Summer 2019

FINANCIAL newsletter

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COMMUNITY BANKS: A FRONT LINE AGAINST ELDER ABUSE?

As the population ages, financial exploitation of the elderly is becoming a national issue. This problem is compounded by the fact that the elderly victims are often embarrassed or ashamed about being exploited. Their abusers may be family members or friends.

Financial institutions, particularly local banks who see their customers regularly, are often well situated to notice suspicious activity in their elderly clientele's accounts. However, there are currently large disincentives and risks around acting on those suspicions. Federal privacy laws, like Graham-Leach-Bliley, restrict the sharing of private financial information, and state power of attorney laws limit the bank's ability to challenge or refuse to honor a power of attorney which appears valid on its face.

Minnesota has enacted criminal laws which punish financial exploitation of a vulnerable adult with up to 20 years in prison, depending on the nature of the relationship between the abuser and the victim.

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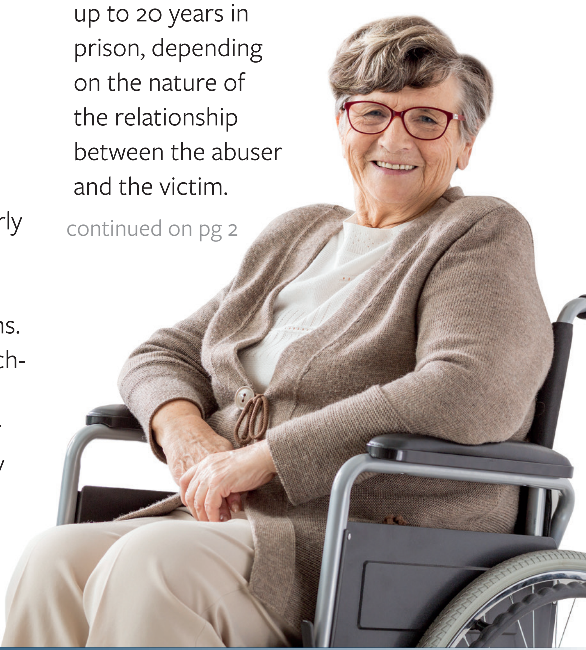

COMMUNITY BANKS: A FRONT LINE AGAINST ELDER ABUSE?

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The definition of vulnerable adult includes a person over the age of 18 who resides in or is inpatient at a hospital, nursing home, or receives in-home or community-based care, but also includes those adults with physical or mental infirmity or dysfunction which impairs their ability to care for themselves and especially impairs their ability to protect themselves from maltreatment.

Minnesota financial institutions are not mandatory reporters for financial exploitation or other maltreatment of vulnerable adults. A financial institution which receives a subpoena in connection with a maltreatment investigation should comply with that subpoena – Minnesota financial institutions are immune from civil and criminal liability for cooperating with such investigations. Likewise, financial institutions should comply with reasonable requests for financial records from DHS, county social services, local law enforcement, or a prosecutor who certify that such requests are part of a maltreatment investigation.

A new federal law, the Senior Safe Act, provides protection for financial institutions who report potential financial exploitation. It creates a program that financial institutions may opt into. In order to qualify, a financial institution must provide training to all employees who come in contact with senior citizens on financial exploitation. The training must include topics on how to identify and report suspected exploitation internally, discussion regarding the need to protect privacy and respect the integrity of each individual customer, and be appropriate to the job responsibilities of the individual trained. A financial institution opting into the Senior Safe Act should also have a policy for internal reporting for one or a handful of individuals who are trained to and responsible for reporting to law enforcement or adult protective services. Records must be maintained regarding what training is provided and that each employee completed training. All employees hired before May 2018 must be trained, and new employees must be trained within one year.

Financial exploitation of vulnerable adults continues to be an issue raised in St. Paul, and we can expect to see new legislation on this issue in the future. Although they were not ultimately passed, a pair of bills which would have introduced new protections to financial institutions which take certain steps in response to the reasonable belief that a customer is being financial exploited were debated this year in the Minnesota State Senate and House. The legislation would have permitted greater reporting of financial exploitation, provided the financial institution complied with reporting requirements, and would have permitted the refusal of a facially valid power of attorney with reasonable cause to believe the principal is or may be the victim of financial exploitation by the attorney-in-fact. The proposed legislation would have granted compliant financial institutions a liability shield from administrative, civil, or criminal liability.

