

Chapter 10

Bankruptcy

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Chapter 10

Bankruptcy

I. Introduction

Bankruptcy can sometimes be an effective tool for farmers facing financial problems after a natural disaster. This chapter provides a general discussion of bankruptcy issues. It is only a brief overview and should not be used to answer specific questions. Deciding whether to file bankruptcy and, if so, which type of bankruptcy to use can be very complicated. As much as any other topic discussed in this book, bankruptcy requires the advice of an expert.¹

II. The Purpose of Bankruptcy

Everyone agrees that, whenever possible, debtors should repay money owed. It is also true, however, that when a person is overwhelmed by debt and realistically cannot pay it all back, it is important to have a system that eliminates part of the debt, reorganizes the remaining debt, and gives the person caught in debt a chance to continue a productive life. As the Supreme Court of the United States has explained, one of the primary purposes of bankruptcy is to “relieve the honest debtor from the weight of oppressive indebtedness” and give debtors a “new opportunity in life . . . unhampered by the pressure and discouragement of preexisting debt.”² The right to bankruptcy is guaranteed in the law and in fact is provided by the United States Constitution.³

Debtor — The person or business that owes money. This book assumes that the farmer is the debtor.

Creditor — The person or business to which the debt is owed — for example, a bank.

III. Planning for Bankruptcy

It is to a farmer's advantage to plan business decisions well before filing bankruptcy, if possible.

Many strategies for managing assets and debts before filing a bankruptcy petition are beneficial and perfectly legal. For example, it is sometimes possible to arrange a farmer's finances and assets to maximize the exemptions available.⁴

However, some financial actions a farmer might take before filing for bankruptcy are illegal.⁵ These can both ruin the bankruptcy and subject the farmer to possible criminal penalties. Unfortunately, recognizing the difference between legal and illegal pre-bankruptcy planning strategies can be difficult.⁶ It is extremely important, therefore, for a farmer to get qualified expert advice well before filing a bankruptcy petition.

IV. Credit Counseling Now Required Before Filing Bankruptcy

Under the Bankruptcy Abuse Prevention and Consumer Protection Act passed by Congress in 2005 (the 2005 Bankruptcy Act), individuals must receive a credit counseling briefing before filing a bankruptcy petition.⁷ The briefing must be received from an "approved" credit counseling agency within 180 days before the filing of a bankruptcy petition.⁸

A. Which Debtors Must Receive Credit Counseling?

Since the 2005 Bankruptcy Act specifically requires that *individuals* receive credit counseling, it does not appear that this requirement

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applies to business entities filing for bankruptcy.⁹ Farmers who operate as a corporation or other business entity and who are considering bankruptcy should consult with a bankruptcy attorney to determine whether the credit counseling requirement applies to their particular circumstances.

B. What Is Required From Credit Counseling?

The credit counseling briefing may be provided in person, over the telephone, or through the Internet, and it typically lasts from one to two hours.¹⁰ Credit counseling agencies may charge a “reasonable” fee for their services, but the law requires them to provide the credit counseling briefing even if an individual is unable to pay.¹¹ Farmers who cannot afford a credit counseling agency’s fee should ask the agency to provide the briefing at a reduced rate or without charge.

After the briefing is completed, the credit counseling agency should provide the farmer with a certificate verifying that the farmer received credit counseling. That certificate must be attached to the farmer’s bankruptcy petition when it is filed.¹² If a debt management plan was developed through the counseling, a copy of that plan must also be filed with the bankruptcy petition.¹³

C. How to Find a Credit Counseling Agency?

In most states, credit counseling agencies are approved by the United States Trustee, an official with the U.S. Department of Justice who is responsible for enforcing bankruptcy laws.¹⁴ Lists of approved credit counselors for all states except Alabama and North Carolina can be found on the United States Trustee Program website at www.usdoj.gov/ust/eo/bapcpa/ccde/cc_approved.htm.

In Alabama and North Carolina, credit counseling agencies are approved by the state bankruptcy administrator.¹⁵ Links to lists of credit counseling agencies approved in Alabama and North Carolina can be found at www.uscourts.gov/bankruptcycourts/approvedagencies.html.

