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Protecting the Lender's Rights When Farmers File for Bankruptcy

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PROTECTING THE LENDER'S RIGHTS WHEN FARMERS FILE FOR BANKRUPTCY

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The purpose of this paper is to discuss some of the salient aspects of bankruptcy practice from an agricultural lender's point of view. This is not intended to be a complete analysis of the Bankruptcy Reform Act of 1978[1] (Code) which became effective October 1, 1979. Before turning to problems in bankruptcy, however, it may be well to consider an alternative to bankruptcy. An assignment for the benefit of creditors may be a better method of liquidating assets and paying creditors than a formal filing under the Code.

GENERAL ASSIGNMENT FOR THE BENEFIT OF CREDITORS

An assignment for the benefit of creditors is a conveyance of assets by a debtor to the assignee in trust. The assignment is voluntary, and the purpose of the trust is to liquidate assets and make distributions to the creditors in a fair manner. This procedure arose out of the law of trusts, was available at common law and has been codified by statutes enacted by a majority of the states.[2]

One of the notable advantages of an assignment is that the procedure is generally less expensive and faster than liquidations under the Code. A significant disadvantage with this method is that the debtor is not discharged from his liabilities.

The lack of a discharge would seem to limit the use of the assignment to circumstances where the debtor is a corporation. It can perhaps be argued that an individual who has conveyed all of his assets to his creditors will not be subjected to judgments, but most individuals will desire the peace of mind offered by the Code. In the corporate debtor setting, however, the assignment technique may provide the relief of bankruptcy in a shorter period of time. It is important to note that the Code does not provide for the granting of a discharge[3] to corporate debtors under Chapter 7, which is the liquidations section of the Code, nor are exemptions[4] available to corporations.

Assuming a corporate debtor is in grave financial difficulty, it may behoove the lender to explore the possibility of an assignment. The debtor's consent is necessary because the assignment must be voluntary. It is not necessary to obtain the consent of the creditors just as it is not necessary to

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1. Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as Title 11 of U.S.C. (1978)).
2. 6A C.J.S. *Assignment for Benefit of Creditors* §§ 8, 9 (1975).
3. 11 U.S.C. § 727(a)(1) (1982).
4. *Id.* § 522(b).

obtain the consent of the beneficiaries in creating a trust. If the debtor decides to execute an assignment, an absolute conveyance is made to the assignee in trust. Notices are distributed and published, claims filed and the debtor's estate is liquidated under the auspices of the state court of general jurisdiction. Each state's statutes will have to be examined with regard to the specific procedures, but in Colorado, at least, the process is relatively simple.[5] With the continued high number of bankruptcy filings, and the attendant costs and delays, the assignment for the benefit of creditors may become a more widely used method of liquidating assets.

BANKRUPTCY

Introduction

The Code provides for liquidation, rehabilitation and reorganization of debts and debtors. Chapter 7 deals with the liquidation of assets into cash and payment of creditors while Chapter 11 governs business reorganizations and Chapter 13 allows individuals to adjust their debts. The provisions of Chapters 1, 3 and 5 generally apply to all bankruptcy filings and contain much of the substantive law affecting the rights of creditors and debtors.

For purposes of this paper it is assumed that the lender has financed an agricultural borrower and that the lender has attempted to secure itself with liens on both real and personal property. As will be seen, however, even lenders with the best of intentions may end up being partially unsecured. The provisions of Chapters 1, 3, 5 and 7 will be discussed first, to be followed by comments on Chapters 13 and 11. Chapter 13 is discussed before 11 because, in the author's view, it is a more logical approach to consider individual rehabilitation before business reorganization. Sections of the Code are often referred to in the text, rather than in footnotes.

A. *Chapter 7—Liquidation*

1. Farmer Defined

Section 101(17) defines "farmer" as a person (individual, partnership or corporation) that received more than eighty percent of gross income from farming operations owned or operated by such person. The eighty percent test applies to the taxable year preceding the year in which the bankruptcy is filed.

Section 101(18) defines "farming operation" as including "farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry or livestock and production of poultry or livestock products in an unmanufactured state."

