



2018 Gislason & Hunter Agricultural Lending Conference

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Back to Basics: Recurring Topics in Ag Lending

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Introduction

- ❑ Goal is to provide refresher on basics and practical information that can be applied in day-to-day situations.
- ❑ Presentation will follow the typical life cycle of a loan:
 - Origination and documentation
 - Modifications, renewals, and correcting mistakes
 - Default and Collection
 - Special situations including bankruptcy and probate

Loan Documents—Who Signs What?

- What's in a Name?
 - UCC Financing Statements
 - CNS Effective Financing Statements
 - Mortgages
- Business Entity Basics
- Trust Basics

Are You My Borrower?

- ❑ Loan agreement and security documents may not be binding on the parties you assumed it would bind
- ❑ May fail to perfect security interest in property if you don't have the right name in the security documents
- ❑ Party that signed security documents may not be the owner of the property you really wanted to collateralize
- ❑ **Lenders must do their due diligence to confirm who actually owns property to be pledged—Borrowers often don't know or misremember**

UCC Financing Statements

- ❑ **“Name of the debtor”**
- ❑ Name of the secured party or its representative
- ❑ Description of the collateral
- ❑ Addresses of parties, but not required to be effective

UCC Financing Statements

□ What is the “name” of the debtor?

- **Individuals = name exactly as spelled on most recent unexpired driver’s license or identification card issued by the State**
- If no driver’s license or ID card, the debtor’s “individual name” or surname and first personal name
- If debtor changes name (including getting a misspelling on their driver’s license corrected), Secured Party has **4 month grace period** to file an amended Financing Statement to cover the “new” name

UCC Financing Statements

- ❑ Practical Tip: If driver's license or ID card is "wrong," file the Financing Statement using **both** the name as spelled on the license or ID **and** as the Borrower says it's actually spelled, in case she corrects the ID later on or lets it expire.

UCC Financing Statements

❑ DBAs/Assumed Names are not sufficient!!

- Example: Jeb Clampett operates under the name “Clampett Farms,” but it’s not a business entity (LLC, corporation, partnership)—it’s just a name.
 - ❑ Even if it’s registered as an “assumed name” with the Secretary of State, not sufficient!
- Practice Tip: OK to list name of borrower as Debtor 1 and D/B/A as Debtor 2
- BUT DON’T list “Jeb Clampett, d/b/a Clampett Farms” all as one debtor!

UCC Financing Statements

❑ What is the “name” of the debtor?

- Registered Organizations = name in the “public organic record”

Entity Type	Public Organic Record (<u>as filed with Secretary of State</u>)
Limited Partnership (LP)	Certificate of Limited Partnership
Limited Liability Partnership (LLP)	Statement of Qualification
Limited Liability Limited Partnership (LLLP)	Certificate of Limited Partnership
Limited Liability Company (LLC)	Articles of Organization
Corporation	Articles of Incorporation

UCC Financing Statements

- **What is the “name” of the debtor?**
 - **Other Organizations (General Partnerships) = “organizational name” if it has one**
 - **If no name, “Partnership of [names of each Partner]”**
 - Example: “Partnership of John Doe, Mary Roe and Joe Schmoe”

UCC Financing Statements

□ Collateral Descriptions:

- “reasonably identifies” what is described
- “Supergeneric” NOT OK (“all assets”)
- For most assets, the general category is sufficient
 - Examples of categories:
 - Equipment
 - Inventory
 - General intangibles
 - Exceptions: Commercial tort claims; certain categories in consumer transactions (e.g., consumer goods)

UCC Financing Statements

- ❑ Collateral Descriptions:
- ❑ If I saw this in a UCC search of a potential borrower, would it make me say, “Hmm, I should look into this”?

UCC Financing Statements

- If used as a fixture filing, also include:
 - Legal description of the real estate
 - Name of the owner of the real estate

CNS Effective Financing Statements

- ❑ For Farm Product Liens
- ❑ Minnesota uses Central Notice System (as opposed to Direct Notice states)
- ❑ Filed with Secretary of State

CNS Effective Financing Statements

- ❑ Description of farm product w/ product code
 - ❑ County in which farm product located w/ county code
 - ❑ **Name and address of debtor**
 - ❑ **Name and address of secured party**
 - ❑ SSN/EIN of debtor
 - ❑ Signatures of debtor and secured party
-
- ❑ "THE INFORMATION CONTAINED IN AN EFFECTIVE FINANCING STATEMENT WILL BE SENT TO FARM PRODUCT BUYERS REGISTERED IN MINNESOTA. SALE OF FARM PRODUCTS TO THOSE BUYERS MAY RESULT IN A CHECK BEING ISSUED PAYABLE JOINTLY TO BOTH THE SELLER AND THE SECURED PARTY."

CNS Effective Financing Statements

- ❑ **What is a debtor or secured party's "name"?**
- ❑ "Full legal name"
- ❑ Individual = full "first name," middle initial, if any and "full last name"
 - No abbreviations except middle initial
- ❑ Business name = "as presented as they have been registered" (with Secretary of State)
 - No abbreviations unless they are in the name as registered

Mortgages

- ❑ **Name of Mortgagor**
- ❑ Indicate creation of a lien (i.e., that it's a mortgage)
- ❑ Debt secured
- ❑ Description of mortgaged property

Mortgages

- ❑ Individuals: Name exactly as spelled on vesting deed, plus spouse (if any), plus marital status
 - If name misspelled in vesting deed, use an “a/k/a” and include both the misspelling and the proper name, and/or record an Affidavit of Identification
 - ❑ “Luke Skywalker, also known as Lunk Skywaller, a single person”
 - ❑ “Elizabeth Darcy, formerly Elizabeth Bennet, and Fitzwilliam Darcy, wife and husband”

Mortgages

- ❑ Business Entities: Name exactly as stated on vesting deed
 - If name on vesting deed and name at Secretary of State don't match, record an Affidavit of Identification explaining the mis-match

Business Entity Basics

Borrower is an...	...so the documents I need to see are...	...and the person usually authorized to sign on the entity's behalf is called...
LP (Limited Partnership)	Certificate of Limited Partnership (MUST have) Partnership Agreement Any Statement of Partnership Authority	General Partners
LLP (Limited Liability Partnership)	Statement of Qualification (MUST have) Partnership Agreement Any Statement of Partnership Authority	All of the Partners
LLLP (Limited Liability Limited Partnership)	Certificate of Limited Partnership (MUST have) Partnership Agreement Any Statement of Partnership Authority	General Partners

Business Entity Basics

Borrower is an...	...so the documents I need to see are...	...and the person usually authorized to sign on the entity's behalf is called...
GP or "Partnership" with no "Ls" (General Partnership)	Statement of Partnership Authority and Partnership Agreement (many GPs don't have either of these) Certificate of Assumed Name	All of the Partners
Inc., Co., Ltd. (Corporation)	Articles of Incorporation By-Laws Any Shareholder Agreements	President/CEO
LLC (Limited Liability Company)	Articles of Organization Operating Agreement (Old LLCs) Any Member Control Agreement	DEPENDS ON WHAT TYPE OF LLC IT IS

Business Entity Basics: LLCs

- LLCs come in three flavors:
 - Member-Managed = typically all members must sign
 - Manager-Managed = typically Manager signs
 - Board-Managed = typically Officer signs, may or may not require Board approval

Business Entity Basics

- These are just the “default” rules
 - How do I know if my borrower follows the default rules?
- Review organizational documents
 - Example: Central Perk, LLC’s Operating Agreement states that Chief Manager Rachel can sign on behalf of the company for any transaction less than \$50,000, but requires unanimous member approval for \$50,000 or more.

Business Entity Basics

- ❑ **What else do I need?**
- ❑ Certificate of Good Standing from Secretary of State
 - Confirms business entity still exists
- ❑ Shareholders/Members/Partners execute Certificate of Authority, Resolutions and/or Declaration of Partnership:
 - Verifying that the organizational documents provided to you are current
 - Confirming who has authority to sign for the business entity

Trust Basics

- ❑ What is a trust?
- ❑ A relationship among the **grantor**, who makes a grant of property to be held by the **trustee** in trust (as a fiduciary) for the benefit of **beneficiaries**
- ❑ Two Broad Categories of Trusts
 - Revocable Trusts
 - Irrevocable Trusts

Trust Basics

- ❑ Trust Signatures
- ❑ **Must include name of Trustee and name of Trust, not just one or the other**
 - WRONG: The Huey, Dewey and Louie Trust
 - WRONG: Scrooge McDuck
 - RIGHT: Scrooge McDuck, as Trustee of the Huey, Dewey and Louie Trust

Mortgage Horror Story: *Norwest Bank Minnesota v. Ode*

- ❑ Grandma's Trust for benefit of Granddaughters owned real estate
- ❑ Trustee (Dad) wanted to mortgage Trust's real estate to secure his personal loan (red flag)
- ❑ Title Co. told Lender that if Trustee executed Mortgage in his individual capacity, Trust had to deed property to Trustee-Dad as an individual first; also, review Trust Instrument due to self-dealing implications
- ❑ Lender ignored Title Co.'s advice; Trustee-Dad **signed mortgage in individual capacity**
- ❑ Trustee-Dad defaulted; Lender foreclosed; Granddaughters objected when they learned what happened

Mortgage Horror Story: *Norwest Bank Minnesota v. Ode*

- ❑ HELD: Lender's mortgage unenforceable, because Trustee had no interest in real estate as an individual, there was no mistake which would allow the mortgage to be reformed, and Trust was not bound by his signature made in his individual capacity
- ❑ Moral of the story: If property held in Trust, crucial that Trustee signs **“as Trustee of Trust”**

Trust Basics

- What do I look at?

