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An Agricultural Law Research Article

**Who Gets the Check: Determining When  
Federal Farm Program Payments Are  
Property of the Bankruptcy Estate**

by

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# Who Gets the Check: Determining When Federal Farm Program Payments Are Property of the Bankruptcy Estate

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## I. INTRODUCTION

From 1995 through 2003, federal farm program payments to farms in the United States totaled over \$131 billion.<sup>1</sup> In the year 2003

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1. Environmental Working Group, Farm Subsidy Database, <http://www.ewg.org/farm/regionsummary.php?fips=00000> (last visited Nov. 11, 2005) [hereinafter Environmental Working Group] (showing annual USDA subsidies for farms in the U.S.); see also Economic Research Service, USDA, Farm Income and Costs:

alone, American farmers received well over \$16 billion in federal farm program payments.<sup>2</sup> In recent years, these payments have accounted for eight percent of the gross cash income across all farms<sup>3</sup> and almost one-half of the aggregate net farm income,<sup>4</sup> with almost half of all farms receiving payments.<sup>5</sup>

When a farmer files for bankruptcy relief, payments from the federal government pursuant to the federal farm programs may well be the most significant or even the only liquid assets available. Therefore, it is no surprise that a dispute is likely to arise as to who has a right to these payments.

Resolution of this dispute should turn on the type of farm program payment at issue, the timing of the right to payment, the contractual rights of the parties, and a careful analysis of bankruptcy law. Different results are anticipated depending upon the nature of the farm program and the timing of the bankruptcy in relation to the right to payment. Unfortunately, however, reaching a resolution may be made more difficult by the complex web of confusing court precedents, some of which demonstrate a lack of understanding of the programs or a desire to shoehorn legal analysis into a perceived equitable result. Recently, the circuit courts have weighed into the mix, attempting to provide a clear rule with regard to one specific type of program.<sup>6</sup> However, while there have been excellent articles published on federal

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Farm Income Forecasts, [http://www.ers.usda.gov/Briefing/farmincome/data/GP\\_T7.htm](http://www.ers.usda.gov/Briefing/farmincome/data/GP_T7.htm) (last modified Nov. 3, 2005) [hereinafter Environmental Research Service, Forecasts] (confirming farm payment figures by totaling program payments).

2. Environmental Working Group, *supra* note 1; Economic Research Service, Forecasts, *supra* note 1.
3. Economic Research Service, USDA, Farm and Commodity Policy: Government Payments and the Farm Sector, <http://www.ers.usda.gov/Briefing/FarmPolicy/gov-pay.htm> (last modified Sept. 13, 2005).
4. United States General Accounting Office, Report to the Chairman, Committee on Agriculture, Nutrition, and Forestry 1 (June 15, 2001) (letter from Lawrence J. Dyckman, Director of Natural Resources and Environment, to The Honorable Tom Harkin, Chairman of the Committee on Agriculture, Nutrition, and Forestry), available at <http://www.goa.gov/new.itmes/d01606.pdf>.
5. *Id.*
6. See, e.g., *Burgess v. Sikes (In re Burgess)*, 392 F.3d 782 (5th Cir. 2004), *reh'g granted*, 403 F.3d 323 (5th Cir. 2005) (analyzing whether crop disaster payments are included in the bankruptcy estate); *Drewes v. Vote (In re Vote)*, 276 F.3d 1024 (8th Cir. 2002) (analyzing whether crop disaster and market loss payments are included in the bankruptcy estate).

farm programs in general,<sup>7</sup> few scholars have delved into the sometimes arcane intersection of farm programs and bankruptcy.<sup>8</sup>

This Article is an attempt to address this issue by confronting the fundamental question: *When is the federal farm program payment property of the bankruptcy estate?* This Article begins, in Part II, by identifying some of the most important characteristics of the wide array of federal farm programs necessary to form the framework for the legal analysis. It then, in Parts III, IV, and V, addresses the property of the estate inquiry, meshing existing precedent with commentary and specifically addressing the recent circuit court opinions on this issue in the context of disaster relief. Based on this analysis, the Article will conclude with comments regarding future decision making and new farm programs.

## II. CHARACTERISTICS OF FEDERAL FARM PROGRAMS

Federal farm programs share a number of basic attributes that separate the payments they provide from other kinds of farm income and that are critical to assessing when the right to payment exists. Despite these similarities, there are also important distinguishing characteristics that differentiate some programs from others. These differences are also critical to a determination of when the right to a farm program payment exists.

### A. Basic Attributes of Federal Farm Programs

Federal farm programs share basic attributes that are critical to an understanding of their special role as a source of farm income. First, each farm program is specifically created by statute, either as

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7. See, e.g., Christopher R. Kelley, *The Agricultural Risk Protection Act of 2000: Federal Crop Insurance, the Non-Insured Crop Disaster Assistance Program, and the Domestic Commodity and Other Farm Programs*, 6 DRAKE J. AGRIC. L. 141 (2001); Christopher R. Kelley, *Introduction to Federal Farm Program Payment Legislation and Payment Eligibility Law*, 2002 ARK. L. NOTES 11; Christopher R. Kelley, *Recent Developments in Federal Farm Program Litigation*, 48 OKLA. L. REV. 215 (1995); Christopher R. Kelley, *Recent Developments in Federal Farm Program Litigation*, 25 U. MEM. L. REV. 1107 (1995); Christopher R. Kelley, *Recent Federal Farm Program Developments*, 4 DRAKE J. AGRIC. L. 93 (1999); Allen H. Olson, *Federal Farm Programs—Past, Present and Future—Will We Learn from Our Mistakes?*, 6 GREAT PLAINS NAT. RESOURCES J. 1 (2001); see also The National Agricultural Law Center, Farm Commodity Programs, <http://nationalaglawcenter.org/readingrooms/commodityprograms/> (last visited Nov. 11, 2005) (containing additional information on federal farm commodity programs).

8. This issue was addressed in an article by the Author and noted farm program scholar, Christopher R. Kelley in the early 1990s, but this work is long out of date. See Christopher R. Kelley & Susan A. Schneider, *Selected Issues of Federal Farm Program Payments in Bankruptcy*, 14 J. AGRIC. TAX'N & L. 99 (1992).

part of a comprehensive farm bill<sup>9</sup> or as a separate statutory enactment.<sup>10</sup> Each individual program exists only as a direct result of congressional action to create the program. Statutory provisions and the regulations promulgated through statutory authority control all aspects of the programs.<sup>11</sup>

Second, in addition to being created by federal statute, a farm program must be funded by Congress. Funding, or a lack of funding, for a program may be an issue whenever rights to a federal program payment are considered. Moreover, even if initially funded, a congressional appropriation may be less than is needed if response to the program is more than anticipated.<sup>12</sup> In this case, Congress may or may not appropriate additional funds to make up for the shortfall.<sup>13</sup> Similarly, federal government compliance with obligations under long-term farm program contracts depend upon annual appropriations from Congress.<sup>14</sup>

Third, each individual farm program is implemented by the United States Department of Agriculture (“USDA”) through the promulgation of specific regulations<sup>15</sup> and the development of internal administra-

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9. Congress typically enacts comprehensive legislation setting forth farm policy every four or five years. This legislation is termed the “farm bill.” See Alan R. Malasky, Christopher R. Kelley & Susan A. Schneider, *Resolving Federal Farm Program Disputes: Recent Developments*, 19 WM. MITCHELL L. REV. 283, 288 (1993); see also, e.g., Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (2002) (codified as amended in scattered sections of 7, 15, 16 & 21 U.S.C.) (setting forth the provisions of the most recently enacted farm bill).
  10. See, e.g., Agricultural Assistance Act of 2003, Pub. L. No. 108-7, 117 Stat. 11 (2003) (codified as amended at 16 U.S.C. §§ 3801, 3832, 3841) (authorizing crop loss disaster assistance for prior crop losses).
  11. This is evidenced by provisions in the program regulations that confirm that the statutory and regulatory provisions will prevail over conflicting provisions in the contract. See, e.g., 7 C.F.R. § 1410.53 (2005) (providing that, “[i]f, after a CRP contract is approved by CCC, it is discovered that such CRP contract is not in conformity with this part, these regulations shall prevail, and CCC may, at its sole discretion, terminate or modify the CRP contract, effective immediately or at a later date as CCC determines appropriate”).
  12. See, e.g., *United States v. Thomas (In re Thomas)*, 91 B.R. 731, 732–33 (N.D. Tex. 1988) (explaining the supplemental appropriation that was needed to fully fund disaster payments under the Agriculture, Rural Development, and Related Agencies Appropriations Act of 1987), amended by 93 B.R. 475 (N.D. Tex. 1988).
  13. *Id.*
  14. See, e.g., Commodity Credit Corporation, USDA, Appendix to Form CRP-1, Conservation Reserve Program Contract, available at [http://forms.sc.egov.usda.gov/efcommon/eFileServices/Forms/CRP0001APPENDIX\\_030501V01.pdf](http://forms.sc.egov.usda.gov/efcommon/eFileServices/Forms/CRP0001APPENDIX_030501V01.pdf) (last visited Nov. 11, 2005) [hereinafter USDA Commodity Credit Corporation] (committing the USDA to payment under the contract “subject to the availability of funds”).
  15. See, e.g., Grains and Similarly Handled Commodities—Marketing Assistance Loans and Loan Deficiency Payments for the 2002 Through 2007 Crop Years, 7 C.F.R. pt. 1421 (2005).

tive rules and procedures.<sup>16</sup> Each program is administered by the Farm Service Agency ("FSA"), an agency within the USDA.<sup>17</sup> Eligibility for farm programs, as proscribed by regulation, is determined by an FSA County Committee made up of local farmers.<sup>18</sup>

Fourth, each program is based on the voluntary participation of the farmer. Although economics may provide farmers a great incentive to participate, they are never required to do so. The voluntary decision to participate in a specific program will bind the farmer to specific statutory and regulatory requirements.<sup>19</sup>

Fifth, if a farmer chooses to enroll in a federal farm program, the farmer is required to sign a contract with the Commodity Credit Corporation ("CCC").<sup>20</sup> Typically, the contract recites the primary obligations of the farmer and the government and incorporates by reference the regulations governing the particular program.<sup>21</sup> The terms of the contract are not negotiated by the parties. Instead, they are dictated by the applicable statutes and regulations. The application process

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16. See Christopher R. Kelley & Alan R. Malasky, *Federal Farm Program Payment-Limitations Law: A Lawyer's Guide*, 17 WM. MITCHELL L. REV. 199, 210-15 (1991) (explaining the origin and importance of the administrative handbooks in implementing federal farm programs).
  17. Before USDA reorganization in 1994-1995, federal farm programs were administered by the Agricultural Stabilization and Conservation Service ("ASCS"). See Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, 108 Stat. 3178 (1994) (codified as amended in scattered sections of 7 U.S.C.).
  18. See 16 U.S.C. § 590(h)(b)(5) (2000); 7 C.F.R. §§ 7.4-7.18, 7.21 (2005). See generally Christopher R. Kelley & John S. Harbison, *A Guide to the ASCS Administrative Appeal Process and to the Judicial Review of ASCS Decisions*, 36 S.D. L. REV. 14, 24-26 (1991).
  19. Malasky, Kelley & Schneider, *supra* note 9, at 289.
  20. The CCC is a federally chartered corporation created and governed by the CCC Charter Act. 15 U.S.C. §§ 714-714p (Supp. II 2002). It is "an agency and instrumentality of the United States, within the Department of Agriculture, subject to the general supervision and direction of the Secretary of Agriculture." *Id.* § 714. The CCC serves as the fiscal agency for the commodity program and other farm programs. See *Rainwater v. United States*, 356 U.S. 590, 592 (1958) (describing the CCC as "simply an administrative device established by Congress for the purpose of carrying out federal farm programs with public funds").
  21. For example, in order to receive Direct Payments under a current farm program, a producer must complete and sign the Direct and Counter-Cyclical Program Contract, Form CCC-509. See U.S. DEPT OF AGRIC., DIRECT AND COUNTER-CYCLICAL PROGRAM CONTRACT, CCC-509 (on file with the NEBRASKA LAW REVIEW). A representative of the CCC will sign when the producer is accepted into the program, committing the government to the contract. This contract, along with the Appendix to Form CCC-509, which sets forth additional terms and conditions and specifically incorporates the program regulations into the contract, governs the duties of the parties. *Id.*

occurs when the farmer and a representative of the CCC each sign a contract that binds both parties to the terms of the contract.<sup>22</sup>

## B. Distinguishing Characteristics of Different Types of Farm Programs

While certain basic attributes are shared across the spectrum of federal farm programs, the programs can be further analyzed according to a series of distinguishing characteristics that separate one program from another. The differences between the programs make it inappropriate for one uniform rule to exist for the property of the estate analysis. Whether a program payment is property of a bankruptcy estate should be determined in part based on these distinguishing characteristics.