As under prior law, a farmer may not be forced into bankruptcy.[6] Also, even though Chapter 13 allows for involuntary conversion to Chapter 7

5. COLO. REV. STAT. §§ 6-10-101 to -132 (1977 and 1978).
6. 11 U.S.C. § 303(a) (1982).

under some circumstances, such a conversion cannot be ordered by the court if the debtor is a farmer.[7]

2. Proof of Claim

Creditors should file a proof of claim in all bankruptcy proceedings. This should be done as soon as possible after the creditor receives notice to avoid any argument that the proof was not timely filed.[8]

3. Meeting of Creditors

The meeting of creditors required by section 341 can be of benefit to the creditor. Section 343 requires the attendance of the debtor, and allows creditors and the trustee to question him under oath. The scope of examination includes any reasonable questions about the debtor's property or debt. This is an excellent opportunity to learn about the condition of machinery, equipment, crops and the like. If not reviewed previously, the creditor can see and inquire about the schedules listing assets and debts. To properly prepare for the meeting, it is preferable for the creditor to obtain and study the debtor's schedules in advance.

This is also the time to investigate the recent actions of the debtor to learn if any fraud or dishonesty has occurred. Perhaps it will be possible for the creditor to successfully object to the discharge of the debtor or discharge of a particular debt. A creditor needs to be aggressive to protect its interests and the section 341 hearing is a good place to begin.

4. Automatic Stay, Relief and Adequate Protection

Section 362 stays the creditor from collecting its debt, repossessing chattels or taking other action to enforce rights specified by the note, security agreement or deed of trust. This stay is imposed the instant a petition in bankruptcy is filed, and continues until the court enters an order, or assets are abandoned by the trustee. The stay is enforced by the threat of being found in contempt of court and fined. One exception to the general stay allows a creditor to perfect a lien if state law allows the perfection to have retroactive effect to a point in time prior to the filing of the petition.[9]

If the secured creditor wishes to proceed against its collateral, an order for relief must be obtained. A motion requesting relief is filed with the court and the relief will be automatically granted unless objection is made by the trustee or debtor in possession.[10] If there is objection, one or more hearings are held to allow the court to rule.[11]

Typically, the creditor will contend that there is no equity in the property for the debtor or trustee, and that the creditor should be allowed to take

7. *Id.* § 1307(e).
8. *Id.* § 501.
9. *Id.* § 362(b)(3); *see also id.* § 546(b).
10. *Id.* § 362(c).
11. *Id.*

possession of the personalty or foreclose its lien on the realty. If it is clear to all that no equity beyond the secured debt exists, the creditor may elect to file a request for abandonment under section 554. The section 554 proceeding has the advantage of being simpler and faster, but may not provide all the protection that prudent counsel for a creditor might desire.[12]

The section 362 stay has been held to apply to a public trustee's foreclosure sale.[13] The foreclosure had been held and the purchaser at the sale was waiting for the debtor's redemption period to expire when the petition was filed. The bankruptcy court ruled that the stay tolled the redemption period and prevented the public trustee from issuing a trustee's deed.[14] The reasoning of the court was that until the public trustee's deed is actually issued, the debtor has an enforceable interest in the land and the section 362 stay is applicable.[15]

The Code adopts a new concept of "adequate protection." Section 361 describes this concept and requires that a secured creditor be protected if it is not allowed to foreclose or take possession of its collateral. "Protection" can include periodic cash payments, a replacement lien on other property or such other means as will result in the creditor receiving the "indubitable equivalent" of its security.[16] If a creditor receives an "indubitable equivalent" rather than his collateral, and the protection proves inadequate, the creditor is provided with a special or "super" priority under section 507(b). This priority may be valuable because it places the creditor ahead of *all* other unsecured claims, including administration expenses and the debtor's attorney fees.[17] It is worth noting that a creditor must *seek* adequate protection by filing a proof of claim and request for relief from stay.[18] Again, aggressive sanction is needed.

