Presented by The Iowa State Bar Association's Commercial & Bankruptcy Law Sections

2016 Commercial & Bankruptcy Seminar

Friday, April 22
ISBA Headquarters

2016 Commercial & Bankruptcy Law Seminar

Schedule

7:30 – 8:15	**Registration**
8:15 – 9:15	**Garnishments and UFTA Amendments** Speaker: Kristina Stanger, Nyemaster Goode, PC
9:15 – 10:15	**UCC Update** Speaker: Gary Norton, Whitfield & Eddy, PLC
10:15 – 10:30	**Break**
10:30 – 11:15	**Case Law Developments in Iowa** Speaker: Desirée Kilburg, Shuttleworth & Ingersoll, PLC
11:15 – 12:00	**How to Lose your Appeal Without Trying** Speakers: Hon. Charles L. Nail, Jr., Chief Bankruptcy Judge, District of South Dakota and Hon. Anita L. Shodeen, Chief Bankruptcy Judge, Southern District of Iowa
12:00 – 1:00	**Lunch** (provided with registration)
1:00 – 1:45	**Iowa Ag Law Update: Corporate Farming Law, Farm Tenancies and Contract Feeding Insurance** Speaker: Eldon McAfee, Brick Gentry, PC
1:45 – 2:45	**Ethics: Engagement Agreements** Speaker: Nick Critelli, Critelli Law
2:45 – 3:00	**Break**
3:00 – 3:45	**Bankruptcy Case Law Update** Speakers: Hon. Charles L. Nail, Jr., Chief Bankruptcy Judge, District of South Dakota and Hon. Anita L. Shodeen, Chief Bankruptcy Judge, Southern District of Iowa
3:45 – 4:30	**Pending Doom: Another Ag Crisis** Speakers: Larry Eide, Pappajohn, Shriver, Eide & Nielsen, PC; Nicole Hughes, Telpner, Peterson, Smith, Ruesch, Thomas & Simpson, LLP; Mike Mallaney, Hudson, Mallaney, Shindler & Anderson, PC; Don Molstad, Molstad Law Firm

2016 Commercial & Bankruptcy Law Seminar

Caveat

The printed materials contained in this book and the oral presentations of the speakers are not intended to be a definitive analysis of the subjects discussed. The reader is cautioned that neither the program participants nor The Iowa State Bar Association intends that reliance be placed upon these materials in advising your clients without confirming independent research.

Friday, April 22, 2016

2016 Commercial & Bankruptcy Law Seminar

Garnishments and UFTA Amendments

8:15 a.m.- 9:15 a.m.

Presented by
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Friday, April 22, 2016

2016 Legislative Update:
Iowa's Garnishment and Uniform Fraudulent Transfers Act

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LEGISLATIVE UPDATES: Iowa's Garnishment Statute and Amendments to the Uniform Fraudulent Transfer Act

Presented By:

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OUTLINE

1. Iowa Code Chapter 642 - Garnishment Statute Amendments

2. Iowa Code Chapter 684 - Uniform Fraudulent Transfers Act (NOW -- Uniform Voidable Transactions Act)

2015 Iowa Garnishment Statute Amendments & Form 308

The *Gemini* Quandary

The *Gemini* Quandary

- Iowa Code 642.14's notice provisions are unconstitutional. *New v. Gemini Capital Group and Neiman, Stone & McCormick, P.C.*, 859 F. Supp. 2d 990 (S.D. Iowa 2012) (J. Vietor) ("**Gemini**")
- Working group: Commercial & Bankruptcy Law Section, Iowa Bankers Association representatives, Sheriff's Association, Uniform Law Commission – Professor Henning (AL), IA and Drake Law Professors Bauer and Dore.

Facts: *Gemini* (1 of 2)

- Story Co. small claims *Sears* credit card debt collection.
- Judgment in favor of creditor against debtor Phil New.
- Phil New wins discretionary appeal – the judgment is reversed and vacated on a SOL argument (initial action was barred by 1 mo)

- Meanwhile Gemini (creditor) executes on the small claims judgment by a bank garnishment. The Sheriff turns funds over to Clerk
  - The execution is returned and creditor never applies to condemn funds →thus no Notice of Garnishment sent by either Sheriff or Gemini.
  - Iowa Code Section 642.14 (at the time) required post-garnishment notice **only** at time of condemnation of funds

Facts: *Gemini* (2 of 2)

- Phil New brings action in the U.S. District Court for the Southern District of Iowa against Gemini and the law firm asserting a claim under 42 U.S.C. § 1983 and FDCPA.
  - Claims the creditor and law firm violated federal and state due process rights by garnishing his bank account w/o sufficient notice.
- Defendants file MSJ – argued they are not state actor and they complied with Iowa Code Section 642.14.
- MSJ Denied on 5/2/2012 - J. Vietor
  - § 1983 and FDCPA claims stay alive
    - Compliance with 642.14 not a defense
    - Found "state action" to support § 1983 by jointly participating with Clerk of Court and Sheriff to garnish account
  - Held Iowa Code § 642.14 unconstitutional

Holding: Iowa Code Section 642.14 is unconstitutional b/c it lacks 3 things

1. Notice of Garnishment
   - at deprivation
   - 10 days b4 condemn funds is too late
   - The notice must be "reasonably calculated" to apprise party of pendency of action and afford debtor the opportunity to object
2. Notice of Exemptions
3. Notice that a Hearing is available for exemptions

AKA: "front end" vs. "rear end" notice and hearing

2013 and 2014 Working Group's Recommendation

- Near Term – revise 642.14 to give front end notice
  - Amendments 2014 and 2015
- Long Term – revise execution Chapter in full

2014 Amendments to Section 642.14

- Added Precondemnation (front end) notice (Iowa Code 642.14A).
- Required the Sheriff to serve Notice of Garnishment within 7 days after the garnishee (typically a lending institution) is served with the garnishment.
- The Notice is served by personal service or restricted certified mail and first class mail.
- Notice is provided to both the debtor and the debtor's attorney of record.

2014 Amendments - 4 main concerns

1. Timing – Notice was being served before garnishee responds; notice issued even if no funds for levy; debtor receiving "heads up."
2. Creditors in the dark – no timely notice from Sheriff of service of Notice on debtor. The risk of a constitutional violation and exposure to creditors and counsel was still present.
3. Inconsistent fees/application – Pre and Post garnishment notices; providing the Notice to attorneys of record was duplicative.
4. Confusion on applicability of 642.14A with employers.

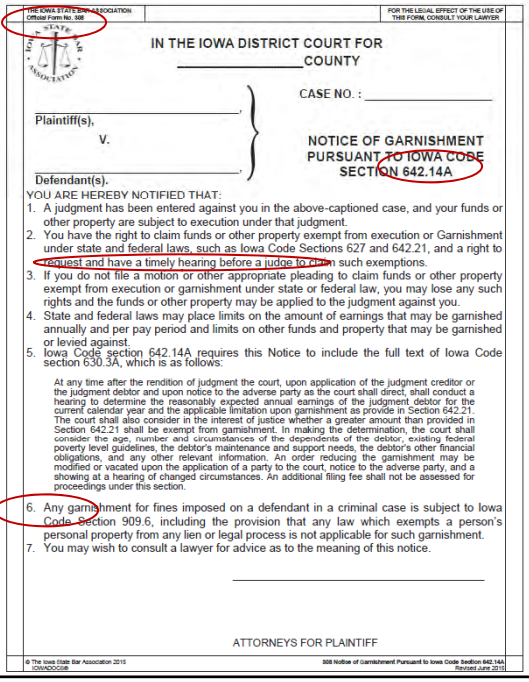
2015 Amendments – 6 main changes
(1 of 2)

1. One "Notice of Garnishment" to debtor per garnishment. Triggered by positive response of garnishee (not condemning funds or issuance of garnishment).
2. Distinguishing the Notice requirements between employer and nonemployer garnishments. (adding *642.14B*)
3. Shifting burden and control of serving the Notice of Garnishment away from the Sheriff's office and to the creditor's agent or employer garnishee.

2015 Amendments – 6 main changes
(2 of 2)

4. Requires the Sheriff to efile the garnishee's answers to examination questions w/in 7 business days of receipt.
5. Notice of Garnishment is served (certified mail) on debtor w/in 7 business days of the Sheriff's filing of the garnishee's answers. Creditor or creditor's counsel may not serve the Notice.
6. Removal of the redundancy serving Notice on the "attorney of record" due to efiling.

NEW FORM #308 – Notice of Garnishment



THE IOWA STATE BAR ASSOCIATION
Official Form No. 308

FOR THE LEGAL EFFECT OF THE USE OF THIS FORM, CONSULT YOUR LAWYER

IN THE IOWA DISTRICT COURT FOR
_____ COUNTY

CASE NO. : _____

_____,
Plaintiff(s),
V.
_____,
Defendant(s).

NOTICE OF GARNISHMENT PURSUANT TO IOWA CODE SECTION 642.14A

YOU ARE HEREBY NOTIFIED THAT:

1. A judgment has been entered against you in the above-captioned case, and your funds or other property are subject to execution under that judgment.
2. You have the right to claim funds or other property exempt from execution or Garnishment under state and federal laws, such as Iowa Code Sections 627 and 642.21, and a right to request and have a timely hearing before a judge to claim such exemptions.
3. If you do not file a motion or other appropriate pleading to claim funds or other property exempt from execution or garnishment under state or federal law, you may lose any such rights and the funds or other property may be applied to the judgment against you.
4. State and federal laws may place limits on the amount of earnings that may be garnished annually and per pay period and limits on other funds and property that may be garnished or levied against.
5. Iowa Code section 642.14A requires this Notice to include the full text of Iowa Code section 630.3A, which is as follows:

   At any time after the rendition of judgment the court, upon application of the judgment creditor or the judgment debtor and upon notice to the adverse party as the court shall direct, shall conduct a hearing to determine the reasonably expected annual earnings of the judgment debtor for the current calendar year and the applicable limitation upon garnishment as provide in Section 642.21. The court shall also consider in the interest of justice whether a greater amount than provided in Section 642.21 shall be exempt from garnishment. In making the determination, the court shall consider the age, number and circumstances of the dependents of the debtor, existing federal poverty level guidelines, the debtor's maintenance and support needs, the debtor's other financial obligations, and any other relevant information. An order reducing the garnishment may be modified or vacated upon the application of a party to the court, notice to the adverse party, and a showing at a hearing of changed circumstances. An additional filing fee shall not be assessed for proceedings under this section.

6. Any garnishment for fines imposed on a defendant in a criminal case is subject to Iowa Code Section 909.6, including the provision that any law which exempts a person's personal property from any lien or legal process is not applicable for such garnishment.
7. You may wish to consult a lawyer for advice as to the meaning of this notice.

_____

ATTORNEYS FOR PLAINTIFF

308 Notice of Garnishment Pursuant to Iowa Code Section 642.14A
Revised June 2015

2015 Iowa Garnishment Statute Amendments - Summary

- Effective July 1, 2015
- Sheriff - efile answers of garnishee within 7 business days of receipt
- New Form 308 Notice of Garnishment - served by certified mail to debtors within 7 business days of the sheriff's efiling of the garnishee rogs (if affirmative response by garnishee)
- Service of Notice of Garnishment may NOT be by the creditor or creditor's attorney [Tip: private process server or Sheriff]
- This Notice serves as precondemnation Notice previously under 642.14 [Tip: reference this Notice and affidavit of service pursuant to 642A.14 in your application to condemn funds]

2016 Amendments to the Uniform Fraudulent Transfers Act

"Fraudulent Transfer" vs. "Voidable Transaction"

"Voids easily make up 50 percent of the universe and while clusters of galaxies collapse, voids grow…If someone put you in some random location in the universe, you'd very likely end up in a void."

Greg Aldering, cosmologist at Lawrence Berkeley National Lab, California.

http://www.forbes.com/sites/brucedorminey/2015/04/23/astronomers-puzzled-by-cosmos-largest-known-supervoid/

2016 Amendments to the Uniform Fraudulent Transfers Act (now UVTA)

- Context: proposed legislation by ISBA Business Law Section and Commercial/Bankruptcy Law Section from the Uniform Law Commission ("**ULC**")

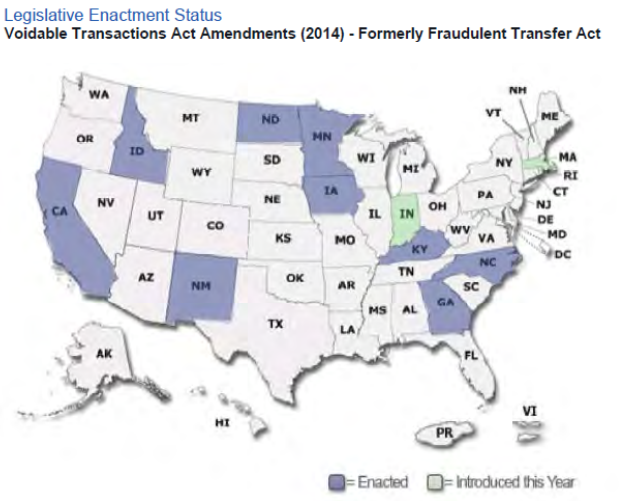
- Purpose: To enact the 2014 Amendments to Uniform **Voidable Transactions** Act ("**UVTA**"), formerly known as "Uniform Fraudulent Transfer Act," ("**UFTA**") which Iowa adopted and presently is found in Iowa Code Ch. 684. The Amendments will reflect developments in the law nationally, address issues that have arisen, and update and maintain the currency of Iowa's uniform laws.

UVTA - Background

- The 2014 Amendments to the UVTA would update Iowa Code Chapter 684.
- UFTA - was approved by the Uniform Law Commission ("**ULC**") in 1984. Adopted in Iowa in 1994.
- Has not been revised or amended in the 30 years since its original approval by the ULC in 1984.
- The current Amendments do not represent a comprehensive revision of the UVTA but instead deal with a number of discrete representing changes in the law or issues that have arisen in the ensuing 30 years.

ULC Enactment Status Map

as of 4/13/2016



UVTA Proposal – 7 Main Changes

1. Name Change
2. Choice of Law
3. Evidentiary Matters
4. Deletion of Special Definition of "Insolvency" for Partnerships
5. Defenses
6. Applicability to a Series Organization
7. Medium Neutrality

1. Name Change

Changed from the "Uniform Fraudulent Transfer Act" to the **"Uniform Voidable Transactions Act"**

1. A transaction did not have to be fraudulent in order for it to be voidable. If the transaction was made when the transferor's debts exceed its assets, or the transfer had that effect, it was voidable.
2. An action did not have to be a "transfer" to be voidable. It could be a transaction like the incurrence of debt.

2. Choice of Law

- The UFTA does not have a governing law provision.

- Following litigation of which state's fraudulent transfer law was applicable, Section 10(b) of the UVTA was adopted.
- Section 10(b) follows case law (and the views of Commissioners and ABA Advisors) that a claim for relief under the UVTA "**is governed by the local law of the jurisdiction in which the debtor is located when the transfer is made or obligation is incurred**."
- Section 10 also states rules for determining location.

3. Evidentiary Matters (1 of 2)

- Five sections--§§ 2(b), 4(c), 5(c), 8(g), and 8(h)—provide uniform rules on allocation of burden of proof and standards of proof relating to operation of the UVTA.

- Presumption: Section 2(b) is amended explicitly to provide that a debtor unable to pay the debtor's debts as they become due, other than as a result of a bona fide dispute, is presumed to be insolvent, and the "presumption imposes on the party against which the presumption is directed the burden of proving the nonexistence of insolvency is more probable than its existence."

3. Evidentiary Matters (2 of 2)

- Burden on Creditor: Under Sections 4 and 5 of the UVTA, a creditor seeking to have declared void a transfer or incurrence of an obligation, and one asserting defenses or protections under section 8, are explicitly allocated the burden of proof.
- Standard: Preponderance of the evidence, not the "clear and convincing" standard usually applied in cases where fraud must be shown. Consistent with the principle that the transaction may be voidable even though it does not constitute common law fraud, and instead the court is presented with an ordinary civil action standard.

4. Deletion of Special Definition of "Insolvency" for Partnerships

- The definition of "insolvency" for partnerships in the UFTA includes as assets of the partnership the personal assets of each partner.
  - This preceded the development and adoption, including in Iowa, of limited liability partnerships, under which individual partners are not subject to liability for partnership debts.
  - Moreover, the assets of guarantors of non-partnership debtors are not included as assets of the entity for purposes of determining insolvency.
- Under the UVTA – personal assets not included; to the extent partners do have personal liability for partnership debts, they are otherwise not viewed differently from ordinary guarantors whose assets are not counted for purposes of determining insolvency.

5. Defenses

- Section 8 [Defenses, Liability, Protection of Transferees] is revised, according to Official Comments, to "refine in relatively minor respects several provisions relating to defenses available to a transferee or obligee." Specifically:
  - 8(a) – UFTA includes complete defenses for good faith and reasonably equivalent value. UVTA adds a requirement that the reasonably equivalent value must have been given to the debtor.
  - 8(b) – derived from Bankruptcy Code Sections 550(a) and (b), creates a defense for a subsequent transferee (that takes in good faith and for value). Amendments clarify this defense through rewording it to follow more closely with the Bankruptcy Code.
  - 8(e)(2) – UFTA created a defense to an action if the transfer results from enforcement of a security interest in compliance with Article 9. Amendments exclude from this defense acceptance of collateral in full or partial satisfaction of the obligation (aka "strict foreclosure").

6. Applicability to a Series Organization (series LLC)

- Some states, including Iowa, authorize the creation of a "series LLC," with each series organization within the LLC treated as a separate "entity." However, not all states make clear that an authorized, protected series is an "entity." Delaware LLC Act § 18-215.
- Amendment: Whether or not a series organization is explicitly regarded as an "entity," or instead as a "person" with certain characteristics and capacities, the Amendments make clear that the UVTA applies to transactions in which the series organization engages.

7. Medium Neutrality (Record v. Writing)

- As Iowa has done in adopting the Uniform Electronic Transactions Act, the LLC Act, and amendments to the MBCA, the UVTA Amendments replace references to "writing" with "record."
- "Record" is defined to mean "information that is inscribed on a tangible medium or that is stored in electronic or other medium and is retrievable in perceivable form."

Iowa Code Chapter 684 UVTA – Summary

- 7 Main Changes
  1. Name Change
  2. Choice of Law
  3. Evidentiary Matters
  4. Deletion of Special Definition of "Insolvency" for Partnerships
  5. Defenses
  6. Applicability to a Series Organization
  7. Medium Neutrality
- Effective immediately

QUESTIONS?

LEGISLATIVE UPDATES

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2015 Ia. Legis. Serv. Ch. 79 (H.F. 569) (WEST)

IOWA 2015 LEGISLATIVE SERVICE

Eighty-Sixth General Assembly, First Regular Session

Additions are indicated by **Text**; deletions by ~~Text~~.
Vetoes are indicated by ~~Text~~;
stricken material by **Text**.

Ch. 79 (H.F. 569)

West's No. 62
GARNISHMENT—LEVY—DEBTORS AND CREDITORS

AN ACT RELATING TO NOTICE OF GARNISHMENT AND LEVY TO A JUDGMENT DEBTOR.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. Section 626.50, Code 2015, is amended to read as follows:

<< IA ST § 626.50 >>

626.50 Duty to levy—notice of ownership or exemption—notice to defendant
1. An officer is bound to levy an execution on any personal property in the possession of, or that the officer has reason to believe belongs to, the defendant, or on which the plaintiff directs the officer to levy, after having received written instructions for the levy from the plaintiff or the attorney who had the execution issued to the sheriff, unless the officer has received notice in writing under oath from some other person, or that person's agent or attorney, that the property belongs to the person, stating the nature of the person's interests in the property, how and from whom the person acquired the property, and the consideration paid for the property; or from the defendant, that the property is exempt from execution.

2. a. The officer making the levy **in subsection 1** shall promptly serve written notice of the levy on the defendant. The notice shall be served in the same manner as provided for original notice.

b. This ~~section~~ **subsection** is not applicable to garnishment proceedings.

Sec. 2. Section 642.5, subsection 2, Code 2015, is amended to read as follows:

<< IA ST § 642.5 >>

2. The sheriff shall ~~append~~ **file** the **answers to the** examination ~~to the sheriff's return~~ **within seven business days of receiving the answers**.

Sec. 3. Section 642.14, Code 2015, is amended to read as follows:

<< IA ST § 642.14 >>

642.14 Notice of garnishment proceedings

Judgment against the garnishee shall not be entered until **notice as required by section 642.14A or 642.14B has been served upon** the defendant in the main action ~~has had ten days' notice of the garnishment proceedings, to be served in the same manner as original notices~~. ~~However, if the garnishment is to earnings owed such defendant by the garnishee, judgment may be entered if notice to the defendant is served with the notice of garnishment to the garnishee who shall deliver the notice to the defendant with the remainder of or in lieu of the defendant's earnings. The garnishee shall state in answer to the service of notice of garnishment whether or not service of notice was delivered to the defendant.~~

~~The notice required by this section shall contain the full text of section 630.3A.~~

Sec. 4. Section 642.14A, Code 2015, is amended to read as follows:

<< IA ST § 642.14A >>

642.14A Notice ~~of garnishment and levy~~ to defendant—non-employer garnishees

1. ~~Within seven~~ **If the garnishment is to property other than earnings an employer owes a defendant, the judgment creditor shall serve upon a debtor who is a natural person not later than seven business** days after ~~execution is served upon a garnishee, the sheriff shall send~~ **the sheriff's filing of a garnishee's answers pursuant to section 642.5, subsection 2, which show that the garnishee is indebted to the defendant,** a notice of garnishment and levy ~~to the defendant in the main action informing~~ **notifying** the defendant ~~that certain real and personal property of the defendant may be exempt from execution or garnishment and that a hearing process is available for the defendant to claim such exemptions~~ **of the information required in subsection 3**.

2. The notice required by this section shall be served by personal service or restricted certified mail and first class mail to the last known address of the defendant ~~and to the defendant's attorney~~. ~~The judgment creditor shall provide the sheriff with the last known address of the defendant and the defendant's attorney if there is an attorney of record.~~ **Service shall not be made by a party to the action or an attorney for a party to the action. Service may be made by taking acknowledgment of service from the defendant.** Proof of ~~mailing or personal~~ **such** service ~~by the sheriff~~ shall be ~~by affidavit~~ **filed with the court**.

3. The notice required by this section shall:

a. Inform the defendant that judgment has been entered in the main action and the defendant's funds or other property is subject to execution under the judgment.

b. Inform the defendant that the defendant has the right to claim funds or other property exempt from execution or garnishment and a right to ~~be timely heard on those claims~~ **request and have a timely hearing before a judge to claim such exemptions**.

c. Inform the defendant that if the defendant does not file a motion or other appropriate pleading to claim funds or other property exempt from execution or garnishment under state or federal law, the defendant may lose any such rights and the funds or other property may be applied to the judgment against the defendant.

d. Inform the defendant that state and federal laws may place limits on the amount of earnings that may be garnished annually and per pay period and limits on other funds and property that may be garnished or levied against.

e. Contain the full text of section 630.3A.

f. State that the defendant may wish to consult a lawyer for advice as to the meaning of the notice.

g. Inform the defendant that any garnishment for fines imposed on a defendant in a criminal case is subject to section 909.6, including the provision that any law which exempts a person's personal property from any lien or legal process is not applicable for such garnishment.

4. An additional court filing fee shall not be assessed for proceedings under this section.

Sec. 5. NEW SECTION.

<< IA ST § 642.14B >>

642.14B Notice to defendant—employer garnishees
If the garnishment is to earnings an employer owes a defendant, the employer shall deliver the notice of garnishment to the defendant with the remainder of or in lieu of the defendant's earnings. The garnishee shall state in answer to the sheriff's examination whether or not service of the notice of garnishment was delivered to the defendant. The notice required by this section shall contain the information required by section 642.14A, subsection 3, and shall be delivered by personal service, mail, or electronic means.

Sec. 6. NEW SECTION.

<< IA ST § 642.25 >>

642.25 Sheriff not an agent
The sheriff's actions under this chapter, including service of notice, shall not be construed to be that of an agent of any person or party in the proceedings.

Approved April 24, 2015.

End of Document

IN THE IOWA DISTRICT COURT FOR _____COUNTY

CASE NO. : _____

_____,
Plaintiff(s),

V.

_____,
Defendant(s).

NOTICE OF GARNISHMENT PURSUANT TO IOWA CODE SECTION 642.14A

YOU ARE HEREBY NOTIFIED THAT:

1. A judgment has been entered against you in the above-captioned case, and your funds or other property are subject to execution under that judgment.
2. You have the right to claim funds or other property exempt from execution or Garnishment under state and federal laws, such as Iowa Code Sections 627 and 642.21, and a right to request and have a timely hearing before a judge to claim such exemptions.
3. If you do not file a motion or other appropriate pleading to claim funds or other property exempt from execution or garnishment under state or federal law, you may lose any such rights and the funds or other property may be applied to the judgment against you.
4. State and federal laws may place limits on the amount of earnings that may be garnished annually and per pay period and limits on other funds and property that may be garnished or levied against.
5. Iowa Code section 642.14A requires this Notice to include the full text of Iowa Code section 630.3A, which is as follows:

> At any time after the rendition of judgment the court, upon application of the judgment creditor or the judgment debtor and upon notice to the adverse party as the court shall direct, shall conduct a hearing to determine the reasonably expected annual earnings of the judgment debtor for the current calendar year and the applicable limitation upon garnishment as provide in Section 642.21. The court shall also consider in the interest of justice whether a greater amount than provided in Section 642.21 shall be exempt from garnishment. In making the determination, the court shall consider the age, number and circumstances of the dependents of the debtor, existing federal poverty level guidelines, the debtor's maintenance and support needs, the debtor's other financial obligations, and any other relevant information. An order reducing the garnishment may be modified or vacated upon the application of a party to the court, notice to the adverse party, and a showing at a hearing of changed circumstances. An additional filing fee shall not be assessed for proceedings under this section.

6. Any garnishment for fines imposed on a defendant in a criminal case is subject to Iowa Code Section 909.6, including the provision that any law which exempts a person's personal property from any lien or legal process is not applicable for such garnishment.
7. You may wish to consult a lawyer for advice as to the meaning of this notice.

_____

ATTORNEYS FOR PLAINTIFF

Iowa's garnishment statute receives update effective July 1

By Kristina Stanger

On July 1, 2015, changes to Iowa's garnishment statute will go into effect. You may recall that in 2014, Iowa Code Section 642.14A was added to plug the holes identified in *Phil New v. Gemini,* 859 F.Supp.2d 990 (S.D. Iowa 2012), where Judge Harold Vietor found previous Section 642.14 unconstitutional because it violated the notice requirements of the Due Process Clause. The 2014 law, though a prophylactic measure to the problems identified in *Gemini,* has nonetheless grown soggy and created its own set of harms.

The case

In *Gemini,* a debtor raised a claim under 42 U.S.C. Section 1983 stating that the debt collector and its law firm violated the debtor's due process rights by not providing sufficient notice when garnishing the debtor's bank account. 859 F.Supp.2d at 992. Under the former Iowa Code Section 642.14, a debtor was only guaranteed 10 days written notice before the funds were condemned, instead of notice at the time of the garnishment of a debtor's asset. This could be nearly four months after a debtor's account was frozen. Judge Vietor held that this "post-garnishment" notice was too late to satisfy due process requirements and stated "[t]o satisfy due process, notice must be 'reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id.* at 996 (quoting *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950)). As such, Iowa Code Section 642.14 was found unconstitutional.

The 2014 amendment

In response to *Gemini,* Iowa Code Section 642.14A was assembled. The 2014 band-aid addressed the pre-garnishment notice need. Under the 2014 legislation, within seven days after the garnishee, typically a lending institution or employer, is served with the garnishment, the sheriff must send a notice of garnishment to the debtor informing them "that certain real and personal property . . . may be exempt from execution or garnishment" and that a hearing is available to them in order to claim these exemptions. Iowa Code § 642.14A (2014). The notice must be served either by personal service or restricted certified mail and first class mail to both the debtor and the debtor's attorney of record. This notice was in addition to what was typically known as the "pre-condemnation" notice at the end of the garnishment term.

2014 Legislation concerns

Although Iowa Code Section 642.14A offered a solution, it was quickly growing soft with its own issues. There were four main concerns:

First, the 2014 language, which required the sheriff's office to notify the debtor within seven days after executing the garnishment, did not account for waiting until a garnishee (bank) responded. Thus, in practice, debtors were given advance notice about the process before many banks could check the account or implement the levy ("freeze"). Creditors were finding two situations: debtors were removing funds from the account before the levy was in place and/or creditors were paying for notices of garnishment even when a debtor's funds were not located at that institution.

The second concern related to the creditor's control of the process. Under Gemini, the creditor and creditor's attorney were exposed to independent liability under Section 1983, even though arguably they did not have much control over the notice process with the sheriff. Unfortunately, the 2014 legislation nursed this problem.

Third, the 2014 legislation led to inconsistent sheriff fees, procedures and unnecessary burdens as the sheriffs were required to serve both pre-garnishment and post-garnishment notices. When polling the sheriff's offices around the state, some departments were charging over $100 for garnishment services, where another county may be charging $30. This inconsistency was costly to creditors up front and debtors would suffer in the end as most creditors charged the fees back as costs adding to the underlying judgment debt.

Lastly, it was unclear as to whether Section 642.14A's notice procedure applied to wage garnishments or solely to bank and other nonparty garnishments.

The 2015 amendments were desperately needed to clarify these issues, create uniformity and ultimately reduce costs.

2015 Legislation (HF 569) is signed by the governor

In response, HF 569 was proposed, adopted and signed by the governor April 24. The 2015 legislation makes six main changes:

1. Requires only one notice of garnishment to the judgment debtor per garnishment and eliminates post-garnishment notice;

2. Distinguishes the notice service requirements based on the type of debt—i.e. criminal debt, employer garnishments, and non-employer garnishments. With respect to employers, the 2015 amendments reaffirm the "old" rule where the employer is obligated to deliver the notice with debtor's wages;
3. Shifts the burden of serving the notice away from the sheriff's office and into the hands of the creditor or employer garnishee;
4. Requires the sheriff's office to file the garnishee's answers to sheriff examination questions within seven business days of receipt by the sheriff;
5. Requires the creditor to serve notice on the judgment debtor within seven business days of the sheriff's filing of the garnishee's answers. This service may be conducted by a private process server or the sheriff and may be performed by certified mail; and
6. Removes the redundancy of serving the notice on the "attorney of record."

The way ahead

In addition to the 2015 legislation, a standard notice of garnishment form was drafted and will be proposed/circulated for uniform use. Stay tuned for the updates to IowaDocs.

Many seek an omnibus revision to Iowa's garnishment and execution chapters. The Commercial and Bankruptcy Law Section Council is exploring these opportunities in its work with an ABA Committee on Model Garnishment statutes and invites you to contact the council if you have an interest in this subcommittee.

**Kristina M. Stanger is the Chair of the ISBA Commercial and Bankruptcy Law Section and a creditor's rights attorney and shareholder at Nyemaster Goode, P.C. in Des Moines. Chris Jensen, a 2014 summer associate with Nyemaster Goode, P.C. and second-year law student at Drake University Law School assisted with the state-wide sheriff's research.*

ATJ SPOTLIGHT

West Des Moines church hosts weekly Hispanic legal clinic

By Brett Toresdahl

One of the goals of the ATJ Spotlight is to showcase various access to justice efforts going on around Iowa. Recently, an interesting partnership developed in Polk County. This is a great example of how access to justice can be addressed outside of the traditional legal setting. In January 2015, the Polk County Bar Association Volunteer Lawyers Project began a partnership with Lutheran Church of Hope. It is a very large congregation located in West Des Moines, Iowa. The Lutheran Church of Hope has a large ministry targeting the homeless and other disadvantaged individuals and families. On Thursday evenings, the church provides meals and access to a food pantry and clothing closet. Additionally, there is Hispanic programming and a Celebrate Recovery program which provides assistance to those suffering from addictions and other life problems.

"An average of over 600 individuals are served each week on Thursday evenings," says Carol Burdette, executive director of the PCBA VLP. Because of her years of experience working on delivery of legal services issues, Burdette saw an opportunity to provide an outreach program to a segment of the community in need. "Access to legal services is frequently a challenge for many of those participating in these programs," she said. "Telephone access to traditional intake for the PCBA VLP and other programs may not be an option for these individuals."

She met with the planning team at The Lutheran Church of Hope to discuss how the resources of the PCBA VLP could be utilized to reach individuals who have legal needs. The team was thrilled to add a legal outreach component to its ministry. Staff of the PCBA VLP and volunteer attorneys have been offering intake and advice every Thursday evening since the partnership developed. The legal issues have been varied including immigration, landlord/tenant, family law and a variety of consumer issues.

Attorney Nick Cooper of the Whitfield & Eddy law firm in Des Moines has been a key volunteer in getting this outreach project established.

"The outreach on Thursday at Lutheran Church of Hope has been an extremely rewarding opportunity for me," says Cooper. "With the leadership of Carol Burdette, I have seen a handful of Polk County lawyers demonstrate a commitment to providing pro bono service each week to individuals in genuine need." Nick encourages all lawyers to get involved.

"The questions and issues have varied, but the consistent theme is the heartfelt appreciation from the people we meet. I assure you that it does not matter the type of law you practice, you can volunteer and provide assistance. There have been questions outside my area of expertise and, even so, I have been able to direct these people to programs and resources they would not otherwise have known about. The 90 minutes out of my week flies by, and I always leave feeling refreshed and proud of my profession."

Burdette also pointed out that resolving legal issues frequently helps with the process of recovery and establishing a residence resulting in a more stable life. In the three months that this service has been provided, approximately 50 individuals have been assisted through this outreach program. There are times in which the client's legal issues cannot be resolved through the initial interview. In these circumstances the PCBA VLP locates volunteer attorneys to represent the individual.

This outreach project is an example of how you can get involved in your community. Access to Justice is a societal issue to address. Creating partnerships outside of the legal community is a step in the right direction to help all Iowans with their legal issues.