The first distinction concerns the farm program's connection, or lack thereof, to current commodity production. Some programs, most notably the disaster assistance programs, are directly connected to production. The farmer's eligibility for the program and the amount of payment that the farmer will receive under the program is tied to what the farmer did or did not produce.<sup>23</sup>

In contrast, many current farm programs are "decoupled" from production. These programs "separate the linkage between government payments to producers and the quantity of a commodity produced or marketed"<sup>24</sup> Decoupled payments are made irrespective of any particular crop currently grown by the farmer.<sup>25</sup> Production Flexibility Contract ("PFC") payments provide an example of a recent program that was decoupled.<sup>26</sup> Although the production *history* of the acreage that the farmer enrolled in the program was factored into the amount of PFC payments received, the payment bore no relation to the crops

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22. Most federal farm program contracts are available on the USDA website, e-forms service. See Service Center Agencies, USDA, eForms, <http://forms.sc.egov.usda.gov/eforms/formsearchservlet> (last visited Nov. 11, 2005).
  23. See, e.g., 7 C.F.R. § 1480.12 (2005) (explaining the payment calculation for the Crop Disaster Program).
  24. CHUCK CULVER, NATIONAL AGRICULTURAL LAW CENTER, GLOSSARY OF AGRICULTURAL PRODUCTION, PROGRAMS, AND POLICY (4th ed.), <http://www.nationalaglawcenter.org/glossary/index.phtml> (last visited Nov. 11, 2005).
  25. See generally Economic Research Service, USDA, *Decoupled Payments in a Changing Policy Setting*, Agric. Econ. Rep. No. 838 (Mary E. Burfisher & Jeffrey Hopkins eds., 2004), available at <http://www.ers.usda.gov/publications/aer838/aer838.pdf> [hereinafter Economic Research Service, *Decoupled Payments*]. Note that the farmer's right to a level of payment may, however, be based on historical production figures. See, e.g., 7 C.F.R. § 1412.502 (2005) (linking Direct Payments to historical base of production).
  26. 7 C.F.R. pt. 1412 (2002). The PFC Program was the first major federal farm program that provided for completely decoupled payments, marking a significant change in U.S. farm policy. See Economic Research Service, *Decoupled Payments*, *supra* note 25, at 1.

grown during the contract period.<sup>27</sup> The Direct Payment (“DP”) Program that is currently in effect is based upon the PFC, and as such also provides a decoupled payment.<sup>28</sup> Direct Payments are not tied to current production nor are they tied to market price. Payments are based on rates specified by statute and the producer’s historic payment acres and payment yields.<sup>29</sup> Not only does it not matter how much the farmer grows during the program year, with very limited exceptions, it does not even matter what crop is grown, or if a commercial crop is produced at all.<sup>30</sup>

A second distinguishing factor is the underlying goal of the program. On this basis, federal farm programs can be divided into three categories—price support, conservation, and disaster assistance.<sup>31</sup> Price support programs are enacted with the goal of increasing farm income.<sup>32</sup> Conservation programs seek to minimize the negative environmental consequences of farming and encourage conservation practices.<sup>33</sup> Disaster assistance programs are created by special legislation enacted in response to crop and livestock damage caused by natural forces.<sup>34</sup> Like the price support programs, they seek to increase farm income, but only insofar as there have been offsetting losses incurred as a result of a natural disaster. These diverse underlying goals may be significant if it is necessary to determine congressional intent in interpreting farm program provisions.

A third factor involves how closely the program is associated with a specific tract of farm property. While many programs have a connection with the production history of a particular tract of farmland,<sup>35</sup> other programs have a more direct connection with the particular

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27. See 7 C.F.R. § 1412.206 (2002).

28. 7 U.S.C. § 7913 (Supp. II 2002); 7 C.F.R. § 1412.502 (2005).

29. 7 U.S.C. § 7913; 7 C.F.R. § 1412.502 (2005).

30. 7 U.S.C. § 7916; 7 C.F.R. § 1412.407 (2005); see HARRISON M. PITTMAN, NATIONAL AGRICULTURAL LAW CENTER, DIRECT PAYMENTS AND COUNTER-CYCLICAL PAYMENTS UNDER THE 2002 FARM BILL: AN OVERVIEW 1 (2003), available at [http://nationalaglawcenter.org/assets/articles/pittman\\_programpayments.pdf](http://nationalaglawcenter.org/assets/articles/pittman_programpayments.pdf).

31. This is the classification that is used by the FSA. See Farm Service Agency, USDA, Services, <http://www.fsa.usda.gov/pas/services.htm> (last visited Nov. 11, 2005).

32. See 7 U.S.C. § 1421 (authorizing the Secretary to provide price support to farm producers through the CCC).

33. See, e.g., 16 U.S.C. § 3831 (Supp. II 2002) (authorizing the Conservation Reserve Program under “to assist owners and operators of land . . . to conserve and improve the soil, water, and wildlife resources of such land”).

34. See, e.g., Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified as amended in scattered sections of 7 U.S.C.) (creating the Crop Loss Assistance Program).

35. The production history of a specific acreage is memorialized in the determination of “base.” See, e.g., 7 U.S.C. § 7911 (determining base acres for purposes of the Direct Payment Program). Base acres help to determine that amount of future payments received.



tract of farmland itself. The Conservation Reserve Program ("CRP") is a clear example of this latter type of program.<sup>36</sup> Under the CRP, the producer receives payments for taking a specific tract of farmland out of production. These payments are often referred to as rental payments.<sup>37</sup>

The fourth distinguishing factor concerns the obligations that are required of the farmer under the program. There are a continuum of possibilities. Under some programs, few obligations are placed on the farmer. For example, under the DP Program, the farmer is required to agree to a rather minimal list of requirements.<sup>38</sup> The farmer need not grow a specific crop and can proceed to use the land without major restrictions.<sup>39</sup> In contrast, under other programs, the farmer is contractually bound to detailed and specific ongoing obligations required under the statute and regulations that implement the program. The CRP provides an example of this type of ongoing contractual duty.<sup>40</sup>

36. See 7 C.F.R. pt. 1412 (2002).

37. 7 C.F.R. § 1410.42 (2005). Courts that have evaluated the nature of CRP payments have split on their legal designation, with some finding them to be rental payments and others finding that they are not. Compare *FDIC v. Hartwig*, 463 N.W.2d 2, 5 (Iowa 1990) (holding that CRP payments constitute rent under a mortgage "rents and profits" clause), with *Brown v. Farmers Home Admin. (In re Koerkenmeier)*, 107 B.R. 195, 198 (W.D. Mo. 1989) (holding that CRP Program does not create an interest in real estate sufficient for a characterization of the payments as rent).

38. The statute authorizing the Direct Payments provides that:

[T]he producers shall agree, during the crop year for which the payments are made and in exchange for the payments—

- (A) to comply with applicable conservation requirements under subtitle B of title XII of the Food Security Act of 1985;
- (B) to comply with applicable wetland protection requirements under subtitle C of title XII of the Act;
- (C) to comply with the planting flexibility requirements of section 7916 of this title;
- (D) to use the land on the farm, in a quantity equal to the attributable base acres for the farm and any base acres for peanuts for the farm under subchapter III of this chapter for an agricultural or conserving use, and not for a nonagricultural commercial or industrial use, as determined by the Secretary; and
- (E) to effectively control noxious weeds and otherwise maintain the land in accordance with sound agricultural practices, as determined by the Secretary, if the agricultural or conserving use involves the noncultivation of any portion of the land referred to in subparagraph (D).

7 U.S.C. § 7915.

39. *Id.* Planting flexibility requirements restrict only the production of fruits, vegetables, and wild rice. *Id.* § 7916.

40. The statute authorizing the CRP provides that a participating farmer must agree as follows:

- (1) to implement a plan approved by the local conservation district . . . ;
- (2) to place highly erodible cropland subject to the contract in the conservation reserve established under this subpart;

Finally, the length of the contract term can be an important distinguishing factor. Farm program contracts can run as long as ten years (e.g., the CRP)<sup>41</sup> although more frequently, one year or one crop season is the duration.<sup>42</sup>

Each of these factors can be important in assessing the legal obligations of the parties, and by extension, rights to the payments as of commencement of the bankruptcy case.

### III. DEFINING PROPERTY OF THE ESTATE

Section 541 of the Bankruptcy Code provides that the commencement of a bankruptcy case, i.e., the filing of the petition, “creates an estate.”<sup>43</sup> This estate includes “all legal or equitable interests of the debtor in property” at that point in time.<sup>44</sup> In addition, the estate will include “[p]roceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.”<sup>45</sup>

Applying this to a federal farm program payment, either the farm debtor must have had a “legal or equitable interest” in the payment as of the commencement of the case or the farm program payment must be characterized as “proceeds, product, offspring, rents or profits of or from” property of the estate. This inquiry has been particularly im-

- (3) not to use the land for agricultural purposes, except as permitted by the Secretary;
- (4) to establish approved vegetative cover (which may include emerging vegetation in water), water cover for the enhancement of wildlife, or, where practicable, maintain existing cover on the land, . . . ;
- . . . .
- (7) not to conduct any harvesting or grazing, nor otherwise make commercial use of the forage, on land that is subject to the contract, nor adopt any similar practice specified in the contract . . . ;
- (8) not to conduct any planting of trees on land that is subject to the contract . . . , nor otherwise make commercial use of trees on land that is subject to the contract unless it is expressly permitted in the contract . . . ;
- (9) not to adopt any practice specified by the Secretary in the contract as a practice that would tend to defeat the purposes of this subpart; and
- (10) to comply with such additional provisions as the Secretary determines are desirable and are included in the contract to carry out this subpart or to facilitate the practical administration of this subpart.

16 U.S.C. § 3832 (Supp. II 2002); *see also* 7 C.F.R. § 1410.20 (2005) (explaining the requirements of participation). Penalties can be assessed if the farmer fails to comply with these requirements. *Id.* § 1410.52.

41. 7 C.F.R. § 1410.7 (2005).

42. *See, e.g., id.* § 1412.401 (providing that DP Program contracts are for one year).

43. 11 U.S.C. § 541(a) (2000).

44. *Id.* § 541(a)(1).

45. *Id.* § 541(a)(6).

portant in Chapter 7 bankruptcy, with the trustee claiming the payments as “property of the estate” and the debtor seeking to retain them as post-petition property.<sup>46</sup> Putting aside the potential issue of an interested secured creditor, the basic delineation of interests is clear. Either the payments belong to the estate and, unless exempted,<sup>47</sup> can be distributed to creditors, or they belong to the debtor as part of the “fresh start” provided by bankruptcy.

Obviously, the inquiry is easiest if the farmer has a farm program check in hand as of commencement of the case. Unless exempted, this payment would clearly be property of the estate as a “legal or equitable interest[ ]” of the debtor.<sup>48</sup> The analysis becomes more complex, however, the further back in time the right to payment is found. For instance, the debtor may have signed the contract pre-petition, but performance, including payment, is made post-petition. Going back further in time, the contract may not have been signed before the

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46. For purposes of Chapter 12 bankruptcy, the special chapter of the Bankruptcy Code for family farmer reorganization, the definition of property of the estate is much broader, and thus, the farm program payment dispute will typically not arise. Under Chapter 12, the expanded definition of “property of the estate” is not limited to interests as of the commencement of the case, but includes property acquired thereafter. Chapter 12 provides that:

- (a) Property of the estate includes, in addition to the property specified in section 541 of this title—
  - (1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7 of this title, whichever occurs first; and
  - (2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7 of this title, whichever occurs first.

