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ABI/UMKC Midwestern Bankruptcy Institute

ABI Talks: Bankruptcy Ideas Worth Sharing

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Following the Money: Tracing Financial Transactions in Popular Phone Apps

Rachel L. Foley

Foley Law, PC | Independence, Mo.

An Analytical Review of Reversals/Affirmance Rates Between BAPs and District Courts

Jacklyn M. Branby

Snell & Wilmer L.L.P. | Phoenix

The Unconstitutionality of Chapter 11 UST Fee vs. Non-UST Fee Districts

Nicholas J. Zluticky

Stinson LLP | Kansas City, Mo.

SBRA and Chapter 12 Definitions for Qualifying Debtors

Mark A. Craige

Crowe & Dunlevy | Tulsa, Okla.

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UMKC

UNIVERSITY OF MISSOURI-KANSAS CITY
KANSAS CITY, MISSOURI

OCTOBER 6-7, 2022

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Following the
Money: Tracing
Financial
Transactions in
Popular Phone Apps





Not every household uses traditional banking systems.

According to a 2019 FDIC survey, it is estimated that approximately 5% (7.1 million) of American households lack a checking or savings account at either a bank or a credit union.

The reasons for not having a bank account vary, including a distrust in banks and a lack of funds to meet the required minimum account balance.

Source: How America Banks: Household Use of Banking and Financial Services, FDIC, last updated December 17, 2021, fdic.gov/analysis/household-survey/index.htm



One in five Americans has invested in, traded or otherwise used cryptocurrency, a new NBC News polls shows.

<https://www.cnn.com/2022/03/31/cryptocurrency-news-21percent-of-adults-have-traded-or-used-crypto-nbc-poll-shows.html>

The logo for the Midwestern Bankruptcy Institute, featuring the text "MIDWESTERN BANKRUPTCY INSTITUTE" in white, bold, sans-serif capital letters on an orange background. To the right of the text is a faint, stylized white graphic of a hand or a flame.

More than 83 million people as of July 2022 created unique Bitcoin wallets on Blockchain.com, a site that makes buying Bitcoin possible. That's about 72% more than a year earlier and a 237% increase since 2018.

<https://explodingtopics.com/blog/blockchain-stats>

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P2P = person to person or peer to peer payments.

Paypal give birth to the P2P revolution when they purchased EBAY in 2002.

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What are Peer to Peer (P2P Payment Systems) aka Money Transmitters?

Used to quickly send payment from one party to another, usually via one's mobile device.

Funds are transferred from the sender's bank account to the sender's P2P account; they can then be transferred from the sender's P2P account to the recipient's P2P account. The recipient may either keep those funds in the P2P account or have those funds deposited in his or her bank account.

Examples include Paypal, Venmo, Zelle, Cash App, Apple Pay.

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Blockchain:

a system in which a record of transactions made in bitcoin or another cryptocurrency is maintained across several computers that are linked in a peer-to-peer network

34 Million US adults own cryptocurrency

<https://www.insiderintelligence.com/insights/us-adults-cryptocurrency-ownership-stats/>

Crypto Currency is easy to purchase.

- Coinbase IRA
- Crypto ATMs
- Vape Shops
- Robinhood Account
- Paypal
- Venmo

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DIGITAL WALLET

A digital wallet is like your regular wallet except the funds are in a digital format.

The wallet can be used to make purchases through NFC. NFC is near field communication also referred to as contactless payment.



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**A DIGITAL WALLET OR
ELECTRONIC WALLET
IS A FINANCIAL
TRANSACTION
APPLICATION THAT
RUNS ON MOBILE
DEVICES**

Graphic by Business Insider



What are the risks to money transmitters?

- Not federally insured
- Not subject to traditional federal banking regulations
- Account holders don't necessarily have immediate access to funds
- Can take a few days to process
- Often cannot cancel transaction once it's been authorized

Wide variety of crypto assets

Don't need a bank account to own cryptocurrency (many owners have crypto wallets)

Can be viewed as money, commodity, or as a security depending upon whom you ask

Incredibly broad – can be hard to track transactions and valuations can fluctuate rapidly

Not insured and not accepted everywhere and presents concerns related to criminal activity

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Bitcoin, the world's largest cryptocurrency, currently consumes an estimated 150 terawatt -hours of electricity annually — more than the entire country of Argentina, population 45 million

This is one of the reasons Elon Musk stopped accepting bitcoin for purchases of Teslas.

