FLAG

FARMERS' LEGAL ACTION GROUP, INCORPORATED

November 2010

Tools for Dairy Farmers in Tough Economic Times

Inside

I. Introduction

The prices dairy farmers receive for their milk tend to go through cycles of highs and lows. During the current recession, dairy farmers have suffered from the combination of low prices for their milk and high prices for inputs such as feed and fuel. In some areas, adverse weather has added to the challenges. Organic dairy farmers suffered from a softening in demand for organic milk at the same time supply was increasing.

Yet there is hope for dairy farmers in tough economic times. Learning about possible options is an important first step for dairy farmers who are struggling to run the farming operation, make scheduled payments on debts, or meet basic needs. There may be tools to help you achieve a long-term solution to the problem and achieve a positive cash flow for the farming operation.

This article was written for educational purposes. References, including citations to the laws and regulations discussed, are included at the end for further reading. This article discusses some relevant laws in Minnesota. The laws in your state may be different. This article cannot substitute for an experienced lawyer who is current on the latest changes in federal laws and regulations as well as the laws in your own state. For legal advice regarding your particular situation, consult an attorney in your area.

II. Economic Emergency Payments and Disaster Assistance

Congress has created programs to assist dairy farmers during periods of economic emergency. In addition, dairy farmers who are experiencing financial distress because of a natural disaster may be eligible for assistance payments under certain federal disaster programs.

A. Economic Emergency Payments

There are three types of economic emergency payments for dairy farmers authorized at this time at the federal level. The programs are administered by the Farm Service Agency (FSA) of the United States Department of Agriculture (USDA).

1. Milk Income Loss Contract (MILC)

The Milk Income Loss Contract (MILC) Program provides payments to eligible dairy farmers during periods of low domestic milk prices and high feed

This publication was supported by the Beginning Farmer and Rancher Development Program of the National Institute of Food and Agriculture, USDA, Grant #2009-49400-05898. Additional funding for this publication was provided by the WedgeShare Program of the Wedge Community Co-op, the Bush Foundation, the Yackel Foundation, and the Lawson Valentine Foundation.

costs. The payment rate for MILC is based on the amount by which the monthly Class I milk price in Boston falls below $16.94, multiplied by a feed-ration adjustment calculated by FSA. The 2008 Farm Bill reauthorized the MILC program through September 30, 2012. Dairy farmers may enter into a MILC contract at any time up until the end of the program.

2. *Dairy Economic Loss Assistance Payment Program (DELAP)*

The Dairy Economic Loss Assistance Payment Program (DELAP) provides payments to dairy farmers who produced and marketed milk at some time from February through July 2009, a period when milk prices were far below the cost of production. As authorized by the 2002 Farm Bill, the 2010 Agriculture Appropriations Act provided funds for DELAP. In general, DELAP benefits are based upon milk production data already reported by farmers under the MILC program.

3. *Dairy Indemnity Payment Program (DIPP)*

The Dairy Indemnity Payment Program (DIPP) provides that payments are made to dairy farmers when a public regulatory agency directs them to remove their raw milk from the commercial market because it has been contaminated by pesticides, nuclear radiation or fallout, or toxic substances and chemical residues other than pesticides. The 2008 Farm Bill extended authority for DIPP through 2012. To be eligible for DIPP for losses occurring between October 1, 2009, and September 30, 2010, farmers must apply for the program by December 31, 2010. For losses occurring between October 1, 2010, and September 30, 2011, farmers must apply for DIPP by December 31, 2011.

B. Disaster Assistance

Farmers affected by natural disaster may be eligible for assistance under various federal disaster programs. In many cases, farmers must have obtained crop insurance or other crop loss coverage before the disaster struck in order to be eligible for assistance. However, farmers who fall into one of three "historically under-served" categories established by USDA—farmers with low income and low gross sales, called "limited resource" farmers; farmers who are members of racial or ethnic minorities, called "socially disadvantaged" farmers; and those who have been farming for 10 years or less, called "beginning" farmers—may request a waiver of this requirement for some programs.

In general, crop insurance must be obtained from private crop insurance providers, while most other disaster assistance programs are administered by USDA's Farm Service Agency. Farmers affected by natural disaster may also be eligible for FSA's low-interest Emergency loans.

1. *Federal Crop Insurance*

Crop insurance provides compensation for losses to crops due to natural disasters. Whether payment is triggered and the amount a farmer will receive for a loss are based on the coverage level selected by the farmer. Crop insurance has fixed purchase dates for each crop in each state. The farmer must purchase coverage before the loss occurs.

Crop insurance may be a useful tool for dairy farmers who raise their own feed crops and/or cash crops. A local insurance provider should be able to help you estimate insurance costs, likelihood of having a covered loss, and likely payment under different coverage options.