- Trust Instrument

- For Testamentary Trusts, these are a part of the deceased's Will

- One document may create many trusts

- Example: Ward Cleaver Revocable Trust creates a Marital Trust and Family Trust after Ward's death but during wife June's lifetime; at her death, splits into separate Trusts for each of Ward's children

Trust Basics

□ Certificate of Trust

- Works like a summary of the Trust instrument, so whole document doesn't need to be recorded
- Shows Trust's existence, relevant Trustee powers, identity of Trustees
- If one is on record and nothing has changed since it was recorded, do not need to have Trustee execute a new one
- Can be used to certify any trust term, if Trustee does not want to provide copy of full Trust Instrument

□ Affidavit of Trustee

- Affirms identity of Trustee, that act is within Trustee's power, etc.
- Execute a new one **every time** there is a recorded document signed by the Trustee

Special Issues When the Borrower is a Revocable Trust

- ❑ Grantor of Trust retains the power to **revoke** (terminate/undo) the Trust in its entirety, and remove specific items from the Trust
 - Trustee (who is usually also Grantor, at least at first) usually can distribute Trust property to Grantor for any (or no) reason
- ❑ This means it is very easy for property to move back and forth between an individual Grantor and that Grantor's Revocable Trust

Who Is My Borrower With a Revocable Trust?

Document	Who Should Sign/Be Bound
Credit Agreement	BOTH Trustee of Revocable Trust AND Individual Grantor
Security Agreement/UCC	BOTH Trustee of Revocable Trust AND Individual Grantor
Mortgage	Whoever is the title holder of record, <u>exactly</u> as stated in the vesting instrument

- ❑ Because it is so easy for Grantor to move property in and out of Trust, or for Grantor to accidentally omit property from Trust, **assume he will do so without notice to Lender.**

Who Is My Borrower With an Irrevocable Trust?

Document	Who Should Sign/Be Bound
Credit Agreement	Trustee of Trust
Security Agreement/UCC	Trustee of Trust
Mortgage	Whoever is the title holder of record, <u>exactly</u> as stated in the vesting instrument

- ❑ Irrevocable Trusts = Grantor usually has no or limited powers; Trustee is the driver/decision-maker
- ❑ Note that just because the word “Revocable” is in the Trust’s name, doesn’t necessarily mean it’s still revocable
 - Trust instrument will state when the Trust can be revoked
 - Usually, remains revocable until Grantor’s death

Special Issues When Collateral is in an Irrevocable Trust

- ❑ Most Trusts give Trustees broad discretion in management of Trust assets, including the power to pledge assets as security, BUT—
- ❑ All Trustee powers are limited by Trustee's fiduciary duty to beneficiaries
- ❑ If a Trustee takes an action outside the powers granted in the trust (“ultra vires”), or in the Trustee’s best interest rather than the beneficiary’s (breach of fiduciary duty) **beneficiaries can, in some circumstances, have those acts undone**

Special Issues When Collateral is in an Irrevocable Trust (cont'd)

- ❑ Danger is when Trust provides collateral but is not involved in the farming operation/not receiving loan proceeds, thus beneficiaries not getting a benefit
- ❑ Common Example: Life Insurance Trust
 - Bank requests assignment of \$1 million life insurance policy on Grandpa Farmer
 - Grandpa Farmer wants to use the \$ 1 million life insurance policy in his Life Insurance Trust
 - Grandma Farmer (also a borrower) is Trustee; grandchildren are beneficiaries
 - **Is an assignment of a policy or a personal guaranty from the Life Insurance Trust as good as an assignment of a life insurance policy in the same amount?**

Special Issues When Collateral is in an Irrevocable Trust (cont'd)

- ❑ NO!
- ❑ What benefit is there to the beneficiary-grandchildren?
 - If Trustee (Grandma) doesn't assign the policy, they have an almost guaranteed right to \$1 million when Grandpa dies.
 - If Trustee (Grandma) assigns the policy to Bank as security for Grandpa and Grandma's loan, in return for the risk that Bank will end up getting the \$1 million when Grandpa dies if the loan is called, Grandpa and Grandma get a loan, and the grandchildren get...**nothing**.
 - Looks much more like Trustee (Grandma) was doing this for own benefit and to the detriment of the beneficiaries, breaching fiduciary duty

Beneficiary Consent & Virtual Representation

- ❑ When in doubt (or when the stakes are high), avoid potential problems by getting beneficiaries' **written acknowledgment and consent** to guaranties/pledges of collateral by Trustee
- ❑ Virtual representation rules can allow others to bind certain minor or unborn beneficiaries

Questions???

Mortgage Fixes and Loan Modifications

- ❑ After a loan is closed, sometimes changes are necessary
- ❑ Errors and omissions may need to be corrected
- ❑ Loan amounts increased, additional security added, or loan extended
- ❑ This section discusses actions to take to correct errors and what to do when increasing

Increasing Debt Secured by Mortgage or Adding Real Estate

- ❑ In some situations, the debt secured by a mortgage will have to be increased:
 - E.g., Mortgage secures an operating line, and the debtor requests an increase in the maximum operating line
- ❑ How? Typically the debtor will:
 - Sign an Amendment to the original promissory note or a replacement note
 - And execute a Supplemental Mortgage

Increasing Debt Secured by Mortgage or Adding Real Estate

- Easiest Method for a Supplemental Mortgage:
 - Use an identical version of the prior mortgage,
 - Add the word “Supplemental” to the title
 - i.e. Supplemental Real Estate Mortgage (With Future Advance Clause)
 - Make the corresponding change to the dollar amount listed in the mortgage or insert additional real estate legal description
 - Add clause stating reason for supplement.
 - (See written materials)

Increasing Debt Secured by Mortgage or Adding Real Estate

- ❑ If adding land to a mortgage, the priority of the mortgage against other lienholders is determined from date of Supplemental Mortgage.
 - So lender must obtain new title work
- ❑ Additional Mortgage Registration Tax may be owed if increasing debt amount
 - But see exceptions to tax in Minn. Stat. 287.04

Incorrect Legal Description or Other Fixes

- ❑ Occasionally an error is discovered in a mortgage after the loan is made and mortgage is recorded
- ❑ Can be corrected by an “Amendment”
- ❑ What is an amendment?
 - A document that alters an existing mortgage without securing new debt, increasing the amount debt, or in the case of multistate mortgage increasing the percent of MN real estate.

Incorrect Legal Description or Other Fixes

- ❑ Amendments may do any of the following:
 - Extend repayment time for unpaid debt
 - Change interest rate for unpaid debt
 - Add additional real estate (also called a “Supplement” as discussed above)
 - Replace all real estate with other real estate
 - Replaces a party to the mortgage
 - Reduces the amount of debt or reduces the percentage of real property in MN encumbered by multistate mortgage

Incorrect Legal Description or Other Fixes

- ❑ Two ways to accomplish and amendment:
- ❑ An “Amended Mortgage”
 - Add “Amended” to the title of mortgage otherwise identical to the original and make the corresponding change
 - And add language at end of new Amended mortgage explaining purpose of amendment
 - ❑ See written materials

Incorrect Legal Description or Other Fixes

- ❑ An “Amendment to Mortgage” or “Mortgage Modification”
 - Identifies the earlier mortgage
 - Identifies the error or omission being changed
 - States that such provision is being amended and restated as corrected to fix the problem.
- ❑ Either must be signed, notarized, and recorded

Extending Maturity Date

- If a note secured by a mortgage is extended, it is good practice to extend the maturity date of the mortgage as well
 - If not, 15 year statute of limitations runs from stated maturity date (or from inception if no date stated)

Extending Maturity Date

- ❑ Either a Mortgage Modification Agreement or Mortgage Extension Agreement
 - Generally will describe original mortgage, state the maturity date is being extended, and state new maturity
 - Often signed by both borrower and lender
 - Must be recorded to avoid S/L
 - Example is provided in materials

Modifying Loan Secured by Mortgage

- ❑ Sometimes lender will modify the loan, but not necessarily the mortgage
 - E.g., Due date, interest rate, change in repayment terms, change in “default”
 - Accomplished by an Amendment to a Promissory Note
- ❑ Considerations:
 - If original transaction involved a separate Loan Agreement, that must often be amended as well
 - ❑ Identify original loan agreement, identify changes, and be signed by lender and borrower

Modifying Loan Secured by Mortgage

□ Considerations:

- In some circumstances, guarantors should also sign amendments or consents to loan agreements or promissory notes
 - Typically Guarantees include language permitting amendments without their consent, but an affirmative signature will often thwart later challenges
- Attach signed amended note to original note
- See example Amendment to Promissory Note in materials
 - But no standard form is required.

Default and Collection

- ❑ When a borrower fails to repay on time or in full, lenders have to resort to collection
- ❑ Reminder:
 - Continually monitor loans, preferably annually, and even more frequent when risk factors are present.
 - This can help avoid or work through a default before it starts
- ❑ This section deals with troubled loans and strategies for addressing them

Default and Collection

□ Basic Steps in Collection:

- Loan file audit
- Determination of a default
- Providing notice of default
- Provide required notice to government guarantors
- Farmer Lender Mediation
- Enforcement and collection against personal or real property
- Obtaining and enforcing a judgment

Loan File Audit

- ❑ When a lender identifies an at-risk loan, begin by auditing the loan file
 - Look for problems that might impede ability to enforce loan documents on collection
 - Ensure documents have been filed and recorded appropriately
 - ❑ E.g., mortgages with the county recorder, financing statements with the Secretary of State
 - Conduct UCC or title search to see other creditors with interest in collateral

Loan File Audit

- ❑ Update appraisals or conduct valuation of collateral
- ❑ If defects are discovered, correct them if possible.
 - E.g. Forbearance Agreement, Amendments, Modifications, etc.