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Crypto Bankruptcy Filings

Celsius Key	22-10967 SDNY
Compute North	22-90272 SDTX
Cred	20-12836 Delaware
Three Arrows Capital	22-10920 SDNY
Voyager	22-10493 SDNY

NFT: Non-Fungible Tokens

- Digital representation of ownership in an item, usually a tangible item, like photo, video, art, audio, etc.
- Use digital ledger (aka a blockchain)
- The idea is that NFTs are identifiable and traceable but practically speaking it's still an evolving area of the law.
- Ex: relatively unknown artist paints a painting and sells an NFT of the painting for \$500. The artist later grows in popularity and that same painting is resold for \$500,000. In a traditional arrangement, artist would see \$0 in second sale. With an NFT, the terms can stipulate the artist receives a portion of all future sales

“Fungible” means you can substitute one thing for another of the same kind. For example, money is fungible. It doesn’t matter which particular dollar bill you use – the value remains the same.

“Nonfungible” items, in contrast, are unique. Art, for example, is nonfungible.

“Tokens” are items of some value on a blockchain.

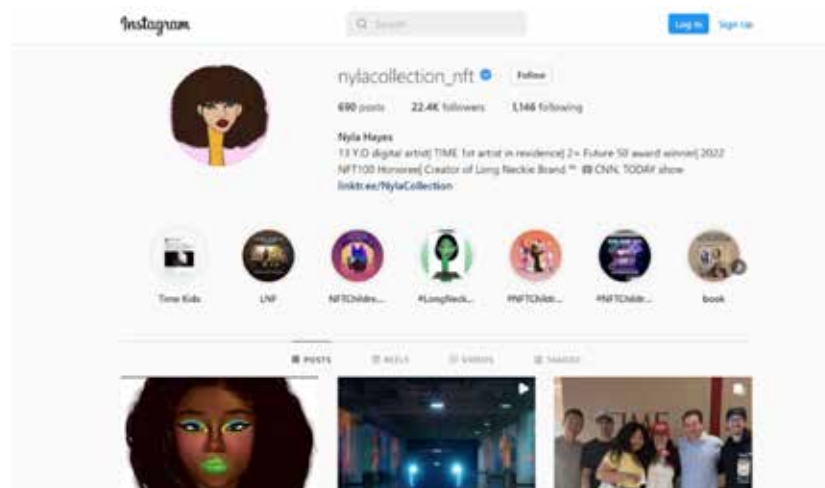


In general, an NFT is accompanied by a digital file, such that it should hopefully be easier to track or confirm who owns the NFT.

Again, this is a relatively new concept.



Nya Hayes is a 13-year-old artist and now a multimillionaire due to her NFT art



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Patrick Mahomes has sold over \$3 million dollars worth of NFTs.



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PERFORMING DUE DILLIGENCE



- Review the bank statements carefully.
 - If you see Paypal, Venmo, Cash App, etc, ask for the statements from each of those accounts. Your client may not realize these accounts have monthly statements.
- Ask your clients what apps they have on their phone.
 - Your client may not know the name of the app but may recognize image.
 - Have an image sheet and ask them to identify which ones they use.
- Ask to review your client's phone.




If your client is using Western Union, Xoom, or Circle Pay, they may be transferring funds overseas.

Are they taking care of family members?

Do they have assets or will have assets overseas?





WASHINGTON — The IRS reminds taxpayers that there is a virtual currency question at the top of Form 1040, Form 1040-SR and Form 1040-NR. It asks: "At any time during 2021, did you receive, sell, exchange, or otherwise dispose of any financial interest in any virtual currency?"

All taxpayers filing Form 1040, Form 1040-SR or Form 1040-NR must check one box answering either "Yes" or "No" to the virtual currency question. The question must be answered by all taxpayers, not just taxpayers who engaged in a transaction involving virtual currency in 2021.

When taxpayers can check "No"

Taxpayers who merely owned virtual currency at any time in 2021 can check the "No" box when they have not engaged in any transactions involving virtual currency during the year, or their activities were limited to:

Holding virtual currency in their own wallet or account.
Transferring virtual currency between their own wallets or accounts.
Purchasing virtual currency using real currency, including purchases using real currency electronic platforms such as PayPal and Venmo.
Engaging in a combination of holding, transferring, or purchasing virtual currency as described above.