** The ATJ Spotlight is a reoccurring column hosted by the ISBA Public Service Project. It highlights access to justice issues and topics of interest to the legal profession and the citizens of Iowa. For questions about the ATJ Spotlight, contact Brett Toresdahl, the ISBA Public Service Project executive director, at isbavlp@dwx.com or 515-697-7881.*

House File 2400 - Enrolled

House File 2400

AN ACT

PROVIDING FOR VOIDABLE COMMERCIAL TRANSACTIONS AND INCLUDING APPLICABILITY PROVISIONS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. Section 684.1, Code 2016, is amended to read as follows:

684.1 Definitions.

As used in this chapter:

1. *"Affiliate"* means any of the following:

a. A person ~~who~~ that directly or indirectly owns, controls, or holds with power to vote, twenty percent or more of the outstanding voting securities of the debtor, other than a person ~~who~~ that holds the securities as either of the following:

(1) As a fiduciary or agent without sole discretionary power to vote the securities.

(2) Solely to secure a debt, if the person has not in fact exercised the power to vote.

b. A corporation twenty percent or more of whose outstanding

voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person ~~who~~ that directly or indirectly owns, controls, or holds with power to vote, twenty percent or more of the outstanding voting securities of the debtor, other than a person ~~who~~ that holds the securities as either of the following:

(1) As a fiduciary or agent without sole discretionary power to vote the securities.

(2) Solely to secure a debt, if the person has not in fact exercised the power to vote.

c. A person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor.

d. A person ~~who~~ that operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

2. *"Asset"* means property of a debtor, but does not include any of the following:

a. Property to the extent it is encumbered by a valid lien.

b. Property to the extent it is generally exempt under nonbankruptcy law.

c. An interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

3. *"Claim"*, except as used in *"claim for relief"*, means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

4. *"Creditor"* means a person ~~who~~ that has a claim.

5. *"Debt"* means liability on a claim.

6. *"Debtor"* means a person ~~who~~ that is liable on a claim.

7. *"Electronic"* means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

~~7.~~ 8. *"Insider"* includes all of the following:

a. If the debtor is an individual, all of the following:

(1) A relative of the debtor or of a general partner of the debtor.

(2) A partnership in which the debtor is a general partner.

(3) A general partner in a partnership described in subparagraph (2).

(4) A corporation of which the debtor is a director, officer, or person in control.

b. If the debtor is a corporation, all of the following:

(1) A director of the debtor.

(2) An officer of the debtor.

(3) A person in control of the debtor.

(4) A partnership in which the debtor is a general partner.

(5) A general partner in a partnership described in subparagraph (4).

(6) A relative of a general partner, director, officer, or person in control of the debtor.

c. If the debtor is a partnership, all of the following:

(1) A general partner in the debtor.

(2) A relative of a general partner in, or a general partner of, or a person in control of the debtor.

(3) Another partnership in which the debtor is a general partner.

(4) A general partner in a partnership described in subparagraph (3).

(5) A person in control of the debtor.

d. An affiliate, or an insider of an affiliate as if the affiliate were the debtor.

e. A managing agent of the debtor.

~~8.~~ 9. "*Lien*" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

10. "*Organization*" means a person other than an individual.

11. "*Person*" means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

~~9.~~ 12. "*Property*" means anything that may be the subject of ownership.

13. "*Record*" means information that is inscribed on a

tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

~~10.~~ 14. "*Relative*" means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.

15. "*Sign*" means, with present intent to authenticate or adopt a record to do either of the following:

a. Execute or adopt a tangible symbol.

b. Attach to or logically associate with the record an electronic symbol, sound, or process.

~~11.~~ 16. "*Transfer*" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, license, and creation of a lien or other encumbrance.

~~12.~~ 17. "*Valid lien*" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

Sec. 2. Section 684.2, Code 2016, is amended to read as follows:

684.2 Insolvency.

1. A debtor is insolvent if, at a fair valuation, the sum of the debtor's debts is greater than ~~all~~ the sum of the debtor's assets~~, at a fair valuation~~.

2. A debtor ~~who~~ that is generally not paying the debtor's debts as they become due other than as a result of a bona fide dispute is presumed to be insolvent. The presumption imposes on the party against which the presumption is directed the burden of proving that the nonexistence of insolvency is more probable than its existence.

~~3. A partnership is insolvent under subsection 1 if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all of the partnership's assets, and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.~~

~~4.~~ 3. Assets under this section do not include property that has been transferred, concealed, or removed with intent

to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this chapter.

~~5.~~ 4. Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

Sec. 3. Section 684.4, Code 2016, is amended to read as follows:

684.4 ~~Transfers fraudulent~~ Transfer or obligation voidable as to present ~~and~~ or future ~~creditors~~ creditor.

1. A transfer made or obligation incurred by a debtor is ~~fraudulent~~ voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation under any of the following circumstances:

a. With actual intent to hinder, delay, or defraud any creditor of the debtor.

b. Without receiving a reasonably equivalent value in exchange for the transfer or obligation, if either of the following applies:

(1) The debtor was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.

(2) The debtor intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

2. In determining actual intent under subsection 1, paragraph *"a"*, consideration may be given, among other factors, to whether any or all of the following apply:

a. ~~Whether the~~ The transfer or obligation was to an insider.

b. ~~Whether the~~ The debtor retained possession or control of the property transferred after the transfer.

c. ~~Whether the~~ The transfer or obligation was disclosed or concealed.

d. ~~Whether, before~~ Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

e. ~~Whether the~~ The transfer was of substantially all the debtor's assets.

f. ~~Whether the~~ The debtor absconded.

g. ~~Whether the~~ The debtor removed or concealed assets.

h. ~~Whether the~~ The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

i. ~~Whether the~~ The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

j. ~~Whether the~~ The transfer occurred shortly before or shortly after a substantial debt was incurred.

k. ~~Whether the~~ The debtor transferred the essential assets of the business to a lienor ~~who~~ that transferred the assets to an insider of the debtor.

3. A creditor making a claim for relief under subsection 1 has the burden of proving the elements of the claim for relief by a preponderance of the evidence.

Sec. 4. Section 684.5, Code 2016, is amended to read as follows:

684.5 ~~Transfers fraudulent~~ Transfer or obligation voidable as to present ~~creditors~~ creditor.

1. A transfer made or obligation incurred by a debtor is ~~fraudulent~~ voidable as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

2. A transfer made by a debtor is ~~fraudulent~~ voidable as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

3. Subject to section 684.2, subsection 2, a creditor making a claim for relief under subsection 1 or 2 has the burden of proving the elements of the claim for relief by a preponderance of the evidence.

Sec. 5. Section 684.6, subsection 1, paragraph a, Code 2016, is amended to read as follows:

a. With respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against ~~whom~~ which applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee.

Sec. 6. Section 684.6, subsection 5, paragraph b, Code 2016, is amended to read as follows:

b. If evidenced by a ~~writing~~ record, when the ~~writing executed~~ record signed by the obligor is delivered to or for the benefit of the obligee.

Sec. 7. Section 684.7, subsection 1, paragraph b, Code 2016, is amended to read as follows:

b. ~~A remedy by any special action available under this subtitle, including~~ An attachment or other provisional remedy~~,~~ against the asset transferred or other property of the transferee if available under applicable law.

Sec. 8. Section 684.8, Code 2016, is amended to read as follows:

684.8 Defenses, liability, and protection of transferee or obligee.

1. A transfer or obligation is not voidable under section ~~684.7,~~ 684.4, subsection 1, paragraph *"a"*, against a person ~~who~~ that took in good faith and for a reasonably equivalent value given the debtor or against any subsequent transferee or obligee.

2. To the extent a transfer is avoidable in an action by a creditor under section 684.7, subsection 1, paragraph *"a"*, all of the following apply:

a. Except as otherwise provided in this section, ~~to the extent a transfer is voidable in an action by a creditor under section 684.7, subsection 1, paragraph *"a"*,~~ the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection 3, or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against either of the following:

~~*a.*~~ (1) The first transferee of the asset or the person for whose benefit the transfer was made.

~~*b.*~~ (2) ~~Any subsequent transferee~~ An immediate or mediate transferee of the first transferee, other than ~~a~~ any of the following:

(a) A good-faith transferee ~~or obligee who~~ that took for value ~~or from any subsequent transferee or obligee~~.

(b) An immediate or mediate good-faith transferee of a person described in subparagraph division (a).

b. Recovery pursuant to section 684.7, subsection 1, paragraph "*a*", or section 684.7, subsection 2, of or from the asset transferred or its proceeds, by levy or otherwise, is available only against a person described in paragraph "*a*", subparagraph (1) or (2).

3. If the judgment under subsection 2 is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

4. Notwithstanding voidability of a transfer or an obligation under this chapter, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to any of the following:

a. A lien on or a right to retain ~~any~~ an interest in the asset transferred.

b. Enforcement of ~~any~~ an obligation incurred.

c. A reduction in the amount of the liability on the judgment.

5. A transfer is not voidable under section 684.4, subsection 1, paragraph "*b*", or section 684.5 if the transfer results from either of the following:

a. Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law.

b. Enforcement of a security interest in compliance with chapter 554, article 9, other than acceptance of collateral in full or partial satisfaction of the obligation it secures.

6. A transfer is not voidable under section 684.5, subsection 2, in any of the following circumstances:

a. To the extent the insider gave new value to or for the benefit of the debtor after the transfer was made ~~unless~~,

except to the extent the new value was secured by a valid lien.

b. If made in the ordinary course of business or financial affairs of the debtor and the insider.

c. If made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

7. The burden of proving matters referred to in this section is determined according to the following:

a. A party that seeks to invoke subsection 1, 4, 5, or 6, has the burden of proving the applicability of that subsection.

b. Except as otherwise provided in paragraphs "*c*" and "*d*", the creditor has the burden of proving each applicable element of subsection 2 or 3.

c. The transferee has the burden of proving the applicability to the transferee of subsection 2, paragraph "*a*", subparagraph (2), subparagraph division (a) or (b).

d. A party that seeks adjustment under subsection 3 has the burden of proving the adjustment.

8. The standard of proof required to establish matters referred to in this section is preponderance of the evidence.

Sec. 9. Section 684.9, Code 2016, is amended to read as follows:

684.9 Extinguishment of ~~cause of action~~ claim for relief.

A ~~cause of action~~ claim for relief with respect to a ~~fraudulent~~ transfer or obligation under this chapter is extinguished unless action is brought as follows:

1. Under section 684.4, subsection 1, paragraph "*a*", ~~within five~~ not later than four years after the transfer was made or the obligation was incurred or, if later, ~~within~~ not later than one year after the transfer or obligation was or could reasonably have been discovered by the claimant.

2. Under section 684.4, subsection 1, paragraph "*b*", or section 684.5, subsection 1, ~~within five~~ not later than four years after the transfer was made or the obligation was incurred.

3. Under section 684.5, subsection 2, ~~within~~ not later than one year after the transfer was made ~~or the obligation was incurred~~.

Sec. 10. NEW SECTION. **684.9A Governing law.**

1. In this section, a debtor's location is determined as follows:

a. A debtor who is an individual is located at the individual's principal residence.

b. A debtor that is an organization and has only one place of business is located at its place of business.

c. A debtor that is an organization and has more than one place of business is located at its chief executive office.

2. A claim for relief in the nature of a claim for relief under this chapter is governed by the local law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred.

Sec. 11. NEW SECTION. **684.9B Application to series organization.**

1. As used in this section:

a. *"Protected series"* means an arrangement, however denominated, created by a series organization that, pursuant to the law under which the series organization is organized, has the characteristics set forth in paragraph *"b"*.

b. *"Series organization"* means an organization that, pursuant to the law under which it is organized, has the following characteristics:

(1) The organic record of the organization provides for creation by the organization of one or more protected series, however denominated, with respect to specified property of the organization, and for records to be maintained for each protected series that identify the property of or associated with the protected series.

(2) Debt incurred or existing with respect to the activities of, or property of or associated with, a particular protected series is enforceable against the property of or associated with the protected series only, and not against the property of or associated with the organization or other protected series of the organization.

(3) Debt incurred or existing with respect to the activities or property of the organization is enforceable against the property of the organization only, and not against the property of or associated with a protected series of the organization.

2. A series organization and each protected series of the

organization is a separate person for purposes of this chapter, even if for other purposes a protected series is not a person separate from the organization or other protected series of the organization.

Sec. 12. NEW SECTION. **684.9C Relation to Electronic Signatures in Global and National Commerce Act.**

This chapter modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §7001 et seq., but does not modify, limit, or supersede section 101(c) of that Act, 15 U.S.C. §7001(c), or authorize electronic delivery of any of the notices described in section 103(b) of that Act, 15 U.S.C. §7003(b).

Sec. 13. Section 684.12, Code 2016, is amended to read as follows:

684.12 Short title.

This chapter ~~may be cited~~, which was formerly cited as the *"Uniform Fraudulent Transfer ~~Act."~~ Act"*, may be cited as the *"Iowa Uniform Voidable Transactions Act".*

Sec. 14. CODE EDITOR DIRECTIVE.

1. The Code editor is directed to make the following transfers:

a. Section 684.9A, as enacted in this Act, to section 684.10.

b. Section 684.9B, as enacted in this Act, to section 684.11.

c. Section 684.9C, as enacted in this Act, to section 684.14.

d. Section 684.10 is transferred to section 684.12.

e. Section 684.11 is transferred to section 684.13.

f. Section 684.12, as amended in this Act, to section 684.15.

2. The Code editor is directed to correct internal references in the Code and in any enacted legislation as necessary due to the enactment of this section.

Sec. 15. APPLICABILITY.

1. a. This Act applies to a transfer made or an obligation incurred on or after the effective date of this Act.

b. This Act does not apply to a transfer made or an obligation incurred prior to the effective date of this Act.

2. For purposes of this section, a transfer is made and an obligation is incurred at the time provided in section 684.6.

LINDA UPMEYER
Speaker of the House

PAM JOCHUM
President of the Senate

I hereby certify that this bill originated in the House and is known as House File 2400, Eighty-sixth General Assembly.

CARMINE BOAL
Chief Clerk of the House

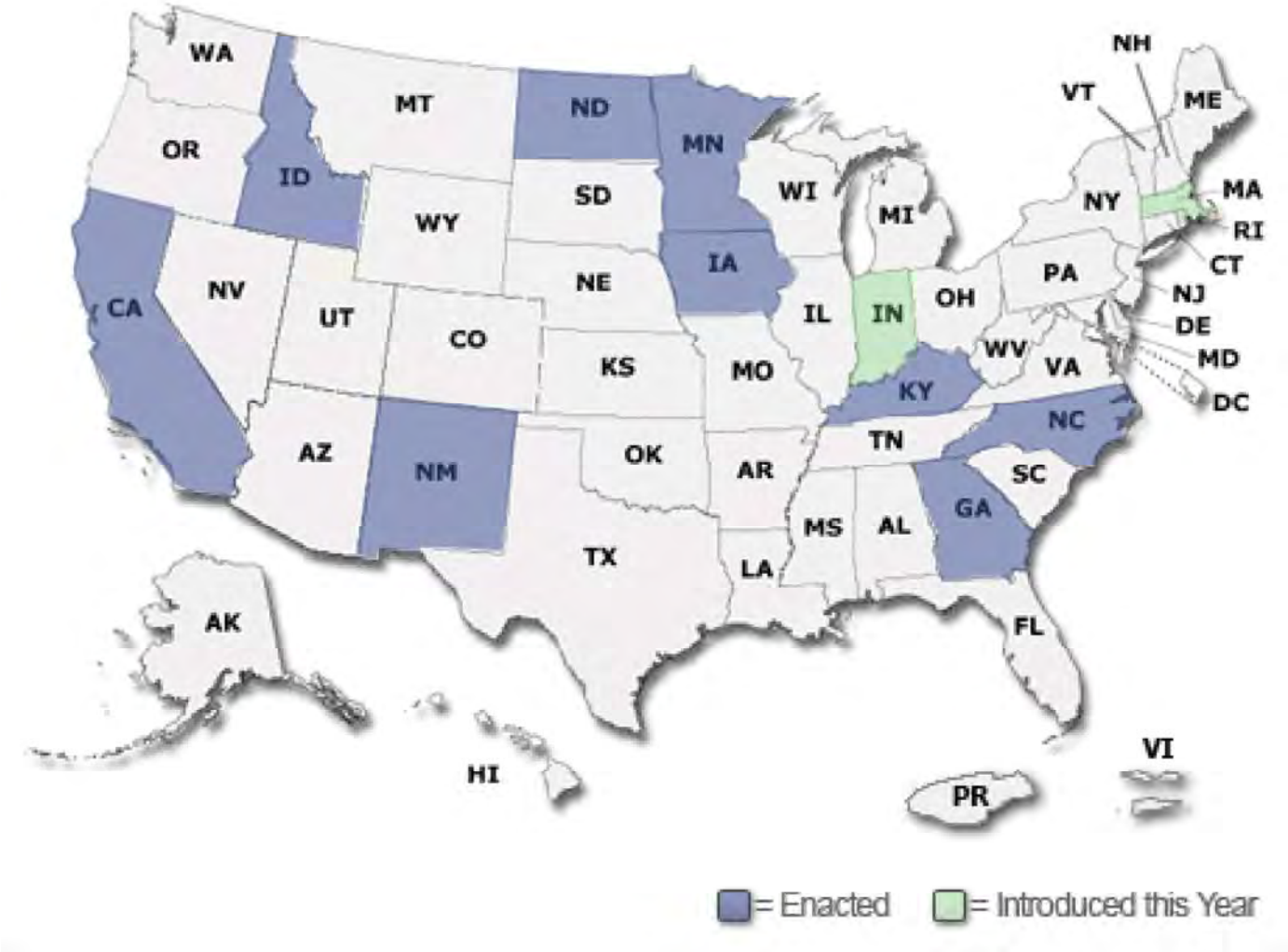
Approved _____, 2016

TERRY E. BRANSTAD
Governor

Contact Us: **312.450.6600**

Legislative Enactment Status

Voidable Transactions Act Amendments (2014) - Formerly Fraudulent Transfer Act



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2016 Commercial & Bankruptcy Law Seminar

Uniform Commercial Code Update

9:15 a.m.- 10:15 a.m.

Presented by
Gary Norton
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Friday, April 22, 2016

UNIFORM COMMERICAL CODE UPDATE

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April 22, 2016
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Bayer CropScience LP v. Texana Rice Mill Ltd., 2015 U.S. Dist. LEXIS 41376, *18, 86 U.C.C. Rep. Serv. 2d (Callaghan) 279 (E.D. Mo. 2015)

The Article 9 dispute in this case involves the ability to secure an interest in a commercial tort claim. The court draws a distinction between an interest in payment intangibles created by a settlement and an interest in the proceeds of original collateral that takes the form of a claim.

Texana Rice Mill and Texas Rice, Inc. (collectively, Texana) sued Bayer in state court, which was removed to federal court as part of the multi-district litigation in February 2007 (the "Bayer Suit"). Texana brought five claims against Bayer, including negligence *per se,* negligence, public and private nuisance, and strict liability related to the contamination of the United States rice supply by Bayer's genetically modified rice. Texana's damages included costs to decontaminate its property, plant, and equipment from the Bayer rice; lost profits and unrecovered costs due to the unmarketability of its contaminated rice; lost or diminished value in its plant, equipment, and improvements; lost future profits; increased financing costs; and others. The Bayer Suit settled on September 10, 2012.

All parties to the Bayer Suit consented to an order authorizing Bayer to pay the settlement payment of $2,137,500 into the custody of the clerk of court and discharging Bayer from further liability with respect to the payment. The parties also consented to two disbursements to two of the parties, leaving $933,697.90 claimed by two secured creditors of Texana, Amegy Bank and Stearns Bank.

Amegy loaned Texana $2 million on February 1, 2006, secured by collateral including Texana's inventory, accounts, equipment, furniture, and fixtures. Texana defaulted on the Amegy loan in 2006. On June 8, 2007, Texana and Amegy executed a Forbearance Agreement, wherein Amegy agreed to forbear its collections rights on the Amegy Loan in exchange for a security interest in the Bayer Suit, including any recovery or settlement therefrom (the "Claims Agreement"). On June 13, 2007, Amegy perfected its interests from the Claims Agreement by filing a UCC financing statement.

Stearns loaned Texana $2.65 million on September 13, 2002, and Texana granted a security agreement describing all fixtures, chattel paper, equipment, and general intangibles, excluding inventory and accounts receivable, whether then existing or thereafter acquired. The description also included

> all proceeds ... from the sale, destruction, loss, or other disposition of any of the property described in this Collateral section, and sums due from a third party who has damaged or destroyed the Collateral, or from that party's insurer, whether due to judgment, settlement or other process.

Stearns filed a UCC financing statement describing the collateral on September 20, 2002. Stearns filed an amended financing statement that restated the collateral on April 2, 2003, and it filed financing continuation statements on April 9, 2007 and April 20, 2012.

After Texana defaulted on its loan, Stearns sued in state court; it obtained a final summary judgment against Texana on January 21, 2010, in the amount of $3,161,405.94 plus attorney's fees and interest. Stearns foreclosed upon its deed of trust and the security agreement on June 1, 2010; three days later, it bought all collateral at the foreclosure sale at the sale price of $268,000. Stearns Bank filed its Application for a Writ of Garnishment against the Bayer Entities on October 4, 2012; the writ was issued three days later and then served on the Bayer entities on October 12 and 15, 2012.

In this dispute over right to the Bayer Suit settlement proceeds, Stearns moved for summary judgment, arguing that its own security interest had priority because it filed a UCC financing statement covering Texana's general intangibles before Amegy filed its UCC statement over the suit. Amegy countered that an interest in general intangibles cannot cover the settlement of a later-arising commercial tort claim and because Stearns' security interests were discharged when Stearns foreclosed on the interest and bought Texana's collateral at auction.

The court recites a variety of UCC law in dealing with this dispute. The court noted that in Texas a creditor can secure its right to repayment of a debt by obtaining a security interest in property held by its debtor, including commercial tort claims. However, the court also noted that while most property can be secured by a description referencing only its "type," such as general intangibles or fixtures, a description by type alone will not secure a commercial tort claim; the UCC "requires greater specificity of description in order to prevent debtors from inadvertently encumbering" that property. § 9.108 cmt. ("For example, a description such as 'all tort claims arising out of the explosion of debtor's factory' would suffice....").

Stearns argued that it first filed and perfected its interest in the settlement payment as two different forms of collateral governed by the security agreement and financing statement, first as after-acquired "general intangible"; and second, since the suit included claims for harms to Texana's fixtures and equipment, the payment represents "proceeds" from the loss of that collateral.

Texana granted to Stearns an interest in its general intangibles, including those acquired after authentication of the security agreement. The court also very correctly noted:

> Payment intangibles are a subset of general intangibles, "under which the account debtor's principal obligation is a monetary obligation." Tex. Bus. & Com.Code Ann. § 9.102(62) (West). Stearns Bank contends that it has a security interest in the Settlement Payment, because a **settled** tort action is a "payment intangible" under Texas law. See § 9.109 cmt. 15 ("[O]nce a claim arising in tort has been settled and reduced to a contractual obligation to pay, the right to payment becomes a payment intangible and ceases to be a claim arising in tort.").

Emphasis added.

The court ultimately decided that Amegy had the superior security interest, saying:

> The Settlement Payment is proceeds of the Bayer Suit. Amegy's interest in the Settlement Payment was perfected when its interest in the Bayer Suit itself was perfected. See § 9.322(b)(1) ("[T]he time of filing or perfection as to a security interest in collateral is also the time of filing or perfection as to a security interest in proceeds[.]"). Stearns Bank's interest in the payment intangible, being after-acquired collateral, did not perfect until the Bayer Suit settled. See § 9.322 cmt. As Amegy's interest was the first to perfect, it has priority over the Settlement Payment. Cf. § 9.322(a)(1), ex. 3.

Stearns next argued that, despite the foregoing analysis, it should still have priority as to the portion of the settlement payment that can be attributed to the "proceeds" of its original collateral. Amegy argued that Stearns did not retain any right even to the proceeds of Texana's fixtures and equipment, as described above, because Stearns foreclosed upon its security interests. The relevant timeline was:

• September 2002—Stearns Bank obtains its security interest in Texana's fixtures, equipment, and proceeds thereof

• November 2006—Texana sues Bayer

• June 2007—Amegy perfects its security interest in the Bayer Suit

• January 2010—Stearns Bank obtains final summary judgment against Texana after Texana defaults on its loan

• June 2010—Stearns Bank forecloses and buys all existing collateral at public auction

• September 2012—Parties to Bayer Suit notify court of settlement

The court concluded:

> A secured party's disposition of collateral after default discharges the security interest under which the disposition is made and all subordinate security interests or subordinate liens. Tex. Bus. & Com.Code Ann. § 9.617(a); § 9.617 cmt. 2 (West) ("[This] discharges the security interest being foreclosed ... even if the secured party fails to comply with this Article."). Stearns Bank foreclosed after Texana defaulted, and it then bought the existing collateral at auction. Under § 9.617, this discharged Stearns Bank's security interest. In June 2010, when Stearns Bank foreclosed and the disposition occurred, the Bayer Suit had not yet settled. Thus, at that time, Stearns Bank had neither an interest in the Bayer Suit as either a payment intangible, § 9.109 cmt. 15, nor as proceeds. Cf. In re Cartage, 656 F.3d at 89.

The court found that Amegy remained the sole holder of a perfected security interest in the settlement payment, and, of course, also had priority over all other unsecured claimants under. § 9.322.

Bayer CropScience LP v. Texana Rice Mill Ltd, 2015 U.S. Dist. LEXIS 80348, *12 (E.D. Mo. June 22, 2015)

This decision is on a motion to reconsider the court's previous ruling (Bayer case immediately above). The court affirmed the original analysis, stated above. The only change the court makes is a minor misstatement of priority. The court says it was a misstatement in the prior appeal to say "conflicting perfected security interest on the same collateral are accorded priority based upon whichever interest was first perfected or, if simultaneously perfected, upon whichever secured party first filed a UCC financing statement covering the collateral," and restated the law correctly as "conflicting perfected interests on the same collateral are accorded priority according to which was first filed or perfected."

In re Knight, 544 B.R. 141, 150, 2016 Bankr. LEXIS 348, *26 (Bankr. E.D. Ark. 2016)

This case involves a debtor who liquidated his crops and equipment - a secured party lender's collateral. The debtor later asserted failure of commercial reasonableness by the lender as to the sale process trying to avoid the deficiency. The court analyzed the evidence and found that the debtor had voluntarily liquidated the collateral himself. The court's factual findings were as follows.

First, the debtor voluntarily contacted the lender and informed its loan officer, that the debtor was discontinuing farming operations. The lender did not withdraw its financial support of the debtors' operation nor force them to cease farming. There was not default and, therefore, the lender did not serve any notice of default prior to the debtors' decision to discontinued his farming operation, which was what set the process in motion that culminated in the sale of his crops and equipment.

Second, the debtor proceeded to market and sell the remainder of his 2013 crop without lender intervention or oversight, and then voluntarily turned over most of the proceeds to the lender, apparently under their original agreement or their course of dealing.

Third, the lender never resorted to engaging an attorney to pursue payment through legal process and did not issue a notice of default, nor did it refer the account to an attorney for collection or other legal action after the debtors failed to make payments on the loans when due. Similarly, the debtor did not consult an attorney at any time prior to the sale.

Fourth, the lender neither repossessed nor disposed of the equipment nor did it exercise actual or even constructive possession over the property in the manner defined by the four security agreements. From the testimony of all the witnesses, the court found that the debtor maintained sole control of the property until it was transported to the sale and transferred into the physical control of the auctioneer.

Fifth, the debtor voluntarily assembled the equipment at a location where it was inventoried and appraised by the lender an FSA. After learning that the lender and FSA were agreeable to a sale, it was the debtor who began interviewing auctioneers. The telephone invoices showed the various calls were made. There was no evidence that the debtor was ordered or instructed to pursue the sale of the collateral by anyone at the lender or FSA.

Sixth, the debtor, himself, chose the auctioneer and the earliest available auction date. The lender did not give written permission to the debtors to contact the auctioneer but did supply equipment lists to auctioneer after he was selected.

Seventh, the debtor and the auctioneer spoke by telephone at least seventeen times. The frequency of contact just weeks before the sale supported the inference that the debtor was deeply involved in and was supervising the various aspects of planning and consummating the sale.

Eighth, the fact that the debtor did not sign a contract with the auctioneer was not considered important because the auctioneer explained he does not enter into written contracts with his consignors.

On the question of commercial reasonableness, the court held that when the debtor or debtor's agent is liquidating the collateral, the notice and commercial reasonableness requirements of Article 9 are not applicable. The court also discussed deficiency damages and how they interplay with disposition of collateral in a commercially reasonable or unreasonable manner. However, because the court found that the notice and commercial reasonableness requirements of Article 9 are inapplicable when the debtor sells the collateral, those issues were not relevant.

Nelson v. BMW Fin. Servs. NA, LLC, 2015 U.S. Dist. LEXIS 165012, *6 (D. Minn. Dec. 8, 2015)

BMW Financial Services NA, LLC ("BMW") extended a loan to Nelson to finance the purchase of a 2011 Chrysler 200. According to Nelson, BMW accepted these payments and failed to notify her that strict compliance with the payment schedule was required under the loan. Nelson relied for her authority on *Cobb v. Midwest Recovery Bureau Co*., which held that "the repeated acceptance of late payments by a creditor who has the contractual right to repossess the property imposes a duty on the creditor to notify the debtor that strict compliance with the contract terms will be required before the creditor can lawfully repossess the collateral." 295 N.W.2d 232, 237 (Minn. 1980).

Prior to the suit, upon receiving a statement for a past due amount, Nelson sent BMW a payment of $250.00. She again became delinquent on her payments soon thereafter, so BMW hired All Wheels, an independent contractor, to repossess the vehicle. All Wheels executed repossession of the car from Nelson's driveway over her objections. Nelson initiated a lawsuit against BMW and All Wheels, ultimately alleging wrongful repossession under the Minnesota version of UCC.9–609. All Wheels asserted that it could not be held liable under UCC § 9–609 because that

provision only mandates a standard of conduct for secured parties, not independent contractors operating on a secured party's behalf.

The court ultimately agreed with several other cited court decisions which require those performing repossession on behalf of secured parties to comply with the standards set forth in UCC § 9–609.

However, Nelson also asserted the same damages against All Wheels as it asserted against BMW, the secured party, including damages under UCC 9-625(c)(2), which states:

> (b) Damages for noncompliance losses. Subject to subsections (c), (d), and (f), a person is liable for damages in the amount of any loss caused by a failure to comply with this article. Loss caused by a failure to comply may include loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing.
>
> (c)(2) if the collateral is consumer goods, a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover for that failure in any event an amount not less than the credit service charge plus ten percent of the principal amount of the obligation or the time-price differential plus ten percent of the cash price.

Emphasis added.

The court disagreed and noted that the plain language of (c)(2), specifies that the finance charge plus 10 percent is applicable in instances when "a secured party failed to comply" with the statute. The court also noted the UCC comment to this section states that "[a] person who has delegated the duties of a secured party but who remains obligated to perform them is liable under this subsection." Uniform Commercial Code, Former § 9–503, cmt. 3. As such, the court found an intent to hold the secured party liable, even in situations when the secured party contracted with a third party to perform the act of repossession, but also held that the statutory damages did not apply to the independent contractor itself.

Des Moines Flying Services, Inc. v. Aerial Services Inc., 2015 WL 1817032 *$ (Iowa Ct. App. 2015).

This case involves a replaced airplane windshield that cracked in flight because of a manufacturer's defect. Plaintiff sought recovery from the installer of the windshield, not the manufacturer.

The court stated that the Iowa UCC applies to mixed contracts for goods and services, citing *Semler v. Knowling*, 325 N.W.2d 395, 398 n. 1 (Iowa 1982). The court determined whether contracts for goods and services are covered by the UCC by examining "whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved ... or is a transaction of sale, with labor incidentally involved." *M &*

W Farm Serv. Co. v. Callison, 285 N.W.2d 271, 274 (Iowa 1979) (citing *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir.1974).

The evidence showed that the invoice from DMFS, the defendant who sold and installed the windshield, showed the cost of the pilot and co-pilot windshields were each $19,323.63, but the "labor totals" listed in the invoice for removing the windows, prepping the frames, and installing the new windows were $6300. The court found the cost disparity between the goods and the labor suggested that the predominant factor—the gist—of the contract was for the specialized part, i.e., a sale of a good. Plaintiff brought its plane to DMFS for an inspection and agreed to purchase certain parts from DMFS to replace those that were worn, including a new co-pilot windshield. The windshield's installation was secondary to its purchase. Therefore, Iowa's UCC was found to apply to this contract.

Plaintiff asserted that DMFS breached an implied warranty of merchantability when it sold a defective windshield, and so argued it should not have to pay for the cost of the replacement windshield.

DMFS argued it was immune from the plaintiff's warranty action by virtue of section 613.18(1)(a) of the Code of Iowa. That section reads as follows:

> 1. A person who is not the assembler, designer, or manufacturer, and who wholesales, retails, distributes, or otherwise sells a product is:
>
> 4 a. Immune from any suit based upon strict liability in tort or breach of implied warranty of merchantability which arises solely from an alleged defect in the original design or manufacture of the product.
>
> Iowa Code § 613.18(1)(a).

It was undisputed DMFS did not assemble, design, or manufacture the windshield. Based on evidence, the district court found the windshield did not fail because of improper storage or installation and granted summary judgment in favor of DMFS, finding that a reasonable finder of fact could determine that the co-pilot windshield failure arose from a defect in the original design or manufacture of the product."

Plaintiff contended that 613.18 only barred claims sounding in tort and not contract, however the court dismissed this argument and declined to read such a limitation into the statute finding its meaning clearly stated and held section 613.18(1)(a) barred Plaintiff's claim for breach of implied warranty of merchantability against DMFS.

In re Agriprocessors, Inc., 2016 WL 1060297 (N.D. Iowa 2016).

This is a bankruptcy preference case, but the UCC issue in the case was whether intraday overdrafts gave rise to antecedent debt.

