claim over a period exceeding 5 years, but under § 1222(b)(9), the plan may provide for payment of allowed secured claims consistent with § 1225(a)(5) over a period exceeding the period permitted under § 1222(c). § 1225(a)(5) allows a plan to pay a secured creditor the value of its collateral over time, as long as the deferred payments have a present value equal to the value of the collateral. Therefore, under chapter 12, the debtor's plan providing for payments to secured creditor over a 360 month period was consistent with the Bankruptcy Code.

Arbitration:
In re M & M Independent Farms, Inc., No. 09-03514-8-SWH, 2009 Bankr. LEXIS 5532, 2011 WL 5902606 (Bankr. E.D.N.C. July 7, 2011): Creditor's motion to compel arbitration was denied because arbitration would take far more time than an adversary proceeding in the bankruptcy court, thus impeding the court's efficient administration of the estate and potentially disrupting the successful completion of the chapter 12 plan. The centralization of disputes concerning a debtor's legal obligations is critical in chapter 12 cases where the fundamental purpose is the rehabilitation of the debtor. "Ordering arbitration would substantially interfere with the debtor's efforts to reorganize, which evidences an inherent conflict between arbitration and the underlying purpose of the bankruptcy laws."

Attorney's Application for Employment:
In re Ortega, No. 10-11175(1)(12), , 2011 Bankr. LEXIS 3289, 2011 WL 3810287 (Bankr. W.D. Ky. Aug. 26, 2011): The court denied the debtors' attorney's Application for Employment as debtors' counsel where the attorney failed to timely file an Application. "[W]ell-established authority requir[es] court approval of counsel in a timely manner to determine the qualifications of the attorney to render professional services, as well as the disinterestedness of the counsel." The court reached its conclusion in spite of the extensive work already performed and the fact that the Application would likely have been approved had it been timely filed.

Disinterested Persons under § 101(14):
In re Tamcke, No. 09-60833-12, 2011 Bankr. LEXIS 857, 2011 WL 5417095 (Bankr. D. Mont. Nov. 8, 2011): Real estate professional employed to sell debtor's home was a "disinterested person" under § 101(14) even though real estate professional's employee and her two children were residing with the debtor. Debtor's live-in girlfriend was not a real estate agent and was not associated with the real estate business in question when debtor retained the real estate professional to market his real estate. Nothing in the facts suggested that the relationship between debtor and real estate professional was anything other than arm's-length.

"Residential" versus "Commercial" Zoning Classification:
Central State Bank v. Volas, Nos. 11-999-swd, 1:12-CV-75, 2012 WL 3069947 (Bankr. W.D. July 26, 2012): A property classified as a "family farm" for chapter 12 purposes may be

residential and still have a greenhouse that is an "incidental commercial use," consistent with the property's zoning classification as "residential." Property is classified as a "family farm" because of the debts and income from the property, not because of the property's use.

ASSOCIATION OF CHAPTER 12 TRUSTEES

CHAPTER 12 CASE LAW UPDATE TO AUGUST 10, 2012

SUPPLEMENT TO THE ASSOCIATION'S CASE LAW COMPILATION

PRESENTED AT THE ASSOCIATION OF CHAPTER 12 TRUSTEES 22ND ANNUAL CONFERENCE
ATLANTA, GEORGIA
OCTOBER 11TH AND 12TH, 2012

AND

THE 17TH ANNUAL CENTRAL NEW YORK AND CAPITAL REGION'S ANNUAL BANKRUPTCY CONFERENCE
COOPERSTOWN, NEW YORK
NOVEMBER 4TH AND 5TH, 2012

MATERIALS PREPARED BY ZACHARY M. PRIMROSE
3RD YEAR LAW STUDENT
SYRACUSE UNIVERSITY COLLEGE OF LAW

TABLE OF CONTENTS

STATUTES **CASE NO.**

CASES CITED IN CASES **CASE NO.**

CASES BY JURISDICTION

Supreme Court of the United States
29.) In re Hall, 132 S.Ct.1882, 182 L.Ed.2d 840, 5/14/2012

1st Cir.
33.) In re Teolis, 419 B.R. 151(Bkrtcy.D.R.I. 2009) 10/26/2009

2nd Cir.
8.) In re Nichols, 2010 WL 3491162 (Bkrtcy.N.D.N.Y.) 8/31/2010
27.) In re Cady, 440 B.R. 16 (Bkrtcy.N.D.N.Y., 2010) 11/22/2010
30.) In re Ellis, _____ (Bkrtcy.N.D.N.Y., 2012) 7/3/2012

3rd Cir.
13.) In re Smith, 447 B.R. 435 (Bkrtcy.W.D.Pa., 2011) 3/10/2011
22.) In re Buchanan, 2010 WL 1039981 (D.Del., 2010) 3/22/2010

4th Cir.
4.) In re Tognini, 2011 WL 2650598 (Bkrtcy.E.D.Va, 2011) 7/11/2011
6.) In re Brixey, 2010 WL 358495 (Bankr. E.D.N.C.) 1/15/2010
9). In re M & M Independent Farms, Inc., 2011 WL 5902606 (Bkrtcy.E.D.N.C., 2011) 7/7/2011
23.) In re Sandifer, 448 B.R. 382 (Bkrtcy.D.S.C., 2011) 4/13/2011

5th Cir.
(None)

6th Cir.
3.) In re Bolender, 2011 Bankr. LEXIS 2824 (Bankr. S.D. Ohio, 2011) 7/20/2011
5.) In Re Hudson, 2011 WL 1004630 (Bkrtcy.M.D.Tenn., 2011) 3/16/2011
28.) In re Pertuset, _____ (Bankr. S.D. Ohio, 2011) 3/5/2012

7th Cir.
15.) In re Ferguson, Slip Copy, 2011 WL 5910659 (Bkrtcy.C.D.Ill. 2011)

8th Cir.
17.) In re Schley, 2011 WL 1344595 (Bkrtcy.N.D.Iowa, 2011) 4/7/2011
18.) Timmerman v. Eich, 809 F.Supp.2d 932 (N.D.Iowa 2011) 9/12/2011
21.) In re Schnuelle, 2010 WL 1440520 (Bkrtcy.D.Neb., 2010) 4/9/2010

9th Cir.

1.) Fuentes v. Danielson, (In re Fuentes), 2011 WL 6294498 (C.D. Cal. 2011) 12/16/2011.
2.) In Re Allen. Slip Copy, 2012 WL 1207233 (Bkrtcy.D.Ariz. 2012) 4/10/2012
10.) In re Powers, Slip Copy, 2011 WL 3663948 (Bkrtcy.N.D.Cal. 2011) 8/12/2011
16). In re Gray-Bailey, 427 B.R. 536 (Bkrtcy.D.Idaho, 2010) 4/29/2010
19.) In re Cooper, 2011 WL 3882278 (Bkrtcy.D.Or.. 2011) 9/2/2011
24.) In re Tamcke, 2011 WL 5417095 (Bkrtcy.D.Mont., 2011) 11/8/2011
25.) In re Jones, 2011 WL 3320504 (Bkrtcy.D.Or., 2011) 8/2/2011
32.) In re Ted Wiest & Sons Inc., 446 B.R. 441 (Bkrtcy.D.Mont., 2011) 2/18/2011

10th Cir.

7.) In re Benefield, 438 B.R. 706 (Bkrtcy.D.N.M., 2010) 8/20/2010
11.) In re Dawes, 652 F.3d 1236 C.A.10 (Kan. 2011) 6/21/11
12.) In re Woods, 465 B.R. 196 (10th Cir. BAP Colo. 2012) 2/27/12
14.) In re Bange, 2010 WL 1418410 (Bkrtcy.D.Kan. 2010) 4/5/2010
26.) In re Rafter Seven Ranches L.P., 414 B.R. 722 (10th Cir.BAP (Kan. 2009) 9/17/2009

11th Cir.

20.) In re Prescott, 2011 WL 7268057 (Bkrtcy.S.D.Ga., 2011) 12/21/2011
31.) In re Hand, 2010 WL 745624 (Bkrtcy.M.D.Fla., 2010) 2/4/2010

1.) Fuentes v. Danielson, (In re Fuentes), 2011 WL 6294489 (C.D.Cal. 2011) 12/16/2011

On April 13, 2010, Milton Fuentes ("Debtor") filed a voluntary Chapter 12 Petition. To be eligible to file bankruptcy under Chapter 12 of the Bankruptcy Code one must be a "family farmer" as defined under 11 U.S.C. § 101(18). In pertinent part, § 101(18) provides that a family farmer is an "individual or individual and spouse engaged in a family farming operation . . . and such individual or individual and spouse must receive from such farming operation more that 50 percent of such individual's or such individual and spouse's gross income for the taxable year preceding; or each of the 2d and 3d taxable years preceding. . . the taxable year in which the case . . . was filed."

Fuentes provided figures of $32,837.56 farming income and $59,128.80 income from social security and military benefits for 2009; $32,643 farming income and $55,888.80 income from Social Security and military benefits for 2008; and $54,753 farming income and $53,526 income from Social Security and military benefits for 2007. Based on these figures, the Chapter 12 trustee ("Trustee") concluded that Fuentes was not a "family farmer" under § 101(18) and moved to dismiss Fuentes' petition. The Bankruptcy Court agreed with the Trustee and dismissed Fuentes' petition.

Fuentes appealed arguing that both his social security and military benefits should be excluded from his gross income for purposes of determining whether he qualifies as a "family farmer" under § 101(18). The United States Court for the Central District of California held that the interpretation of "gross income" that best carries out Congress' purpose in the Bankruptcy Code is the same meaning as "gross income" in the Internal Revenue Code for the purpose of determining whether a farmer is entitled to deduct social security from income. Only "qualified military benefits" are excludable from gross income under the Internal Revenue Code. There was no evidence that Fuentes had received excludable "qualified military benefits" during the years in question. Therefore, the Court concluded that Fuentes' Social Security benefits and Military benefits were properly included in his "gross income" for the purpose of determining whether he was "family farmer" according to § 101(18) and affirmed the dismissal of his Chapter 12 petition.

IN RE FUENTES: HOLDINGS

Social Security benefits constitute gross income for Chapter 12 eligibility purposes to the extent provided in the tax code. Only "qualified military benefits" are excludable from gross income.

Whether a particular source on income will be included in the Debtor's "gross income" when determining eligibility for Chapter 12 purposes depends on whether that source of income would be considered gross income under the Internal Revenue Code for determining one's eligibility for farmer's exemptions.

Social Security benefits and Military benefits that are not "qualified military benefits" under the Internal Revenue Code are included in a Debtor's gross income when determining whether a debtor is eligible for Chapter 12 relief.

2.) In Re Allen, 2012 WL 1207233 (Bkrtcy.D.Ariz.2012) 4/10/2012

Michael and Donalta Allen ("Debtors") filed a petition for Chapter 12 relief on May 25, 2011. Schedules I and J indicated that Mrs. Allen was unemployed and Mr. Allen was a seasonal assistant deck boss for Siberian Sea Fisheries. Debtors did not own, serve as officers for, or have any interest in Siberian Sea Fisheries, or any other business.

On February 7, 2012, Freedom Mortgage Co. filed a "Motion to Dismiss or Convert" the Debtors' case alleging that Debtors were not "family fisherman" as defined by 11 U.S.C. § 101(19A) because they did own or operate a fishing concern and failed to show that at least 80% of their debts arose from operating a fishing concern.

The Bankruptcy Court for the District of Arizona agreed that the Debtors were not "family fisherman." First, they failed to show that "not less than 80 percent" of their "aggregate noncontingent, liquidated debts" arose out of a commercial fishing operation. Second, Debtors did not show that they "own or operate" a commercial fishing operation. Schedules I and J indicate that Mr. Allen is a seasonal employee of a commercial fishing operation, and Debtors do not list an ownership or management interest in any commercial fishing operation. Therefore, the Debtors did not meet the definition of "family fisherman" under § 101(19A), and dismissal of their Chapter 12 petition was proper unless they chose to convert to a chapter for which they were eligible.

IN RE ALLEN: HOLDINGS

Both subsections (i) and (ii) must be proved to qualify a debtor as a family fisherman under 11 U.S.C. § 101(19A).

Merely working for someone who operates a fishing operation does not qualify a Debtor for relief under Chapter 12 as a family fisherman.

Not less than 80 percent a Debtor's debts (excluding debt for a principal residence) who is seeking relief under Chapter 12 as a family fisherman must arise from the ownership or operation of a commercial fishing operation.

More than half of a Debtor's income who is seeking relief under Chapter 12 as a family fisherman must be derived from owning or operating a commercial fishing operation.

3.) In re Bolender, 2011 Bankr. LEXIS 2824 (Bankr.S.D.Ohio, 2011) 7/20/2011

Roger Bolender, ("Debtor") sought relief under Chapter 12 of the United States Bankruptcy Code. The Debtor's Chapter 12 plan proposed a cramdown of five claims held by Ripley Federal Savings Bank, ("Ripley"). The Debtor's plan proposed repayment of Ripley's claims, which were secured by certain parcels of farmland owned by the Debtor, over a thirty year period at an interest rate of 5.25%. At the confirmation hearing Ripley objected to the 5.25% interest rate which the Debtor derived from the formula promulgated by the United States Supreme Court in Till v. SCS Credit Corporation, 541 U.S. 465 (2004). Ripley argued that the interest rate should revert back to the rate stated in the original loan documents after the Debtor completed his five year plan.

The Court held that, despite the fact that the Till formula was devised in a Chapter 13 case, it is the appropriate formula for calculating interest rates in Chapter 12 cases "given the similarities that exist between Chapter 13 and Chapter 12." The Court reasoned that the prime rate contemplates inflation and ensures that the creditor will receive present value if the debtor completes the plan. The "risk interest," the extra one to three percent added to the prime rate according to the Till formula, compensates for the creditor's risk of lending to the debtor. Thus, the Court approved the 5.25% interest rate proposed by the Debtor which was arrived at by taking the prime rate of 3.25% and adding an additional 2% to compensate for risk and confirmed the Debtor's plan over Ripley's objection.

IN RE BOLENDER: HOLDINGS

The formula devised by the United States Supreme Court in Till v. SCS Credit Corporation, the prime interest rate at the date of confirmation plus one to three percent to compensate for risk, is the appropriate formula to determine adjusted interest rates in Chapter 12 plans.

The prime rate contemplates inflation and ensures that the creditor will receive present value if the debtor completes the plan. The extra one to three percent added to the prime rate according to the *Till* formula, compensates for the creditor's risk of lending to the debtor.

4.) In re Tognini, 2011 WL 2650598 (Bkrtcy.E.D.Va, 2011) 7/11/2011

Irene and Daniel Tognini ("Debtors") operated a horse farm in Middleburg Virginia. The Debtors filed a joint petition for relief under Chapter 12 of the Bankruptcy Code as family farmers. Among the assets listed on their schedules was real property valued at $400,000 subject to a first lien deed of trust held by the Bank of New York Mellon for $400,000, and a second lien deed of trust held by CitiMortgage, Inc., in the amount of $100,000. The debtor "stripped down" CitiMortgage's lien and treated it as an unsecured creditor in the plan and proposed to pay the Debt owing to New York Mellon over the course of thirty (30) years at an interest rate of 4.5%.

Although there was no objection from a party in interest the court raised, *sua sponte*, the issue of whether a plan could properly provide for payment of a "modified" mortgage loan secured by the debtors'; real property over a period exceeding the maximum five year plan period that is applicable in Chapter 12 cases. The Court held that such treatment is permissible. The court reasoned that § 1222 (c) provides that payments in the plan may not exceed the three or five year plan period "except as provided in subsections (b)(5) and (b)(9)." Section 1222(b)(9) of the Bankruptcy Code provides that a debtor may: "provide for payment of allowed secured claims consistent with section 1225 (a)(5)of this title, over a period exceeding the period permitted under section 1222 (c)." § 1225(a)(5) provides that the creditor must retain their lien and receive payments having a present value not less than the allowed amount of their claim. Therefore, the court held, so long as a creditor receives amount not less than the secured portion of their claim the payments may extend beyond the plan period. Thus, the thirty year payment period provided in the Debtors' plan is proper.

IN RE TOGNINI: HOLDING

Pursuant to 11 U.S.C. § 1222(b)(9) a Chapter 12 reorganization plan may provide for payments that extend beyond the plan period provided that the creditor retains its lien and receives payments that have a present value not less the amount of its secured claim pursuant to 11 U.S.C. § 1225(a)(5).