When taxpayers must check "Yes"

The list below covers the most common transactions in virtual currency that require checking the "Yes" box:

The receipt of virtual currency as payment for goods or services provided;
The receipt or transfer of virtual currency for free (without providing any consideration) that does not qualify as a bona fide gift;
The receipt of new virtual currency as a result of mining and staking activities;
The receipt of virtual currency as a result of a hard fork;
An exchange of virtual currency for property, goods, or services;
An exchange/trade of virtual currency for another virtual currency;
A sale of virtual currency; and
Any other disposition of a financial interest in virtual currency.

If a taxpayer disposed of any virtual currency that was held as a capital asset through a sale, exchange or transfer, they must check "Yes" and use Form 8949 to figure their capital gain or loss and report it on Schedule D (Form 1040).

If a taxpayer received any virtual currency as compensation for services or disposed of any virtual currency that they held for sale to customers in a trade or business, they must report the income as they would report other income of the same type (for example, W-2 wages on Form 1040, 1040-SR, or 1040-NR, line 1, or inventory or services from Schedule C on Schedule 1).

For more information, see page 17 of the 2021 Form 1040 InstructionsPDF and visit Virtual Currencies for general information on virtual currency and other related resources.

Is cryptocurrency untraceable and anonymous?

Not exactly but it is not easy either.

In 2016 Ilya Lichtenstein and Heather Morgan hacked Bitfinex. It took the DOJ until February 2022 to race and recover \$3.6 billion in bitcoin.

Technology continues to change and advance in the tracing of cryptocurrency.

Cryptocurrency is recorded in a Blockchain which is a public digital wallet.

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Cryptocurrency is treated like property by the IRS.

This means it is taxed as a Capital Gain or Loss.

But if one has more than \$20,000 proceeds and 200 transactions in a crypto exchange, you will get a Form 1099-K indicating proceeds for each month.

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Form 1099-K, Payment Card and Third-Party Network Transactions, is an IRS information return used to report certain payment transactions to improve voluntary tax compliance. You should receive Form 1099-K by January 31st if, in the prior calendar year, you received payments:

- From payment card transactions (e.g., debit, credit, or stored-value cards), and/or
- In settlement of third-party payment network transactions above the minimum reporting thresholds as follows:
 - For returns for calendar years prior to 2022:
 - Gross payments that exceed \$20,000, AND
 - More than 200 such transactions
 - For returns for calendar years after 2021:
 - Gross payments that exceed \$600, AND
 - Any number of transactions



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Form **1040** Department of the Treasury—Internal Revenue Service (99) **2021** U.S. Individual Income Tax Return OMB No. 1545-0074 IRS Use Only—Do not write or staple in this space.

Filing Status ☐ Single ☐ Married filing jointly ☐ Married filing separately (MFS) ☐ Head of household (HOH) ☐ Qualifying widow(er) (QW)
 Check only one box. If you checked the MFS box, enter the name of your spouse. If you checked the HOH or QW box, enter the child's name if the qualifying person is a child but not your dependent ▶

Your first name and middle initial	Last name	Your social security number
If joint return, spouse's first name and middle initial	Last name	Spouse's social security number
Home address (number and street). If you have a P.O. box, see instructions.		Apt. no.
City, town, or post office. If you have a foreign address, also complete spaces below.		State
Foreign country name		Foreign province/state/county
ZIP code		Foreign postal code

Presidential Election Campaign
 Check here if you, or your spouse if filing jointly, want \$3 to go to this fund. Checking a box below will not change your tax or refund.
☐ You ☐ Spouse

At any time during 2021, did you receive, sell, exchange, or otherwise dispose of any financial interest in any virtual currency? ☐ Yes ☐ No

Standard Deduction **Someone can claim:** ☐ You as a dependent ☐ Your spouse as a dependent
☐ Spouse itemizes on a separate return or you were a dual-status alien

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1099-K ☐ VOID ☐ CORRECTED

FILER'S name, street address, city or town, state or province, country, ZIP or foreign postal code, and telephone no.