Prior to the ninety-day preference period, the debtor regularly incurred so-called "intraday overdrafts" in its account with its bank. The court articulated the complex UCC related law in stating:

> Intraday overdrafts are a function of the Uniform Commercial Code ("U.C.C.") and the two-day check clearinghouse process. Intraday overdrafts occur because of the U.C.C.'s deferred posting procedure. See U.C.C. § 4-301(a) (allowing banks to utilize a deferred posting procedure); see also Iowa Code § 554.4301(1) (allowing banks in Iowa to utilize a deferred posting procedure). This procedure generally authorizes a bank to provisionally settle a check presented to it but then gives it the option to revoke the settlement prior to the bank's "midnight deadline." See U.C.C. § 4-301 cmt. 1 (" '[D]eferred posting' merely allows a payor bank that has settled for an item on the day of receipt to return a dishonored item on the next day before its midnight deadline, without regard to when the item was actually posted."). The "midnight deadline" is midnight on the next banking day after a customer presents a check for settlement. See U.C.C. § 4-104(10) (defining the "midnight deadline" as "midnight on [a bank's] next banking day following the banking day on which it receives the relevant item"); see also Iowa Code § 554.4104(j) (adopting the U.C.C.'s definition of "midnight deadline").
>
> Functionally, this procedure allows banks to provisionally settle a presented check and create a negative charge on the account holder's account balance. Under the U.C.C. and Iowa law, a check processing through the clearinghouse procedure will generally result in a provisional settlement. If the account holder has less money in the account than the value of the check, the provisional settlement places the account into an overdraft position—creating an intraday overdraft. If the customer deposits funds sufficient to cover the intraday overdraft by the midnight deadline, say on the next business day, the payment on the check becomes final and the customer's account will not show an overdraft. On the second day, the bank has three options: it can (1) dishonor, or "bounce," the check; (2) immediately honor it and allow the provisional overdraft to become final, or a "true" overdraft; or (3) do nothing and wait for covering funds, potentially carrying the negative account balance past the midnight deadline and creating a true overdraft on the account.
>
> When there is an intraday overdraft by operation of the two day window in Article 4 for honoring checks, Article 4 allows for a bank to either 1) immediately honor checks, 2) provisionally honor checks, 3) wait and see if funds will become available on a check that would otherwise overdraft the account. The court interpreted Article 4 along with the Barnhill case and determined that no antecedent debt is created through an intraday overdraft. When there is a provisional settlement of a check a

> debt will not arise until the bank can no longer revoke that provisional settlement. i.e. the check must be completely and finally honored to give rise to a debt.

The court cited various cases finding that intraday overdrafts do not give rise to debt and determined that intraday overdrafts do not constitute antecedent debt, such that no preferential transfer occurred.

Budach v. NIBCO, Inc., 2015 WL 6870145 (W.D. Missouri 2015).

A homeowner alleged that Defendant NIBCO, Inc.'s PEX plumbing system, which was installed in his home, failed and on multiple occasions caused water damage to the home. The issue in this case was whether UCC 2-607 requires pre-suit notice of breach of warranty claim.

Section 2-607 of the Uniform Commercial Code, as adopted by Missouri, provides that "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." The Plaintiff asserted that he provided notice of his breach of warranty claims to NIBCO through the filing and serving of his complaint arguing that such notice is sufficient, because § 2-607(3)(a) does not state that notice must precede the filing of a lawsuit.

The court recognized the split in authority on whether filing a law suit itself constitutes pre-suit notice, but determined that some minimal notice must be given before filing a law suit for breach. The court first noted that the purposes of 2-607 are best satisfied with pre-suit notice because the purpose is to facilitate negotiations and settlement without full on litigation. Secondly, the history and drafters' comments indicated that some minimal pre-suit notice must be given before filing suit.

Legg v. West Bank, 873 N.W.2d 763 (Iowa 2016).

The plaintiffs filed a multiple-count consumer class action lawsuit against the bank challenging the one-time nonsufficient funds (NSF) fees it charged when the plaintiffs used their debit cards that created overdrafts in their checking account.

West Bank issues bank cards to its customers. When customers are issued a bank card, they receive a "Deposit Account Agreement". The Agreement provides that West Bank "shall have an obligation to Depositor to exercise good faith and ordinary care in connection with each account. The court described the other obligations which arise in the use of a bank card.

> When a customer uses a Bank Card, once the transaction is approved at the point of sale the bank is required to pay the transaction when presented, even if there are not sufficient funds in the account by the time the transaction is posted to the account. Such posting typically occurs one to three days after the original transaction.

> If West Bank is called upon to pay a Bank Card transaction when there are insufficient funds in the account, the bank advances sufficient money to cover the amount by which the account is short, and assesses a non-sufficient funds (NSF) fee. Those advances are automatically deducted from the customer account and repaid to the bank the next time a deposit sufficient to cover the advances is made to the account.

However, West Bank apparently changed its procedure. Like most banks, West Bank did not post customer account balances in real time, instead posting tranactions in a batch at the end of the day. Prior to July 1, 2006, West Bank posted bank card transactions with the lowest amount for each day's debits posted first and the highest amount posted last (low-to-high sequencing). After July 1, 2006, West Bank reversed its posting sequencing and posted bank card transactions with the highest amount posted first and the lowest amount posted last (high-to-low sequencing). Beginning October 1, 2010, West Bank changed its posting order back to low-to-high sequencing. Apparently, the summary judgment record supported an inference that West Bank made the change without adequately notifying its customers.

The plaintiffs claimed that West Bank breached the implied and express duties of good faith when it changed the sequencing order of bank card transactions to high-to-low without informing customers. West Bank argued that Article 4 of the Uniform Commercial Code (UCC) applies.

The issue in this case was whether an implied duty of good faith under Article 4 was preserved. The court went on to find that there was an express duty of good faith written in the contract between plaintiffs and defendant. Additionally the court referenced U.C.C. § 1–203 cmt., 1 U.L.A. 273 (2012), which states that Article 4 does not create an independent cause of action for violation of good faith. The court stated it was not err to allow the plaintiff to seek the express violation of good faith under the contract, but it was err to allow plaintiff to seek a claim under an implied duty of good faith under Article 4.

Hanjy v. Arvest Bank, 94 F.Supp.3d 1012 (E.D. Ark. 2015).

The UCC issue in this case again dealt with high-to-low posting in a debit account. Article 4 allows a bank to do high-to-low posting with checks, explicitly. Defendant bank argued this should apply to debit accounts as well. However, the court was unwilling to extend Article 4 to cover debit accounts, and stated that debit transactions were governed by the EFTA and thus outside the scope of the UCC.

Badilla v. Wal-Mart Stores East Inc., 357 P.3d 936 (New Mexico 2015).

A buyer of work boots sued the seller for breach of warranty under New Mexico's version of the sales article (Article 2) of the Uniform Commercial Code (UCC) and sought damages for

personal injury, alleging that loose soles caused him to fall and suffer injuries while working as a tree trimmer.

At issue here was the proper statute of limitations for a "tort" claim under the UCC as a breach of implied warranty of merchantability and fitness for a particular purpose. The tort statute of limitations. in New Mexico is 3 years and the UCC's statute of limitations is 4 years.

The court described a split in other jurisdictions as to when an action is governed by the limitations period of the UCC. The majority view is that the UCC limitations period applies to all actions for breach of warranties, regardless of whether the plaintiff seeks personal injury damages or economic and contractual damages. This approach essentially looks to the nature of the right asserted; if the right is based in contract, it is subject to the UCC.

The minority approach looks at the type of damages sought in an action to determine whether the statute of limitations in UCC § 2–725 applies, such that actions for personal injury damages or tortious injury to personal property are governed by general, non-UCC limitations periods, while actions for economic or breach of contract damages are governed by § 2–725.

The court found the 4 year UCC statute applied because 1) the complaint was filed under the UCC, 2) the plain language of the UCC encompasses the claim, 3) the longer statute was adopted after the shorter one and should be considered to amend it, 4) the UCC statute is specific and should be given effect over a general statue of limitations, 5) courts prefer to use a longer statute of limitations when faced with choosing between two, and 6) using the UCC statute promotes uniformity under the UCC, nationwide.

JAG Orthopedics, P.C. v. AJC Advisory Corp., 18 N.Y.S. 579 (2015).

Plaintiff's claims against defendants arose out its allegations that one of the defendants, plaintiff's officer manager from September 2009 to June 2014, misappropriated/embezzeled hundreds of thousands of dollars from plaintiff by: (1) writing checks to herself well in excess of her monthly salary of $4,000; (2) obtaining, without authorization from plaintiff, a debit/credit card tied to plaintiff's checking account and charging items for her own personal use; (3) forging the signature of plaintiff's owner and president, on checks made out in her name, and (4) misappropriating funds from a checking account that plaintiff had closed prior to the misappropriation.

Plaintiff alleged that the bank improperly paid the checks forged by the office manager in violation of its UCC obligations that give rise to a strict liability of a bank that charges against its customer's account any item' that is not properly payable, (citing UCC 4–401; *see also Clemente Bros. Contr. Corp. v. Hafner–Milazzo*, 23 NY3d 277, 283–284 [2014]). The bank moved for dismissal under UCC §§ 3-406 and 4-406 which impose reciprocal duties on a bank's customer.

Under UCC 3–406, a bank will be excused from the strict liability imposed for paying on a forged check where the customer's own negligence contributes to allowing the alteration to the

check and the bank pays the check in good faith despite exercising due diligence. UCC 4–406 provides that a bank will not be held liable for paying on forged or unauthorized signatures where the bank has sent statements of account to the customer and the customer fails to timely notify the bank of the unauthorized items.

Both UCC 3–406 and UCC 4–406, are affirmative defenses where the defendant must show the plaintiff was negligent and such negligence led to the incorrect payment by the bank. With respect to UCC 3–406, a bank cannot establish a defense under that section if it fails to show that it acted in good faith and in accordance with reasonable commercial standards and the bank in this case submitted no documentary proof that it followed reasonable commercial standards in the handling of either of plaintiff's accounts. In the absence of evidence showing that the bank followed reasonable commercial standards, the bank fails to conclusively establish its entitlement to a defense based on documentary proof premised on UCC 3–406.

A defense under UCC 4–406 is premised on a bank sending out statements of account and a customer's failure to discover an item paid based on his or her unauthorized signature and timely notifying the bank after discovery. This bar does not apply if the customer establishes that the bank failed to exercise ordinary care in paying the item or items. Regardless of a bank's failure to exercise ordinary care, however, UCC 4–406(4) bars a customer's claim for recovery on a wrongfully paid item when the customer fails to report the irregularity within one year after the bank provides the statement and item. Again, the bank failed to show that it had properly send out that statements to the customer/plaintiff.

CNH Capital America, LLC v. Hunt Tractor, Inc., 2015 WL 5554020 (W.D. Kentucky 2015).

In 1991, Hunt Tractor entered into a "Wholesale Financing and Security Agreement" ("WFSA") with CNH's corporate predecessor. Under the WFSA, CNH financed Hunt Tractor in buying Case inventory and equipment. Hunt Tractor granted CNH a security interest "in inventory, equipment, all proceeds of inventory, Hunt Tractor's accounts with CNH, and other collateral requested by CNH.

In 2007, Scott Hunt borrowed $400,000 from his father-in-law so that he could buy Hunt Tractor, the family business. In 2008, Hunt Tractor entered into a $500,000 line of credit and took out a $600,000 term loan with Commonwealth Bank and Trust Company ("Commonwealth Bank"). Along with the Bank Loans, Hunt Tractor maintained a checking account at Commonwealth Bank. Commonwealth Bank "swept," or deducted from, the checking account on a daily basis to pay down the Bank Loan balances. Commonwealth Bank held a security interest in the funds deposited in Hunt Tractor's checking account.

By 2009, Hunt Tractor struggled to make payroll and pay CNH. Hunt Tractor received a $825,347.00 check from the Kentucky Department of Transportation ("KYDOT") as payment for twelve backhoes and deposited the KYDOT check in its Commonwealth Bank checking account.

Thereafter, Commonwealth Bank swept $348,998.26 from Hunt Tractor's account to pay off the line of credit, resulting in a zero balance and Hunt Tractor made a $501,549.87 payment on the term loan via check using the proceeds from the KYDOT sale to pay off both Commonwealth Bank loans. None of the KYDOT proceeds went to CNH, as the WFSA required.

The court found that in a conversion claim, the plaintiff must establish title to the converted property and the immediate right to possession of the article converted. Also the court noted that under 9-327 of the UCC when a bank maintains a deposit account with a security interest, the bank's security interest prevails over another secured party's conflicting interest.

The court also found that UCC Article 9 section 9-601 also addresses secured parties' rights upon default when it states "After default, a secured party has the rights provided in this part of this article...." The court stated that if a bank holds a depository security interest, "in any event after default," the bank may exercise its right of setoff by applying the deposit account balance to the obligation secured by the deposit account. 9-607(1)(d).

However, the court held that CNH had a purchase money security interest in its collateral and proceeds and that Commonwealth Bank only had superior rights to the deposit account under § 355.9-607 if Hunt Tractor defaulted on either of the Bank Loans. Commonwealth Bank had no right to setoff the funds without a default.

The Court held that Commonwealth Bank could only have prevailed over CNH if Hunt Tractor defaulted on the Bank Loans. While § 355.9-327(3) does give "super-priority" to depository banks over secured creditors, a bank's right to setoff deposit funds under § 355.9-607(d) arises "after default." Commonwealth Bank presented no evidence of a default.

Roy v. Quality Pro Auto, LLC, 2016 WL 302496 (New Hampshire 2016).

This case involved the sale of a motor vehicle. The plaintiff bought a used motor vehicle from the defendant for $1,895. The bill of sale indicated that the vehicle was sold "As is As seen." The sale also included a form from the New Hampshire Division of Motor Vehicles (DMV) titled "**NOTICE OF SALE OF UNSAFE MOTOR VEHICLE**," which stated, in pertinent part: "If you are considering the purchase of a used motor vehicle which may not pass a New Hampshire safety inspection, you have a right under RSA 358–F, to request that the dealer inspect the vehicle prior to sale and list the defects which must be corrected before an inspection sticker will be issued." The DMV form contained the following notice: "The motor vehicle described herein will not pass a New Hampshire inspection and is unsafe for operation." By signing the form, the plaintiff "acknowledge[d] that [the] vehicle will not pass a New Hampshire inspection, is unsafe for operation, and cannot be driven on the ways of this state." The plaintiff indicated on the form that he did not "desire a safety inspection to be conducted."

After the plaintiff drove the vehicle to his home (in Maine), he discovered that it "would not pass inspection because the frame was completely rotted almost to the point where it was dangerous." The plaintiff alleges that the motor vehicle had "two rust holes, one the size of a softball," and that "[b]ecause the holes completely compromised the structural integrity of the vehicle, the

vehicle failed inspection and was unsafe." The plaintiff further alleged that when he "tried to get his money back, [the defendant] refused, asserting that the sale was 'as is-as shown.' "

The plaintiff brought a small claims action against the defendant and the trial court ruled in favor of the defendant. On appeal, the plaintiff argued that the trial court erred by failing to rule that the defendant breached the implied warranty of merchantability, contending that, to the extent that the trial court found that he waived this implied warranty, the court erred.

The implied warranty of merchantability is set forth in UCC Section 2–314. On interpreting the UCC, the court stated that it would "rely not only upon our ordinary rules of statutory construction, but also upon the official comments to the UCC."

UCC § 2–314 provides:

> (1) Unless excluded or modified (Section 2–316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
>
> (2) Goods to be merchantable must be at least such as
>
> (a) pass without objection in the trade under the contract description; and
>
> (b) in the case of fungible goods, are of fair average quality within the description; and
>
> (c) are fit for the ordinary purposes for which such goods are used; and
>
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity with each unit and among all units involved; and
>
> (e) are adequately contained, packaged, and labeled as the agreement may require; and
>
> (f) conform to the promises or affirmations of fact made on the container or label if any.
>
> (3) Unless excluded or modified (Section 2–316) other implied warranties may arise from course of dealing or usage of trade.

The court also referred to the official comments to UCC Section 2–314 which state that "[t]he question when the warranty is imposed turns basically on the meaning of the terms of the agreement as recognized in the trade." UCC 2–314 cmt. 2. "Goods delivered under an agreement made by a merchant in a given line of trade must be of a quality comparable to that generally acceptable in that line of trade under the description or other designation of the goods used in the agreement." With regard to used goods, the court found that the official comments state that a

contract for such goods "involves only such obligation as is appropriate to such goods for that is their contract description." UCC 2–314 cmt. 3.

In this case the agreement specifically stated that the vehicle sold was not safe and could not pass inspection for operation on the road. So the fact that the car was unsafe and did not pass inspection was exactly what was contracted for and thus there was no breach of the implied warranty of merchantability.

Otto Container Management, LLC v. Greenkraft, Inc., 2016 WL 831325 (W.D. North Carolina 2016).

The plaintiff in this case offered to purchase four compressed natural gas trucks with extended warranties from the defendant. Based on prior conversations between the parties as well as an initial invoice from defendant, on July 31, 2013, plaintiff sent a purchase order via email to defendant with the PO number "M000000216" (the "**Initial PO**"). The subject line of the email was "GREENKRAFT-M216." The Initial PO contained the initial purchase price of $268,800 for the trucks and extended warranties, and it referenced defendant's "Invoice #GKT-13-JFCT-03A." The Initial PO also included on its fourth page a detailed list of terms and conditions, including a forum selection clause providing that any dispute shall be maintained in Mecklenburg County, North Carolina, and shall be governed by North Carolina law. The Initial PO was never signed by either party.

On August 12, 2013, the defendant sent an email under the same subject line of GREENKRAFT-M216" to plaintiff, which read, "Can you have our two forms signed please we need those to get the incentives [sic]." Plaintiff responded on August 13, 2013, by emailing the signed forms back to defendant. Later that day, the defendant sent another email under the same subject header requesting that "[Plaintiff] also get the purchase order that [Defendant had] prepared signed." Attached to that email was a one-page form defendant had prepared that was labeled "Purchase Order" (the "Second PO"). The Second PO was nearly identical to Defendant's Invoice Number GKT-13-JFCT-03 except that the Second PO was labeled as a purchase order and it displayed Otto Environmental Systems North America, Inc. in the header instead of Greenkraft, Inc. The Second PO did not reference any other purchase order or invoice number, it did not contain any terms or conditions beyond the number of trucks and the pricing, and it did not include any extended warranties. Both parties signed the Second PO on August 13, 2013.

Defendant delivered the four trucks to plaintiff, and on February 28, 2014, defendant issued two invoices to plaintiff - one invoice was for the four trucks, and the other invoice for the extended warranties. Both invoices referenced the same invoice number GKT-13-JFCT-03, which had been originally referenced in Plaintiff's Initial PO. Plaintiff subsequently paid for the trucks and warranties.

On May 29, 2015, plaintiff filed its lawsuit alleging claims for breach of contract, negligent misrepresentation, and unfair and deceptive trade practices under North Carolina law. The

defendant filed a motion to dismiss, or, to transfer venue challenging both personal jurisdiction and venue, which the magistrate court recommended be granted.

In this de novo review, the defendant argued that there was no general or specific jurisdiction because the defendant lacked sufficient contacts with North Carolina, the contention being that the forum selection clause included in the terms and conditions of plaintiff's Initial PO did not apply because the Initial PO was not signed, rather the Second PO, which did not contain any terms or conditions, was signed by both parties. In response, the plaintiff asserted that the forum selection clause contained in its Initial PO was valid and enforceable.

The UCC specifies that "[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." U.C.C. § 2-204(1). The UCC further recognizes that, unless clearly stated otherwise, acceptance of an offer may be made "in any manner and by any medium reasonable in the circumstances." U.C.C. § 2-206. Therefore, a contract for the sale of goods may be formed by any objective expression of agreement, whether it be oral, written, by conduct, or any combination thereof. The court explained further:

> The UCC's expanded concept of contract formation also allows for acceptances of offers to occur even when the documents exchanged by the parties are not in complete agreement. Pursuant to UCC § 2-207(1) "[a] definite and seasonable expression of acceptance or a written confirmation ... operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms." Although no exact language is required to show that an acceptance is expressly conditional on assent to the terms of that acceptance, the offeree must make it clear to the offeror that the offeree is not willing to proceed with the transaction unless the offeree's terms are accepted. (citations omitted) Furthermore, when terms or conditions contained in the buyer-offeror's purchase order are not contradicted by the acceptance, they become part of the contract. (citation omitted) Likewise, when the buyer's initial written communication contains terms and conditions and subsequent communications from the seller are silent as to those terms, the seller's subsequent document operates as an acceptance of the terms in the buyer's initial offer. (citation omitted)
>
> . . . UCC § 2-207 addresses circumstances in which the offer for the purchase of goods contains terms which the acceptance for the purchase of those goods does not contain and does not expressly reject, as actually occurred in this case. The Initial PO set forth the requested goods and prices, and it contained the terms and conditions of plaintiff's offer, including, among others, a forum selection clause, which established Mecklenburg County, North Carolina, as the forum in which any dispute between plaintiff and defendant shall be litigated. Those terms and conditions established the parameters of the deal plaintiff was willing to consummate.

The court further stated:

> Regarding acceptance, the Initial PO stated, "The Terms and Conditions which are attached hereto are incorporated and made part of this Purchase Order and are binding upon the Seller by its acceptance or performance under this Purchase Order." It also indicated, "Acceptance of this PO [is] subject to the conditions set herein." Furthermore, the "Terms and Conditions" page included the following provisions regarding how and under what terms Plaintiff's offer could be accepted:
>
> ACKNOWLEDGMENT: Shipment of an order shall be considered Seller's acceptance of these terms and conditions. If Seller acknowledges this Purchase Order on a different form, then the terms and conditions of Seller's acknowledgment are not a part of this Purchase Order until Buyer agrees in writing.
>
> DELIVERY AND ACCEPTANCE: .... By accepting this Purchase Order, Seller agrees that this Purchase Order constitutes the final agreement of the parties ....
>
> The Initial PO, as well as the UCC, contemplates that Defendant may acknowledge and, therefore, accept the offer "on a different form;" however, any terms and conditions contained on Defendant's form do not become part of the contract unless Plaintiff expressly agreed to them in writing. The UCC also provides that Plaintiff's offer could be accepted by any expression of acceptance or agreement, including the conduct of Defendant. U.C.C. §§ 2-204, 2-206, 2-207.

The court found as a matter of fact, that the defendant's correspondences, together with the conduct of the parties indicate that the parties had reached an agreement and that the defendant had accepted plaintiff's offer. The emails, the additional forms and the Second PO did not negate the Initial PO, but memorialized the prior acceptance and finalized the details of the offer.

Moral of the story: be careful of what you are accepting because the UCC may consider terms not in the original form as part of the contract.

Beemac Trucking, LLC v. CNG Concepts, LLC 2016 WL 638735 (Pennsylvania 2016).

Appellant was a trucking company planning to build and operate a compressed natural gas fueling station to service its own fleet and to sell gas to the public. Appellant contacted CNG Concepts, LLC to discuss Appellant's interest in acquiring equipment needed to construct a compressed natural gas fueling station. CNG Concepts is a seller's agent for the equipment Appellant was seeking. CNG Concepts referred Appellant to Pearce Sales Agency, LLC which was acting as an agent for Aspro, and its United States affiliate, Aspro USA (collectively, "Aspro"). Appellant later entered into negotiations with Pearce regarding the purchase of equipment necessary to build the compressed natural gas fueling station.

Initially, Aspro provided a proposal to appellant which included, Aspro's "General Conditions of Supply for Products and Services." Included in those conditions was the following provision:

> This contract shall be governed by and construed in accordance with the laws of the State of Texas, and the parties agree to submit to the personal jurisdiction of any court of law in the state of Texas any controversy or claim arising out of or relating to this agreement.

After continued negotiations, Aspro thereafter provided a revised proposal. The revised proposal included different equipment, and a different price, than the first proposal. The later proposal stated that, "Aspro's standard [t]erms and [c]onditions of [s]ale have been attached to this [p]roposal." However, no such terms and conditions were attached to the proposal.

The issue involved in this case on appeal whether the trial court erred in concluding that a forum selection clause existed between the parties which precluded the trial court from exercising jurisdiction over Appellant's claims.

The court in this case had to determine how Texas would treat a subsequent offer bearing new terms under UCC 2-206. The court stated that under both Pennsylvania and Texas versions of section 2–206, when a second (or subsequent) offer is made which does not expressly incorporate the terms of a prior offer, the prior offer is considered revoked. Therefore, any terms and conditions that were part of the previous offer are no longer considered part of the new offer unless included therein or expressly incorporated by reference.

As such, the Court ruled that the subsequent offer acted as a revocation of a prior offer. The court cited three reasons: first Pennsylvania case law treats subsequent offers the same under an identical statute, second Texas looks to other common law and prior Texas cases not under the UCC that treat subsequent offers as revocation of a prior offer, and third the general purpose of the UCC is to promote uniformity among states and the general consensus is that a subsequent offer revokes a prior offer under the UCC.

2016 Commercial & Bankruptcy Law Seminar

Case Law Developments in Iowa

10:30 a.m.- 11:15 a.m.

Presented by
Desirée Kilburg
Shuttleworth & Ingersoll, PLC
115 3rd St S.E.
Cedar Rapids, IA 52401
Phone: 319-365-9461

Friday, April 22, 2016

ISBA Commercial and Bankruptcy Law Seminar

Iowa Case Law Update

Desirée A. Kilburg
Shuttleworth & Ingersoll, PLC
115 3rd St SE, Cedar Rapids, IA 52401
dak@shuttleworthlaw.com

Receivership and Secured Creditors

DHS v. CCI, 861 N.W.2d 868 (Iowa 2015)

- DeWitt Bank & Trust loaned millions of dollars to CCI, a non-profit Iowa corporation providing residential health care services to eastern Iowans with physical, mental and intellectual disabilities. DeWitt Bank's loans were fully secured and their interests were properly perfected.
- The State commenced an investigation of CCI regarding alleged Medicaid overpayments. The State eventually requested appointment of a receiver pursuant to Iowa Code § 249A.44(3). DeWitt Bank did not oppose or object to the appointment of a receiver.
- The district court appointed a receiver. The court set the receiver's compensation and ordered the receiver would be entitled to receive super-priority payments for its expenses and services.
- DeWitt Bank filed a motion to intervene and for clarification of the term "super-priority." DeWitt Bank argued the receiver had no right to avoid the liens of secured creditors to cover receivership costs. The State, the receiver and all other parties resisted. The district court ruled that Iowa Code § 680.7, part of Iowa's general law relating to receiverships, allowed a receiver to avoid liens in favor of receivership expenses before all other creditors, including secured creditors.
- Upon interlocutory appeal, the Iowa Supreme Court recognized the general rule that administrative expenses of a receiver generally must be paid from unencumbered assets rather than from secured collateral. It further held that nothing in Iowa's Medicare or general receivership statutes allows a receiver to surcharge a secured creditor's collateral to satisfy the costs of the receivership. Rather, Iowa common law, which mirrors Title 11 U.S.C. § 506(c) enacted to codify pre–Bankruptcy Code law, subjects a secured creditor to liability only for the reasonable and necessary expenses of preserving or disposing of the collateral to the extent of the benefit received by the secured creditor.

- The Iowa Supreme Court also rejected the argument that DeWitt Bank consented to the receivership, finding the bank took action as soon as it became aware that its security interests are threatened.
- The matter was remanded for further proceedings to ascertain the extent, if any, to which DeWitt Bank benefitted from the appointment of the receiver.

Bank Overdrafts and Duties of Good Faith

Legg v. W. Bank, 873 N.W.2d 763 (Iowa 2016)

- Plaintiffs initiated a class action against West Bank challenging NSF fees it charged when Plaintiffs used debit cards to create overdrafts in their checking accounts.
- The Petition included usury claims under the Iowa Consumer Credit Code alleging NSF fees amounted to a finance charge in excess of 21% in violation of Iowa Code § 537.2201 and claims for unjust enrichment and breach of duties of good faith arising from West Bank's decision to change the sequencing process of posting transactions from low-to-high to high-to-low, which resulted in more NSF fees to customers.
- The Court found payment of an overdraft is not an extension of credit under the ICCC. The ICCC defines credit as the right granted by a person extending credit to a person to defer payment of debt, to incur debt and defer its payment, or to purchase property or services and defer payment therefor. The contract with customers does not extend a right to defer payment. It gives the bank the right to immediately collect payment as soon as a customer deposits sufficient funds to cover overdraft. The overdraft advanced is due and payable at the time the account is overdrawn. Plaintiffs pointed to other cases where overdrafts were treated as an unsecured loan or extension of credit, but the Court distinguished those cases noting the ICCC definition of "credit" is narrower than the common law definition.
- Plaintiffs claimed West Bank breached implied and express duties of good faith when it changed the sequencing order without informing customers. The Deposit Agreement provided the bank had an obligation to Depositor to exercise good faith in connection with each account. Before the bank made change, it consulted with compliance officer and concluded in an internal memo it should notify customers, but did not. The Court found the district court should consider these claims.
- The Iowa Supreme Court found the Plaintiffs' unjust enrichment claim could not proceed because there were express contracts (agreements, signature card) that allowed for the sequencing changes.

Class Action Certification

Legg v. W. Bank, 873 N.W.2d 756 (Iowa 2016)

- In a separate opinion, The Iowa Supreme Court affirmed the district court with respect to claims of breach of good faith.

- IRCP 1.261 provides the basic requirements of a class (a is class is so numerous that joinder would be impracticable and common questions of law or fact predominate).
- Numerosity was stipulated. The bank argued individual issues would predominate as Plaintiffs would have to prove date, amount of OD, NSF fees, etc., but the Court rejected this argument.
- IRCP 1.262 provides that a court may certify if a class action will promote fair and efficient adjudication and reps fairly and adequately will protect interests of the class. This requires analysis of many factors, including judicial economy, common interest of the class members, conflict of law issues, and others. The trial court has broad discretion in weighing the various factors.

Constitutionality of Ag Leases Lasting More than 20 Years and Claim Preclusion

Gansen v. Gansen, 874 N.W.2d 617 (Iowa 2016)

- Francis Gansen created a Trust that received two tracts of farm land. The Trust entered into two identical leases with James Gansen commencing in 1997. The leases called for annual reconsideration of rental rates.
- First Round of litigation: In 2007, after unsuccessful negotiation of rent, Trustee filed declaratory action against James claiming he breached the lease by refusing to cooperate in good faith; asking the court to determine a fair rental rate; and seeking a determination the leases terminated for failure to include a material term. The district court found James's refusal to negotiate was not a breach but set a rental rate.
- Second Round of Litigation: Trustee filed another declaratory action after the parties could not reach an agreement in 2013, alleging James breached duty of good faith; that the leases violated the Iowa Constitution; and that the leases terminated pursuant to notices of termination filed by Trustee. James filed a counterclaim alleging the constitutional and termination claims were barred by res judicata.
- The Court noted the elements of res judicata were met. Although not raised by the parties, the Court raised question of whether res judicata applies in a second action when the first is a declaratory action. The Court found it did not. The purpose of a declaratory action is to provide fast remedy. Requiring joinder of additional claims would complicate that action. Further, many declaratory actions are brought early in a potential dispute when the full nature of claims may not be known.
- The Iowa Constitution provides no lease of agricultural land shall be valid for a longer period than 20 years. Here, the lease was for 5 years with additional 5-year renewal periods at the option of the tenant. Here, only the tenant may opt out. Therefore, Landlord may be locked into a lease for 25 years, but tenant is not.
- Although the Constitutional provision was intended to protect tenants who suffered due to oppressive long term relationships with landlords, the language doesn't run solely in favor of tenants. Because one of the parties *may* be locked into an agricultural lease for more than twenty years, the lease is invalid after 20 years.

Mortgage Foreclosure, Statute of Limitations, and Rule 1.904

U.S. Bank Nat. Ass'n v. Callan, 874 N.W.2d 112 (Iowa 2016)

- The mortgagee obtained a decree of foreclosure in February 2010, filed a notice of rescission in March 2012, and filed a subsequent petition seeking foreclosure in October 2013.
- The mortgagor asserted that under Iowa Code § 615.1 the mortgagee had only two years to enforce its March 2012 judgment and failure to do so extinguished "all liens." The mortgagee argued that only the judgment lien is extinguished by the two-year statute of limitations in Iowa Code § 615.1 and that its rescission of the original foreclosure judgment was valid under Iowa Code § 654.17.
- The district court granted the mortgagee summary judgment. The mortgagor appealed. The court of appeals affirmed the judgment of the dc. The Iowa Supreme Court affirmed on further review.

Kobal v. Wells Fargo Bank, N.A., No. 13-1926, 2016 WL 363809 (Iowa Jan. 29, 2016)

- In addition to raising similar issues as in *U.S. Bank Nat. Ass'n v. Callan*, Kobal asserted an unclean hands defense to foreclosure. While there may be a question as to whether the unclean hands defense was adequately presented to the district court, the district court did not rule upon it and Kobal did not file a motion for enlargement under Iowa Rule of Civil Procedure 1.904(2). The unclean hands issue was therefore found to have been waived.

Parol Evidence

Lubbers v. MDM Pork, Inc., No. 15-0675, 2016 WL 742892 (Iowa Ct. App. Feb. 24, 2016)

- Ray Lubbers owned 80 acres of farm land. MDM, a corporation, decided to build a hog confinement facility. The parties executed a Real Estate Purchase Agreement in which MDM purchased some of Lubbers' property to use for the facility. Pursuant to an oral agreement between the parties, Lubbers received the manure produced at by the facility at no cost. MDM eventually dissolved and sold its property to another party who ceased allowing Lubbers to pump manure without payment.
- Plaintiff initiated an action claiming MDM breached the Real Estate Purchase Agreement, breached its oral contract to provide an easement for manure access, and made a fraudulent representation. The district court entered summary judgment for MDM, finding the agreement was a fully integrated contract and Plaintiff was barred from entering evidence of a separate manure agreement.
- Although the Real Estate Purchase Agreement contained an integration clause, given ambiguity in that agreement, the Iowa Supreme Court found the Plaintiff should not be barred from introducing evidence concerning the oral agreement for

the purpose of demonstrating the Real Estate Purchase Agreement was representative of the parties' agreement.

- The parol evidence rule should not be invoked to prevent a litigant the chance to prove a writing does not, in fact, represent what the parties understood to be their agreement. The language in the Real Estate Purchase Agreement was merely an "agreement to agree" and not an enforceable contract. *See Scott v. Grinnell Mut. Reins. Co.*, 653 N.W.2d 556, 562 (Iowa 2002).