If you have questions about what your financial institution can do to assist potentially vulnerable customers, while complying with your federal and state privacy obligations, please contact us for more information and advice. ■

By Rick Halbur
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POTENTIAL UPDATES TO CHAPTER 12 BANKRUPTCY LAW

B Bankruptcy rates among American family farmers have risen in the last few years as the agricultural economy has experienced prolonged difficulties and financial stress. These difficulties include, but are not limited to, declining prices for some agricultural commodities and uncertainty regarding global export markets.

Some commentators have compared the current economic environment to the 1980's, when many family farmers experienced high mortgage interest rates, declining land values, increasing production costs, and depressed commodity prices. In 1986, Congress intervened to address the 1980's agricultural crisis by creating Chapter 12 of the Bankruptcy Code.

Specifically, Congress created Chapter 12 of the Bankruptcy Code "to give family farmers facing bankruptcy a fighting chance to reorganize their debts and keep their land." *In re Fortney,* 36 F.3d 701, 703 (7th Cir.1994) (quotation omitted). At present, certain individuals who qualify as either a "family farmer" or a "family fisherman" can utilize Chapter 12 of the Bankruptcy Code to restructure their debts and keep the family farm in operation.

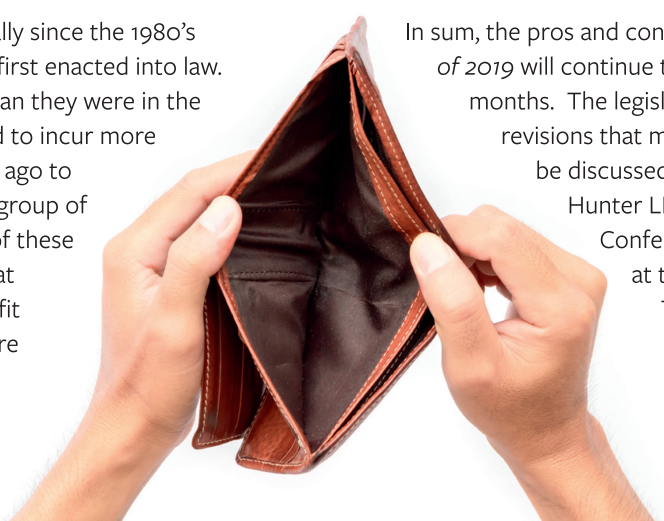
Chapter 12 bankruptcy requirements are simpler, more abbreviated, and usually substantially less costly than the requirements for other chapters of the Bankruptcy Code, like Chapter 11. However, currently a "family farmer" can only file for Chapter 12 bankruptcy protection if the "family farmer" has $4.153 million or less in debt. This debt limit is indexed to inflation and adjusted every three years.

However, farming has changed dramatically since the 1980's when the lower debt limit threshold was first enacted into law. Farming operations are typically larger than they were in the 1980's, which usually means farmers need to incur more debt today than they did several decades ago to keep their farms operating. A bipartisan group of United States Senators have taken note of these changes in agriculture and recognized that many individuals who would greatly benefit from Chapter 12 protections have far more than $4.153 million in debt, and thus cannot qualify for Chapter 12 bankruptcy.

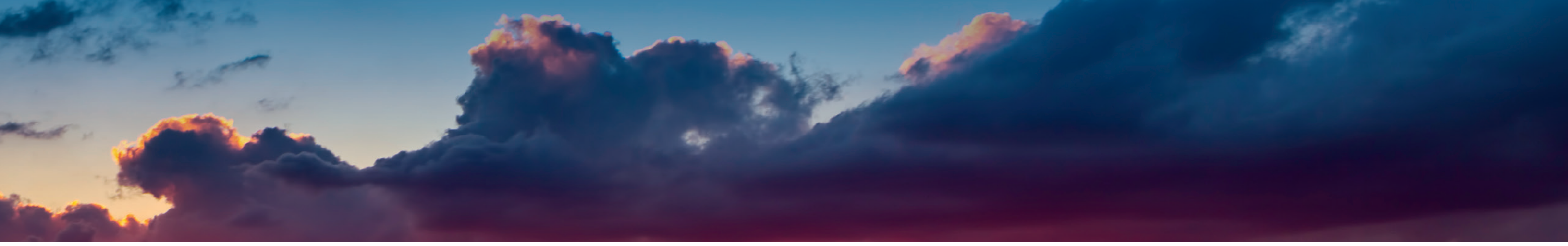
In recognition of the challenges that many farmers have faced over the last few years, a bipartisan group of United States Senators recently introduced legislation entitled the *Family Farmer Relief Act of 2019*. This group of Senators includes Senator Chuck Grassley (R-Iowa) and cosponsoring Senators Amy Klobuchar (D-Minn.), Ron Johnson (R-Wis.), Patrick Leahy (D-Vt.), Thom Tillis (R-N.C.), Doug Jones (D-Ala.), Joni Ernst (R-Iowa), and Tina Smith (D-Minn.).