2. *Non-Insured Crop Disaster Assistance Program*

The Noninsured Crop Disaster Assistance Program (NAP) provides crop loss coverage for crops that are not eligible for insurance. Unlike crop insurance, farmers are not able to select a coverage level under NAP for these uninsurable crops. NAP only provides a level of protection equal to catastrophic risk (CAT) insurance coverage. As with crop insurance, farmers must obtain coverage for a crop by an established application date, before the loss occurs.

NAP is available for grain and forage crops for which insurance coverage is not available in the county. NAP coverage is not available for livestock or livestock products.

3. *Supplemental Revenue Assistance Payment Program (SURE)*

The Supplemental Revenue Assistance Payment Program (SURE) provides cash payments to eligible farmers who have incurred crop production losses or crop quality losses, or both, to crops covered under (1) a crop insurance policy, or (2) NAP. This includes feed crops and forage. Farmers who meet USDA's definitions of "socially disadvantaged," "limited resource," or "beginning" farmers and ranchers may request a waiver of the requirement that the crop must have been covered by insurance or NAP to be eligible for SURE.

A farmer's SURE payment will be 60% of the difference between the revenue amount guaranteed under the program, calculated by FSA, and the farmer's total farm revenue for all crop acreage in all counties. This program is administered by FSA.

4. *Livestock Indemnity Program (LIP)*

The Livestock Indemnity Program (LIP) provides cash payments to eligible farmers who have incurred livestock death losses in excess of normal mortality due to adverse weather. This program is administered by FSA.

5. *Livestock Forage Disaster Program (LFP)*

The Livestock Forage Disaster Program (LFP) provides cash payments to eligible producers who suffer grazing losses for eligible livestock because of drought (or fire on federal grazing lands). LFP benefits are based upon the severity and length of the drought. Producers must have obtained crop insurance or NAP coverage, if available, for all pasture or grazing land for which LFP benefits are being requested, unless the producer qualifies for a waiver. This program is administered by FSA.

6. *Emergency Assistance for Livestock, Honey Bees, and Farm-Raised Fish Program (ELAP)*

The Emergency Assistance for Livestock, Honey Bees, and Farm-Raised Fish Program (ELAP) is intended to provide assistance for a variety of losses that are caused by natural disaster but not covered by other disaster assistance programs. To be eligible for ELAP, a loss must have occurred on or after January 1, 2008, and before October 11, 2011.

A farmer may seek ELAP benefits for:

- Loss of purchased forage or feed that was intended for use as feed for the farmer's eligible livestock.
- Loss of mechanically harvested forage or feed that was stored and intended for use as feed for the farmer's eligible livestock.
- Additional costs incurred to provide or

transport feed to eligible livestock due to eligible adverse weather or an eligible loss condition.

- Cost of purchasing feed, above normal quantities, required to maintain eligible livestock during eligible adverse weather or an eligible loss condition, until additional feed becomes available.
- Grazing losses on eligible grazing lands caused by a loss condition not eligible under LFP.
- Livestock death loss caused by a loss condition not eligible under LIP.

This program is administered by FSA.

7. Pasture, Rangeland, and Forage Crop Insurance

The Pasture, Rangeland, Forage Insurance Program (PRF) is a federal crop insurance program that provides coverage for losses to grazed and hayed forage crops on pastures and rangeland due to adverse weather conditions. PRF coverage is based upon average forage production for the selected area. Contact your crop insurance provider to find out whether it is offered in your state or county.

8. Adjusted Gross Revenue-Lite Program (AGR-Lite)

The Adjusted Gross Revenue-Lite (AGR-Lite) insurance program is a federal crop insurance program designed to be a whole farm insurance plan. It provides protection for multiple crop and livestock enterprises in one policy. Milk, dairy cows, forage crops, feed crops, and cash crops may all be insured under one AGR-Lite policy. AGR-Lite is designed to protect against low farm revenues due to unavoidable natural disasters or changes in the market. A farmer's revenue guarantee under an AGR-Lite policy is based on a five-year average of income and expenses taken from the farmer's income tax returns and the coverage level selected by the farmer. You may want to contact your crop insurance provider to learn more about AGR-Lite and whether it is available in your state or county.

9. Livestock Gross Margin for Dairy

Livestock Gross Margin for Dairy (LGM-Dairy) insurance is a federal crop insurance program designed to insure against economic risk rather than losses from natural disaster. It provides coverage over a specified period against a decrease in the farmer's gross margin, that is, the difference between the market price for milk and eligible feed expenses. You may want to contact your crop insurance provider to learn whether LGM is available for dairy cows in your state or county.

III. Access to Credit

One major challenge for dairy farmers during periods of high input costs and low milk prices is gaining access to credit. This section briefly reviews a range of potential sources of credit for farmers.

A. Input Suppliers and Service Providers

Some forms of agricultural credit do not involve a formal loan application. A provider of agricultural inputs—such as seed, feed, fertilizer, or fuel—or services—such as veterinary care or custom harvesting—may supply these inputs based on an agreement by the farmer to pay in the future. In some cases, the input supplier may be willing to rely upon a lien provided under state law (known as a statutory lien) for assurance that payment will be made. In other cases, the input supplier may require that the farmer agree to give the supplier a security interest.