5. Using the Creditor's Collateral

The trustee may use the farming equipment of a debtor even if that equipment is encumbered by a security agreement if the creditor fails to object under section 363. Even if the creditor does object, the court may allow the trustee to use, sell or lease the collateral so long as the creditor is given adequate protection.[19] Section 363 also provides that the trustee may not use cash, negotiable instruments or securities unless all interested parties give their consent, or the court authorizes cash collateral use after notice and a hearing.

12. *See In re* Murphy, 22 Bankr. 663 (Bankr. Colo. 1982).
13. Jenkins v. Peet, 19 Bankr. 105, 110 (D. Colo. 1982).
14. *Id.*
15. *Id.* at 109.
16. 11 U.S.C. § 361(1), (2) (1982).
17. *Id.* § 507(b); *see also id.* at §§ 362, 363, 364(d).
18. *Id.* § 501.
19. *Id.* § 363(e).

6. Executory Contracts and Leases

Section 365 allows the trustee to assume or reject any executory contract or unexpired lease of the debtor, subject to the court's approval. Section 365(c)(2) is important to lenders because a trustee is denied the power to assume a loan agreement. If, therefore, the loan agreement required future advances to the debtor, the trustee cannot demand those advances from the lender.

7. Secured Claims, Interest and Value of Collateral

Section 506 states that a creditor having a valid lien on property of the debtor has a secured claim in the amount of the value of that property. The claim is unsecured to the extent the debt exceeds the value of the collateral.[20] If a lender has taken a valid security interest in a hay swather worth $25,000, but the debt is $30,000, the lender has an unsecured claim for $5,000.

The value of the collateral becomes very important in determining whether the creditor is under secured, secured or over secured, because the creditor can collect interest, attorney fees and costs *only* if his claim is over secured.[21] If the value of collateral does not exceed the debt, interest must stop when the petition is filed and the general stay becomes effective.[22]

The value of the collateral is relevant and can vary under several sections of this Code. A creditor would prefer to be over secured so it can collect interest, but if over secured that creditor may have difficulty in obtaining relief from the stay under section 362 so that he can proceed against the collateral. In the section 362 hearing, the creditor will want to show the court that the debtor and trustee have no equity in the collateral. Also, if the debtor wishes to exempt collateral under section 522 or redeem the collateral under section 722, the creditor will urge high value to avoid losing the property without adequate compensation.

The Code addresses the value problem in two ways. First, section 522 states that value is the fair market value as of the date the bankruptcy petition was filed. Second, section 506(a) provides that value (for secured status purposes) "shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property . . . ." The courts have construed the section 506(a) valuation language as being a "commercially reasonable"[23] value, a standard which will ordinarily result in a value somewhere between distressed sale value and retail value.[24] Although it is possible to argue different values at different stages of the bankruptcy proceedings, the wisdom of doing so is suspect. One could look quite foolish if proposed valuations are significantly inconsistent. The better approach

20. *Id.* § 506(a).
21. *Id.* § 506(b).
22. *Id.* § 502(b)(2).
23. *In re* QPL Components, Inc., 20 Bankr. 342, 345 (E.D.N.Y. 1982); *In re* Davis, 14 Bankr. 226 (D. Me. 1981).
24. *In re* Damron, 8 Bankr. 323, 326 (Bankr. S.D. Ohio, 1980).

seems to be for a lender to obtain sound appraisals and put forth a fair estimate of value at any time the worth of assets is to be considered.

8. Trustee as Lien Creditor or the "Strong Arm Clause"

Section 544 creates a hypothetical judgment lien in favor of the trustee as of the date the petition is filed. This is of particular importance to creditors who believe they are secured because it allows the trustee to challenge the perfection of the security interest. If the creditor's lien was not perfected due to improper filing of a financing statement or improper recording of a mortgage, the creditor may only have an unsecured claim. Once the petition is filed it is generally too late to perfect a security interest, so the creditor needs to be cautious in seeing that the presumed security interest will withstand the "acid test" of bankruptcy.

The issue of perfection is decided by the appropriate state's recording statutes, the Uniform Commercial Code or other relevant provisions. If it is possible under state law to perfect by filing a financing statement within a period of time after the loan is made, such a perfection will be recognized by the bankruptcy court.