The government does not vouch for the quality of the services provided by the “approved” credit counseling agencies. Being “approved” simply means that the agency meets the standards required under the 2005 Bankruptcy Act. When choosing a credit counseling agency, farmers should carefully consider which agency will be best for them, as agency fees and services can vary widely. A bankruptcy attorney should be able to help with making this choice.

D. Limited Exceptions to the Credit Counseling Requirement

The 2005 Bankruptcy Act provides two limited exceptions to the credit counseling requirement.

1. Lack of Adequate Credit Counseling Services in the Geographic Area—As Determined by the U.S. Trustee

First, the requirement does not apply if the United States Trustee (or bankruptcy administrator in Alabama and North Carolina) has waived the requirement for the farmer’s geographic area because credit counseling agencies are not available to provide the required services.¹⁶ Many counseling agencies operate nationwide by offering telephone and Internet briefings, so it is unlikely that many areas of the country will qualify for this kind of waiver.

However, following Hurricane Katrina, the credit counseling requirement was temporarily waived for bankruptcy filers in Louisiana and the Southern District of Mississippi. The waiver for bankruptcy filers in the Southern District of Mississippi and the Middle and Western Districts of Louisiana expired on March 10, 2008.¹⁷ A waiver for bankruptcy filers in the Eastern District of Louisiana was scheduled to expire on September 30, 2008, but has been extended “until further notice.”¹⁸ More information about the waivers in these areas may be obtained from the United States Trustee Program’s Region 5 Office, which is responsible for enforcing bankruptcy laws in Louisiana and Mississippi. Region 5 can be reached at 504-589-4018, or through their website at www.usdoj.gov/ust/r05.

Once a waiver of the credit counseling requirement expires—presumably because adequate credit counseling services have become available in the area—any individuals filing for bankruptcy on or after the waiver’s expiration date will be required to receive a credit counseling briefing before filing a bankruptcy petition.

2. Debtor’s Incapacity to Complete Credit Counseling

The second exception to the credit counseling requirement is for debtors who are “unable” to complete the requirement. The 2005 Bankruptcy Act limits this group to those who are on active military duty in a combat zone and those who have an incapacity or disability that prevents them from participating in credit counseling.¹⁹

For the purpose of this exception, the 2005 Bankruptcy Act defines “incapacity” to mean those who have a mental illness or mental deficiency making them unable to realize and make rational decisions with respect to their financial responsibilities, and defines “disability” to mean those that are so physically impaired as to be unable, “after reasonable effort,” to participate in an in-person, telephone, or Internet briefing.²⁰

E. In an Emergency, Credit Counseling Might Be Immediately Obtained or Postponed Until After Filing

In some cases, a farmer may have no choice but to attempt filing a bankruptcy petition quickly, without much planning. For example, a filing may be needed to stop a threatened repossession or foreclosure, at least temporarily. Under the law in effect before October 2005, last-minute filings were sometimes used to temporarily stop threatened foreclosures and repossessions by creditors. The 2005 Bankruptcy Act’s credit briefing requirement makes last-minute filings impossible, and requires some degree of advance planning in all cases.

If a farmer is facing an emergency situation, it may be possible to find a credit counseling agency that will provide the required briefing

immediately, so that the farmer may more quickly file a bankruptcy petition.²¹ Farmers attempting to stop a repossession or foreclosure should explain their circumstances to the credit counseling agency and request that the agency immediately provide the required briefing.

If a farmer cannot arrange to have credit counseling in time to stop a threatened foreclosure or repossession, it might be possible to postpone the requirement until after the bankruptcy petition is filed. To obtain approval for a postponement from the bankruptcy court, a debtor must prove: (1) that "exigent circumstances" exist which merit a waiver of the pre-filing credit counseling requirement, and (2) that the debtor requested credit counseling services from an approved agency and could not obtain the services during the five-day period following the request. If the bankruptcy court finds the debtor's certification of these facts to be satisfactory, it can grant a 30-day postponement of the credit briefing requirement.²² If the postponement request is denied, the bankruptcy petition will most likely be dismissed.