Determination of Default

- ❑ Typically before collection/enforcement can begin, borrower must actually be in default.
- ❑ Review various loan documents to assess whether default occurred
- ❑ Even common default of an untimely payment should be scrutinized:
 - e.g., promissory note pay provide a “grace period” in which the borrower may timely pay even after the stated due date.

Determination of Default

❑ Other common defaults:

- Cross-Default: default on 1 triggers a default on all
- Collateral Protection: Failure to properly preserve, protect, insure, or maintain collateral, or selling without approval/notification
- Debt Ratios: Failure to satisfy certain financial conditions (e.g., debt to income, etc.)
- Defaults to Other Lenders: failure to pay debt to a third party, or another creditor obtaining a judgment
- Fraud/Misrepresentation: Any misrepresentation of material fact on a loan application, or other fraud

Provide Notice of Default

- ❑ If a default has occurred,
 - Lender may attempt to resolve informally through a work-out/forbearance
 - Or may move toward enforcement/collection
- ❑ Lender should consider whether they should or must provide a notice of default

Provide Notice of Default

□ Review loan documents:

- Some loan documents require that lender provide a formal written notice of default
- Some provide borrower a “cure” period: a time period in which the borrower can attempt to remedy the default
- May require default notice be sent to a particular person, or by particular means
 - E.g., certified mail

Provide Notice of Default

□ Guarantors

- Guarantee may provide that guarantor is entitled to notice of default.

□ Should a notice be provided anyhow?

- Even if not required, lender may still provide written notice
- It could prompt repayment, and may document collection efforts for a fraudulent conveyance action

Provide Notice of Default

- What is included in Notice of Default
 - *Anything required by loan document*
 - Identity (e.g., loan number) or description of loans in default
 - Total indebtedness including principal, interest, and fees
 - Current interest rate, including applicable default rate
 - Description of default, and a general statement that the failure to ID a particular default is not a waiver
 - Any right to cure – timeframe and actions to take

Notice to Government

- ❑ Is the loan a government guaranteed loan or part of some other government program?
 - E.g., SBA guaranteed loans, FSA guaranteed loans
- ❑ If so, review reporting requirements to government and provide required notice
 - E.g., FSA guaranteed loan requires notice to local agency credit officer when loan becomes 30 days past due, and status updates every 60 days.
- ❑ Review other collection provisions for government loans and comply

Offer Farmer-Lender Mediation

- ❑ If applicable, Farmer-Lender Mediation must be offered before collecting against agricultural land or other agricultural personal property
- ❑ Generally required when:
 - Farmer or farming entity borrower
 - Debt exceeds \$15,000
 - Enforcing debt against agricultural property
 - ❑ Machinery/Equipment
 - ❑ Crops/Livestock
 - ❑ Ag land

Offer Farmer-Lender Mediation

□ Process of Farmer-Lender Mediation

- Lender must serve a mediation notice to the borrower in a form provided in the statute (See example forms)
- Borrower has 14 days after receipt to request mediation
- If mediation is requested, the borrower provides information about the borrower's financial condition
- An orientation meeting is held where the mediator explains the process
- One or more mediation sessions is held during a 90 day period
- Mediator issues a termination statement

Evaluate Available Collateral

- ❑ After satisfying any Farmer-Lender Mediation requirements, collection can begin in earnest
- ❑ Lender should review sources of recovery:
 - Repossess and sell personal property in which the lender has security interest
 - ❑ Machinery, livestock, grain, etc.
 - Foreclose of real property that is subject to the lender's mortgage
 - Obtain money judgment against borrower or guarantor and then enforce that judgment

Collection: Personal Property

- Review Security Agreements and Financing Statements
 - The Security Agreement governs what particular property serves as collateral for the loan
- Two common types of Security Agreements:
 - “Blanket” Security Agreements identify broad categories of property
 - E.g., all machinery and equipment, all crops and proceeds
 - Security Agreements covering specific items
 - E.g., John Deere 9520 s/n #####

Collection: Personal Property

□ “After-Acquired Property” Clause

- Included in many security agreements
- Provides that the security interest attaches not only to the property owned at the time of execution, but other property acquired later that fits within the collateral descriptions
- E.g., “includes the following collateral whether now owned or hereafter acquired”

Collection: Personal Property

□ Future Advances Clause

- Provides that collateral secures not only the debts outstanding at the time of execution, but any future loans or future advances

□ Cross-Collateralization Clause

- Provides that collateral secures not only the loan that might be signed along with the security agreement, but other outstanding loans.
- Some security agreements are limited to particular loans

Collection: Personal Property

□ Third-Party Security Agreements

- A person other than the borrower may grant a security interest in the third-party's property to serve as collateral for a loan
- e.g., two farming entities under common family ownership
 - Loan may be to one entity
 - But the other entity may own a majority of the equipment, and thus will grant a security interest

Collection: Personal Property

- Generally there are three avenues for actually collecting personal property to satisfy a loan:
 - Voluntary Repossession
 - “Self-Help” Repossession
 - Replevin/Claim and Delivery

Collection: Personal Property

□ Voluntary Repossession

- Situations where the borrower agrees to work with the lender to liquidate
- Examples:
 - borrower delivering the collateral to the lender (or to the lender's auctioneer)
 - Allowing auctioneer to conduct an auction at borrower's farm
 - Selling grain and turning over proceeds

Collection: Personal Property

□ Voluntary Repossession

- May provide important benefits:
 - Minimize liquidation costs, thereby maximizing loan repayment
 - Can be structured to minimize impact on debtor's operation in the case of a partial liquidation
 - Minimize time
- Parties should have clear understanding on whether lender is waiving other collection remedies in exchange for cooperation

Collection: Personal Property

□ “Self Help” Repossession

- Repossessing personal property with notice to the borrower, but not with the borrower’s cooperation
- Permissible only if it can be accomplished without a “breach of the peace”
 - E.g., entering onto private property over borrower’s objection may be a breach
 - Verbal, and certainly physical altercation, may be a breach

□ Should be approached with caution

Collection: Personal Property

□ Replevin/Claim and Delivery

- Two phrases used to describe using judicial process to enforce a security interest

□ Procedure

- Lawsuit is commenced by filing a summons and complaint
- Lender brings motion asking the court to order seizure of the property from the borrower (or other person in possession)

Collection: Personal Property

□ Replevin/Claim and Delivery

□ Procedure

- Lender must post a bond equal to 1 ½ times the fair market value
- Borrower can regain possession by posting similar bond amount
- Court can order immediate possession without notice if the lender will suffer irreparable harm if property is not obtained before a hearing.

Collection: Personal Property

❑ Liquidation

- After lender has taken possession, the lender can liquidate the property and sell it and apply proceeds to loans
- Must be done in a “commercial reasonable” manner
 - ❑ Must act reasonably in attempting to realize highest value possession
 - ❑ Will often involve hiring an auction company to advertise and conduct the sale
- Must also act reasonably to preserve value of collateral
 - ❑ Especially important with livestock, perishable produce or other goods, or property that may be damaged by weather

Collection: Personal Property

- Liquidation

- Notice

- Generally lender must provide debtor, guarantor, and other secured parties notification of the disposition (sale) of collateral.
- Minn. Stat. 336.9-613 provides a form to use

Collection: Real Property

- ❑ If lender has a mortgage on real property as security for a loan, lender can foreclose
 - Foreclosure is the process by which a lender/mortgagee sells real property to satisfy a debt and the borrower/mortgagor's rights in the real property are extinguished
- ❑ Two Types of foreclosure
 - By Advertisement
 - By Action/Judicial Foreclosure
- ❑ Decision should usually be made in consultation with attorney

Collection: Real Property

❑ Foreclosure by Advertisement

- Generally faster and cheaper, but more vulnerable to a later challenge
- Available if:
 - ❑ Mortgage contains “power of sale” clause
 - ❑ Foreclosure is not barred by statute of limitations
 - ❑ Registration tax has been paid
 - ❑ There is a default under the terms of the mortgage
 - ❑ No pending action to collect the debt secured by the mortgage
 - ❑ Mortgage and assignments have been properly recorded

Collection: Real Property

- ❑ Foreclosure by Advertisement – General Process:
 - Requirements are strictly enforced
 - Notice of Pendancy: record notice within 6 months before first date of publication and mail to each person requesting notice 14 days before sale
 - Notice of Sale: Publish in a qualified newspaper each of 6 consecutive weeks prior to sheriff's sale. Must also serve on person in possession
 - Other Notices: Example, foreclosure of ag land with separate tracts, must inform mortgagor of right to request tracts be sold separately

Collection: Real Property

□ Foreclosure by Advertisement – General Process:

- Sheriff's Sale: After required notices provided, sale conducted by sheriff of county where land is located.
- Bidding: Land is sold to highest bidder; lender may “credit bid” but should carefully consider amount, because surplus will go to junior creditors or mortgagor
- Redemption Period: Mortgagor has time period in which to “redeem” (by paying approx. bid amount plus interest) – 12 months for most ag land.

