



AMERICAN
BANKRUPTCY
INSTITUTE

2020 Rocky Mountain Bankruptcy Conference

Vote Yourself a Farm: Agriculture Bankruptcy in Chapters 7, 11 and 12

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Presentation Outline

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The presentation will provide an overview of the outlook for major agricultural commodities (corn, wheat, soybeans, livestock, and hay). Briefly address the trade issues/tariffs currently in place and impact on agricultural producers.

Weather conditions and outlook, debt levels, technological advances, interest rates are all variables impacting today's agriculture.

In a Chapter 11 or 12 bankruptcy where a farm/ranch management specialist is utilized in the development of the reorganization plan, there are a number of points that should be addressed with the farm/ranch operator and the family. After having been involved in numerous Chapter 11's and 12's since 1986 I would offer 6 or 7 suggestions to ensure the success of the reorganization.

**2020 ROCKY MOUNTAIN BANKRUPTCY CONFERENCE
AGRICULTURAL EDUCATIONAL CHECKLIST AND POINTERS**

The process of representing an agricultural bankruptcy debtor in either a Chapter 11 or a Chapter 12 reorganization is challenging. The following steps should almost always be taken:

A. GET TO KNOW THE DEBTOR

1. Ask the debtor (or the principal of the debtor) what is the history of its operation, (herein after “farm”) including:

- a. Was the farm homesteaded by a grandfather or other family member;
- b. What farm crops or animals does the debtor have and what if any other crops rotations he tried;
- c. What equipment does the farm have and what does it need and how that need is being meet now;
- d. What is the labor situation with the farming operation; and
- e. What, if anything, is wrong with the farming operations.

2. Ask the debtor what outside help the farm has ongoing relationships with including:

- a. A co-op of growers in the area and the farmers involvement in it;
- b. Veterinarian;
- c. Accountant or Computer professional; and
- d. Any relationship with Agricultural Colleges.

3. What is the cause of the financial troubles of the farm?

- a. Crop failure or disease of the farm animals;
- b. Break down of relationship with secured creditors;
- c. Problems with suppliers or other unsecured creditors;

- d. Problems with leased property or leasers of needed property;
 - e. Drop in crop prices and what reason for same, such as tariffs;
 - f. Internal ownership disputes of equity holders;
 - g. Other causes.
4. What are the relationships between the debtor, its creditors, and its workers?
- a. Are the secured creditors seeking to foreclose on collateral and is the collateral needed;
 - b. Have unsecured suppliers put the debtor on COD or refusing to sell needed supplies;
 - c. What kind of labor does the debtor utilizes and does the debtor have labor relationship problems;
 - d. Has a co-op terminated the relationship with the debtor by reason of defaults on payments?
5. Schedule an inspection of the debtor's farming operation to learn the following:
- a. Find out how clean the grease rags are;
 - b. How well the cattle are fed;
 - c. The flow and nature of the operation;
 - d. What kind of records does the debtor keep and how are they maintained;
 - e. Have the debtor drive you around the farm explaining the history the land.
6. Research on the internet UCC Filings and the Secretary of State's office all information about the debtor's corporate status and all information about the debtor's industry including the following:
- a. Secretary of State's Status;

- b. UCC Filings;
- c. Local Agricultural College web sites;
- d. National trends in the farming industry;
- e. Industry information on the Internet;
- f. Any experts the debtor has employed such as Accountants or Veterinarian;
- g. Check for co-operatives that the debtor may join in its industry, i.e. turkey

co-op in area of farm.

B. KNOW THE CREDITORS

- 1. Review all secured debt and cross-check said debt with the UCC filings.
- 2. Review all secured creditor documents and any default notices that may exist for timing issues.
- 3. Review the unsecured creditors contacts including reviewing the terms of any invoices.
- 4. Know the executory contracts of the debtor including any buying groups that buy the farm's product and check if there are alternative buyers.
- 5. Research all litigation for status and effect on reorganization efforts.

C. KNOW THE INDUSTRY

- 1. Contact either Colorado State University or Utah State University and see which expert they have on the particular agricultural business that your debtor is in.
- 2. See if that University can assign you a graduate student to study trends or guide you on trends in that industry.
- 3. Contact any industry organization for trends and effect of national and international markets to see what impact that will have on plan payments and operations,
- 4. Check for association publications for that industry and review them.

D. ORGANIZE THE INFORMATION NEEDED FOR A DISCLOSURE STATEMENT EVEN IN CHAPTER 12 OR IN SMALL BUSINESS CHAPTER 11'S UNDER THE SMALL BUSINESS REORGANIZATION ACT OF 2019.

1. Draft detailed and accurate statements and schedules and train the debtor to prepare good monthly financial reports which must be filed timely.
2. Describe and articulate the history of the debtor and the history of the debtor's dealing with its creditors.
3. Supervise the preparation of cash flow proforma to meet the debt service requirement of the claims by either the debtor, the debtor's accountant or professionals you recruit from academia.
4. Organize what evidence you need to prove feasibility of the plan from day one and be willing to change what you are going to do meet the feasibility requirements.