Section 547 defines when a transfer is deemed to be made. There are also several exceptions to the general preference rule, and these exceptions can be summed up as allowing transfers involving a contemporaneous exchange, payment of debt incurred in ordinary course of business where payment was within forty-five days after debt incurred and enabling loans which allow a debtor to purchase assets and convey a security interest to the lender. A ten day grace period is given to the creditor to perfect its lien when an enabling loan is made.

Of significant concern to the agricultural lender is the fact that "inventory" as defined in section 547 includes livestock and crops. The trustee is empowered to set aside a security interest in crops and livestock if that security was obtained under an after-acquired property clause of a security agreement and if the secured creditor's position is improved during the preference period. A voidable improvement in position occurs if the amount of the lender's loan which is secured at the time of filing is greater than the amount secured ninety days prior to filing. This part of the Code poses major problems for agricultural lenders who have a security interest in crops, because the value of those crops will undoubtedly increase in value as they develop to maturity and harvest. How the courts will ultimately interpret this section remains to be seen, but the lender is cautioned that its security interest in crops and livestock may be subject to attack by the trustee.

9. Preferences

The concept of voidable preferences is not new, but the drafters of the Code instituted some important changes. Section 547 allows the trustee to avoid (cancel) transfers if they qualify as preferences. A preference is (1) a

transfer of (2) property of the debtor for (3) antecedent debt made while the debtor was (4) insolvent and made (5) within ninety days of bankruptcy, and (6) the creditor receiving the transfer has received a benefit which would not have been received if the transfer had not been made.[25] The ninety day period is lengthened to a full year if the creditor was an "insider."[26] The debtor is presumed to be insolvent for the ninety day period prior to filing, and the creditor is thus saddled with the burden of proving that the debtor was actually solvent.

Of perhaps greater concern to the creditor is the risk of being an "insider." A lender can be classified an insider if it is demonstrated that the lender was "in control of the debtor." If, for example, the lender and debtor had executed a loan agreement which gave considerable control to the lender, the lender could be an insider, and if the insider-lender had reasonable cause to believe the debtor was insolvent, a transfer occurring within one year of filing could be voided by the trustee.[27] The time is expanded from ninety days to one year but the debtor is not presumed to be insolvent, so the insider-lender does not have the burden of proving solvency.[28]

10. Exemptions

Section 522 provides a list of exemptions which a debtor may utilize. These federal exemptions may be selected rather than the state exemptions allowed by the debtor's domicile unless the state has enacted legislation to "opt out" of the federal exemptions.[29] A debtor must take either the federal list or state list, however, and cannot pick and choose from both lists. The property which may be exempted (retained by the debtor) is considerable, and agricultural lenders should review the state and federal possibilities with counsel.

The important point for the lender is that, but for a few exceptions, the debtor cannot claim an exemption of property which is subject to a valid security interest. If there is equity in the property after considering the security interest, then the debtor can exempt all or part of that equity.[30] A good example is the homestead exemption. We will assume a residence with a value of $100,000 owned by jointly filing debtors who are using the federal exemption and a mortgage lien of $65,000. The mortgage holder is first paid $65,000 plus interest and attorney fees because he is over secured. The debtors then receive $15,000, which is twice the federal homestead exemption, and the remaining money goes to the trustee and ultimately to unsecured creditors after administration expenses.

As indicated, there are some exceptions to the rule and section 522(f)

25. 11 U.S.C. § 547(d) (1982).
26. *Id.* § 547.
27. *See In re* American Lumber, 5 Bankr. 470 (D. Minn. 1980).
28. For a discussion of this area see Comment, *The Term Insider Within Section 547(b)(4)(B) of the Bankruptcy Code*, 57 NOTRE DAME LAW. 726 (1982).
29. 11 U.S.C. § 522(b)(1) (1982).
30. *Id.* § 522(d).

allows the debtor to eradicate certain liens if they impair his ability to claim an exemption. First, a judicial lien[31] which is usually a judgment can be avoided if it encumbers property which the debtor can exempt. Thus, a lender who filed a judgment lien on a homestead is not given the protection of a mortgage holder. Second, the debtor can avoid a lien of a nonpossessory, nonpurchase-money security interest in household goods and furnishings, clothing, jewelry, books, animals or crops that are *held primarily for the personal, family or household use of the debtor or a dependant of the debtor*.[32] Such a lien can also be avoided on implements or tools of the trade of the debtor.