Suppliers providing bigger ticket items, such as livestock or equipment, in exchange for future payment typically require a security agreement giving the creditor a priority claim on the livestock or equipment if the farmer fails to pay.

B. Private Lenders

Private commercial lenders may be a source of credit for dairy farmers. Although some banks have reduced or eliminated their agricultural lending in recent years, other banks continue to view farm lending as a key part of services. Some private lenders participate in the guaranteed loan program offered by USDA's Farm Service Agency, discussed below.

As credit availability from banks has tightened, some farmers have sought financing from other types of private lenders and less traditional credit sources. While it is always important for farmers to read and be sure to understand all of the documentation for any loan arrangement, this is particularly true for new and unfamiliar lenders. You should pay particular attention to interest charges and fees provided for and the exact terms of any security agreement.

C. Farm Credit System

The Farm Credit System is a government-sponsored enterprise that was created to be a source of credit for agriculture and rural communities across the country. Although state and regional Farm Credit Services are governed by a federal charter, they are privately owned institutions. FCS institutions are widespread farm lenders and are typically quite experienced with the FSA guaranteed loan program, discussed below.

Each regional association of the Farm Credit System is required to have written policies to establish a program to provide credit and services to farmers and ranchers who qualify as young (35 or younger), beginning (less than 10 years in operation), or small (less than $250,000 in production annually).

D. Farm Service Agency Direct Loans

USDA's Farm Service Agency (FSA) is a possible source of credit for farmers whose loan requests have been turned down by other lenders. FSA makes direct loans, in which it is the lender, for otherwise eligible farmers who are unable to obtain credit from commercial sources.

1. Operating Loans

In general, an Operating loan (OL) from FSA may be used to pay for annual farm operating expenses, including seed, fertilizer, farm supplies, repairs, cash rent, and family living expenses. FSA Operating loans may also be used to buy livestock and equipment. In some cases, FSA Operating loans may be used to refinance existing farm-related debt.

2. Farm Ownership Loans

In general, FSA Farm Ownership loans (FO) may be used to purchase or make a down payment on a farm, to build or make improvements to farm dwellings or service buildings, or to promote soil and water conservation.

E. Farm Service Agency Guaranteed Loans

In addition to its direct loan program, FSA also offers a guaranteed loan program, in which private entities are the lenders and FSA guarantees payment in the event of a default by the farmer. A guarantee under this program can often be enough additional protection for a lender to allow it to make a loan to a farmer it might otherwise deny.

In addition to the benefit of the guarantee itself, new loans guaranteed by FSA might be eligible for a 4% interest subsidy under the Interest Assistance Program if the farmer cannot cash flow the proposed loan at the lender's normal interest rate.

IV. Revisiting Milk Check Assignments

Dairy farmers often assign a part of their right to receive payment for the milk they produce to their creditors. These creditors may include banks, credit unions, Farm Credit Services, FSA, input suppliers, and equipment dealers.

In times of financial distress, dairy farmers who have not previously given assignments may be asked or required to provide them to continue credit. Dairy farmers who already have made assignments may find in times of financial distress that they need to modify the arrangements or at least clarify the parties' claims. This section provides an overview of assignments and what a dairy farmer in financial distress might want to consider.

A. What Are Assignments

An assignment is an agreement that involves three parties: the farmer, the creditor, and the milk buyer. The milk buyer (often a creamery or processor) owes the farmer payment for milk. The farmer owes a debt to the creditor. Once the creamery is informed that the farmer has assigned his or her payment rights to the creditor, the creamery is legally bound to pay the creditor. If the creamery disregards a valid assignment, the creditor may be able to take legal action against the creamery.

Typically, when the creamery is made aware of a milk check assignment, it will tender payment for the milk in the form of a two-party check. That is, when the creamery issues payment for milk received from the farmer, the check will be made out to both the farmer and the creditor. In general, the creditor is paid first when the check is cashed, because the farmer has transferred his or her interest in the payment to the creditor up to the amount of the assignment. After the creditor is paid, the farmer receives the remainder of the check.

In general, a farmer is free to decline to grant an assignment. However, the creditor may then decline to extend credit, issue a loan, close a sale, or rent property to the farmer. It is important for farmers to try to negotiate for an agreement that protects their interests as much as possible. When the negotiating is done, however, farmers need to consider both the advantages and disadvantages of the terms the creditor is offering, and decide whether the risks are acceptable in light of the benefits.

B. An Assignment May Have One of Two Legal Meanings

The legal meaning of an assignment can be confusing for farmers. This is because assignments are used by creditors in two different ways.

1. *Convenient Way to Make Payment*

An assignment may be a convenient way for the farmer to make payment. Some creditors request an assignment every time they make a loan or sell equipment, livestock, or other inputs on credit.