5.) In Re Hudson, 2011 WL 1004630 (Bkrtcy.M.D.Tenn., 2011) 3/16/2011

Mark and Scarlett Hudson ("Debtors") operated a poultry farm located in Tennessee. In 2004 Wells Fargo, which held a lien on Debtors' property and home, financed the construction of broiler houses necessary for the Debtors' farm operation and assumed the outstanding home and farm loans for a total of $980,000. Debtors filed a Chapter 12 petition on October 15, 2008, and filed their first Chapter 12 plan on March 19, 2009. As a condition to continue receiving flocks of chickens, Debtors were required to make several improvements which would cost $27,500; without them, the debtors would not be able to continue as chicken farmers. Thus, Debtors filed motions to utilize funds. The Court conditioned its approval of the motion on approval of an amended plan. The confirmation hearing on the amended plan was held on December 9, 2010; Wells Fargo was the only party who objected to confirmation of the amended plan.

Pursuant to 11 U.S.C. § 1225(a)(5)(B)(ii), the rights of an unconsenting secured creditor can be modified only if the creditor retains its lien and receives property with a present value not less than the amount of the secured claim. The Court took testimony to decide whether Wells Fargo would receive present value under the plan. Debtors' expert witness, Mr. Mainord, appraised the property at $700,000. Wells Fargo's expert witness, Mr. Stringfellow, appraised the property at $945,000. Both experts based their opinions on three generally accepted methodologies, but the Court found that Mr. Mainord's valuation of the property was more reliable because, unlike Mr. Stringfellow, he utilized data from the Debtors' geographic area rather than nationwide figures and took into consideration the impact of the economic downturn.

Wells Fargo next asserted that Debtors' amended plan was not feasible because Debtors did not provide for funds which would become necessary in 12 to 15 years. The Court held that debtors do not have to guarantee success, they must only "provide a reasonable assurance that the plan can be effectuated." The Debtors obviously could not guarantee that they would be able to obtain financing 12 to 15 years down the road, but the Debtors did show that they would have significantly reduced the principal owed to Wells Fargo and would have sufficient equity in the property from which to finance the necessary upkeep. Therefore, the Court concluded that the Debtors' amended plan should be confirmed and their motions to utilize funds and incur credit should be granted.

IN RE HUDSON: HOLDINGS

Pursuant to 11 U.S.C. § 1225(a)(5)(B)(ii), the rights of an unconsenting secured creditor can be modified only if the creditor retains its lien and receives property with a present value not less than the amount of the secured claim.

When determining the value of real property an expert appraiser should utilize data from the geographic area in which the property is located in rather than nationwide figures and take into consideration economic factors which are likely to affect the value of the property.

To satisfy the feasibility requirement of 11 U.S.C. § 1225(a)(6) debtors do not have to guarantee success, they must only "provide a reasonable assurance that the plan can be effectuated."

6.) In re Brixey, 2010 WL 358495 (Bankr. E.D.N.C.) 1/15/2010

Tommy Brixey ("Debtor") filed a Chapter 12 reorganization plan on October 7, 2009. The plan drew several objections from creditors on the bases that it provided no payments to unsecured creditors, Debtor valued his crops in the field at zero, equipment had been sold within the 90 days immediately preceding filing, and Debtor's sons allegedly owed him money that had yet to be brought into the estate. Crop Production Services, Inc. ("CPS") was granted a hearing on its objection, and, as a result of questions raised at that hearing, the court asked Debtor to file a restated plan and required Debtor to submit an affidavit explaining the questionable circumstances.

11 U.S.C. § 1225 of the Bankruptcy Code sets forth the requirements for confirmation of a Chapter 12 plan. CPS argued that Debtor's plan failed to meet the good faith requirement of § 1225(a)(3) and the best interest of creditors test of § 1225(a)(4).

The administrative costs in the plan consisted of trustee's fees and attorney's fees of approximately $30,000, an amount which was determined to be clearly excessive. The Court held that the excessive amount of money designated as administrative costs should have been included in the hypothetical liquidation to determine whether general unsecured creditors would have received more value in a Chapter 7 liquidation, thus the plan failed the "Best Interests of Creditors Test" pursuant to § 1225(a)(4).

11 U.S.C. § 1225 (b)(1)(B) provides that if an unsecured creditor objects to the confirmation of a proposed Chapter 12 plan, the plan may not be approved unless all of the Debtor's projected disposable income is paid to unsecured creditors for the full term of the plan. Debtor was receiving an extra $10,869.00 a year which consisted of a housing allowance, a contribution from his roommate, etc. that he did not include in the plan to determine disposable income. Those funds were received by Debtor above and beyond his reasonable living expenses and were thereby disposable income subject to distribution by the Chapter 12 trustee. Thus, the Debtor's plan failed to satisfy § 1225(b)(1)(B).

In an attempt to salvage the plan Debtor tried to list a certain creditor as a fully secured creditor with no voting rights whose claim could be amortized over a period exceeding the length of the plan. The Court held that the creditor's liens clearly exceeded the value of the real estate securing their loan, thus its claim must be bifurcated pursuant to § 506(b). For these reasons the court denied the confirmation of Debtor's Chapter 12 plan.

IN RE BRIXLEY: HOLDING(S)

Trustee's fees and attorney's fees categorized by the debtor as administrative fees must be reasonable in proportion to the amount of work reasonably expected to be performed. Amounts in excess of what is reasonable must be included in the hypothetical liquidation to determine if a Chapter 12 plan is in the best interests of creditors pursuant to 11 U.S.C. § 1225(a)(4).

If an unsecured creditor objects to confirmation of the plan, all of the debtor's disposable income must be paid into the plan for the full term of the plan pursuant to 11 U.S.C. § 1225(b)(1)(B).

A debtor may not classify a creditor as fully secured if there is a legitimate dispute as to the value of the collateral. The value of the collateral must be evaluated by the Court to determine whether the creditor's claim will be bifurcated pursuant to 11 U.S.C. § 506(b).

7.) <u>In re Benefield</u>, 438 B.R. 706 (Bkrtcy.D.N.M., 2010) 8/20/2010

Cynthia and David Benefield ("Debtors") were frequent bankruptcy filers; each of them having filed several times in the District of Arizona prior to the instant case. In December of 2006 Debtors purchased an Angus cattle operation from Mr. Slaysman. Debtors' relationship with Slaysman soon deteriorated and he began foreclosure proceedings in September of 2008. Debtors did not respond to the complaint and the state court entered a default judgment of foreclosure on December 5, 2008.

On December 31, 2008 Debtors filed a Chapter 12 bankruptcy petition which was dismissed on October 14, 2009 for Debtors' failure to timely file a plan of reorganization. Debtors promptly filed another Chapter 12 petition on November 12, 2009, Slaysman filed and Emergency Motion to Dismiss pursuant to 11 U.S.C. § 109; an order dismissing that case was entered on February 12, 2010. The instant case was filed three weeks later.

The Court held, pursuant to §362, if a single or joint case is filed by or against a debtor who is an individual under this title, and if two or more single or joint cases of the debtor's were pending within the previous year but were dismissed, the stay under subsection (a) shall not go into effect upon the filing of the later case. The Court issued an order declaring that the automatic stay never went into effect.

IN RE BENEFIELD: HOLDING

If a single or joint case is filed by or against a debtor who is an individual under this title, and if two or more single or joint cases of the debtor's were pending within the previous year but were dismissed, other than a case filed under section 11 U.S.C. § 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case.

8.) In re Nichols, 2010 WL 3491162 (Bkrtcy.N.D.N.Y.) 8/31/2010

Bruce Nichols ("Debtor"), d/b/a as Galilee Farms, LLC ("LLC") filed a bare bones petition for Chapter 12 bankruptcy relief on September 9, 2009. Debtor filed his plan on December 22, 2010 and received several objections to confirmation in the following weeks from, among others, CVM, NBT Bank, and the Chapter 12 trustee. CVM made a motion objecting to confirmation pursuant to 11 U.S.C. § 1208(d) requesting that the Court order Nichols' case to be converted to a liquidation under Chapter 7. The Court scheduled an evidentiary hearing to resolve CVM's motion.

At issue pertinent to CVM's motion to convert Nichols' case to a Chapter 7 was, among other things, an unconsummated transfer of a portion of Debtor's interest in the LLC to his son Scot which Debtor represented in his disclosures as having been consummated, inconsistencies in Debtor's 2008 and 2009 tax returns, and erroneous financial representations to CVM's predecessor in interest for the purpose of obtaining a loan in 2008.

CVM asserted that the Debtor set up the LLC with the specific intent of shielding assets from the reach of his creditors under New York law. CVM also accused the Debtor of promulgating false statements and schedules based upon the fraudulently conceived, but never completed, transfer of assets from Debtor to the LLC. CVM concluded that by making it appear as if he had transferred assets to the LLC, and attempting to strip down or otherwise modify the liens of secured creditors, Debtor was attempting to game the system, his creditors, and the Court.

In response to CVM's allegations, Debtor credibly testified that his only purpose in creating the LLC was to use it as a tool of succession to pass his farm to his son Scot. Though he was an educated businessman, the Debtor testified that he did not understand the legalities of using the LLC as an investment vehicle, therefore he relied entirely on an attorney, Mr. Collins, and his accountant, Ms. Moulton, in establishing and operating the LLC. The Debtor's testimony was largely corroborated by Collins and Moulton.

While Chapter 12 is generally favorable to family farmers, its relatively lenient provisions are tempered by § 1208(d) which, unlike Chapters 11 and 13, allows a trustee or a creditor to force a debtor into a Chapter 7 liquidation, or dismissal, upon a showing that the Debtor committed fraud in connection with the case. Section 1208(d) is an extreme remedy, thus a party moving to compel conversion or dismissal carries a heightened burden. It is never enough to merely prove that a debtor took actions that happened to prejudice a creditor. Fraudulent intent must be proved; if actual fraudulent intent cannot be proved, the moving party may carry its burden by proving circumstantial "badges of fraud."

The Court compared the instant case to several cases in which the debtors were found to have the requisite fraudulent intent to warrant dismissal under § 1208(d): In re Kloubec, the debtor "carried out a deliberate, systematic conversion of the secured creditor's collateral and abused the bankruptcy process" In re Kloubec, 268 B.R. 173, 176 (N.D.Iowa 2001); In re Bange, the debtors engaged in "a concerted pattern of conduct designed to misrepresent the debtors' financial picture" In re Bange,2010 WL 1418410, at *4–5, (Bankr.D.Kan. Apr. 5, 2010); In re Williamson, "applying the definition of actual fraud and finding 'damage to the bankruptcy process' sufficient to justify conversion" In re Williamson, 414 B.R. 886, 892 (Bankr.S.D.Ga.2008); and, finally, In re Zurface, "[a] text-book case for conversion under Code § 1208(d) involves concealment, false statements, and omissions that collectively evidence an intent to manipulate the bankruptcy process" In re Zurface, 95 B.R. 527, 538 (Bankr.S.D.Ohio 1989).

The Court found that the Debtor did not have the intent to defraud creditors or the Court, and that he did not abuse the bankruptcy process. In reaching its conclusion the Court found that the Debtor was an "honest and hard working seventy-two year old farmer. . ." who "possessed an almost blind and absolute faith in both his corporate attorney and his accountant to achieve his estate planning objectives." The Court held that blind faith does not automatically equate to bad faith and a debtor's reasonable reliance on the advice of an attorney may serve to negate any inference of fraudulent intent. Therefore, the Court denied CVM's motion under 1208(d) to convert the Debtor's Chapter 12 case to a case under Chapter 7.

IN RE NICHOLS: HOLDINGS

Conversion from Chapter 12 to Chapter 7, or dismissal of a Chapter 12 case pursuant to 11 U.S.C. § 1208(d) is an extreme remedy, thus a party moving to compel conversion or dismissal carries a heightened burden. It is never enough to merely prove that a debtor took actions that happened to prejudice a creditor. Fraudulent intent may be proved by establishing actual fraud, or by proving circumstantial "badges of fraud."

Even if the Debtor's actions in connection with the case raise an inference of fraud, such an inference may be negated by Debtor's reliance on actions taken by the professionals, if the court finds that such reliance is actual, reasonable, and justifiable."

9.) In re M & M Independent Farms, Inc., 2011 WL 5902606 (Bkrtcy.E.D.N.C., 2011) 7/7/2011

M & M Independent Farms, Inc. ("M&M") is a family owned farming operation that grows tobacco, soybeans and other crops in Eastern North Carolina. In 2008 Rural Community Insurance Services ("RCIS") issued a crop insurance policy to M&M on its tobacco crop. M&M submitted a claim at the conclusion of the 2008 crop year and RCIS appraised M&M' loss in October of 2008. M&M's Chapter 12 plan was confirmed September 18, 2009. On May 27, 2010, RCIS denied coverage for M&M's loss.

On October 26, 2010, M&M initiated this adversary proceeding, alleging that RCIS's refusal to pay M&M's claim constituted breach of contract, and unfair and deceptive trade practices. RCIS filed this motion requesting that the adversary proceeding be dismissed, or, that the Court compel M&M to arbitrate its claim pursuant to the insurance policy's arbitration clause.

While arbitration is generally favored in federal courts, in bankruptcy proceedings, whether a proceeding is a "core" proceeding as defined by 28 U.S.C. § 157(b) generally determines whether an arbitration clause can be enforced. The rationale for treating arbitration differently in bankruptcy is that it is inconsistent with the centralized decision-making vested in the bankruptcy judge that is assigned to a debtor's case. The burden is on the party opposing arbitration to show that Congress intended to limit the forum as to that particular issue.

In its analysis the Court quoted the Fourth Circuit in saying: "(the) centralization of disputes concerning the debtor's legal obligations is especially important in Chapter 11 cases, . . . where the fundamental purpose of Chapter 11 is the rehabilitation of the debtor." The Court concluded that the quote is just as applicable to Chapter 12 as it is to Chapter 11, possibly more so in light of the increased emphasis on speed, simplicity, economy, and the continuing nature of funding obligations in Chapter 12.

The Court ultimately held that the relevant inquiry when determining whether a dispute is a "core" dispute under 28 U.S.C. § 157(b) is the impact that it has on other core bankruptcy functions. The dispute between M&M and RCIS is a core issue in M&M's reorganization not only because the breach of contract occurred post-petition, but also because an adversary proceeding in Bankruptcy Court is much more expedient than arbitration. Arbitration would impede the court's efficient administration of the estate and possibly disrupt the Chapter 12 plan. The arbitration would also impose additional unnecessary litigation costs on the estate and, the amount M&M seeks to recover is an integral part of this proceeding. RCIS's motion to dismiss or compel arbitration was denied.

IN RE M & M INDEPENDENT FARMS, INC.: HOLDINGS

Whether an arbitration clause will be enforced in bankruptcy depends on whether it is a core proceeding as defined by 28 U.S.C. § 157(b). The relevant inquiry regarding whether a dispute is a "core" dispute is the impact that it has on other core bankruptcy functions.

If arbitration will impose unnecessary litigation costs on the bankruptcy estate and cause undue delay by causing money or property that is integral to the estate to remain tied up the arbitration clause should not be enforced.

10.) In re Powers, 2011 WL 3663948 (Bkrtcy.N.D.Cal.) 8/12/2011

Charles Powers, ("Debtor"), owned forested property from which timber was cut and sold. Debtor filed a petition for relief under Chapter 12. Soon thereafter, a creditor, Richard Yaski, moved to dismiss the Debtor's case arguing that the Debtor did not meet the income requirements in 11 U.S.C. § 101(18).

To qualify as a "family farmer" under Chapter 12, § 101(18)(A) requires that not less than 50 percent of aggregate noncontingent, liquidated debts, excluding a debt for the principal residence, arise out of a farming operation, and that the debtor receive from such farming operation more than 50 percent of such individual's or such individual and spouse's gross income for either (i) the year preceding the year in which the petition is filed, or, the second and third years preceding the year in which the petition was filed.

In the year preceding Power's filing, his income was $180,955. Thus at least $90,478 of Powers' income would need to be derived from the operation of a family farm to qualify to file under Chapter 12 pursuant to § 101(18)(A)(i). $160,000 of Power's income for the year preceding the year in which he filed was derived from the sale of land in Missouri. Generally, the sale of land is not considered income received from the operation of a family farming operation unless the land is shown to be an inherent part of farming. Farming operations are generally held to be those activities that subject the debtor to the risks traditionally associated with farming.