Because the animals and crops must be held for personal or family use, the agricultural lender will probably not be affected. Also, the aggregate amount of the federal exemption for implements and tools of the trade is $750, so the lender would not appear to be greatly damaged. However, a recent case allowed an Oklahoma debtor to exempt a John Deere 4840 tractor as an implement because Oklahoma has an exemption statute stating that all implements of husbandry used upon the homestead are exempt from forced sale for payment of debt.[33] This is a painful example of how one farmer used a broad state exemption coupled with his lien avoidance powers to defeat a secured creditor. Note that the lien of a purchase-money security interest cannot be avoided.[34] Therefore, if the lender provides money to purchase the property, it is given protection.

11. Redemption

Section 722 allows a debtor to redeem tangible personal property intended for personal use by paying the secured creditor the value of its claim. This provision is limited to consumer debts and Chapter 7 cases and should not greatly affect the agricultural lender.

12. Setoff

Section 553 allows a creditor to offset mutual debts by applying assets held by the creditor for the benefit of the debtor to the debt. This is of particular concern to depository institutions which have loaned money to a depositor. A setoff made during the preference period, usually ninety days, can be voided by the trustee if the creditor's position is improved over what it would have been if the setoff had been taken immediately before the preference period.[35]

The best advice would seem to be to make the setoff when bankruptcy appears imminent and contend with the trustee later. Note that a setoff *cannot* be made after the petition is filed without first obtaining relief from

31. *See* 11 U.S.C. § 101(27) (1982).
32. 11 U.S.C. § 522(f) (1982) (emphasis added).
33. *In re* Liming, 22 Bankr. 740 (W.D. Okla. 1982).
34. 11 U.S.C. § 522(f)(2) (1982).
35. *Id.* § 553(a)(3).

the automatic stay under section 362. On the other hand, if setoff is approved by the court after filing, there is no voidable preference. But the trustee may be allowed to use the cash collateral under section 363. The lender is given Hobson's choice.

13. Discharge and Exceptions to Discharge

Section 727 lists reasons for denying a debtor a discharge or "fresh start" under the Code. If the debtor is guilty of fraud or material dishonesty, he may be denied an overall discharge, which means that all of the debts are kept alive, and the creditor can pursue normal means of collection. For this event to occur, however, either the trustee or a creditor must raise an objection to discharge; again it takes action to get results.

Section 523 details the exceptions to discharge. This part of the Code relates to the dischargeability of a particular debt rather than the general discharge. If the debtor has borrowed money under false pretenses, false representation or actual fraud, that particular debt may be kept alive under section 523(a)(2)(A). If the creditor has received a false financial statement, for example, it can file a complaint to question the dischargeability of the debt. At the hearing, however, the creditor must prove that the financial statement was (1) materially false, (2) intended to deceive the lender and (3) that the lender reasonably relied on the false information.

The lender is also burdened with a potentially significant risk if the debt being challenged is a consumer debt and the lender fails to sustain its objection. Section 523(d) allows for a judgment against the unsuccessful creditor for costs and reasonable attorney fees incurred by the debtor in the proceeding to determine dischargeability. This provision is limited to consumer debts and a farm loan should be construed otherwise. Also, the current case law holds that attorney fees will be awarded to successful debtors in non-dischargeability proceedings only if the creditor filed the complaint in bad faith or to harass the debtor.[36]

Other grounds for arguing that a particular debt should not be discharged are:

a. Section 523(a)(3) provides that unlisted debts are not discharged. This would appear to benefit only smaller creditors as the debtor will generally remember his significant debts.
b. Section 523(a)(6) denies discharge if the debtor willfully and maliciously damages collateral such as disposing of mortgaged property without remitting proceeds to the debtor. The burden of proof seems considerable.