2. ***Assurance of Repayment***

An assignment may be part of the creditor's effort to protect itself and assure repayment. Creditors might ask for a security interest in the farmer's cows and in milk produced by the cows every time they extend credit, or only when the farmer applying for credit has had difficulty making payments on time in the past. When an assignment of payment to a creditor is backed by a security interest in favor of the creditor, the creditor has an ownership interest in the farmer's property. A creditor with a security interest in property may seek to repossess the property or to obtain a court judgment for money damages if the debtor defaults on the loan. This puts the creditor in a powerful position and makes it difficult for the farmer to avoid serious consequences if the creditor does not receive payment through the agreed-upon assignment.

C. Structuring the Assignment

Creditors will generally seek to protect their own interests in assignments. It makes sense for farmers to try to negotiate with creditors to protect their own interests as well. The most common form of assignment gives a creditor the right to a certain amount of money from each milk check. Other types of arrangements, however, may have advantages for farmers. For example, granting an assignment for a certain percentage of the milk check ensures that the farmer will always receive some funds from every milk check, even if the amount of the check changes.

Other arrangements for assignments combine the use of a flat amount and a percentage. For example, a farmer might assign a certain amount of money, not to exceed a certain percentage of the milk check. Or a farmer might assign a certain percentage of a milk check, not to exceed a certain amount.

When deciding what type of arrangement to use for an assignment, it is important to keep in mind that milk prices frequently change—a flat amount or percentage that seems reasonable at the time a farmer is considering the assignment may not seem reasonable after prices have fallen or risen. Farmers may also want to think about how the assignment arrangement would be affected if the dairy operation changed in size or nature.

Get It in Writing

One of the most important steps you can take when granting an assignment is to create a written agreement that includes the important details of the assignment, including a precise description of the types of payment being assigned and the amounts. If there are questions about what was agreed to, you can refer to the signed agreement rather than having to rely on either party's memory of what was said. If you agree to change any of the terms of the assignment later, be sure to get that in writing, too.

If you ever need to prove that the assignment is valid over a later creditor's claim, you may need to produce the written agreement signed by both parties. In some states, you may need to prove that the first creditor's claim was recorded with the state or local government.

D. An Assignment May Help a Farmer to Stay Current on Payments to the Creditor, But May Lead to Problems Paying Other Expenses

One surprising problem that some dairy farmers have with assignments is that assignments keep them current on their major payments. One would not normally think of being current on one's debts as a problem. But it can be a problem if it prevents farmers who are not truly generating enough income for all of their expenses—family living and farm operating expenses in addition to payments to creditors—from taking advantage of federal and state laws designed to protect them. For example, the Farm Service Agency generally notifies farmers of debt restructuring options available under its direct loan programs only after a farmer becomes delinquent, even though farmers who are not delinquent may take advantage of some of them, too.

E. If the Farmer Has Granted the Creditor a Security Interest in Milk Produced, Taking the Milk to Another Creamery May Lead to Criminal Charges

Dairy farmers who find that they lack the funds needed to pay family living and farm operating expenses sometimes feel tempted to take matters into their own hands. They may wonder if they simply take their milk to another creamery—one that they have not told about the assignment—they can gain access to some needed cash.

The consequences for a farmer of taking his or her milk to another creamery can be serious and depend partly upon whether the assignment is paired with a security interest. As was discussed above, assignments are used in two ways. If the creditor does not claim a security interest in the milk, and the assignment was merely a convenient way for the farmer and the creditor to ensure that the creditor would be paid, there may be no direct harmful result of taking the milk to another creamery. However, taking the milk to another creamery may be a default on the terms of the loan agreement, if the assignment was required under the loan. Of course, if the farmer uses the money from the milk check for other purposes and does not make the payment to the creditor, the farmer will certainly be in default on the loan and the creditor could pursue action to recover on its debt.

If the creditor took a security interest in the milk, the consequences for a farmer of taking milk to another creamery may be quite serious. The second creamery might search the public records and discover that the creditor has a security interest in the milk. The second creamery would probably still list the creditor on the milk checks. If the second creamery did not discover the security interest and released the full milk check to the farmer, the second creamery could be drawn into a dispute with the farmer's creditor. If this happened, the farmer might have difficulty finding a creamery willing to buy his or her milk in the future. Even more importantly, if the second creamery issued a check solely to the farmer, the creditor could regard the farmer's act of taking its collateral to another creamery as conversion, or theft. The farmer could face criminal charges.

As a general rule, farmers should be aware that taking their milk to another creamery is unlikely to resolve their financial difficulties for the long-term, and may make their situation worse. Seeking a release of income, requesting loan servicing from FSA or restructuring from a private creditor, or filing bankruptcy are all more likely to help farmers find a long-term resolution for financial difficulties.