FILER'S TIN

PAYEE'S TIN

OMB No. 1545-2205
Form **1099-K**
(Rev. January 2022)

Payment Card and Third Party Network Transactions

1a Gross amount of payment card/third party network transactions
\$

1b Card Not Present transactions
\$

2 Merchant category code

3 Number of payment transactions

4 Federal income tax withheld
\$

5a January
\$

5b February
\$

5c March
\$

5d April
\$

5e May
\$

5f June
\$

5g July
\$

5h August
\$

5i September
\$

5j October
\$

5k November
\$

5l December
\$

6 State
\$

7 State identification no.
\$

8 State income tax withheld
\$

Check to indicate if FILER is a (an):
Payment settlement entity (PSE) ☐
Electronic Payment Facilitator (EPF) ☐
Other third party ☐

Check to indicate transactions reported are:
Payment card ☐
Third party network ☐

PAYEE'S name

Street address (including apt. no.)

City or town, state or province, country, and ZIP or foreign postal code

PSE'S name and telephone number

Account number (see instructions)

2nd TIN not ☐

Form 1099-K (Rev. 1-2022) Cat. No. 54118B www.irs.gov/Form1099K Department of the Treasury - Internal Revenue Service

Do Not Cut or Separate Forms on This Page — Do Not Cut or Separate Forms on This Page

Copy A
For Internal Revenue Service Center
File with Form 1096.
For Privacy Act and Paperwork Reduction Act Notice, see the current General Instructions for Certain Information Returns.

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1099-B ☐ VOID ☐ CORRECTED

PAYEE'S name, street address, city or town, state or province, country, ZIP or foreign postal code, and telephone no.

Applicable checkbox on Form 994-B

OMB No. 1545-0015
2022
Form **1099-B**

Proceeds From Broker and Barter Exchange Transactions

1a Description of property (Example: 100 sh. XYZ Co.)

1b Date acquired

1c Date sold or disposed

1d Proceeds
\$

1e Cost or other basis
\$

1f Adjusted market discount
\$

1g Wash sale loss disallowed
\$

2 Short-term gain or loss ☐
Long-term gain or loss ☐
Ordinary ☐

3 Check if proceeds from:
Collectibles ☐
GIF ☐
Check if noncovered security ☐

4 Federal income tax withheld
\$

5 Reported to IRS:
Gross proceeds ☐
Net proceeds ☐

6 Profit or (loss) realized in 2022 on closed contracts
\$

7 Check if loss is not allowed based on amount in 1b ☐

8 Unrealized profit or (loss) on open contracts—12/31/2021
\$

9 Unrealized profit or (loss) on open contracts—12/31/2022
\$

10 Unrealized profit or (loss) on open contracts—12/31/2022
\$

11 Aggregate profit or (loss) on contracts
\$

12 Check if basis reported to IRS ☐

13 Bartering
\$

PAYEE'S TIN

RECIPIENT'S TIN

RECIPIENT'S name

Street address (including apt. no.)

City or town, state or province, country, and ZIP or foreign postal code

Account number (see instructions)

2nd TIN not ☐

CUSIP number

FATCA filing requirement ☐

14 State name

15 State identification no.

16 State tax withheld
\$

Form 1099-B Cat. No. 14411V www.irs.gov/Form1099B Department of the Treasury - Internal Revenue Service

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Coinbase Bankruptcy Trustee Guide

<https://help.coinbase.com/en/coinbase/other-topics/other/bankruptcy-trustee-guide>



Thank you!
Rachel Lynn Foley



ANALYTICAL REVIEW OF REVERSAL & AFFIRMANCE RATES BETWEEN BAPS & DISTRICT COURTS

JACKLYN BRANBY

THE “LAWYER FOLKLORE”

You are more likely to get reversed by the BAP
and affirmed by the District Court.

HOW DOES THIS EXIST?

Appeals automatically go to the BAP unless a party elects to have the appeal heard by the district court.

There is an alleged “strategy” of where to appeal.

RESEARCH FRAMEWORK

Appeals from 1999 to June 2022 = 5,538 appeals total

District Court

- Published and unpublished opinions for 3 District Courts from each Circuit – 2 large and 1 small.

BAP

- Published and unpublished opinions for the 1st, 6th, and 9th Circuits.
- Published opinions for the 8th and 10th Circuits.

SO, IS IT TRUE?

Are you more likely to get reversed by the BAP
and affirmed by the District Court?