B. *Chapter 13—Adjustment of Debts of an Individual with Regular Income*

This portion of the Code is the modified version of what was formerly

36. *In re* Fulwiler, 624 F.2d 908 (9th Cir. 1980).

called the "wage earner plan." It is available to individuals who have unsecured debts of less than $100,000 and secured debts of less than $350,000. It is intended to allow debtors time, usually three years, to pay all or part of their debts. As with other chapters in the Code, Chapter 13 is too complex to discuss thoroughly in a few pages. There are, however, several matters of particular interest to agricultural lenders which can be mentioned.

1. Eligibility

A person filing under Chapter 13 must have "regular income." The chapter contemplates small businessmen and farmers[37] as well as factory workers and lawyers. Farmers, of course, receive income which is difficult to predict, but a South Dakota case held that a farmer qualifies where the farmer has annual income from the farming business even though the future annual income is not readily ascertainable with any degree of certainty.[38]

2. Stay of Action Against Codebtor

Section 1301 stays action by a creditor against an accommodation maker or other codebtor if the debt is a consumer debt. The agricultural lender will usually be dealing with a business debt to a farmer and will not be required to receive a court order to proceed against the codebtor.

3. Debtor Engaged in Business

The debtor engaged in business is allowed to continue in business unless the court orders that the trustee operate the business. The business debtor is, however, required to file reports detailing income and expenses to keep all interested parties informed.

4. The Plan and Confirmation

The Chapter 13 debtor has the exclusive right to submit a plan of rehabilitation. Section 1322 requires that the plan have certain provisions and allows the debtor to choose others. The plan must (a) provide that sufficient future income be given to the trustee to allow the plan to be successful, (b) provide for full payment of priority claims under section 507 and (c) provide for like treatment for all creditors within a particular class. The optional provisions include curing or waiving any default, modification of rights of unsecured and secured creditors and rejection of contracts and leases. The rights of a holder of a secured claim against the debtor's residence may not be altered.

The plan will be confirmed (approved) by the court if (1) it is made in good faith, (2) it allows the unsecured creditors no less than they would have

37. For a discussion of this and other aspects of agricultural bankruptcies see Looney, *The Bankruptcy Reform Act of 1978 and the Farmer: A Survey of Applicable Provisions*, 25 S.D.L. REV. 509 (1980); *see also* Annot., 57 A.L.R. FED. 339 (1982).

38. *In re* Hines, 7 Bankr. 415 (D. S.D. 1980).

received under liquidation and (3) it is feasible.[39] The consent of secured creditors is important. Either the secured creditor must accept the plan or receive (1) the secured property or (2) payment under the plan equal to the value of the allowed amount of the secured claim.[40]

5. Discharge

Chapter 13 offers two types of discharge: ordinary and hardship. The ordinary discharge is granted when all payments under the plan are completed.[41] A hardship discharge can be granted at any time if (1) the debtor's failure to make all payments under the plan was caused by circumstances beyond his control, (2) unsecured creditors have not received less than they would have received under liquidation and (3) it is not practical to modify the plan.

If the debtor receives the ordinary discharge, even those debts which would be nondischargeable under section 523, except alimony and support, are in fact discharged. Therefore, the false financial statement and sale of secured assets are less relevant in a Chapter 13 proceeding than one brought under Chapters 7 or 11.

C. *Chapter 11—Business Reorganization*

The purpose of Chapter 11 is to allow a business debtor to gain time to pay creditors, reduce debt and become a sound business again. Because farmers are engaged in the business of farming, they can file here as well as under Chapters 7 and 13. The larger, more complex, businesses must file under 11 if they elect not to file for liquidation under 7. Although a simplification, it can be said that a Chapter 11 proceeding is to businesses what a Chapter 13 proceeding is to individuals.