F. Changing the Assignment

When dairy farmers run into financial difficulties, they often wonder if they should contact their creamery to change the assignment. It is important to remember that no creamery wants to get caught in the middle between a farmer and the farmer's creditor. The creamery will be concerned with meeting its own legal obligations. The creamery may fear that if it were to change the way it issues a farmer's milk check without the creditor's approval, the creditor could accuse the creamery of converting property in which the creditor had an interest. Farmers should contact their creditors to discuss changing the assignment before they approach their creamery.

In general, an assignment of a milk check is valid until it is revoked. It is generally a good idea to approach the creditor to make alternative arrangements before revoking an assignment. Farmers may also wish to review their loan agreements, to see whether the assignment is required as a part of the loan agreement. If an assignment is required as part of a loan agreement, any action revoking the assignment could be seen by the creditor as a default on the loan. At a minimum, it is likely that the loan agreement requires the farmer to promptly notify the creditor if the assignment is revoked.

Any time a farmer reaches a new agreement with his or her creditor, the farmer should put it in writing. Then the farmer can take the written agreement to the creamery, and all of the parties can be confident that the proper procedure has been followed.

G. Can Milk Checks Be Garnished?

Dairy farmers should be aware that even if they do not give a creditor a milk check assignment, the creditor may be able to claim a portion of the milk check proceeds in certain circumstances. Some states allow payments for milk or milk products to be garnished or levied upon to pay the farmer's debts. Garnishment and levy are different from assignments, because the creditor must obtain a court judgment, rather than the farmer's consent, before the earnings may be taken. Even in states that allow milk checks to be garnished, state law may limit the amount subject to garnishment, or create exemptions from garnishment in certain cases. If your creditor is garnishing your milk check, or if you believe your creditor may attempt to garnish your milk check, you should consult an attorney licensed in your state to find out your rights regarding garnishment.

V. Loan Restructuring and Release of Income

Farmers in financial distress may be able to arrange a release of income or to restructure their loans. Federal regulations govern these procedures for direct loans from FSA. Farmers with loans from private lenders (whether or not they are guaranteed by FSA) may be able to negotiate for restructuring or release of income.

A. Release of Income May Help Farmers Operate the Farm and Pay for Basic Family Needs

A "release of income" occurs when the creditor releases its claim on a portion of a milk check or other payment, and the farmer receives the money. Release of income is important because a farmer who has no funds to pay living and operating expenses may be "starved off" the land, but a farmer who has some funds to meet immediate needs is in a better position to negotiate a long-term solution.

Farmers who are direct loan borrowers with FSA have the right to a release of income to pay for essential family living or farm operating expenses. (Note that this applies only to income from the sale of "normal" security, such as milk, calves, cull cows, or cash crops; it would not apply to income from the sale of "basic" security, such as the foundation herd, necessary equipment, or real estate.) In general, a milk check assignment to FSA should leave the farmer with enough money to operate the farm and care for the family. If income falls or expenses increase and a dairy farmer needs to reduce a milk check assignment to FSA in order to pay for essential expenses, FSA generally is required to approve the needed reduction so long as the loan has not been accelerated. Changes should be noted on the farmer's Form FSA-2040 ("Agreement for the Use of Proceeds/ Release of Chattel Security"). This form was previously known as Form 1962-1.

Essential family living and farm operating expenses are those that are basic, crucial, and indispensable to the farming operation and the farm family. FSA regulations include examples of the types of expenses that will normally be considered essential family living and farm operating expenses. The list includes things like food; clothing and personal care; health and medical expenses, including medical insurance; house repair and sanitation; machinery repair and replacement; rent on equipment, land, and buildings; animal feed; veterinary bills; fuel; insurance; and taxes. Farmers may want to look at their own family budget and farming operation and make a detailed list of expenses that they consider essential before they meet with FSA to request a release of income.

No federal law requires private creditors to release income to farmers. But some state laws may protect the rights of farmers to a portion of their income. Even if a farmer cannot force a private creditor to release income from a milk check to allow him or her to pay living and operating expenses, it may be possible to convince a private creditor to grant a release. The farmer may be able to persuade the creditor that a short-term reduction in payment would be in the creditor's best interests if the release of income would better enable the farmer to fully repay the debt.

B. Loan Restructuring with the Farm Service Agency

If a farmer becomes delinquent on a direct FSA loan, FSA is required to send the farmer a notice of the availability of primary loan servicing once the farmer becomes 90 days past due. The farmer will have 60 days to return an application for loan servicing. Loan servicing may enable the farmer to restructure debt so that he or she can continue to make payments, operate the farm, and meet basic family needs.

Farmers need not wait until they are delinquent on an FSA debt to apply for most types of loan restructuring. FSA direct loan borrowers who are "financially distressed" may request and receive all types of loan servicing, except a writedown of the debt. Farmers are considered to be "financially distressed" if they will not be able to make payments as planned for the current year, or if they will not be able to come up with a feasible plan to make the payments for the next year. Farmers who have not yet missed a payment, but who need a release of income to pay family living and farm operating expenses, are often "financially distressed."