In line with these principles, courts have held that proceeds from land sold to enable debtors to continue farming constitutes farm income, but proceeds from farm land that was held only for speculation does not constitute farm income. For example, where a farmer sells assets to scale down his operation and save the farm, the proceeds are farm income, but income from renting land to a farmer is not farm income because no farming risks are bore by the debtor, etc.

The majority of Debtor's income in 2007 and 2008 was derived primarily from the sale of property. Debtor did not plant trees on, or harvest any trees from, the property and did not sell the property out of necessity to further his farming operation. Therefore, the Debtor could not qualify as a "family farmer" under § 101(18)(A)(ii) and dismissal was appropriate unless the Debtor moved for conversion to a case in another Chapter for which he was eligible before an order for dismissal was entered.

IN RE POWERS: HOLDINGS

Generally the sale of land is not considered income received from the operation of a family farming operation unless the land is shown to be an inherent part of farming.

Farming operations are generally held to be those activities that subject the debtor to the risks traditionally associated with farming.

Income from renting land to a farmer is not farm income because no farming risks are bore by the debtor, but a sale of assets to scale down the farm in order to continue operating is income received from a farming operation.

11.) In re Dawes, 652 F.3d 1236 C.A.10 (Kan. 2011) 6/21/2011[1]

The Dawes (Debtors) had a history with the IRS spanning nearly thirty years which included convictions for failing to file and pay taxes. Most recently, the IRS acquired a judgment against Debtors for fraudulent conveyances. After a lengthy court battle the IRS proceeded to execute its judgment. Debtors filed for relief under Chapter 12 of the Bankruptcy Code. After declaring bankruptcy the Debtors sold several pieces of property with the Court's permission. The sale of the properties created income tax liabilities which Debtors sought to treat as a general unsecured claim not entitled to priority and ultimately discharge through their reorganization plan. The IRS vigorously opposed the proposed treatment of its claim, but lost in Bankruptcy Court and District Court. The IRS appealed to the Tenth Circuit Court of Appeals.

The Debtors argued that under 11 U.S.C. § 1222(a)(2)(A) certain claims that are otherwise entitled to priority under § 507, but happen to be owed to the government as a result of the sale of farm assets, can be treated as unsecured claims, and are, thus, eligible for discharge. The basis for the Debtors' argument is that claims entitled to priority under § 507, according to § 507(a)(2) include "administrative expenses allowed under § 503(b). Under § 503(b)(1)(B)(i) "administrative expenses . . . include . . . any tax incurred by the estate." Thus, Debtors argue that because the federal income taxes were incurred by the bankruptcy estate as the result of a farm asset sale, they may be treated as general unsecured claims pursuant to § 1222(a)(2)(A).

The Court began its analysis with an examination of the plain language of "incurred by the estate" under § 503(b). "Incur" means to "become liable, or subject to," under any definition one who has "incurred" an expense is *liable* for it. To determine who has "incurred" a tax the court looked to underlying tax law under Title 26 of the United States Code. According to various provisions of 26 U.S.C. §§ 1398, 1399, 6012, and 6151, tax liabilities incurred in Bankruptcy differ in nature depending on which chapter the debtor has filed under. In Chapters 7 and 11, the trustee is required to file a separate tax return on the behalf of the bankruptcy estate and pay any resulting taxes. Cases in Chapters 12 and 13, however, which are typically confirmed quickly compared to cases in Chapters 7 and 11, the tax obligations incurred are the personal obligation of the debtor, during, after, and apart from the bankruptcy.

[1] In May of 2012, in In re Hall, The United States Supreme Court addressed the issue of dischargeability of post-petition capital gains tax incurred from the sale of farm assets. The Supreme Court reached the same conclusion in Hall that the Court reached in Dawes and the reasoning is similar. In re Hall should be the primary authority cited on the issue of non-dischargeability of post-petition income taxes incurred as a result of the sale of farm assets pursuant to 11 U.S.C. § 1222(a)(2)(A), but the court's opinion in In re Dawes remains instructive.

The Court also noted that the Debtors' interpretation of the statute violates another canon of statutory interpretation because it would render 11 U.S.C. § 1305(a)(1) purposeless. Section 1305(a)(1) allows the government the option of having post-petition taxes incurred by the debtor treated as part of the reorganization plan. If post-petition taxes are automatically included in the bankruptcy plan as taxes "incurred by the estate," as the Debtors claim then § 1305(a)(1)'s optional inclusion of these taxes is pointless.

The Court dismissed the Debtors' remaining arguments as meritless and concluded that post-petition federal income taxes are not "incurred" by a Chapter 12 estate for purposes of § 503(b)(1)(B)(i), they are incurred by the debtor(s) in their personal capacity, outside of bankruptcy. Accordingly, post-petition income tax liabilities stemming from the sale of farm assets are not eligible for treatment as unsecured claims under § 1222(a)(2)(A).

IN RE DAWES: HOLDINGS

Post-petition income tax liabilities stemming from the sale of farm assets cannot be treated as unsecured claims pursuant to § 1222(a)(2)(A).

Post-petition federal income taxes are not "incurred" by a Chapter 12 estate for purposes of § 503(b)(1)(B)(i), they are incurred by the debtor(s) in their personal capacity, outside of bankruptcy, therefore, post-petition income taxes cannot be discharged in bankruptcy.

12.) <u>In re Woods</u>, 465 B.R. 196 (10th Cir. BAP Colo. 2012) 2/27/2012

First National Bank of Durango, ("Bank") objected to the confirmation of Reson Lee and Shaun K. Woods' ("Debtors") plan for reorganization under Chapter 12. The Bankruptcy Court confirmed the plan over the Bank's objections that the Woods were not family farmers pursuant to 11 U.S.C. § 101(18), that the interest rate proposed on its secured claim was insufficient, that the plan was not feasible, and that it should have been awarded attorney's fees. The Bank appealed arguing that its $503,000 claim, which was secured by the Debtors' home, did not "arise out of a farming operation" and, therefore, more than fifty percent of Debtors' debt did not arise out a farming operation, thus making them ineligible for relief under Chapter 12.

Whether a particular activity conducted by Chapter 12 debtors constitutes a "farming operation" is a legal question subject to de novo review. Whether a debtor was engaged in that particular activity is a factual question reviewed only for clear error. Section 101(18)(A) excludes a "debt from the principle residence" of the family farmer, unless such debt arises out of a farming operation. Debtors claimed that the debt from the house "arose from a farming operation" because the house was necessary and integral to the farming operation. The Court agreed and affirmed the Bankruptcy Court's holding because the location of the Debtors' principal residence allowed them to care for their livestock and maintain the irrigation system, and, because the home had an office in it where the farm's books were kept.

When a secured creditor rejects to its treatment in a Chapter 12 plan, the debtor must show, pursuant to § 1225(a)(5), that the creditor will retain its lien, and that it will receive property with a value that is equal to the amount of the creditor's allowed secured claim on the effective date of the plan. The Bank objected to the interest rate of 5.25 percent and argued that the rate should be considerably higher to protect it against the risk of continuing to lend to a Chapter 12 debtor. The Bank argued that the "cost of lending," or "market rate" approach set forth in the Tenth Circuit's opinion in In re Hardzog, 901 F.2d 858 (10th Cir. 1990) should apply rather than the formulaic "prime rate plus risk adjustment of one to three percent" approach set forth in Till v. SCS Credit Corp. 541 U.S. 465 (2004). The Bank reasoned that since Till is a Chapter 13 case and Hardzog is a Chapter 12 case, Hardzog should be controlling. The Court held that Till effectively overruled Hardzog and applies in both Chapter 12 and 13 because Chapter 12 was patterned after Chapter 13 and § 1225(a)(5) is nearly identical to § 1325(a)(5).

Next, the Court considered whether the Debtors' plan met the feasibility requirements of § 1225(a)(6). Whether a Chapter 12 plan is feasible is reviewed for clear error. The Bank argued that the Court was wrong in holding that the plan was feasible because the cash flow analysis provided by the Debtors to prove feasibility only extended three years into the future. The Court held that a debtor must "provide reasonable assurances that a plan can be achieved, not guarantee its success. Cash flow projections are examined to the extent that they are based on valid assumptions, and questions about plan feasibility are resolved by giving the debtor the benefit of the doubt when the projections warrant it." The projections along with the expert testimony presented was enough to reasonably assure that Debtors would be able to make their payments.

In conclusion, the Court affirmed the Bankruptcy Court's holdings that: the Woods met the farm-debt test, that Till overruled Hardzog and is the appropriate method of determining cramdown interest rates in Chapter 12, that the Woods gave adequate assurances of feasibility.

IN RE WOODS: HOLDINGS

It is of no object that a farm operation is operational before the addition of a principal residence in determining whether the principal residence is "necessary and integral to the farming operation" and therefore "arises out of a farm debt." The proper inquiry is the reasons for and purpose of the addition of the residence and its connection to the farming operation.

If a principal residence is "necessary and integral" to the farming operation it may be deemed debt that arose from a farming operation. The Debtors' principal residence was necessary and integral to the farming operation because its proximity allowed them to take care of their livestock, maintain their irrigation system, and the books and records for the farm were made and stored there.

The formula for determining cramdown interest set forth by the Supreme Court in Till v. SCS Credit Corp. is the proper formula for determining cramdown interest rates in Chapter 12 as well as Chapter 13; In re Hardzog is effectively overruled.

Debtors only need to provide adequate assurance that they can abide by the terms of the plan with credible evidence to satisfy the feasibility requirement of § 1225(a)(6), they need not guarantee success.

13.) In re Smith, 447 B.R. 435 (Bkrtcy.W.D.Pa., 2011) 3/10/2011[2]

On June 20, 2006, Gene and Charlene Smith ("Debtors") filed a petition under Chapter 12 of the Bankruptcy Code. The Debtors' plan was confirmed on November 30, 2007. After a drastic decrease of the price of milk, the Debtors could not afford to make their plan payments. To continue to fund their plan Debtors filed a Motion ("Sale Motion") seeking authority to sell all of their farm equipment and their cattle herd at auction. The Court approved the sale with an Order directing that all of the proceeds of the sale to be turned over to the Chapter 12 Trustee. As of that time, the Debtors were effectively out of the farming business.

[2] While the Court was in the process of deciding this matter, the Court of Appeals for the Ninth Circuit rendered a decision in United States v. Hall, (In re Hall) 617 F.3d 1161 (9th Cir.2010). Hall was subsequently granted Certiorari; In re Hall, 132 S.Ct.1882, 182 L.Ed.2d 840 was decided May 14, 2012 and is now the definitive authority on the issue of dischargeability of post-petition income taxes incurred as a result of the sale of farm assets pursuant to 11 U.S.C. § 1222(a)(2)(A). The Court believed that the instant case is distinguishable from Hall because the sale took place post-confirmation without notice to the IRS.

The IRS was not given notice of the Sale Motion, the hearing on it, or the Sale Order. The first notice to the IRS came on August 25, 2009, when the Debtors filed a motion ("Tax Motion") arguing that pursuant to 11 U.S.C. § 1222(a)(2)(A), they had a right to treat the capital gains tax incurred from the sale of their farming assets as an unsecured claim, not entitled to priority and subject to discharge. The IRS filed its response to the Tax Motion on September 30, 2009. The Tax Motion was heard on April 19, 2010, at which time the IRS raised the issue of sovereign immunity for the first time. The Court ordered further briefing. On June 2, 2010 the Debtors filed a fourth proposed, amended plan ("4th Amended Plan") which would provide for the farming asset sale, add the IRS as a creditor, and address the IRS tax claim under § 1222(a)(2)(A).

A defense of sovereign immunity implicates the Court's subject matter jurisdiction, and as such, may be raised at any time and must be resolved before substantive issues can be addressed. The IRS argued that § 1222, the provision upon which the Debtors relied, is not among the "laundry list" of Bankruptcy Code sections for which sovereign immunity has been expressly abrogated in § 106(a)(1). The Court held that the discharge of a debt by a bankruptcy court is an *in rem* proceeding, with the Court's jurisdiction premised on the debtor and his estate, not on creditors. Therefore, the sovereignty of the United States is not implicated.

The Debtors argued that the post-petition capital gains taxes incurred as a result of the sale of their farm equipment were dischargeable under 11 U.S.C. § 1222(a)(2)(A) which provides that certain priority claims under § 507 that happen to be owed to the government as a result of the sale of farm assets, are allowed to be treated as unsecured claims in Chapter 12. In its analysis, the Court compared two cases that had recently dealt with the issue, In re Knudsen, and United States v. Hall (In re Hall). The Court found the instant case to be factually distinguishable from both Hall and Knudsen, because, in this case, the IRS did not have any notice of the Plan or the related motions; therefore, it could not have been bound by the terms therein.

The Debtors attempted to bind the IRS with its 4th Amended Plan, however a post-confirmation plan modification cannot be used to add a new creditor that was not part of the plan that was originally confirmed. The Court held that post-confirmation plan modifications are not a matter of right, but are subject to the court's discretion. When considering a proposed modification, the court must determine, pursuant to § 1225(a)(3), whether the modification has been proposed in "good faith." In this context, good faith requires the absence of any abuse of the purpose and intent of the Bankruptcy Code. "Not in good faith" does not necessarily mean that there must be deception or underhandedness; seeking to extract too many benefits from the Chapter 12 process at a creditor's expense can constitute an absence of good faith.

The Court had substantial doubts as to whether Debtors' Proposed 4th Amended Plan was proposed in good faith. Avoidance of their tax obligation would not further the purpose of § 1222(a)(2)(A), and was evidence that the Debtors were seeking to extract too many benefits from the Chapter 12 process. Additionally, after learning of the objection of the IRS to their Tax Motion the Debtors waited more than eight (8) months before taking any step to amend the Plan. The Court saw the delay as akin to laches, adding another reason to question whether the Debtors proposed their plan in good faith.

The Court ultimately concluded that there is no mechanism under § 541 for the proceeds of such a sale to become property of the estate. Since the IRS was not included in the Debtors' originally confirmed plan, the proceeds from the farm assets in the present case were not even property of the estate, therefore § 1222(a)(2)(A) does not apply here. For the reasons stated above, the Debtors' *Tax Motion* requesting an order determining that capital gains taxes arising from the sale of the Debtors' farm assets "shall not be entitled to administrative or priority status, but shall be treated as an unsecured claim if the debtors receive a discharge in this case," will be denied.

IN RE SMITH: HOLDINGS

The discharge of a debt by a bankruptcy court is an *in rem* proceeding, with the Court's jurisdiction premised on the debtor and his estate, not on creditors. Therefore, the sovereignty of the United States is not implicated in this proceeding, hence, no waiver of sovereign immunity is required to be shown for the matter to proceed.

Post-confirmation plan modifications are not a matter of right, but are subject to the court's discretion.

A post-confirmation plan modification cannot be used to add a new creditor that was not part of the original confirmed plan.

Good faith requires the absence of any abuse of the purpose and intent of the Bankruptcy Code. "Not in good faith" does not necessarily mean that there must be deception or underhandedness; seeking to extract too many benefits from the Chapter 12 process at a creditor's expense can constitute an absence of good faith.

14.) In re Bange, 2010 WL 1418410 (Bkrtcy.D.Kan. 2010) 4/5/2010

Edward William Bange ("Debtor") filed his Chapter 12 petition on February 20, 2008, but he did not file his schedules and statement of financial affairs until a month later. Over the next year and a half Debtor appeared to resolve various disputes with creditors, including Bank of America and the Chapter 12 Trustee ("Trustee"). Debtor finally filed his Chapter 12 plan on August 29, 2009. Soon thereafter, Debtor began creating difficulties by sending counterfeit money orders to the Trustee, disputing debts, and filing a document with the court purporting to remove the Trustee from the case and replace him with a man named J. Thomas McBride. McBride, who was not licensed to practice law, began submitting nonsensical documents to the Court on Debtor's behalf. The Debtor's attorney withdrew from representation and the Trustee filed the instant motion to strike McBride's documents and convert the Debtor's Chapter 12 to a case under Chapter 7 pursuant to 11 U.S.C. § 1208(d).