Collection: Real Property

❑ Foreclosure By Action

- Involves commencement of a legal action (i.e., a lawsuit) seeking order from court directing sheriff to sell land.
- Defendants are mortgagors, junior mortgagors, or others claiming interest in property.
- Six weeks published notice still required after order for foreclosure

Collection: Real Property

❑ Deficiency Judgment

- If foreclosure sale proceeds are insufficient to satisfy debt, lender may obtain “deficiency judgment” – i.e. a money judgment for the unpaid amount
- Special rules apply to ag land
 - ❑ Deficiency may only be obtained by filing legal action within 90 days after a foreclosure sale
 - ❑ Judgment only valid for 3 years, not usual 10

Collection: Real Property

□ Right of First Refusal

- Often a lender is the highest (or only) bidder at sheriff's sale and becomes owner of mortgaged land.
- MN Law provides right of first refusal for ag land and ag homestead
- Before attempting to sell, must provide 14 day notice of intent to sell to prior owner (mortgagor)
- After entering into purchase agreement, must provide a statutory right of first refusal for prior owner to buy at same price
- See forms in written materials

Collection: Money Judgment

- ❑ In addition to collecting against collateral, lender can obtain a money judgment through a lawsuit against the borrower and any guarantors
- ❑ After judgment is entered, there are a number of statutory remedies to collect:
 - E.g., levies on personal property
 - Garnish bank accounts
 - Garnish wages
 - Foreclose judgment lien on real property

Special Situations: Bankruptcy

- ❑ During or before collection efforts begin, borrower may file for bankruptcy protection
- ❑ Lender must stop all collection activity once receiving notice of bankruptcy filing
- ❑ This Section highlights two steps in the bankruptcy process that may be of special interest to lenders

First Meeting of Creditors

□ Preparation

■ Review and compare documents

- Bankruptcy Schedules
- Tax return depreciation schedules
- Balance sheets
- Statement of Financial Affairs Question #18- (sell or trade property within 2 years of filing)
- Statement of Intention

First Meeting of Creditors

□ Questions to Ask

■ Collateral

- Where collateral being held?
- Status of missing collateral?
- Depending on time of year- How much grain in storage? Grain contracts?

■ How farming operation will change?

Voting on a Reorganization Plan

□ Chapter 11-

- Ballot.
- Acceptance or cram down.

□ Chapter 12-

- Does not require creditor consent, but creditors can object to plan.

□ Chapter 13-

- Does not require creditor consent, but creditors can object to plan.

First Meeting of Creditors

□ What to Expect

- Trustee
- Identify yourself
- Speak clearly and loudly.
- Length- depends on type of bankruptcy

My Borrower Died. Now What?

- ❑ Unsecured claims and deficiency judgments:
 - File a written Statement of Claim in probate proceeding
 - ❑ Longer of 1 month from date of mailed notice and 4 months from notice published in newspaper
 - PR will allow or disallow claims; consider petitioning to allow the claim if PR disallows.
 - Homestead, one vehicle and \$15,000 exempt from all claims if a surviving spouse or children
 - Allowed claims are paid in order of priority, with expenses of administration, funeral & medical expenses, and taxes all ahead of “normal” debts

My Borrower Died. Now What?

- ❑ Secured claims:

- Don't file a Statement of Claim in the probate proceeding!

- ❑ *Estate of Lasha*: Secured creditor who filed Statement of Claim lost its priority as a secured creditor and was lumped in with the other “normal” unsecured creditors.

- Continue with collection as normal, but with Personal Representative as contact person

- ❑ Recognize that probate and estate administration take time—but a creditor can step in and be appointed Personal Representative if no one is taking next steps

Questions???

THANK YOU!

This program is not intended to be responsive to any individual situation or concerns as the contents of this presentation are intended for general informational purposes only. Participants are urged not to act upon the information contained in this presentation without first consulting competent legal advice regarding implications of a particular factual situation. Questions and additional information can be submitted to your Gislason & Hunter Attorney or to the presenter of this session.



2018 Gislason & Hunter Agricultural Lending Conference

Thursday, September 6, 2018

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Top Issues Impacting Lenders

2018 Agricultural Lending Conference
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The Automatic Stay – General Overview

- ❑ The automatic stay, codified as 11 U.S.C. § 362, automatically “stays” (i.e. “stops”) most collection and enforcement actions against the debtor, the debtor’s property, and property of the estate immediately upon the filing of a bankruptcy petition.
- ❑ As long as the stay is in place, creditors generally may not take any action (e.g., repossessions, foreclosures, wage garnishments, etc.) to obtain property of the estate, continue or commence lawsuits against the debtor, terminate contracts with the debtor based on pre-petition defaults, or otherwise create, perfect, or enforce any lien against the debtor’s property.

The Automatic Stay – General Overview

- ❑ The purpose of the automatic stay is to give the debtor “a breathing spell from his creditors” in which the debtor may “attempt a repayment or reorganization plan.” *Farley v. Henson*, 2 F.3d 273, 274 (8th Cir. 1993) (citation omitted).
- ❑ The automatic stay also protects creditors by averting a scramble for the debtor’s assets and promoting instead “an orderly liquidation procedure under which all creditors are treated equally.” *Id.*

The Automatic Stay – Scope

- ❑ The automatic stay broadly applies to most types of collection and enforcement actions against the debtor, the debtor's property, or property of the estate. "The stay applies to all entities, including a "person, estate, trust, governmental unit, and United States trustee." 11 U.S.C. § 101(15). It only protects, however, the debtor.
- ❑ Actions against nondebtor entities, such as partners, affiliates, corporate officers, directors, or a co-defendant or co-debtor who is liable on a debt with the debtor, are generally not barred by the automatic stay. The bankruptcy court may, however, extend the stay to or enjoin actions against nondebtor entities to further the statutory purposes of section 362.

The Automatic Stay – Scope

❑ Sample List of Common Actions Covered by the Automatic Stay

- All types of legal actions or proceedings except those identified in 11 U.S.C. § 362(b);
- Enforcements of a pre-petition judgment obtained against the debtor or property of the estate;
- Acts to create, perfect, or enforce liens against property of the estate;
- Acts to collect, assess, or recover pre-petition claims against the debtor; and
- Setoff of claims against the debtor.

The Automatic Stay – General Duration

- 11 U.S.C. § 362(c) provides that the automatic stay shall be in place generally “until one of the following events occurs:
 - (1) the property at issue is no longer property of the estate;
 - (2) the bankruptcy court grants or denies a discharge;
 - (3) the bankruptcy case is closed;
 - (4) the bankruptcy case is dismissed; or
 - (5) until the automatic stay is lifted by the bankruptcy court.”

The Automatic Stay – Co-Debtors

- ❑ Chapters 12 and 13 of the Bankruptcy Code each contain provisions extending the automatic stay to “prohibit creditors from commencing or continuing any civil action to collect all or any part of a *consumer* debt from an individual (a “co-debtor”) who is liable on such debt together with the debtor.”
- ❑ The Bankruptcy Code provides that a “consumer debts” are debts incurred by an individual for a personal, family, or household purpose. 11 U.S.C. § 101(8).

The Automatic Stay – Relief

- ❑ A “party in interest” may obtain relief from the automatic stay. Relief may include (1) termination of the automatic stay.
 - This enables a “party in interest” to take some action permitted by the Court Order terminating the stay. A Court’s Order terminating the stay will be specifically limited to permitting a specific creditor to take some action, like allowing an appeal of a dismissal of a debtor’s lawsuit to move forward in state appellate courts, or to allow a specific creditor to foreclosure upon a specific parcel of real estate, etc.
- ❑ Relief may also include an (2) annulment of the automatic stay or (3) a modification or conditioning of the automatic stay.
 - A “party in interest” must show cause in order to obtain relief from the automatic stay, which often includes a (a) stipulation for relief with the debtor or (b) lack of adequate protection, etc.

The Automatic Stay – Violations

- ❑ In Minnesota, “violations of the automatic stay are void, not voidable. *In re Vierkant*, 240 B.R. 317, 324 (B.A.P. 8th Cir. 1999).” ““An *individual* injured by any willful violation of the automatic stay is entitled to recover actual damages, ‘including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive damages.’ 11 U.S.C. § 362(k).
- ❑ Once a creditor becomes aware of the automatic stay, any intentional act that results in a violation of the automatic stay is ‘willful.’ *In re Knaus*, 889 F.2d 773 (8th Cir. 1989).” (emphasis in original).
- ❑ “To recover damages after a willful violation of the stay, a debtor must file a motion for sanctions with the bankruptcy court and show: (1) that the creditor violated the stay; (2) that the violation was willful; and (3) that the debtor was injured by the violation. *Lovett v. Honeywell, Inc.*, 930 F.2d 625 (8th Cir. 1991).”

The Automatic Stay – Takeaways

- The automatic stay is extraordinarily broad.
 - Lenders must be aware of the scope and duration of an automatic stay, as well as potential avenues for obtaining relief from the stay.
 - In all cases, lenders should be careful to not take any action that may violate the stay to avoid sanctions for willful violations of the stay.

Minnesota's ROFR Statute for Foreclosed Agricultural Property

- ❑ Minnesota law provides the former owner of foreclosed agricultural real property a right of first refusal to purchase the property back at the same price agreed to with the potential buyer.
- ❑ Similarly, before leasing property, the former owner is entitled to a similar right of first refusal to lease the property.
- ❑ In addition, the lender must also provide notice to the former owner 14 days before marketing the property before attempting to solicit offers from buyers.

Minnesota's ROFR Statute for Foreclosed Agricultural Property

□ When Must a Right of First Refusal Be Offered?