A request for a postponement should be considered only as a last resort. A farmer cannot count on the court's approval of such a request, even when facing immediate foreclosure. Some courts have refused to grant postponements that were requested immediately preceding a foreclosure. These courts have reasoned that, where a debtor knows he or she is facing foreclosure, but waits until the last minute to attempt to obtain the required credit counseling, no "exigent" circumstances exist.²³ Therefore, in all cases, farmers should plan ahead and expect to obtain credit counseling before being able to file a bankruptcy petition.²⁴

V. Two General Types Of Bankruptcy: Liquidation and Reorganization

Two general types of bankruptcy are available to farmers and other debtors: liquidation bankruptcy and reorganization bankruptcy. The

bankruptcy code provides for several specific types of bankruptcy—commonly known as chapters. Farmers sometimes use chapters 7, 11, 12 and 13. Chapter 12 reorganization bankruptcy was specifically designed for family farmers.

A. Chapter 7 Liquidation Bankruptcy

Chapter 7 liquidation bankruptcy—sometimes called “straight” bankruptcy—is what comes to mind most often when people think of bankruptcy. In a Chapter 7 bankruptcy, the debtor’s nonexempt assets are typically sold or distributed to creditors.²⁵ (Exemptions are discussed below.) The proceeds from the liquidation sale are used to pay the debtor’s creditors. Eventually, the debtor receives a “discharge” of most of the rest of the debts. This means the debtor is no longer legally required to pay those debts. Mortgages and other security interests, however, survive even after a discharge of debt. With careful pre-bankruptcy planning, farmers who go through a Chapter 7 bankruptcy may be able to keep significant assets and might even be able to continue a farming operation.

To be eligible for a Chapter 7 bankruptcy discharge, debtors must be able to satisfy the “means test”—a new requirement added by the 2005 Bankruptcy Act.²⁶ In general terms, the means test is designed to remove debtors from the Chapter 7 process if their anticipated future income shows they have the ability to repay their debts. To that end, the means test measures debtors’ projected future income against their expenses. If the projected future income remaining after expenses are deducted exceeds a specified amount, the Chapter 7 case will generally be dismissed or converted to a reorganization bankruptcy under Chapter 11 or 13.²⁷ A limited exception to this rule exists where a debtor can show “special circumstances” that justify allowing the case to move forward under Chapter 7.²⁸ The United States Trustee Program considers “income loss, expense increase, and other adverse effects of a natural disaster to constitute “special circumstances” for purposes of the Chapter 7 means test.²⁹

B. Reorganization Bankruptcy

In a reorganization bankruptcy, the debtor proposes a plan to pay some or all of his or her debts over a specified period. The plan is then carried out under court supervision. In a successful reorganization bankruptcy, the farming operation can continue. Farmer bankruptcy reorganizations generally will be under either Chapter 12 or Chapter 11. A Chapter 13 reorganization bankruptcy is also possible.

1. Chapter 13 Wage-Earner Reorganization Bankruptcy

Chapter 13 bankruptcy—sometimes called wage-earner bankruptcy—is designed for individuals.³⁰ The debtor follows a court-approved plan to make payments on debts and agrees to commit all disposable income to repaying creditors. The plan must be the debtor's best good faith effort to repay creditors. The plan also should result in unsecured creditors receiving at least as much as if the debtor filed a Chapter 7 liquidation bankruptcy. Secured creditors should receive at least the value of their security. After the three- to five-year reorganization plan is completed, the debtor's remaining debts are discharged.

To qualify for Chapter 13 bankruptcy, the debtor must have regular income, his or her unsecured debts must be less than \$336,900, and his or her secured debts must be less than \$1,010,650.³¹ (These amounts are adjusted every three years.) Although not designed with farmers in mind, Chapter 13 can sometimes be the best bankruptcy option, especially for farmers who cannot qualify under Chapter 12.