The Court struck the nonsensical documents submitted by McBride without much deliberation and barred him from submitting anymore documents. In its analysis of whether to convert Debtor's case to Chapter 7 the court considered two cases dealing with a motion to convert or dismiss for fraud in connection with the case under 11 U.S.C. § 1208(d), Agribank FCB v. Kingsley (In re Kingsley), and In re Caldwell. In Kingsley, the court analogized the elements of fraud under § 1208(d) to the elements of actual fraud under § 523(a)(2)(A) which requires a intent to deceive the creditor, justifiable reliance on the part of the creditor, and damages as a result of a willful misrepresentation. In Caldwell, on the other hand, the court held that under § 1208(d) neither reliance on the part of the creditor nor actual damages are necessary because the purpose of § 1208(d) is intended to proscribe damage to the bankruptcy process as well.

The Court held that Caldwell was the appropriate standard and that, in this case, there was damage to the bankruptcy process in that Debtor never really intended to reorganize, but used the Chapter 12 process as a means to delay and coerce his creditors for two years. The Court ultimately ordered, pursuant to § 1208(d), that Debtor's Chapter 12 case be converted to a case under Chapter 7.

IN RE BANGE: HOLDING

For a Chapter 12 case to be dismissed, or converted to a case under Chapter 7, pursuant to 11 U.S.C. § 1208(d) neither reliance on the Debtor's misrepresentation by the a party in interest, nor actual damages is necessary because the purpose of § 1208(d) is to proscribe damage to the bankruptcy process as well.

15.) In re Ferguson, 2011 WL 5910659 (Bkrtcy.C.D.Ill. 2011)

Jerry and Julie Ferguson ("Debtors") filed their Chapter 12 petition on April 28, 2010. At the time of filing, First Community Bank ("FCB") held a first priority blanket lien on the Debtors' equipment and West Central FS ("WCFS") held a second priority lien on the same equipment. The equipment was sold post-petition generating $170,060.75 which was held by the Chapter 12 Trustee. Similarly, FCB held a first priority lien on Debtors' 2009 crop proceeds and WCFS held a second lien on the same; $115,288.78 from the 2009 crop was being held with the Trustee. FCB held a first mortgage on certain real estate owned by the debtors. The value of that real estate was greater than the amount of all of FCB's liens, therefore FCB was over-secured on the basis of the real estate alone. WCFS did not hold a lien on that real estate. Unlike the equipment and the crop proceeds the real estate was not liquidated and Debtors' plan proposed to retain the real estate.

Since FCB held first priority liens on both of the liquidated assets and WCFS had second priority liens FCB was positioned to receive a vast majority of their claim in cash upon confirmation and WCFS was positioned to receive little to nothing in cash upon confirmation. That being the case, WCFS asked the Court to apply the equitable doctrine of marshaling so that WCFS would received the equipment proceeds and possibly some of the crop proceeds while FCB would have to look to its mortgage on the real estate for satisfaction of its debt. FCB vigorously objected to the proposed marshaling.

Marshaling of property is an equitable doctrine that is related to property rights and is, therefore, determined by state law. Its application is not automatic and will not be applied to the injury of a senior creditor. Delay and illiquidity are common reasons for the denial of marshaling requests. Application of marshaling in the instant case would have certainly been harmful to FCB since it would been forced to resort to the real estate for payment over the course of a long-term plan of reorganization. WCFS' request for marshaling was thereby denied.

WCFS requested in the alternative that the Court approve a settlement between itself and FCB, pursuant to which the parties' liens would be arranged to get a more equitable distribution to each of the creditors. The Court flatly rejected the proposition for two reasons: first, the Debtors would not be a party to the agreement and, therefore would not be bound and, second, there are no court ordered alternatives to marshaling; either the conditions exist where marshaling is proper or the junior creditor must accept the natural consequences of its subordinate status. Non-statutory remedies that favor one creditor over another are construed narrowly in bankruptcy cases.

IN RE FERGUSON: HOLDINGS

Marshaling will not be applied to the detriment of a senior creditor.

Delay and illiquidity are common reasons for the denial of marshaling requests. There are no court ordered alternatives to marshaling; either the conditions exist where marshaling is proper or they don't and the creditor asking for marshaling must accept the natural consequences of its subordinate status.

Non-statutory remedies that favor one creditor over another are construed narrowly in bankruptcy cases.

16.) In re Gray-Bailey, 427 B.R. 536 (Bkrtcy.D.Idaho, 2010) 4/29/2010

Leslie Gray-Bailey ("Debtor") bought a home with 98.2 acres property several years ago from Christopher Drakos ("Drakos"). Debtor made her living as a bookkeeper and kept a small herd of cattle. The Debtor's intent was to live on the property for a time while herding cattle and ultimately subdivide the property and sell the parcels for a profit. After Debtor's attempts to sell the parcels failed, Debtor marketed the property as one parcel, but failed to attract a purchaser. As a result, the Debtor fell behind on her payments and Drakos moved to foreclose. On the eve of the foreclosure sale the Debtor filed for relief under Chapter 12 of the Bankruptcy Code.

The Debtor proposed a plan of reorganization which provided for the following treatment for Drakos' secured claim: "Chris Drakos has a first mortgage on approximately 98.2 acres of real property together with the house thereon in the sum of approximately $613,918.22. Effective as of April 14, 2010 the Stay shall be lifted and the debtor shall continue to market the real property." Debtor argued that this treatment of Drakos' claim was a "surrender" which satisfied the requirement of § 1225(a)(5)(C), and, thus, her plan should be confirmed.

Debtor's reasoning was that, after the stay was lifted, Drakos would continue with a sheriff's sale at which he would purchase the property with a credit bid equaling the amount of his lien; the Debtor would remain in possession of the property and continue to market it during the one year statutory period during which she would be allowed to redeem the property under Idaho law. The Debtor claimed that she would pay Drakos a reasonable amount for rent during the one year statutory redemption period. Drakos disagreed with the Debtor's reasoning and objected that the Debtor's proposed treatment of his claim did not constitute a "surrender" according to § 1225(a)(5)(C).

The Court agreed with Drakos holding that "surrender," according to § 1225(a)(5)(C), means *unconditional* relinquishment of property to a secured creditor which leaves the creditor free to sell the property in accordance with non-bankruptcy law. Furthermore, the Court held, it is unclear whether a transfer of title is necessary to effectuate a surrender according to § 1225(a)(5)(C), but, at the very least, the debtor must relinquish possession *and* control of the property to the secured creditor.

The Court concluded that the Debtor's plan could not be confirmed because it had not met the requirements of § 1225(a)(5)(C). The Debtor was given fourteen days after the entry of the Court's order to file an amended plan in accordance with this opinion.

IN RE GRAY-BAILEY: HOLDINGS

Surrender, according to § 1225(a)(5)(C) means unconditional relinquishment of property to a secured creditor which leaves the creditor free to sell the property in accordance with non-bankruptcy law.

It is unclear whether there needs to be a transfer of title to effectuate a surrender according to § 1225(a)(5)(C), but at the very least the debtor must relinquish possession and control of the property to the secured creditor.

17.) In re Schley, 2011 WL 1344595 (Bkrtcy.N.D.Iowa, 2011) 4/7/2011

Gary and Julie Schley ("Debtors") had been operating a farm in Northern Iowa for sixteen years. The entire time Julie was also employed as the principal of the local school district. Debtors filed for Chapter 12 relief and no parties in interest challenged their status as family farmers regarding their eligibility to file under Chapter 12. Debtors claimed $20,000 of farm equipment as exempt; the maximum amount available under Iowa state law. Debtors made a motion pursuant to 11 U.S.C. § 522(f)(1)(B) to avoid the liens of Peoples Bank ("Peoples"), Cooperative Credit Company ("Cooperative"), and Ag Quest, (collectively "Creditors"). Both Peoples and Cooperative objected to the motion which led to a hearing on February 15, 2011.

Although the property claimed exempt by the Schleys was deemed exempt because no one objected, the creditors were not precluded from raising exemption issues in objection to a lien avoidance motion. Debtors bore the burden of proving each element of lien avoidance. The crux of Creditors' argument was that, if only one spouse performs farm work as primary occupation, only that spouse is entitled to avoid liens on his or her own claimed exemptions. Thus, since Julie Schley only visited the farm sites about 12 times per year, and her primary duties were of a clerical nature, she was not a family farmer, and was not entitled to avoid liens on her claimed exemptions.

To determine whether a debtor is entitled to the "tools of the trade" exemption, a court must first take into account past farming activities, the intention to continue farming, and evaluate whether the debtor is legitimately engaged in a trade which currently and regularly uses the specific implements or tools claimed as exempt. It is well-established that a debtor may be a farmer for the purposes of lien avoidance despite receiving income from an off-farm job. Iowa has not adopted a percentage based formula for claiming an exemption on tools of the trade, all that is required is that a debtor works on the farm, and the work "contribute to the debtor's support."

In this case it is clear that Julie Schley worked on the farm. Cooperative argued the fact that Julie was not paid for her bookkeeping work and that the alfalfa crop that she helped with does not contribute to support. The Court rejected this argument holding that "contribute to the debtor's support" has a different meaning than "generating revenue." Julie Schley's work contributed to hers and her husband's support because it facilitated the rest of the farm operations that did, in fact, generate revenue. The court ultimately held that Julie Schley was engaged in farming and that Debtors were entitled to avoid Peoples Bank's and Cooperative Credit's liens to the extent it impaired their combined exemptions, not just the exemptions claimed by Gary Schley.

IN RE SCHLEY: HOLDINGS

Even if property claimed exempt by a debtor is deemed exempt because no one objected, the creditors are not precluded from raising exemption issues in objection to a lien avoidance motion.

The debtors bear the burden of proving each element of lien avoidance.

The Court must first take into account the intensity of a debtor's past farming activities and the sincerity of his intentions to continue farming, as well as evidence that the debtor is legitimately engaged in a trade which currently and regularly uses the specific implements or tools exempted and on which lien avoidance is sought.

Full-time employment in another profession is not an absolute bar to claiming Iowa exemptions in farm machinery and equipment as tools of the trade. It is well-established that a debtor may be a farmer for the purposes of lien avoidance even if the debtor has income from an off-farm job.

Iowa has not adopted a "percentage of income" or "percentage of time" formula for claiming an exemption on tools of the trade, all that is required is that in addition to working at the trade or profession, and that the work "contribute to the debtor's support."

18.) Timmerman v. Eich, 809 F.Supp.2d 932 (N.D.Iowa 2011) 9/12/2011

The Timmermans ("Debtors") had been family farmers in Iowa for nearly three decades running a large farm on which they primarily planted row crops. In January of 2006, American National Bank ("ANB" or the "Bank"), which lent the Debtors hundreds of thousands of dollars annually to pay for agricultural products and rent, stipulated that Debtors file a Chapter 7 bankruptcy before receiving any funds for the year of 2006.

Despite the fact that the Bank urged the Debtors to file a Chapter 7 bankruptcy, Debtors' attorneys, the Eich Law Firm ("Eich"), filed under Chapter 12. During its representation of the Debtors, Eich committed several acts of negligence and legal malpractice due to its unfamiliarity with bankruptcy, particularly Chapter 12 bankruptcies. Eich converted the Debtors' Chapter 12 case to a case under Chapter 7, which the Debtors contend was done without consulting them. Eich's actions drew objections from various parties in interest, and the United States Trustee filed an adversary action to deny the Debtors a discharge pursuant to 11 U.S.C. § 727. In October 2007 the Debtors hired new attorneys to represent them in the adversary action and Eich withdrew from representation. The Debtors' new attorneys negotiated a settlement ("Settlement") with the objecting parties to delay adversary proceedings and collection efforts until the Debtors malpractice suit against Eich concluded.

The instant proceeding concerned the Debtors' malpractice suit against Eich in which they sued for damages resulting from the mishandling of their bankruptcy. The United States Trustee joined the Debtors in bringing suit against Eich on behalf of the bankruptcy estate. Eich moved for summary judgment arguing that the Trustee was not a party in interest and therefore had no standing to bring suit. The Court rejected that argument holding that § 1207(a), which defines property of the estate in Chapter 12, includes: "all property . . . specified in § 541 that the debtor acquires after the commencement of the case, but before the case is closed, dismissed, or converted." Thus, the Court held, all of the claims which accrued after the filing of the Debtors' Chapter 12 case, but before the conversion were claims of the estate. It is well-settled law that the Trustee has standing to bring claims on behalf of the estate. On the other hand, only the Debtors themselves have standing to take action on the claims accrued after the conversion from Chapter 12 to Chapter 7.

Eich also argued that the Debtors were barred from bringing certain malpractice claims by the doctrine of issue preclusion because the Debtors had admitted in the Settlement that they were responsible for fraudulent misrepresentations in their schedules. Eich reasoned that since the Bankruptcy Court had approved the settlement, it had found that the Timmermans, and not Eich, were responsible for the fraudulent misrepresentations. The Court rejected Eich's argument because issue preclusion requires that the issue in question must have actually been litigated. Authority from the Eighth Circuit and the Supreme Court's ruling in Arizona v. California, 460 U.S. 605 (1983) has made it clear that consensual judgments do not constitute "litigation" for the purpose of issue preclusion.

Based on the foregoing, the Court denied Eich's motion for summary judgment on all of the above mentioned issues.

TIMMERMAN v. EICH: HOLDINGS

11 U.S.C. § 1207(a), defines property of the estate in Chapter 12 cases. Property of the Chapter 12 estate includes: all property specified in § 541 that the debtor acquires after the commencement of the case, but before the case is closed, dismissed, or converted to a case under Chapter 7. Thus, all claims which accrue after the filing of a Chapter 12 case, but before it is closed, dismissed, or converted to Chapter 7 are claims of the estate for which the United States Bankruptcy Trustee has standing to bring.

Consensual settlements and/or stipulations made between parties in interest in a bankruptcy proceeding, that are approved by a Bankruptcy Court, are not considered to have been "litigated" for the purposes of issue preclusion and will not have a preclusive effect in subsequent litigation.

19.) In re Cooper, 2011 WL 3882278 (Bkrtcy.D.Or.. 2011) 9/2/2011

Jordonna and Melvin Cooper ("Debtors") filed their Chapter 12 petition on October 27, 2010. Citizens Bank and JP Morgan Chase Bank, (collectively "Creditors"), objected to the confirmation of Debtors' modified plan dated June 8, 2011 on the basis that Debtors were not eligible to proceed in Chapter 12, and that Debtors' valuation of their real estate was far lower than its actual value.

Under 11 U.S.C. § 109(f) only a family farmer . . . may be a debtor under Chapter 12. Section 101(18)(A) defines "family farmer" as an "individual or individual and spouse engaged in a family farming operation . . . and such individual or individual and spouse must receive from such farming operation more that 50 percent of such individual's or such individual and spouse's gross income for the taxable year preceding; or each of the 2d and 3d taxable years preceding. . . the taxable year in which the case . . . was filed." Debtors relied solely on their information from 2009 to qualify. The financial information provided for 2009 showed that 68.5% of the Debtors' income came from a business in which Debtors bought Christmas trees from third parties and sold them on the retail market. Creditors objected that this was not a farming operation as contemplated by the Bankruptcy Code.

Under § 101(21), a "farming operation" includes "farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state." The District of Oregon uses a six factor "totality of the circumstances" test to determine whether a Chapter 12 debtor is engaged in a farming operation. The most important factor is "whether or not the practice or operation is subject to the inherent risks of farming." The Court held that, under the test, the retail sale of Christmas trees purchased from third parties does not subject the proprietor to the inherent risks of farming and, therefore, does not constitute a "farming operation."

The Court's analysis of the valuation dispute was equally as straightforward. The Debtors owned two 20.4 acre parcels both secured in varying degrees by the Creditors' liens. The Debtors proposed to surrender the North parcel and retain the South parcel, which included the Debtors' principle residence and nearly 12 acres of wine grapes, by cramming-down Chase Bank's secured claim to the value of the property. Debtors' expert valued the property at $488,000; Chase Bank's expert valued the property at $820,000. The Court held that Chase Bank's valuation was correct since it used an experienced agricultural appraiser who valued the property at its highest use, a principle residence and a "part-time vineyard farm." The Debtors' expert had no agricultural experience, listed the grapes and trellises on the property as "landscaping," and valued the property as a "hobby farm." The gross annual income of $112,000 makes it clear that Debtors' vineyard was more properly classified as a part-time vineyard than a hobby farm.