Filing Deadlines

Concerned Citizens of Se. Polk Sch. Dist. v. City Dev. Bd. of State, 872 N.W.2d 399 (Iowa 2015)

- This case addressed whether the time to file a notice of appeal in an electronically filed case begins on the day the notice of filing is electronically transmitted or the day the court order from which the appeal is taken has been electronically filed.
- The Iowa Supreme Court held the time to file a notice of appeal is calculated from the date the applicable judgment or order of the trial court was filed.
- The Court determined the notice of appeal filed in this case was untimely and there was no jurisdiction to consider the case.

Uzma Amin v. Iowa Dep't of Human Servs., No. 14-0399, 2016 WL 275276 (Iowa Jan. 22, 2016)

- An order was e-filed on February 3, 2014. On February 4, the Electronic Data Management System generated the electronic notice of the order, which included the "Official File Stamp: 02-03-2014:15:16:29." On March 6, thirty-one days after the order was filed, Amin filed a notice of appeal, which noted the order's issuance on February 3. The Iowa Rules of Appellate Procedure require a notice of appeal "be filed within 30 days after the filing of the final order or judgment." Iowa R. App. P. 6.101(1)(*b*). Based on the decision in *Concerned Citizens of Southeast Polk School District v. City Development Board*, the Court found the notice of appeal was untimely and dismissed the appeal.

Piercing the Corporate Veil

Minger Const., Inc. v. Clark Farms, Ltd., 873 N.W.2d 301 (Iowa Ct. App. 2015)

- Minger contracted with the City of Terril to upgrade its sewer system. Minger subcontracted with Clark Farms to remove "sludge". Kevin Clark was the sole owner, shareholder, board member, and president of Clark Farms. Clark Farms failed to perform and Minger terminated the contract and sued for breach of

contract. A jury found Clark Farms breached the contract and that Kevin Clark was personally liable for the breach.

- The jury instructions set forth factors the jury could consider in deciding whether an abuse of the corporate privilege was established, including undercapitalization, the failure to maintain separate books, and failure to follow corporate formalities.
- The Court of Appeals found a reasonable juror could have found the existence of those factors because Kevin Clark allowed the corporate registration to lapse, made $530,000 in loans to the company to keep it funded, and personally lost over $800,000 over the life of the company. The Court affirmed shareholder personal liability for corporate debt involving breach of contract.
- Judge McDonald advocated in a partial dissent a change in the law that veil piercing be decided by the court rather than the jury.

Keith Smith Co. v. Bushman, 873 N.W.2d 776 (Iowa Ct. App. 2015)

- Duane and Shirley Bushman are each 50% owners of FGP, which was created to purchase eggs for hatching, coordinate delivery of hatched chicks to contract growers, and then coordinate delivery for processing. Keith Smith Co. initiated a breach of contract action against FGP for unpaid invoices under a Hatching Agreement. Over the course of about five months, Keith Smith Co. received payment for a number of shipments, but was owed nearly $250,000 on past due invoices.
- After a bench trial, the court entered a ruling piercing the corporate veil and imposing personal liability on the Bushmans, noting the Hatching Agreement was signed before FGP's formation and FGP did not secure a line of credit, had no employees, moved funds between related entities, and was not adequately capitalized to fund the egg purchases from Keith Smith or pay other expenses.
- The Court of Appeals found the trial court's fact findings supported by substantial evidence and found the court did not rely solely on the inadequacy of the capitalization of Farmer Grown Poultry; rather, its findings supported a determination that adherence to the corporate structure would promote an injustice to the creditor Keith Smith. The Court also denied Keith Smith's cross-appeal finding there was no basis to impose liability on other Bushman related entities under an alter ego theory.
- Judge McDonald, in a partial dissent, stated he would hold personal liability should not be imposed on members of an LLC for the LLC's obligations due to inadequate capitalization of the LLC where the judgment creditor's claim arises in contract, where the judgment creditor had the opportunity to obtain financial statements and other credit information prior to entering the contract, where the judgment creditor had the opportunity to price and allocate the risk of loss by requesting personal guaranties or other security, and where the judgment creditor failed to do so. He noted a court should impose personal liability on a member of an LLC for its obligations "only in the most exceptional of circumstances."

2016 Commercial & Bankruptcy Law Seminar

How to Lose your Appeal Without Trying

11:15 a.m.- 12:00 p.m.

Presented by

Hon. Charles L. Nail, Jr.
Chief Bankruptcy Judge,
District of South Dakota
400 South Phillips Avenue
ioux Falls, South Dakota 57104

Hon. Anita Shodeen
Chief Bankruptcy Judge
Southern District of Iowa
110 E Court Avenue, Ste. 447
Des Moines, IA 50309

Friday, April 22, 2016

Bankruptcy Appeals:
A Litigant's Manual for Appeals
Before the Eighth Circuit BAP

Susan M. Spraul
Clerk, Ninth Circuit BAP

Cindy Harrison
Coordinator, Eighth Circuit BAP

Revised December 2014

TABLE OF CONTENTS

I. INTRODUCTION

These materials are designed to assist attorneys and litigants involved in a bankruptcy appeal before the BAP. The analysis contained herein is summary in nature, is not intended as legal advice, and is no substitute for legal research. It is the responsibility of attorneys and litigants to review and comply with applicable laws and rules governing appellate practice and procedure.

The federal rules governing bankruptcy appeals (Part VIII of the Federal Rules of Bankruptcy Procedure (FRBP)) may be found at:

http://www.uscourts.gov/uscourts/rules/bankruptcy-procedure.pdf

The BAP's local rules may be found at:

http://www.ca8.uscourts.gov/panel-rules-and-publications

Where national and local rules are silent or where they so specify, the Federal Rules of Appellate Procedure (FRAP) and the Local Rules of the United States Court of Appeals for the Eighth Circuit (Circuit Rules) may also apply. L.R. BAP 8th Cir. 8001A(b)(4). The FRAP and the Circuit Rules may be found at:

http://www.ca8.uscourts.gov/rules-procedures

II. JURISDICTION OF THE BAP

Under the Bankruptcy Code, the district court has always had the jurisdiction to review decisions of a bankruptcy court. 28 U.S.C. § 158(a).[1] The Bankruptcy Reform Act of 1978 (the "Bankruptcy Code"), which became effective on October 1, 1979, authorized circuits to establish BAPs. 28 U.S.C. § 158(b). The Eighth Circuit established a BAP which began hearing bankruptcy appeals on January 1, 1997.[2]

Specific issues of appellate jurisdiction are discussed in sections V and VII.G, below.

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[1] 28 U.S.C. § 158(a) provides:

> (a) The district courts of the United States shall have jurisdiction to hear appeals
>
> (1) From final judgments, orders, and decrees;
>
> (2) From interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and
>
> (3) With leave of the court, from other interlocutory orders and decrees;
>
> and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceeding referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving. [Redundancy in original.]

[2] Currently, the First, Sixth, Ninth and Tenth Circuits have also established a BAP. In December 1999, the Second Circuit discontinued its BAP, as only a few of the smaller districts in that circuit participated (significantly, the Southern District— New York City— did not authorize bankruptcy appeals to the Second Circuit BAP). District judges must authorize appeals to the BAP from their districts (28 U.S.C. § 158(b)(6)). All of the districts of the Eighth Circuit have granted that authorization.

III. INTRODUCTION TO THE BAP

Six bankruptcy judges from districts within the Eighth Circuit serve on the BAP. All maintain a regular trial docket in their home districts. The six members of the BAP are as follows:

Hon. Arthur B. Federman, Kansas City, MO, Chief Judge
Hon. Robert J. Kressel, Minneapolis, MN
Hon. Barry S. Schermer, St. Louis, MO
Hon. Thomas L. Saladino, Lincoln, NE
Hon. Charles L. Nail, Jr., Sioux Falls, SD
Hon. Anita L. Shodeen, Des Moines, IA

Each appeal is heard by a panel of three judges. No bankruptcy judge may hear an appeal originating from his or her district. 28 U.S.C. § 158(b)(5).[3]

[3] 28 U.S.C. § 158(b)(5) provides:

> An appeal to be heard under this subsection shall be heard by panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

The BAP hears cases as they arise, with the three-judge panels traveling to various venues in the Eighth Circuit

Michael E. Gans, Clerk of the Eighth Circuit Court of Appeals, serves as Clerk of the BAP. Cindy Harrison serves as Panel Coordinator.

Address: U.S. Bankruptcy Appellate Panel for the Eighth Circuit, Thomas F. Eagleton Courthouse, 111 South Tenth Street, St. Louis, MO 63102
Phone: 314-244-2430
Website: www.ca8.uscourts.gov
Email: cindy_harrison@ca8.uscourts.gov

IV. PRACTICE BEFORE THE BAP AND ELECTRONIC FILING

An attorney admitted to practice before the Court of Appeals for the Eighth Circuit, and in good standing before that court, may practice before the BAP. No separate admission fee shall be required. An attorney who is not admitted may file a written pleading but may not appear to present oral argument. L.R. BAP 8th Cir. 8026A(a).

Effective October 7, 2009, electronic filing is mandatory for all BAP filers unless granted an exemption. L.R. BAP 8th Cir.8011A(a).

Here are a few procedural highlights:

- Document Filing: All documents must be filed electronically. Counsel no longer needs to prepare an appendix on appeal; rather, the record on appeal will consist of the bankruptcy court's electronic docket. Original exhibits not available electronically must be scanned by counsel and filed through CM/ECF.

- Briefs: References in a brief to the bankruptcy court record must indicate the exact docket entry where that document can be found, or a hyperlink to the document.

- Service: Service shall be made by CM/ECF upon the filing of a document. However, a paper copy must be served on any party who is not a CM/ECF participant; such documents shall be accompanied by a certificate stating the date and method of service, as well as the address to which the document was served. Paper copies need not be served on any party receiving electronic notice.

- Paper documents: Paper documents received by the clerk will be scanned and attached to the public docket.
- Filing Deadlines: An electronic filing completed before midnight Central Time will be entered on the docket as of that date.

- Technical Requirements: All pleadings should be submitted in PDF format and should be generated by printing to PDF from the original word processing file so the text may be searched and copied. Scanning is only acceptable for exhibits which are otherwise not available in a word-processing file version.

- Sealed documents: Sealed documents and motions for permission to file documents under seal shall be filed in paper format. The motion should state whether the motion to seal should remained sealed as well.

- Privacy: Do not include (or partially redact if necessary) minor's names (use initials only); social security numbers (last 4 digits only); dates of birth (year only); financial account numbers (identify type of account, institution, and last 4 digits of account number); and home addresses (use phrase such as "4000 block of Elm").

V. STARTING THE APPEAL PROCESS

A. Time and Method for Filing a Notice of Appeal

A notice of appeal must be filed with the bankruptcy court within 14 days of entry of the judgment, order, or decree appealed from. FRBP 8003(a) and 9006(a). If a timely notice of appeal is filed, any other party may file a notice of appeal (often a cross-appeal) within 14 days of the date on which the first notice of appeal was filed. Id. The timely filing of a notice of appeal is "mandatory and jurisdictional." Browder v. Director, Dep't of Corrections, 434 U.S. 257, 264 (1978); see also Jacobson v. Nielsen, 932 F.2d 1272 (8th Cir. 1991).

Discretionary extensions may be granted by the bankruptcy court, with some exceptions,[4] upon written motion. Any extension granted may not exceed the later of: (1) 21 days from the expiration of the time for filing a notice of appeal, or (2) 14 days from the entry of the extension order. FRBP 8002(d)(2).

[4] FRBP 8002(d) prohibits the bankruptcy court from extending the time to appeal orders granting relief from stay; authorizing sale or use of property, extensions of credit and use of cash collateral; assumption and assignment of executory contracts; approval of a Chapter 11 disclosure statement; and confirmation of a plan under Chapters 9, 11, 12 and 13.

If the motion is filed not later than 21 days after the expiration of the original 14-day period, an extension may be granted upon a showing of excusable neglect. See Jacobson v. Nielsen, 932 F.2d at 1272-73. FRBP 8002(d)(1). Once the appeal period has expired, it cannot be resurrected. The BAP may not extend the time requirements of FRBP 8002. See FRBP 8028 and 9006(b)(3).

B. Tolling Motions

If, within 14 days of entry of the judgment, order or decree, a party files a motion

(1) to amend or make additional findings of fact under FRBP 7052,
(2) to alter or amend the judgment under FRBP 9023,
(3) for a new trial under FRBP 9023, or
(4) for relief under FRBP 9024,

then the 14 days for filing an appeal runs from the entry of the order disposing of the last such motion outstanding. FRBP 8002(b).

A motion for reconsideration filed within 14 days may be considered a motion to "alter or amend the judgment" within the meaning of FRBP 8002(b). Hanson v. Sabala (In re Sabala), 334 B.R. 638, 640 (B.A.P. 8th Cir. 2005). See generally 16A Wright & Miller, Federal Practice & Procedure, § 3950.4. However, the better practice is to file a motion expressly under FRBP 7052, 9023, or 9024, as set forth in FRBP 8002(b).

An untimely post-judgment motion does not toll the time to appeal. Constellation Dev. Corp. v. Dowden (In re B.J. McAdams, Inc.), 999 F.2d 1221, 1225 (8th Cir. 1993).

C. Premature Notice of Appeal

A premature notice of appeal (a notice of appeal filed after the announcement of a decision but before entry of the judgment or order) is treated as filed after such entry and on the day thereof. FRBP 8002(a).

A separate second notice of appeal after entry of the order on appeal is not necessary.

A notice of appeal also is premature if an unresolved tolling motion is pending (see § V.B above).

D. Appeal Fees

A filing and docketing fee of $298 is required and should be made payable to the "Clerk of Court." The fee should be paid to the bankruptcy court at the same time the notice of appeal is filed.

E. Election to the District Court (Opt-Out)

The appeal from the bankruptcy court automatically goes to the BAP unless a party timely elects to have the appeal heard by the district court. 28 U.S.C. § 158(b)(1).

A party might choose to have an appeal heard by the district court if other litigation or related appeals are already pending in the district court, or if there is adverse BAP authority on the party's issue.

- The Notice of Appeal and the Statement of Election may be in a combined document as of 12/1/14 - New Off Form 17A. FRBP 8005(a)requires use of the Official Form or a form substantially conforming to it.

- Deadline for appellant's Statement of Election. The appellant's election must be filed at the same time as the notice of appeal, or as part of the notice of appeal. 28 U.S.C. § 158(c)(1); FRBP 8005.

- "Any other party" (e.g., the appellee) must make the election not later than 30 days after service of notice of the appeal. 28 U.S.C. § 158(c)(1); Official Form 17B.

- FRBP 8005(c) allows parties to challenge the validity of an election in the court where the appeal is pending within 14 days after the election is made.

F. Petition to Appeal Directly to Court of Appeals

1. Where the underlying bankruptcy case was filed on or after October 17, 2005, the parties may petition for permission to appeal directly to the Court of Appeals. Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") § 1501.[5] The petition generally is brought before the Court of Appeals in the same manner as other permissive appeals under FRAP 5. See BAPCPA § 1233(b). A timely, effective notice of appeal from a bankruptcy court order or judgment is a prerequisite. FRBP 8006(a)(c).

2. Before the parties file their direct appeal petitions with the Circuit Clerk, they generally must first obtain a certification from either the bankruptcy court, the district court or the BAP, as contemplated in 28 U.S.C. § 158(d)(2)(B). If all of the parties to the appeal unanimously agree, then they may self-certify their appeal. See § V.F.6, infra.[6]

3. A request for certification must be filed in and determined by:

   i. the bankruptcy court, until the BAP dockets the appeal of a final order or judgment, or a motion for leave to appeal has been granted (whichever occurs first); or

   ii. the BAP, after: (a) the BAP dockets the appeal of a final order or judgment; or (b) the BAP grants leave to appeal; or

   iii. (if an election has been timely filed) the district court, after: (a) the district court receives and files a Certificate of Readiness; or (b) the district court grants leave to appeal.

   See FRBP 8006(b). See also 28 U.S.C. § 158(d)(2).

4. For purposes of determining where to file the request for certification, the appeal is deemed to be docketed at the BAP 30 days after the date the notice of appeal was filed. FRBP 8006(b). Therefore, a request for certification shall be filed with the bankruptcy court during the first 30 days after the notice of appeal and with the BAP thereafter. FRBP 8006(b).

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[5]BAPCPA § 1501 provides in relevant part: "Except as otherwise provided in this Act and paragraph (2) [exceptions not applicable here], the amendments made by this Act shall not apply with respect to cases commenced under title 11, United States Code, before the effective date of this Act [October 17, 2005]. Under BAPCPA § 1501, the direct appeal provisions do not apply to appeals arising out of bankruptcy cases filed before October 17, 2005. In re McKinney, 457 F.3d 623, 624 (7th Cir. 2006). Berman v. Maney (In re Berman), 344 B.R. 612, 615 (9th Cir. BAP 2006).

[6]For an example of a certification of an interlocutory appeal, see eCast Settlement Corp. v. Washburn (in re Washburn), 579 F.3d 934 (8th Cir. 2009).

5. The court in which the certification request is properly filed must serve the request on all parties to the appeal. FRBP 8006(f)(2).

6. If all of the parties to the appeal unanimously agree that a direct appeal is appropriate, then their self certification must be filed in the appropriate court. FRBP 8006(b) and (c). While there is a sixty-day time limit for certification requests made pursuant to 28 U.S.C. § 158(d)(2)(B) (see 28 U.S.C. § 158(d)(2)(E)), there is no express time limit specified for self- certifications, or for a court certification made on the court's own motion.

7. Once a certification is entered on the court's docket, the parties have 30 days to file their petition to appeal to the Court of Appeals with the Clerk of the Court of Appeals. FRBP 8006(g).

8. Absent an order to the contrary, neither the issuance of a certification nor the Circuit's granting of a petition for permission to appeal suspends prosecution of an appeal before the BAP or the district court. 28 U.S.C. § 158(d)(2)(D). If the Circuit grants the direct appeal petition, the BAP might either stay or dismiss the corresponding BAP appeal.

9. If leave to appeal is required by 28 U.S.C. § 158(a) and has not yet been granted by the BAP or district court, the authorization of a direct appeal by a court of appeals under 28 U.S.C. § 158(d)(2) shall be deemed to satisfy the requirement for leave to appeal. FRBP 8004(e).

G. Final Orders vs. Interlocutory Orders

In general, the BAP has jurisdiction to hear bankruptcy appeals from final judgments, orders, and decrees. See 28 U.S.C. § 158.

In addition, the BAP has jurisdiction to hear appeals from two types of interlocutory orders:

(1) Orders under 11 U.S.C. § 1121(d) increasing or reducing exclusivity time periods, 28 U.S.C. § 158(a)(2); and

(2) Interlocutory orders as to which the BAP grants a motion for leave to appeal, 28 U.S.C. § 158(a)(3). See generally 16 Wright & Miller, Federal Practice & Procedure § 3926.2.

The BAP lacks jurisdiction to hear appeals from interlocutory orders (except § 1121(d) orders) unless and until the BAP grants leave to appeal.

1. Definition of Finality

The standard for determining finality in the bankruptcy context is more flexible than in other areas. Contractors, Laborers, Teamsters & Eng'rs Health & Welfare Plan v. Killips (In re M & S Grading, Inc., 526 F.3d 363, 368 (8th Cir. 2008). While this test is more liberal than in an ordinary civil case where a complete act of adjudication ends the litigation on the merits and leaves nothing for the court to do but execute the judgment, a bankruptcy order is final if it finally resolves a discrete segment of the underlying proceeding, also referred to as a relevant judicial unit of the proceeding. Id.; Official Committee of Unsecured Creditors v. Farmland Indus., Inc. (In re Farmland Industries, Inc.), 397 F.3d 647, 649-50 (8th Cir. 2005); Drewes v. St. Paul Bank for Coops (In re Woods Farmers Coop. Elevator Co.), 983 F.3d 125, 127 (8th Cir. 1993); Kubicik v. Apex Oil Co. (In re Apex Oil Co.), 884 F.2d 343, 347 (8th Cir. 1989).

The relevant factors in determining finality in the bankruptcy context are the extent to which (1) the order leaves the bankruptcy court nothing to do but execute the order; (2) delay in obtaining review would prevent the aggrieved party from obtaining effective relief; and (3) a later reversal on that issue would require recommencement of the entire proceeding. In re M & S Grading, Inc.,

526 F.3d at 368; In re Farmland Industries, Inc., 397 F.3d at 650; In re Apex Oil Co., 884 F.2d at 437.

2. Separate Document Rule

As of December 1, 2009, judgments or orders entered in contested matters do not need to comply with the separate judgment requirement. FRBP 9021 ("A judgment or order is effective when entered under Rule 5003.") and accompanying Advisory Committee Note ("The entry of judgment in adversary proceedings is governed by Rule 7058, and the entry of a judgment or order in all other proceedings is governed by [FRBP 5003].").

3. Leave to Appeal

To appeal an interlocutory order, one must file a notice of appeal along with a motion for leave to appeal. FRBP 8004(a).

Although filed in the bankruptcy court, the leave motion is sent to the Panel, and the Panel is the court which grants or denies leave. The motion for leave to appeal must contain: (1) the facts necessary to understand the question presented; (2) the question itself; (3) the relief sought; (4) the reasons why leave to appeal should be granted; and (5) a copy of the interlocutory order or decree and any related opinion or memorandum. FRBP 8004(b)(1).

Depending upon the nature of the interlocutory order, the appellant can also seek certification from the bankruptcy judge under FRCP 54(b), made applicable by FRBP 7054 and 9021 (through FRCP 58).

If the bankruptcy court makes an "express determination that there is no just reason for delay" in entry of a final judgment on a distinct claim or cause of action, the bankruptcy court may direct entry of a final judgment and the matter is then final as to that claim for purposes of appeal.

An order that purports to be a final order on fewer than all causes of action or parties will not be considered final absent such express determination and direction.

a. Standard for Granting Leave to Appeal

In deciding whether to grant leave to appeal, the BAP typically applies the standards found in 28 U.S.C. § 1292(b), which define the jurisdiction of courts of appeal to review interlocutory orders. Gen. Elec. Capital Copr. v. Machinery, Inc. (In re Machinery, Inc.), 275 B.R. 303, 306 (B.A.P. 8th Cir. 2002). Section 1292(b) requires that: (1) the question involved be one of law; (2) the question be controlling; (3) there exists a substantial ground for difference of opinion respecting the correctness of the appealed decision; and (4) a finding that an immediate appeal would materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b); FL Receivables Trust, 2002-A v. Gilbertson Restaurants, LLC (In re Gilbertson Restaurants, LLC), 315 B.R. 845, 849 (B.A.P. 8th Cir. 2004); In re Machinery, Inc., 275 B.R. at 306. Review of interlocutory orders should be granted sparingly and only in exceptional cases. In re Machinery, Inc., 275 B.R. at 306.

The BAP's decision to deny leave to appeal is an exercise of discretion. Union County, Iowa v. Piper Jafray & Co., Inc., 525 F.3d 643, 646 (8th Cir. 2008)(appellate court possesses discretion to hear an interlocutory appeal and may refuse to exercise jurisdiction for any reason).

b. Direct Appeal

The authorization of a direct appeal by a court of appeals shall be deemed to satisfy the requirement for leave to appeal. FRBP

8004(e).

VI. THE RECORD ON APPEAL

A. Designation of the Record and Issues on Appeal

FRBP 8009 requires the appellant to file and serve a designation of items to be included in the record on appeal and a Statement of Issues on Appeal within 14 days after filing the notice of appeal. However, L.R.BAP 8th Cir. 8018A states the list of relevant bankruptcy court docket entry numbers may be filed as a separate document or may be attached to a party's initial brief. The designation should be filed with the clerk of the BAP. In addition to those documents referenced in Rule 8009, the designation of record should specifically include any exhibits received into evidence in the bankruptcy court which are to be considered on appeal. If those exhibits are not available electronically on the bankruptcy court docket, counsel **must** scan them and file them onto the BAP docket. L.R. BAP 8th Cir. 8009A.

The appellee may file a counter-designation of record with the clerk of the BAP 14 days after appellant has filed its designation of record or as a part of its brief.

If the matter on appeal was the subject of a hearing, the appellant should immediately deliver to the court reporter and file with the bankruptcy court clerk a written request for the transcript and make arrangements for payment. If a party is not ordering a transcript, the party must file a statement of not ordering a transcript. If a party is ordering a transcript, the party only needs a transcript of those parts of the proceeding not already on file. See FRBP 8009.

B. Completion of the Record

Preliminary Record: Promptly upon the filing of the notice of appeal, the clerk of the bankruptcy court shall transmit to the BAP a notice that an appeal has been taken.

Supplemental Record: The clerk of the bankruptcy court shall supplement the preliminary record by transmitting to the clerk of the BAP notice of any appeal-related post-judgment motions and orders. L.R. BAP 8th Cir. 8010A(b)

Docketing the Appeal: Upon receipt of the preliminary record, the BAP clerk shall docket the appeal and establish a schedule for the completion of the transcript and the filing of briefs. L.R. BAP 8th Cir. 8010A(d); FRBP 8010(b).

Transcript: When the reporter completes the transcript, the reporter files it with the clerk of the bankruptcy court. FRBP 8010(a)(2)(B). Upon the filing of the transcript, the clerk of the bankruptcy court shall transmit the transcript to the BAP clerk. Please note that the BAP **may not** accept transcripts from any source other than the bankruptcy court.

C. Consequences of Incomplete Record

The burden of presenting a proper record to the appellate court is on the appellant. Kubicik v. Apex Oil Co. (In re Apex Oil Co.), 884 F.2d 343, 348-49 (8th Cir. 1989). Unless the record before the appellate court affirmatively shows the matters on which appellant relies for relief, the appellant may not argue those matters on appeal. 10 L. King Collier on Bankruptcy ¶ 8006.03[1] (15th ed. rev. 2006).

The failure to provide an adequate record may result in affirmance where the appellant challenges a factual finding and a review of the issue is dependent upon the record. In re Apex Oil Co., 884 F.2d at 349.

VII. MOTIONS

A. Motions are to be filed onto the BAP docket electronically through CM/ECF. FRBP 8013(a)(2)(A).[7]

A motion must state with particularity the grounds for bringing the motion and set forth the relief sought. Declarations and supporting materials must be attached to the motion and should not be filed separately. FRBP 8013(a)(2)(C). The BAP does not hold hearings on motions.

On a substantive motion, the opposing party has seven days after service to file a response. FRBP 8013(a)(3).

Motions for procedural orders may be acted upon at any time without an opportunity to respond. FRBP 8013(b). Motions other than the type listed in Section VII B will be submitted to a panel of three judges for consideration.

[7]However, a motion for leave to pursue an appeal from an interlocutory order should be filed in the bankruptcy court with the notice of appeal. See FRBP 8001(b); 8003. For detailed information on interlocutory orders and leave motions, see section V.G., supra.

B. The BAP clerk has discretion to enter orders on procedural matters including: (1) applications for leave to file oversized briefs; (2) extensions of time to file briefs, transcripts, appendices; (3) extensions of time to designate the record; (4) corrections to briefs, pleadings, or the record; (5) supplementation of the record on appeal; (6) incorporation of the record from prior appeals; (7) consolidation of appeals; (8) substitution of parties; (9) motions to appear as amicus curiae; (10) requests by amicus curiae to participate in oral argument; (11) advancement or continuance of cases; (12) withdrawal of counsel; (13) extensions of time to file motions for rehearing, bills of costs, and motions for attorneys' fees; and (14) taxation of costs. L.R. 8th Cir. BAP 8013A(a).

C. Although a single judge may rule on a motion, rulings are usually made by a panel of three judges. Rulings made by a single judge may be reviewed by a panel of 3 judges. FRBP 8013(e).

D. Rulings by a motions panel are not binding on the merits panel. FL Receivables Trust, 2002-A v. Gilbertson Restaurants, LLC (In re Gilbertson Restaurants, LLC), 315 B.R. 845, 847 (B.A.P. 8th Cir. 2004)(administrative panel initially granted leave to file interlocutory appeal; merits panel ultimately dismissed interlocutory appeal).

E. Motions for Stay Pending Appeal

Requests for a stay pending appeal normally should be presented to the bankruptcy judge first. FRBP 8007(a). The bankruptcy court retains jurisdiction to rule on a motion for stay pending appeal after a notice of appeal has been filed.

Parties may file a motion for stay pending appeal directly with the appellate court only if an explanation is given why relief was not first sought from the bankruptcy court. FRBP 8007(b).

The bankruptcy court may require the posting of a bond as a condition of granting a stay pending appeal. FRBP 8007(e). If an appeal is from a money judgment in bankruptcy, the supersedeas stay is available as a matter of right. The court has discretion in determining the sufficiency of the bond and the adequacy of the surety. FRCP 62(d) by incorporation. If the BAP orders the stay, it may condition such stay on the filing of a bond with the bankruptcy court. FRBP 8007. A bond may be required of a trustee but not of the United States Trustee or any other office, agency, or department of the United States. FRBP 8007(d).

F. Motions to Dismiss for Lack of Jurisdiction

Appellants occasionally appeal an issue that the BAP does not have jurisdiction to consider for various reasons, including the appellants lack standing, the notice of appeal was untimely, or the appeal has become moot. Although jurisdictional issues may be raised by the court sua sponte, it generally makes sense for an appellee to file a motion to dismiss the appeal as early as possible to save the cost of briefing in a case that will ultimately be dismissed. Thus, it is important to recognize the following concepts of finality, standing and mootness in a bankruptcy context.

1. Untimeliness and Lack of Finality

Appeals can be either too early or too late (§§ V.A - V.C, V.G, above). Both defects can be the basis for a motion to dismiss for lack of jurisdiction.

2. Lack of Standing

Standing is a jurisdictional issue that is open to review at all stages of the litigation. National Org. For Women, Inc. v. Scheidler, 510 U.S. 249, 255 (1994). Questions of standing are reviewed de novo. See Sioux Falls Cable Television v. State of South Dakota, 838 F.2d 249, 251 (8th Cir. 1988); Williams v. Marlar (In re Marlar), 252 B.R. 743, 748 (B.A.P. 8th Cir. 2000). Because standing is a jurisdictional requirement, the BAP must dismiss an appeal when no standing exists.

Neither the Bankruptcy Code nor Title 28 lays out the requisites for appellate standing. See 1 Collier on Bankruptcy ¶ 5.06. The Court of Appeals and the BAP follow the "person aggrieved" standard for standing in bankruptcy appeals. See Zahn v. Fink (In re Zahn), 526 F.3d 1140, 1142 (8th Cir. 2008); Powers v. Odyssey Capital Group, LLC (In re Mesaba Aviation, Inc.), 418 B.R. 756, 761 (B.A.P. 8th Cir. 2009); Yates v. Forker (In re Patriot Co.), 303 B.R. 811, 815 (B.A.P. 8th Cir. 2004).

Normally, only a bankruptcy trustee or a debtor-in-possession has standing on appeal to pursue or defend the rights of the bankruptcy estate. Moraztka v. Morris (In re Senior Cottages of America, LLC), 482 F.3d 997, 1001 (8th Cir. 2007); Mixon v. Andderson (In re Ozark Rest. Equip. Co., Inc.), 816 F.2d 1222, 1225 (8th Cir. 1987). A chapter 7 debtor usually lacks standing on appeal unless: (1) the debtor is pursuing or defending his or her own personal rights (as opposed to those of the bankruptcy estate); see e.g., In re Zahn, 526 F.3d at 1142; or (2) the bankruptcy estate might be a surplus estate. Kapp v. Naturelle, Inc. (In re Kapp), 611 F.2d 703, 707 (8th Cir. 1979); see also In re Patriot Co., 303 B.R. at 815 (shareholder standing requires a real possibility of a surplus estate).

The United States Trustee ("UST") has statutory standing conferred by 11 U.S.C. § 307 to appeal and to intervene in an appeal.

3. Mootness

In addition to the constitutional mootness implicit in the Article III "case" or "controversy" requirement, two lines of bankruptcy mootness cases have developed. One line focuses on the court's ability to fashion meaningful relief. See In re Mesaba Aviation, Inc., 418 B.R. at 762-63; Hartford Cas. Ins. Co. v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.), 214 B.R. 197, 201 (B.A.P. 8th Cir. 1997). This line includes orders which authorize the sale of property and which implement 11 U.S.C. § 363(m). Official Comm. of Unsecured Creditors v. Trism, Inc. (In re Trism, Inc.), 328 F.3d 1003, 1006-07 (8th Cir. 2003); Jefferson Co. v. Halverson (In re Paulson), 276 F.3d 389, 392 (8th Cir. 2002); Wintz v. Am. Freightways, Inc. (In re Wintz Cos.), 219 F.3d 807, 811 (8th Cir. 2000). Equity plays a role; thus although effective relief may conceivably be fashioned, the appeal may be moot if implementation of the relief would be inequitable. Blackwell v. Little (In re Little), 253 B.R. 427, 430 (B.A.P. 8th Cir. 2000).

The other line involves cases where there is no ongoing controversy. Lewis v,. Cont'l Bank Corp., 494 U.S. 472 (1990); see also In re Little, 253 B.R. at 430.

Examples of Mootness

The following are common examples of mootness in the bankruptcy context:

- When funds have been disbursed or when the failure to obtain a stay causes a change of circumstances to the point where it would be inequitable to consider the merits of the appeal, Briggs v. LaBarge (In re McGregory), 223 Fed. Appx. 530, 531 (8th Cir. 2007);

- Where substantial steps have been taken in implementation of a confirmed plan, Metro Prop. Mgmt. Co. v. Information Dialogues, Inc. (In re Information Dialogues, Inc.), 662 F.2d 475, 476 (8th Cir. 1981);

- Where real property central to the appeal has been foreclosed upon, United States v. Fitzgerald, 109 F.3d 1339, 1342 (8th Cir. 1997);

- Orders involving § 363(m), which approve a sale or lease of property, In re Trism, Inc., 328 F.3d at 1006-07; In re Paulson, 276 F.3d at 392; In re Wintz Cos., 219 F.3d at 811.

G. Emergency Motions

1. If the motion requests immediate action in order to avoid irreparable harm, the motion shall have a cover page bearing the legend "EMERGENCY MOTION" and the case caption. FRBP 8013(d)(1); L.R. 8th Cir. BAP 8013A(d).