Detailed regulations govern the loan restructuring, or primary loan servicing programs, administered by FSA. Types of primary loan servicing include loan consolidation, rescheduling, reamortization, interest rate reduction, deferral of interest and/

or principal, conservation easements in exchange for debt reduction, and writedown. All types of loan servicing are not available in all circumstances.

When FSA restructures a loan, the farmer and FSA should agree to a new Farm and Home Plan (or Farm Business Plan), a new Form FSA-2040 ("Agreement for the Use of Proceeds / Release of Chattel Security"), and a new milk check assignment, if any. In cases where a farmer is ineligible for primary loan servicing and the loan must be liquidated, FSA may offer the farmer debt settlement or a chance to enter the homestead protection program.

Minnesota's Farmer-Lender Mediation Act: Protection for Financially Distressed Farmers

Under Minnesota's Farmer-Lender Mediation Act, before creditors can take certain agricultural property to collect on a debt, the creditor generally must give the farmer the option to try resolving the problem through mediation. Because the creditor is required to offer mediation to the farmer to resolve the situation, this is called mandatory mediation. During the mandatory farmer-lender mediation process, creditors must release funds from the sale of farm products to be used for the farmer's necessary living and farm operating expenses.

C. Loan Restructuring with a Private Creditor

Any farmer who is unable to meet living and operating expenses under a current payment arrangement with a private creditor may contact the creditor to discuss restructuring the debt. During any such negotiation, farmers should keep in mind that creditors want to be assured of being paid. In general, creditors are most likely to respond favorably if there is a short-term problem specific to one farm or one region. For example, if a farmer has experienced a natural disaster or had illness in the herd, but the farmer has a plan to restore the operation's profitability, the creditor is more likely to be willing to work with the farmer than if he or she is struggling due to nationwide low prices and does not have a plan to address the shortfall.

Farmers who reside in a state with an agricultural mediation program may find that working with a trained, neutral mediator helps them and their creditors to find creative ways to solve problems together. In Minnesota, the law provides for a mandatory mediation process when a creditor seeks to collect on certain agricultural debts. Laws in other states may be different.

D. Loan Restructuring with an FSA Guaranteed Loan

FSA regulations allow lenders to consider a range of loan restructuring options on a guaranteed loan, including consolidation, rescheduling, reamortization, capitalization of accrued interest, deferral of principal and/or interest, writedown, and Interest Assistance. A guaranteed lender may also allow another creditor to take higher lien priority in order to secure new operating financing or restructure existing debt. This is called subordination. Guaranteed lenders may also approve a "transfer and assumption," in which all of the security property and payment obligations associated with a guaranteed loan are taken on by a new borrower, often a family member who is better able to secure new operating credit.

A restructuring plan may be submitted even if the borrower is not delinquent on the guaranteed loan.

Although FSA does not specifically require lenders to restructure distressed guaranteed loans, the agency's program guide states that lenders are "expected to work with the borrower so that the loan can be brought current and the borrower can continue the farming or ranching operation." FSA's expectations differ somewhat, depending on what type of guaranteed lender is involved. Standard (SEL) and Certified (CLP) guaranteed lenders are required to meet with the borrower in a specified timeframe after a default on the loan to identify a course of action. FSA must provide assistance with developing solutions if asked by either the lender or the borrower to participate in the meeting. On the other hand, a Preferred (PLP) lender is required only to satisfy the servicing requirements set out in its agreement with FSA.

VI. Bankruptcy

Sometimes, farmers are not able to reach an agreement with their creditors about how to address financial shortfalls. This can often be the case when a farmer remains current on major secured debts as a result of a milk check assignment, but is unable to meet basic family living and farm operating expenses. Farmers in these circumstances may conclude that filing bankruptcy shows the most promise of allowing them to restore their farming operation to economic health.

Chapter 12 is the part of the bankruptcy code specifically designed to allow family farmers to reorganize their debts and remain in operation. In general, a Chapter 12 bankruptcy puts a hold on most creditor collection actions to allow the farmer to propose a reorganization plan. Although the plan must meet certain requirements to be approved, it provides several protections intended to allow debtors to make a "fresh start." If you are interested in exploring whether a reorganization bankruptcy might work for you, contact an attorney experienced with Chapter 12 for individual guidance about your situation.

For farmers who are unable to meet all of the requirements to qualify for Chapter 12, Chapter 7 liquidation bankruptcy might be worth considering. Although designed, as the name says, primarily for cases where the debtor will liquidate most assets to pay secured creditors, some dairy farmers have been able to remain in operation after completing a Chapter 7. Again, it is important to speak with an experienced bankruptcy attorney to determine what can work for your particular circumstances.