*Id.* § 1207. Thus, unless the debtor is allowed to claim the payment as exempt, the payment will be found to be property of the Chapter 12 estate. *See* First Nat’l Bank v. Klenke (*In re* Klenke), Nos. 01-13051, 02-5016, 2004 WL 2192517, at \*3 (Bankr. D. Kan. Feb 3, 2004) (holding that post-petition Market Loss Assistance Program payment was property of the Chapter 12 estate under § 1207, even though right to payment did not exist as of commencement of the case).

47. Most cases seeking to exempt payments have been rejected. *See, e.g., In re* Burke, 251 B.R. 720, 722 (Bankr. D. Minn. 2002) (holding that there was no basis for the debtors claim that a crop disaster program payment was exempt); *In re* Boyett, 250 B.R. 822, 827 (Bankr. S.D. Ga. 2000) (holding that a crop disaster program payment could not be exempted as a “local” public assistance benefit under Georgia law); *In re* Holte, 83 B.R. 647, 648 (Bankr. D. Minn. 1988) (holding that CRP payments could not be exempted as earnings under Minnesota law); *In re* Pritchard, 75 B.R. 877, 878 (Bankr. D. Minn. 1987) (rejecting the debtor’s claim that his federal farm program payments were exempt under non-bankruptcy federal law). *But see* Wilson v. Sergeant (*In re* Wilson), 305 B.R. 4, 21 (N.D. Iowa 2004) (allowing the exemption of DP farm program payments under the section 627.6(8)(a) of the Iowa Code, which allows an exemption for “any public assistance benefit”).
48. 11 U.S.C. § 541(a)(1).

bankruptcy filing, but nevertheless, as of filing, the program was available to the debtor. Still further, the program may have been enacted by statute as of filing, but at that time it was not yet funded or implemented. Finally, the program may not have even been enacted as of filing, but it can be argued that there is a connection to the pre-petition farming operation.

In each of these instances, two fundamental questions must be addressed. First, what legal or equitable interest under § 541(a)(1) did the debtor have in the farm program payment as of the commencement of the case? Second, if the debtor did not have a legal or equitable property interest in the actual farm program payment at the time of filing, can a link be established to a pre-petition interest, such as a crop, sufficient for purposes of § 541(a)(6)?

While the answers to these questions must be found in an interpretation of § 541, two other provisions of the Bankruptcy Code require a similar analysis when farm program payments are at issue. For instance, § 553 governs setoff rights in bankruptcy.<sup>49</sup> In particular, when the government attempts to use these rights against farm program payments, the critical issue will usually be whether farm program payment obligations to the debtor are pre-petition or post-petition obligations. This inquiry is similar to that involving § 541(a)(1), therefore, some of the case law in this area will be relevant to the analysis.

Similarly, § 552 governs post-petition security interests and whether a security interest is cut off by the bankruptcy filing.<sup>50</sup> When a secured creditor claims an interest in a farm program payment received post-petition, the critical issue may be whether the debtor had a sufficient interest in the payment as of the commencement of the case for attachment of the security interest. Again, this inquiry is similar to that under § 541(a)(1). The security interest can also survive the bankruptcy under § 552 if the payment is found to be proceeds of property of the estate, invoking an analysis very similar to that under § 541(a)(6).

#### IV. LEGAL OR EQUITABLE INTERESTS AS OF COMMENCEMENT OF THE CASE

Congressional history confirms that the scope of § 541's coverage is "broad."<sup>51</sup> House and Senate Reports confirm Congress' intention that "all kinds of property, including tangible or intangible property,

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49. *See id.* § 553.

50. *See id.* § 552.

51. *See H.R. REP. NO. 95-595*, at 367 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6323; *S. REP. NO. 95-989*, at 82 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5868.

causes of action . . . , and all other forms of property” included under the previous Bankruptcy Act should be brought into the bankruptcy estate.<sup>52</sup> Congressional history also confirms, however, that § 541 “is not intended to expand the debtor’s rights against others more than they exist at the commencement of the case.”<sup>53</sup> Thus, the initial inquiry as to whether a farm program payment is property of the estate will turn on an analysis of what property interest the debtor had in the payment as of commencement of the case.

### A. Contractual Obligation

As noted, federal farm programs invariably involve a farmer’s decision to enroll in a program by signing a written contract. In determining whether the debtor had a legal or equitable interest as of the commencement of the case, the first inquiry should be whether or not the contract was signed pre-petition. If a pre-petition contract is found, it is likely that some type of “legal or equitable interest” under § 541(a)(1) existed as of the commencement of the case.

The significance of the existence of a pre-petition farm program contract was highlighted years ago in the seminal farm program case of *Moratzka v. United States (In re Matthieson)*.<sup>54</sup> Although this case addressed the issue of setoff rather than property of the estate, the inquiry was similar, as the case turned on whether the debtor had a right to payment as of commencement of the case.<sup>55</sup> The eventual decision of the district court in this case provides the framework for much of the subsequent analysis of federal farm program contracts in bankruptcy.

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52. H.R. REP. NO. 95-595, at 367, reprinted in 1978 U.S.C.C.A.N. 5963, 6323; S. REP. NO. 95-989, at 82, reprinted in 1978 U.S.C.C.A.N. 5787, 5868.

53. H.R. REP. NO. 95-595, at 367, reprinted in 1978 U.S.C.C.A.N. 5963, 6323; S. REP. NO. 95-989, at 82, reprinted in 1978 U.S.C.C.A.N. 5787, 5868.

54. 63 B.R. 56 (D. Minn. 1986).

55. The court can allow setoff under § 553 of the Bankruptcy Code if authorized under non-bankruptcy law and if a mutual pre-petition debt and a pre-petition obligation is owed. 11 U.S.C. § 553. Courts are split on the issue of whether setoff is mandatory or permissive if the requirements of § 553 are met. Compare *United States v. Myers (In re Myers)*, 362 F.3d 667, 672 (10th Cir. 2004) (describing setoff under § 553 as “neither automatic nor mandatory; rather its application rests within the sound discretion of the bankruptcy court”), with *United States v. Krause (In re Krause)*, 261 B.R. 218, 223 (B.A.P. 8th Cir. 2001) (holding that § 553 does not allow for a consideration of equitable considerations (citing *In re Sauer*, 223 B.R. 715, 725–26 (Bankr. D. N.D. 1998))). In *Matthieson*, the USDA sought to setoff the farm program payment against a debt the farmer owed to the USDA. The determinative issue was whether the government had a pre-petition obligation to pay the debtor pursuant to a pre-petition farm program contract. *Matthieson*, 63 B.R. at 59. The trustee argued against setoff, arguing that signing the contract did not create a sufficient obligation. *Id.*

*Matthieson* involved the appeal of six consolidated Chapter 7 cases. At issue were payments under the Federal Crop Deficiency Program, an annual federal farm program for producers of feed grains, rice, cotton, and wheat.<sup>56</sup> Farmers were required to produce one of the program crops and to “set-aside” certain acreage (i.e., not grow crops on it), while keeping the set-aside acres free of noxious weeds. If they complied with these requirements, they had the possibility of receiving “deficiency payments” if, at a designated time after the usual harvest period, the market price for the commodity produced was less than a target price set by statute. The program was not tied to the amount that a farmer actually grew or the sale proceeds received, but rather to the general market price compared to the target price. Farmers enrolled in this program early in the year by signing a contract. The amount of the deficiency payment if any, was determined and paid well after harvest.<sup>57</sup>

In the cases consolidated into the *Matthieson* decision, the debtors signed up for the Deficiency Program prior to filing bankruptcy. At the time of the filing, however, debtors had yet to fulfill their duties under the program, and the amount of payment, or even the existence of a payment obligation from the government was not yet ascertained. Nevertheless, when a deficiency was determined post-petition, the USDA<sup>58</sup> argued that the deficiency payments that became due constituted pre-petition obligations that could be setoff against pre-petition debts owed to the government by the farmers.<sup>59</sup>

The trustee objected, seeking to preserve the payments for the estate. He argued that because the Deficiency Program imposed specific performance requirements on the debtor, and because there was not even a known obligation to pay as of commencement of the case, simply signing the contract did not give rise to a pre-petition right to payment. He characterized the Deficiency Program contracts as subject to various “conditions precedent,” including the final condition that a deficiency actually exist. Accordingly, no obligation to pay arose until the conditions were met post-petition.<sup>60</sup>

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56. *Matthieson*, 63 B.R. at 58.

57. See 7 C.F.R. pt. 713 (1985). If there was not a deficiency, the farmer would receive no payment and would have to pay back any advance payment received at the beginning of the year in anticipation of a deficiency. *Id.* § 713.04. In *Matthieson*, a deficiency was determined post-petition. *Matthieson*, 63 B.R. at 58.

58. The ASCS was the former agency of the USDA that administered the federal farm programs during this time period. See 7 C.F.R. pt. 1421 (2005); *supra* note 17. This agency is referenced throughout the *Matthieson* opinion. *Matthieson*, 63 B.R. 56 *passim*. For purposes of consistency, this Article will refer only to the USDA.

59. *Matthieson*, 63 B.R. at 57–58.

60. *Id.* at 58. It is unfortunate that this “seminal opinion” discussing farm program contract obligations was one brought involving a program that required little of its farmer participants. *United States v. Gerth*, 991 F.2d 1428, 1431 (8th Cir.

The court rejected the trustee's argument, finding that the requirements of the program were contractual duties rather than conditions precedent to the obligation.<sup>61</sup> The court held that when a Deficiency Program contract was signed, mutual obligations were created.<sup>62</sup> The contract thus created a pre-petition obligation that could be setoff against a pre-petition claim.<sup>63</sup>

Although at the time *Matthieson* was decided there was a split of authority,<sup>64</sup> eventually a majority of courts adopted the *Matthieson* analysis with respect to other farm programs and often in other bankruptcy contexts, focusing exclusively on contract signing and ignoring post-petition program requirements.<sup>65</sup> For example, *Matthieson* was influential in the subsequent analysis of the Eighth Circuit Court of

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1993). Other programs require far more. See *supra* note 40 and accompanying text.

61. *Matthieson*, 63 B.R. at 59.

62. *Id.* at 60.

63. *Id.* There may have been a serious flaw in the trustee's position in *Matthieson*. Had the trustee been successful in convincing the court that there was no pre-petition obligation for purposes of setoff, arguably the payments should have gone to the debtors rather than to the bankruptcy estates. If no payment obligation existed for purposes of § 553, there may not have been an obligation sufficient to support a property of the estate analysis under § 541. Nevertheless, as the trustee lost on this argument, the issue is moot.

64. The case often cited as the competing authority with *Matthieson* is the Chapter 11 case of *Walat Farms, Inc. v. United States (In re Walat Farms, Inc.)*, 69 B.R. 529 (Bankr. E.D. Mich. 1987). *Walat Farms* held that a Deficiency Program contract was executory and that if it were affirmed by the Chapter 11 debtor-in-possession, the new contract would not meet the mutuality requirement of § 553. Before *Walat Farms*, however, other courts rejected the immediate link between contract signage and the obligation to pay. The Texas bankruptcy court in *Hill v. Farmers Home Administration (In re Hill)*, 19 B.R. 375 (Bankr. N.D. Tex. 1982), found that the obligation to pay arose only when the amount, if any, of a deficiency was determined. *Matthieson* discussed and specifically rejected the *Hill* holding. In accord with *Hill*, the bankruptcy court in *Medor v. Lamb (In re Lamb)*, 47 B.R. 79 (Bankr. D. Vt. 1985), held that payments under the Dairy Diversion Program were not property of the estate because the debtor had not completed his contractual performance. *Id.* at 82. For a discussion of the split of authority and the progression toward a majority approach, at least with regard to setoff, see *In re Allen*, 135 B.R. 856 (Bankr. N.D. Iowa 1992).