- The statutory right of first refusal applies only to “agricultural land” or a “farm homestead.”
- The lender may request a certificate from the county assessor indicating whether property is agricultural land or a farm homestead, and that certificate serves as prima facie evidence of whether the property meets the definition. Minn. Stat. § 500.245 subd. 1(j).
- A “state or federal agency, limited partnership, corporation, or limited liability company” that acquires agricultural property “by enforcing a debt against the agricultural land or farm homestead” by (1) foreclosing a mortgage, (2) accepting a deed in lieu, (3) terminating a contract for deed, or (4) accepting a deed in lieu of termination of a contract for deed, must comply with the right of first refusal statute. Minn. Stat. § 500.245 subd. 1(a).

Minnesota's ROFR Statute for Foreclosed Agricultural Property

□ Who Receives a Right of First Refusal?

- The “immediately preceding former owner” is entitled to receive the notice. This is the person or entity who held the record legal title to the land before the lender acquired the property. Minn. Stat. § 500.245 subd. 1(b).

Minnesota's ROFR Statute for Foreclosed Agricultural Property

❑ What is Required?

- Prior to offering land for sale if the statute applies, the seller must provide written notice to the former owner that the land will be offered for sale at least 14 days before it is offered for sale. Minn. Stat. § 500.245 subd. 1(a). No 14 day notice is required before land is offered for lease.
- Generally, when the lender enters into a purchase agreement or lease agreement with a third party, the lender must first make “a good faith effort to offer the land for sale or lease to the immediately preceding former owner at a price no higher than the highest price offered by a third party that is acceptable to the seller or lessor.” Minn. Stat. § 500.245 subd. 1(a).
- A lender satisfies the requirement of providing such an offer by either sending via certified mail with a receipt of mailing, or by personally serving the former owner, with a notice as specified in subdivision 2 of the statute. See Minn. Stat. § 500.245 subd. 1(f). The notice must substantially comply with the sample provided in the statute. When sending the notice, the lender must also enclose a copy of the lease or purchase agreement in question (buyer's name may be redacted) and send an affidavit attesting that the agreement is a true and accurate copy. Minn. Stat. § 500.245 subd. 2(b).

Minnesota's ROFR Statute for Foreclosed Agricultural Property

□ How Does the Right of First Refusal Operate?

- If the land is being leased, the former owner must exercise the right to lease the property and accept the offer in writing within 15 days after the notice is sent. The former owner then has 10 days after accepting the offer to perform and tender the amount due. Minn. Stat. § 500.245 subd. 1(i).
- If the land is being sold, the former owner must exercise the right to purchase the property and accept the offer in writing within 65 days after notice is sent. The former owner again has 10 days after accepting the offer to perform and tender the amount due. Minn. Stat. § 500.245 subd. 1(i).
- The statute does provide a method of calculating the offer price in situations where the purchase agreement entered into calls for payments over time (e.g., a contract for deed). In other words, the former owner would be required to pay the present value in full after accepting the offer rather than paying over time. See Minn. Stat. § 500.245 subd. 1(d).

Minnesota's ROFR Statute for Foreclosed Agricultural Property

❑ May the Statutory Right of First Refusal Be Waived or Transferred?

- In general, a pre-default waiver is not effective.
- However, a deed offered in lieu of foreclosure or a deed in lieu of the termination of a contract for deed may include an express statement waiving the right. In addition, after the lender has acquired the property, the former owner may convey the statutory right of first refusal to the lender owning the property. Minn. Stat. § 500.245 subd. 1(l).
- The statutory right of first refusal may not be otherwise transferred except through inheritance, and the former owner cannot exercise the right of first refusal as part of an agreement with a third-party negotiated *prior* to exercising the right. Minn. Stat. § 500.245 subd. 1(n).

Farmer Lender Mediation

- ❑ **Mediation is Mandatory Under the Farmer-Lender Mediation Act if each of the Following Requirements are Present:**
 - A collection action will be commenced against agricultural property;
 - The party commencing the collection action is a creditor within the scope of the Act;
 - The debtor is within the scope of the Act; and
 - The debt is within the scope of the Act. Minn. Stat. § 583.26, subd. 1.

Farmer Lender Mediation

- ❑ **Mediation is Mandatory Before a Creditor May Initiate Any of the Following Collection Proceedings to Enforce a Debt Against Agricultural Property:**
 - Foreclosure of a mortgage on agricultural property if the debt secured is more than \$15,000.00 (effective 8/1/17) Minn. Stat. § 582.039, subd. 1;
 - Enforcement of a security interest in agricultural property under Article 9 of the Uniform Commercial Code if the debt secured is more than \$15,000.00 (effective 8/1/17) Minn. Stat. § 336.9-601(h);
 - Termination of a contract for deed to purchase agricultural property if the remaining balance on the contract is more than \$15,000.00 (effective 8/1/17) Minn. Stat. § 559.209, subd. 1; and/or
 - Attachment of, execution on, levy on, or seizure of agricultural property if the debt secured is more than \$15,000.00 (effective 8/1/17) Minn. Stat. § 550.365, subd. 1.

Farmer Lender Mediation

❑ What is Not a Debt Covered by the Act?

- A debt for which a proof of claim was filed by a creditor or the debt was listed as a scheduled debt in a bankruptcy proceeding filed by the debtor;
- A debt for which the creditor received a mediation proceeding notice when the debt was in default, the creditor filed a claim form, and the debt was previously mediated;
- A debt for which the creditor served a mediation notice and the debtor failed to timely request mediation (this exception only applies for 60 days after the debtor's failure to request mediation);
- A debt for which the creditor received a mediation proceeding notice and the debtor and creditor have restructured the debt and signed a separate mediation agreement;
- A debt for which there is a lien for rental value of farm machinery under Minn. Stat. § 514.661; or
- The debt is a new line of credit, loan or other debt extended by a creditor to the debtor as a result of mediation under the Act. This new debt becomes subject to mediation two years after the end of the mediation from which the debt originated. The Mediation Termination Statement will contain the mediation end date. (effective 8/1/17) Minn. Stat. § 583.24, subd. 4.

Farmer Lender Mediation

□ What is Agricultural Property?

- Real property that is principally used for farming;
- Personal property that is used as security to finance a farm operation;
- Personal property that is used as part of a farm operation, including equipment, crops, livestock, proceeds of the security, and removable agricultural structures under with option to purchase. Minn. Stat. § 583.22, subd. 2.

Farmer Lender Mediation

□ What is Not Agricultural Property?

- Personal property subject to a possessory lien under Minn. Stat. §§ 514.18-514.22;
- Leased property (other than removable agricultural structures under lease with option to purchase); and
- Farm machinery that is primarily used for custom field work. Minn. Stat. § 583.22, subd. 2.

Farmer Lender Mediation

□ Who is a Creditor?

- The United States or any agency of the United States;
- A corporation, partnership or other business entity; or
- An individual. Minn. Stat. § 583.24, subd. 1.

□ A creditor can be any of the following persons:

- The holder of a mortgage on agricultural property;
- A vendor of a contract for deed of agricultural property;
- A person with a lien or a security interest in agricultural property; or
- A judgment creditor with a judgment against a debtor with agricultural property. Minn. Stat. § 583.22, subd. 4.

Farmer Lender Mediation

□ Who is a Debtor?

- A person operating a family farm as defined in Minn. Stat. § 500.24, subd. 2;
- A family farm corporation as defined in Minn. Stat. § 500.24, subd. 2; or
- An authorized farm corporation as defined in Minn. Stat. § 500.24, subd. 2. Minn. Stat. § 583.24, subd. 2(a).

Farmer Lender Mediation

- ❑ **Situations Where Farmer Lender Mediation Does Not Apply to a Debtor**
 - The debtor owns and leases less than 60 acres of real property; and
 - The debtor has less than \$20,000.00 in gross sales of agricultural products in the preceding year. Minn. Stat. § 583.24, subd. 2(b).
 - Further, the Act also does not apply to a debtor who fraudulently conceals, removes, or transfers agricultural property in violation of a security agreement.
 - ❑ In order to avoid mandatory mediation, the secured party must petition the district court in the county of the debtor's residence for an order permitting the secured party to proceed with its remedies without mediation.
 - ❑ Such a petition must be brought within 1 year after the alleged conversion and before a mediation notice is served on the debtor. Minn. Stat. § 583.27, subd. 7.

Farmer Lender Mediation

□ How is a Mediation Agreement Enforced?

- If an agreement is reached during mediation, the agreement will be binding upon the debtor, creditors who approved the agreement, and creditors who filed claim forms and failed to object to the agreement.
- Any mediation agreement must be enforced by the district court. Minn. Stat. § 583.31.

Electronic Communications With Customers – Best Practices

- ❑ According to a 2016 report by Kleiner Perkins on internet trends, twenty-four (24%) percent of Millennials prefer to contact businesses through internet or webchat, twenty-four (24%) percent through social media, twenty-one (21%) through electronic messaging (e-mail or SMS), nineteen (19%) percent through smartphone applications, and twelve (12%) percent through telephone.
- ❑ By comparison, sixty-four (64%) of Baby Boomers prefer to contact a business by telephone. (See Appendix.)
- ❑ Consumer preferences are changing. People want and prefer to communicate electronically, whether it be via e-mail, text messaging, or social media.

Electronic Communications With Customers – Best Practices

□ Email

■ Full List of Do's and Don'ts Are in Your Materials, but here are a few highlights:

- Don't Use the Auto-Fill Function;
- Do Watch Your Tone;
- Do Trim the Length;
- Do Use the Importance Function; and
- Do Utilize Secured Messaging.