The Court ultimately concluded that Debtors' valuation was too low for the plan to be confirmable, but that point was moot because Debtors were not "family farmers" and their Chapter 12 case should be dismissed unless Debtor's elected to convert to a case under another chapter.

IN RE COOPER: HOLDINGS

The mere purchase and resale of farm by-products is not necessarily a "farming operation," were it otherwise the corner vegetable/fruit market or butcher would qualify for Chapter 12 relief, this is clearly not what Congress intended.

When a farm is being appraised to determine valuation under Chapter 12 it must be valued in accordance with its intended use.

The District of Oregon uses a "totality of the circumstances" test to determine whether a Chapter 12 debtor is engaged in a farming operation. The most important factor is "whether or not the practice or operation is subject to the inherent risks of farming."

20.) In re Prescott, 2011 WL 7268057 (Bkrtcy.S.D.Ga., 2011) 12/21/2011

Sidney Prescott ("Debtor") was a family farmer who mainly sold hay and cattle. Like most family farmers, his monthly income varied greatly. Debtor filed a Chapter 12 plan which proposed to pay Southern Bank ("Bank") $410,476.51, plus interest at 5.00% per annum, based on a 25 year amortization, with semi-annual payments on April 25 and October 25 of each year. The Bank objected on the basis that the interest rate was inadequate, that the 25 year amortization and repayment period was too long, and that the semi-annual payments were inappropriate.

On the hearing date Debtor owed Bank approximately $353, 078.11 which was secured by real property, and approximately $72,944.27, which was secured by Debtor's farm equipment. Both parties agreed that Bank was oversecured and the value of the real estate alone was more than adequate to secure both amounts. Debtor agreed for Bank's attorneys' fees to be included. In Debtor's treatment of Bank's claim, the two loan amounts were combined and the liens on both the real-estate and the equipment were retained, thus there was no dispute as to whether 11 U.S.C. § 1225(a)(5)(B)(i) was satisfied. The only issue that remained was whether § 1225(a)(5)(B)(ii) was satisfied, that is, whether the plan adequately provided for "the value as of the effective date of the plan of property to be distributed . . . under the plan on account of such claim is not less than the allowed amount of such claim."

The Court held that the interest rate was proper under the U.S. Supreme Court's formula set forth in Till v. SCS Credit Corp. In this case the rate of 5% was determined properly by adding a 1.75% risk premium to the prime rate of 3.25%. The additional 1.75% protects the lender from: (1) the probability of plan failure; (2) collateral depreciation; (3) the liquidity of the capital market; and (4) the administrative costs of enforcement. Under Till the original contract rate is irrelevant.

The Court also held that the 25 year amortization and repayment period was proper. Pursuant to § 1222(b), the debtor has the statutory ability to "modify the rights of holders of secured claims" so long as the debtor satisfies the terms of § 1225. This includes the right to extend loan repayment terms beyond the period of the plan, even if the loans may have matured prior to the petition being filed. Debtor satisfied the terms of § 1225, therefore the 25 year repayment period was proper.

Lastly , Bank's objection to the semi-annual payments proposed by the Debtor is just not supported anywhere in the code, nor by Congressional intent. In fact, the title heading of Chapter 12 in the Code refers to "annual income" as does the definition of family farmer. With this, and the fact that plans have routinely been confirmed with yearly payments since the inception of Chapter 12 the Court saw no merit in the assertion that more frequent payments could be prejudicial to the Bank.

The Court ultimately Denied the Bank's objection to the Confirmation of the Debtors' Chapter 12 plan.

IN RE PRESCOTT: HOLDINGS

Pursuant to § 1222(b), the Debtor has the statutory ability to "modify the rights of holders of secured claims" so long as the Debtor satisfies the terms of § 1225. This includes the right to extend loan repayment terms beyond the period of the plan, even if the loans may have matured prior to the petition being filed.

Semi-annual, instead of monthly payments are allowable in Chapter 12 in certain circumstances.

21.) In re Schnuelle, 2010 WL 1440520 (Bkrtcy.D.Neb., 2010) 4/9/2010

David Schnuelle ("Debtor") submitted a plan for reorganization under Chapter 12 of the Bankruptcy Code. Southeast Nebraska Cooperative ("Cooperative") sought a determination and order of non-dischargeability pursuant to 11 U.S.C. § 523(a)(2)(B) on the basis that Debtor made fraudulent written representations to Cooperative about his financial condition in order to induce Cooperative to lend him money.

Debtor admitted at trial that he misrepresented his assets and liabilities on a balance sheet, misrepresented the amount of crops he had produced in prior years on collateral worksheets, and provided false and inaccurate information to his banker; all of the aforesaid information was presented to Cooperative as an accurate representation of Debtor's financial affairs for the purpose of obtaining several hundred thousand dollars in financing to use to further his farming objectives. Additionally, Debtor admitted to knowingly feeding 14,000 bushels of feed, which Cooperative had a security interest in, to his cattle.

To except debt from discharge under § 523(a)(2)(B) a creditor must prove, by a preponderance of the evidence, that the debtor obtained money by (1) use of a statement in writing that was materially false; (2) that pertained to his or his business's financial condition; (3) on which the plaintiff reasonably relied; and (4) that the debtor made with the intent to deceive the plaintiff.

The writing must contain a statement of the Debtor's overall financial health, not a mere statement as to a single asset. A financial statement is materially false if it "paints a substantially untrue picture of a debtor's financial condition by misrepresenting information which would normally affect the decision to grant credit. Reasonableness of reliance is determined by looking at the totality of the circumstances. Reliance may be unreasonable if there were "red flags" which would have alerted the creditor to the fact that the statement was not accurate with minimal investigation. Intent may be established by proving reckless indifference or disregard as to the accuracy of the information. Factors to consider include whether the debtor was intelligent and experienced in financial matters, and whether there was a clear pattern of purposeful conduct.

With § 523(a)(2)(A) the Code also prohibits the discharge of a debt for "money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's . . . financial condition."

To establish fraud within the context of § 523(a)(2)(A), the creditor must show, by a preponderance of the evidence, that: (1) the debtor made a representation; (2) the representation was made at a time when the debtor knew the representation was false; (3) the debtor made the representation deliberately and intentionally with the intention and purpose of deceiving the creditor; (4) the creditor justifiably relied on such representation; and (5) the creditor sustained a loss as the proximate result of the representation having been made.

When the circumstances imply a particular set of facts, and one party knows the facts to be otherwise, that party may have a duty to correct what would otherwise be a false impression. This is the basis of the 'false pretenses' provision of Section 523(a)(2)(A) ." A "misrepresentation" is "not only words spoken or written but also any other conduct that amounts to an assertion not in accordance with the truth." Justifiable reliance does not require an investigation, even if the failure to investigate would be considered negligent and the falsity of the representation would be readily discovered upon investigation.

Cooperative easily established the elements of 11 U.S.C. § 523(a)(2)(A) and (B) and the Debtor's debt to Cooperative was excepted from discharge.

IN RE SCHNUELLE: HOLDINGS

The *Till* formula is appropriate to determine adjusted interest rates in Chapter 12 reorganization plans.

The prime rate contemplates inflation and ensures that the creditor will receive present value if the debtor completes the plan. The extra one to three percent added to the prime rate according to the *Till* formula, compensates for the creditor's risk of lending to the debtor.

To establish fraud within the context of § 523(a)(2)(A), the creditor must show, by a preponderance of the evidence, that: (1) the debtor made a representation; (2) the representation was made at a time when the debtor knew the representation was false; (3) the debtor made the representation deliberately and intentionally with the intention and purpose of deceiving the creditor; (4) the creditor justifiably relied on such representation; and (5) the creditor sustained a loss as the proximate result of the representation having been made.

To except debt from discharge under § 523(a)(2)(B) a creditor must prove, by a preponderance of the evidence, that the debtor obtained money by (1) use of a statement in writing that was materially false; (2) that pertained to his or his business's financial condition; (3) on which the plaintiff reasonably relied; and (4) that the debtor made with the intent to deceive the plaintiff.

22.) In re Buchanan, 2010 WL 1039981 (D.Del., 2010) 3/22/2010

Buchanan ("Debtor") had filed at least eight separate actions in the Delaware Supreme Court, all relating to his dissatisfaction with the courts' handling of the property distribution when he divorced his wife. Buchanan used to have a farm, but the farm was sold pursuant to court order in his divorce proceeding on July 9, 2008. Since 2006 Buchanan had a Chapter 13 Bankruptcy and a prior Chapter 12 Bankruptcy dismissed. On July 25, 2008, Debtor, apparently not knowing that the farm had already been sold, filed the current proceeding in an attempt to prevent the sale.

The Chapter 12 Trustee ("Trustee") filed a motion to dismiss Debtor's case on January 23, 2009. Three days later Debtor filed an adversary action "to avoid a transfer in an interest in real estate" in which Debtor alleged, in part, that his ex-wife, the Family Court, and the Delaware State Police fraudulently transferred his farm in violation of his due process rights and without paying just compensation.

The Court determined at the hearing, which Debtor could not attend due to being incarcerated in state prison, that the Debtor did not qualify as a family farmer because he did not meet the income and debt requirement, nor did he meet the "stable income" requirement.

The Court dismissed Debtor's case as well as the pending adversary action holding: "Generally, the dismissal of a bankruptcy action should result in the dismissal of all remaining adversary proceedings. This is particularly true of adversary proceedings which are related to the bankruptcy case, for the related proceedings can only be heard by a bankruptcy court because of their nexus to the bankruptcy case. Certain situations, however, may not mandate dismissal of all adversary actions such as judicial economy, fairness and convenience to the parties, etc."

IN RE BUCHANAN: HOLDING

"Generally, the dismissal of a bankruptcy action should result in the dismissal of all remaining adversary proceedings. This is particularly true of adversary proceedings which are related to the bankruptcy case, for the related proceedings can only be heard by a bankruptcy court because of their nexus to the bankruptcy case. Certain situations, however, may not mandate dismissal of all adversary actions such as judicial economy, fairness and convenience to the parties, etc."

23.) In re Sandifer, 448 B.R. 382 (Bkrtcy.D.S.C., 2011) 4/13/2011

Steven and Cynthia Sandifer ("Debtors") filed their Chapter 12 bankruptcy petition on January 6, 2011. In January of 2008 Debtors formed Sandifer and Sons Farms LLC (the "LLC"); Debtors' farm income was reported by the LLC, but was held in a bank account in the Sandifers' names. Since the LLC was created the farm had been running at a loss and the couple had considerable non-farm income. AgSouth Farm Credit ("AgSouth"), filed a motion to dismiss Debtors' case on the basis that since Debtors' farm had been running at a loss, Debtors did not have any income, much less "regular income" and, 50% of their income did not come from a farming operation. Debtors opposed the motion to dismiss arguing that their gross farming income is used to determine eligibility for Chapter 12, not profit.

Gross income is not defined in the Bankruptcy Code. The Court concluded that Congress intended that "gross income" have its ordinary tax code meaning when referenced in the Bankruptcy Code. 26 U.S.C. § 61 defines "gross income" as all income from whatever source derived. The Sandifers elected to treat their LLC as a Subchapter S corporation for tax purposes, as a result the corporation's profits pass through directly to its shareholders on a pro rata basis and are reported on each shareholder's individual Federal Income Tax Returns. AgSouth argued that the LLC's income belonged to the LLC and should not be available for the Sandifers to claim for the purposes of Chapter 12 eligibility. The Court rejected AgSouth's argument holding that the purpose of Chapter 12 is to benefit family farmers and preserve the family farm way of life, thus, Congress could not have possibly intended to exclude farmers who make sound pre-bankruptcy business decisions.

According to 11 U.S.C. 101(19) to qualify as a family farmer, one must have an income sufficiently stable to enable the Debtor to make payments under a plan under Chapter 12 of this title. AgSouth complained that Debtors did not meet this requirement because Debtors have reported farm income losses for at least the past two years. The Court found that Debtors had regular income sufficient to make Chapter 12 payments being that they have a stable non-farm income of at least $83,000. Also, the main cause of the LLC's losses was the burden of debt servicing which will be alleviated by the bankruptcy and, according to projections, allow the LLC to become profitable.

The Court ultimately held that Debtors' farm income accounted for more than 50% of their total income and they had regular income for purposes of Chapter 12; AgSouth's motion to Dismiss was denied.

IN RE SANDIFER: HOLDINGS

For purposes of determining whether one is a "family farmer" under 11 U.S.C. § 101(19), the Tax Code definition of "gross income" shall apply. The Tax Code defines "gross income" under 26 U.S.C. § 61 as: "all income from whatever source derived."

A farmer who has a source of gross income, but reports a net loss on his/her tax returns is considered to have regular income for the purposes of qualifying as a "family farmer" under 11 U.S.C. § 101(19).

When a farm operation is established in which an LLC claims the farm income, and the individual receives his/her salary from the LLC, such an individual is still receives farm income for the purpose of 11 U.S.C. § 101(19).

24.) In re Tamcke, 2011 WL 5417095 (Bkrtcy.D.Mont., 2011) 11/8/2011

Douglas Tamcke ("Debtor") was a rancher in Montana who owned thousands of acres of real property. In order to fund a feasible plan for reorganization it became necessary for Debtor to sell 3,343.9 acres of land. Debtor made a motion to appoint Realtor James C. Lane of West/Lane & Associates ("West/Lane") to sell the property, the Chapter 12 trustee objected on the basis that Debtor's live in girlfriend Kimberly Lowry ("Lowry") had recently become employed by West/Lane Realty. The trustee argued that, because Lowry was employed by the same Realty as Lane, there was a conflict of interest. More specifically, the trustee argued that Lowry had no interest in the property being sold because it would mean that she, and her son, would have to find another place to live, and since she worked with Lane, he was thereby conflicted.

Employment of professionals in bankruptcy is governed by 11 U.S.C. § 327(a), which reads, in pertinent part: ". . . the trustee, with the courts approval may employ . . . professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title." "Disinterested person" is defined, in pertinent part, at 11 U.S.C. § 101(14) as a person that:"is not . . . an insider; . . . and does not have an interest materially adverse to the interest of the estate . . . by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason." The question became whether Lane was an "insider," and thus, a "interested person" according to § 101(14), and therefore, ineligible for appointment pursuant to § 327(a).

The Trustee cited In re McIver, 177 B.R. 366 (Bankr.N.D.Fla 1995) and In re Demko, 264 B.R. 404 (Bankr.W.D.Pa.2001), cases which dealt with the definition of an "insider" in the context of recovering preferential transfers under § 547. Those cases' determinations of whether one is an "insider" focused on the relationship between the person in question and the debtor and whether the relationship could be "characterized as arm's length." For example, In re McIver defined an insider relationship as one that is "close enough to gain an advantage attributable simply to affinity."

The Court held that those definitions would be particularly relevant if it was Lowry herself who had been appointed. The evidence, however, did not show that the relationship with Lane was anything other than arm's length. Lane was initially appointed in June of 2011 when the case was still a Chapter 13, after Debtor converted to a Chapter 12 it was necessary to reappoint Lane. When Lane was initially appointed Lowry was not yet a real estate agent and was in no way affiliated with West/Lane. Lowry's employment with West/Lane after appointment was merely happenstance. Under the terms of the plan if the Debtor did not sell his property by July 1, 2012, he would be required to put his property up for auction by the year's end. Thus, the Debtor, Lane, and Lowry had great motivation to see the property sold as quickly is possible. The Court ultimately denied the Trustee's motion to terminate Lane's appointment.

IN RE TAMCKE: HOLDINGS

The true test to determine whether one is an "insider" according to 11 U.S.C. § 101(14), and thus, ineligible for appointment pursuant to 11 U.S.C. § 327(a) is whether the relationship between that person and the debtor, or the estate, can be characterized as arm's length.

The simple fact that a realtor happens to work at the same realty as a debtor's live-in girlfriend, without more, does not make that realtor an interested person who is ineligible for appointment under 11 U.S.C. § 327(a).

25.) In re Jones, 2011 WL 3320504 (Bkrtcy.D.Or., 2011) 8/2/2011

Linda Jones ("Debtor") owned and maintained 22 acres of land in Oregon doing business as "Eden Farm." Debtor's principal activity was the boarding and training of horses; she also offered horse shows and riding lessons. Debtor was also the executive director of a charitable foundation called Equamore whose mission was to care for abandoned and/or neglected horses. On the Debtor's property there were 45 horses, 3 of which she owned, 15 of which were owned by private parties, and approximately 27 which were owned by Equamore. Debtor filed bankruptcy under Chapter 11 on September 9, 2010 and later converted to a Chapter 12. Her conversion drew objections from PremierWest Bank ("PremierWest"), and Charles and Joyce Todd, the ("Todds") who moved to dismiss the case. Premier and the Todds argued that the Debtor did not qualify for Chapter 12 because she did not own or operate a farm, Debtor opposed the motion.