1ST CIRCUIT – DISTRICT COURT

Reversed/Vacated: 14.53%

Affirmed: 61.49%

Denied/Dismissed: 17.91%

Sample size: 296

1ST CIRCUIT – BAP PUBLISHED

Reversed/Vacated: 25.27%

Affirmed: 54.30%

Denied/Dismissed: 6.45%

Sample size: 372

1ST CIRCUIT – BAP PUBLISHED + UNPUBLISHED

Reversed/Vacated: 25.27%

Affirmed: 54.30%

Denied/Dismissed: 6.45%

Sample size: 372

Reversed/Vacated: 30.93%

Affirmed: 54.64%

Denied/Dismissed: 9.28%

Sample size: 97

1ST CIRCUIT – BAP COMBINED

Reversed/Vacated: 26.44%

Affirmed: 54.37%

Denied/Dismissed: 7.04%

Sample size: 469

1ST CIRCUIT – COMPARISON

BAP

Reversed/Vacated: 26.44%

Affirmed: 54.37%

Denied/Dismissed: 7.04%

Sample size: 469

District Court

Reversed/Vacated: 14.53%

Affirmed: 61.49%

Denied/Dismissed: 17.91%

Sample size: 296

6TH CIRCUIT – DISTRICT COURT

Reversed/Vacated: 18.71%

Affirmed: 56.99%

Denied/Dismissed: 21.94%

Sample size: 465

6TH CIRCUIT – BAP PUBLISHED

Reversed/Vacated: 28.11%

Affirmed: 53.51%

Denied/Dismissed: 8.65%

Sample size: 185

6TH CIRCUIT – BAP PUBLISHED + UNPUBLISHED

Reversed/Vacated: 28.11%

Reversed/Vacated: 9.66%

Affirmed: 53.51%

Affirmed: 75.17%

Denied/Dismissed: 8.65%

Denied/Dismissed: 6.90%

Sample size: 185

Sample size: 145

6TH CIRCUIT – BAP COMBINED

Reversed/Vacated: 20.00%

Affirmed: 63.03%

Denied/Dismissed: 7.88%

Sample size: 330

6TH CIRCUIT – COMPARISON

BAP

Reversed/Vacated: 20.00%

Affirmed: 63.03%

Denied/Dismissed: 7.88%

Sample size: 330

District Court

Reversed/Vacated: 18.71%

Affirmed: 56.99%

Denied/Dismissed: 21.94%

Sample size: 465

8TH CIRCUIT – DISTRICT COURT

Reversed/Vacated: 11.41%

Affirmed: 57.61%

Denied/Dismissed: 23.37%

Sample size: 184

8TH CIRCUIT – BAP PUBLISHED

Reversed/Vacated: 21.26%

Affirmed: 67.15%

Denied/Dismissed: 6.04%

Sample size: 414

8TH CIRCUIT – COMPARISON

BAP

Reversed/Vacated: 21.26%

Affirmed: 67.15%

Denied/Dismissed: 6.04%

Sample size: 414

District Court

Reversed/Vacated: 11.41%

Affirmed: 57.61%

Denied/Dismissed: 23.37%

Sample size: 184

10TH CIRCUIT – DISTRICT COURT

Reversed/Vacated: 19.94%

Affirmed: 57.23%

Denied/Dismissed: 16.08%

Sample size: 311

10TH CIRCUIT – BAP PUBLISHED

Reversed/Vacated: 23.84%

Affirmed: 63.25%

Denied/Dismissed: 3.31%

Sample size: 302

10TH CIRCUIT – COMPARISON

BAP

Reversed/Vacated: 23.84%

Affirmed: 63.25%

Denied/Dismissed: 3.31%

Sample size: 302

District Court

Reversed/Vacated: 19.94%

Affirmed: 57.23%

Denied/Dismissed: 16.08%

Sample size: 311

9TH CIRCUIT – DISTRICT COURT

Reversed/Vacated: 16.89%

Affirmed: 57.00%

Denied/Dismissed: 18.60%

Sample size: 586

9TH CIRCUIT – BAP PUBLISHED

Reversed/Vacated: 35.90%

Affirmed: 56.67%

Denied/Dismissed: 1.03%

Sample size: 390

Note: Data is from 1/1/2005-6/1/2022

9TH CIRCUIT – BAP PUBLISHED + UNPUBLISHED

Reversed/Vacated: 35.90% Reversed/Vacated: 15.41%

Affirmed: 56.67% Affirmed: 69.35%

Denied/Dismissed: 1.03% Denied/Dismissed: 5.08%

Sample size: 390

Sample size: 1,791

9TH CIRCUIT – BAP COMBINED

Reversed/Vacated: 19.07%

Affirmed: 67.08%

Denied/Dismissed: 4.36%

Sample size: 2,181

9TH CIRCUIT – COMPARISON

BAP

Reversed/Vacated: 19.07%

Affirmed: 67.08%

Denied/Dismissed: 4.36%

Sample size: 2,181

District Court

Reversed/Vacated: 16.89%

Affirmed: 57.00%

Denied/Dismissed: 18.60%

Sample size: 586

SO, IS IT TRUE?

Are you more likely to get reversed by the BAP
and affirmed by the District Court?

THE LAWYER ANSWER

Well, it depends.

CONCLUSION

6th Circuit Reverse Rates

- BAP: 20.00%
- District Court: 18.71%

9th Circuit Reverse Rates

- BAP: 19.07%
- District Court: 16.89%

10th Circuit Reverse Rates

- BAP: 23.84%
- District Court: 19.94%

CONCLUSION

1st Circuit Reverse Rates

- BAP: 26.44%
- District Court: 14.53%

8th Circuit Reverse Rates

- BAP: 21.26%
- District Court: 11.41%

THE END



Chapter 12 Eligibility Requirements For "Family Farmers"

For an individual to be eligible for relief under Chapter 12 they must be a "family farmer"

- What is a "family farmer?"