One of the highlights of the *Family Farmer Relief Act of 2019* is that the current $4.153 million debt limit would be raised to $10 million such that individuals who otherwise fit the definition of a "family farmer" would be able to qualify for Chapter 12 bankruptcy protections. The practical effect of enacting the Family Farmer Relief Act of 2019 into law would be that more family farmers would probably file for Chapter 12 bankruptcies instead of Chapter 11 bankruptcies.

In closing, the *Family Farmer Relief Act of 2019* was only recently introduced, and it is unknown whether or not the legislation will pass. It has its supporters from certain interest groups, like the American Farm Bureau Federation. However, some groups like the American Bankers Association have announced their opposition to certain aspects of the legislation and have instead suggested other proposals, such as adjusting the current $4.153 million debt limit annually instead of every three years.



In sum, the pros and cons of the *Family Farmer Relief Act of 2019* will continue to be debated in the upcoming months. The legislation, and any potential revisions that may be made to the same, will be discussed in greater detail at Gislason & Hunter LLP's annual Agricultural Lending Conference, which will take place at the New Ulm Event Center on Thursday, September 5, 2019.



You are invited to the

2019 Agriculture Lending Conference

Thursday, September 5, 2019

New Ulm Event Center
301 20th South Street
New Ulm, Minnesota

9:30 – 11:30 a.m. Back to the Basics Workshop

11:30 a.m. – 1:00 p.m. Lunch

Box lunch or taco buffet available

1:00 – 4:30 p.m. Main Conference

• Top Issues Impacting Lenders
• The Cooperative Debtor
• Legislative and Case Law Update

Reception to follow at New Ulm Event Center

REGISTRATION

$75.00 per person. $15.00 lunch. Use registration form below;
or you may obtain a registration form online at www.gislason.com.

Name ____ Company __________________________________

Address __________________________________ City ______________________ State _____ Zip __________

Phone ____________________________________ Email ____

________ I will be attending the "*Back to the Basics*" Workshop beginning at 9:30 a.m. **AND** the Main Conference.

________ I would like a lunch ($15.00) ____box lunch ____taco buffet

________ I will be attending **ONLY** the Main Conference starting at 1:00 p.m.

Please remit a check payable to "Gislason & Hunter" along with registration form,
and mail to Gislason & Hunter LLP, Attn: Julie Donner, PO Box 458, New Ulm, Minnesota, 56073. **OR**
Scan and send to: jdonner@gislason.com and you will be called for credit card payment.

Please register by August 20, 2019.

DO YOU KNOW WHERE YOUR COLLATERAL IS?

By Chris Bowler
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A very common early step in a collection action initiated by a financial institution is to make a claim—typically referred to as a replevin claim—to enforce a security agreement signed by the borrower and repossess collateral. While such a claim is often fairly straightforward, there are a few inherent pitfalls that can be avoided through various actions taken before the loan becomes troubled. This article provides a brief overview of the replevin process, discusses a recent Minnesota federal court case illustrating one such pitfall, and provides practical insight for avoiding similar pitfalls.

I. The Replevin Process.

A replevin claim is often resolved in a lawsuit through a motion filed by the lender and that the borrower is often, but not always, provided prior notice of. Minnesota statutes spell out exactly what the lender needs to do in order for a lender to be successful on the motion. Namely, the lender is required to describe (a) the particular collateral sought to be recovered; (b) the facts giving

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DO YOU KNOW WHERE YOUR COLLATERAL IS?

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rise to the lender's right to possession of the collateral; (c) the facts showing that borrower is wrongfully detaining the collateral; (d) the current status of the indebtedness; and (e) a good faith approximation of the current market value of each item of collateral being claimed.