Debtor first argued that the Todds should be estopped from arguing that she is not eligible for Chapter 12 because her successful motion to convert to Chapter 12 is conclusive. The Court denied this argument because 11 U.S.C. §1112(f) provides that: "a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter." Additionally, the Todds did not receive any notice of the Debtor's motion to convert and, according to Federal Rule of Bankruptcy Procedure 1017(f)(1), would not be bound even if there were such a preclusive effect.

It was not disputed that the vast majority of Debtor's income came from boarding and training horses, however, PremierWest and the Trustee argued that boarding and training horses is not a "farming operation." Debtor put forth evidence that her property was zoned for exclusive farm use and that her employees are treated as "agricultural employees" for tax purposes to prove that her ranch was a farming operation.

The District of Oregon uses the Sugar Pine Ranch totality of the circumstances test to determine whether a Chapter 12 debtor was engaged in a "farming operation." The test has seven factors, but the last and most important factor is "whether the operation is subject to the inherent risks of farming." The Court held that under this test the Debtor was not operating a "farming operation" because she produces no product, but, rather, "provides a service, and charges a fixed fee." "Raising horses for a living is a farming operation, training and boarding them is not."

The Court ultimately held that dismissal was too harsh of remedy and set aside the erroneous conversion from Chapter 11 to Chapter 12. The Court mandated that the Debtor must file a Chapter 11 plan under a shortened deadline.

IN RE JONES: HOLDINGS

According to Federal Rule of Bankruptcy Procedure 1017(f)(1) a party who did not receive notice of a motion cannot be considered to have waived any rights or privileges pertaining to that motion.

Courts in the District of Oregon use the Sugar Pine Ranch totality of the circumstances test to determine whether a Chapter 12 debtor was engaged in a "farming operation." The test has seven factors, but the last and most important factor is "whether the operation is subject to the inherent risks of farming."

"Raising horses for a living is a farming operation, training and boarding them is not."

26.) In re Rafter Seven Ranches L.P., 414 B.R. 722 (10th Cir.BAP (Kan. 2009) 9/17/2009

Debtor Rafter Seven Ranches L.P. ("Rafter Seven") owned three tracts of farmland ("Tracts") in Finney county Kansas. The land was held jointly by Debtor and two trusts controlled by Debtor's majority owner and general partner, Michael Friesen ("Friesen"). Debtor failed to make the required tax payments on the tracts and, to avoid tax foreclosure, WNL Investment, L.L.C. ("WNL") purchased the Tracts and leased them back to the Debtor with an option to repurchase. Debtor failed to make the lease payments and WNL brought suit to quiet title. In response, the trusts abandoned their claims of interest in the properties and Debtor filed bankruptcy under Chapter 12.

The parties reached a settlement agreement ("Settlement") in which WNL would be deemed "absolute owner" of all three Tracts, if it paid WNL $240,000 on or before July 15, 2006. If Debtor failed to pay the full amount WNL would thereby be authorized to sell as much of the property as necessary to recoup full payment. The Settlement also provided that: "all farm income generated from the Real Estate (Tracts) from and after January 11, 2006 shall be and is the sole and exclusive property of the debtor." Debtor failed to make the payments stipulated in the Settlement and WNL sold one of the Tracts in September of 2006 to Duane Koster ("Koster"). The sale of the remaining two Tracts was to be held on October 31, 2006.

Pending the closing of Tract three Koster received permission from WNL to begin farming the land. A wheat crop was planted on the land and harvested in 2007. Friesen believed that Debtor was entitled to the farm proceeds from the harvest. Debtor filed a "Motion for Actual Damages, Attorneys' Fees, Costs and Punitive Damages Against Respondents for Violation of the Stay" asserting that WNL and Koster violated the stay by harvesting and selling the 2007 wheat crop. In the alternative Debtor sought sanctions under 11 U.S.C. § 105.

On July 15, 2008 the bankruptcy court entered an order granting summary judgment to WNL and Koster. The court interpreted the portion of the agreement in which Debtor would be entitled to "all farming proceeds" from the tracts, in the context of the entire agreement, to mean that the Debtor was entitled to the net proceeds of the 2006 crop already in the ground; to interpret it to entitle Debtor to all future proceeds regardless of ownership would be absurd. The bankruptcy court determined that even if there had been a stay violation, Debtor would not be entitled to damages under § 362(h). Section 362(h) entitles allows "an *individual* injured by a willful violation of the stay to recover damages." Although some courts have held otherwise, the bankruptcy court determined that Debtor, a general partnership, is not an individual as contemplated by Congress. The bankruptcy court also denied Debtor's request for sanctions under § 105.

The Tenth Circuit Bankruptcy Appellate Panel ("BAP") affirmed the bankruptcy court's holdings. Though there is a split in authority of whether only natural persons may recover for willful violations of the stay, the BAP held that the plain meaning of "individual" in § 362(h) means an individual person, not an entity or partnership. The Bankruptcy Code distinguishes between "Person" which includes individuals, partnerships, and corporations, and "individual." Congress chose these words to distinguish individual natural persons from the general definition of person which includes entities such as partnerships and corporations.

IN RE RAFTER SEVEN RANCHES: HOLDING

Only individual, natural persons, are entitled to recover damages for willful violations of the stay under 11 U.S.C. § 362(h). The word "individual," which refers only to individual, natural persons, was used in § 362(h) by Congress to distinguish from "persons" which includes partnerships, LLCs, and corporations.

27.) In re Cady, 440 B.R. 16 (Bkrtcy.N.D.N.Y., 2010) 11/22/2010

Creditor CVM Partners ("CVM") moved for relief from the automatic stay in the Chapter 12 case of Vickie Cady ("Debtor") on the basis that her farmland ("Property") which secured CVM's loan was not property of the estate. The basis for CVM's argument was that CVM's predecessor in interest, HSBC Bank, made the loans for which the Property was collateral to the Debtor's father-in-law in the 1970's. The loan notes contained "due on sale" clauses which made the full amount of the loan due and owing upon the transfer of the property. Debtor acquired the property jointly with her husband several years before filing bankruptcy and neither HSBC nor CVM consented. Thus, CVM argued that there was no contractual privity with Debtor, and Debtor could not retain the property, modify the loan, or cure any defaults of the deceased obligor.

In analyzing the issue of whether the Debtor may address the notes in a Chapter 12 case when the Debtor's deceased father-in-law was the sole obligor on original loan documents, the Court found that it was necessary to determine: (1) whether a valid transfer took place, and (2) the breadth of the term "claim." The Court held that, despite the fact that the loan agreement with the Debtor's father-in-law contained a "due on sale" clause, the transfer was valid. The Garn-St. Germain Depository Institutions Act (the "Act") provides an exception to the enforceability of certain clauses when the transfer takes place between a borrower and his children. In this case the Act prevented the enforceability of the due on sale clause and the transfer was valid.

Under 11 U.S.C. § 1222 "the reorganization plan may modify the rights of creditors holding a claim against the estate." In Johnson v. Home State Bank, 501 U.S. 78 (1991) the Supreme Court held that "a bankruptcy discharge severs only the in personam means of enforcement." As a result "Congress fully expected that an obligation only enforceable against a Debtor's property would be a claim under § 101(5) of the Code." The Court added that the majority of Second Circuit cases that have dealt with the issue have allowed a debtor to pay a claim through the plan even if the debtor is not personally liable for the debt. For this proposition the Court cited In re Rutledge, 208 B.R. 624 (Bankr.E.D.N.Y. 1997), which held that "Johnson mandates the conclusion that a transferee debtor who is not the original obligor under a mortgage, and who is without any personal liability under the mortgage may still treat the claim of the mortgage arrears in a chapter 13 plan." Rutledge followed the reasoning of In re Allston, 206 B.R. 297 (Bankr.E.D.N.Y. 1997), which held that (1) the debtor owns property as to which the mortgagee holds a lien; (2) the property is property of the estate; and (3) therefore it follows that the mortgagee holds a claim against the debtors . . . to the extent that the mortgagee asserts a claim against the property.

In holding that a debtor who is not the original obligor under a loan agreement may modify the lienholder's rights in a Chapter 12 plan, the Court held that the courts must be cautious to ensure that debtors in similar situations are not acting in bad faith, as the debtor did in In re Kizelnik, 190 B.R. 171 (Bankr.S.D.N.Y. 1995). Absent any evidence of bad faith the Court allowed CVM's claim to be treated through the plan and denied CVM's motion for relief from stay, all of CVM's rights to object to the plan on other bases were preserved.

IN RE CADY: HOLDINGS

A debtor who is not the original obligor under a loan agreement may treat a secured creditor's claim through their Chapter 12 Plan and modify the creditor's rights, even if the debtor is not the original obligor in the loan agreement, as long as the debtor owns the property as to which the mortgage holds a lien and the property is property of the estate.

The court must be cautious to ensure that the debtor is not acting in bad faith when it allows the debtor to treat a secured creditor's claim through their Chapter 12 plan when the debtor is not the original obligor in the creditor's security agreement.

The Garn-St. Germain Depository Institutions Act (the "Act") provides an exception to the enforceability of a "due on sale" clause when the transfer takes place between a borrower and his children.

28.) In re Pertuset, _____ (Bankr. S.D. Ohio, 2011) 3/5/2012

Debtors' first case was filed on November 16, 2009. In that case Debtors made various pro se filings including one in which they claimed to assign a partial interest in a maritime Judgment lien to pay off all of their creditors. Debtors' unilateral actions caused their attorney to withdraw from representation and American Savings Bank ("ASB") made a motion asking the court to dismiss the case pursuant to 11 U.S.C. § 1208. The Court ultimately dismissed the Debtors' case pursuant to 11 U.S.C. § 1221 for failing to timely file a plan. Debtors appealed the dismissal, but lost the appeal.

The Debtors filed the instant Chapter 12 case, their second, on September 14, 2011. Soon thereafter, creditors Quality Car and ASB filed motions for relief from stay, and ASB filed a motion to dismiss for cause alleging gross mismanagement of the estate, continuing loss to the estate, and absence of a reasonable likelihood of rehabilitation. Soon thereafter, Debtors began filing pro se motions which, among other things, objected to the claims of their creditors. Debtors' attorney made a motion to withdraw as counsel, which the Court stayed until the confirmation hearing.

At the confirmation hearing, Debtors' behavior became even more outrageous as they asked the Court to allow Rodney Dale Class, who was not admitted to practice law in any state, to appear as "Private Attorney General" to represent Debtors in connection with the confirmation hearing. Debtors once again requested the opportunity to introduce evidence that their creditors did not have standing to advance their claims, the Court refused to consider Debtors' pro se filings holding that 28 U.S.C. § 1654 presents an either/or proposition. In other words, a party may plead and conduct its own case personally or by counsel; the Court does not allow a party to have an attorney of record and also file pro se filings.

Debtors asked the Court orally to extend the 90 day period to file a Chapter 12 plan pursuant to § 1221 and the 45 day period for confirmation after a plan has been filed pursuant to § 1224. The time periods in § 1221 and § 1224 may be extended "for cause." The phrase "for cause" is not defined by the code, but the Court held that the legislative history indicates that any extension of the time periods is primarily for the convenience of the Court. The Court found that cause did not exist as the Debtors had plenty of time to conduct discovery and creditors would be inconvenienced by further delay.

Upon evaluating Debtors' plan, the court found several grounds which warranted dismissal. Debtors failed to provide a liquidation analysis in their plan and thereby failed to satisfy § 1225(a)(4), the best interest of creditors test. Debtors also failed to satisfy § 1225(a)(6) in that they provided no evidence that tended to establish that their plan was feasible. Additionally, Debtors' plan lacked specificity with regard to projected income, expenses, and distributions to creditors. Due to Debtors' actions, the Court found cause to dismiss under § 1208(c)(9) based on continuing loss or diminution of the estate and the absence of a reasonable likelihood of rehabilitation; § 1208(c)(5) for denial of confirmation and an extension of time in which to confirm a plan; and § 1225(a)(3) for Debtors' failure to file in good faith. Debtors' bad faith in filing similarly constituted grounds for dismissal for cause under § 1208(c).

The Court listed nearly twenty factors for determining whether a Debtor's conduct was in bad faith and stated that a court must determine whether, in the totality of the circumstances, there has been an abuse of the provisions, purpose, or spirit of the Bankruptcy Code; the question being one of fundamental fairness. The Court held that Debtors' conduct was in bad faith for the following reasons: (1) the instant case was Debtors' second filing in a year in which they made numerous nonsensical pro se filings; (2) Debtors disputed the claims of nearly all of their creditors; (3) Debtors refused to comply with code provisions requiring the Court to issue several orders directing the Debtors to amend their schedules; and (4) Carl Pertuset's testimony was less than forthcoming and his signatures on loan documents were evasive. Debtors' actions, in totality, demonstrated an abuse of the Bankruptcy system. The Court dismissed the Debtors' case with a two year bar on filing another bankruptcy pursuant to § 349(a).

IN RE PERTUSET: HOLDINGS

Most courts interpret 28 U.S.C. § 1654 to be an either/or proposition, therefore the Court will not allow parties to have an attorney of record and also file their own pro se filings. The attorney of record may endorse the client's pro se filings, but if the attorney does not, the court will take them into consideration.

Repeated pro se motions by a Debtor is an indicia that the Debtor filed for bankruptcy in bad faith.

Erosion of creditors' position due to diminution of the value of collateral securing their claims coupled with the absence of a reasonable possibility of reorganization is grounds for conversion or dismissal pursuant to § 1208(c)(9).

Failure to file in good faith is grounds for dismissal pursuant to 11 U.S.C. § 1225(a)(3). Affirmative evidence of proceeding in bad faith is grounds for dismissal "for cause" generally under 11 U.S.C. § 1225(c).

11 U.S.C. § 1225(a)(6)'s feasibility provision requires that the Debtor establish with credible evidence that they will be able to make the payments proposed under the plan. Debtors must not prove beyond a doubt that they will be able to make the required plan payments, but the evidence must provide adequate assurance that timely payments according to the plan are possible.

11 U.S.C. § 1224 allows the 45 day time period to confirm a Chapter 12 plan after filing to be extended "for cause." The phrase "for cause" is not defined by the code, but the legislative history behind § 1224 indicates that any extension of the 45 day period is primarily for the convenience of the Court.

29.) In re Hall, 132 S. Ct.1882, 182 L.Ed.2d 840 5/14/2012

The issue of whether capital gains income tax from the post-petition sale of farm assets cannot be treated as unsecured and discharged in a Chapter 12 bankruptcy pursuant to 11 U.S.C. § 1222(a)(2)(A) became ripe for decision by the Supreme Court after a circuit split had developed. See In re Dawes, 652 F.3d 1236 (2011); and, Knudsen v. IRS, 581 F.3d 696 (2009). In a 5-4 decision delivered by Justice Sotomayor, the United States Supreme Court resolved the split holding that capital gains income taxes resulting from the post-petition sale of farm assets cannot be treated as general unsecured debt subject to discharge pursuant to 11 U.S.C. § 1222(a)(2)(A).

Capital gains income tax from the sale of property is normally a priority claim as defined by § 507 and therefore, nondischargeable in bankruptcy. Section 1222(a)(2)(A), however, provides that certain governmental claims arising from the sale of farm assets are stripped of priority status and downgraded to general unsecured claims which are subject to discharge after partial repayment. The 1222(a)(2)(A) exception only applies to claims "entitled to priority under § 507." Section 507(a)(2) covers "administrative expenses allowed under § 503(b)," which includes "any tax incurred by the estate pursuant to § 503(b)(1)(B)(i). By this reasoning many Chapter 12 bankruptcy practitioners had attempted to treat capital gains income taxes resulting from the sale of farm assets as general unsecured claims dischargeable in bankruptcy.

Like many lower court that had addressed the issue, The Supreme Court's analysis turned on whether the tax was " incurred by the estate" pursuant to § 503(b)(1)(B)(i). To determine whether capital gains taxes from the sale of farm assets were "incurred by the estate," the court looked to the Internal Revenue Code, particularly 26 U.S.C. §§ 1398, 1399, and 6012, which provide that chapter 7 and 11 estates shall be liable for taxes and that there is no taxable estate created in Chapter 12 and 13 cases.