Even if you never file a bankruptcy petition, knowing what relief is available to you under the bankruptcy code might help you to negotiate a repayment or restructuring plan with a creditor. If a farmer can show the creditor that both the creditor and the farmer will be better off under a negotiated solution than under bankruptcy, the farmer's negotiating position will be stronger.

VII. Changes to the Farming Operation

Making changes to the farming operation may be part of a plan to restore a dairy farm to a positive cash flow.

A. Changes in Ownership or Structure of the Business

In some cases, changing the ownership or structure of the farming operation may improve credit access, reduce expenses, or otherwise improve the farm's financial situation. For example, changes to the structure of a farm business may help ease passing the farm from one generation to the next. The farm business structure may also affect the farmer's tax obligations, and/or provide the farmer with protection from personal liability for injuries or other harm resulting from the farm operations. Current debts and obligations will always need to be provided for through any change in farm ownership or business structure.

There is a cost to changing business or ownership structure, however, since it is important to have individualized legal advice about the effect of choosing one form or another. And it is critical to be sure that all ownership documents are prepared properly. One other issue to address is whether there is any limit on the types of business entity that may own farmland in your state, as there is in Minnesota.

B. Changes in Farming Practices

Farmers faced with a long stretch of farm income shortfalls sometimes consider changes in their farming practices, for example to reduce expenses or shift to a higher-value commodity or marketing method. For many of these changes, there may be cost-share assistance available from USDA to help complete the transition. For example, the Environmental Quality Incentives Program (EQIP) and Conservation Stewardship Program (CSP), administered by the Natural Resources Conservation Service (NRCS) can provide cost-share assistance for a wide range of projects to conserve, protect, improve, and enhance water, soil, air, and related resources. To name just a few examples, cost-share under these programs could be available for activities related to nutrient management, manure management, forage and haying practices, transition to organic production, and transition to grazing.

Depending on the changes being considered, there may be other assistance available from USDA or even state agriculture or natural resource agencies.

VIII. Issues for Organic Dairy Farmers

In addition to facing issues common to all dairy farmers, organic dairy farmers face some unique issues.

A. Organic Certification

Organic dairy farmers must maintain their organic certification. The federal government provides cost-share assistance to help farmers with the costs of organic certification. In most states, the certification cost-share assistance is administered by the state department of agriculture.

The National Organic Program recently passed regulations setting forth requirements related to access to pasture for dairy cows. Organic dairy farmers must keep detailed records to demonstrate that they comply with all requirements.

B. Contract Negotiations

For years, many organic farmers reported that having a stable pay price was one of the most important advantages of entering into a contract to sell organic milk. To some extent, this has changed during the recent recession. Many organic dairy processors informed their producers that they would no longer purchase all of the farmers' milk at the pay price for organic milk. Some processors instituted quotas in order to limit the amount of milk they would purchase from farmers at the organic pay price.

Many organic farmers had contracts in which the processor had committed to purchase all of their organic milk at the organic pay price. However, because the farmers tended to want to be able to renew the contract after its term was over, the processors had a great deal of bargaining power to obtain the farmers' agreement to changes before the contract term was over. Leaders among organic dairy producers and processors continue to discuss how to manage the supply of organic milk in order to maintain organic milk prices at current levels and provide the highest, most consistent return on investment to both processors and producers.

IX. Reform in the Dairy Industry

The dairy industry is highly concentrated, with a small number of processors selling most of the fluid milk purchased across the country. USDA and the U.S. Department of Justice held a workshop in Madison, Wisconsin, in June 2010 to explore concentration in the dairy industry and to determine whether antitrust laws are being adequately enforced in the dairy industry. Unfortunately, it is impossible to predict when and how the federal government might act to challenge concentration in the dairy industry and increase competition, or how such actions might increase options for individual dairy farmers.

X. Conclusion

Learning about your options is an important first step for dairy farmers in tough economic times. There may be tools to help farmers achieve long-term solutions to restore the farming operation to financial success.

If you'd like to learn more about . . .

Milk Income Loss Contract (MILC) Program, see FSA's program fact sheet available at www.fsa.usda.gov/Internet/FSA_File/milc2008.pdf. MILC program regulations are at 7 C.F.R. Part 1430, Subpart B.

Dairy Indemnity Payment Program (DIPP), see FSA's program fact sheet available at www.fsa.usda.gov/Internet/FSA_File/milc2008.pdf. DIPP program regulations are at 7 C.F.R. Part 760, Subpart A.

Dairy Economic Loss Assistance Payment Program (DELAP), see FSA's program fact sheet available at www.fsa.usda.gov/Internet/FSA_File/delap09.pdf. DELAP program regulations are at 7 C.F.R. Part 760, Subpart N.

Disaster programs generally, see FLAG's Disaster Assistance web page at www.flaginc.org/topics/disaster/.

Crop insurance, see Chapter 3 of FLAG's *Farmers' Guide to Disaster Assistance* available at www.flaginc.org/topics/disaster/. And explore the Risk Management Agency website at www.rma.usda.gov. You can access crop policies, program handbooks, as well as fact sheets, question-and-answer materials, and more general crop insurance information.