65. *In re Affiliated Food Stores, Inc.*, 123 B.R. 747, 748-49 (Bankr. N.D. Tex. 1991); *In re Lundell Farms*, 86 B.R. 582, 586-88 (Bankr. W.D. Wis. 1988); *Greseth v. Fed. Land Bank of St. Paul (In re Greseth)*, 78 B.R. 936, 942 (D. Minn. 1987); *Buske v. McDonald (In re Buske)*, 75 B.R. 213, 215-16 (Bankr. N.D. Tex. 1987); *United States v. Parrish (In re Parrish)*, 75 B.R. 14, 16 (N.D. Tex. 1987); see also *Pinkert v. Farmers Home Admin. (In re Pinkert)*, 75 B.R. 218, 220-21 (Bankr. N.D. Tex. 1987). For cases which preceded *Matthieson* or were decided more or less contemporaneous with it, and that also focus on a contract analysis, see *In re Weyland*, 63 B.R. 854, 863 (Bankr. E.D. Wis. 1986) (finding that rights under the Dairy Termination Program contract are property of the estate); *In re Lee*, 35 B.R. 663, 666 (Bankr. N.D. Ohio 1983) (describing the acceptance of the debtor's bid for the Payment in Kind Program as creating "inchoate rights" that passed to the estate upon bankruptcy filing).

Appeals in *United States v. Gerth*,<sup>66</sup> where that court found it “persuasive” and adopted its reasoning.

There are two aspects of *Matthieson* that make it a rather odd leader in farm program analysis. First, *Matthieson* failed to address the executory nature of farm program contracts. Subsequent cases that have considered this issue have generally found that farm program contracts are executory contracts under § 365, to be affirmed or rejected by the Chapter 7 trustee.<sup>67</sup>

An executory contract is defined as “[a] contract under which the obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.”<sup>68</sup> Because most farm program contracts require some performance on the part of the farmer, unless performance has been completed pre-petition, an executory contract should be found.<sup>69</sup> Unperformed obligations were critical to the trustee’s arguments in *Matthieson*. Yet, no mention is made of the executory contract issue.

It appears likely that the issue of executory contracts was not raised by the trustee in *Matthieson* because the pre-petition contracts had not been timely assumed and thus were deemed rejected under § 365. In support of its rejection of *Matthieson*, the bankruptcy court in *Walat Farms, Inc. v. United States (In re Walat Farms, Inc.)*,<sup>70</sup> noted that “[s]ince rejected executory contracts are themselves considered pre-petition unsecured claims, [under] § 365(g), the necessary mutuality for use of § 553 existed; hence, the government obligations

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66. 991 F.2d 1428, 1431 (8th Cir. 1993) (allowing government to set off against pre-petition CRP contract).
67. See, e.g., *United States v. Myers (In re Myers)*, 362 F.3d 667, 674 (10th Cir. 2004) (finding that because the debtor’s PFC had not been affirmed, it was deemed rejected under § 365(d)(1)); *Walat Farms*, 69 B.R. at 531–32 (finding that the debtor’s pre-petition Deficiency Program contract was executory, supporting the court’s holding that the payments were a post-petition obligation that could not be setoff); *Gerth*, 991 F.2d at 1431 (finding that the parties were in agreement that the CRP contract was executory); *In re Ratliff*, 79 B.R. 930, 933 (Bankr. D. Colo. 1987) (finding that a CRP contract “bears all the classic earmarks of an executory contract”).
68. *Walat Farms*, 69 B.R. at 531 (citing Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973)).
69. See *Myers*, 362 F.3d at 673 (stating that “[a]gricultural contracts, such as the PFC, are executory in nature because material performance remains due on both sides”); *Ratliff*, 79 B.R. at 933 (observing that under the CRP contract “both parties have ongoing obligations—the government to pay rent and the Debtors to continue to implement the conservation programs”). However, in a situation where most obligations have been performed pre-petition, the farm program contract may no longer be executive. See, e.g., *Lundell Farms*, 86 B.R. at 584 (finding that the farm program contracts were not executory because, as of filing, there were no material obligations left to perform other than payment).
70. 69 B.R. 529 (Bankr. E.D. Mich. 1987).



were available for set-off against the pre-petition crop loans obtained by the debtors.<sup>71</sup> It appears that the court in *Matthieson* need not have addressed the contract obligation issues for which it is now followed, but instead could have allowed setoff on this basis.

Future farm program cases are not likely to be able to avoid the executory contract issue. The USDA has taken the position that under most circumstances, a farm program is an executory contract, and state administrative procedures have been developed to deal with contracts when the farm debtor has filed for relief in bankruptcy. These procedures include instructions that an executory contract must be affirmed or the agency will consider it rejected.<sup>72</sup>

The trustee's position in cases like *Matthieson* could be better framed for future analysis by arguing that, while the government had no payment obligation as of commencement of the case, the estate did obtain rights under the pre-petition farm program contract. Under § 365, the trustee could choose to either affirm or reject the contract. If the trustee affirms the contract, the right to payment that flows from the contract becomes property of the estate, provided that the trustee performs according to the obligations required by the contract. If the trustee is unable or unwilling to perform, then presumably no payment will be made.<sup>73</sup>

Second, *Matthieson's* almost exclusive reliance on contract law misses a critical aspect of the government's liability and oversimplifies the analysis of federal farm program law. Farm programs are subject to a variety of federal funding complications, and as such, farm program contracts always include language that negates the government's obligation to pay if sufficient funds are not appropriated. Farm program contracts routinely state that the "CCC agrees, subject to the availability of funds."<sup>74</sup>

Two early farm program cases recognized the interplay between the program contract and the availability of funds. In *United States v. Thomas (In re Thomas)*,<sup>75</sup> the U.S. District Court for the Northern District of Texas affirmed a bankruptcy court holding in a case in

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71. *Id.* at 532.

72. See, e.g., MINNESOTA FARM SERVICE AGENCY, USDA, MINNESOTA FSA BANKRUPTCY HANDBOOK (2d rev. 2003) (available from the Minnesota Farm Service Agency, 400 AgriBank Bldg, 375 Jackson St., St. Paul, Minn, 55101). According to this handbook, when a bankruptcy petition is filed by a debtor who participates in a farm program, the FSA County Executive Director is required to send a letter to the debtor's attorney, copied to the debtor, the bankruptcy trustee, the U.S. Attorney, and the state FSA Office, advising the debtor that the outstanding farm program contract is an executory contract.

73. Adding another twist, in *Matthieson*, it was the debtors who performed the post-petition obligations. *Moratzka v. United States (In re Matthieson)*, 63 B.R. 56, 58 (D. Minn. 1986).

74. USDA Commodity Credit Corporation, *supra* note 14.

75. 91 B.R. 731 (N.D. Tex. 1988).

which the farm debtor had a pre-petition contract, but part of the funding for the program was appropriated post-petition.<sup>76</sup> Before filing bankruptcy, the farmer signed a contract with the CCC and disaster assistance was authorized by Congress. The appropriated funds, however, only allowed for a payment of seventy-four percent of the losses incurred. The following May, after the debtor had filed for bankruptcy relief, Congress appropriated additional funds by passage of supplemental disaster legislation that allowed for one hundred percent loss payments.<sup>77</sup> The government sought to setoff against all of the payments, but the court in *Thomas* held that rights to the 1987 supplemental payments did not accrue until the post-petition legislation was enacted.<sup>78</sup> The court explained that “[n]owhere can we find that the 1987 money was absolutely owing in February 1987. It was not even in existence until May, 1987.”<sup>79</sup> Setoff was allowed against the funds that were appropriated pre-petition, but not those appropriated post-petition.<sup>80</sup> The same result was reached independently in *In re Neilson*,<sup>81</sup> a North Carolina bankruptcy case that addressed similar facts.

Neither *Thomas* nor *Neilson* discuss the concept of a contingent interest, and had *Matthieson* been confronted with these facts, the court may have found that the government had a contractual obligation to pay whenever funds were appropriated. Nevertheless, *Thomas* and *Neilson* demonstrate the complexity of the interplay between farm program contractual obligations and legislative action in a way that few other courts have. As *Neilson* correctly stated, “Congress had no obligation to fully fund the disaster relief program.”<sup>82</sup> In practical terms, without funding, farm program contract rights are meaningless.

With these limitations, the *Matthieson* decision is essentially an analysis of the contractual obligations under a specific farm program contract in which program funding has preceded the contract formation. Cases following and expanding upon its analysis adhere to the same contractual characterization of the relationship between the government and the farmers who participate in the federal farm programs.

Given this judicial focus on the importance of the contract, if the farm program contract is not signed pre-petition, a different result

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76. *Id.* at 735, *affg in relevant part* 84 B.R. 438 (Bankr. N.D. Tex. 1988).

77. *Id.* at 732-33.

78. *Id.* at 734.

79. *Id.*

80. *Id.* at 737.

81. 90 B.R. 172, 175 (Bankr. W.D.N.C. 1988) (holding that post-petition supplemental appropriation for disaster assistance program could not be setoff against pre-petition debt).

82. *Id.*

will generally be in order. The Tenth Circuit Court of Appeals applied reasoning that is consistent with *Matthieson* when it held, in *Schneider v. Nazar (In re Schneider)*,<sup>83</sup> that the farm program payment at issue was not property of the estate primarily because the farm program contract had not been signed prior to the bankruptcy filing.<sup>84</sup> The post-petition contract was the basis for the court's holding that, as of commencement of the case, there was no contractual right to the payment.<sup>85</sup>

The *Schneider* case involved Payment in Kind ("PIK") Program payments that were provided to the debtor in exchange for his agreement not to plant a crop on the subject acreage. The court described this program as:

an artificial inducement for producers to reduce acreage or divert land that would normally be used for the production and harvest of certain program crops. In return for non-production and other services, the producer receives a like quantity of the commodity that would have been produced, but for participation in the program.<sup>86</sup>

Prior to filing bankruptcy, the debtor had requested an eligibility determination for the program, but his request had not been approved. After filing, the debtor received approval and subsequently signed up for the program.

The bankruptcy court in *Schneider* characterized the PIK payments as "an inseparable part of rights established by debtor in his pre-petition farming operations."<sup>87</sup> The district court agreed, but allowed for reimbursement to the debtor for costs incurred in post-petition contract performance.<sup>88</sup> However, the Tenth Circuit Court of Appeals reversed, holding that "because the agreement was not executed by the government as of the date the petition was filed, the agreement is not part of the debtor's estate."<sup>89</sup>

The court recognized that there may be instances where a different result is reached.<sup>90</sup> However, the court implied that in order for post-petition payments received as the result of a post-petition contract to

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83. 864 F.2d 683 (10th Cir. 1988).

84. *Id.* at 686.

85. *Id.*

86. *Id.* at 684.

87. *Id.* (citing the bankruptcy court ruling). The bankruptcy court may have based its ruling on a finding that the payments were proceeds of property of the estate under § 541(a)(6). The proceeds argument is addressed *infra* at Part V.

88. *Schneider*, 864 F.2d at 684-85 (citing the district court ruling).

89. *Id.* at 686. *Accord In re Mattice*, 81 B.R. 504 (Bankr. S.D. Iowa 1987) (holding that Deficiency Program payments were not property of the bankruptcy estate because the contract was not signed before commencement of the bankruptcy case). Note, however, that the court in *Schneider* limited its holding to certain types of farm programs and stated that program payments that "result from the actual disposition of a planted crop" may be found to be the proceeds of a crop. *Schneider*, 864 F.2d at 685 (citations omitted).

90. *Schneider*, 864 F.2d at 686.

be property of the estate, something other than contract rights must form the basis of the debtor's interest.

Looking to the statutory language, either there must be a right to payment that transcends the contract, creating a "legal or equitable interest"<sup>91</sup> prior to the commencement of the case and prior to the signing of the contract, or the right to payment must be brought into the estate as proceeds of property of the estate.<sup>92</sup> Each of these potential interests is discussed in turn.