According to the IRS code, in Chapter 12 and 13 cases, the estate never incurs the post-petition capital gains tax, the tax is incurred by the individual, who is ultimately liable for the payment of the taxes. This assertion is further enforced by 11 U.S.C. § 346. Section 346(b) expressly states that income of the estate in a chapter 7 or 11 may be taxed "only to the estate, and may not be taxed to such individual." Section 346 also expressly states that, in a Chapter 13, income of the estate may be taxed "only to the debtor, and may not be taxed to the estate." Additionally, § 1322 (a)(2) does not allow for post-petition capital gains taxes to be treated as unsecured. Because Chapter 12 was modeled on Chapter 13, and so many of the provisions are identical, "chapter 13 cases construing provisions corresponding to chapter 12 provisions may be relied on as authority in chapter 12 cases."

Lastly, the Court noted that § 1305 allows an entity "to file a proof of claim against the debtor. . . for taxes that become payable to a governmental unit while the case is pending." The Court reasoned that such a provision would be superfluous if post-petition taxes were already collectible inside the bankruptcy. The Court concluded that "when Congress amends the Bankruptcy laws, it does not do so on a clean slate. If Congress wished to alter these background norms, it needed to enact a provision to enable postpetition income taxes to be collected in the Chapter 12 plan in the first place."

The Court ultimately held that "federal income tax liability resulting from petitioners' postpetition farm sale is not 'incurred by the estate' under § 503(b) and thus neither collectible nor dischargeable in the Chapter 12 plan." The Court affirmed the judgment of the Court of Appeals for the Ninth Circuit. Dissent by Breyer omitted.

IN RE HALL: HOLDINGS

In Chapter 12 and 13 cases the estate never incurs the post-petition capital gains tax, the tax is incurred by the individual, who is ultimately liable for the payment of the taxes.

Chapter 13 cases construing provisions corresponding to chapter 12 provisions may be relied on as authority in chapter 12 cases.

Post-petition federal income taxes are not "incurred" by a Chapter 12 estate for purposes of § 503(b)(1)(B)(i), they are incurred by the debtor(s) in their personal capacity, outside of bankruptcy, and, therefore, post-petition income taxes cannot be discharged in bankruptcy.

30.) In re Ellis, _____ (Bkrtcy.N.D.N.Y., 2012) 7/3/2012

Constance S. Ellis ("Debtor") filed for Chapter 12 relief on February 11, 2011, prompted by a foreclosure proceeding initiated by NBT Bank ("NBT") against four parcels of real property (the "Property") in southern Onondaga County, New York. At the time the petition was filed, NBT claimed to be owed $756,024.55; Debtor and NBT stipulated that NBT was secured to the extent of $576,622.54. Debtor was forced to sell her cows and equipment in January of 2009. At the time of petition Debtor's income consisted of wages for working full-time on a neighboring farm, rental income from leasing farmland, food stamps, and SSI income paid to Debtor's 31 year old daughter, nonetheless, Debtor testified that it was her intention to continue farming.

Debtor's plan proposed to reduce secured claimholders' claims with the sale of her second residence. Debtor planned to raise replacement heifers, raise pumpkins for a neighboring farmer, and purchase and resell mum flowers. Debtor projected that she would make approximately $28,000 each year from these operations approximately $25,000 per year of which she would use to fund her plan. The Chapter 12 trustee and NBT objected that the Debtor's plan was not feasible; NBT also objected that the Debtor was ineligible for Chapter 12 because she was not "engaged in a farming operation" at the date of petition and because the repayment terms of its secured claims were unreasonable and inconsistent with customary lending practices.

The Debtor was the only witness to testify in support of confirming her plan and there was no independent evidence to support Debtor's estimates of net revenue from her anticipated farming ventures. NBT presented the testimony of Mary Pulver, a Vice President of NBT Bank who had been involved in agricultural lending for more than thirty years. Pulver testified that the loans were chronically past due, the proposed payout of 30 years at 5% interest was inadequate, the plan failed to provide for necessities such as crop insurance, and the projections yielded a negative cash flow and did not provide for transportation fuel, clothing, or food.

The Court held that being physically engaged in farming at the date of petition is not controlling when determining whether someone is eligible for Chapter 12 relief pursuant to 11 U.S.C. § 109(f) and 11 U.S.C. § 101(19). The intention to continue farming is what is controlling and "Debtor's temporal interlude of working off farm arising from a forced displacement does not supplant her ongoing intention to continue farming." Therefore, the Court held that Debtor was eligible for Chapter 12 relief.

The Debtor has the burden of establishing all elements essential to confirmation of the plan. Feasibility is fundamentally a question of fact which necessarily entails a determination of the comparative credibility of experts as well as the credibility of the Debtor. The Debtor simply testified as to her hopes and introduced no independent evidence as to the feasibility of her plan. Additionally, the Debtor's performance during the 14 months since the filing of the petition were not promising. The Court held that the Debtor did not establish feasibility and that "[n]otwithstanding the sincerity of her effort, the proposal is entirely speculative."

The Debtor similarly failed to prove that NBT was adequately protected and the Court granted NBT's motion for relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1) and § 362(d)(2). The Debtor bears the burden of proving that the creditor's interest in the collateral is adequately protected pursuant to 11 U.S.C. § 362(g). Having already determined that the Debtor was without money to fund a plan the Court held that the creditor was entitled to relief from stay under § 362(d)(1). Given the fact that NBT was over-secured and there were additional junior liens on the property, it was established that there was no equity in the property; since the Court had determined that Debtor's second amended plan was not feasible it was established that there was not a reasonable possibility of a successful reorganization within a reasonable time. Therefore, the Debtor had not refuted either of the elements of § 362(d)(2) and NBT was entitled to relief from stay under that provision as well.

The Court concluded that the Debtor's second amended plan was not feasible and NBT was entitled to relief from the automatic stay after the conclusion of the fourteen day stay period provided for in Fed. R. Bankr. P. 4001(a)(3) for consensual resolution.

IN RE ELLIS: HOLDINGS

Whether or not a debtor is physically engaged in farming at the date of petition is not controlling when determining eligibility for Chapter 12 relief pursuant to 11 U.S.C. § 109(f) and 11 U.S.C. § 101(19). The intention to continue farming is controlling and a debtor's temporal interlude of working off farm arising from a forced displacement does not supplant their ongoing intention to continue farming."

The Debtor has the burden to establish all elements essential to confirmation of the plan. Feasibility is fundamentally a question of fact which necessarily entails a determination of the comparative credibility of experts as well as the credibility of the Debtor. Speculative and conclusory statements will not suffice to establish feasibility.

When it comes to preventing a creditor from obtaining relief from the automatic stay, the Debtor bears the burden of proving that the creditor's interest in the collateral is adequately protected pursuant to 11 U.S.C. § 362(g).

31.) <u>In re Hand</u>, 2010 WL 745624 (Bkrtcy.M.D.Fla., 2010) 2/4/2010

Wilbur and Jeri Hand ("Debtors") owned and operated a poultry farm in Florida on which Debtors grew broiler chickens pursuant to an agreement with Pilgrim's Pride. On thier schedules Debtors listed 40 acres of land encumbered by a first mortgage held by First Federal Bank of Florida ("First Federal"). Debtors filed their first Chapter 12 plan on July 10, 2009 which drew an objection from First Federal. Over the course of the next four months they would go on to file six amended plans. First Federal objected to the treatment of its secured claim, that the Debtors filed their plans in bad faith, and that the plan was not feasible.

First Federal objected first that their secured claim was not addressed in full because their initial claim of $725,109.64 was being treated as secured only to the extent of $380,000 and the balance of $345,109.64 was being treated as unsecured. Debtors bifurcated First Federal's claim pursuant to § 506(a)(1), treating the claim as secured up to the value of the collateral, and treating the remainder as unsecured. Based on the combined operation of § 1222(b)(2) and § 506(a) a debtor in Chapter 12 is permitted to strip down an under-secured creditor's lien and treat the creditor's claim as secured only to the extent of the value of its collateral. First Federal could have provided expert testimony to refute Debtors' valuation, but they neglected to do so.

Next, First Federal argued that Debtors' plan should not be confirmed because it was not submitted in good faith. The basis for First Federal's allegations was that Debtors omitted certain property including two motorcycles, an ATV, and other miscellaneous items of property, and they received post-petition loans from Mr. Hand's father to cover immediate operating expenses. The Court held that the plan was not proposed in bad faith because Debtors had a proper business purpose for the filing, the omissions were corrected as soon as they were discovered, and the post-petition funds received from Mr. Hand's father were unsecured and necessary to continue their farming operations. Additionally, Debtors' demeanor and candor with the Court indicate that the Debtors reorganization plan was in good faith.

First Federal also objected to Debtors' repayment of its claim in the plan over a period of twenty years, but the Court could not sustain First Federal's objection. Section 1222(b)(9) clearly authorizes Chapter 12 debtors to provide for payments on secured claims that extend beyond the five year term of the plan provided that the payment is consistent with section 1225(a)(5).

Lastly, feasibility is a question of fact that entails a determination of the credibility of experts as well as the debtor. The debtor does not have to prove that it will be able to make the payments as according to the plan, but only provide reasonable assurance that the plan can be achieved. In this case an agricultural economist testified that the Debtor's plan was feasible and there was nothing set forth to refute the credibility of that assessment, therefore the Debtor adequately proved feasibility.

The court ultimately concluded that the Debtors' plan satisfied the requirements of § 1225 of the bankruptcy code and should be confirmed. The Plan had been proposed in good faith as required by § 1225(a)(3), and satisfied the feasibility requirement of § 1225(a)(6). Lastly, the value distributed to First Federal under the Plan was not less than the allowed amount of its claim as required by § 1225(a)(5)(B).

IN RE HAND: HOLDINGS

Based on the combined operation of 1222(b)(2) and 506(a) a debtor in Chapter 12 is permitted to strip down an under-secured creditor's lien and treat the creditor's claim as secured only to the extent of the value of its collateral.

Section 1222(b)(9) clearly authorizes Chapter 12 debtors to provide for payments on secured claims that extend beyond the five year term of the plan provided that the payment is consistent with section 1225(a)(5).

Feasibility is a question of fact that entails a determination of the comparative credibility of experts as well as the debtor. The Debtor does not have to prove that it will be able to make the payments as according to the plan, but only provide reasonable assurance that the plan can be achieved.

32.) In re Ted Wiest & Sons Inc., 446 B.R. 441 (Bkrtcy.D.Mont., 2011) 2/18/2011

Get 'Er Done Wiest LLC filed a Chapter 12 petition on November 16, 2009. Ted Wiest & Sons Inc. and Gary and Kim Wiest filed Chapter 12 petitions on January 22, 2010. The Debtor believed that it was necessary to consolidate the cases because of cross collateralization of property common to all three cases. On February 22, 2010, the Debtors filed a "Motion to Substantively Consolidate Estates. After giving due notice, with no objections the Court entered an order consolidating the three cases.

Debtors filed their first amended Chapter 12 plan on August 3, 2010. Get 'Er Done Wiest LLC and Gary and Kim Wiest showed negative $366,718 cash available after liquidation while Ted Wiest & Sons Inc. showed positive cash after liquidation of $576,974. Instead of treating the bankruptcy estate as one estate, thereby allowing all of the unsecured claims against each entity, the Debtor, citing 11 U.S.C. § 1222(b)(2), treated each unsecured claim as allowed only against the entity by which it was incurred before the motion to consolidate. Thus, in its plan the Debtor allowed for treatment of the four unsecured claims against the solvent entity, Ted Wiest & Sons Inc., but provided for no treatment and no payment of the sixteen unsecured claims against the other two entities.

Objections to the Debtor's first amended plan were filed, but they were eventually resolved by stipulation. After the resolution of the objections the Debtor filed a "Motion to Vacate the Confirmation Hearing and Confirm the Debtor's First Amended Plan Without Hearing." The creditors did not oppose the motion and the Chapter 12 trustee consented to the motion.

11 U.S.C. § 1227(a) provides that "The provisions of a confirmed plan bind the debtor, each creditor, each equity security holder, and each general partner in the debtor." The Debtors argue that the trustee is bound by the effect of confirmation. The Court noted that the language of § 1227(a) does not include "the trustee." However, case law on the topic including, among others, In re Ogle, 201 B.R. 22; In re Mickelsen 00.3.I.B.C.R. 147, and In re Plata, 958 F.2d 918 recognize that res judicata binds a trustee to the terms of a plan if he fails to object at confirmation. Thus, once the court confirms a Chapter 12 plan the parties may not unilaterally depart from its terms to cure missteps they might have made prior to confirmation. By admittedly failing to catch the omissions of the 16 unsecured creditors, who received no treatment through the plan, and object at confirmation, the trustee is bound by his consent and bound by the terms of the plan under § 1227(a).

The Trustee also moved for a modification of the plan pursuant to 11 U.S.C. § 1229(a). Under § 1229(a) the plan may be modified at any time after confirmation, but before the completion of the plan on request of the debtor, the trustee, or the holder of an allowed unsecured claim, but a modification pursuant to § 1229(a) is only warranted when an unanticipated change in circumstances affects implementation of a plan as confirmed. The moving party has the burden to show a changed in circumstances. The trustee did not prove a change in circumstances that warranted a plan modification.

IN RE TED WIEST & SONS INC.: HOLDINGS

11 U.S.C. § 1227(a) provides that "The provisions of a confirmed plan bind the debtor, each creditor, each equity security holder, and each general partner in the debtor." However, case law on the topic including, among others recognize that res judicata binds a trustee to the terms of a plan if he fails to object at confirmation. By admittedly failing to catch the omission of the other 16 unsecured creditors and object at confirmation, the trustee is bound by his consent and bound by the terms of the plan under § 1227(a).

Under § 1229(a) the plan may be modified at any time after confirmation, but before the plan is completed, on request of the debtor, the trustee, or the holder of an allowed unsecured claim, but a modification in only warranted when an unanticipated change in circumstances affects implementation of a plan as confirmed. The moving party has the burden to show a changed in circumstances.

33.) In re Teolis, 419 B.R. 151(Bkrtcy.D.R.I. 2009) 10/26/2009

Kimberly and Glenn Teolis ("Debtors") filed separate Chapter 12 petitions in July 2008 and January of 2009 respectively. Meshanticut, a secured creditor of their nursery operation, and the trustee filed motions to dismiss both cases on the basis that their nursery operation, T–Co Depot, Inc. ("T–Co"), which was in the business growing and selling plants and trees, including vegetables, shrubs and flowering plants, was not a "farming operation" according to 11 U.S.C. § 101(18) and, therefore, Debtors were not eligible to file under Chapter 12 pursuant to 11 U.S.C. § 109(f).

According to § 101(21) the term "farming operation" includes "farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state." However, this is not an exclusive list; other activities may also qualify as farming operations and each case should be decided on its own unique facts. Two main methods to determine whether a particular enterprise constitutes a farming operation have evolved. One method concentrates on whether the operation is subject to the traditional risks of farming, while the other employs a "totality of the circumstances" test, in which the traditional risks of farming is but one factor to be considered.

In this case, the Court favored the totality of the circumstances test, because it found the "traditional risks" test to be too narrow and exclude too many non-traditional farmers from Chapter 12 eligibility. Courts considering the totality of the circumstances approach have discussed a variety of non-exclusive factors, including: (1) The location of the operation; (2) The nature of the enterprise; (3) The type of product and its eventual market; (4) The physical presence or absence of family members at the property; (5) Ownership of traditional farm assets; (6) Whether the owners are engaged in the process of growing or developing crops or livestock; and (7) Whether the operation is subject to the inherent risks of farming. Generally, courts have treated the "inherent risks of farming" factor as the most important of all of the factors, but this Court believes that, to avoid the same inequitable results reached by the "inherent risks of farming test," no one factor should be given disproportionate weight.