2. A certificate of counsel for the movant shall follow the cover page and shall contain the following: (a) facts showing the existence and nature of the emergency; (b) the telephone numbers and office addresses of moving and opposing counsel and of parties not represented by counsel; (c) when and how the other parties were notified and whether they have been served; or, if not, the reasons why not; and (d) if the relief was available in the bankruptcy court, a statement as to whether all grounds advanced in support of the motion were submitted to the bankruptcy court and, if not, the reasons why not. FRBP 8013(d)(2); L.R. 8th Cir. BAP 8013A(d)(2).

3. The emergency motion shall include an appendix with: (a) a copy of the notice of appeal; (b) a copy of the judgment, order or decree appealed; and (c) a copy of the bankruptcy court's order denying the emergency relief. L.R. 8th Cir. BAP 8011A(d)(3).

4. The movant must file and serve as quickly as possible all documents relevant to the motion. FRBP 8013(d)(3); L.R. 8th Cir. BAP 8013A(d)(3).

H. Writ of Mandamus

Although it denied a petition for a writ of mandamus on the merits in Salter v. Bankruptcy Court (In re Salter), 279 B.R. 278 (9th Cir. BAP 2002), the Ninth Circuit BAP in a case of first impression concluded that it did have the power to issue such a writ because the BAP is a court "established by Act of Congress" which is authorized by the All Writs Act to issue writs of mandamus.

VIII. BRIEFING THE ISSUES

Rules 8014-8018 apply to briefs in bankruptcy appeals.

A. Filing and Formatting

1. Unless the BAP orders otherwise, the appellant's brief is due 30 days after entry of the appeal on the BAP docket or 30 days after the date set for the filing of a transcript. FRBP 8018(a)(1).
2. The appellee's brief is due 30 days after service of appellant's brief. FRBP 8018(a)(1). If appellee has filed a cross appeal, the appellee's brief shall contain a response to appellant's brief and the issues and argument pertinent to the cross appeal. FRBP 8016(c)(2).

3. The appellant may file a reply brief within 14 days after service of appellee's brief. FRBP 8018(a)(3).

4. In a cross appeal, the appellee may file a reply to the response of appellant to the issues presented in the cross appeal within 14 days after service of appellant's reply brief FRBP 8016(e)(3).

5. Contents of Briefs. Briefs shall conform to FRBP 8014 (8016 for cross appeals) and L.R. 8th Cir. BAP 8014A and 8015A. The appellant's brief shall contain under appropriate headings: (1) a table of contents, table of cases, statutes and other authorities, with references to the pages of the brief where they are cited; (2) a statement of the basis of appellate jurisdiction; (3) a statement of the issues presented and the applicable standard of review; (4) a statement of the case; (5) a statement of facts with appropriate references to the record; (6) an argument; and (7) a short conclusion stating the precise relief sought.

FRBP 8014(a).

The appellee's brief shall conform to the same requirements established for the appellant's opening brief except that a statement of the basis of appellate jurisdiction, issues, or the case need not be made. FRBP 8014(b).

6. Opening briefs must include certifications of (1) interested parties, and (2) related cases. L.R. 8th Cir. BAP 8014A(b)(1) and (2).

7. Length of Briefs. The appellant's and appellee's initial briefs shall not exceed 6500 words and reply briefs shall not exceed 3900 words, exclusive of pages containing table of contents, table of citations, statement of the basis of appellate jurisdiction, statement of issues and standard of review. The filing party must include in the brief a certificate stating the number of words contained in the body of the brief. L.R. 8th Cir. BAP 8015A.

8. Reference to Excerpts of Record. The briefs must indicate the docket entry where a cited document can be found either by (1) a hyperlink to the docket entry, page and line or (2)the docket number, page, and line.

9. Appendix to Brief (Excerpts of the Record). Parties shall not file an appendix in paper form. Parties may comply with the requirement to file an appendix as set forth in Fed.R.Bankr.P. 8018(b) by filing a list of relevant bankruptcy court docket entry numbers in lieu of copies of the pleadings. This list may be filed as a separate document or may be attached to a party's initial brief. Original exhibits which are not available electronically from the bankruptcy court docket must be scanned and filed through CM/ECF. L.R. 8th Cir. BAP 8009A and 8018A.

B. Standards of Review

The appellant's opening brief must state the appropriate standard of review for the appeal. FRBP 8014(a)(5). Both sides should be familiar with the standard under which the appellate courts will review each issue. Findings of fact are reviewed for clear error, FRBP 8013, and legal issues are generally reviewed de novo, which means that the appellate court looks at the entire record before the bankruptcy court and gives no deference to the bankruptcy judge's legal conclusions. Mixed questions of law and fact are reviewed de novo. Knudsen v. Internal Revenue Service, 581 F.3d 696, 704 (8th Cir. 2009); McCarty v. Lasowski (In re Lasowski), 575 F.3d 815, 818 (8th Cir. 2009); Drewes v. Vote (In re Vote), 276 F.3d 1024, 1026 (8th Cir. 2002); Papio Keno Club, Inc. v. City of Papillion (In re Papio Keno club, Inc.), 262 F.3d 725, 728-29 (8th Cir. 2001).

The abuse of discretion standard of review applies to many types of bankruptcy court orders. A bankruptcy court necessarily abuses its discretion if it bases its decision on an erroneous view of the law or clearly erroneous factual findings. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990). Before reversal is proper under the abuse of discretion standard, the Panel must be definitely and firmly convinced that the bankruptcy court committed a clear error of judgment. Peterson v. Weber (In re Weber), 392 B.R. 760 (8th Cir. BAP 2008).

The Panel does not reverse for harmless error, i.e., an error not affecting substantial rights of the parties, and may affirm for any reason supported by the record. 28 U.S.C. § 2111; FRCP 61, incorporated by FRBP 9005.

C. Service

Copies of all papers filed by any party (and not required by the rules to be served by the clerk of the BAP) shall, at or before the time of filing, be served by the party or a person acting for the party on all other parties to the appeal. Service on a party represented by counsel shall be made on counsel. FRBP 8011(b). A document is served by cm/ecf when it is filed. A document must by accompanied by proof of service on any party who is not a cm/ecf participant.

D. Motions for Extension of Time

1. Procedure. If a party seeks to file a brief but is unable to do so within the time prescribed by the BAP's scheduling order, the party may move for an extension of time for filing a brief. L.R. 8th Cir. BAP 8013A(c). Requests for extensions should be limited to what is justified under the circumstances. A motion for an extension of time for filing a brief shall be made within the time limit prescribed by the BAP Rules for the filing of such brief and shall be accompanied by a proof of service on any party not a cm/ecf participant. L.R. 8th Cir. BAP 8013A(c)(1).

2. Contents. The motion shall be supported by a declaration stating the time when the brief is due, how many extensions of time, if any, have been granted, when the brief was first due, and whether any previous requests have been denied or denied in part. The motion shall also state the reasons why such an extension is necessary and the amount of time requested. If the motion requests an extension on the ground that the transcript is unavailable, the movant must affirmatively show that the transcript was timely ordered and paid for or must state why the transcript was not so ordered. L.R. 8th Cir. BAP 8013A(c)(2)-(3).

E. Issues on Appeal

1. FRBP 8014(a)(5) requires appellant to file a statement of issues to be decided. The statement of issues shall be contained in the brief.

2. Generally, the BAP will not consider issues not presented to the bankruptcy court in the first instance. First Bank Investors' Trust v Tarkio College, 129 F.3d 471, 477 (8th Cir. 1997).

3. However, it is not unusual for an appellate court to recognize an issue important to an appeal and not raised by the parties. Reynolds v. Penn. Higher Educ. Assistance Agency (In re Reynolds), 425 F.3d 526, 536 n.8 (8th Cir. 2005)(Bright, J., concurring). An appellate court is well within its authority to ask the parties to brief an obvious issue not presented at trial. Id.

   Furthermore, appellate courts recognize an exception to the general rule and will consider an issue where necessary to prevent a miscarriage of justice or substantial injustice. Exec Tech Partners v. Resolution Trust Corp. (In re Exec Tech Partners), 107 F.3d 677, 681 (8th Cir. 1997).

4. In addition, the BAP must consider matters affecting its jurisdiction sua sponte even if not briefed by the parties. Contractors, Laborers, Teamsters & Eng'rs Health & Welfare Plan v. Killips (In re M & S Grading, Inc., 526 F.3d 363, 367 (8th Cir. 2008).

5. An appellate court generally will not consider an issue raised by an appellant for the first time in a reply brief; Resolution Trust Corp. v. Ambruster, 52 F.3d 748, 751 n.2 (8th Cir. 1995); nor will they consider an issue first raised at the en banc stage of an appeal. Hartford Underwriters Ins. Co. v. Magna Bank (In re Hen House Interstate, Inc), 177 F.3d 719, 724 (8th Cir. 1999).

F. Developments while Appeal Pending

1. Duty of Attorneys. Attorneys have a "'continuing duty to inform the Court of any development which may conceivably affect the outcome' of the litigation." Board of License Comm'rs v. Pastore, 469 U.S. 238, 240 (1985) (quoting Fusari v. Steinberg, 419 U.S. 379, 391 (1975)). See also Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n.23 (1997) ("It is

the duty of counsel to bring to the federal tribunal's attention, 'without delay,' facts that may raise a question of mootness.").

2. Procedures for Informing the BAP. If pertinent and significant authorities come to a party's attention after the party's brief has been filed--or after oral argument but before decision--a party may promptly advise the BAP clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited. See FRBP 8014(f).

3. Once the appeal is set for oral argument, it is particularly important to advise the BAP if the parties have settled or are in the process of settling. If settlement requires approval of the bankruptcy court, any motion for continuance should be supported by a declaration regarding the status of the settlement discussions and indicating whether a hearing on approval has been set before the bankruptcy court.

G. Amicus Curiae Briefs

1. The BAP accepts amicus briefs on occasion. E.g., Babin v. Wilson (In re Wilson), 383 B.R. 729, 732 n.4 (B.A.P. 8th Cir. 2008); Amtech Lighting Servs. Co. v. Payless Cashways (In re Payless Cashways, Inc.), 230 B.R. 120 (B.A.P. 8th Cir. 1999).

2. FRBP 8017(a) provides the rules for submitting an amicus brief, as well as dictating the contents of the brief.

IX. ORAL ARGUMENT

A. Oral Argument

Oral argument shall be allowed in all cases unless both sides waive it or the BAP judges assigned to hear the appeal determines after examination of the briefs and record that oral argument is not needed. FRBP 8019(b). A party may file a statement setting forth the reasons why oral argument should be allowed. FRBP 8019(a).

Oral argument will not be allowed if the appeal is frivolous; the dispositive issue has been recently authoritatively decided; or the facts and legal arguments are adequately presented in the briefs and record and the decision process would not be significantly aided by oral argument. FRBP 8019(b).

B. Scheduling

Oral argument is scheduled by the BAP Coordinator as the case load permits.

C. Location of Hearing

The BAP clerk provides notice of the time and place of argument. The BAP can sit at any location in the Eighth Circuit. When economical and feasible, the appeal will be set for hearing in the district from which the appeal originated. Occasionally, counsel may be asked to travel to nearby districts to present oral argument.

D. Effective Oral Argument

1. Oral argument is typically limited to fifteen minutes per side. Parties aligned on the same side typically are asked to split their fifteen minutes. Appellants usually reserve

five of their fifteen minutes for rebuttal. Appellees generally are not allowed to reserve time for rebuttal. In cases of significant complexity or involving multiple parties, the Panel may grant additional time. Counsel believing that more time is needed should file a motion requesting more once the notice of oral argument has been received from the clerk.

2. Counsel should not attempt to address every fact and argument in the briefs; the BAP judges thoroughly review the briefs and the excerpts of record before oral argument. Rather, counsel should summarize the arguments and directly answer the judges' questions in order to clarify factual or legal issues or to address any concerns.

3. At oral argument, counsel should not make the mistake of disregarding or sidestepping a judge's question. Counsel's response may be the pivotal point in a judge's vote. Given the limited amount of time available, counsel should make every effort to satisfy the judges' concerns before moving on to the remainder of the argument.

4. Good appellate advocates are not wedded to their scripts. Counsel should be familiar with every aspect of the case, including the arguments of opposing counsel, pertinent facts, legal issues, controlling or persuasive case law, and the current procedural posture of the bankruptcy case. Counsel should also be prepared to elaborate on legal or factual issues that may not have been emphasized in their briefs, to explore a narrow legal issue, and to discuss the ramifications of a published decision. Fewer than fifteen minutes is certainly acceptable if there are no questions.

E. New Matters or Matters Outside of the Briefs

Generally, an appellate court will not consider matters that are not specifically and distinctly argued in the appellant's opening brief. Resolution Trust Corp. v. Ambruster, 52 F.3d 748, 751 n.2 (8th Cir. 1995).

X. SANCTIONS

Sanctions for frivolous appeals, in the form of just damages and single or double costs, are awarded only upon a separately-filed motion or after notice from the BAP and reasonable opportunity to respond. FRBP 8020.

XI. DECISIONS

G. After Oral Argument

The judges confer immediately after the hearing to come to a tentative decision. The judge assigned to write the disposition then circulates a draft for formal votes. Once all comments have been considered by the lead judge, and any concurrences or dissents have been prepared, the lead judge transmits the disposition to the BAP clerk, who files it on behalf of the Panel and serves the parties.

H. Mandate

The mandate returns jurisdiction over the matter to the bankruptcy court. The BAP issues a form that advises when the mandate is issued. It is issued seven days after the expiration of the time for filing a motion for rehearing. L.R. 8th Cir. BAP 8024A(b). The mandate is effective when issued.

I. Motions for Rehearing

FRBP 8022 requires motions for rehearing to be filed within fourteen days after entry of the judgment of the BAP. The Rule does not set forth standards for granting rehearing. FRAP 40, a similar provision, may provide guidance.

If a timely motion for rehearing has been filed, the time for appeal to the Court of Appeals begins to run from the entry of an order disposing of the motion for rehearing. FRAP 6(b)(2)(A); see also FRAP 6(b)(1)(A). Motions for rehearing will delay issuance of the appellate court's mandate until seven days after the order is entered. FRAP 41; L.R. 8th Cir. BAP 8024A(b).

D. Appeals to the Court of Appeals from Decisions of the BAP - FRAP 6

A notice of appeal to the Court of Appeals must be filed within 30 days after the entry of a final judgment/order of the BAP (60 days if the United States or an officer or agency thereof is one of the parties.) FRAP 4(a)(1) and FRAP 6.

The notice of appeal is filed with the clerk of the BAP. A filing fee of $505 is required and should be made payable to the “Clerk of Court.” A timely motion for rehearing under FRBP 8022 tolls the time for filing the notice of appeal. See FRAP 6(b)(2)(A).

Unlike the district court and the BAP, the Court of Appeals does not ordinarily have jurisdiction to hear interlocutory appeals. See 28 U.S.C. § 158(d). The order on appeal must be a final order of both the bankruptcy court and the district court or BAP. However, if the underlying bankruptcy case was filed on or after October 17, 2005, a party might be able to obviate the need for a final order by petitioning for a direct appeal to the Court of Appeals. See 28 U.S.C. § 158(d)(2)(A); FRBP 8004(e). (For a discussion of direct appeals, see section V.F, supra.)

Requests for stay pending appeal to the Court of Appeals are presented first to the BAP, in the same fashion as BAP appeal stay requests are initially made to the bankruptcy court. FRAP 8(a)(1)(A) (made applicable by FRAP 6(b)(1)(C)).

XII. BAP DECISIONS AS PRECEDENT

A. The Court of Appeals has not determined whether BAP decisions are binding. Official Committee of Unsecured Creditors v. Farmland Indus., Inc. (In re Farmland Indus., Inc.), 397 F.3d 647, 653 (8th Cir. 2005).

B. The BAP, for itself, regards the precedents established in prior published BAP opinions as binding on itself, absent changes in statute or controlling Court of Appeals or Supreme Court precedent. Greenwood Trust Co. v. Hurley (In re Hurley), 215 B.R. 391, 393 (B.A.P 8th Cir. 1997); Luedtke v. Nationsbanc Mortgage Corp. (In re Luedtke), 215 B.R. 390, 391 (B.A.P. 8th Cir. 1997).

XIII. CONCLUSION

This guide is merely an introduction to the world of bankruptcy appeals. It is a procedural road map that should be of assistance, but is no substitute for preparation and familiarity with the FRBP and the BAP Rules.

APPENDIX I
Do's and Don'ts for an Effective Appeal

DO:

1. **Know what relief you want** (and why).

2. **Know your audience**. BAP judges generally possess a level of expertise in bankruptcy matters superior to that of most district court judges and their law clerks.

3. **Understand the role of the appellate court**. While its dominant role is to assess whether the trial court reached the correct result, the appellate court is also concerned with the overall impact of its ruling on the general body of bankruptcy law.

4. **Clarify the standard of review** and frame arguments around that standard.

5. **Simplify the story**. Write with punch - short, crisp, essential facts.

6. **Organize your brief with short headings**, rather than long sentence headings.

7. **Paraphrase quotes whenever possible**. Long block quotes are soporific.

8. **Focus your appellant's argument** on areas where the judge's ruling is most susceptible to being reversed.

9. **Provide an adequate record**, and know what is in it. Follow the rules with respect to organizing, paginating and tabbing the record (appendix), so that the judges and law clerks can find pertinent excerpts quickly.

10. **Use a conversational tone** rather than a formally structured oral argument. This helps facilitate the transitions that are inevitable when interrupted with questions from the Panel. Feel free to take less than your allotted time. Expect the most questions to be asked of the party with the weakest position, and expect numerous questions about facts and procedure.

11. **Be honest and direct in answering the Panel members' questions**. Acknowledge the weaknesses of your case. Use policy arguments

sparingly, if at all.

12. **Listen to the questions being asked of your opponent** and be ready to fill in the blanks on matters of concern to the Panel.

DON'T:

1. Use many words when a few will do.

2. Make convoluted arguments.

3. Make grammatical or typographical errors.

4. Write in a disorganized and unintelligible manner.

5. Attack the trial judge or opposing counsel.

6. Use block quotes extensively.

7. Plagiarize/fail to attribute quoted sources

8. Overuse policy arguments or § 105.

9. Avoid direct answers to the judges' questions.

10. Deflect the question and distract the judge if it is not the question you wanted to hear.

11. Cut off the judge's question in mid-sentence.

12. Be ignorant of the record or mischaracterize the record.

13. Blame your unfamiliarity with the record on the fact that you did not handle the case at the trial level. (The "SODDI" excuse - "some other dude did it").

APPENDIX II
Potential Traps for the Unwary

1. 14-day appeal period. This refers to calendar days, not court days. FRBP 9006(a). The period begins from entry of the judgment or order to be appealed, not notice. Failure to receive notice or failure of the clerk to serve notice of the entry of the order will not excuse an untimely notice of appeal. It is the appealing party's responsibility to monitor the docket for entry of the order.

2. A motion to dismiss an appeal as untimely that is made before the time to request an extension has expired under FRBP 8002(d) alerts your opponent how to save the appeal.

3. An appeal from an untimely tolling motion under FRBP 8002(b) only raises the issue of the appropriateness of the order resolving the tolling motion, not the underlying order. Obtaining reversal of a denial of reconsideration is usually much harder than reversing the initial decision. File a timely appeal or move to extend the time to appeal if your tolling motion is not timely filed.

4. The notice of appeal and statement of election are to be combined in one document, Official Form 17A, and parties must use the form or one in substantially conformity with the official form under new FRBP 8003(a)(3)(A).

5. If the order on appeal is not final, appellant must obtain FRCP 54(b) certification from the trial court (applicable via FRBP 7054) or move the BAP for leave to appeal.

6. Obtain a stay pending appeal, if necessary, to avoid mootness. Motions for stay ordinarily will not be considered unless they are first made to the bankruptcy court or the movant explains why the stay wasn't obtained from the bankruptcy court. FRBP 8007. "I didn't think the bankruptcy judge would grant my stay" is not usually a sufficient explanation. The BAP typically denies without prejudice stay requests where the movant does not bring the motion before the bankruptcy court in the first instance. If time is of the essence, make sure that your stay motion is made before the correct court.

7. Understand the standard of review and what hurdles need to be overcome to obtain a reversal.

8. Support your brief with your excerpts of the record. Do not expect that the Panel will look at any supporting documents filed with intermediate motions. The excerpts of the record need to stand alone as support for your position. The excerpts may only contain items that are part of the record on appeal. FRBP 8009. Make sure your excerpts include the items listed in FRBP 8018(b).

9. Arguments not made both before the bankruptcy court and in the opening brief may be considered waived.

10. Court of Appeals jurisdiction may differ from BAP or district court jurisdiction. The Court of Appeals generally has jurisdiction over final orders only. A district court or BAP decision on an interlocutory appeal is not reviewable by the Circuit until the matter becomes final at the bankruptcy court level, unless the Court of Appeals grants a direct appeal petition.

11. Motions for reconsideration or rehearing must be made within 14 days after the BAP has rendered its decision. FRBP 8022. A timely motion for reconsideration or rehearing tolls the time to appeal to the Circuit. An untimely motion does not. The time to appeal to the Circuit is normally 30 days from the entry of the BAP decision; if the United States is a party, the time is 60 days. FRAP 4 and 6.

12. Requests for stay pending appeal to the Circuit are made to the BAP, the same way BAP appeal stay requests are initially made to the bankruptcy court. FRAP 8(a)(1)(A) (made applicable by FRAP 6(b)(1)(C)).

13. Requests for sanctions must be made in a separately-filed motion. FRBP 8020.

2016 Commercial & Bankruptcy Law Seminar

Iowa Ag Law Update: Corporate Farming Law, Farm Tenancies and Contract Feeding Insurance

1:00 p.m.- 1:45 p.m.

Presented by
Eldon McAfee
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6701 Westown Parkway
Suite 100
West Des Moines, IA
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Friday, April 22, 2016

Iowa Ag Law Update: Corporate Farming Law, Farm Tenancies and Contract Feeding Insurance

ISBA Commercial & Bankruptcy Law Section
April 22, 2016

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CONTENTS

1. Iowa Corporate Farming and Non-Resident Alien Ownership of Ag Land.

(This is discussion is intended to be a quick reference on the topic of Iowa corporate farming laws. For a more complete discussion of the relevant legal issues for practitioners, with citations to the relevant law, see Iowa's Corporate Farming Law, ISBA 2013 Bloethe Tax School, Eldon McAfee, Dec. 6, 2013. Also see "Iowa's Anti-Corporate Farming Laws: A General Overview", Kristine A. Tidgren, Iowa State University Center for Agricultural Law and Taxation, Oct. 2015, https://www.calt.iastate.edu/article/iowas-anti-corporate-farming-laws-general-overview)

Iowa Code Chapter 9H - Restriction on Ownership of Agricultural Land by Legal Entities.

a. **Restriction.** Except as provided in ¶b, a corporation, limited liability company, trust, or limited partnership (including limited liability limited partnerships) cannot, either directly or indirectly, acquire or otherwise obtain or lease agricultural land in Iowa. Iowa Code §9H.4.

"Agricultural land" is land suitable for use in farming. §9H.1(2).
"Farming" is the cultivation of land for the production of agricultural crops, the raising of poultry, the production of eggs, the production of milk, the production of fruit or other horticultural crops, grazing, or the production of livestock. . . . 9H.1(12).
"Indirect" means to act or attempt to accomplish an act through an interest in a business association, through one or more affiliates or intermediaries, or by any method other than a direct approach, including by any circuitous or oblique method. 9H.1(15)

b. **Exceptions.** Legal entities that can own or lease ag land in Iowa (entities that can only own or lease ag land for livestock production are not included in this list, see Iowa Code Chapter 10) if they meet certain restrictions under Iowa Code Chapter 9H are:

i. Family farm corporation (See ¶c)
ii. Family farm limited liability company. (See ¶c)
iii. Family farm limited partnership. (See ¶c)
iv. Family trust. (See ¶c)
v. Revocable trust. (See ¶d)
vi. Testamentary trust. (See ¶e)
vii. Authorized farm corporation. (See ¶e)
viii. Authorized limited liability company. (See ¶e)
ix. Authorized trust. (See ¶e)
x. Limited partnership. (See ¶f)
xi. Limited liability limited partnership. (See ¶f)

Legal ownership structures/entities that can own or lease ag land in Iowa because they are not directly regulated under Chapter 9H are:

xii. General partnership. (See ¶g)
xiii. Limited liability partnership. (See ¶g)
xiv. Individuals/sole proprietorship. (See ¶h)
xv. Individuals/tenants in common. (See ¶h)

c. **Family farm corporations, LLC's, LP's and trusts.** Family farm entities (i, ii, iii, and iv in ¶b) must:

i. Be founded for the purpose of farming and the ownership of ag land
ii. For family farm corporations, have a majority of voting investors that are related to each other as spouse, parent, grandparent, lineal ascendants of grandparents or their spouses and other lineal descendants of the grandparents or their spouses, or persons acting in a fiduciary capacity (trustee, etc.) for the related persons. For family farm LLC's, have a majority of members who are these persons. For family farm limited partnerships, have a majority of limited partners who are these persons. For family trusts, have a majority of the beneficiaries who are these persons.
iii. For family farm corporations, have a majority of the voting stock held by persons listed in ¶c,ii. There is no such requirement for family farm LLC's. For family farm limited partnerships, the general partner and a majority of the partnership interests must be held by these persons. For family trusts, have a majority of the interest in the trust held by these persons.
iv. Have all investors who are natural persons (i.e., no legal entities as investors)(for family farm limited partnerships, all limited partners must be natural persons & the general partner must manage and supervise the day-to-day farming operations).
v. 60% of the gross revenues over the last consecutive 3 year period must be from farming. (Newly formed entities must only meet this requirement going forward.)

d. **Revocable and testamentary trusts.** Revocable trusts and testamentary trusts may own or lease ag land. There are no restrictions on beneficiaries, trust income, family relationship of beneficiaries, etc.

e. **Authorized corps, LLC's, and trusts.** Authorized entities (vii, viii, and ix in ¶b) (entities that do not qualify as family entities) must:

i. Be founded for the purpose of farming and the ownership of ag land (this does not apply to trusts)
ii. Have no more than 25 investors
iii. Have all investors who are natural persons.
iv. For authorized trusts, not have income which is federal or state tax exempt.
v. Own or lease no more than 1,500 acres of ag land.
vi. Have investors who are not investors in any other authorized entity or limited partnership (other than a family farm limited partnership)(the "one bite at the apple" rule).

(an entity meeting these requirements is an authorized entity by definition and no other steps or certifications from the state are required)
(a person who is not an investor but provides management services to an authorized entity is not subject to these restrictions)
(An authorized entity found in violation of the "one bite at the apple" rule is subject to a civil penalty of not more than $25,000 and divestment of land held in violation within one year after a court order. To get a court order, the attorney general or a county attorney may file a lawsuit. In addition to these penalties, the attorney general or a county attorney may petition the court to order an entity to restructure to prevent or correct violations. In addition, an investor who causes a violation of this section is subject to a civil penalty of not more than $1,000 and divestment of the investment interest. Any financial gain realized upon divestment must be forfeited to the state.)

f. **LP's and LLLP's.** Limited partnerships and limited liability limited partnerships (x and xi in ¶b)(other than family farm limited partnerships) must, among other requirements:

i. Own or lease no more than 1,500 acres of ag land
ii. Not have an investor who does not qualify to own or lease ag land (the indirect prohibition).
iii. Not have limited partner investors who are investors in any other authorized entity or limited partnership (other than a family farm limited partnership)(general partners are not subject to this requirement, therefore, a person may be a general partner in more than one LP).

g. **GP's and LLP's.** General partnerships and limited liability partnerships (vii and xiii under ¶b) are not expressly regulated by Iowa Code Chapter 9H. Therefore, requirements such as the 1,500 acre limitation, the 25 investor limit, the requirement that all investors be natural persons, or the requirement that investors not be investors in more than one authorized entity or limited partnership do not apply. However, the following restriction does apply:
Not have an investor who does not qualify to own or lease ag land (the indirect prohibition). Therefore, investors in a GP or LLP can be individuals, family farm

entities (see ¶c), authorized entities (see ¶e), LP's and LLLP's (those that meet the requirements in ¶f), or other GP's or LLP's (those that meet the requirements of this ¶g).

h. **Sole proprietors and tenants in common.** Individuals are not regulated by Iowa Code Chapter 9H. Thus, individuals acting as sole proprietors or as tenants in common may own ag land without restrictions. Note that Iowa law does restrict ownership or leasing of ag land by foreign individuals and businesses. See discussion in the next section of this outline.

i. **Development land.** Any legal entity (corporation, limited liability company, limited partnership, etc.) may acquire ag land for immediate or potential use in non-farming purposes without restrictions under Iowa law. There is no limit under Iowa law on the amount of land or the time to convert the ag land to a non-farm use.

j. **Foreclosure.** A corporation or limited liability company may acquire ag land by foreclosure or other "process of law in the collection of debts" without restrictions under Iowa Code Chapter 9H. Under this exemption there is no time limit on how long a foreclosing lender may possess the ag land after taking possession, nor any restrictions on the lender farming or otherwise utilizing the ag land for agricultural purposes. Although there is no time limit on possessing ag land after acquiring it in enforcement of a mortgage or other lien under Iowa Code Chapter 9H, Iowa Code §524.910(2) regulating state banks provides that real property purchased by a state bank at a foreclosure sale, or acquired for judgments for outstanding debt, or real property conveyed to the bank in satisfaction of debt, or real property obtained through redemption as a junior mortgagee or judgment creditor, "shall be sold or otherwise disposed of by the state bank within five years after title is vested in the state bank, unless the time is extended by the superintendent."

k. **IRA's.** In general, investment of IRA contributions in ag land is permissible under federal income tax law and Iowa corporate farming law, but it is discouraged by some tax advisors. The income tax concerns are beyond the scope of this memo but are fully covered in Dr. Neil Harl's article, "Is It Possible (or Wise) to Put Farmland in an IRA?" Agricultural Law Digest, July 2, 2010.

Retirement plans such as 401K's and SEP's, including solo plans, are trusts in that there is a plan administrator that acts as a fiduciary/trustee on behalf of the plan beneficiaries. Iowa law regulates the ownership of ag land by trusts under Iowa Code Chapter 9H similar to other legal entities. See ¶'s c, d and e. Authorized trusts must not have any federal or state tax exempt income. However, there is no such requirement for family trusts. Because IRA income is both state and federal tax exempt, IRA's that are authorized trusts cannot own or lease ag land in Iowa. However, IRA's that qualify as family trusts can own ag land under Chapter 9H if, in addition to meeting the natural person and family relationship tests, the IRA also is established for the purpose of farming and at least 60% of gross revenues over the last consecutive three year period come from farming.

Summary:

- Under current Iowa corporate farming law, LLP's are not directly regulated and therefore offer the most flexibility for investor ownership of ag land. See ¶g.
- Ag land purchased for development (non-ag use) is exempt from Iowa corporate farming law restrictions and there is no limit on the amount of land or the time to convert the ag land to a non-farm use. See ¶i.
- LLC's are often used instead of corporations due to income tax advantages. As set out in ¶'s c and e, LLC's are regulated essentially the same as corporations for ag land ownership. An LLC in which less than a majority of the investors are related (authorized LLC) can own or lease ag land if the requirements in ¶e are met (e.g., no more than 25 natural person investors, individual investors can only be in one authorized LLC ("one bite at the apple"), and the LLC cannot own more than 1,500 acres of ag land). The most difficult restriction is usually the "one bite at the apple". Keep in mind that an investor can invest in one or more family farm entities as well as LLP's and still invest in an authorized entity. In other words, the "one bite at the apple" rule only applies to authorized entities and limited partners in LP's that are not family farm LP's.
- Individuals are not regulated by under the corporate farming law and therefore individuals acting as sole proprietors or as tenants in common may own ag land without restrictions. See ¶h. Accordingly, owning land directly as tenants in common gives the most flexibility looking solely at Iowa corporate farming law.
- Entities that qualify to own ag land directly can do so as a tenant in common. Family farm entities would not be restricted by the "one bite at the apple" rule.
- Entities who violate Chapter 9H are subject to a civil penalty of not more than $25,000 and divestment of land held in violation within one year after a court order. The attorney general or a county attorney may also petition the court to order an entity to restructure to prevent or correct violations. An investor who causes a violation of the "one bite at the apple' rule is subject to a civil penalty of not more than $1,000 and divestment of the investment interest. Any financial gain realized upon divestment must be forfeited to the state.

Iowa Code Chapter 9I – Non-resident Aliens – Ag Land Ownership

a) "A nonresident alien, foreign business or foreign government, or an agent, trustee or fiduciary thereof, shall not purchase or otherwise acquire agricultural land in this state. A nonresident alien, foreign business or foreign government, or an agent, trustee or fiduciary thereof, which owns or holds agricultural land in this state on January 1, 1980, may continue to own or hold the land, but shall not purchase or otherwise acquire additional agricultural land in this state." Iowa Code section 9I.3(1)
Note: Leasing ag land is not prohibited under Chapter 9I as it is under Chapter 9H.

b) "A person who acquires agricultural land in violation of this chapter or who fails to convert the land to the purpose other than farming within five years, as provided for in this chapter, remains in violation of this chapter for as long as the person holds an interest in the land." Iowa Code section 9I.3(2).

c) " 'Nonresident alien' means an individual who is not any of the following:
a. A citizen of the United States.
b. A person lawfully admitted into the United States for permanent residence by the United States immigration and naturalization service. An individual is lawfully admitted for permanent residence regardless of whether the individual's lawful permanent resident status is conditional." Iowa Code section 9I.1(5).