2. Chapter 11 Reorganization Bankruptcy

Chapter 11 is a reorganization bankruptcy for businesses. The debtor follows a court-approved plan to reschedule the business's debts over time while the business continues to operate.³² Chapter 11 is the most complex and costly form of bankruptcy, and in some important ways is better suited to a large corporation

than a family farm. In general, therefore, family farmers should only use Chapter 11 when Chapter 12 is not available.

3. Chapter 12 Family Farmer Reorganization Bankruptcy

Chapter 12 is a reorganization bankruptcy designed especially for family farmers.³³ Chapter 12 was originally enacted in 1986 as a temporary provision of the Bankruptcy Code. Thereafter, Congress renewed Chapter 12 through a series of temporary extensions over the course of nearly 20 years.³⁴ In 2005, Congress made Chapter 12 permanent as part of the 2005 Bankruptcy Act.

The 2005 Bankruptcy Act also extended Chapter 12 eligibility to family fishermen who meet specific eligibility requirements³⁵ Although this book is focused on family farmers, much of the information here concerning Chapter 12 bankruptcy may also apply to family fishermen.

To qualify for a Chapter 12 bankruptcy, a farmer must be engaged in a farming operation and must have a regular annual income that is stable enough to make payments under the reorganization plan.³⁶ Further eligibility requirements for Chapter 12 bankruptcy are: (1) no more than \$3,544,525 in total debt (this amount is adjusted every three years);³⁷ (2) at least 50 percent of the debt arose out of the farming operation; and (3) more than 50 percent of the debtor's (and spouse's) income came from farming in either the tax year preceding the bankruptcy, *or* in each of the second and third tax years preceding the bankruptcy.³⁸ Different eligibility requirements apply to family fishermen.³⁹

Because of the lower debt limits and other restrictions on who may use Chapter 13 and the difficulties and expense of Chapter 11, Chapter 12 bankruptcy often provides the best alternative for farmers who can meet its eligibility requirements.⁴⁰ This is especially true given the significant leeway that Chapter 12 gives a farmer in dealing with secured creditors.⁴¹ Even farmers who do not file a bankruptcy petition have found that having a

Chapter 12 bankruptcy as a fallback helps to encourage creditor negotiations.

In general, Chapter 12 allows a farmer to reorganize if the farmer can: (1) pay secured creditors, over time, the value of their collateral plus interest; and (2) pay unsecured creditors (including secured creditors to the extent that they are undersecured) as much as they would receive if the farmer filed a Chapter 7 liquidation bankruptcy.

The farmer proposes a plan to meet these goals. The plan must be the farmer's best good faith effort to repay creditors. In addition, it must provide that the farmer will pay to the unsecured creditors all "projected disposable income."⁴² Projected disposable income includes any income that is not reasonably necessary for the farmer's reasonable operating and living expenses.⁴³ The plan must also provide for full payment, in deferred cash installments, of all "priority claims." Priority claims are specific types of obligations that receive special protection under the Bankruptcy Code.⁴⁴ The goal—which often is achievable—is to restructure the debts on farm assets and allow the farmer to keep assets and continue farming.⁴⁵

VI. Important Bankruptcy Features

Several of the important features of a bankruptcy filing are described here.

A. The Automatic Stay: Stopping Creditor Actions

Once a debtor files a bankruptcy petition, the debtor immediately gets the benefit of an "automatic stay."⁴⁶ An automatic stay temporarily stops creditors from taking a number of actions against the debtor to enforce debts. During an automatic stay, for example, a creditor is prohibited from attempting to enforce a judgment, repossess property, enforce a lien, or recover a debt. It is illegal for a creditor to violate the stay, and the stay remains in effect until the case is closed

or dismissed, a discharge is granted or denied, or the creditor gets permission from the court to act.

For many farmers, the automatic stay in bankruptcy may provide the only way to prevent a foreclosure or other creditor action.

B. Exemptions: The Minimum That Can Be Protected From Unsecured Creditors

Each state has laws exempting certain types of property from creditor actions to enforce unsecured debt. “Exempt” property is property that creditors cannot take unless it has been specifically pledged to them. Common state law exemptions include a homestead, a motor vehicle, and household goods.⁴⁷ Exemptions come into play in bankruptcies. For example, in a Chapter 7 bankruptcy, exempt assets will not be taken or sold for the benefit of unsecured creditors.