Non-insured Crop Disaster Assistance Program (NAP), see Chapter 4 of FLAG's *Farmers' Guide to Disaster Assistance* available at www.flaginc.org/topics/disaster/. FSA's program fact sheet is available at www.fsa.usda.gov/Internet/FSA_File/nap08.pdf. NAP program regulations are at 7 C.F.R. Part 1437.

Supplemental Revenue Assistance Payments (SURE) Program, see FSA's program fact sheet available at www.fsa.usda.gov/Internet/FSA_File/sure09.pdf. SURE program regulations are at 7 C.F.R. Part 760, Subpart G.

Livestock Indemnity Program (LIP), see www.flaginc.org/topics/pubs/arts/LIP.pdf. FSA's program fact sheet is available at www.fsa.usda.gov/Internet/FSA_File/lip09.pdf. LIP program regulations are at 7 C.F.R. Part 760, Subpart E.

Livestock Forage Disaster Program (LFP), see www.flaginc.org/topics/pubs/arts/LivestockForageDisasterProg.pdf. FSA's program fact sheet is available at www.fsa.usda.gov/Internet/FSA_File/lfp09.pdf. LFP program regulations are at 7 C.F.R. Part 760, Subpart D.

Emergency Assistance for Livestock, Honeybees, and Farm-Raised Fish Program (ELAP), see www.flaginc.org/topics/pubs/arts/ELAP2008.pdf. FSA's program fact sheet is available at www.fsa.usda.gov/Internet/FSA_File/elap_live10.pdf. ELAP program regulations are at 7 C.F.R. Part 760, Subpart C.

Pasture, Rangeland, Forage Insurance Program (PRF), see www.flaginc.org/topics/pubs/arts/PstrRngldFrg.pdf. The Risk Management Agency's PRF web page is at www.rma.usda.gov/policies/pasturerangeforage/.

Adjusted Gross Revenue-Lite Insurance Program (AGR-Lite), see www.flaginc.org/topics/pubs/arts/AGR-Lite.pdf. The Risk Management Agency's AGR-Lite web page is at www.rma.usda.gov/policies/agr-lite.html.

Livestock Gross Margin for Dairy Insurance Program (LGM-Dairy), see the Risk Management Agency's livestock insurance web page at www.rma.usda.gov/livestock/. On October 21, 2010, RMA announced "significant improvements" to LGM-Dairy; see www.rma.usda.gov/news/2010/10/lgmnewsrelease.html.

Direct loan making by the Farm Service Agency, see FSA's program fact sheet at www.fsa.usda.gov/Internet/FSA_File/loans10.pdf. Program regulations are at 7 C.F.R. Part 764.

Restructuring, or primary loan servicing, of direct loans offered by the Farm Service Agency, see the program regulations at 7 C.F.R. Parts 765 and 766.

Release of income by the Farm Service Agency for living and operating expenses, see 7 C.F.R. § 765.303(b).

Guaranteed loan making by the Farm Service Agency, and restructuring of guaranteed loans, see FSA's program information sheet at www.fsa.usda.gov/Internet/FSA_File/guaranteed_farm_loans.pdf. Program regulations are at 7 C.F.R. Part 762.

Minnesota Farmer-Lender Mediation, see Chapter 7 of FLAG's *Farmers' Guide to Minnesota Lending Law*, available at www.fsa.usda.gov/Internet/FSA_File/guaranteed_farm_loans.pdf. The statutory provisions are at Minn. Stat. §§ 583.20 to 583.32.

Bankruptcy, see Chapter 8 of FLAG's *Farmers' Guide to Minnesota Lending Law*, available at www.flaginc.org/topics/pubs/mnlend/FGMLL2003_g.pdf. The statutory provisions for Chapter 12 bankruptcy are at 11 U.S.C. §§ 1201 – 1231. The statutory provisions for Chapter 7 bankruptcy are at 11 U.S.C. §§ 701 – 727.

Environmental Quality Incentives Program (EQIP), see www.flaginc.org/topics/pubs/arts/FGtoEQIP.pdf. The Natural Resource Conservation Service's EQIP web page is at www.nrcs.usda.gov/programs/eqip/. EQIP program regulations are at 7 C.F.R. Part 1466.

Conservation Stewardship Program (CSP), see the Natural Resource Conservation Service's CSP web page at www.nrcs.usda.gov/programs/new_csp/csp.html. CSP program regulations are at 7 C.F.R. Part 1470.

USDA-defined categories of "socially disadvantaged," "limited resource," and "beginning" farmers and ranchers, see the Natural Resource Conservation Service's web site at www.nrcs.usda.gov/programs/SLB_Farmer/. For the disaster programs created by the 2008 Farm Bill, the regulatory definitions of these categories are at 7 C.F.R. § 760.107.

For further information:

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