Note: The definition of "nonresident alien" was amended in the 2002 Legislative session (SF 2272). Prior to amendment, a nonresident alien was any person who was not a U.S. citizen or who had not been classified as a "permanent resident alien" by the U.S. Immigration & Naturalization Service. Following amendment, any person lawfully admitted into the U.S. for permanent residence by INS is not considered to be a nonresident alien regardless of whether the lawful permanent resident status is conditional.

d) 'Foreign business' means a corporation incorporated under the laws of a foreign country, or a business entity whether or not incorporated, in which a majority interest is owned directly or indirectly by nonresident aliens. Legal entities, including but not limited to trusts, holding companies, multiple corporations and other business arrangements, do not affect the determination of ownership or control of a foreign business." Iowa Code section 9I.1(3).

e) " 'Agricultural land' means land suitable for use in farming."
" 'Farming' means the cultivation of land for the production of agricultural crops, the raising of poultry, the production of eggs, the production of milk, the production of fruit or other horticultural crops, grazing or the production of livestock. Farming includes the production of timber, forest products, nursery products, or sod. Farming does not include a contract where a processor or distributor of farm products or supplies provides spraying, harvesting or other farm services." Iowa Code sections 9I.1(1) and (2).

f) Exceptions:

1) Ag land acquired by devise or descent. Iowa Code section 9I.3(3)(a). A nonresident alien, foreign business, etc. which acquires ag land by devise or descent after January 1, 1980, must divest all right, title and interest in the land within 2 years after acquisition. Divestment is not required if the land was originally acquired by a nonresident alien prior to July 1, 1979. Iowa Code section 9I.5.

2) A bona fide encumbrance on ag land taken for purposes of security. Iowa Code section 9I.3(3)(b).

3) "Agricultural land acquired by a process of law in the collection of debts, by a deed in lieu of foreclosure, pursuant to a forfeiture of a contract for deed, or by any procedure for the enforcement of a lien or claim on the land, whether created by mortgage or otherwise. However, agricultural land so acquired shall be sold or otherwise disposed of within two years after title is transferred. Pending the sale or disposition, the land shall not be used for any purpose other than farming, and the land shall not be used for farming except under lease to an individual, trust, corporation, partnership or other business entity not subject to the restriction on the increase in agricultural land holdings imposed by section 9H.4. Agricultural land which has been acquired pursuant to this paragraph shall not be acquired or utilized by the nonresident alien, foreign business, or foreign government, or an agent, trustee, or fiduciary thereof, under either paragraph "d" or paragraph "e"." Iowa Code section 9I.3(3)(c).

4) Ag land acquired for research or experimental purposes. Iowa Code section 9I.3(3)(d). Lessees of ag land for research or experimental purposes under 9I.(3)(d)(3)(land used for the primary purpose of testing, developing, or producing animals for sale or resale to farmers as breeding stock) must file an annual report with the Secretary of State on or before March 31 each year.

5) An interest in ag land, not more than 320 acres, acquired for an immediate or pending use other than farming. Iowa Code section 9I.3(3)(e). A report must be filed with the Secretary of State before March 31 of each year. Iowa Code

section 9I.8. The land must be converted to a purpose other than farming within 5 years after acquisition. Iowa Code section 9I.4.

If a person or business holding ag land becomes a nonresident alien or foreign business, the person must divest interest in the land within 2 years. Iowa Code section 9I.6 .

g) A nonresident alien, foreign business, etc. owing ag land on or after January 1, 1980 must register the land with the Secretary of State. Iowa Code section 9I.7.

h) The Iowa Attorney General has enforcement authority after receiving a report of a violation from the Secretary of State. Iowa Code section 9I.10 .

i) Penalties.

a. Failure to timely file reports or registration: fine of not more than $2,000 for each offense.

b. Escheat: "If the court finds that the land in question has been acquired in violation of this chapter or that the land has not been converted to the purpose other than farming within five years as provided for in this chapter, the court shall declare the land escheated to the state. When escheat is decreed by the court, the clerk of court shall notify the governor that the title to the real estate is vested in the state by decree of the court. Any real estate, the title to which is acquired by the state under this chapter, shall be sold in the manner provided by law for the foreclosure of a mortgage on real estate for default of payment, the proceeds of the sale shall be used to pay court costs, and the remaining funds, if any, shall be paid to the person divested of the property but only in an amount not exceeding the actual cost paid by the person for that property. Proceeds remaining after the payment of court costs and the payment to the person divested of the property shall become a part of the funds of the county or counties in which the land is located, in proportion to the part of the land in each county." Iowa Code section 9I.11.

2. Farm Tenancies.

1) Farm leases are created by contract as with other tenancies. However, Iowa law provides that the termination date for farm tenancies must be March 1 in the year the lease terminates. See Iowa Code § 562.5 which provides:

> "In the case of a farm tenancy, the notice must fix the termination of the farm tenancy to take place on the first day of March, except in cases of a mere cropper, whose farm tenancy shall terminate when the crop is harvested. However, if the crop is corn, the termination shall not be later than the first day of December, unless otherwise agreed upon."
>
> Also, see Iowa Code §562.6:
> "If an agreement is made fixing the time of the termination of a tenancy, whether in writing or not, the tenancy shall terminate at the time agreed upon, without notice. Except for a farm tenant who is a mere cropper or a person who holds a farm tenancy with an acreage of less than forty acres where an animal feeding operation is the primary use of the acreage, a farm tenancy shall continue beyond the agreed term for the following crop year and otherwise upon the same terms and conditions as the original lease unless written notice for termination is served upon either party or a successor of the party in the manner provided in section 562.7, whereupon

the farm tenancy shall terminate March 1 following. However, the tenancy shall not continue because of an absence of notice if there is default in the performance of the existing rental agreement."

Note: In the current 2016 session of the Iowa Legislature H.F. 2344 has been passed by both the House and the Senate, but as of the date this outline was prepared had not yet been signed by the Governor. Effective July 1, 2016 HF 2344 will amend §562.6 to require agreements to terminate a farm tenancy to be written. See the Auen v. Auen decision discussed later in this outline.

Iowa Code §562.1A defines a farm tenancy as "a leasehold interest in land held by a person who produces crops or provides for the care and feeding of livestock on the land, including by grazing or supplying feed to the livestock." This section also defines an animal feeding operation the same as defined in section 459.102 ("a lot, yard, corral, building, or other area in which animals are confined and fed and maintained for forty-five days or more in any twelve-month period, and all structures used for the storage of manure from animals in the operation. Except as required for a national pollutant discharge elimination system permit required pursuant to the federal Water Pollution Control Act, 33 U.S.C. ch. 26, as amended, an animal feeding operation does not include a livestock market.")

Foster v. Schwickerath, 780 N.W.2d 746 (Iowa Ct. App. 2009). Landlord notified tenant of termination of the tenancy before Sept. 1, but the notice stated the tenancy would terminate at the end of the calendar year. The court noted that the notice of termination of farm tenancy must fix the termination on the first day of March. However, even though the notice improperly set the termination date at the end of the calendar year, the court ruled that a wrong termination date did not nullify the notice and that the notice of termination was valid for a termination date of March 1.

2) Crop Residue. In 2010 Chapter 562 was amended to add the following section on legal rights to crop residue:
"562.5A Farm tenancy — right to take part of a harvested crop's aboveground plant. Unless otherwise agreed to in writing by a lessor and farm tenant, a farm tenant may take any part of the aboveground part of a plant associated with a crop, at the time of harvest or after the harvest, until the farm tenancy terminates as provided in this chapter."

3) Termination
   a. When and How
      Iowa Code §562.7 provides:
      "Written notice shall be served upon either party or a successor of the party by using one of the following methods:
      1. By delivery of the notice, on or before September 1, with acceptance of service to be signed by the party to the lease or a successor of the party, receiving the notice.
      2. By serving the notice, on or before September 1, personally, or if personal service has been tried and cannot be achieved, by publication, on the same conditions, and in the same manner as is provided for the service of original notices, except that when the notice is served by publication no affidavit is required. Service by publication is completed on the day of the last publication.

3. By mailing the notice before September 1 by certified mail. Notice served by certified mail is made and completed when the notice is enclosed in a sealed envelope, with the proper postage on the envelope, addressed to the party or a successor of the party at the last known mailing address and deposited in a mail receptacle provided by the United States postal service."

Note: Certified mail is the most often used option for method to give notice of termination. Iowa Code §618.15(1) defines certified mail as mail service provided by the U.S. Post Office where the sender is provided with a receipt to prove mailing. Note that notice of termination is not required by 562.7(3) to be delivered by restricted certified mail (defined in 618.15(2) as certified mail "delivered to addressee only"). Also, acceptance of the notice is not required for completion of service by certified mail. However, the sender must have proof of refusal, e.g., notice marked by postal service as "Returned to Sender", to have completion of service. See Long v. Crum, 267 N.W.2d 407 (Iowa 1978) and Escher v. Morrison, 278 N.W.2d 9 (Iowa 1979) interpreting previous version of current law.

Note: The validity of the certified mail termination procedures for farm tenancies have come into question following the Iowa Supreme Court's decision in War Eagle Village Apartments v. Plummer, 775 N.W.2d 715 (Iowa 2009). In this case the court found that notice of FED hearing by certified mail in a residential lease violated Due Process under the Iowa Constitution. While there may be concerns that the War Eagle analysis could be applied to farm lease terminations, it would appear that the circumstances under farm lease terminations are distinguishable from FED hearings – primarily because of the much shorter time period involved in notice of FED hearings, because there is no hearing for farm lease terminations, and because there are generally no tenant defenses to a farm lease termination notice.

b. Effect of Failure to Terminate

Under 562.6, a farm lease for a term of years continues past the contractual term on a year-to-year basis unless it is terminated prior to September 1 of the final year of the contractual term. While usually it is the landlord who desires to terminate a lease and is therefore required to give notice of termination, 562.6 also applies to tenants who wish to terminate a farm lease. *Pollock v. Pollock, 72 N.W.2d 483, 485 (Iowa 1955).* In *Pollock*, the court rejected the argument that if notice of termination is not given in the final year of a lease, the lease would continue for only one year and then terminate automatically without notice. *Id.* at 485-486. The court ruled that a farm tenancy continues year to year until notice of termination is given. *Id.*

c. Effect of Tenancy on Forfeiture or Foreclosure

In *Ganzer v. Pfab, 360 N.W.2d 754 (Iowa 1985)*, a contract vendee entered into a one year farm lease with a third party tenant. The one-year lease was not terminated by the contract vendee prior to September 1 of the year of the lease. The contract vendor served notice of forfeiture on the contract vendee and the tenant in March of the next year. The court ruled that the lease was not properly terminated prior to September 1, stating: "The broad protection the statute provides for farm tenants should not, absent a clear statement of legislative intent, be subjected to a judicial exception in cases where the landlord's rights in the premises are cut off by a forfeiture occurring after the statutory notice date for termination of farm tenancies."

In *Jamison v. Knosby, 423 N.W.2d 2 (Iowa 1988)*, a contract vendee entered into a three year lease with a third party tenant just prior to defaulting on the underlying installment real estate contract. The lease was recorded with the county recorder. The contract

vendor attempted forfeiture of the real estate contract by serving the contract vendee with notice of forfeiture. However, the tenant was not served. The tenant considered the forfeiture ineffective because he had not been served with notice of forfeiture of the real estate contract or notice of termination of farm tenancy. *Id.* at 4. The contract vendor considered the tenant's rights extinguished by the forfeiture. *Id.* The court ruled that the tenant was a person in possession of the farm and "[f]ailure to serve notice of forfeiture on a person in possession under Iowa Code section 656.2 renders the forfeiture ineffective. *Fulton v. Chase, 240 Iowa 771, 773-74, 37 N.W.2d 920, 921 (1949)*." *Id.* at 5.

However, a tenant under an oral lease where no factors existed to give the foreclosing creditor notice that the tenant was a party in possession was not entitled to notice of forfeiture. *Dreesen v. Leckband, 479 N.W.2d 620 (Iowa App. 1991).*

In *Kansas City Life Ins. Co. v. Hullinger, 459 N.W.2d 889 (Iowa App. 1990)* a foreclosing creditor failed to terminate a farm tenancy created by the appointed receiver. The creditor contended that the filing of the foreclosure petition and its subsequent indexing in the *lis pendens* index provided the tenant with constructive notice of the foreclosure. *Id.* at 891. However, the court upheld the tenant's rights under the lease.

4) Exceptions to Notice Requirements.

a. Sharecropper
Chapter 562 excludes "mere croppers" from requirements for termination date and notice of termination. While "mere croppers" are not defined in the Code, the Iowa Supreme Court distinguished croppers from tenants on the basis that a tenant has an interest in the land and a property right in the crop while a cropper has no such interest but receives a portion of the crop as pay for labor. *Dopheide v. Schoeppner, 163 N.W.2d 360, 362 (Iowa 1964)*. Custom farming agreements (i.e., contractual arrangements where an operator is hired to perform specific crop raising services) are extensively used today in Iowa and like cropper agreements are not subject to Iowa's farm tenancy law.

b. Failure to Occupy and Cultivate – exception deleted by 2006 legislation.
Before July 1, 2006, Iowa Code §562.6 required that a farm tenant occupy and cultivate farmland for the notice of termination requirements to apply. See *Morling v. Schmidt, 299 N.W.2d 480, 481 (Iowa 1980)* (notice of termination for an oral lease for pasture land was not required because "notice under section 562.5 is required only when the land is both occupied and under cultivation. The land in question was not cultivated. It was used for grazing only."), *Dorsey v. Dorsey, 545 N.W.2d 328, 331-332 (Iowa App. 1996),* (the court ruled that pasture land was not under cultivation.), and *Garnas v. Bone, 637 N.W.2d 114 (Iowa 2001)*(tenant's mowing of land pursuant to a CRP agreement was not cultivation so as to require notice of termination under the statute).

As of July 1, 2006, Iowa Code §562.1A defines farm tenancy as a "leasehold interest in land held by a person who produces crops or provides for the care and feeding of livestock on the land, including by grazing or supplying feed to the livestock."

c. Acreage of Less Than 40 Acres – exception deleted by 2013 legislation (except for animal feeding operations)
Senate File 316 effective July 1, 2013 amended Iowa Code §562.6 (Agreement for Termination) which requires written notice of termination of farm leases by Sept. 1 of

the final year of the lease. This legislation eliminated the long-standing exemption to the Sept. 1 farm rental termination notice requirements for farms of less than 40 acres, with one exception. To avoid impacting hog barn, cattle feedlot or other animal feeding operation leases, the amendment does not apply to farms of less than 40 acres where the primary use is an animal feeding operation as defined by Iowa Code §459.102. An animal feeding operation is a lot, yard, corral, building or other area where livestock are confined and fed and maintained for 45 days or more in a 12 month period. An animal feeding operation does not include pasture or any other area where there is vegetation, forage growth or crop residue.

In summary, after July 1, 2013, written notice must be given by Sept. 1 of the final year of a farm lease to terminate the lease for the following crop year for all farm leases, except for farms of less than 40 acres where the primary use is an animal feeding operation. Pastures are not animal feeding operations and therefore pasture leases, as well as crop leases, of less than 40 acres are now subject to the Sept. 1 termination deadline. If there is no termination notice by the Sept. 1 deadline, the farm lease automatically continues under the same terms and conditions for the next crop year.

d. Default

Iowa Code §562.6 provides that a farm "tenancy shall not continue because of absence of notice if there is default in the performance of the existing rental agreement." The most obvious default is failure to pay rent. If failure to pay occurs before September 1 of a one-year lease, then the landlord can easily give notice of termination and need not depend on the default exclusion to notice of termination. However, if the failure to pay occurs in other than the last year of a multi-year lease or after the September 1 deadline for notice, the landlord must depend on the exclusion to terminate the lease.

While there can be defaults other than failure to pay rent, termination based on such defaults run the risk of being considered by the courts as attempts to terminate a lease after the September 1 deadline has passed. To avoid this situation, tenants should be given notice of default as soon as the landlord is aware of the default and be allowed a period of time to correct the problem. In *McElwee v. Devault, 120 N.W.2d 451 (Iowa 1963)*, the landlord notified the tenant of several defaults of the lease in the middle of the first year of a three-year lease. The court supported eviction of the tenant and found that the tenant's actions, "while not a flagrant violation of the lease" were nonetheless violations and the landlord was fair in giving timely notice to the tenant. *Id.* at 454. The court seemed to indicate that the decision might have been different if this had been a one-year lease when it noted that the landlord should not have to put up with such a tenant for the remaining two crop years of the lease.

What conduct by the tenant constitutes default? In *Thompson v. Mattox, 2005 Iowa App. LEXIS 125 (Feb. 24, 2005)*, the court discussed the duty of a tenant to farm in a competent manner. Because the parties in *Thompson* did not have a written lease, the court found that the landlord did not have a right to "control and supervise" the tenant Mattox's farming practices. *Id.* The landlord brought suit for breach of contract, alleging numerous deficiencies in the way Mattox conducted his farming activities, that he failed to use nitrogen, use proper equipment, and plant crops on time. Mattox offered evidence to rebut each and every claim of the landlord, arguing that his above average yields, appearance in *Wallaces' Farmer* magazine, and his ability to survive the farm crisis were evidence of his proficiency as a farmer. *Id.* The trial court found in favor of

Mattox, agreeing with his quote: "there's a lot of right ways to farm." The Court awarded Mattox damages of $62,054.21 on his counterclaims, which requested damages for lost profits from not farming the farm in 2002, as well as damages for emotional distress as a result of wrongful removal. The Court of Appeals affirmed, taxing the costs of the appeal to the landlord. *Id.*

e. Agreement to Terminate

As previously noted, Iowa Code section 562.6 provides in part: "If an agreement is made fixing the time of the termination of a tenancy, whether in writing or not, the tenancy shall terminate at the time agreed upon, without notice."

(1) The right of parties to a lease to waive the notice requirements in Iowa's farm tenancy statute was the issue in *Schmitz v. Sondag, 334 N.W.2d 362 (Iowa App. 1983)*. The defendant landlord argued that the notice to terminate requirements of 562.6 did not apply because of the following clause in the lease:

> The second party [lessee] covenants with the first party [lessor] that at the expiration of the term of this lease he will yield up the possession to the first party, without further demand or notice ... and second party specifically waives any notice of cancellation or termination of said lease and specifically agrees that this lease shall not be extended by virtue of failure to give notice of cancellation or termination thereof. *Id*. at 364. The court ruled that the clauses in the lease could not nullify the tenant protections in section 562.7. *Id.* at 365.

The court has upheld the right of the parties to agree to terminate without statutory required notice. *Id.* at 365; *Crittenden v. Jensen, 1 N.W.2d 669 (Iowa 1942)*. In that case the parties entered into an agreement to terminate the lease during the crop year after the original written lease was signed. The court ruled:

> The tenancy was thus ended, and the statute has no application. After the lease had been thus terminated by agreement of the parties, no further notice was required. This statute does not mean that a landlord and tenant cannot agree to cancel or terminate a lease, and that such termination can only be brought about by serving the notice provided for in the section. *Id.* at 670.

Note: The agreement for termination was executed by the parties before the statutory deadline for notice of termination. However, no subsequent notice of termination was given. The court did not discuss whether the fact that the agreement to terminate was executed before the statutory deadline entered into its decision.

(2) *Auen v. Auen*, *No. 13-1501, 851 N.W. 2d 547 (Iowa Ct. App. May 14, 2014)* (*table, unpublished disposition)*. Defendant tenant appealed the trial court's declaratory judgment determining that his farm lease was terminated by an oral agreement. Defendant was the step-grandson of the landowner, Plaintiff, in this case. The step-grandson began leasing the farm in 2007. Defendant and Plaintiff's POA, her son, met and the Defendant agreed that the rent should probably be raised. In August of that year, Defendant and Plaintiff's POA met again to discuss rent for the next year. Plaintiff's POA testified that he told Defendant that the lease was terminated because the two could not come to an

agreement on the amount of rent. Defendant claimed he never agreed to terminate in that meeting. After the meeting, Plaintiff's POA had his attorney send a notice of termination. However, it was not sent certified mail or, if it was, the certification was lost. The Defendant testified that he never opened the letter. At trial, the district court held that the lease was terminated by oral agreement during the August meeting. The district court found the Defendant's testimony that he did not open the letter from the Plaintiff's attorney "fairly unbelievable." The district court also found the testimony of the Plaintiff's POA and his wife that the Defendant had agreed that the lease was terminated was more credible than Defendant's testimony that he had not agreed. The district court also noted that the Plaintiff's POA was required to look out for the best interests of his mother and had nothing to personally gain from increasing the rent in 2013 while the Defendant's personal interest affected his credibility. The Court of Appeals on de novo review (declaratory judgment action filed in equity) affirmed the district court's analysis and ruling stating "[w]e give 'great deference to the trial court on issue of witness credibility.'"

Note: As discussed previously in this outline, effective July 1, 2016 HF 2344, passed by both the House and the Senate but as of the date this outline was prepared not yet signed by the Governor, will amend §562.6 to require agreements to terminate a farm tenancy to be written.

Note: As a practical matter, some landlords simply enter into one-year farm leases and routinely give written notice of termination every year before September 1. This provides the landlord with the flexibility to evaluate the tenant's performance and the terms of the lease after each crop year. If the landlord is satisfied, another lease with the same tenant and with the same terms can be executed. If not, the landlord may negotiate another lease. However, this practice puts tenants in a position of not being able to plan for the next crop year, particularly if the landlord delays making a decision for a substantial period of time.

Current Iowa farm lease appellate court decisions:

(1) *Lakin v. Richards Farms LTD*, No. 13-1634, (Iowa Ct. App. Jan. 28, 2015). Lakin was a real estate developer who rented farmland to Richards under a two year written lease. Richards lost money in the first year of the lease and tried to negotiate a reduced rental for the second year. No agreement was reached but Richards nonetheless paid a reduced rental at the end of the lease term. Lakin pursued the remaining amount due and in 2010 "improperly filed" landlord's liens for 2009 crops. The liens were eventually removed but Richards claimed the liens caused him damage. Lakin also sent a letter to one of Richards' other landlords, the Emerson Cemetery Association, telling the Association that Richards had not paid him rent and that he wished Richards father, whom Lakin had had a relationship with, was still alive. The Association then put the land up for cash rent auction. Lakin filed suit and the trial court jury awarded him $319,951 on his breach of contract claim and also awarded Richards $353,465 on his counterclaim for interference with prospective business relations between the tenant and the city. In addition, the jury awarded Richards $1.4 million in punitive damages. The only issue preserved for appeal was whether the punitive

damages award was excessive. The court ruled that the punitive damages award of four times the compensatory award was not excessive. Further, the court ruled that that the jury punitive damages award did not violate Lakin's due process rights because the jury likely considered his wealth in rendering the large punitive damages award.

(2) *Slach v. Heick*, No. 14-0539 (Iowa Ct. App. April 8, 2015). When the new owner of the farm, Slach, did not properly terminate the tenant's, Heich's, lease, the lease continued for another crop year. Before the lease rolled over under Iowa law, Iowa law was amended to enact Iowa Code §562.5A to give a tenant the right to all corn stover unless the parties otherwise agreed in writing. After the 2011 harvest, Slach went onto the leased farm to do fall tillage for the following crop year when the lease would be terminated. Heick maintained that Slach destroyed the corn stalks that were his to bale and Heick setoff $7,117.50 from the $9,450 in rent that was due Slach. Slach sued for the unpaid rent, and Heick counterclaimed for trespass, breach of contract, conversion and unjust enrichment. The district court rejected Heick's claims ruling that because Iowa law giving the tenant rights to the corn stover did not become effective (July 1, 2010) until after the original lease went into effect (Mar. 1, 2010), the change in the law did not apply to the lease that automatically renewed for the 2011 crop year. The Court of Appeals reversed, stating that it was a close call, finding that the changed law giving a tenant rights in the corn stover did apply to the 2011 crop year lease that automatically renewed under Iowa law and remanded the case for a determination on damages.

(3) *Peck v. Four Aces Farms, Inc.*, No. 14-1482 (Iowa Ct. App. Aug. 5, 2015). Peck retired from farming and leased his farm to Four Aces, operated by a former math teacher, by a written cash rent lease. Peck's agronomic consultant facilitated the lease. For several years, Four Aces would make a payment to Plaintiff landlord in addition to the rent required under the written cash rent lease in as an incentive to keep renting the farm and maintain good relations. In 2009 Four Aces did not make an additional payment as the cash rent was more than the profits from the farm. For the next two years, the parties did not enter into a new written lease but rather arguably rented the farm as a roll-over of the previous written lease. The relationship kept deteriorating and eventually Peck terminated the lease and filed suit. Peck argued that the written cash rent lease was not the full agreement and that the actual lease was an oral 50/50 crop share lease. The trial court ruled for the Peck finding that the oral agreement supplemented the written cash rent lease and awarded $204,072.08 to Peck. The Court of Appeals disagreed and ruled that the additional payments by Four Aces were discretionary bonus payments. There was also a dispute as to the corn stover and because the court found a cash rent agreement, the entire value of the corn stover was Four Aces' as provided by Iowa Code section 562.5A. Peck's net judgment was reduced to $80,548.70.

(4) *Gansen v. Gansen*, No. 14-2006 (Iowa January 22, 2016). The Iowa Supreme Court ruled that two five year farm leases that renewed for four successive five year terms at the sole option of the tenant violated the Iowa Constitution provision (Article I, section 24) restricting ag land leases to terms of no more than twenty years, to the extent the leases exceeded twenty years. The Court

noted: (1) a lease that potentially lasts longer than twenty years is not invalid from its inception, but only becomes invalid after the expiration of a twenty-year period; (2) A critical fact was that the landlord was locked in for 25 years at the discretion of the tenant and that Article I, section 24 does not prohibit a landlord and tenant from mutually agreeing to renew a lease beyond twenty years; and (3) Article I, section 24's prohibition on lease terms of over twenty years protects landlords as well as tenants.

(5) *Wischmeier Farms, Inc. v. Wischmeier,* No. 15-0221 (Iowa Ct. App. April 6, 2016). This case involved a family dispute over a farm lease agreement. The lease was a 10 year crop-share lease executed between the Plaintiff farm corporation and the defendant who was the Plaintiff's son. The principal in the farm corporation was the father who died two years into the lease term. Following his death the non-farming siblings took control of the corporation and filed suit contesting various provisions in the farm lease. On appeal the Court interpreted alleged ambiguities in an addendum to the standard ISBA form lease regarding the tenant's right to use the landlord's farm equipment on other land the tenant farmed that was not owned by the Landlord corporation and the tenant's obligation for maintenance of that equipment. The Court ruled that the lease did not restrict the use of the farm equipment on other land and that any ambiguity was to be construed against the drafter, the landlord. Further, the Court noted that the tenant had in fact used the equipment on other land prior to his father's death. The Court also ruled the landlord could not sell the equipment that the tenant used in his farm operation. The Court also ruled that maintaining the equipment included making repairs to the equipment. The Court also ruled that as is standard practice in crop share leases, fuel costs were part of machinery and equipment costs to be paid by the tenant and not a crop input to be shared 50-50. The Court then ruled that although the tenant's father had paid one-half of the grain hauling expense, the lease clearly required the tenant to pay this expense. The Court also interpreted a lease provision allowing the tenant to pasture cattle or till the land under lease as would be consistent with good husbandry and "the best crop production that the soil and crop season permit" and rejected the landlord's claims that it could determine which land could be pasture or tilled. The Court then remanded the case to the trial court for a determination of attorney fees and costs under the lease's terms.

f. Waiver and Estoppel

The parties to a farm lease may also waive their rights to statutory notice of termination. In *Laughlin v. Hall, 20 N.W.2d 415 (Iowa 1945)*, the court ruled noted that when the landlord told the tenant she would get another tenant, the tenant did not object and in fact agreed that it was best for the landlord to get another tenant. *Id.* The court ruled that the tenant consented to the lease to the new tenant and waived statutory notice of termination *Id.* at 417.

Two good references on Iowa farm leases for Iowa practitioners are:

1. Iowa State University Center for Ag Law and Taxation, Kristine Tidgren, Assistant Director: http://www.calt.iastate.edu/resources/leases
2. Drake University Agricultural Law Center's Sustainable Agricultural Land Tenure Initiative, Neil Hamilton, Director: http://sustainablefarmlease.org

3. Livestock Contract Feeding – Insurance.

All farmers must carefully consider and review their insurance policies to make sure they are covered for insurable risks that are critical to their operations and financial situation. Livestock producers who feed hogs or other livestock owned by someone else under contract in the producer's buildings have insurance issues to be aware of in addition to the usual concerns with property casualty coverage for buildings and other facilities, liability coverage for accidental injuries and property damage, and worker's compensation. Those issues are potential lack of liability coverage for livestock death loss, damages due to environmental contamination, and liabilities assumed under the contract.

a. Exclusion to liability coverage for property under the "care, custody and control" of the insured. One of the most troubling legal situations for contract livestock feeders is when livestock have suffocated in the contract feeder's buildings. Often the death loss is due to something that the feeder failed to do correctly (for example, failing to properly ventilate the building when agitating the pit for manure application). When this happens, the contract feeder assumes there is insurance coverage under his or her liability insurance policy. However, unless the feeder has specific coverage for this situation, the contract feeder is surprised to learn that there is no coverage because of what is called the "care, custody or control exclusion." This exclusion means that there is no liability coverage for loss of property (hogs in this case) owned by someone else but in the care, custody or control of the insured. The basic premise of the "care, custody or control exclusion" is that there is only liability insurance coverage when the person who caused the loss of property owned by someone else is not in control of that property when the loss occurs.

Many farm liability policies also exclude coverage for custom farming operations as non-farming business pursuit. See *McNeilus Hog Farms v. Farm Bureau Mut. Ins. Co.,* 781 N.W.2d 101 (table, unpublished disposition)(Iowa Ct. App. 2010), where court found no liability insurance coverage for hog suffocation death loss for contract feeder due to business pursuits exclusion in the policy.

The Iowa Supreme Court denied a contract feeder liability insurance coverage for his losses for 535 nursery pigs that died in his building due to suffocation from manure pumping, even though Boelman had purchased a "custom feeding endorsement" to his farm liability policy. *Boelman v. Grinnell,* 826 N.W.2d 494 (Iowa 2013).

The Boelmans were aware that they would not have coverage under their standard policy and purchased a custom feeding endorsement that they understood would cover the hogs they were contract feeding under their "care, custody and control." The Supreme Court found that the language of the policy was not ambiguous and that the policy language was clear that the endorsement would not provide coverage for pig death losses. The Appeals Court had characterized Grinnell's denial of coverage as gutting the endorsement and withdrawing "with the policy's left hand what is given with its right." However, the Supreme Court overruled the Appeals Court and found that the Boelmans did get what they paid for in the endorsement – liability protection for third party losses. For example, the Supreme Court said, "if their custom farming operation caused an explosion, damaging a third person's car parked on the Boelman's property" the policy with the endorsement would have provided coverage. *Id.* at 503. The Court also rejected Boelman's argument under the reasonable expectations doctrine. In addition to relying on its finding that the policy was not ambiguous, the Court found that the record lacked any evidence that the Boelmans "expected the endorsement's dominant purpose was to provide coverage for the hogs in their care, custody, or control." *Id.* at 506.

A similar case was recently decided in Polk County District Court. See *Schulz Farm Enterprises, Inc. v. IMT Insurance,* Rulings on Motions for Summary Judgment, Polk County Case No. LACL130213, Oct. 20, 2015. In this case the district court granted summary judgment to IMT finding that a custom feeding endorsement that extended coverage for custom feeding and deleted exclusions "pertaining to" custom feeding deleting only the custom feeding exclusion but did not delete "your work" or "property damage" exclusions in the policy. The court thus found there was no coverage under the endorsement for the insured's loss of pigs being fed under contract due to ventilation system failure. The case is currently on appeal to the Iowa Supreme Court.

b. Pollution exclusion. Most standard liability policies exclude coverage for injury or property damage from situations described in policies as pollution. Pollution is often defined as any solid, liquid, gaseous or thermal contaminant, including smoke, vapor, soot, fumes, odor, and waste. This is the exclusion that most often prevents producers from having coverage for odor nuisance lawsuits. As with other exclusions in standard liability policies, there are endorsements that provide coverage for so-called pollution events and livestock producers who are concerned about nuisance and other environmental risk should evaluate this coverage.

The importance of the wording of the pollution exclusion has been illustrated, unfortunately to the detriment of the producer. The contract feeder knew of the "care, custody and control" exclusion in standard policies and bought an insurance endorsement that specifically provided liability coverage for contract feeding hogs. When the feeder pumped the manure pits, as he had been done many times before without problems, several hundred market weight hogs suffocated because of improper ventilation. Despite the contract feeding endorsement, the insurance company denied coverage under the pollution exclusion. The company's analysis was that because the veterinarian's necropsy report confirmed that the pigs died of asphyxiation from manure pit gases, and because the hogs' death was property damage, the hogs' death was due to pollutants and the pollution exclusion in the policy precluded coverage. Again, producers and their advisors must carefully review the language of the policy and any endorsement.

c. Contract liability. Some contracts shift legal liability from one party to the other through risk of loss, indemnification, or other similar clauses that make a party liable for something they would not otherwise have responsibility. In these cases, many standard liability policies exclude coverage for these losses that the insured would not have been liable for if they hadn't signed the contract. Contract feeders need to carefully review their contracts regarding contract liability and more importantly, have their insurance company review the contract and give them a determination as to coverage.

d. Practical issues in analyzing contract feeders' insurance risk.

a) Unfortunately, the contract feeders in the cases noted in this outline were not provided with the coverage they needed. But contract feeders should not shy away from getting coverage. Livestock death losses from ventilation system failure can be a staggering economic loss and there are good policies available that provide liability coverage for those losses.
b) Producers must read and understand the policy and have an advisor review the policy carefully. Better yet, get written assurance from the insurance company stating that livestock death losses from ventilation system failure are covered.
c) If an endorsement is for custom farming, review the definition of custom farming and make sure contract feeding livestock is included.
d) Make sure an endorsement for contract feeding overrides any general policy exclusion for damage or loss to property in the insured's "care, custody or control."
e) Make sure all potential causes of livestock injury or death loss (for example, asphyxiation, hypothermia, hyperthermia and suffocation) are covered and not excluded under a policy exclusion such as the care, custody and control exclusion or the pollution exclusion. The best approach is to make sure the terms asphyxiation, hypothermia, hyperthermia and suffocation are listed under coverages.
f) Under the Supreme Court's ruling in *Boelman*, the contract feeder would not have had coverage for third-party losses without the endorsement. Contract feeders who do not have a custom feeding endorsement should at a minimum review their liability policy to make sure they have protection for claims by anyone who might get hurt in or near their livestock operations.
g) Producers who own livestock being contract fed may have insurance coverage for livestock death losses. Some contract feeders wrongfully assume that if the livestock owner has coverage, they don't need liability coverage under a custom feeding endorsement. It is critical that the parties understand that if the contract feeder is responsible for livestock losses, the livestock owner's insurance company may cover the loss but then demand reimbursement from the contract feeder for the loss. Without their own insurance coverage, the contract feeder could be forced to pay the producer's insurance company.
h) Some feeding contracts require the feeder to have custom feeding liability coverage. Contract feeders may mistakenly view this as requiring them to insure the owner's livestock. Rather, livestock losses are a significant potential liability for the feeder. Insurance can protect against those losses as well as avoiding a contract feeding dispute.