In this case, the Court analyzed each element coming to the following conclusions: (1) the suburban nature of the Teolises' operation did not weigh against it being classified as a farm because Rhode Island enacted legislation to promote urban and suburban farms; (2) Similarly, under the Fair Labor Standards Act employees of a nursery business are classified as agricultural workers; (3) fruits, vegetables, flowers, seeds, grasses, trees, etc. are farm products; (4) family members worked in the Debtors' nursery; (5) Debtors owned traditional agricultural equipment such as a tractor, wheelbarrows, potting utensils, a tiller, and nursery stock; (6) several cases have held nursery plants to be crops; and (7) the nursery plants are susceptible to pests, disease, etc. which are considered to be traditional farming risks. After finding that the Debtor's were "family farmers" eligible for Chapter 12, the Court denied the motions to dismiss.

IN RE TEOLIS HOLDINGS

According to 11 U.S.C § 101(21) the term "farming operation" includes farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state. However, this is not an exclusive list; other activities may also qualify as farming operations and each case should be decided on its own unique facts.

The "Totality of the Circumstances Test," which takes into account such factors as: (1) The location of the operation; (2) The nature of the enterprise; (3) The type of product and its eventual market; (4) The physical presence or absence of family members at the property; (5) Ownership of traditional farm assets; (6) Whether the owners are engaged in the process of growing or developing crops or livestock; and (7) Whether the operation is subject to the inherent risks of farming, is the proper test for determining whether a Debtor's operation is a family farm pursuant to 11 U.S.C. § 101(18).

Generally, courts have treated the "inherent risks of farming" factor as the most important of all of the factors, but this Court believes that to avoid the inequitable results reached by the "inherent risks of farming test" no one factor should be given disproportionate weight.

34.) In re Williamson, 414 B.R. 895 (Bkrtcy.S.D.Ga., 2009) 08/03/2009

Jack Williamson ("Debtor") filed his Chapter 12 case July on 26, 2007 and filed a motion to voluntarily dismiss his case on June 19, 2008. On June 20, 2008, the United States Trustee ("Trustee") filed an Objection to Debtor's Motion to Dismiss and asked that Debtor's case be converted to Chapter 7 pursuant to 11 U.S.C. § 1208(d) because Debtor had engaged in a pattern of fraudulent conduct. Debtor's fraudulent conduct included undisclosed bank accounts, an undisclosed claim for proceeds from crop insurance, missing collateral, hidden money, etc. In granting the motion to convert Debtor's case to Chapter 7 the Court noted that Williamson's case was a "text-book case for conversion under § 1208(d).

On September 11, 2008, the Trustee filed an Adversary Proceeding in Debtor's Chapter 7 case seeking a denial of discharge based on Debtor's fraudulent conduct. The Trustee argued that the facts established by the order converting Debtor's Chapter 12 to Chapter 7 were "synonymous with the facts necessary to support a denial of discharge under 11 U.S.C. § 727(a)." The Trustee argued further that, since the Court had already established that the Debtor had intentionally concealed assets, records, made false oaths, etc, which supports the denial of discharge under § 727(a)(2), (3), and (4), the Debtor was precluded from disputing the prior adjudication of these issues under the doctrine of collateral estoppel.

In order for the doctrine of collateral estoppel to apply, the following four elements must be satisfied: (1) the issue must be identical in both the prior and current action; (2) the issue must have been actually litigated; (3) the determination of the issue must have been critical and necessary to the judgment in the prior action; and (4) the burden of persuasion in the subsequent action must not be significantly heavier than the first.

For a court to grant a denial of discharge pursuant to § 727(a)(4)(A), the moving party has the burden of proving that:" the debtor, with the intent to hinder, delay or defraud a creditor, or an officer of the estate charged with custody of property, concealed property of the debtor." With regard to the motion to convert pursuant to § 1208(d), the Court found that the Debtor intentionally concealed property, including cash and collateral, with the intent of defrauding creditors and the Trustee. Therefore, the issue in the motion to convert was identical to the issue in present motion to deny discharge and the first element of collateral estoppel was satisfied.

The last three elements of collateral estoppel were easily satisfied. First, the issue of whether debtor's previous representations were fraudulent and intentional was previously litigated in connection with the motion to convert. The issue was determined by this Court, and that determination was affirmed by the District Court. Second, the finding of fraud was essential to this Court's conversion order since § 1208(d) requires such a finding to grant such a motion. Third, "[a] party who objects to a discharge has the burden to prove the objection by preponderance of the evidence."

For these reasons, the Court held that the doctrine of collateral estoppel prevented the relitigation of whether fraud had been committed in connection with the case and granted the Trustee's motion to deny the Debtor's discharger pursuant to § 727(a)(4)(A).

IN RE WILLIAMSON HOLDINGS

Debtor's fraudulent conduct which included undisclosed bank accounts, an undisclosed claim for proceeds from crop insurance, missing collateral, hidden money, etc. In granting the motion to convert Debtor's case to Chapter 7 the Court noted that the debtor's case was "text-book case for conversion under § 1208(d).

When it is determined that a debtor committed fraud in connection with the case in the course of determining that a debtor's case should be converted from a Chapter 12 case to a case under Chapter 7, collateral estoppel will prevent the debtor from relitigating the fraudulent conduct in subsequent motions.

35.) In re Poe, 2009 WL 2357160 (Bkrtcy.N.D.W.Va., 2009) 07/29/2009

William and Kathleen Poe ("Debtors") had 50 acres of land on which they bred, raised, trained, and sold horses. In recent years, the boarding of horses had become most of the Debtors' business. Mr. Poe had been working full-time with the Harrison County Board of Education since 1986. In 2009 the Debtors filed bankruptcy under Chapter 12. The Debtors sought to modify the claim of the Farm Service Agency ("FSA") to the value of their real property collateral and amortize the payments over a period of 40 years. The FSA objected that the Debtors were not eligible for Chapter 12 relief because the boarding and training of horses is not sufficiently akin to the types of "farming operations" listed in 11 U.S.C. § 101(21) and, therefore, they did not meet the "family farmer" income requirements of § 101(18).

Courts have formulated at least two tests to ascertain what constitutes a "farming operation." The first test focuses on two key factors: (1) the debtor's operations must be subject to cyclical risks such that drought, disease, etc. may result in the debtor's inability to pay creditors; and (2) those risks must relate to the debtor's own farming operation and not the farming operations of others. The second test is based on the "totality of the circumstances." Under the totality of the circumstances approach, however, courts have held that a determination of whether a particular practice or operation is subject to the inherent risks of farming is "perhaps the key factor."

The Court ultimately determined, that under either test, the raising of horses by the Debtors was a "farming operation" as defined by § 101(21), but the Debtors' boarding/training services were not. The distinction is that, in raising horses for sale, the "family farmer" bears all risks. If an animal is lost, a farmer has lost all he has invested and bears the cost of replacing it. In contrast, a boarding/training business is only minimally affected. Similarly, if the price for feed was to drastically increase, the boarding operator could simply pass this cost on to the owner, whereas the family farmer would lose profit upon sale of the animal.

To be a "family farmer," according to § 101(18) the Debtors must have received more than 50% of their gross income from a "farming operation." The Debtors' 2007 tax return shows the following gross incomes: (1) $36,785 in wages to Mr. Poe from the Board of Education and fees earned from boarding horses, and (2) $5,000 earned from the sale of horses. Thus, only about 12 percent of the Debtors' gross income for 2007 came from a "farming operation." Therefore, the Debtors did not receive enough income from their farming operation to qualify as family farmers and were not eligible for Chapter 12 relief.

IN RE POE HOLDING

Boarding and training animals does not constitute a farming operation pursuant to 11 U.S.C. § 101(21) because it does not carry with it the inherent risks associated with farming. Raising animals, on the other hand does carry the inherent risks associated with farming and is a "farming operation."

36.) In re Schreiner, 2009 WL 924418, (Bkrtcy.D.Neb., 2009) 03/30/2009

The Debtors filed their first amended Chapter 12 plan on December 30, 2008 in which they proposed to pay the secured claims of Platte Valley Bank ("Bank") and Rabo AgServices ("Rabo") with annual payments over a period of 20 years at 5.25 percent. The claims arose from short-term loans with interest rates over 7 percent. Rabo objected to what it described as the Debtors' attempt "to parlay the deflated prime rate of interest in the near term to a long term lending relationship."

According to 11 U.S.C. § 1222(c) a plan must generally propose to pay claims in no more than five years, however, secured claims may be paid over longer terms if the requirements of § 1225(a)(5) are met. Section 1225(a)(5) provides: "with respect to each allowed secured claim provided for by the plan . . . the value, as of the effective date of the plan, of property to be distributed by the trustee or the debtor under the plan on account of such claim is not less than the allowed amount of such claim

When contemplating a plan's repayment period, the court may consider the length of the underlying note and the creditor's customary repayment periods for similar loans. The Court noted that the formula interest rate as proposed by the Debtors was appropriate under the Supreme Court's Till formula, however, in addition to the interest rate, the creditors questioned the duration and feasibility of the plan.

The Court cited In re Torelli,338 B.R. 390, 397 (Bankr.E.D.Ark.2006) in which the debtor proposed repayment of a five-year, 7.75 percent note over 20 years at 5 percent. The court in Torelli ruled that the 20–year term did not withstand scrutiny in light of § 1225(a)(5), holding that the lender would not receive "the benefit of its bargain by being forced into a new loan of substantially longer term than originally contemplated by the parties." The Torelli court refused to approve the 20 year term and held that a 10–year amortization with a five-year balloon payment was more appropriate. If the debtor insisted on the 20–year term, the court warned that it would mandate a significantly higher interest rate.

In the instant case, the Court held, in line with Torelli, that neither the Bank or Rabo anticipated a 20–year repayment schedule when it signed the notes, and they should not be compelled to accept such terms. A shorter amortization with a balloon payment was deemed appropriate under the circumstances.

IN RE SCHREINER HOLDINGS

According to 11 U.S.C. § 1222(c) a plan must generally propose to pay claims in no more than five years, however, secured claims may be paid over longer terms if the requirements of 11 U.S.C. § 1225(a)(5) are met.

When contemplating a plan's repayment period, the court may consider the length of the underlying note and the creditor's customary repayment periods for similar loans.

When a debtor proposes a long-term repayment period, and an adjusted interest rate, for what was originally a short-term loan in a Chapter 12 plan, the court may find that the creditor is not receiving present value pursuant to 11 U.S.C. § 1225(a)(5).

37.) Southwest Georgia Farm Credit, Aca v. Breezy Ridge Farms, Inc. (In re Breezy Ridge Farms), 2009 WL 1514671 (Bkrtcy.M.D.Ga., 2009) 05/29/2009

Breezy Ridge Farms, Inc. ("Debtor"), is a Georgia corporation that filed a Chapter 12 petition on November 25, 2008. Plaintiff Southwest Georgia Farm Credit filed a complaint alleging nondischargeability of certain debts pursuant to 11 U.S.C. § 523(a)(2), (4), and (6) and § 1228(b) of the Bankruptcy Code. Debtor filed a motion to dismiss for failure to state a claim, arguing that the debts of a corporate Chapter 12 debtor cannot be excepted from discharge. The Court held a hearing on the motion on May 6, 2009.

The Debtor argued that since the language of § 523(a), provides: "A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) . . . does not discharge an *individual* debtor" from specific debts," and by its plain language, § 523(a) does not apply to corporate debtors. The Court held, however, that § 523 does not define the breadth of a discharge. Instead, it limits the initial discharge parameters set forth in §§ 727, 1141, 1228, and 1328. This can be illustrated by looking at the varying definitions of discharge provided in the different chapters. For example, Congress secured a broader discharge for debtors under Chapter 13 than Chapter 7 by extending to Chapter 13 Debtors some, but not all, of § 523(a)'s exceptions to discharge. In Chapter 11, Congress has applied parts of § 523(a) to corporate debtors, even though such debtors are excluded from § 523(a) by its terms. As with Chapter 13, Congress is using the definition of discharge to alter the applicability of § 523.

Under § 1228, if the debtor makes all plan payments "the court shall grant the debtor a discharge of all debts provided for by the plan ... *except any debt ... of the kind* specified in section 523(a)[.]" 11 U.S.C. § 1228(a). Similarly, in certain circumstances, if the debtor fails to make all plan payments, it may receive a discharge excluding "any debt ... of a kind specified in section 523(a)." *Id.* § 1228(b), 1228(c)(2). Unlike § 1141(d), nothing in the language of § 1228 provides a broader Chapter 12 discharge for certain corporations than for individuals.

The Court held that § 1228 and § 523(a) can be read in harmony. Although § 523(a) applies only to individuals, Congress has used it as shorthand to define the scope of a Chapter 12 discharge for corporations as well as individuals. Thus it is appropriate to rely on § 523(a) to determine whether a debt is included in the Chapter 12 discharge, even when the debtor is a corporation. Because the Chapter 12 discharge does not include debts of the kind specified in § 523(a), regardless of whether the debtor is an individual or a corporation, the Court held that the Plaintiff was entitled to relief under § 523(a) so long as it could prove its claim. Therefore, the Court denied the motion to dismiss for failure to state a claim and gave the Defendant 15 days from entry of the order following the opinion to file an answer.

IN RE BREEZY RIDGE FARMS HOLDINGS

Section 523 does not define the breadth of a discharge. Instead, it limits the initial discharge parameters set forth in §§ 727, 1141, 1228, and 1328. Unlike § 1141(d), nothing in the language of § 1228 provides a broader Chapter 12 discharge for certain corporations than for individuals.

Chapter 12 discharge does not include debts of the kind specified in § 523(a), regardless of whether the debtor is an individual or a corporation.

38.) <u>In re Melcher</u>, 416 B.R. 666 (Bkrtcy.D.Neb., 2009) 10/27/2009

In 2008 Randy Melcher ("Debtor") was awarded his hog farm, and the real estate on which it is situated, in his divorce from Alesa Melcher ("Ex-Wife"). Debtor, in turn, was ordered to pay Ex-Wife a lump sum cash payment of $406,781.69. Pending appeal of his divorce judgment, Melcher filed bankruptcy under Chapter 12. In his appeal, the Nebraska Court of Appeals reduced the amount of Melcher's required lump-sum payment to Ex-Wife to $394,781.69.

In his Chapter 12 plan for reorganization, Debtor proposed to pay his Ex-Wife's claim in full over a 30 year period with a 10 year balloon, and he proposed to pay his Ex-Wife's attorney's fees over a ten year period with a five year balloon, both at a 5.25% interest rate. Ex-Wife objected to confirmation asserting that the farming operation has not made any profit for several years, that Debtor's plan was not feasible, and that the proposed repayment of her claim was inadequate in light of Debtor's highly speculative high risk farming operation.

The evidence presented at the hearing shows that the Debtor had a net equity in his farm assets of approximately $300,000 over and above his obligation to the first and second lien holders and his Ex-Wife. In his plan, Debtor reserved the right to sell farm assets to make his farm work, nonetheless, Debtor claimed that he was unable to refinance his farming debt or sell assets to allow for the immediate payment of his Ex-Wife's judgment. Debtor presented no evidence at the hearing that he was unable to refinance, or acquire new financing, from any lending institutions, much less those which already had first and second liens against the farm property.

The Court upheld Ex-Wife's objection, holding that Debtor's treatment of Ex-Wife's claim was "unfair and unreasonable" and did not meet the present value requirement of 11 U.S.C. § 1225(a). The Court held further that, even if the plan were found to be feasible, it discriminated unfairly against Ex-Wife and her attorneys because they would not receive any payment for nearly a year and then they would receive nominal payments with the hope that Debtor would be able to make the balloon payments. The claims of Ex-Wife and her attorneys are claims for domestic support pursuant to § 507(a)(1)(A), therefore, they have a lien against the Debtor's property to the extent of their judgment and their claims must be paid within a short amount of time.

Additionally, the Court held that the plan was not proposed in good faith citing several cases including In re Kemp, 134 B.R. 413 (Bankr.E.D.Cal., 1991) as authority. In re Kemp held that Kemp, the debtor, unfairly discriminated against his wife when he proposed to pay her $300,000 over the course of 10 years, with no adequate protection payments, when he could have afforded to pay more.

The Court ultimately denied confirmation of the plan and warned the Debtor that, if significant payments to ex-wife and her attorneys were not made soon, the case would be dismissed so Ex-Wife could foreclose on her claim.

IN RE MELCHER HOLDING

Domestic support obligations are priority claims which must be paid in full over a short period of time. When a claim for domestic support is amortized over the course of several years in a Chapter 12 plan, and there is evidence that the debtor could pay the claim back in a shorter amount of time, the court will deem the treatment inadequate and, and may hold that the plan was proposed in bad faith.