E. PREPARE FOR ANY CASH COLLATERAL NEEDS

1. While Chapter 12 has a unique definition of adequate protection, the Judges who have heard hundreds of cash collateral hearings in all kinds of chapter 11's or 12's, look to a certain projected treatment of the secured creditors
2. Have your cash collateral evidence reviewed by an accountant if possible and evaluate what is happening to the liquidation position of the secured creditor's collateral.
3. Prepare your debtor for the cash collateral hearing, by explaining to him what happens in court and maybe take him to the courtroom to watch the Judge.
4. Don't allow the secured creditor to negotiate away from you the opportunity to get the Judge on your side at the cash collateral hearing.
5. Get the personality of your farmer out in front of the Judge at the cash collateral. It may be the key to the case going anywhere.

6. Integrate the information from your graduate student's/associations'/Universities into your cash collateral presentation including having an expert there.

F. RELATIONSHIPS WITH CHAPTER 11 SMALL BUSINESS TRUSTEE OR CHAPTER 12 TRUSTEE

1. Take your debtor to the office of the Chapter 12 Trustee or the Chapter 11 Trustee and meet with him. Use him or her as a resource to organize your disclosure information and do it early in the case.

2. Arrive at the meeting of creditors ready to educate the trustee and those creditors who come to what the history of the debtor has been and what steps the debtor is taking ongoing take to addresses financial problems of the past at the meeting of creditors.

3. Bring real financial information, not mink pelts, photographs of your Charolaise cattle or other agricultural products to the meeting of creditors.

G. RELATIONSHIPS WITH CREDITORS

1. Research on the internet or otherwise, the lending practices of your major secured creditors and see what they are doing regarding agricultural borrowers.

2. Carefully educate your debtor on the importance of his relationships with his unsecured creditors and/or suppliers and help him meet with those unsecured creditors and suppliers and maybe, more importantly, any co-op it is in so that they can be utilized at confirmation as support witnesses.

3. Communicate with counsel for your secured creditors by scheduling a meeting early in the case or in conjunction with the cash collateral hearing or the meeting of creditors trying to learn what the lenders want

H. DRAFTING THE PLAN

1. Separately classify all who can be separately classified and go through which of the separately classified secured creditors will be favorable to the plan, i.e., which small bank that the debtor has dealt with for 25 years that will support it because they have financed a tractor and they would like to get more work with it.

2. Even if you do not have the requirements of voting in a chapter 12, you need to get support of any creditors you can.

3. When drafting the plan, look first at feasibility and adjust the treatment of creditors to meet the feasibility requirements of the debtor's operation.

4. Do not be tied to the current terms of the secured claims and draft them realistically up to the point of negative amortization

5. Give your unsecured creditors equal treatment with your professionals. If your professionals need to be paid a certain amount per month, give that same amount to your unsecureds. It will help you when you are in front of a judge who thinks professionals should not be treated better than unsecured creditors.

6. If the plan includes any potential litigation for recovery of claims, organize the section on that litigation with excruciating detail including what attorney, what the nature of the claim is, what lawsuit have previously been filed, and if the attorney has taken it on a contingency,

I. WATCH YOUR DEADLINES

1. In Small Business Chapter 11's and in Chapter 12, the plan must be filed not later than 90-days after the order for relief. Also, the hearing on confirmation must be concluded not later than 90-days after the filing of a plan in Chapter 12.

2. This tight deadline works to the practitioner's advantage if he is on top of this case and properly working the case.

J. CONFIRMATION HEARING

1. Draft a stipulation with the parties objecting to conformation to all facts you can to narrow the issues for conformation.

2. Negotiate a pretrial order after reviewing discovery response of the parties for witnesses and documents you will face.

3. Bring any key members of the debtor's family who work in the agricultural operation to the hearing and prepare them to testify.

4. Bring experts to address the problem with the farming operation to show the problem have been addressed and therefore feasibility is solved.

5. Bring any key members of the debtor's family who work in the agricultural operation to the hearing and prepare them to testify

6. Utilize key experts from universities or other places on each element of confirmation, i.e. feasibility.

7. Utilize a representative of any co-op that the debtor is in as to what the industry is doing and how your client is using the best standards for that industry.

8. Remember that eligibility to be in a chapter 12 or for that matter Chapter 11 small business case is always an issue for confirmation, it is i.e., jurisdictional. Write your brief early on eligibility and address it on a legal basis, not a factual basis at conformation

Respectfully Submitted,

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Advantages and Unique Features of Chapter 12

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Now that the aggregate debt limit for family farmers under Chapter 12 has been increased to \$10,000,000, practitioners who have previously filed cases under Chapter 11 for family farmers because they did not qualify for Chapter 12 should be aware of the advantages and unique features of Chapter 12.