For a complete listing and discussion of agricultural court decisions and related issues, see the Iowa State University Center for Agricultural Law and Taxation website, Kristine Tidgren, Assistant Director, http://www.calt.iastate.edu.

2016 Commercial & Bankruptcy Law Seminar

Bankruptcy Case Law Update

3:00 p.m. - 3:45 p.m.

Presented by

Hon. Charles L. Nail, Jr.
Chief Bankruptcy Judge,
District of South Dakota
400 South Phillips Avenue
Sioux Falls, South Dakota 57104

Hon. Anita Shodeen
Chief Bankruptcy Judge
Southern District of Iowa
110 E Court Avenue, Ste. 447
Des Moines, IA 50309

Friday, April 22, 2016

IOWA STATE BAR ASSOCIATION

Commercial and Bankruptcy Seminar

April 22, 2016

CASE LAW UPDATE

Judge Charles L. Nail (D. S. D.)

Judge Anita L. Shodeen (S.D. IA)

SUPREME COURT OF THE UNITED STATES

***Baker Botts, KKP v. ASARCO, LLC,* 135 S.Ct. 2158 (2015)**

Compensation for attorney fees incurred for defending an objection to a professional's fee application not permitted.

***Bank of America v. Toledo-Cardona and Bank of America v. Caulkett,* 135 S.Ct. 1995 (2015)**

These cases involve an issue previously addressed in *Dewsnup v. Timm,* 502 U.S.410 (1992) which prevented a debtor from stripping a lien down to the value of the collateral in a chapter 7 case. The Court declined to revisit its prior holding to extend the ability of a debtor to strip off a wholly unsecured lien.

***Wellness International Network, Ltd. v. Sharif,* 135 S.Ct. 1932 (2015)**

Addresses the issue of consent to overcome jurisdictional issue identified in *Stern v. Marshall* which was not resolved in the prior appeal in *Executive Benefits v. Arkinson.*

***Harris v. Viegelahn,* 135 S.Ct. 1829 (2015)**

Amounts paid by debtor that are still held by the chapter 13 trustee upon conversion of the case to chapter 7 must be refunded to the debtor.

***Bullard v. Hyde Park Savings Bank,* 135 S.Ct. 1686 (2015)**

An order denying confirmation of a plan is not final for purposes of appeal.

EIGHTH CIRCUIT[1]

STANDING

***O&S Trucking, Inc. v. Mercedes Benz Fin. Servs. USA (In re O&S Trucking, Inc.),* No. 15-2048, 2016 WL 279269, 2016 U.S. App. LEXIS 1126 (8th Cir. Jan. 22, 2016) (Gruender, J.), *aff'g* 529 B.R. 711 (B.A.P. 8th Cir. 2015)**

Agreeing that the appellant lacked standing, the Eighth Circuit affirmed the BAP's dismissal of an appeal from a chapter 11 plan confirmation order and related interlocutory orders for the lack of jurisdiction.

The debtor appealed from three orders—the order determining a secured claim, the order denying reconsideration, and the plan confirmation order. The BAP stated that the secured-claim order and the order denying reconsideration were interlocutory orders; the Eighth Circuit agreed and stated that those orders merged into plan confirmation.

As to the confirmation order, the BAP determined that the debtor had no standing to appeal it because the debtor was not an aggrieved party. Under the "person-aggrieved" doctrine, "to have standing to appeal the decision of the bankruptcy court, an appellant must be a person aggrieved," and "a party may not appeal from a judgment of decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree." Here, the debtor proposed the plan, did not object to the plan, and obtained confirmation of that plan. In this manner, the debtor was not an aggrieved party, and thus, did not have standing to appeal the confirmation order. The BAP then noted that in the chapter 13 context, there is an exception—the *Zahn* procedure—which permits a debtor to seek review from a confirmed plan. Under this procedure, a debtor would propose a plan that incorporates a disputed interlocutory determination, and then object to confirmation of that plan while highlighting opposition to the disputed determination, and then appeal if the confirmed plan contains the objectionable provision. The BAP noted that the debtor did none of that. So it was not an aggrieved party and thus had no standing to appeal the confirmation order.

The Eighth Circuit agreed. It reiterated that "a debtor lacks standing to appeal a judgment rendered wholly in his favor." The Eighth Circuit then extended *Zahn* to chapter 11 cases, and agreed that the debtor's failure to comply with the *Zahn* procedure was fatal to the debtor's appeal. Under the *Zahn* procedure, "a debtor who objects to her own plan may be an aggrieved party and have standing to appeal confirmation of such plan." The debtor argued that it had standing to appeal the confirmation order because the plan provided that the secured claim would be adjusted upon the outcome of pending appeals. The Eighth Circuit determined that this provision was not enough "to meet *Zahn's* requirement that a debtor object to a plan in order to demonstrate person-aggrieved status," because the provision did not state the debtor's objection

[1] Acknowledgement and thanks to Judge Robert Kressel and Chief Judge Shon Hastings for allowing materials which they prepared and presented at a recent webinar sponsored by the Federal Judicial Center in Washington, D.C. to be incorporated into this outline.

to the plan nor did the provision state the debtor's intent to appeal the confirmation order because of the disputed interlocutory determination.

***Cutcliff v. Reuter*, 791 F.3d 875 (8th Cir. 2015)**

This ruling is one of many that arise from a bankruptcy proceeding originally filed in 2010. At issue in this appeal is a judgment for actual and punitive damages recommended by the bankruptcy court without an evidentiary hearing. Upon de novo review the district court adopted the proposed findings and conclusions of law and entered final judgment. The debtor's appeal was dismissed because he lacked standing under the person aggrieved doctrine. In addressing the co-trustee's arguments on appeal, the Court of Appeals held that the issue was properly referred to the bankruptcy court for determination as a "related to" matter under 11 U.S.C. §157. It further determined that a hearing prior to the award of punitive damages was subject to an exception and was not required in this case.

***Robb v. Harder (In re Robb),* 534 B.R. 354 (B.A.P. 8th Cir. 2015)**

The BAP dismissed the debtor's appeal from an order overruling the debtor's objection to claim for the lack of jurisdiction. The chapter 7 trustee filed an unsecured proof of claim for $450.00 in the debtor's newly converted chapter 13 case for services rendered in the chapter 7 case. The debtor objected to the claim, arguing that the trustee was not entitled to compensation under § 326 because the trustee did not disburse funds before conversion. The bankruptcy court overruled the debtor's objection and allowed the claim, holding that § 326(a) was not the sole method of trustee compensation. The debtor appealed.

The BAP dismissed the appeal for the lack of jurisdiction after it concluded that the debtor lacked standing to appeal the order because she was not a person aggrieved. "The person-aggrieved doctrine limits standing to persons with a financial stake in the bankruptcy court's order, meaning they were directly and adversely affected pecuniarily by the order." One is a "person aggrieved" when "an order diminishes [her] property, increases [her] burden, or impairs [her] rights." Debtors often lack standing to object to claims or related orders because they do not have a pecuniary interest in the distribution of estate assets. An objection to a proposed distribution only affects how much each creditor would receive; the objection does not affect a debtor's rights, except when there is a surplus to be returned to the debtor.

Here, it was not clear that creditors would receive a 100% distribution. Moreover, the debtor's $590.00 monthly plan payment obligation remained the same despite the allowance of the chapter 7 trustee's claim and despite the claim's impact on other creditors. Therefore, the debtor was not aggrieved by the order overruling her objection to claim and thus lacked standing, which warranted dismissal of the appeal for the lack of jurisdiction.

CLAIM OBJECTIONS/FDCPA

***Gatewood v. CP Medical, LLC (In re Gatewood),* 533 B.R. 905 (B.A.P. 8th Cir. 2015)**

Debtors petitioned for relief under Chapter 13 on October 7, 2013. CP Medical, LLC timely filed a proof of claim on October 24, 2013. Debtors filed an adversary action, claiming CP Medical violated the Fair Debt Collection Practices Act (FDCPA) by filing a proof of claim for a debt that was time-barred. Specifically, debtors alleged that the medical services included in CP Medical's proof of claim were provided on February 27, 2011, outside the Arkansas two-year statute of limitations for medical debt collections. They claimed this conduct constituted "false, deceptive, misleading, unfair and unconscionable debt collection practice" in violation of the FDCPA.

The bankruptcy court granted summary judgment in favor of CP Medical, finding that CP Medical's conduct did not rise to the level of actual or threatened litigation. Debtors appealed, and the BAP affirmed.

The BAP observed that "it is abundantly clear that filing a proof of claim in a bankruptcy case is intended to result in some recovery for the creditor" and arguably invokes debt collection litigation. Next, the BAP addressed the question of whether CP Medical's filing of a proof of claim on a stale debt was false, misleading, deceptive, unfair or unconscionable under the FDCPA. The BAP cited compelling analysis from Broadrick v. LVNV Funding, LLC (In re Broadrick), 532 B.R. 60 (Bankr. M.D. Tenn. 2015). In Broadrick, the bankruptcy court reasoned that, while not every proof of claim filing on a stale debt is an automatic violation of the FDCPA, an FDCPA violation could arise in the bankruptcy claims process. Applying similar rationale, the BAP found that debtors listed the debt at issue in their schedules, CP Medical filed a timely proof of claim that was facially accurate and not misleading and debtors did not object to this claim. It held that filing a timely and facially accurate proof of claim on a stale debt, alone, is not a prohibited "false, deceptive, misleading, unfair or unconscionable" debt collection practice under the FDCPA.

REAFFIRMATION AGREEMENTS

***Venture Bank v. Lapides,* 800 F.3d 442 (8th Cir. 2015)**

After debtor was discharged the bank initiated a declaratory judgment action in state court for enforcement of various post-discharge agreements and foreclosure of its third mortgage. [R]eaffirmation agreements are enforceable only if they are enforceable under state law *and* meet the requirements of federal law in §524(c)." (emphasis original). The Agreements entered into between Lapides and the bank were unenforceable as reaffirmation agreements because they did not meet the requirements of 11 USC §524. This conclusion renders the application of state law or other legal issues involving contracts unnecessary. Under the bankruptcy code, a debtor may elect to voluntarily repay a debt after its discharge. The decision affirmed the conclusion that the

actions of the bank provided "ample evidence of pressure and inducement" to conclude that Lapides' were not voluntary.

ABSOLUTE PRIORITY RULE IN INDIVIDUAL CHAPTER 11 CASE

***Heritage Bank v. Woodward, (In re Woodward),* 537 B.R. 894 (B.A.P. 8th Cir. 2015)**

Heritage Bank, holder of an allowed unsecured claim, appealed from a bankruptcy court order confirming debtor's Fifth Amended Chapter 11 Plan. On appeal to the BAP, Heritage argued that the confirmed plan violated the absolute priority rule because it allowed individual debtors in Chapter 11 to retain property acquired prior to petitioning for bankruptcy relief when not all creditors were paid in full.

The BAP held that the absolute priority rule applies in individual Chapter 11 cases, preventing debtors from retaining prepetition property. It concluded: (a) the relevant statutory language in § 1115 and § 1129(b)(2)(B)(ii) read in context supports the continuing application of the absolute priority rule in individual Chapter 11 cases; (b) Congress has not evinced clear intent to abrogate the absolute priority rule; and (c) the majority of courts to address this issue (including the Fourth, Fifth, Sixth and Tenth Circuits) agree that the absolute priority rule applies in individual Chapter 11 cases. Accordingly, it reversed the decision of the bankruptcy court and remanded the case for a new confirmation hearing.

STUDENT LOANS

***Conway v. National Collegiate Trust (In re Conway),* 542 B.R. 855 (B.A.P. 8th Cir. 2015)**

In a student loan discharge case, the BAP ruled that the bankruptcy court did not clearly err when selecting a certain time period to calculate the debtor's present disposable income, and that the court did not abuse its discretion when denying the debtor's motion to make additional findings and to amend the judgment.

Previously, the BAP reversed the bankruptcy court, concluding that excepting from discharge all (fifteen) student loans would impose an undue hardship. The BAP concluded that the debtor's past, present, and reasonably reliable future financial resources were not sufficient to make all of the monthly, separate student loan payments while maintaining a minimum standard of living. Because of the debtor's fluctuating income, the BAP also remanded the case to the bankruptcy court to determine whether the debtor's present disposable income over an entire year was sufficient to service any of the loans, in a separate loan-by-loan undue hardship analysis. The BAP's decision was affirmed by the Eighth Circuit in a per curiam opinion.

On remand, the bankruptcy court selected November 2013 to October 2014 to calculate the present disposable income. The court then determined that the debtor could make payments on four of the student loans without undue hardship, thereby entering judgment that those four loans were nondischargeable. Subsequently, the debtor filed a motion to make additional findings and to amend the judgment. The bankruptcy court denied the motion.

On appeal to the BAP, the debtor argued that the bankruptcy court clearly erred in its disposable income calculations by selecting the November 2013 to October 2014 time period and by failing to consider her post-October 2014 decrease in income and increase in expenses. The debtor also argued that the bankruptcy court abused its discretion in denying the motion to amend.

The BAP affirmed, holding that the bankruptcy court was not clearly erroneous in its fact findings for the time period analyzed because it was the most recent year period for which complete income and expense information was available and was therefore the most reliable. The BAP reasoned that courts make decisions based on the most reliable evidence before them and that undue hardship determinations are inherently discretionary based upon circumstances at the relevant time. Further, "courts are not equipped to revisit a nondischargeability determination every time a debtor's circumstances change; to do so would wreak havoc with the concept of the finality of a court order." In so holding, the BAP also concluded that the bankruptcy court did not abuse its discretion in denying the motion to amend.

This is the second BAP decision holding there is no such thing as a partial discharge, but where there are multiple student loans, the bankruptcy court should analyze each one individually for undue hardship. See In re Andresen, 232 B.R. 127, 128 (B.A.P. 8th Cir. 1999).

***Jordahl v. Burrell (In re Jordahl),* 539 B.R. 567 (B.A.P. 8th Cir. 2015)**

The BAP affirmed the ruling of the bankruptcy court, holding that when a chapter 13 plan's proposed treatment of a claim under one subsection of § 1322(b) also falls within the scope of another subsection of § 1322(b), both subsections must be satisfied.

The debtors were current on their nondischargeable student loans; the last payment was due after plan completion. The debtors' original plan proposed to classify the student loans separately from other unsecured, non-priority debt, to maintain direct student loan payments with interest, and to pay the other unsecured creditors pro rata under the plan. Distribution to the student loan claims would be 52%, while distribution to the other unsecured claims would be 6%-11.5%.
The trustee objected to the plan, arguing that while the proposed treatment of the loans was permissible under § 1322(b)(5), it violated § 1322(b)(1) by unfairly discriminating against other unsecured claims, and violated § 1322(b)(10) by paying post-petition interest on the loans without providing for full payment of all allowed claims.

The court held that the debtors may use § 1322(b)(5) to maintain student loan payments, but that they may not unfairly discriminate against other unsecured creditors under § 1322(b)(1). It declined to address § 1322(b)(10). The court then applied *In re Leser*'s unfair discrimination

test, held that the proposed treatment constituted unfair discrimination, and then denied confirmation and sustained the trustee's objection. Later, the court confirmed a modified plan over the debtors' objection; the debtors appealed.

The BAP affirmed, holding that "when a Chapter 13 Debtor's treatment of a creditor under one subsection of § 1322(b) falls within the contours of another subsection of that statute, all standards of both subsections must be satisfied." The BAP also agreed with the bankruptcy court that the plan was unfairly discriminatory under *Leser*. The BAP further held that § 1322(b)(10) applied to and barred the proposed plan treatment of the student loans because the proposed plan would pay post-petition interest on the student loans without paying all allowed claims in full.

SUBSTANTIVE CONSOLIDATION

***Boellner v. Dowden*, 612 Fed. App'x 399 (8th Cir. 2015) (per curiam)**

The Eighth Circuit ruled that the bankruptcy court did not abuse its discretion in ordering joint administration and substantive consolidation of two chapter 7 cases, and affirmed.

Two debtors were married but living separately when they filed separate chapter 7 petitions. The chapter 7 trustee moved for substantive consolidation, arguing that the debtors' assets, liabilities, and financial affairs were substantially the same. The bankruptcy court ordered substantive consolidation after it considered the following factors: "whether the debtors were interrelated, whether the benefit of consolidation outweighed the harm to the creditors, and whether any prejudice would result from allowing the debtors to maintain separate bankruptcy estates."

On appeal, the Boellners argued that the bankruptcy court abused its discretion in ordering substantive consolidation because there not enough evidence to support the court's ruling. The district court affirmed. The Eighth Circuit also affirmed.

The Eighth Circuit stated that when deciding whether to order substantive consolidation, a court must consider "(1) whether there is a substantial identity between the assets, liabilities, and handling of financial affairs between the debtor spouses; and (2) whether harm will result from permitting or denying consolidation;" and that "[u]ltimately, the court must be persuaded that the creditors will suffer greater prejudice in the absence of consolidation than the debtors (and any objecting creditors) will suffer from its imposition." As to each of these factors, the Eighth Circuit concluded that there was sufficient evidence in the record to support the bankruptcy court's findings.

EXEMPTIONS

***Dittmaier v. Sosne,* 806 F.3d 987 (8th Cir. 2015)**

The Eighth Circuit affirmed the bankruptcy court in denying the debtor's claimed exemption in her earned income tax credit and in ordering turnover of the funds. Shortly before filing for chapter 7 relief, the debtor received an income tax refund, a portion of which included the earned income tax credit. After the trustee moved for turnover of the refund, the debtor amended her schedules and claimed the EITC portion exempt under Mo. Rev. Stat. § 513.430.1(10)(a) as a public assistance benefit. The relevant statute provided, "The following property shall be exempt from attachment and execution to the extent of any person's interest therein: . . . (10) Such person's right to receive . . . a public assistance benefit." The dispute on appeal was whether the "right to receive . . . a public assistance benefit" terminates when the debtor received the benefit prior to filing for relief. The bankruptcy denied the exemption and ordered the debtor to turnover the nonexempt portion. On appeal, the district court affirmed, holding that § 513.430.1(10)(a) did not exempt the debtor's EITC because she received the EITC before filing her case. The debtor appealed to the Eighth Circuit.

The Eighth Circuit affirmed, holding that § 513.430.1(10)(a) does not exempt public assistance benefits received by the debtor prior to filing for relief in bankruptcy court. It relied on a Missouri Court of Appeals decision, which held that the phrase "right to receive" excludes "funds already received by a debtor because funds already received are [the debtor's] personal property and are no longer exempt from execution." Under this interpretation, the "right to receive . . . a public assistance benefit" terminated when the debtor received the benefit prior to filing for relief. In addition, the Court analyzed the structure of § 513.430.1, noting that the Missouri legislature uses certain language—"property that is traceable to"—in other portions of § 513.430.1—here § 513.430.1(11) to exempt other types of property, but that the phrase was not present in § 513.430.1(10)(a), which further indicates that the Missouri legislature did not intend to exempt a public assistance benefit, here an EITC, that is received by the debtor before filing for relief.

***Hardy v. Fink,* 787 F.3d 1189 (8th Cir. 2015)**

The debtor sought to exempt the portion of her income tax refund arising from the Additional Child Tax Credit as a public assistance benefit under Missouri law. The bankruptcy court sustained the trustee's objection on the basis that the credit did not benefit only the "needy" and because the purpose of the tax credit was to ease the tax burden on working families and to promote family values. The BAP affirmed, concluding that because non-needy families (married filing jointly with modified adjusted gross income in excess of $100,000) were potentially eligible for the credit, and because the ACTC also required a minimum earned income threshold that the "most needy" would not meet, it was not a public assistance benefit.

On appeal, the Eighth Circuit reversed, holding that because the legislative intent of the ACTC, as documented through amendments, was to help low-income families, the credit at issue qualifies as a public assistance benefit. The court noted that, while defined in other parts of its

code, Missouri's definitions of "public assistance benefit" did not aid in the application of the term with respect to a federal tax refund. The court next sought to determine the federal congressional intent behind the term and agreed with the BAP that "public assistance benefit" generally means those government benefits provided to the needy. But, the court determined, after a lengthy review of the legislative history from its original passing in 1997 through each amendment, that the legislative purpose of the ACTC is to benefit low-income families, and that it has fulfilled that legislative intent in practice by overwhelmingly benefitting low-income families. The court found that the BAP had focused too narrowly on the statute only as originally enacted without due consideration of the various amendments and legislative purposes behind those amendments.

SANCTIONS

***Young v. Young, (In re Young)*, 789 F.3d 872 (8th Cir. 2015)**

During the course of representing a Chapter 13 debtor, counsel repeatedly mischaracterized past-due postpetition domestic support obligations as past-due prepetition obligations, falsely represented that debtor was current on his alimony payments and claimed debtor would "continue" to make his alimony payments even though he had not been making the payments. Based in part on these representations, the bankruptcy court confirmed debtor's plan. The bankruptcy court discovered the inaccurate statements and entered an order to show cause (OCS) directed at both debtor and his counsel. At the OSC hearing, the bankruptcy court found counsel had no basis in law or fact for the assertions the court questioned. The bankruptcy court also found that counsel obtained impermissible benefit for debtor as a result of her misrepresentations and that she manipulated the Bankruptcy Code and bankruptcy system. The bankruptcy court suspended counsel from practice in Arkansas bankruptcy courts for six months, fined her $1,000 and directed her to attend 12 hours of CLE on Chapter 13 bankruptcy within six months for violating Rule 9011. The bankruptcy court also sanctioned counsel for misrepresentations she made at the OCS hearing. Relying on the court's inherent power under § 11 U.S.C. 105, the bankruptcy court suspended counsel for six months to run concurrent with the Rule 9011 suspension and imposed an additional $1,000 fine.

On appeal, the BAP affirmed the bankruptcy court's imposition of Rule 9011 sanctions, but reversed its imposition of the additional sanctions. The BAP found that the bankruptcy court did not provide counsel with notice and an opportunity to respond before imposing sanctions resulting from her misrepresentations at the OCS hearing.

Counsel appealed the Rule 9011 sanctions to the Eighth Circuit. The Eighth Circuit affirmed, concluding that the bankruptcy court's findings were supported by ample evidence in the record. The Eighth Circuit agreed that counsel "had no basis in law or fact" for the characterizations she made and that her misconduct was "calculated and disingenuous," justifying the sanctions. The Eighth Circuit explained that "Rule 9011 is critical for the bankruptcy system to function because 'the bankruptcy judge must rely on counsel to act in good faith'" due to the high volume and fast-paced proceedings. The Eighth Circuit rejected the "pure-heart-and-empty-head"

defense, ruling that Rule 9011 requires attorneys to conduct reasonable investigation into the facts and law to support representations made to the court because the "'potential for mischief to be caused by an attorney who is willing to skirt ethical obligations and procedural rules is enormous.'" The Eighth Circuit also rejected counsel's argument that the sanctions imposed were too severe, finding that they were commensurate with the severity of the attorney's deception and limited to "what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Notably, the Eighth Circuit found that the bankruptcy court was authorized to suspend the attorney from the practice of law before the bankruptcy court under local rule and under Fed. R. Bankr. P. 9011(c)(2).

***Needler v. Casamatta (In re Miller Automotive Group, Inc.),* 536 B.R. 828 (B.A.P. 8th Cir. 2015)**

Attorney William L. Needler filed a voluntary petition under Chapter 11 on behalf of debtor. Because he was not admitted to practice in the Western District of Missouri, Needler filed a motion to appear pro hac vice and an application to be employed as debtor's counsel under § 327. The bankruptcy court approved the application over the objection of the United States Trustee. While the case was pending, counsel ineffectively represented his client and failed to comply with local filing requirements. The court eventually dismissed the case on debtor's motion and subsequently closed the case. Needler never sought or obtained approval of fees or expenses while the case was open.

The United States Trustee filed a motion to reopen the case after receiving complaints from debtor and debtor's principals concerning Needler's false and misleading representations, misconduct and mishandling of the case. The bankruptcy court granted the motion to reopen without a hearing and the United States Trustee filed a motion for sanctions, including disgorgement and indefinite suspension from practice in the district. At a preliminary hearing on the motion, the bankruptcy court ordered Needler to file a fee application. Needler complied. The bankruptcy court held an evidentiary hearing and granted the motion for disgorgement and sanctions. Specifically, the bankruptcy court disapproved Needler's application for fees and ordered disgorgement of all fees he collected as part of his retainer. The bankruptcy court also suspended Needler indefinitely from practicing before the United States Bankruptcy Court for the Western District of Missouri and revoked his electronic filing privileges.

On appeal, the BAP affirmed, finding that the attorney received the requisite notice and opportunity to be heard. The BAP also concluded that the evidence overwhelmingly supported the bankruptcy court's conclusion that the attorney failed to provide value to the debtor's estate, inform his client, obtain his client's input and authorization before filing pleadings, enter into a written fee agreement with his client, comply with local rules and perform reasonable investigation into facts contained in the petition and other filings. The BAP held that the bankruptcy court did not abuse its discretion by imposing sanctions under Rule 9011(c)(1)(B) and § 105(a).

***Williams v. Living Hope Southeast, LLC (In re Living Hope Southwest Medical Services, LLC)*, 525 B.R. 95 (B.A.P. 8th Cir. 2015)**

Attorney David Kimbro Stephens is the owner and controlling principal of the debtor. He also owns an interest in Living Hope Southeast, LLC, a debtor in a separate bankruptcy case. The bankruptcy trustee filed an adversary proceeding against Southeast and Stephens, seeking a judgment or claim for the value of the assets transferred postpetition by debtor to Southeast. By stipulation, Stephens was dismissed as a defendant in the adversary proceeding. Following trial, the bankruptcy court granted the trustee's request and allowed an unsecured claim against Southeast in the amount of $1,190,000. Although Stephens had been dismissed from the case and his motion to intervene denied, he appealed the bankruptcy court's order to the district court. While his appeal was pending, Stephens filed a Rule 60 motion, seeking relief from the order approving the unsecured claim against Southeast. Stephens alleged that the trustee's attorney colluded with Southeast's attorneys and that the collusion resulted in the judgment against Southeast. Stephens alleged that the attorneys' conduct was "fraud on the court." The motion prompted the trustee's attorney to send Stephens a safe harbor letter. Stephens responded by filing a corrected and amended brief but did not withdraw or amend the Rule 60 motion. The trustee filed a motion for imposition of Rule 9011 sanctions and a motion to strike the corrected and amended brief. After a hearing on the motions, the bankruptcy court denied Stephens' Rule 60 motion for lack of standing because he had been dismissed as a party and granted the Rule 9011 motion. The bankruptcy court ordered Stephens to pay the trustee $19,188.42 in attorney fees as the prevailing party under Rule 9011(c)(1)(A) and ordered Stephens to pay $1,659.10 as a sanction under Rule 9011(c)(2) to deter Stephens from repeating the offending conduct. Stephens moved for reconsideration, and the bankruptcy court denied the order.

On appeal, Stephens argued that the trustee violated Rule 9011(c)(1)(A) by proceeding with the motion for sanctions after Stephens had corrected the original Rule 60 pleadings within the safe harbor time period. The BAP found that Stephens did not withdraw or correct the Rule 60 motion which, like the brief, included allegations of misconduct, collusion and fraud on the court. It also found that the corrected brief removed only a few of the many allegations that trustee found offensive. The BAP concluded that "[f]iling a 'corrected' pleading which retains the substance of the allegedly-offensive material does not 'withdraw or appropriately correct' a pleading under the Rule, and does not trigger a new safe harbor period." The BAP applied an objective standard of reasonableness under the circumstances and affirmed the bankruptcy court. It agreed that Stephens' allegations were not plausible, not objectively reasonable and not supported by the evidence. In reviewing the fee award imposed by the bankruptcy court, the BAP noted that Rule 9011(c)(1)(A) is not a sanction but rather a fee-shifting provision that does not require the court to consider Stephens' ability to pay. The BAP also concluded that the bankruptcy court did not err in imposing the sanction under Rule 9011(c)(2) because Stephens failed to meet his burden of producing evidence that he could not afford to pay the $1,659.10 fine.

SETTLEMENT

***Ritchie Capital Management, L.L.C. v. Kelley*, 785 F.3d 273 (8th Cir. 2015)**

Bankruptcy Judge: Greg Kishel

The Eighth Circuit concluded that the bankruptcy court did not err in approving a settlement agreement. Beginning with the proposition that a bankruptcy court's approval of a settlement will not be set aside unless there is plain error or abuse of discretion, the Eighth Circuit noted that a bankruptcy court abuses its discretion when it relies upon a clearly erroneous finding of fact or fails to apply the proper legal standard. A settlement is not required to constitute "'the best result obtainable.'" Rather, the bankruptcy court must only "ensure 'the settlement does not fall below the lowest point in the range of reasonableness.'" The proper standard is whether the settlement is fair and equitable and in the best interests of the estate. In applying the proper legal standard, the bankruptcy court must consider: "'(A) the probability of success in the litigation; (B) the difficulties, if any to be encountered in the matter of collection; (C) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (D) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.'" The Eighth Circuit rejected each of Richie Capital Management's arguments, finding that the bankruptcy court's decision to approve the settlement was not an abuse of discretion and that it did not err in approving the settlement.

AVOIDANCE ACTIONS

***Dietz v. Calandrillo (In re Genmar Holdings, Inc.),* 776 F.3d 961 (8th Cir. 2015)**

To settle claims with a boat owner alleging that the boat was defective, a manufacturer agreed to accept return of the boat in exchange for a payment of $140,000 to a bank to obtain release of a lien and a payment of $65,000 to the boat's owner. The agreement specifically provided that the manufacturer was to pay the $65,000 "*no sooner than*" 15 days after receiving the lien waiver and title documents.

The manufacturer filed for bankruptcy. The manufacturer's payment to the bank was outside the 90-day preference period of §547(b), but the $65,000 payment to the owner was within the period. The trustee sought to avoid the payment to the owner as preferential, but the owner argued the payment satisfied an exception as a "contemporaneous new value exchange" pursuant to §547(c)(1). The bankruptcy court rejected the argument and avoided the transfer. The BAP affirmed. The Eighth Circuit also affirmed.

The court noted that the owner bore the burden of proving the parties intended the payment to be a contemporaneous exchange for new value. The court then emphasized that a time lag, standing alone, often will not answer the question of the parties' intent because many scenarios exist in which parties intend a contemporaneous exchange for new value, but delays nonetheless occur. The court gave the example of a stock purchase intended as a contemporaneous exchange event though it may not actually settle for seven days. The court stated, "Contemporaneity is a flexible

concept which requires a case-by-case inquiry into all relevant circumstances." The court then concluded that a reasonable jury could view the mandatory 15-day delay period contained in the settlement agreement as evidence that the owner and manufacturer intended the transaction to include a 15-day, short-term loan from the owner to the manufacturer. Because the owner bore the burden of proof and failed to present evidence to disprove this reasonable interpretation, the owner failed to prove the transfer was a contemporaneous new value exchange.

DISCHARGE

***Home Service Oil Company v. Cecil (In re Cecil),* 542 B.R. 447 (B.A.P. 8th Cir. 2015)**

Creditor Home Service Oil Company filed an adversary action seeking denial of debtor's discharge under § 727(a)(2) and (4). Following trial, the bankruptcy court found that debtor's failure to include several assets on her schedules (including 12 bank accounts, jewelry, firearms, business interests and income), viewed together, amounted to reckless indifference to the truth sufficient to find fraudulent intent under § 727(a)(4). The bankruptcy court denied debtor a discharge for making a false oath or account in connection with the case.

On appeal, debtor did not dispute that the creditor proved all the elements of its § 727(a)(4) claim except intent. Debtor admitted she filled out her bankruptcy schedules "'without doing a thorough investigation and ended up doing a poor job,'" but argued that a "'poor job'" is not sufficient to deny her discharge under § 727(a)(4). Instead, she suggested that the creditor must prove "'she did a poor job of filling out those papers with the specific purpose of defrauding her creditors.'" She argued that her creditors would not have received anything had she disclosed all her assets and missing information and, therefore, she could not have had the specific intent to defraud them by omitting them. She also claimed that certain cash payments were properly omitted from her schedules because they were not bankruptcy estate assets.

The BAP was not persuaded. In its opinion affirming the bankruptcy court, it explained: "Full disclosure is required, not only to ensure that creditors receive everything they are entitled to receive under the Bankruptcy Code, but also to give the bankruptcy system credibility and make it function properly and smoothly." The BAP also noted that questions regarding whether assets titled in debtor's name are property of the estate are not questions debtor should decide. "Rather, those questions are plainly and fundamentally issues to be determined by a trustee or the court." Debtors are not free to pick and choose what to disclose.

2016 Commercial & Bankruptcy Law Seminar

Pending Doom: Another Ag Crisis

3:45 p.m. - 4:30 p.m.

Presented by

Larry Eide
Pappajohn
Shriver, Eide & Nielsen, PC
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Friday, April 22, 2016

CHAPTER 12 BANKRUPTCY

I. GOALS OF FARM BANKRUPTCIES

1. Discharge of Debts
2. Relaxation of Repayment Terms
    a. Increase length of time for repayment
    b. Decrease interest rate
    c. Decrease annual debt service requirements
3. Protection for Debtor
    a. Automatic stay protects Debtor from creditors' collection activities
    b. Allows Debtor time to evaluate available options
4. Preservation of Exempt Assets
    a. Machinery, Livestock & Feed for Livestock, if farming - $10,000 per farmer
        1. Spouse with non-farm job is oftentimes still found to be a farmer
5. Tax Avoidance
    a. Avoid payment of taxes on gain realized by the sale of agricultural assets that were primarily used in the farming operation
    b. Insolvency test re: debt forgiveness income

II. CHAPTER 12

1. Debt Limits - $4,031,575 total
    a. Debt Limit may be too low for some farmers. Debtor may need to liquidate unnecessary assets in the year prior to filing to reduce debt enough to qualify.
2. Family Farmer - Can be individual, partnership or corporation
    a. Income limit – More than 50% of income from farming either in the tax year prior to filing or <u>both</u> the second and third year tax years prior to filing.

b. Debt type – Excluding the primary residence, more than 80% of debt must be from a family operation owned or operated by the Debtor

c. Asset Composition - If Debtor is corporation, more than 80% of the value of its assets must relate to farming operations.

d. Ownership Restrictions – If Debtor is a corporation, more than 50% of the outstanding stock/equity is held by one family, or by one family and relatives of members of the family and the family or relatives farm.