Electronic Communications With Customers – Best Practices

□ Texting

- **Full List of Do's and Don'ts Are in Your Materials, but here are a few highlights:**
 - **Don't Say Anything You Would Not Want Your Mother or a Judge to Read;**
 - **Do Ask For Permission;**
 - **Do Allow the Ability to Opt-Out;**
 - **Don't Text Sensitive Information;**
 - **Do Keep a Lock on Your Phone; and**
 - **Don't Send Mass Texts or Emails.**

Electronic Communications With Customers – Best Practices

❑ All Electronic Communications Are Permanent and Do Not Contradict Lending Documents

- Once you put something online, it generally cannot be taken offline; it exists forever in the ether of cyber space. This can have lasting implications for you as an individual and for your company's brand.
- It is important that you do not contradict provisions or terms of a lending document when communicating with a client through text, e-mail, or some other form of electronic communication because you could inadvertently modify the contract. Most contracts or agreements used in the banking industry have integration clauses that state this agreement constitutes the entire agreement between the parties, which cannot be modified except in a writing signed by all parties. Electronic signatures are now commonly utilized in commercial transactions due in part to the Uniform Electronic Transactions Act (“UETA”), which is a “uniform law” that has been enacted in most states (including Minnesota). E-mail text is generally sufficient for the purposes of an electronic signature.

Electronic Communications With Customers – Best Practices

□ **Keep Electronic Correspondence in Accordance with Retention Records**

- Communication with clients, especially relating to lending documents, payment disputes, and anything regarding changes to accounts or services provided to a client should be maintained in accordance with federal and applicable state law, as well as your financial institutions record retention policies.

The Credit Agreement Statute – Minn. Stat. § 513.33

Subdivision 1. Definitions. For the purposes of this section, the following terms have the meanings given them:

- (1) “credit agreement” means an agreement to lend or forbear repayment of money, goods, or things in action, to otherwise extend credit, or to make any other financial accommodation;
- (2) “creditor” means a person who extends credit under a credit agreement with a debtor;
- (3) “debtor” means a person who obtains credit or seeks a credit agreement with a creditor or who owes money to a creditor; and
- (4) “signed” has the meaning specified in section 336.1-201(b)(37).

Minn. Stat. § 513.33, subd. 1.

Subd. 2. Credit agreements to be in writing. A debtor may not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor.” Minn. Stat. § 513.33, subd. 2.

The Credit Agreement Statute – Minn. Stat. § 513.33

- ❑ Minn. Stat. § 513.33 “was passed in 1985 in response to the farm crisis of the 1980s.” *Figgins v. Wilcox*, 879 N.W.2d 653, 655-56 (Minn. 2016) (citing *Rural Am. Bank of Greenwald v. Herickhoff*, 485 N.W.2d 702, 705 (Minn.1992)).
- ❑ “The farm crisis of the 1980s produced cash-strapped and financially unsophisticated farmers who claimed reliance upon their bank officers’ oral promises to renew their loans. Numerous lawsuits arose over the bankers’ alleged oral promises. The credit agreement statute was passed to prevent the litigation of such difficult claims.” *Figgins*, 879 N.W.2d at 656 (citing *Rural Am. Bank*, 485 N.W.2d at 705).
- ❑ “The statute accomplishes its goal by creating a requirement that certain ‘credit agreements’ be in writing.” *Id.*

The Credit Agreement Statute – Minn. Stat. § 513.33

- ❑ In sum, “the legislature intended [Minn. Stat. § 513.33]” to apply *broadly* to protect *lenders* from having to litigate claims of oral promises.” *Petsche v. EMC Mortgage Corp.*, 830 F.Supp.2d 663, 671 (D. Minn. 2011) (citing *Rural Am. Bank*, 485 N.W.2d at 705-06 (emphasis added)).
- ❑ It is important to note at the outset that Minn. Stat. § 513.33 bars actions by *debtors* on statutorily defined “credit agreements.”
- ❑ The plain language of this statute does *not* bar actions by *creditors* on a “credit agreement” even if the “credit agreement” that a creditor may bring an action on does not satisfy the writing, consideration, terms/conditions, and signature requirements set forth in Minn. Stat. § 513.33, subd. 2. This is consistent with the above-referenced purpose of the statute to protect lenders.

The Credit Agreement Statute – Minn. Stat. § 513.33

- ❑ However, courts have sometimes struggled in determining whether purported agreements between “creditors” and “debtors” are “credit agreements” as defined by Minn. Stat. § 513.33, subd. 1(1).
- ❑ *In Rural Am. Bank*, 485 N.W.2d at 706, the Court found that an agreement to apply proceeds to a father’s loan first was a credit agreement to forbear repayment of a son’s loan.
- ❑ By way of further example, one case determined that an agreement to postpone a foreclosure sale was a “financial accommodation” under Minn. Stat. § 513.33, subd. 1(1). See *Bracewell v. U.S. Bank Nat’l Ass’n*, 748 F.3d 793, 795 (8th Cir. 2014).

The Credit Agreement Statute – Minn. Stat. § 513.33

- ❑ Admittedly Minnesota courts have not always been uniform in applying Minn. Stat. § 513.33.
- ❑ In particular, immediately following the enactment Minn. Stat. § 513.33 Minnesota courts occasionally issued decisions that arguably applied this statute far more narrowly than the legislature intended it to be applied. See *Carlson v. Estes*, 458 N.W.2d 123, 127 (Minn. App. 1990) (finding that an oral promise not to record a mortgage was not, by itself, a credit agreement within the terms of Minn. Stat. § 513.33).
- ❑ The most prominent example of the Minnesota Court of Appeals' not applying the plain language of Minn. Stat. § 513.33 is *Norwest Bank Minnesota, N.A. v. Midwestern Machinery Co.*, 481 N.W.2d 875 (Minn.App.1992), *rev. denied* (Minn. May 15, 1992). In *Norwest Bank*, the Minnesota Court of Appeals judicially invented a promissory estoppel exception to Minn. Stat. § 513.33 such that debtors were able to bring promissory estoppel claims against creditors even though the plain language Minn. Stat. § 513.33, subd. 2 explicitly barred these claims.

The Credit Agreement Statute – Minn. Stat. § 513.33

- ❑ In 2016, the Supreme Court in *Figgins* explicitly overruled the above-referenced *Norwest Bank* case.
- ❑ *Figgins* expressly acknowledged that a “judicially crafted exception to section 513.33 that allows for promissory estoppel claims would substantially undermine the purpose of the statute and would be inconsistent with both the letter and the spirit of the law.” *Id.* at 659.
- ❑ In sum, *Figgins* made clear that lower courts should not permit statutorily defined “debtors” to rely upon or invent “judicially crafted exceptions” to Minn. Stat. § 513.33 to survive a creditor’s dispositive motions. This is good news for lenders as we continue to go through financially difficult times.

Statutory Agricultural Input Lien

- ❑ Minnesota provides various statutory liens to provide protections to those who contribute goods or services for the benefit of a farming operation. The most common types of these statutory liens include:
 - Crop Production Input Liens
 - Harvester's Liens
 - Landlord's Liens
 - Livestock Production Input Liens
 - Feeder's Liens
 - Veterinarian's Liens

Statutory Agricultural Input Lien

❑ Crop Production Input Lien Considerations

- It is possible for a crop production input lien to gain priority over an existing security interest:
 - ❑ First, a crop input lien supplier must comply with all statutory notice requirements (e.g. lien notification statements).
 - ❑ Within ten days of receiving a notification statement, lender must either:
 - Respond with letter of commitment for part or all of the amount specified in notification statement; or
 - Respond with a refusal to provide letter of commitment.
 - ❑ If lender does not respond within ten days, “a perfected crop production input lien...has priority over any security interest in the same crops or their proceeds.”

Statutory Agricultural Input Lien

□ Harvester's Lien Considerations

- This lien is perfected by filing a financing statement within 15 days after the last harvesting services have been provided. Minn. Stat. § 514.964, subd. 5(c). A perfected harvester's lien has priority over all competing security interests and agricultural liens except:
 - Perfected landlord's lien.
 - Perfected crop production input lien. *Id.* at subd. 7(b).

Statutory Agricultural Input Lien

❑ Landlord Lien Considerations

- Minn. Stat. § 514.964, subd. 1 provides that a “person leasing real property for agricultural production has a lien for unpaid rent on the crops produced on the real property in the crop year that is the subject of the lease. A landlord’s lien becomes effective when the crops become growing crops.”
- “A landlord’s lien...is perfected if a financing statement is filed...within the time periods set forth in paragraphs (b) to (d).” *Id.* at subd. 5(a). However, a “landlord’s lien must be perfected on or before 30 days after the crops become growing crops.” *Id.* at subd. 5(b).
- “A perfected landlord’s lien under this section has priority over all competing security interests and all agricultural liens in crops and the products or proceeds thereof.” Minn. Stat. § 514.964, subd. 7(a). But this lien and its priority is limited to the crops grown on the land rented and only up to the amount of unpaid rent.

Statutory Agricultural Input Lien

❑ Livestock Production Input Lien Considerations

- ❑ This lien attaches to the livestock served by the agricultural lienholder. It is possible for a livestock production input lienholder to gain priority over an existing security interest, as set forth below:
 - First, a livestock input lien supplier must comply with all statutory notice requirements (e.g. lien notification statements).
 - Within ten days of receiving notification statement, lender must either:
 - ❑ Respond with letter of commitment for part or all of the amount specified in notification statement; or
 - ❑ Respond with a refusal to provide letter of commitment.
 - If lender does not respond within ten days, “a perfected livestock production input lien...has priority over any security interest in the same crops or their proceeds.”