In some states, a debtor in bankruptcy can choose between state law exemptions and those set out in federal law.⁴⁸ Federal exemptions include the equity value (up to certain limits) of a homestead, a motor vehicle, certain types of pension and retirement accounts, household goods, and other property, including the implements and tools of the debtor’s trade.⁴⁹

In general, if a debtor has given a creditor a security interest in an item of property, the debtor has waived the right to claim that property as exempt from that secured creditor’s claims. However, sometimes a debtor can use bankruptcy “lien avoidance” provisions to remove a creditor’s security interests.⁵⁰

C. Discharge of Unsecured Debts

At the end of a successful bankruptcy, some unsecured debts will likely be discharged—which means that the debtor will no longer be legally required to pay them.⁵¹ Not every type of unsecured debt owed by a debtor can be discharged in bankruptcy. For example, debts for child support or alimony, most student loans, and some taxes are not

subject to discharge.⁵² These will remain the debtor's obligation even after the bankruptcy is complete.

The 2005 Bankruptcy Act requires individual bankruptcy filers under Chapters 7 and 13 to complete a personal financial management course (after filing for bankruptcy) before they may receive a discharge.⁵³ This requirement is subject to the same limited exceptions which apply to the credit counseling requirement described above: (1) waiver of the requirement for a specified geographic area, or (2) an inability to comply with the requirement because of military service, incapacity, or disability.⁵⁴

D. Voluntary Payments and Reaffirmation of Debts

After a bankruptcy, some farmers may wish to make payments on debts that were discharged in the bankruptcy. There could be any number of reasons for someone to voluntarily pay discharged debts, including a desire to keep a business relationship with a certain creditor. Voluntary payments to a creditor after the debt has been discharged are permitted.⁵⁵ Such payments, however, are never legally required.

It is a completely different matter, however, if a debtor chooses to "reaffirm" a debt. Reaffirmation is a formal agreement to pay all or part of a debt that would otherwise be discharged in the bankruptcy.⁵⁶ Reaffirmation therefore has the debtor giving up the benefits of the bankruptcy discharge and remaining legally obligated to repay dischargeable debt. This is usually done to gain some benefit from a creditor—such as a continued line-of-credit—but should only be considered in special cases after careful consultation with a bankruptcy expert. The Bankruptcy Code itself specifies a number of protections to ensure that debtors do not unknowingly enter into reaffirmation agreements.⁵⁷

E. Future Credit

A bankruptcy generally can be listed in a debtor's credit history for up to ten years.⁵⁸ It therefore can affect a debtor's future ability to get

credit. However, farmers in substantial debt and in default likely already have a poor credit rating even without a bankruptcy. In addition, some potential creditors may be more willing to grant credit once the slate is wiped clean and they do not have to compete with past creditors.

F. Income Taxes

A number of different aspects of bankruptcy and pre-bankruptcy planning efforts can affect the debtor's income taxes. The tax implications of a bankruptcy are important and often complicated. It is possible, for example, to lose much of the benefit of a bankruptcy due to taxes owed. Although Chapter 11 of this book discusses taxes briefly, it is important to get expert, individualized tax advice before filing a bankruptcy petition.

VII. Disaster-Specific Issues in Bankruptcy

This chapter is intended to give a quick overview of bankruptcy to farmers who might be considering filing for bankruptcy in the aftermath of a natural disaster. In addition to the general issues discussed above, it is important for farmers to be aware of some bankruptcy issues dealing specifically with disasters.