### **B. Pre-Petition Statute as Creating "Legal or Equitable Interest"**

Given the courts' historical focus on the contractual nature of federal farm programs, it is somewhat unusual to consider that a farmer may have a right to payment prior to signing the program contract. As one court stated, the farm program is "no more than a simple contract with benefits and obligations flowing to both sides."<sup>93</sup> Under this analysis, in most circumstances, the inquiry regarding property of the estate should end if the contract has not been signed.

However, with regard to certain disaster assistance programs, several courts have found that the passage of the statute authorizing the assistance creates a sufficient interest to constitute property of the estate. Although these courts have not always articulated their reasoning clearly, and few have addressed the contract analysis approach, this holding can best be explained by viewing the debtor's right to participate in the disaster program as a "legal or equitable interest" pursuant to § 541(a)(1).<sup>94</sup> These cases tend to oversimplify the disaster assistance programs, which in fact have typically had restrictions on eligibility, a rigorous application process, the signing of a binding contract, and some post-assistance requirements.<sup>95</sup> However, if there are few future duties imposed on the farmer, arguably, voluntary participation and contractual obligations can be set aside to directly link the *availability* of the program to the right to the payment. There is no obligation for payment as of the effective date of the statute, but there may be a right for a farmer to apply that could rise to the level of a "legal or equitable right." This is best understood, not as a specific right to payment, but as a right to participate in a program that may result in a payment.

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91. 11 U.S.C. § 541(a)(1) (2000).

92. *Id.* § 541(a)(6).

93. *In re Lee*, 35 B.R. 663, 666 (Bankr. N.D. Ohio 1983).

94. Some of these decisions merge an analysis of § 541(a)(1) with an analysis of proceeds of property of the estate under § 541(a)(6). The proceeds analysis is discussed *infra* at Part V.

95. *See, e.g.*, 7 C.F.R. pt. 1480 (2004) (implementing the Crop Disaster Program for years 2001 and 2002).

This approach is complicated by post-petition requirements imposed on the debtor. Not only is there a rigorous application process to determine eligibility and the amount, if any, of payment to be received,<sup>96</sup> but participation in the program may impose additional requirements on the farmer. For example, farmers who receive disaster assistance are typically required to purchase crop insurance during each of the next two seasons.<sup>97</sup>

In the case law, this argument is usually buttressed with the alternative argument that the payments are proceeds of the lost or damaged crops pursuant to § 541(a)(6).<sup>98</sup> This proceeds analysis under § 541(a)(6) presents another set of problems and will be discussed separately.<sup>99</sup>

A North Dakota bankruptcy court addressed disaster assistance in *Drewes v. Lesmeister (In re Lesmeister)*,<sup>100</sup> when it ruled on the attachment of a security interest in a Crop Loss Disaster Assistance Program ("CLDAP") payment that the debtor applied for and received post-petition.<sup>101</sup> In that case, the statute authorizing the disaster program was enacted pre-petition, but the regulations implementing the program were promulgated post-petition. Similarly, the application period for the assistance was not available until post-petition. Consequently, the debtors applied for and received payments several months after their bankruptcy filing. In finding that the payments were property of the estate and subject to a pre-petition security interest, the court analogized them to "a right of action for damages not yet put into suit."<sup>102</sup> The court declared that the debtors "were farmers who had suffered a loss from drought and had a right to payments under the program the moment the Crop Loss Disaster Assistance Program became effective."<sup>103</sup>

The court's analogy to a right of action is convincing at first glance. Like a right of action for damages, before the debtor signs up for the program, he or she has a claim of crop loss that can be pursued under the assistance program. Whether or not this claim will be successful in producing an actual payment does not alter the right to apply for relief. Some aspects of the court's analysis in *Lesmeister* raise concern, however. On one hand, the court states that the debtor had a right to payment as soon as the program became "effective." However, it is clear that the program does not become effective until implement-

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96. See 7 C.F.R. §§ 1480.4, 1480.11 (2005).

97. See *id.* § 1480.7.

98. 11 U.S.C. § 541(a)(6) (2000).

99. The proceeds analysis is discussed *infra* at Part V.

100. 242 B.R. 920 (Bankr. D. N.D. 1999).

101. *Id.* at 923.

102. *Id.* at 924 (citing *In re Bates*, Bankr. No. 5-88-287 (Bankr. D. Minn. 1990) (unpublished decision)).

103. *Id.* at 926.

ing regulations have been promulgated. Moreover, the debtor did not have a right to payment “the moment” it became effective. In reality, the debtor had only a right to apply for the program. The court’s language implies an automatic right of payment that does not comport with the regulations that eventually did implement the program. These regulations limited eligibility in a variety of ways depending upon county average losses, the specific cause of the farmer’s loss, the extent of the loss, and even the farmer’s gross revenue.<sup>104</sup> While all of these eligibility criteria relate to pre-petition facts, nevertheless, the simplicity implied by the language of *Lesmeister* is deceiving.

More recently, in *Boyett v. Moore (In re Boyett)*,<sup>105</sup> a Georgia bankruptcy court held that a CLDAP payment for pre-petition losses of the debtor’s watermelon and squash crops was property of the estate under § 541(a)(1), even though the debtor did not apply for the benefits until post-petition.<sup>106</sup> As in *Lesmeister*, the relevant crop loss occurred pre-petition, and the CLDAP legislation was enacted pre-petition. The regulations, however, were promulgated post-petition, and the debtor applied for the assistance post-petition.<sup>107</sup> Nevertheless, the court held that as of filing, the “[d]ebtor’s entitlement to payment existed, even though he could not immediately realize that payment. The post-petition application for payment was merely a ministerial act, not a qualifying event.”<sup>108</sup> In support of this diminished view of the importance of the contract, the court distinguished application for the CLDAP from the farm program contracts that other courts had found to be executory contracts. The court stated that the “[d]ebtor has not claimed to have and does not have a contract, much less an executory contract. He owes no post-petition duty to the government.”<sup>109</sup>

The court’s statement that the debtor had no contract with the government is in error. The application document was a contract, signed by both the debtor and a representative of the government.<sup>110</sup> Similarly, the statement that the debtor owes no post-petition duty is also in error. In addition to adherence with duties associated with the post-petition application,<sup>111</sup> under the terms of the CLDAP, farmers were bound to obtain crop insurance for the 1999 and 2000 crop years, and failure to do so would subject them to liquidated damages.<sup>112</sup>

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104. See 7 C.F.R. pt. 1477 (1998).

105. 250 B.R. 817 (Bankr. S.D. Ga. 2000).

106. *Id.* at 822.

107. *Id.* at 819.

108. *Id.* at 822.

109. *Id.*

110. See 7 C.F.R. § 1477.109(d) (2003) (authorizing penalty for debtor’s failure to comply with any “term, requirement or condition”).

111. See *id.* § 1477.203.

112. *Id.* § 1477.108.

While there is merit to the court's attempts to distinguish disaster programs from traditional farm programs, the court clearly exaggerated those differences.

### C. Post-Petition Statute: Circuit Courts Draw the Line

In situations where the statute authorizing disaster assistance was post-petition, trustees in some cases have, nevertheless, argued that the payment should be property of the estate. This argument has taken alternative approaches, alleging that the payment is either a "legal or equitable interest" under § 541(a)(1) or a proceed of property of the estate under § 541(a)(6). The proceeds issue will be discussed in the next Part of this Article. However, focusing on § 541(a)(1) in two recent cases, the trustee was successful in convincing a bankruptcy court that the debtor's pre-petition loss and resultant "right" to participate in any potential future federal farm program was sufficient to bring the payment into the bankruptcy estate. While neither of these opinions stand as good law today, both of the courts' analyses are instructive.

In *Lemos v. Rakozy (In re Lemos)*,<sup>113</sup> the debtor converted his Chapter 12 bankruptcy case to a Chapter 7 case in July of 1998, several months prior to the enactment of the CLDAP legislation in October of 1998. The debtor received his discharge in November, 1998, and did not apply for CLDAP disaster benefits until April, 1999. The debtor was determined to be eligible, and in June, 1999, the CCC issued a check for \$13,386, which the trustee intercepted and claimed as property of the bankruptcy estate.<sup>114</sup> The bankruptcy court held that the CLDAP payment was either property of the estate under § 541(a)(1) or alternatively as proceeds of property of the estate under § 541(a)(6).<sup>115</sup>

The *Lemos* holding that the farm program payment was a "legal or equitable interest" at the time of commencement of the bankruptcy was based on the "broad proposition that even contingent interests may constitute property of the estate."<sup>116</sup> The court described the farm programs as follows:

The scenario is a common one. Congress frequently and regularly enacts a variety of farm subsidy programs, including price supports, set-asides, and disaster relief, which change from year to year. The prospect of a federal program being adopted to compensate for farm losses in any given year may therefore be properly characterized as a contingent interest, which, though it may never vest if the program does not encompass a particular crop or a par-

113. 243 B.R. 96 (Bankr. D. Idaho 1999). The holding in *Lemos* is no longer a valid statement of the law, at least in the Ninth Circuit. See *In re Stallings*, 290 B.R. 777, 781 (Bankr. D. Idaho 2003).

114. *Lemos*, 243 B.R. at 97.

115. *Id.* at 101. But see *Stallings*, 290 B.R. at 781.

116. *Lemos*, 243 B.R. at 99.

ticular year, is property of the bankruptcy estate when it relates to pre-petition crops.<sup>117</sup>

Unfortunately, the “scenario” described by the court in *Lemos* is far from accurate. While there have been a variety of farm programs in place since the New Deal, the notion that for every crop loss there is disaster legislation waiting in the wings is simply not true. Historically, disaster legislation has generally come about only when there is evidence of widespread crop failure on a regional basis. An individual’s loss will generally not be compensable if the regional loss is insufficient to generate the attention of Congress, if his or her area is not specifically designated as a disaster area, or if his or her loss does not reach the threshold level for compensation.<sup>118</sup> Moreover, there may be program requirements that affect the farmer’s right to participate. The situation is neither as simple, nor as automatic, as the court in *Lemos* suggested.

To support its position, however, the court in *Lemos* cited the case of *Segal v. Rochelle*,<sup>119</sup> in which the United States Supreme Court held that a pre-petition loss-carryback that would result in a post-petition tax refund was property of the estate.<sup>120</sup> The Court in *Segal* stated that “‘property’ [of the estate] has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed.”<sup>121</sup> The loss-carryback could not be used to gain the tax refund until the tax year ended, so the refund was not available as of commencement of the case. Nevertheless, the Court found that it was “sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupts’ ability to make an unencumbered fresh start that it should be regarded as ‘property’ [of the estate].”<sup>122</sup> The obvious problem with the application of this argument to the facts in *Lemos* is that in *Segal*, the law that supported the tax refund was in place pre-petition. In *Lemos*, congressional action to create the authority for the payment had not yet occurred as of the filing of the bankruptcy.

A Georgia bankruptcy court reached a similar result in *Kelley v. Bracewell (In re Bracewell)*.<sup>123</sup> In this case, the crop disaster program was also enacted post-petition. Nevertheless, the court held that “[t]he right to the disaster payment was a pre-petition inchoate right

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117. *Id.*

118. Steffen N. Johnson, *A Regulatory ‘Wasteland’: Defining a Justified Federal Role in Crop Insurance*, 72 N.D. L. REV. 505, 545 (1996).

119. 382 U.S. 375 (1966).

120. *Id.* at 380.

121. *Id.*

122. *Id.*

123. 310 B.R. 472 (Bankr. M.D. Ga. 2004), *rev’d*, 322 B.R. 698 (M.D. Ga. 2005), *appeal docketed*, No. 05-11951 (11th Cir. Apr. 8, 2005). See *infra* notes 162–65 and accompanying text.



that vested or became choate post-petition upon the enactment of the Act. Upon the occurrence of the disaster, Respondent had the right to collect disaster payments from the government, if such legislation was passed."<sup>124</sup>

The weight of authority, however, rejects these two decisions. Within the last two years, there have been four related circuit court opinions. Two circuit courts recently addressed the precise issue of disaster assistance awarded pursuant to a post-petition statute, a third issued a related decision involving another federal program, and a fourth ruled on the property of the estate issue in a different context, but relied upon the other circuit decisions. Each of these important decisions is discussed individually.