 - A family farmer is an individual or individual and spouse engaged in a farming operation whose aggregate debts do not exceed \$1,500,000 and not less than 80 percent of whose aggregate noncontingent, liquidated debts ..., on the date the case is filed, arise out of a farming operation ..., and such individual or such individual and spouse receive from such farming operation more than 50 percent of such individual's or such individual and spouse's gross income for the taxable year preceding the taxable year in which the case concerning such individual or such individual and spouse was filed. *In re Watford*, 898 F.2d 1525, 1527 (11th Cir. 1990).

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Statutory Definition of the Word “Engaged” What does this look like for “Family Farmers?”

There are two elements to consider when determining if a debtor is “engaged in a farming operation”

1. Temporal Element: the debtor must be engaged in farming operation at the time of filing
2. Substantive Element: whether the debtor’s activities on that date constitute as “farming operations”
 - The term “farming operation” includes farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state. 11 U.S.C.A. § 101 (West).
 - You will often see that the determination of whether debtors were “engaged in” a farming operation on the petition date and whether a particular activity constitutes a “farming operation” are determined on a case-by-case basis where the court considers the totality of the circumstances

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In re McNeal (1988)

Can individuals who provide and sell a specific service to other farmers be “engaged in commercial and business activity?”

- The court said no, their reasoning follows:
 - McNeal provided farmers a chicken coop cleaning service and then sold the collected manure to other farmers. He was not selling the by-product of his own farm but was purchasing and selling the products of other farms. His enterprise was analytically identical to an operation that purchased corn from a corn farmer and sold it to a hog farmer for feed. The mere purchase and sale of farm by-products is not necessarily a “farming operation.” *In re McNeal*, 848 F.2d 170, 172 (11th Cir. 1988).
 - They reasoned that his cleaning of the chicken houses and selling of manure did not relate to the debtor’s own farming operation but to the farming operation of others

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In re Mongeau (2021)

Can a Debtor who ceased farming prepetition still be eligible for Chapter 12 relief?

- The court said yes, their reasoning follows:
 - “Debtor has not been looking at all farming operations at the time of filing. Debtors were “engaged”—they are very involved in their extended family’s farms, Debtors’ daughter has cattle that the family runs with other cattle owned by extended family, and Debtors help work those cattle. Debtors partially own cattle equipment that they have worked post petition to make usable in a future livestock operation. To be engaged in a farming operation, a debtor need not “only use assets belonging to them.” *In re Mongeau*, 633 B.R. 387, 394–95 (Bankr. D. Kan. 2021).
 - “The question is whether handling the business of farming is part of being a farmer. The answer is: of course it is. Thus, when the Court looks to see if a debtor is engaged in a farming operation, it is looking at the totality of circumstances for the debtor’s eligibility, and this business side should not be overlooked.” *Id.* at 395
 - “The Court readily concludes Debtors intend to continue farming in the future and the liquidation of their LLC was part of a shift to a smaller scale farm endeavor.” *Id.* at 396
 - “Debtors do own some farm assets. Debtors have a pickup they use to physically assist in their family’s farm operations. At the time of filing Debtors still had possession of the Deere Flex King Blade Plow.” *Id.*

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In re Comeau (2021)

Can farming operations done through a Debtor’s LLC be considered for determination of whether the Debtor’s was engaged in farming operations?