If the lender is able to provide each of those pieces of information, the court is to issue an order permitting the repossession and, among other things, providing the local sheriff with the authority to force entry into a specific location (including the authority to break into buildings) to retrieve the collateral. That authority is typically the main thing a lender is looking to obtain, as any non-judicial repossession must be done in a way that does not "breach the peace." However, obtaining such authority can be complicated if the lender does not know exactly where its collateral is located, as illustrated by the following case.

II. Farm Credit Leasing Services Corporation v. Farrar.

On May 3, 2019, the United States District Court for the District of Minnesota decided a replevin motion in *Farm Credit Leasing Services Corporation v. Farrar*. The motion's background and the court's decision–while not necessarily binding on Minnesota's state courts but conceivably capable of duplication—was as follows.

The parties entered into a lease agreement regarding a 2013 Bron Self-Propelled Drainage Plow. Under the agreement, the borrower was to keep the plow at a certain address and use it for his trade and business. Likely unbeknownst to the lender, the borrower allowed a third party to use the plow. As of the time of the lawsuit, it was not clear where the plow was, but it was believed to be located in a field near Morris, Minnesota.

The borrower failed to make timely payments under the lease agreement, and the lender moved to retake possession of the plow. The borrower conceded that he had defaulted under the lease agreement and did not fight the lender's replevin motion. However, when the lender requested that the court's order permit the sheriff to enter any property where the plow may be located, the court pushed back. Relying on other federal court cases, the court ruled its order could only provide such authority if the lender could specify where it believed the plow to be located. As a result, if it was later determined that the plow was located somewhere other than the field or the borrower's property, the lender would need to return to the court, request a new order specifying that location, and wait for that new order to be entered if the sheriff needed to break into a building to retrieve it.

III. Action Items.

While not necessarily the norm, the court's decision in *Farrar* illustrates the need for lenders to keep close watch over their collateral. And even if the issue is not something that directly arises in litigation, lenders obviously need to know where collateral is if and when it comes time to collect on the loan. However, many of these problems can be avoided on the front end through regular collateral inspections. Those inspections, which will typically be permitted under a standard security agreement, should be done regularly, in person, and on site prior to credit stress. The inspections should also entail visual inspection of collateral and collection of information about any items that cannot be seen. Clearly, it is not realistic to expect that collateral can be tracked with 100% accuracy, but efforts to do so should not be ignored in order to avoid a situation where a loan, thought to be collectible, is drastically undersecured.

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METRO BANKING CONFERENCE

You and Your Colleagues are Invited to Be Our Guest
For a Complimentary Seminar

Thursday, October 24, 2019

DoubleTree Conference Center | St. Louis Park MN

11:30 a.m. Complimentary Lunch | Noon – 4:00 p.m. Seminar

Please RSVP to: jdonner@gislason.com

Topics to Include:

Bankruptcy & The Lender
Consumer and Commercial
Presented by Pete Stein and Jennifer Lurken

Protecting the Elderly and Vulnerable Adult Clients
Presented by Abby Pettit

Insuring a Smooth Liquidation Before a File Goes Bad
Presented by Jim Fahey, President Fahey Sales and Auctioneers

Preparing for the Potential Down Turn
Presented by Wade Wacholz

Case Law and Legislative Update
Presented by Dan Beckman

Jim Fahey and his wife Linda are second generation owners of their family 72 year old auction firm. With their staff of 28, they conduct about 250 auction events a year in the Midwest, for business liquidations, fleets, corporations and estates. They have learned all the important steps to helping clients make changes in their lives or the files they are in charge of when it comes to the selling of assets. For creditors, that means being the eyes and ears for their banking clients when working with troubled files. This session will cover some basic steps that creditors can take to help insure a smooth liquidation process before a file goes bad.

There are several simple steps that creditors can take while loan relationships are "business as usual" that can make a huge difference to the net recovery for a creditor when a file goes bad.

REFRESH ON THE STATUTORY RIGHT OF FIRST REFUSAL

By Dean Zimmerli
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Even after a default, foreclosure, and the expiration of the redemption period, a lender is not necessarily quite finished dealing with the borrower. While this is the moment a lender finally can offload the property and recover the losses on the loan, if the land is agricultural, the lender needs to make sure the borrower is afforded his statutory right of first refusal.

Among other protections enacted by the Minnesota legislature in the wake of the farm crisis of the 1980s was a statutory right of first refusal in favor of a farmer who lost ownership of property through foreclosure, cancellation of a contract for deed, or through a deed-in-lieu. In short, the right of first refusal allows the prior owner of farmland an opportunity to buy it back from the lender at the same price and terms agreed to between the lender and a new prospective buyer. The statute provides a similar right of first refusal to lease the land as well. The ostensible purpose of this statute is help preserve family farms by providing a final opportunity to reclaim land lost due to financial difficulties.