A. Disaster Payments in Bankruptcy

Crop insurance and disaster payments often play a role in a farm bankruptcy following a natural disaster. Typically, the farmer will want to be able to use those payments to support a reorganization plan or post-bankruptcy expenses, while the farmer's creditors will want to claim such payments as available for distribution in bankruptcy. It can be quite complicated to determine who is entitled to them. These payments can become the property of the bankruptcy estate, depending on when the farmer's right to payment takes effect.⁵⁹ They might also be claimed by a creditor that has a security interest in the farmer's crops or farm program payments.⁶⁰ If disaster payments and crop insurance proceeds are covered by a creditor's security

interest, the debtor still may be able to use them to fund a reorganization plan so long as the creditor is given additional collateral to protect the secured claim.⁶¹

B. Special Bankruptcy Guidelines for Debtors Affected by Natural Disasters

Following Hurricane Katrina in 2005, the United States Trustee Program announced special bankruptcy enforcement guidelines for debtors affected by natural disasters.⁶² These guidelines are designed to take into account the unique circumstances faced by victims of natural disasters. They appear to apply to victims of any natural disaster, not just Hurricane Katrina.

Generally, these guidelines: (1) release debtors who are victims of natural disasters from filing certain types of documents with the bankruptcy court that are normally required from bankruptcy filers, such as pay stubs and monthly income statements; (2) take the effects of a natural disaster into account in determining whether a debtor has satisfied the "means test" required under Chapter 7; (3) allow debtors to attend mandatory creditor meetings in ways other than an in-person appearance; and (4) permit debtors who have been displaced due to a natural disaster to file bankruptcy petitions in states other than the ones in which they normally reside.

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- ¹ Helpful general information about bankruptcies can be found in: National Consumer Law Center, CONSUMER BANKRUPTCY AND LAW PRACTICE (8th ed. 2006); Roger E. McEowen & Neil Harl, PRINCIPLES OF AGRICULTURAL LAW, ch. 5 (2005); and Susan A. Schneider, *An Introduction to Chapter 12 Bankruptcy: Restructuring the Family Farm* (Oct. 2005) and *Bankruptcy Reform: Changes to Chapter 12 – Adjustment of Debts for a Family Farmer* (Sept. 2005), both available from the National Agricultural Law Center’s website at www.nationalaglawcenter.org/research.
- ² *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).
- ³ U.S. Const. Art. I, § 8, cl. 4.
- ⁴ H.R. Rep. No. 95-595, at 361 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6317; S. Rep. No. 95-989, at 76 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5862 (“As under current law, the debtor will be permitted to convert nonexempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent as to creditors and permits the debtor to make full use of the exemptions to which he is entitled under the law.”). See also, National Consumer Law Center, at 77-78.
- ⁵ For example, some transfers can be regarded as fraudulent. 11 U.S.C. §§ 548, 727(a)(2)(A).
- ⁶ See, for example, *In re Curry*, 160 B.R. 813 (Bankr. D. Minn. 1993); *In re Coates*, 242 B.R. 901 (Bankr. N.D. Tex. 2000).
- ⁷ Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005) (codified in scattered sections of 11 U.S.C.).
- ⁸ 11. U.S.C. §§ 109, 111.
- ⁹ See *In re Watson*, 332 B.R. 740 (Bankr. E.D. Va. 2005) (holding that an individual who establishes a legally identifiable business entity separate from himself or herself may file bankruptcy on behalf of the business entity without having received the credit briefing). See also, *Bogedain v. Eisen*, 2006 U.S. Dist. Lexis 59926 (E.D. Mich. 2006) (holding that the credit counseling requirement applied to a family farmer who filed for bankruptcy as an individual, but stating it would not be likely to apply to family farmers filing

for bankruptcy on behalf of a business entity, such as a family farm corporation or partnership).

¹⁰ 11 U.S.C. § 109(h). See also, National Consumer Law Center, at 88.

¹¹ 11 U.S.C. § 111(c)(2)(B).

¹² 11 U.S.C. § 521(b)(1).

¹³ 11 U.S.C. § 521(b)(2).

¹⁴ See www.uscourts.gov/bankruptcycourts/administrators.html.

¹⁵ See www.uscourts.gov/bankruptcycourts/administrators.html.

¹⁶ 11 U.S.C. § 109(h).