The Eighth Circuit Court of Appeals addressed the issue of CLDAP payments in *Drewes v. Vote (In re Vote)*,<sup>125</sup> holding that the payments at issue were not property of the bankruptcy estate.<sup>126</sup> The debtor was a North Dakota farmer who was unable to plant his crops in 1999 because of excess rainfall. He filed for relief in bankruptcy under Chapter 7 in early September, 1999. As in *Lemos* and *Bracewell*, the statute that authorized disaster payments to the debtor was enacted post-petition. As a result of the disaster program, the farmer eventually received \$33,238 in payments.

The trustee claimed that the CLDAP payments to the farmer were property of the estate, arguing that because they related to pre-petition crop losses, they were "sufficiently rooted in the pre-bankruptcy past" under *Segal*.<sup>127</sup> The bankruptcy court denied the trustee's motion, as did the bankruptcy appellate panel.

On appeal, the Eighth Circuit Court of Appeals affirmed, holding that the payments were not property of the estate.<sup>128</sup> The court distinguished *Segal*, pointing out that in *Segal*, the law authorizing the tax refund was in existence when the bankruptcy was filed.<sup>129</sup> Therefore, the debtor "possessed an existing interest at the time of filing."<sup>130</sup> In contrast, the debtor in *Vote* had only "a mere hope that his losses might generate revenue in the future."<sup>131</sup> The court further stated that to find for the trustee would be to allow the trustee to assert more rights than the debtor had as of commencement of the case.<sup>132</sup> While the scope of § 541 is broad, it "is not intended to expend [sic] the

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124. *Bracewell*, 310 B.R. at 477.

125. 276 F.3d 1024 (8th Cir. 2002).

126. *Id.* at 1027.

127. *Id.* at 1026.

128. *Id.* at 1027.

129. *Id.* at 1026.

130. *Id.*

131. *Id.*

132. *Id.*

debtor's rights against others more than they exist at the commencement of the case."<sup>133</sup>

The court in *Vote* also found support for its decision in a recent opinion from the Ninth Circuit Court of Appeals, *Sliney v. Battley (In re Schmitz)*.<sup>134</sup> *Schmitz* involved a different kind of federal program, the Alaska Halibut and Sablefish Management Plan ("AHSMP"). Under this plan, qualified fishermen could apply for and be awarded Quota Shares and Individual Fishing Quotas, annual catch limits applicable to future fishing rights. The quotas awarded were based on fishing done during the "qualifying years" of 1988 to 1990.<sup>135</sup>

Schmitz filed his Chapter 7 bankruptcy petition in April, 1992, and later received his bankruptcy discharge. The AHSMP was not implemented until January 1, 1994, when the Secretary of Commerce published final regulations setting up the program. Schmitz applied for his quota rights in 1994, but because of a competing application, he did not receive them until December, 1996. He subsequently sold the rights. Several months later, the Chapter 7 trustee filed bankruptcy proceedings to recover the money received from the sale and subsequent resale of the quota rights and to revoke the debtor's discharge.<sup>136</sup>

The bankruptcy court cited "ongoing federal activity to implement" a plan at the time of the bankruptcy filing and stated that the rights that were eventually awarded were "rooted in Schmitz's prebankruptcy past."<sup>137</sup> For these reasons, the bankruptcy court held that the quota rights were property of the estate and revoked the discharge.<sup>138</sup> The bankruptcy appellate panel affirmed.<sup>139</sup>

The Ninth Circuit reversed.<sup>140</sup> The court carefully reviewed the timing of the creation of the program, and found that although the program was "under consideration" at the time that the debtor filed his bankruptcy petition, the Secretary of Commerce had not yet received the management council's recommendation to limit fishing.<sup>141</sup> This recommendation was not received until over four months after the Schmitz bankruptcy filing. Proposed rules were not published until almost seven months after the bankruptcy filing, and the eventual final rules establishing the program were published nineteen months

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133. *Id.* (citing S. REP. NO. 95-989, at 82 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5868).

134. *Id.* at 1027 (citing *Sliney v. Battley (In re Schmitz)*, 270 F.3d 1254 (9th Cir. 2001)).

135. *Schmitz*, 270 F.3d at 1255.

136. *Id.* at 1255-56.

137. *Id.* at 1256.

138. *Id.*

139. *Id.*

140. *Id.* at 1258.

141. *Id.* at 1257.

after the filing.<sup>142</sup> The court described the situation as of filing as follows:

Any number of legal, political or bureaucratic factors can affect whether mere proposals ever ripen into full-fledged regulations. Rule-making is like baseball: It ain't over 'til it's over. On the date that Schmitz filed his petition, he might have had a hope, a wish and a prayer that the Secretary would eventually implement the plan then under consideration. However, the fact remains that as of the date of the petition, Schmitz's 1988-1990 catch history had no value. At most, there existed the possibility that his prior catch record *might* be relevant *if* a fishing quota program were ever adopted in a form favorable to him, *if* his application for such rights were granted, and *if* he could successfully defend against any competing challenge to his application. This sort of nebulous possibility is not property.<sup>143</sup>

Just as the Eighth Circuit used the Ninth Circuit opinion in the *Schmitz* case as support for its decision in *Vote*, the Ninth Circuit cited the bankruptcy appellate panel decision in *Vote* as support for its holding.<sup>144</sup> The court in *Schmitz* noted the similarity between the cases in terms of the timing issues and noted that the *Vote* bankruptcy appellate panel emphasized that there was a date certain "when the debtor became legally entitled to the payments," and that date was post-petition.<sup>145</sup> The *Schmitz* opinion quotes the bankruptcy appellate panel in *Vote* as follows:

As of the date the Debtor filed his bankruptcy petition, he may have had, at most, an expectation that Congress would enact legislation authorizing crop disaster or assistance payments to farmers affected by weather conditions in 1999, but there was no assurance that Congress would authorize such payments or that the Debtor would qualify for them if they were authorized. It was equally likely that Congress would *not* pass such relief legislation. Such an expectancy (or "hope," if you will) does not rise to the level of a "legal or equitable interest" in property such that it might be considered property of the estate under 11 U.S.C. § 541(a)(1).<sup>146</sup>

Subsequent to the Ninth Circuit's decision in *Schmitz*, the bankruptcy court that decided the *Lemos* case, *In re Stallings*,<sup>147</sup> was called to rule on the issue of whether a secured creditor's interest attached to a federal crop loss payment that resulted from a post-petition statute. The *Stallings* case involved a congressional appropriation for reimbursement of crop damage resulting from herbicides used by the federal Bureau of Land Management. Both the establishment of the reimbursement program and the payment occurred post-petition.<sup>148</sup> The court noted that since its decision in *Lemos*, "the

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142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 1257-58 (citing *Drewes v. Vote (In re Vote)*, 261 B.R. 439, 444 (B.A.P. 8th Cir. 2001)).

147. 290 B.R. 777 (Bankr. D. Idaho 2003).

148. *Id.* at 780-81.

legal landscape has changed markedly.”<sup>149</sup> Citing both *Schmitz* and *Vote*, the court held that the secured creditor’s interest did not attach to the payment.<sup>150</sup>

The Eleventh Circuit weighed in on the issue of property of the estate in the recent case of *Witko v. Menotte (In re Witko)*.<sup>151</sup> Although this case did not involve a federal program or even a statutorily created right, the court, nevertheless, relied in part on the decisions in *Schmitz* and *Vote*. At issue was a malpractice cause of action caused by the debtor’s attorney’s negligence in a non-bankruptcy matter. While the alleged actions that formed the basis for a malpractice claim occurred pre-petition, as of the commencement of the case, the non-bankruptcy litigation was still in process, and therefore no harm had been suffered.<sup>152</sup> Looking to state law, the court found that a cause of action does not accrue until the last element constituting the cause of action occurs.<sup>153</sup> Therefore, the court held that as of commencement of the case, the malpractice claim did not exist and consequently, it could not be property of the estate.<sup>154</sup>

The most recent circuit court to address this issue is the Fifth Circuit in the case of *Burgess v. Sikes (In re Burgess)*.<sup>155</sup> *Burgess* was another case involving post-petition crop disaster assistance. The debtor filed a Chapter 7 bankruptcy petition in August, 2002, and received his discharge in December, 2002. The Agricultural Assistance Act of 2003 became law on February 20, 2003, and provided crop disaster assistance for crop years 2001 and 2002. The earliest date that a farmer could sign up for the assistance was June 21, 2003. When the debtor received his assistance check, the bankruptcy was reopened, and the trustee filed a motion for turnover, claiming the check as property of the estate. The bankruptcy court ruled in favor of the trustee, and the district court affirmed.<sup>156</sup>

In a panel decision, the Fifth Circuit Court of Appeals reversed, holding that as of commencement of the case, the most that the debtor had was a “mere hope” that Congress would enact future legislation.<sup>157</sup> Acknowledging the broad reading that is given to § 541, and characterizing contrary decisions as “plausible,” the court nevertheless found *Vote* and *Schmitz* to be “more persuasive.”<sup>158</sup> The debtor had no legal or equitable right to disaster relief absent enactment of

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149. *Id.* at 781.

150. *Id.* at 782.

151. 374 F.3d 1040 (11th Cir. 2004).

152. *Id.* at 1042–43.

153. *Id.* at 1043–44.

154. *Id.* at 1044.

155. 392 F.3d 782 (5th Cir. 2004).

156. *Id.* at 784.

157. *Id.* at 786.

158. *Id.*

the legislation; therefore he had no right to the relief as of commencement of the case.<sup>159</sup>

In light of an unpublished panel decision in conflict with *Burgess*,<sup>160</sup> petitions for rehearing both cases en banc were granted in March of 2005.<sup>161</sup> As of this writing, the full court has not issued an opinion.

In line with these appellate decisions, in March, 2005, a district court in Georgia reversed the bankruptcy court in the *Bracewell* case.<sup>162</sup> In a well reasoned opinion, that court noted that disaster program benefits present a difficult analysis: “[T]he post-petition enactment of crop disaster legislation coupled with the retroactive nature of crop disaster payments . . . make the payments difficult to categorize and analogize with other types of property interests.”<sup>163</sup> However, the court reasoned that it was the enactment of the legislation that was essential to the creation of a legally recognizable, albeit contingent right. The court agreed that “once crop disaster legislation is enacted, legally significant facts exist upon which a farmer could base a contingent right.”<sup>164</sup> Prior to enactment, however, no such right exists, despite the existence of a crop failure that may one day spawn disaster assistance. The court noted that “the mere hope that crop disaster legislation will be enacted to create the contingent interest . . . is a different concept. Without the crop disaster legislation, growing crops and suffering crop loss—no matter how sufficiently rooted to the pre-bankruptcy past—are of no legal significance and create no right.”<sup>165</sup>

Thus, while there have been attempts to push the “legal or equitable” right to disaster assistance benefits back to before the time that the statute authorizing the assistance was enacted, these attempts have largely been rejected by the circuit courts. The next issue to be discussed, however, is whether these benefits can be tied to the pre-petition crop losses, becoming property of the estate under § 541(a)(6).

## V. PROCEEDS, PRODUCT . . . OR PROFITS OF OR FROM PROPERTY OF THE ESTATE

In addition to “all legal or equitable interests of the debtor in property as of the commencement of the case,”<sup>166</sup> under § 541(a)(6), the

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159. *Id.* at 787.

160. *In re Westmoreland*, 110 F. App'x 412 (5th Cir. 2004).

161. *Burgess v. Sikes (In re Burgess)*, 403 F.3d 323 (5th Cir. 2005); *Westmoreland v. Sikes (In re Westmoreland)*, 403 F.3d 324 (5th Cir. 2005).

162. *Bracewell v. Kelley (In re Bracewell)*, 322 B.R. 698 (M.D. Ga. 2005), *appeal docketed*, No. 05-11951 (11th Cir. Apr. 8, 2005).

163. *Id.* at 708.

164. *Id.* at 706.