3. Plan Deadline – must be filed within 90 days of the petition date unless extended by Court Order

4. Unsecured creditors must receive as much as they would have received in a Chapter 7 liquidation.

5. Trustee fees are paid on all debts and claims that are paid through the Trustee.

6. Interest paid on secured claims is typically 2% above the yield on a U.S. Treasury security with a maturity equal to the length of repayment. See *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004).

7. Repayment of debts can be extended

   a. Real estate: 15-30 years

   b. Machinery: 3-7 years

   c. Breeding Livestock: 3-7 years if replacements are brought back into the herd

8. No Absolute Priority Rule

9. Net disposable income is paid to the trustee for distribution to unsecured creditors until discharge.

10. Plan Length: 3-5 years

    a. Longer plans are used in cases where Debtor must make significant payments to unsecured creditors based on liquidation analysis

11. Before incurring secured debt after filing, Debtor must get the Court's approval.

12. Cash Collateral – Use is prohibited absent agreement of secured creditor or the Court's approval.

13. Adequate Protection Payments – often paid to secured creditors.

14. Monthly Operating Reports – Due the 10th of the month; Trustee uses to gauge progress of bankruptcy

15. Feasibility – Plan must be feasible. Debtor must show ability to make payments under plan from normal annual income.

16. Dismissal – Debtor can dismiss case at any time.

17. Voluntary – Debtor cannot be forced into a Chapter 7 or 12.

18. Avoidance of Income Taxes – Debtor can avoid paying income taxes resulting from disposition of farm assets used in the farming operation provided that the disposition of assets occurs in the tax year before filing the Petition.

    a. *Hall v. U.S.*, 132 S. Ct. 1882 (2012): Applies to transactions in the tax year **prior** to filing; Lesson: Sell farm property with gains before filing Chapter 12. The sale must occur and close in tax year before filing.

    b. *Knudsen v. IRS*, 581 F.3d 696 (8th Cir. 2009): May apply to sales of farm assets that would produce ordinary income such as the sale of fat hogs.

III. NECESSARY DOCUMENTS AND WHERE TO GET THEM

1. Cash Flow Projections – how is the operation currently working and how is it projected to work if restructuring is successful

2. CCC Documents – CRP contracts, FSA documents and notices

3. List of Assets and Debts – appraisals, if available

    a. Appraiser

4. Depreciation Schedules - given to creditors in last 3 years

5. Income Tax Returns for past 5 years

    a. Tax preparer/CPA

    b. IRS/IDOR

6. Leases on real estate or machinery

    a. Landlord/leasing company

    b. County Recorder, if recorded

7. Life Insurance Policies

8. Promissory Notes

a. Creditors

9. Security Agreements

    a. Creditors

10. UCC Financing Statements – verify validity

    a. Secretary of State

    b. Creditors

11. Mortgages/Deeds of Trust – verify signed by property owner and valid notary

    a. County Recorder

12. Guarantees

    a. Creditors

13. Financial Statements – given to creditors in last 3 years

    a. Creditors

14. Real Estate Contracts

15. Divorced – if divorced, all decrees, stipulations, and/or orders relating to property settlements, child support, and alimony. - Priority

    a. Clerk of County in county where case was filed

    b. Debtor's divorce attorney

16. Corporate/Partnership Records, if applicable - record book, stock register, partnership agreements

    a. Corporation's/Partnership's attorney

IV. CHAPTER 12 TAX CONSIDERATIONS

1. Bankruptcy Code 1231 enables the Court to determine tax issues in certain events.

2. Bankruptcy Code 346 applies to Chapter 12 cases.

3. A separate taxable entity is NOT created by the commencement of a Chapter 12 case. The debtor-in-possession continues to file federal and state income tax returns in the same manner as pre-petition.

4. Bankruptcy Code 346(j) states that the rules of Internal Revenue Code (IRC) 108 apply to determine whether a discharge of indebtedness under

Chapter 12 is excluded from gross income for federal and state income tax purposes.

5. The general rule of IRC is that debt that is discharged is gross income for income tax purposes. There are numerous exceptions to the general rule.

6. IRC 108 provides that gross income does NOT include any amount (but for this section) which would be includible in gross income by reason of the discharge (in whole or in part) of indebtedness of the taxpayer if the discharge occurs in a Title 11 case.

7. Special Chapter 12 Tax Rule. Bankruptcy Code 1222(a)(2)(A) contains a special rule applicable only to Chapter 12 which can convert both federal and state income taxes due as of the commencement of a Chapter 12 date from a priority claim to a general unsecured claim which can be discharged at the conclusion of the Chapter 12 case. The rules and requirements are complex.

    a. The 8th Circuit was the first circuit court to consider this bankruptcy provision and it explained the application of the provisions *In re Knudsen*, 581 F.3d 696 (8th Cir. 2009).

    b. Subsequently the Supreme Court weighed in on the issue in *Hall v. United States*, 132 S. Ct. 1882 (2012). This case held that sales of property after the commencement of a Chapter 12 case were NOT eligible for Section 1222(a)(2 treatment. This case overruled the portion of *Knudsen* that allowed tax on the post-petition sale of assets (during the Chapter 12) to be dealt with under Bankruptcy Code 1222(a)(2)).

    c. *Knudsen* is more favorable to the debtors that most decisions that have followed *Knudsen*.

    d. Tax that is eligible for conversion to an unsecured claim must arise from the sale, transfer, exchange or other disposition of any farm asset used in the debtor's farming operation, which is generally considered to be limited to capital assets such as land, equipment, breeding livestock.

    e. The tax due for Section 1231 capital gains and Section 1245 depreciation recapture on eligible assets can be converted to an unsecured claim.

    f. Most courts have held that only the gain due on the sale of capital assets is eligible for conversion to a general unsecured claim. However the 8th Circuit *In re Knudsen* decided this issue differently and included the tax due on the sale of a large herd of market hogs to be converted to a general unsecured claim.

g. Tax that is eligible for conversion to an unsecured claim must be reflected on a return for a pre-petition period (i.e. the sale of assets must have occurred in a taxable year prior to the taxable year in which the Chapter 12 case is commenced.

h. IRC 1398 permits a Chapter 7 debtor to elect to close his or her tax year as of the date of commencement of the Chapter 7 case in order to permit the use of tax attributes by the debtor and to capture pre-petition taxes as a claim to be dealt with in the Chapter 7 case.

i. IRC 1398 does not apply to Chapter 12 case so that there is no election available to divide the year in which the case is commenced into 2 tax years. The portion of the 8th Circuit decision *In re Knudsen* that allowed the tax on the gain from the post-petition sale of assets to be eligible for conversion to a general unsecured claim was overruled by the US Supreme Court *Hall* decision.

j. Tax due on the net profit from the sale of crops, market livestock and other similar form of income is considered by most courts to NOT be eligible for conversion to a general unsecured claim. However the 8th Circuit *In re Knudsen* decided this issue differently.

k. The discharge of the taxes that are converted to a general unsecured claim occurs only upon issuance of the discharge of debtor.

l. The procedure to be followed in the plan is to attach 2 sets of income tax returns, one set as the debtor filed the returns and the other set reporting similar income with the eligible gains removed. The difference in the tax due on the 2 sets of returns is eligible for conversion to a general unsecured claim (this is considered the "marginal method" of calculation of the converted tax; the government has argued that converted taxes should be determined under the "proportional method" of computation, which causes the non-converted taxes to be higher). *Knudsen* approved the marginal method of calculation over the IRS objections.

CAROL F. DUNBAR
CHAPTER 12 TRUSTEE
531 COMMERCIAL STREET, SUITE 500
WATERLOO, IOWA 50701

TELEPHONE
(319) 233-6327

FACSIMILE
(319) 233-0346

December 09, 2015

Nicole B. Hughes
Attorney at Law
PO Box 248
Council Bluffs, IA 51502-0248

RE: Orvis K. Behrens Farms, Ltd.
Chapter 12 Bankruptcy No. 15-02498-ljm12

Dear Nicole:

You have filed for relief for a family farmer under Chapter 12 of the Bankruptcy Code on behalf of the above-named Debtor. As you may be aware, the Code sets forth certain requirements and imposes a variety of duties upon your client that must be satisfied to obtain prompt confirmation of a plan and to assist in the resolution of all Chapter 12 matters. Please be advised of the following:

1. Pursuant to § 521 of the Bankruptcy Code, Federal Rule of Bankruptcy Procedure 1007, and applicable Local Bankruptcy Rules, Debtor is required to cooperate with the United States Trustee and the Chapter 12 Trustee appointed in this case. Debtor is also required to furnish information requested by the United States Trustee and the Chapter 12 Trustee in supervising the administration of Debtor's estate, including regular reports on the operation of Debtor's farming enterprise. Finally, Debtor is required to give the United States Trustee and the Chapter 12 Trustee notice and copies of all motions and other pleadings.

2. Debtor must provide the Chapter 12 Trustee (NOT THE UNITED STATES TRUSTEE) with the following financial and informational reports:

   a. SUMMARY OF OPERATIONS FOR CHAPTER 12 CASE:

      Enclosure No. 1 is an informational report reflecting Debtor's farm operation, including total acreage, tillable acreage, results of past year's operation and estimates or projections for the current or next crop year. This form must be completed and received in the Chapter 12 Trustee's office at least **five (5) days prior to the first meeting of creditors**. Failure to submit the completed Summary of Operations at least five (5) days prior to the first meeting of creditors may result in the first meeting of creditors being continued to another date.

b. MONTHLY CASH RECEIPTS AND DISBURSEMENTS STATEMENT:

This report is contained in **Enclosure No. 2**. Debtor must report not later that the tenth (10^{th}) day following the end of the month all of his/her income in cash, check or otherwise (including government program payments of any nature), received during the month. **This report must be filed with the Court and served on the Chapter 12 Trustee**. The receipts should be itemized by kind, quantity, and dollar amount [for example: "Sold 2,000 bu. corn to Co-op Elevator at $1/bu. -- $2,000", "Sold 10 beef cattle to Acme Sale Barn for $59 per hundred weight -- $4,000", "Sold 5 tons of hay to Joe Smith -- $275"]. Likewise, all expenses paid in cash or by check must be itemized. Operating expenses must be itemized under appropriate headings such as fuel, feed, veterinarian expense, repairs, etc. Be certain that the part of the form, which calls for monthly cash reconciliation is properly completed. When the first report is filed, include all receipts and disbursements since the filing of the Petition. Debtor must attach to each monthly report a copy of the monthly statement for every bank account he/she maintains. (See paragraph 2(e) below).

c. TAX DEPOSIT STATEMENT:

If Debtor is a family farm corporation or if Debtor has employees who are subject to withholding or Social Security taxes, Debtor must complete the Tax Deposit Statement contained in **Enclosure No. 3** and provide evidence of payment.

d. INSURANCE STATEMENT:

Within ten (10) days after the date of this letter, Debtor must provide the Chapter 12 Trustee with documentation of fire and extended coverage on Debtor' buildings, equipment and motor vehicles. If no such insurance is currently in effect, Debtor must explain why it is not in force. Debtor shall immediately notify the Chapter 12 Trustee of any lapse, cancellation, or proposed cancellation of any insurance coverage.

e. REPORTING OF DEBTOR-IN-POSSESSION BANK ACCOUNTS:

ALL pre-petition bank accounts/investments open on the day of filing in which the Debtor have an interest, possession, custody, control, ownership or access, and **ALL** bank accounts opened or maintained by the Debtor subsequent to the filing of the bankruptcy (including general checking and savings, payroll, tax escrow accounts, cash collateral and certificates of deposit) must be reported to the Chapter 12 Trustee on the **BANK ACCOUNT REPORTING FORM** enclosed herewith (**Enclosure No. 4**).

The Debtor must also attach to Enclosure No. 4 a copy of the most recent **bank statement** received by the Debtor for EACH pre-petition account/investment reported. This form, with the attached bank statements, must be submitted to the

Trustee **within ten (10) days of the opening or closing of any post-petition accounts**. In addition, the Debtor must attach to the monthly receipts and disbursements statement copies of ALL monthly **bank statements** for EACH account/investment corresponding or relating to the month and/or period for which the financial report is being filed.

f. BANK SIGNATURE CARDS:

The Debtor must inform all banks in which the Debtor has debtor-in-possession accounts that the Debtor is in Chapter 12. **Within ten (10) days of receipt of this letter**, the Debtor must submit to the Chapter 12 Trustee copies of bank signature cards for ALL accounts bearing the inscription "Chapter 12 Debtor-In-Possession".

Pursuant to 11 U.S.C. § 345, all deposits must be invested in accounts fully insured the United States (FDIC insured) or in instruments backed by full faith and credit of the United States. All accounts and investments in a particular bank are only insured for $100,000 in the aggregate by the FDIC. If the aggregate amount of funds on deposit in a particular bank or savings institution exceeds the $100,000 FDIC insurance coverage, such funds may only be deposited if the bank of savings institution has either posted a bond in favor of the United States or deposited sufficient securities with the Federal Reserve Bank. Debtor may not deposit funds in excess of $100,000 in any particular bank without the prior approval of the United States Trustee. If deposits are expected to exceed $100,000 at any time, you should contact the office of the United States Trustee to confirm that the subject bank is an authorized depository.

3. DEBTOR'S DUTY TO FILE TAX RETURNS:

a. The specified mandate found in Internal Revenue Code Sections 6012(b)(4) and 1398(a) fails to include estates under Chapter 12 and therefore frees the Chapter 12 Trustee from any obligation to file Federal returns on behalf of the estate. Further, since the separate entity rules and Internal Revenue Code § 1398 do not apply to estates under Chapter 12, it is clearly the responsibility and duty of Debtor to prepare and file his/her own federal tax returns.

b. It is advisable in this complex area of bankruptcy and taxation that Debtor retain a qualified tax preparer to file his/her federal return. Neither the United States Trustee nor the Standing Trustee is permitted to give any tax advice to Debtor.

Copies of the federal and state tax returns which are filed by Debtor for any period commencing with the filing of the Chapter 12 Petition through the completion of the confirmed Plan must be provided to the Chapter 12 Trustee.

4. You will receive a separate notice of the date, time, and place for the first meeting of creditors under § 341 of the Bankruptcy Code. Both Debtor and Debtor's attorney must attend the § 341 meeting, at which time Debtor will be examined under oath by the Chapter 12 Trustee and any creditors who may attend. Debtor must bring to that meeting a copy of his/her last year's federal tax return, Form 1040 and all schedules filed with the return, including Schedule F. **A copy of the income tax return must also be sent to the Chapter 12 Trustee at least five (5) days prior to the § 341 meeting.**

5. Chapters 1, 3 (except for § 361), and 5 of the Bankruptcy Code also apply to cases under Chapter 12 of the Bankruptcy Code. Therefore, Debtor may not:

   a. Retain or employ attorneys, accountants, appraisers, auctioneers or other professional persons without Court approval. This includes employing the attorney who filed the Petition to provide services after the filing. See 11 U.S.C. § 327.

   b. Compensate any attorney, accountant, appraiser, auctioneers or other professional person except as allowed by the Court. See 11 U.S.C. § 330.

   c. Use, sell or lease property of the estate out of the ordinary course of business without prior Court authorization. See 1 U.S.C. § 363(b)(1).

   d. Use, sell or lease cash collateral (or cash equivalents) without the consent of the secured creditor or Court authorization. See 11 U.S.C. 363(c)(2), (4). Cash collateral includes proceeds, products, offspring, rents or profits of property subject to a security interest when reduced to cash.

   e. Obtain credit or incur unsecured debt other that in the ordinary course of business without Court authorization. See 11 U.S.C. § 364(b).

   f. Incur secured debt without Court authorization. See 11 U.S.C. § 364(c).

   g. Pay any creditor for goods or service provided before the filing of the Petition except as provided in a confirmed plan. See 11 U.S.C. § 549.

6. A Chapter 12 Plan must be filed within 90 days of the date the petition was filed, unless Debtor seeks an extension before the 90 days has run out and only if the Court determines that an extension is substantially justified. See 11 U.S.C. § 1221. In addition, the confirmation hearing must be concluded not later than 45 days after the filing of Debtor's plan. See 11 U.S.C. § 1224. Failure to comply with either of these provisions is cause for dismissal under 11 U.S.C. § 1208. Schedules I ("Current Income") and J ("Current Expenditures") should be accurate and should be reviewed and modified if necessary prior to the §341 meeting. Failure to provide accurate schedules may result in denial of confirmation, dismissal or conversion to a Chapter 7 Liquidation.

7. A copy of the Chapter 12 Plan as well as all other motions and pleadings must be served upon the Chapter 12 Trustee and the United States Trustee.

8. LIQUIDATION ANALYSIS: Under § 1225(a)(4) of Chapter 12, Debtor must be able to prove at the confirmation hearing that the amount to be distributed under the Plan for each allowed unsecured claim is not less than that amount the would be paid on such claim if Debtor was liquidated under Chapter 7. A claim filed by an unsecured creditor is allowed unless Debtor or the Chapter 12 Trustee files an objection to it, which the Court sustains. Therefore, I suggest that you give consideration to the early preparation of an accurate analysis of the liquidation value of all of the property of Debtor's estate which you must be prepared to offer as an exhibit at the confirmation hearing, or the Court may not be able confirm Debtor's Plan. The liquidation analysis must be attached as an exhibit to Debtor's Plan.

9. CASH FLOWS: Under § 1225(a)(6) of Chapter 12, Debtor must be able to make all payments called for under the proposed Plan. Therefore, Debtor must attach cash flow statements which project income and expenses during the life of the Plan. In the absence of such cash flow statements, feasibility under § 1225(a)(6) cannot be established, and the Trustee will file an objection to the confirmation of the Plan until such cash flows are provided.

10. CHAPTER 12 TRUSTEE'S PERCENTAGE FEE: Unless you receive separate written confirmation from the undersigned to the contrary, pursuant to 28 U.S.C. § 586(e), the Chapter 12 Trustee's percentage fee has been set at 10% of all payments made under the Plan on the first $450,000 and 3% on the overage. THE CHAPTER 12 TRUSTEE HAS NO AUTHORITY TO NEGOTIATE ANY OTHER PERCENTAGE FEE. A payment is considered to be made under the Plan when Debtor proposes to modify any of the legal, equitable or contractual rights of a creditor's claim. Further, §1226(b)(2) requires that the payments of the Trustee's percentage fee be tendered simultaneously with the monies that are delivered to the Trustee for disbursement to the creditors whose claims are impaired under the Plan. For example, if on November 1, 2015, $20,000 is to be paid to Creditor A on its impaired claim, the Debtor needs to tender $22,000 to the Trustee for distribution at that time. $2,000 of the $22,000 represents the percentage fee owing to the Standing Trustee as provided by 28 U.S.C § 586(e). The remaining $20,000 will then be distributed to the creditor as provided by the Plan. The cash flow statements required to be attached to the Plan should include the payment of the Trustee's fee. Debtor and Debtor's counsel will be notified if the Attorney General (pursuant to 28 U.S.C. § 586(e)) adjusts or lowers the Trustee's percentage fee. If the percentage fee is lowered, the lower percentage will then apply to all payments yet to be made by Debtor under the confirmed Plan.

11. PLAN PAYMENTS THROUGH TRUSTEE: Plan payments on impaired claims, together with the Trustee's statutory percentage fee, must be tendered in a timely fashion to the Chapter 12 Trustee. Payments may be made by personal check or money order. Checks and money orders must be made payable to the Chapter 12 Trustee. Payment to the

Chapter 12 Trustee by Debtor's personal check will delay the Trustee's payments to creditors. This is because the Chapter 12 Trustee is not allowed to disburse funds to creditors until Debtor's check clears the bank. Personal checks normally take 10 days excluding weekends and holidays to clear the bank. Therefore, it is suggested that Debtor make payment to the Chapter 12 Trustee by certified check, bank draft or money order to avoid the delay for the check clearance process. Plan payments should be made payable to "**Carol F. Dunbar, Trustee**" and mailed to the following address:

Carol F. Dunbar
Chapter 12 Trustee
531 Commercial Street, Ste. 500
Waterloo, IA 50701

12. DUTY TO FILE SCHEDULE OF PLAN PAYMENTS: Upon or immediately following confirmation of a Plan, Debtor should prepare and file with the Court, with a copy served on both the Chapter 12 Trustee and the United States Trustee, a schedule of payments required to be made by Debtor under the confirmed Plan. This schedule should detail all payments including the name of the creditor to be paid, the due date of payments, the amount of each payment, a break down of each payment as to principal and interest, and the amount of the Trustee's fee on each payment. This will assist the Chapter 12 Trustee in making a prompt and correct distribution to creditors and will serve as a helpful reminder to Debtor of his/her obligation to make payments under the confirmed Plan.

13. FAILURE TO COMPLY: Debtor's failure to comply with the instructions contained in this letter may be grounds for dismissal of this Chapter 12 case under § 1208 of the Bankruptcy Code. I am providing Debtor with a copy of this letter. Please contact me if you or Debtor have any questions about its contents or the enclosed instructions.

Sincerely yours,

Carol F. Dunbar
Chapter 12 Trustee

CFD:cj

Encs.

Copy with enclosures: Orvis K. Behrens Farms, Ltd.

p.s. PLEASE USE THE ENCLOSED FORMS FOR MONTHLY CASH RECEIPTS AND DISBURSEMENTS STATEMENTS (Enclosure No. 2), TAX DEPOSIT STATEMENT (Enclosure No. 3), AND BANK ACCOUNT REPORTING FORM (Enclosure No. 4) AS MASTER COPIES AND MAKE ADDITIONAL COPIES AS NEEDED.

CHAPTER 12 CASE
SUMMARY OF OPERATIONS – FAMILY FARMER

(This report must be filed with the Chapter 12 Trustee five (5) days before the first Meeting of Creditors.)

NAME OF DEBTOR(S): _____

CASE NO.: _____

I. CURRENT NUMBER OF ACRES

Owned: _____

Leased: (List by Parcel)	Amount or % of rent
_____	_____
_____	_____
_____	_____

Total owned and leased by debtor(s) from others: _____

Total leased to others: _____

Tillable acreage: _____

Set aside acreage: _____

II. CURRENT LIVESTOCK

KIND	NO.	WEIGHT	MARKET VALUE
Hogs	____	_____	_____
Feeder Pigs	____	_____	_____
Sows	____	_____	_____
Boars	____	_____	_____
Calves	____	_____	_____
Stock Cows	____	_____	_____
Steers	____	_____	_____
Heifers	____	_____	_____
Bulls	____	_____	_____
Dairy Cows	____	_____	_____
Lambs	____	_____	_____
Ewes	____	_____	_____
Rams	____	_____	_____
Foals	____	_____	_____
Mares	____	_____	_____
Stallions	____	_____	_____
Chickens	____	_____	_____
Turkeys	____	_____	_____

III. PRIOR YEAR'S OPERATION

A. LIVESTOCK (list by kind)

Kind	No.	Weight Per Animal	Amount Kept For Farm Use	Amount Sold	Sales Price	Total Dollar Sales

B. CROPS (list by kind)

Kind	No. of Acres Planted	Yield Per Acre	Amount Kept For Farm Use	Amount Sold	Sales Price	Total Dollar Sales

C. RAW PRODUCTS (*e.g.* wool, eggs, milk, fish)

Kind	Weight or Number	Amount Kept For Farm Use	Amount Sold	Sales Price	Total Dollar Sales

D. OTHER FARM ENTERPRISES (*e.g.* custom farming, custom feeding, cash rent)

	Total Amount Received
_____	_____
_____	_____
_____	_____
_____	_____

E. GOVERNMENT PAYMENTS

	Total Amount Received
_____	_____
_____	_____
_____	_____
_____	_____

F. SUMMARY OF PRIOR YEAR'S OPERATION

1. Total crop / livestock income _____
2. Total raw products income _____
3. Total other farm income _____
4. Total government payments _____
5. Non-farm income _____
6. Total income _____

G. HAVE YOU MADE AN ASSIGNMENT OF PROCEEDS? (Yes/No)
If yes, which proceeds have you assigned, and to whom have you assigned them? _____
_____
_____

IV. THIS YEAR'S OPERATION (current year projections)

A. LIVESTOCK (list by kind)

Kind	No.	Weight Per Animal	Amount Kept For Farm Use	Amount Sold	Sales Price	Total Dollar Sales

B. CROPS (list by kind)

Kind	No. of Acres Planted	Yield Per Acre*	Amount Kept For Farm Use	Amount Sold	Sales Price**	Total Dollar Sales

C. RAW PRODUCTS (*e.g.* wool, eggs, milk, fish)

Kind	Weight or Number	Amount Kept For Farm Use	Amount Sold	Sales Price	Total Dollar Sales

* Assuming normal moisture and growing conditions

** State your estimate of market price per unit or government support (loan) price if your are eligible for government support program.

D. OTHER FARM ENTERPRISES (*e.g.* custom farming, custom feeding, cash rent)

	Total Amount To Be Received
_____	_____
_____	_____
_____	_____
_____	_____

E. GOVERNMENT PAYMENTS

	Total Amount To Be Received
_____	_____
_____	_____
_____	_____
_____	_____

F. SUMMARY OF PROJECTED YEAR'S INCOME

1. Total crop / livestock income _____
2. Total raw products income _____
3. Total other farm income _____
4. Total government payments _____
5. Non-farm income _____
6. Total Income _____

G. ESTIMATED EXPENSES FOR CURRENT YEAR

EXPENSES	AMOUNT
Fuel	_____
Seed	_____
Feed	_____
Fertilizer	_____
Herbicides, Pesticides, or other Chemicals	_____
Equipment Rental	_____
Electric and Phone Bills	_____
Repairs	_____
Crop Insurance	_____
Other Insurance	_____
Real Estate Taxes	_____
Cash Rent	_____
Hired Labor	_____
Machine Hire	_____
Drying	_____
Other	_____
	_____

Projected Total Operating Expenses _____
Projected Family Living Expense _____
Projected Total Expenses _____

H. PROFIT OR LOSS

Total Income (same as IV F 6) _____
Total Expenses (from page 7) _____
Profit / Loss _____
(subtract total expenses from total income)

I. ESTIMATED CROP EXPENSES BREAKDOWN:

	Corn Cost Per Acre	Soybeans Cost Per Acre	Oats Cost Per Acre	Hay/Alfalfa Cost Per Acre
Seed				
Nitrogen				
Phosphate				
Potash				
Lime				
Herbicide				
Insecticide				
Crop Insurance				
Other Insurance				
Real Estate Taxes				
Cash Rent				
Combining				
Hauling				
Drying				
Handling				
Fuel				
Other Machine Rental				
Miscellaneous				
TOTAL:				

J. ESTIMATED LIVESTOCK EXPENSES BREAKDOWN:

COSTS	Swine Cost per ____	Beef Cost per ____	Sheep Cost per ____	Dairy Cost per _____
Corn	_____	_____	_____	_____
Supplement	_____	_____	_____	_____
Feed Additives	_____	_____	_____	_____
Alfalfa-brome	_____	_____	_____	_____
Corn Silage	_____	_____	_____	_____
Haylage	_____	_____	_____	_____
Salt	_____	_____	_____	_____
Milk Replacer	_____	_____	_____	_____
Minerals	_____	_____	_____	_____
Veterinary	_____	_____	_____	_____
Machinery and Equipment	_____	_____	_____	_____
Electric	_____	_____	_____	_____
Water	_____	_____	_____	_____
Labor	_____	_____	_____	_____
Marketing	_____	_____	_____	_____
Miscellaneous	_____	_____	_____	_____
Purchase Livestock	_____	_____	_____	_____
Other	_____	_____	_____	_____
TOTAL:	_____	_____	_____	_____

NOTE: If your particular livestock operation does not fit these categories, make appropriate adjustments.

If you have an operating loan for the current or proposed crop season, state amount: $_____, and name and address of lender:

_____

_____

and security given or pledged: _____

_____

DATED:_____ SIGNED (debtor) _____

DATED:_____ SIGNED (debtor) _____

CHAPTER 12 MONTHLY REPORT

NAME OF DEBTOR(S): _____

CASE NO.: _____

FOR MONTH ENDING: _____

(Report on a cash basis, unless you keep financial records on an accrual basis.)

I. CASH RECEIPTS

A. FARM INCOME

Grain Sales	MONTH	YEAR TO DATE
#bu. _____ corn at $_____	_____	_____
#bu. _____ beans at $_____	_____	_____
#bu. _____ oats at $_____	_____	_____
#bu. _____ milo at $_____	_____	_____
#bu. _____ wheat at $_____	_____	_____
Livestock Sales		
#hd ___ feeder pigs at $_____	_____	_____
#hd ___ hogs at $_____	_____	_____
per/lb. _____		
#hd ___ calves at $_____	_____	_____
per/lb. _____		
#hd ___ cattle at $_____	_____	_____
per/lb. _____		
#hd ___ lambs at $_____	_____	_____
Eggs _____	_____	_____
Poultry _____	_____	_____
Milk _____	_____	_____
Other _____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Miscellaneous Farm Income

Contract payments	_____	_____
Contract payments	_____	_____
Contract payments	_____	_____
Rent payment	_____	_____
Rent payment	_____	_____
Government payment	_____	_____

B. WAGES FROM OUTSIDE WORK

Husband	_____	_____
Wife	_____	_____

C. OTHER RECIEPTS

Social Security	_____	_____
Other: _____	_____	_____
_____	_____	_____
_____	_____	_____
Total Cash Receipts:	_____	_____

II. EXPENSES PAID

A. HOUSEHOLD (Use more pages, if necessary)

Payee	Date	Amount	Purpose
	Total:		

B. <u>FARM EXPENSES</u> (Use more pages, if necessary)

Payee	Date	Amount	Purpose
	Total:		

C. TOTAL PAYMENTS MADE TO CHAPTER 12 TRUSTEE _____

TOTAL EXPENSES FOR MONTH _____

CASH PROFIT (LOSS) FOR MONTH (TOTAL INCOME minus TOTAL EXPENSES) _____

OTHER NON-CASH LOSSES:

LOSS DUE TO CROP FAILURE OR DAMAGE: $_____

LOSS DUE TO DEATH OR DISEASE OF LIVESTOCK OR POULTRY: $_____

III. CASH RECONCILIATION:

Cash and Bank Accounts Balance at Beginning of Month: $_____

Profit (or Loss) During Month: $_____

Cash and Bank Account Balance at End of Month $_____

IV. EXPENSES CHARGED BUT NOT PAID DURING MONTH (itemize):

Expense	Amount
_____	$_____
_____	$_____

I CERTIFY UNDER PENALTY OF PERJURY THAT I HAVE READ THE FOREGOING STATEMENT, AND IT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

_____ _____

DATE DEBTOR(S) / OFFICER OF DEBTOR(S)

UST – IA
Enclosure No. 3

TAX DEPOSIT STATEMENT

_____ DEBTOR(S)-IN-POSSESSION

MONTH OR PERIOD ENDING: _____ , 20____

SUMMARY

FEDERAL WITHHOLDING TAX

Beginning Withholding Tax Payable	_____
Withheld or Accrued	_____
Disbursements to Tax Account	_____
Deposit Receipt and/or check numbers	_____ _____
Ending Withholding Tax Payable	_____

F.I.C.A. WITHHOLDING TAX

(include both employer and employee share)

Beginning FICA Tax Payable	_____
Withheld or Accrued	_____
Disbursements to Tax Account	_____
Deposit Receipt and/or check numbers	_____ _____
Ending FICA Tax Payable	_____

SALES TAX

Beginning Sales Tax Payable _____
New Sales Tax Payable _____
Disbursements to Tax Account _____

Deposit Receipt
and/or check _____
numbers _____

Ending Sales Tax Payable _____

ATTACH COPIES OF ALL TAX DEPOSIT RECEIPTS TO THE MONTHLY TAX STATEMENT.

I CERTIFY UNDER PENALTY OF PERJURY THAT I HAVE READ THE FOREGOING STATEMENT, AND IT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

_____ _____

DATE DEBTOR(S) / OFFICER OF DEBTOR(S)

UST-IA
Enclosure No. 4

BANK ACCOUNT REPORTING FORM

Case Name:______________________________ Case No. ____________________

(This is a master form. Signed *copies* of this form should be used for providing information on: more than three accounts, on any new account, any subsequently closed accounts, and for each person who is a signatory on any account listed below.)

DEPOSITORY INSTITUTION	ACCOUNT DESCRIPTION (designate type of account: i.e. if payroll, tax account, etc.)	ACCOUNT NO.	DATE ACCOUNT OPENED
Name:			
Address:			
Phone:			
Name:			
Address:			
Phone:			
Name:			
Address:			
Phone:			
Name:			
Address:			
Phone:			

I/we certify that the above is a complete report of all bank accounts/investments owned by the debtor as of the date of the filing of debtor's petition, and, established or closed by the debtor, where applicable, post petition.

I/we certify that all above-listed depository institutions have been notified of the bankruptcy filing; and, where and when the petition was filed.

In addition, I/we hereby authorize the United States Trustee to obtain any information from the above listed financial institutions. This information may include, but is not limited to, bank statements, signature cards, canceled checks, correspondence and other documentation for all accounts upon which I am a signatory.

THE UNDERSIGNED DECLARES UNDER PENALTY OF PERJURY THAT THE INFORMATION CONTAINED IN THE FOREGOING DOCUMENT IS TRUE, COMPLETE, AND ACCURATE.

DATED THIS ________ DAY OF __________________, ______.

SIGNATURE: ____

(This form must be signed by all persons who are signatories on the accounts listed above or all of the debtor's signatory representatives if the debtor is not an individual.)