Subordination Agreements

- ❑ A “subordination agreement” is an agreement in which a senior lienholder agrees to subordinate its interest to an otherwise junior interest. Article 9 of the Uniform Commercial Code expressly recognizes the ability of parties to enter into agreements to alter the priority of their respective security interests. Minn. Stat. § 336.9-316.
- ❑ Minnesota case law also recognizes the validity of agreements to alter the priority of interests in real property. See e.g. *In re Crablex, Inc.*, 762 N.W.2d 247, 253 (Minn.App.2009), *review denied* (Minn. Apr. 29, 2009).

Subordination Agreements

- ❑ The scope of a subordination agreement, and any conditions on its effectiveness, are determined by the parties' agreement. For example, the agreement could provide that the subordination is as to all assets or as to only specified assets (i.e. crops).
- ❑ In all cases, it is always a good idea to identify the specific dollar amount of the senior security interest that is being subordinated.

Deeds In Lieu of Foreclosure

- ❑ A “deed in lieu of foreclosure is a voluntary deed conveying mortgaged property to the secured party as an alternative to the proceedings that would otherwise be required under applicable state law to foreclose the owner’s equity of redemption. Usually, although not necessarily, the consideration for the conveyance is the full or partial satisfaction of the secured debt.” See *In re Anderson*, No. 95-15419-SSM 1997 WL 1102027, at *6 (Bankr. E.D. Va. August 29, 1997).
- ❑ There are many reasons why a deed in lieu of foreclosure may be preferable to a foreclosure. For example, a deed in lieu of foreclosure allows a secured party to obtain immediate control over and possession of the subject real estate. In addition, by obtaining a piece of real estate via a deed in lieu, a secured party can avoid the delays that are inherent in foreclosures.

Deeds In Lieu of Foreclosure

- ❑ However, one thing lenders should be mindful of are potential junior lienholders when using a deed in lieu. Specifically, “[c]are must be taken to prevent the so-called merger of the legal estate which the mortgagee obtains from the deed in lieu with the interest of the mortgagee in the underlying mortgage. If the mortgage is found to merge in the fee title, it is extinguished.
- ❑ The mortgage could not then be foreclosed to extinguish the interests of junior lienholders. If it is clear that the intention of the parties was not to merge the mortgage into the fee, such intention will be given effect. Language should be inserted in the deed to prevent any interpretation of the parties’ intention as one of effecting such a merger.” See 6A Minn. Prac., Methods Of Practice § 43.26 Drafting deeds for special situations—Deed in lieu of foreclosure (3d ed.) (Last Updated September 2017).

Deeds In Lieu of Foreclosure

- ❑ In sum, deeds in lieu of foreclosure are valuable tools that a lender has at its disposal. However, care must be taken when utilizing deeds in lieu to ensure that to the extent possible, that the lender is taking title free and clear of all junior liens.
- ❑ If there are junior liens on the mortgaged real estate, then it may be preferable to go through a foreclosure by advertisement or foreclosure by action to extinguish the junior liens and take title free and clear of all encumbrances.

Syngenta Lawsuits

- ❑ The case facts and procedural posture of this litigation are provided in your written materials.
- ❑ As a part of the settlement, Syngenta agreed to pay eligible claimants a total \$1,510,000,000.00.
- ❑ Of this amount, a maximum of \$22,600,000.00 is set aside to pay corn producers who purchased and planted Viptera and Duracade seeds. A maximum of \$29,900,000.00 is set aside to pay grain handling facilities that are covered by the settlement, and a maximum of \$19,500,000.00 is set aside to pay ethanol production facilities that are covered by the settlement.
- ❑ The total amount available to corn producers who did not purchase or plant Viptera or Duracade seeds prior to April 10, 2018 will be the remaining settlement funds, which will be at least \$1,438,000,000.00 before any deductions for the costs of administering the settlement and any attorneys' fees and litigation expenses are awarded by the Court.

Syngenta Lawsuits

❑ Four Settlement And Non-Settlement Options

- ❑ First, a claimant may submit a claim form at www.cornsettlement.com, but if a claimant elects this option he or she must submit a claim on or before October 12, 2018. Claimants were able to submit their claim forms beginning in May 2018.
- ❑ Second, a claimant may object to the settlement and ask the Court to not approve the settlement.
- ❑ Third, a claimant may be excluded from the settlement. In such a case, the claimant would receive no money from this settlement, but would retain the right to sue Syngenta separately.
- ❑ Fourth, if a claimant does nothing, then that claimant's claims against Syngenta will be lost and the claimant will receive no monetary recovery.

Syngenta Lawsuits

- ❑ Most claimants will likely elect the first option outlined above. The amount that each claimant will receive will vary considerably based on whether the claimant is a corn producer, grain handling facility, or an ethanol production facility. A variety of factors apply to corn producers and affect how much of a recovery each individual corn producer will receive. For example, factors such as:
 - whether the corn producer purchased and planted Viptera or Duracade seeds prior to April 10, 2018;
 - whether the corn producer produced corn during all marketing years covered by the settlement;
 - whether the corn producer fed some or all of the producer's corn grown to livestock on the producer's farm during some or all of the marketing years covered by the settlement;
 - whether the corn producer sold some or all of the producer's corn grown during some or all of the marketing years covered by the settlement;
 - cash-rent farm landlords are also treated differently based on whether cash rent was lowered during the marketing years covered by the settlement and whether the cash rent varied based on the size of, or pricing for, the corn produced.
- ❑ At this time, there is no definitive date as to when the settlement funds will be disbursed to claimants who timely complete and submit their settlement claims.

Questions???

THANK YOU!

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2018 Gislason & Hunter Agricultural Lending Conference

*Thursday, September 6, 2018
New Ulm Event Center*

GISLASON & HUNTER LLP
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Troubled Loans – Workouts to Bankruptcy

2018 Agricultural Lending Conference
New Ulm, MN

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Pre-Collection Actions

Inspection

□ Verify Collateral

- Crops
- Livestock
- Equipment
- Prior year's crops

□ Crop Insurance

- Verify and identify level of coverage
- Form CCC-36

Pre-Collection Actions

Inspection

□ Compare & Review

- Tax return depreciation schedules;
- Balance Sheet;
- Actual Inspection results

□ Acquire Information

- Establish new legal entities?
- Verify ownership of all equipment

Pre-Collection Actions

Identify any Missing Collateral

- ❑ Ask Debtor where collateral is located
- ❑ If sold, what happened to proceeds
- ❑ Avoid Farmer-Lender Mediation

Pre-Collection Actions

UCC Search

- ❑ Conduct new search
- ❑ Identify statutory secured creditors
 - Harvester's Lien
 - Feeder's Lien

Pre-Collection Actions

UCC Search

▣ Input Liens

■ Landlord Lien

- ▣ Must be filed to perfect

- ▣ 30 days after become growing crops

■ Crop/Livestock Production Input Liens

Pre-Collection Actions

Judgment Search

□ Judgment Lien

- Conduct search via MN Trial Court public access
- <http://pa.courts.state.mn.us/default.aspx>

Minnesota Trial Court Public Access (MPA) Remote View

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Case Records

Select a location

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READ THESE NOTICES: Name searches for criminal/traffic/petty case records WILL NOT return 'pending criminal records.' A 'pending criminal record' is a record for which there is no conviction as defined by Minn. Stat. 609.02, subd. 5 (2014). NOTICE: Please read Notices and Instructions (in the link below) before conducting a case inquiry.

[MN Judicial Branch](#) | [MNCIS](#) | [Notices & Instructions](#) | [FAQ](#) | [Level of Sentence Fact Sheet](#)

<http://pa.courts.state.mn.us/default.aspx>

Pre-Collection Actions

Tax Lien Search

- ❑ Tax lien search – MN Secretary of State
- ❑ Must have an account
- ❑ <https://mblsportal.sos.state.mn.us/Secured/SearchUCC>

Pre-Collection Actions

UCC Search

- ❑ Identify PMSI creditors
- ❑ Identify blanket lien creditors
- ❑ Verify “your” filing

Pre-Collection Actions

O & E Updates

- ❑ Junior creditors
- ❑ Tax liens
- ❑ Transfer of real estate
- ❑ Other judgments

Pre-Collection Actions

CNS/Direct Notice

- ❑ Effective Financing Statement
- ❑ Direct Notice
- ❑ Creditor can send notice through certified mail, return receipt requested, or personal service (hand deliver).
- ❑ The notice is effective for only one year, and must be re-sent afterwards. Strict compliance with this rule is required.

Pre-Collection Actions

Identify Other Unencumbered Assets

- ❑ Hedging Accounts
 - Control Agreement to perfect
- ❑ Deposit Accounts – Other financial institution
 - Control Agreement to perfect
- ❑ Vehicles
- ❑ Crop Insurance
 - Verify and identify level of coverage
 - Form CCC-36

Pre-Collection Actions

Loan Document Review

- ❑ Is everything ok?
- ❑ Security Agreement “match” UCC filing
- ❑ All necessary borrowers/obligors

Workout v. Foreclosure – WHICH ONE?

□ Workout Agreement

- Issues with loan documents to clean up
- Issues with perfection of secured position
- “Final chance” to perform
- Additional collateral available
- Additional guarantors available

Workout v. Foreclosure – WHICH ONE?

□ Foreclosure

- Concern regarding bad acts, fraudulent conveyances, transfers
- Issues with collateral not being maintained
- Missing collateral
- Continuing losses
- Inability to perform
- No additional collateral

Workout v. Foreclosure – WHICH ONE?

□ Farmer-Lender Mediation

- When do you offer?
- If workout forbearance agreement is part of a FLM settlement, then lender does not need to go through FLM (again) if debtor breaches the agreement.
- Court can specifically enforce agreement if part of FLM.