Understanding the statutory right of first refusal, and when it applies, will help a lender ensure this last interaction with the borrower does not result in any unforeseen problems.

Minnesota's statutory right of first refusal is found at Section 500.245. By its terms, the right of first refusal applies to both agricultural land as well as farm homesteads. A lender can obtain a certificate from the county assessor stating that the land is not agricultural land or farm homestead and record that certificate

with in the land records. A recorded certificate serves as evidence that the land falls outside the scope of the statute. In a majority of situations, it is fairly clear whether or not the statute applies. A lender will likely want to treat CRP land, temporarily fallow land, or other land that could easily be tilled and farmed as agricultural land and follow the statute as well.

Before marketing the land, a lender must provide a written notice to the former owner that the land will be offered for sale. Failing to provide this notice to the borrower can invalidate a later sale, even if the lender still complies with the remainder of the right of first refusal statute. During this window, the borrower can elect to assert the right of first refusal for just part of the property; for example, if the lender foreclosed on a 160 acre parcel, the former owner might make an election to repurchase only 80 acres of that parcel.

When the lender finds a new buyer for the farmland and enters into a purchase agreement, then the lender must provide the former owner with a notice of the right of first refusal. The notice must follow the form language set forth in the statute, which includes a description of the land, and the price. The notice must be accompanied by a copy of the purchase agreement, as well as an affidavit from the lender affirming that the purchase agreement is true, accurate, and made in good faith. In sending the purchase agreement, the lender can choose to black out the identities of the prospective purchaser. The notice may be hand delivered or sent by certified mail.

If the lender had reached an agreement with a prospective purchaser to sell the land on a contract for deed or similar agreement, the lender has the option of either allowing the prior owner to purchase on the same terms or by paying the cash-equivalent of the purchase price. The equivalent cash price is the present value of the extended stream of payments, using two percent over the US Treasury bond of a similar maturity as the discount rate.

After mailing or delivering the notice, the prior owner has 65 days to exercise the right of first refusal by signing and returning the acceptance form accompanying the notice. Within ten days after accepting, the former owner must complete the sale by tendering the purchase price. If the prior owner fails to accept, or fails to complete the sale after accepting, the lender may complete the transaction with the original prospective purchaser. Because of this up-to 75 day delay, and the potential that the lender will end up selling to the prior owner rather than the prospective purchaser, the purchase agreement for the land should contain a provision addressing the statutory right of first refusal and providing that the lender will not be in default if the prior owner exercises their statutory right.

Generally, providing the notice of right of first refusal for a lease is similar, except that the prior owner has only 15 days to exercise the right for a lease. Also, if the prior owner fails to exercise the right for a lease, the lender is not required to provide the notice for subsequent years.

As mentioned above, the right of first refusal will apply anytime the lender acquires title to property through enforcing a loan or financial obligation. This includes by taking a deed in lieu of foreclosure, or deed in lieu of cancelation of a contract for deed. Generally, the ability to waive the statutory right of first refusal very limited; a lender cannot avoid it by attempting to insert a term into the mortgage that the borrower waives the right. However, the borrower can waive it after the fact if a deed in lieu of foreclosure or cancelation contains an express statement waiving the right of first refusal. Thus, in a workout situation, a lender may consider asking the borrower to waive the right of first refusal if the lender is receiving a deed in lieu.

While the right of first refusal statute adds some additional time and cost to an already lengthy process, remembering and complying with the right of first refusal statute will help avoid any post-foreclosure disputes with your borrower.

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Banking Services

Gislason & Hunter represents numerous financial institutions and has a thorough familiarity with financial economic conditions, as well as an ever-evolving regulatory environment. We have extensive experience in the following banking areas:

- Management & shareholder issues
- Transfer of bank assets
- Bank litigation
- Business planning
- Real estate
- Property foreclosures and repossessions
- Loan and workout agreements
- Collateralizing and securing all forms of loans
- Loan and credit agreements
- Subordination and participation agreements

This publication is not intended to be responsive to any individual situation or concerns as the contents of this newsletter is intended for general informational purposes only. Readers are urged not to act upon the information contained in this publication 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.

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