165. *Id.* at 707.

166. 11 U.S.C. § 541(a)(1) (2000).

bankruptcy estate will also include the “[p]roceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.”<sup>167</sup>

Much of the case law regarding the issue of whether farm program payments are the proceeds of specific crops grown by the debtor has developed in interpreting secured transactions. In bankruptcy, the issue has often arisen in litigation under § 552 instead of § 541. Section 552 provides that bankruptcy cuts off a creditor’s security interest as of commencement of the case, precluding it from attaching to property that is acquired post-petition.<sup>168</sup> An exception is provided, however, under § 552(b), allowing the security interest to continue in “proceeds, product, offspring, or profits” of the collateral if the security agreement so provides.<sup>169</sup>

In order to avoid losing their security interest in farm program payments acquired by the debtor post-petition, creditors have frequently argued that the payments were proceeds of secured crops grown by the debtor under § 552(b).<sup>170</sup> While the results have been mixed depending upon the specific program at issue, the majority of courts have found that a security interest in crops does not attach to farm program payments.<sup>171</sup> Farm program payments have most often been characterized as “general intangibles” or contract rights rather than crop proceeds. This result is consistent with the contractual nature of the programs and reflects an understanding that payments may not even have a relation to crops grown.<sup>172</sup>

Looking specifically at the requirements of § 541(a)(6) for including a farm program payment as property of the estate, two requirements are apparent. First, there must be a clear connection between the farm program at issue and a specific crop. The analysis of farm program payments as proceeds of property of the estate is only credible if there is clear link between the crops that the debtor produced and the

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167. *Id.* § 541(a)(6). In several cases, debtors have unsuccessfully argued that their farm program payments fell within the exception for “earnings from services performed” by the debtor and were “earned” by their compliance with the conservation practices that were required under their contract. *See, e.g., In re Holte*, 83 B.R. 647 (Bankr. D. Minn. 1988).

168. 11 U.S.C. § 552.

169. *Id.* § 552(b).

170. *See, e.g., In re Stallings*, 290 B.R. 777, 783 (Bankr. D. Idaho 2003) (rejecting a creditor’s motion to claim an interest in the federal crop reimbursement payments as proceeds of the debtor’s crops under § 552(b)).

171. *Id.*; *see also Kingsley v. First Am. Bank of Casselton (In re Kingsley)*, 865 F.2d 975 (8th Cir. 1989) (holding that deficiency and diversion payments were general intangibles and not crop proceeds); *In re Schmaling*, 783 F.2d 680 (7th Cir. 1986) (holding that diversion payments were not crop proceeds).

172. *See supra* Part II.

specific farm program payments received.<sup>173</sup> While some regular farm payments may exhibit this linkage,<sup>174</sup> in the context of a bankruptcy, the courts have been most likely to find this connection when analyzing disaster assistance payments.<sup>175</sup>

While conceptually, the argument that a disaster assistance payment is linked to a crop has some appeal, a second requirement presents a practical problem. Section 541(a)(6) requires that the proceeds be "from property of the estate."<sup>176</sup> Thus, even if the payments are considered proceeds, they must be proceeds of actual property that is part of the bankruptcy estate. In many of the farm bankruptcy cases that involve pre-petition disasters, there is no actual crop in existence that relates back to the disastrous production cycle. It may never have grown, or it may be gone long before the bankruptcy. It is not enough for the program payment to be proceeds of a crop, it must also be the proceeds of property of the estate, i.e., there must be a related crop that is already included in the estate. As the Fifth Circuit Court of Appeals panel stated in *Burgess*, "[section] 541(a)(6) and its reference to proceeds cannot retroactively create a property interest that did not exist at the commencement of the case."<sup>177</sup>

In some cases, because of the disaster, there was no crop that was ever produced at all. For example, in *Vote*, the debtor did not plant a crop the year prior to his bankruptcy because the soil was too saturated during the planting season.<sup>178</sup> Although *Vote* did not address § 541(a)(6) because it had not been raised in the bankruptcy court,

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173. For example, in several consolidated cases, the bankruptcy court in *Kelley v. Thaggard (In re Thaggard)*, Nos. 01-60571, 01-60575, 01-70513 (Bankr. M.D. Ga. Apr. 3, 2003), searched for a connection between a new peanut support program passed post-petition and the property that the debtor had as of commencement of the case. Although the payments received were based on the pre-petition farming activities of the debtor, the court held that they could not be considered a "proceed" of any particular crop in existence. Like so many of the current farm programs, payments are based on historical yield as opposed to current production.

174. See *supra* Part II.

175. One notable exception to this is found in the case law discussing the few programs that have called for the destruction of an existing crop in exchange for a government payment. See, e.g., *Pombo v. Ulrich (In re Munger)*, 495 F.2d 511, 512-13 (9th Cir. 1974) (holding that payments under the sugar abandonment program that called for destruction of existing crop were proceeds of the destroyed crop). In dicta, the court in *Schneider* expressed agreement with this analysis, stating that "[a]gricultural entitlement payments which result from the actual disposition of a planted crop are proceeds of that crop." *Schneider v. Nazar (In re Schneider)*, 864 F.2d 683, 685 (10th Cir. 1988). But cf. *Bank of N. Ark. v. Owens*, 884 F.2d 330 (8th Cir. 1989) (concluding that Dairy Termination Program payments were not proceeds of cattle, but contract payments to farmer who agreed to dispose of herd and not produce milk).

176. 11 U.S.C. § 541(a)(6) (2000).

177. *Burgess v. Sikes (In re Burgess)*, 392 F.3d 782, 787 (5th Cir. 2004), *reh'g granted*, 403 F.3d 323 (5th Cir. 2005).

178. *Drewes v. Vote (In re Vote)*, 276 F.3d 1024, 1026 (8th Cir. 2002).

since no crop was ever grown, there was no crop related to the disaster payment that existed as property of the estate. Thus, the payments could not be proceeds of non-existent property.

In other cases, the disaster-related crop may not be property of the estate because there has been significant time elapsed between harvest of the damaged crop and either the bankruptcy filing or the eventual award of assistance. Any limited or reduced-quality crop that may have been produced is long gone. This was the case in *Bracewell*, where the bankruptcy court held that the disaster payments could not be considered proceeds under § 541(a)(6) because the crop that the disaster payments provided compensation for was “not in existence” when the bankruptcy was filed.<sup>179</sup> Two years separated the crop disaster and the filing of the Chapter 7.<sup>180</sup>

In the unpublished, but often cited opinion in *White v. United States (In re White)*,<sup>181</sup> the court argued that a pre-petition “disposition” of the crop occurred when the disaster struck, destroying the crop.<sup>182</sup> The disaster payment that resulted was the “proceed” of that disposition in that it was received as a result of the “disposition.”<sup>183</sup> The court likened the payment to insurance proceeds.<sup>184</sup> The difficulty with this analogy, however, is that in order for a debtor to have an entitlement to insurance proceeds, there must be an underlying insurance contract. Applying this analogy to farm programs, if a pre-petition farm program contract existed, arguably there would be no need to resort to § 541(a)(6)—the contract would give rise to a right under § 541(a)(1). In *White*, however, the farm program contract was signed post-petition, and therefore no contractual rights existed as of commencement of the case.<sup>185</sup>

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179. *Kelley v. Bracewell (In re Bracewell)*, 310 B.R. 472, 476 (Bankr. M.D. Ga. 2004), *rev'd on other grounds*, 322 B.R. 698 (M.D. Ga. 2005), *appeal docketed*, No. 05-11951 (11th Cir. Apr. 8, 2005). The district court affirmed this part of the bankruptcy court holding. *Bracewell*, 322 B.R. at 708–10.

180. *Bracewell*, 310 B.R. at 473. The crop affected by the disaster was a 2001 crop that was harvested with reduced yields. The debtor initially filed a Chapter 12 bankruptcy in 2002, but converted the case to Chapter 7 in 2003. The disaster assistance legislation was not enacted until later in 2003, and the assistance checks were issued in 2004.

181. No. BRL88-00971C, 1989 WL 146417 (Bankr. N.D. Iowa Oct. 27, 1989). *White* was a Chapter 12 case, with § 1207 bringing post-petition payments into the estate regardless of the limitations of § 541. At issue was whether an IRS lien attached to the farm program payment prior to bankruptcy. The *White* court discussed this issue invoking the same arguments addressed under § 541(a)(6).

182. *Id.* at \*5.

183. *Id.* at \*3.

184. *Id.*

185. See *Kelley v. Bracewell (In re Bracewell)*, 322 B.R. 698, 709 (M.D. Ga. 2005) (stating that an insurance analogy “only makes sense if the disaster relief legislation were enacted pre-petition”), *appeal docketed*, No. 05-11951 (11th Cir. Apr. 8, 2005). The court further explained that:



Moreover, the facts provide a limitation to *White's* analysis. In *White*, it appears that some of the debtor's crops were in existence as property of the estate, a critical factor under § 541(a)(6). In fact, *White* cited a Pennsylvania bankruptcy case that confirmed that under § 541(a)(6), "the critical factor is that, although the right to payment arose post-petition, the property at issue was pre-petition property which became part of the estate."<sup>186</sup>

This "critical" aspect is not emphasized in the *White* opinion, and it is not cited by courts who rely on *White* for the authority that farm disaster payments are proceeds under § 541(a)(6). In most cases, the existence or non-existence of pre-petition crops associated with the disaster payment is simply not addressed. It can be presumed that either there are crops in existence or, perhaps more often, that the court is effectively ignoring this necessary aspect of the analysis.

The most frequently cited case for the proposition that farm disaster payments are proceeds of crops under § 541(a)(6) is the case of *Ring v. Kelley (In re Ring)*.<sup>187</sup> However, the only indication as to whether there is, in fact, any property of the estate to support a proceeds finding under § 541(a)(6) is that at one point, late in the bankruptcy opinion, the court uses the phrase "since the crops and their proceeds are property of the estate."<sup>188</sup> The district court held that the disaster assistance payments that the debtor received post-petition were "proceeds" as defined under § 541(a)(6).<sup>189</sup> In a short opinion affirming the bankruptcy court, the district court stated that the disaster payments served as a "substitute for proceeds that would have been recovered had the disaster or low yields not occurred."<sup>190</sup> The bankruptcy court provided more analysis, analogizing the assistance payments to insurance proceeds and citing *White*.<sup>191</sup> As noted, however, insurance proceeds would necessarily stem from a pre-peti-

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[A] crop insurance policy on a pre-petition crop would have been issued pre-petition. Consequently, the contingent right to enforce the insurance policy in the event of crop loss would have existed pre-petition and would have constituted property of the estate together with the crop itself. Thus, the post-petition payment for a loss covered by the policy is easily viewed as proceeds of the pre-petition crop by virtue of the pre-petition policy entitlement.

*Id.*

186. *White*, No. BRL88-00971C, 1989 WL 146417, at \*4 (quoting *Reed v. Philadelphia Hous. Auth. (In re Reed)*, 94 B.R. 48, 52-53 (E.D. Pa. 1988)).
187. 160 B.R. 692 (M.D. Ga. 1993).
188. *Ring v. Kelley (In re Ring)*, 169 B.R. 73, 77 (Bankr. M.D. Ga. 1993), *aff'd*, 160 B.R. 692 (M.D. Ga. 1993). Presumably, the bankruptcy court opinion was submitted for publication after it was affirmed by the district court, resulting in a later citation.
189. *Ring*, 160 B.R. at 693.
190. *Id.* (quoting *First State Bank of Abernathy v. Holder (In re Nivens)*, 22 B.R. 287, 291 (Bankr. N.D. Tex. 1982); *White*, No. BRL88-00971C, 1989 WL 146417, at \*4).
191. *Ring*, 169 B.R. at 77.

tion contract.<sup>192</sup> In *Ring*, that pre-petition contract existed, forming a stronger basis for a “property of the estate” finding than that relied upon by the court. As the case law has developed in the years since *Ring* was decided, *Ring* would have had stronger authority for its outcome had it relied on the fact that the disaster assistance statute authorizing relief was enacted pre-petition, arguably creating a right under § 541(a)(1).