1. Creditors' Committee

Section 1102(a)(1) requires the court to appoint, as soon as practicable, a committee of creditors having *unsecured* claims. Normally the seven largest unsecured creditors serve on the committee, and other committees may be appointed if justifiable.[42] The purpose of the creditors' committee is to conduct relevant investigations into the business or financial condition of the debtor, formulate a plan, request appointment of a trustee or consult with the trustee or debtor in possession. The committee may employ an accountant, attorney or other agent to assist in the work of the committee.

The debtor continues in operation of the business unless a court orders the appointment of a trustee. However, if a trustee is appointed, the debtor is ousted from possession. For the court to appoint a trustee, it must be

39. 11 U.S.C. §§ 1325(a)(3), (a)(4) and (a)(6) (1982).
40. *Id.* § 1325(a)(5).
41. This usually takes place at the end of three years. *Id.* § 1328(a).
42. *Id.* §§ 1102(b)(1), 1102(a)(2).

shown that the debtor is guilty of fraud, dishonesty, incompetence or gross mismanagement of his affairs.

2. Examiner

The court may appoint an examiner to conduct an investigation of any fraud, dishonesty, incompetence, misconduct, mismanagement or irregularity.[43] Such an examiner will be appointed if it is in the interest of the creditors to do so or if unsecured debts exceed $5 million. An examiner would be helpful to lenders who suspect gross mismanagement or fraud, but lack sufficient proof to have a trustee appointed.

3. Plan, Disclosure and Acceptance

Only the debtor can file a plan during the first 120 days after the petition is filed, unless a trustee is appointed, in which case the trustee, creditors' committee or individual creditors may also file a plan. If the debtor fails to file a plan within 120 days, other interested parties may do so.[44]

Section 1123 mandates certain provisions of the plan and allows the debtor to select from others. In conjunction with filing a plan, a detailed disclosure statement must be filed. The disclosure statement must provide all relevant information about the debtor's past, present and future operations. This "adequate information" must be approved by the court after notice and hearing.[45]

Once the disclosure statement is approved, the plan or plans can be sent to the creditors along with a ballot. The plan is accepted by a class of claimants if two-thirds of the dollar amount *and* a majority of those claimants actually voting are affirmative.[46] Also, a class of claimants which is left unimpaired by the plan is deemed to have accepted and need not vote.[47]

4. Confirmation and Cram Down

Section 1128 provides for a court hearing. Any party in interest may object to confirmation. Section 1129 establishes the criteria for confirming a plan. This section is a lengthy one, but the essence is that the plan will be confirmed if it is feasible and if creditors are to receive at least as much as they would have received under a liquidation.[48] If a class of claims is impaired and does not accept the plan, the court may still confirm the plan if the plan is "fair and equitable" and at least one class has accepted.

If a class of secured creditors is impaired and refuses to accept the plan, then one of three results must occur if the court is to confirm:

43. *Id.* § 1104.
44. *Id.* § 1121.
45. *Id.* § 1125(b).
46. *Id.* § 1126(c).
47. *Id.* § 1126(f).
48. *Id.* § 1129(a)(7).

a. Creditor retains lien and receives payments at least equal to the allowed amount of the secured claim (value of collateral);
b. Creditor loses lien due to sale of collateral, but creditor receives the allowed amount of the secured claim (value of collateral as of date of the plan); or
c. Creditor receives the "indubitable equivalent" of its allowed claim.[49]

CONCLUSION

The clear message for creditors is that they should try to always be over secured. This may require a more conservative appraisal of collateral and lending to farmers less than may otherwise seem justifiable. Overly optimistic credit decisions may well lead to losses at any time, but this concern is heightened under the Bankruptcy Code. The debtor and trustee are given considerable powers to avoid or impair the security of the lender and the lender will be challenged as to the validity of its lien perfection. Agricultural lenders should contemplate the prospect of bankruptcy with each loan and should view the borrower as a potential adversary.

If a bankruptcy petition is filed, the lender should aggressively pursue its rights under the Code. Attend the section 341 hearing and ask questions; file for relief from the stay; consider alleging that your debt is nondischargeable and request the appointment of a trustee in Chapter 11 proceedings. In short, keep pushing to move the case forward so that your security does not slip away with time.

49. *Id.* § 1129.