Advantages - Chapter 12 vs. Chapter 11

In enacting Chapter 12, Congress sought to provide family farmers with a quicker and less expensive alternative to Chapter 11 in order to enable family farmers to reorganize their debts and keep their land, while at the same time providing for fair treatment of creditors. Unlike in Chapter 11, in Chapter 12 there is:

- No creditors committee.
- No requirement for a Disclosure Statement.
- No voting.
- No Absolute Priority Rule.
- No provision for parties other than the debtor to file a Plan.
- No U.S. Trustee Fees.

In addition to the advantages set forth above, there are different standards for adequate protection in a Chapter 12 case. Section 1205 provides as follows:

11 U.S.C. §1205 – Adequate Protection

- (a) Section 361 does not apply in a case under this chapter.
- (b) In a case under this chapter, when adequate protection is required under Section 362, 363 or 364 of this title of an interest of an entity in property, such adequate protection may be provided by -
 - (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under Section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of property securing a claim or of an entity's ownership interest in property;

- (2) providing to such entity an additional or replacement lien to the extent such stay, use, sale, lease or grant results in a decrease in the value of property securing a claim or of an entity's ownership interest in property;
- (3) paying to such entity for the use of farmland the reasonable rent customary in the community where the property is located, based upon the rental value, net income, and earning capacity of the property; or
- (4) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will adequately protect the value of the property securing a claim or of such entity's ownership interest in property.

Note that Section 1205 does not contain the “indubitable equivalent” language contained in 11 U.S.C. §363(3). As a result, Section 1205 eliminates the need for a Chapter 12 debtor to pay lost opportunity costs, and adds paying reasonable market rent as another means for providing adequate protection for farmland.

Unique Features of Chapter 12

Modification of Mortgages Secured by the Debtor's Primary Residence

11 U.S.C. §1222(b)(2) provides that a plan may modify the rights of holders of secured claims, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims.

Thus, unlike in Chapter 11 cases [*See* 11 U.S.C. §1123(b)(5)], a debtor in Chapter 12 may modify a mortgage upon the debtor's primary residence even in situations where the lienholder has no other collateral.

Treatment of Tax Claims Based on the Disposition of Property Used in a Farming Operation

It is not uncommon for family farmers to sell assets that have been fully depreciated either prior to the commencement of the case or in connection with a confirmed Plan. Such sales often result in capital gains tax which would ordinarily be subject to priority under 11 U.S.C. §507.

In 2017, Congress enacted 11 U.S.C. §1232 which provides, in part, as follows:

- (a) Any unsecured claim of a governmental unit against the Debtor or the estate which arises before the filing of the petition, or that arises after the filing of the petition and before the debtor's discharge under section 1228, as a result of the sale, transfer, exchange, or other of any property used in the debtor's farming operation -
 - (1) shall be treated as an unsecured claim arising before the date on which the petition was filed;
 - (2) shall not be entitled to priority under section 507;
 - (3) shall be provided for under a plan; and
 - (4) shall be discharged in accordance with section 1228.
- (b) For purposes of applying sections 1225(a)(4), 1228(b)(2), and 1229(b)(1) to a claim described in subsection (a) of this section, the amount that would be paid on such claim if the estate of the debtor were liquidated in a case under Chapter 7 of this title shall be the amount that would be paid by the estate in a chapter 7 case if the claim were an unsecured claim arising before the date on which the petition was filed and were not entitled to priority under section 507.

The procedure for the filing of a claim described in Section 1232(a) is set forth in Section 1232(d), which provides as follows:

- (d)(1) A governmental unit may file a proof of claim for a claim described in subsection (a) that arises after the date on which the petition is filed.
- (2) If a debtor files a tax return after the filing of the petition for a period in which a claim described in subsection (a) arises, and the claim relates to the tax return, the debtor shall serve notice of the claim on the governmental unit charged with the responsibility for the collection of the tax at the address and in the manner designated in section 505(b)(1). Notice under this

paragraph shall state that the debtor has filed a petition under this chapter, state the name and location of the court in which the case under this chapter is pending, state the amount of the claim, and include a copy of the filed tax return and documentation supporting the calculation of the claim.

- (3) If notice of a claim has been served on the governmental unit in accordance with paragraph (2), the governmental unit may file a proof of claim not later than 180 days after the date on which such notice was served. If the governmental unit has not filed a timely proof of the claim, the debtor or trustee may file [a] proof of claim that is consistent with the notice served under paragraph (2). If a proof of claim is filed by the debtor or trustee under this paragraph, the governmental unit may not amend the proof of claim.
- (4) A claim filed under this subsection shall be determined and shall be allowed under subsection (a), (b), or (c) of section 502, or disallowed under subsection (d) or (e) of section 502, in the same manner as if the claim had arisen immediately before the date of the filing of the petition.