- The court said yes, their reasoning follows:
 - “Debtor fully disclosed the existence of the LLCs through which he operates the majority of his agricultural enterprise. Debtor testified credibly and thoroughly about how those LLCs operate, how he runs the business of his farming operations [such as, production of pigs and cattle, planting and tillage of wheat and grass], and the agricultural holdings of those LLCs. Debtor is deeply involved in the entities; he is the sole member/manager and the ones at issue herein carry his name. The Court does not solely rely on the fact of the LLCs’ active farm operations to conclude that Debtor is engaged in farm operations, but after reviewing the facts of this case, the Court views those as an additional factor to reach the conclusion that Debtor is engaged in a farming operation as required by the definition of family farmer given in.” *In re Comeau*, 632 B.R. 707, 716 (Bankr. D. Kan. 2021).

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Chapter 11 Subchapter V Eligibility Requirements

The four eligibility requirements for Subchapter V are as follows:

1. The Debtor must meet the definition of a "person";
2. The Debtor must be "engaged in commercial or business activities";
3. The Debtor cannot have aggregate debt exceeding \$7,500,000 as of the date of the petition; and
4. At least 50% of the Debtor's debts arose from its commercial or business activities of the Debtor

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Statutory Definition of the Word "Engaged"

What does this look like for Small
Businesses?

- The plain meaning of "engaged in" means to be actively and currently involved. In § 1182(1)(A) of the Bankruptcy Code, "engaged in" is written not in the past or future but in the present tense
- What constitutes as a "commercial or business activity?"
 - "The term "commercial or business activities" is not expressly defined by the Bankruptcy Code so many courts have interpreted the term broadly by stating that: "The Court decides from review of the text, and applying ordinary or plain meaning, that the term "commercial or business activities" means any private sector actions related to buying, selling, financing, or using goods, property, or services, undertaken for the purpose of earning income (including by establishing, managing, or operating an incorporated or unincorporated entity to do so)." *In re Ikalowich*, 629 B.R. 261, 276 (Bankr. D. Colo. 2021)

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In re RS Air, LLC (2022)

Can a non-operational business be “engaged in commercial or business activities?”

- The court said yes, their reasoning follows:
 - “The bankruptcy court found that RS Air was engaged in commercial or business activities on the petition date by litigating with NetJets, paying its aircraft registry fees, remaining in good standing as a Delaware LLC, and filing its tax returns and paying taxes. In addition, RS Air intends to resume fractional jet ownership and flight operations with a different partner once able. We conclude that the activities identified by the bankruptcy court are “commercial or business activities” within the meaning of § 1182(1)(A). And the bankruptcy court correctly found that RS Air was “engaged in” these activities on the petition date.” *In re RS Air, LLC*, 638 B.R. 403, 411 (B.A.P. 9th Cir. 2022).

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In re Thurmon (2020)

Can individuals who have ceased business operations, sold assets several months before filing, and are now retired be involved in activities that would allow them to be considered as “engaged in commercial or business activities?”

- The court said no, their reasoning follows:
 - “Aside from the fact that the Thurmon’s aggregated debt did not exceed \$7,500,000; the Thurmon’s were not as a matter of fact or law “engaged in commercial or business activities” on the day they filed bankruptcy because they had in fact sold the business with no intent to return to it and were otherwise not active or involved in any commercial or business activities.” *In re Thurmon*, 625 B.R. 417, 423 (Bankr. W.D. Mo. 2020).



Thank you!

Faculty

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Nicholas J. Zluticky is a partner with Stinson LLP in Kansas City, Mo., in the firm's Bankruptcy and Creditors' Rights Division, where he represents lenders in all aspects of debtor/creditor relationships.

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