Some courts attempt to cover all bases by holding that the disaster payments are property of the estate under § 541(a)(1), but also in the alternative, that the payments constituted “proceeds” of debtor’s pre-bankruptcy crops, to be included as estate property under § 541(a)(6).<sup>193</sup> Other courts have relied upon *Ring*, however, in situations in which there was not a pre-petition disaster assistance statute.<sup>194</sup>

In an attempt to find property with which to link to proceeds under § 541(a)(6), an amicus brief filed in the *Burgess* rehearing argued that the pre-petition crop loss experienced by the farmer is itself property of the estate.<sup>195</sup> According to this argument, the post-petition statute and ultimate disaster award is the “proceed” of that loss.

The Eighth Circuit Court of Appeals in *Vote* rejected a similar argument, finding that a loss by itself could not be an asset. The court stated that it had found “no case in which a pure loss with no attendant potential benefit was included as property of the estate.”<sup>196</sup>

The amici found two Supreme Court cases from 1842 and 1891 that it argued would support the finding of a loss as a property asset.<sup>197</sup> Each of these cases, however, can be distinguished, and neither involve a loss without “an attendant potential benefit.”<sup>198</sup>

192. The district court in *Bracewell* distinguished *Ring* in this regard, finding that the pre-petition enactment of the disaster program was essential to the court’s reasoning, at least with respect to its insurance analogy. *Bracewell v. Kelley (In re Bracewell)*, 322 B.R. 698, 709 (M.D. Ga. 2005), *appeal docketed*, No. 05-11951 (11th Cir. Apr. 8, 2005). *See supra* note 185.

193. *See, e.g., Boyett v. Moore (In re Boyett)*, 250 B.R. 817, 822 (Bankr. S.D. Ga. 2000) (holding that the CLDAP benefits were included in the estate under 11 U.S.C. § 541(a)(1) as a result of the pre-petition statute and alternatively under § 541(a)(6) as proceeds of “the pre-petition crop”). The court does not discuss whether there is actually any of the crop that exists as property of the estate.

194. *See, e.g., Lemos v. Rakozy (In re Lemos)*, 243 B.R. 96, 100–01 (Bankr. D. Idaho 1999) (relying upon *Ring* and *White*, buttressed by congressional intent to compensate for pre-petition crops).

195. Brief of Amici Curiae Professors Susan Block-Lieb et al., *Burgess v. Sikes (In re Burgess)*, 392 F.3d 782 (5th Cir. 2004) (No. 04-30189). This brief was prepared by the students in the LL.M. Program in Bankruptcy, St. John’s University School of Law, Queens, New York.

196. *Drewes v. Vote (In re Vote)*, 276 F.3d 1024, 1027 (8th Cir. 2002).

197. Brief of Amici Curiae Professors Susan Block-Lieb et al., *supra* note 195, at 6–8.

198. *See Vote*, 276 F.3d at 1027.

One case involved an international business trade loss that occurred as a result of the Civil War. At the time that the debtors filed for relief in bankruptcy, related claims had been submitted to an international arbitration tribunal in Geneva, the United States had been awarded compensation, and Congress had begun the process of distributing the fund. While the ultimate congressional award to the debtor came after the debtor had filed for relief in bankruptcy, far more than the "loss" existed pre-petition. The debtor had a clear expectation that the claim would be paid.<sup>199</sup>

Similarly, in the even earlier case of *Milnor v. Metz*,<sup>200</sup> the debtor performed pre-petition services as United States gauger. A pre-petition act of Congress expanded his duties, and the debtor was forced to request compensation from Congress for the additional services performed. This post-petition compensation for pre-petition services was at issue. Because of the pre-petition services, the Court held that his right to payment fell within his assignment of all rights to his creditors.<sup>201</sup> Again, more than a "loss" was present, and consistent with the court's reference in *Vote*, an "attendant potential benefit"<sup>202</sup> existed at the commencement of the case.

Thus in both cases, the debtor had a pre-petition contingent right to an award. Both cases would be factually more akin to a situation in which a farmer had applied for loss assistance under an existing assistance program and was awaiting a decision on eligibility.

The amicus brief submitted in the *Burgess* rehearing argues that like the awards in these cases, a farmer and his or her lender has a reasonable expectation that crop losses will be compensated by disaster assistance. In this regard, however, the brief provides an example of the pervasive lack of understanding of farm programs in general and, in particular, disaster assistance.<sup>203</sup> Many farmers each year suffer crop losses that are not covered by disaster assistance legisla-

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199. Brief of Amici Curiae Professors Susan Block-Lieb et al., *supra* note 195, at 6–8 (citing *Williams v. Heard*, 140 U.S. 529, 530–38 (1891)).

200. 41 U.S. 221 (1842).

201. *Id.* at 223.

202. *See Vote*, 276 F.3d at 1027.

203. Brief of Amici Curiae Professors Susan Block-Lieb et al., *supra* note 195, at 13–14. The amicus brief attempts to support its argument by quoting from a short article summarizing case law involving farm program payments as security interests. *Id.* (citing John K. Pearson, *Revised Article 9 and Government Entitlement Program Payments*, 22 AM. BANKR. INST. J. 24, 55 (Oct. 2003)). Unfortunately, the article is misquoted in the amicus brief. Judge Pearson stated that "[f]arm politics virtually guarantee that there will be additional [farm] programs in the future." *See* Pearson, *supra*, at 55. The brief alters this meaning by inserting the bracketed phrase farm [disaster payment] programs. Judge Pearson's point is that farm programs in one form or another will be with us for a long time, but he does not direct his comment in any way to the very specific category of disaster programs.

tion, and accordingly, the USDA and many farm lenders strongly encourage farmers to rely on crop insurance for crop loss protection.<sup>204</sup> Disaster assistance legislation is enacted only when losses are experienced regionally and only when regional losses are of such significance that political pressures nudge Congress into action. Producers have “no way of knowing in advance whether Congress will bail them out. . . . [A]d hoc disaster relief is anything but predictable for either farmers or those footing the bill.”<sup>205</sup>

Moreover, even if disaster legislation is enacted, there is no reasonable expectation that it will apply to a given farm loss. In order for a farmer to be eligible for disaster assistance, the losses suffered must be attributed to a recognized disaster.<sup>206</sup> The farmer must have individually suffered a “qualifying loss,” as defined under the specific legislation or implementing regulations.<sup>207</sup> Then, the farmer must apply for the assistance, signing a contract with requirements and potential liabilities for violation.<sup>208</sup>

In conclusion, the argument that federal farm program payments are proceeds of property of the estate under § 541(a)(6) has a superficial appeal when applied to disaster assistance payments. This appeal, however, does not stand up to careful analysis in most cases.

## VI. COMMENTS AND CONCLUSIONS

Given the complexity of the issues presented, it is not surprising that over the years, bankruptcy courts have struggled with the various federal farm programs. Trustees have aggressively and creatively argued that the payments should be brought into the estate in a wide range of circumstances. Distinctions, however, between the wide array of farm programs must be made by the courts. There is no unified category of “farm program payments.” They are diverse in function, purpose, duration, and obligation, and should be recognized as such. Based on an analysis of the relevant bankruptcy provisions, the existing case law, and an analysis of the federal farm programs themselves, certain guidelines for future analysis can be developed.

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204. See, e.g., 7 C.F.R. § 1941.32 (2005) (requiring catastrophic crop insurance as a condition for obtaining a farm operating loan from the USDA).

205. Johnson, *supra* note 118, at 545 (contrasting the uncertainty of disaster assistance with the predictability of crop insurance).

206. See, e.g., 7 C.F.R. § 1480.4 (2005) (restricting eligibility to those who have lost crops “as a result of a disaster or related condition”). Note that disaster declarations in and of themselves do not entitle farmers to disaster assistance. They may trigger eligibility for a low interest disaster loan, but unless disaster legislation is enacted and funded, no direct assistance is available.

207. See, e.g., *id.* § 1480.11 (listing the qualifying losses for 2001 and 2002).

208. See, e.g., *id.* §§ 1480.7 (requiring crop insurance for subsequent years), 1480.8 (imposing liability for making a false application).

When evaluating a debtor's rights under a farm program contract signed pre-petition, courts can be guided by the *Matthieson* decision and its progeny, but they should not follow this lead blindly. The general rule first established in *Matthieson*—that farm programs are essentially contracts between the government and the farmer—is still sound.

Today's courts, however, should consider the important issues overlooked by the court in *Matthieson*. Of particular importance is the executory nature of some farm program contracts. Related to this is a specific consideration of the nature of the farm program at issue. This will involve an inquiry into the contractual obligations imposed upon the debtor as well as funding and implementation questions. The better analysis would be that once the contract has been signed by both the government and the debtor, the debtor has certain rights under the contract. These rights, whatever they may be, unless exempted by the debtor, are property of the bankruptcy estate. They may or may not extend to an immediate payment obligation. If significant duties remain unperformed, the contract is executory under § 365, and the trustee can choose to either affirm or reject the contract. If the trustee affirms the contract, the right to payment that flows from the contract becomes property of the estate, and the trustee is bound to perform according to the obligations required by the contract. If the trustee is unable or unwilling to perform, then the contract should be rejected.

If, as of commencement of the case, the pre-petition contract was not executory, i.e., there were no obligations yet to be performed by the debtor, then it appears that the right to payment itself is a legal interest of the estate.

Only in very limited circumstances should the court be able to find a payment to be property of the estate when the contract has not been signed. The right to participate in a federal farm program by itself should not usually be considered to be property of the estate.

One such potential circumstance when a court could be justified in reaching back prior to the contract to find the right to participate in a program as creating a sufficient right to become property of the estate is when a pre-petition disaster results in a program that has been enacted, funded, and implemented pre-petition. The right of the farmer to sign up for this program can and should be treated as property of the estate, even if the contract has not been signed before the bankruptcy is commenced. The district court in *Bracewell* characterized this as a contingent right to the program benefits. It is contingent because the farmer must still meet the "congressionally mandated requirements to qualify" and must perform various administrative

tasks.<sup>209</sup> Nevertheless, contingent rights are property of the estate, subject to their contingency.

In line with *Vote*, *Burgess*, and *Schmitz*, however, no legal right exists until the program itself exists and is available. Neither crop losses themselves nor expectations of future benefits rise to the level of property of the estate. As the Eighth Circuit Court of Appeals in *Vote* concluded in its analysis, “[w]e have found no case in which a pure loss with no attendant potential benefit was included as property of the estate.”<sup>210</sup>

Finally, courts interpreting § 541(a)(6) should be aware that in order for “proceeds” to be properly brought into the estate, they must be the proceeds of existing property of the estate. Applying this to farm program payments produces a two part test.

First, the program payment must have a clear nexus to something beyond the contract obligation. It must be connected to either a specific crop, to specific livestock, or other tangible property of the debtor. This test will call for a careful analysis of the farm program that underlies the payment. For example, decoupled program payments should never be considered to be proceeds, as there is no linkage between the payment and the debtor’s crops. On the other hand, linkage may be found under some programs that are designed specifically to provide supplemental income for a particular crop, and are thus “coupled” with specific production. Some of the disaster assistance programs have this attribute or can be linked to a particular crop loss.

Second, the tangible property to which the payment is connected must exist and become property of the estate as of commencement of the case. If there was no crop, or if the crop was destroyed or sold prior to the bankruptcy, there is no property to which the payment can be connected under § 541(a)(6). A crop loss by itself is not a property interest.

The wide array of farm program payments continue to present interesting issues in bankruptcy. As future programs change to meet international trade, environmental, and budgetary challenges, new programs are likely to emerge. Whenever a farmer files for relief in bankruptcy, one should expect a legal struggle to determine, who gets the check.

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209. *Kelley v. Bracewell* (*In re Bracewell*), 322 B.R. 698, 706 (M.D. Ga. 2005), *appeal docketed*, No. 05-11951 (11th Cir. Apr. 8, 2005).

210. *Drewes v. Vote* (*In re Vote*), 276 F.3d 1024, 1027 (8th Cir. 2002).