Workout Agreements

- ❑ Correct documentation/perfection issues
 - New lienholder cards
 - Control Agreement for hedging account
 - Additional collateral
- ❑ Timing
 - 90-day preference period

Workout Agreements

Key Components

- ❑ Restatement of all debt and collateral
- ❑ Reaffirmation, ratification, and acknowledgment of current indebtedness and validity of current loan documents
- ❑ Terms of loans (amounts, interest rates, repayment, etc.)

Workout Agreements

Key Components

- ❑ Collateral security and administration of collateral
 - any additional collateral
 - deed in lieu of foreclosure
 - confession of judgment
 - stipulation for replevin of personal property
 - appointment of receiver
- ❑ Covenants
- ❑ Remedies on default
- ❑ Release

Workout Agreements

Restatement of debt/collateral

- ❑ Include all notes
- ❑ Include all collateral

Workout Agreements – Reaffirmation

- ❑ Borrower/Obligor reaffirm and ratify current indebtedness and validity of current loan documents:
 - By execution of this Agreement, _____, individually, jointly and severally, acknowledge, represent and warrant that all Loan Documents executed in connection with the Indebtedness, to include but not be limited to those Loan Documents and/or instruments identified herein, have been duly executed by _____ (and each proper party) in favor of the [Lender], are valid and binding agreements and/or instruments, are properly perfected liens on the property described therein; and that the same are enforceable as against _____, individually, jointly and severally, in accordance with the terms thereof; and that _____, individually, jointly and severally, have no defense, offset, deductions, counterclaims or any other defense or claim whatsoever, as to the validity and enforceability of the same.

Workout Agreements – Loan Terms

- ❑ Identify all changes
- ❑ If no change in terms – “except as set forth, all terms and conditions remain the same”
- ❑ Set aside notes

Workout Agreements – Collateral and Administration

- ❑ Add additional collateral
- ❑ What's the consideration?
- ❑ Timing – 90-day preference period

Workout Agreements – Collateral and Administration

- Deed in lieu of foreclosure
 - Confirm correct owner
 - Non-merger language – ability to foreclose
 - Save time, effort and money
 - Determine credit price

Workout Agreements – Collateral and Administration

□ Deed in Lieu

- Statutory Rights of First Refusal
- Lease – 15 days to exercise / 10 days to perform
- Sale – 65 days to exercise / 10 days to perform

Workout Agreements – Collateral and Administration

- ❑ Deed in Lieu
- ❑ Waive Statutory Rights in deed in lieu
- ❑ Modify – shorter period – contractual

Workout Agreements – Collateral and Administration

□ Stipulation for Replevin of Personal Property

- Include list of equipment (from inspection)
- Sample language

“Upon execution of this Agreement, _____ shall execute and deliver to the Bank a Stipulation for Entry of Order for Seizure and Delivery of Personal Property and Order, substantially in the form attached hereto as **Exhibit** ____ (the “Replevin Stipulation and Order”).”

Workout Agreements – Collateral and Administration

- ❑ Confession of Judgment
 - Full amount of debt
 - Hold in escrow
 - Record, but not enforce

Workout Agreements – Collateral and Administration

□ Covenants

- Reporting/borrowing base
- Limit capital expenditures
- All accounts at institution
- Timing for liquidating collateral

Workout Agreements – Collateral and Administration

□ Remedies

- Record deed
- Record confessions of judgment
- Other actions
- If FLM – “enforce” agreement

Workout Agreements – Collateral and Administration

- Release

- Lender liability issues

Legal Action

- ❑ Replevin
- ❑ Foreclosure
- ❑ Judgment

Legal Action

- G & H Intake Form

INTAKE FORM

CLIENT: _____

CONTACT PERSON FOR CLIENT:

Name: _____

Title: _____

Phone Number: _____

Fax Number(s): _____

E-mail Address(es): _____

BORROWER(S) INFORMATION (attach additional sheets if needed):

Name(s): _____

Current Address(es): _____

Phone Number(s): _____

E-mail Address(es): _____

Social Security Number(s): _____

DOCUMENTS / INFORMATION NEEDED REGARDING BORROWER(S):

1. Debt Instruments

- ___ Promissory Notes / Contracts
- ___ Amendments / Modifications / Extensions of Promissory Notes / Contracts
- ___ Loan Balance Information (by Principal, Interest, Late Fees, Etc.)
- ___ Loans in Default and Explanation of Default
- ___ Notices of Default Sent to Borrower(s)

2. Personal Property

- ___ Security Agreements
- ___ UCC Financing Statements (and Amendments and Continuations)
- ___ Effective Financing Statements
- ___ Certificates of Title
- ___ Lien Holder Cards
- ___ Machinery & Equipment Lists
- ___ Appraisals

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3. Real Property

- ___ Mortgages
- ___ Amendments / Modifications / Extensions of Mortgages
- ___ Assignments of Rents
- ___ Fixture Financing Statements
- ___ O&E Reports
- ___ Title Insurance Policies / Title Opinions
- ___ Appraisals

4. Other

- ___ Guaranties
- ___ Third Party Pledge Agreements
- ___ Subordination Agreements
- ___ Notice of Bankruptcy Filing
- ___ Other Written Communications with Borrower(s)
- ___ Loan Comments (only if requested by G&H)

5. Borrowers' Financial Information

- ___ Financial Statements
- ___ Tax returns
- ___ Other

6. Farmer Lender Mediation

Has Farmer Lender Mediation been offered? _____ Yes _____ No

If yes, provide:

- ___ Notice of Waiver of Mediation
- ___ Notice of Termination of Mediation

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Bankruptcy

- ❑ Chapter 7
- ❑ Chapter 11
- ❑ Chapter 12
- ❑ Chapter 13

Bankruptcy – Cash Collateral

- Motion for use of cash collateral
 - Debtor's request to use collateral to run operations

Bankruptcy – Cash Collateral

- ❑ What is cash collateral?
 - Cash
 - Collateral that can easily be converted to cash
 - Money/proceeds
 - Crops
 - Accounts receivable
- ❑ Send letter stating debtor is not authorized to use cash collateral.

Bankruptcy – Cash Collateral

- Interim Motion for use of cash collateral until final motion can be heard.
 - Expedited basis – 2-4 days notice
 - Rarely denied
 - Request adequate protection – decided by judge
 - Negotiate what is “necessary”
 - Necessary – insurance, wages, utilities, feed
 - Not necessary – real estate taxes

Bankruptcy – Cash Collateral

- Final Motion for Use of Cash Collateral
 - Sets tone for the case – educate judge
 - Additional collateral available for adequate protection
 - Real estate
 - Equipment
 - Time limits for use

Bankruptcy – Cash Collateral

- Challenge/Object to use of cash collateral
 - Debtor's projections compared to actual past production
 - Review past balance sheets, tax returns, cash flows
 - Marketing plan

Bankruptcy – Cash Collateral

- ❑ Stipulation for Use of Cash Collateral
 - Require a budget that debtor cannot exceed
 - Require consent for certain amounts/uses
 - Require filing of monthly operating reports
 - Require “reader” access to DIP accounts
 - Require debtor to seek to avoid liens that were not properly perfected
 - Require adequate protection

Bankruptcy – Adequate Protection

- ❑ Entitled to maintain “status quo” diminution in value of collateral
- ❑ Not entitled to payments under the note

Bankruptcy – Adequate Protection

□ Types

- Cash payments
- Additional or replacement liens
 - Future crops
 - Other real estate or equipment

Bankruptcy – Adequate Protection

- ❑ Equity cushion
- ❑ If no adequate protection, move for relief from stay.

Bankruptcy Plans

- ❑ Chapter 11 – Reorganization plan sorts claims into like classes and provides the same treatment of claims within each class.
11 U.S.C. § 1123(a)-(b)
- ❑ Chapter 12 – Repayment plan provides for payments to be made to the trustee and distributed among the creditors.
11 U.S.C. § 1222(a)-(b)

Bankruptcy Plans – Timing

□ Chapter 11

- Debtor has the exclusive right to file a plan for 120 days after Order for Relief.
- Interested party may file if:
 - i. The debtor does not file a plan during the 120-day period.
 - ii. The debtor's plan is not accepted by all impaired classes of claims within 180 days, or
 - iii. A trustee is appointed.

Bankruptcy Plans – Timing

□ Chapter 12

- Debtor must file a repayment plan within 90 days after Order for Relief, unless extended.
- Creditors cannot file a plan.
- If debtor does not file, case can be dismissed.

Bankruptcy – Plan Confirmation

□ Chapter 11

- Disclosure Statement approved and served with order for confirmation hearing, plan and ballot form.
- Ballot form sent in to clerk's office, unless ordered otherwise.

Bankruptcy – Plan Confirmation

□ Chapter 11

- Plan proponent and committee of unsecured creditors must count the ballots and file report no later than 24 hours before the confirmation hearing.
- Plan proponent “shall provide testimony at the confirmation hearing.”
- Acceptance v. Cramdown

Bankruptcy – Plan Confirmation

□ Chapter 12

- No disclosure statement necessary.
- Ballots not necessary. Creditor consent not required.
- Court determines if plan is feasible.
- Cramdown allowed.

Bankruptcy Plan

□ Repayment Terms

- Debtor can change terms (amortization periods, length of repayment, interest rates)
- Compare to original terms
- Compare to acceptable terms in the market

□ Negotiate terms

Bankruptcy Plan – Feasibility

- ❑ Can they make the plan work
- ❑ Review
 - Cash flows/tax returns
 - Prior yield history
 - Average yield
 - Contracting/Pricing v. Open market
 - Reamortization period – Expert?

Bankruptcy Plan Confirmation

- Order approving Plan is new contract with lender.

Questions???

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