¹⁷ See *Notice of Credit Counseling and Debtor Education Waiver Decisions, Region 5 of the United States Trustee Program*, at www.usdoj.gov/ust/r05/pdfs/OPE7CB1.pdf (last visited May 29, 2008).

¹⁸ *Changes to Waiver of Credit Counseling and Debtor Education Requirements in Areas Affected By Hurricane Katrina*, January 16, 2008, posted as an "Important Notice" on the United States Trustee Program website at <http://www.usdoj.gov/ust/eo/bapcpa/ccde/index.htm>.

¹⁹ 11 U.S.C. § 109(h)(4).

²⁰ 11 U.S.C. § 109(h)(4).

²¹ 11 U.S.C. § 109(h)(3)(A). See also, National Consumer Law, at 29-30.

²² See National Consumer Law, at 29-30. For cause, the court may order an additional 15-day extension, resulting in a total of 45 days for the debtor to obtain the credit counseling briefing. 11 U.S.C. § 109(h)(3)(B).

²³ See, for example, *In re Dixon*, 338 B.R. 383 (B.A.P. 8th Cir. 2006) (denying request to postpone briefing where debtor was given 20-day advance notice of pending foreclosure). But see, *In re Cleaver*, 333 B.R. 430 (Bankr. S.D. Ohio 2005) (holding that pending foreclosure was "exactly the sort of exigent circumstance contemplated by the statute," thus warranting approval of postponement request).

²⁴ See National Consumer Law, at 87-88 (explaining that postponements may be difficult to obtain and that some courts have held the briefing cannot be obtained on the same date the petition is filed).

²⁵ 11 U.S.C. §§ 701-727.

²⁶ 11 U.S.C. § 707(b).

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- 27 11 U.S.C. § 707(b)(2).
- 28 11 U.S.C. § 707(b)(2)(B).
- 29 U.S. Trustee Program Announces Enforcement Guidelines For Bankruptcy Debtors Affected By Natural Disasters, at www.usdoj.gov/ust/eo/public_affairs/press/docs/pr20051005.htm.
- 30 11 U.S.C. §§ 1301-1330.
- 31 11 U.S.C. § 109(e). See also 72 Fed. Reg. 7082 (2007).
- 32 11 U.S.C. §§ 1101-1146.
- 33 11 U.S.C. §§ 1201-1231.
- 34 See, for example, Pub. L. No. 108-73, 117 Stat. 891 (2003) (codified at 11 U.S.C. § 1201 note); S. 2864, 108th Cong., 2nd Sess. (2004).
- 35 11 U.S.C. § 101(19A). The 2005 Bankruptcy Act defines a family fisherman as someone "engaged in a commercial fishing operation." 11 U.S.C. § 101(19A). A commercial fishing operation is defined as "the catching or harvesting of fish, shrimp, lobsters, urchins, seaweed, shellfish, or other aquatic species or products of such species; or . . . aquaculture activities consisting of raising [any of these species or products] for market." 11 U.S.C. § 101(7A). A corporation or partnership is considered to be a "family fisherman" only if it meets specific criteria, including that more than 50 percent of the outstanding stock or equity is held by the family and the family conducts the commercial fishing operation. 11 U.S.C. § 101(19A)(B).
- 36 11 U.S.C. §§ 101(18)-(21), 109(f). The definition of a family farmer is limited for bankruptcy purposes. Farm corporations and partnerships are considered to be "family farmers" only if they meet certain specific criteria, including requirements that more than 50 percent of the stock or equity in the farm be held by one family and their relatives and that the family conduct the farming operation. 11 U.S.C. § 101(18)(B).
- 37 See 72 Fed. Reg. 7082 (2007). This amount will increase in future years with the Consumer Price Index. 11 U.S.C. § 104(b).
- 38 11 U.S.C. § 101(18).
- 39 Eligibility requirements are: (1) no more than \$1,500,000 in total debt; (2) at least 80 percent of the debt arose out of the commercial fishing operation; and (3) more than 50 percent of the debtor's (and spouse's) income came from commercial fishing in the tax year preceding the bankruptcy. 11 U.S.C.

§ 101(19A). Additionally, like farmers, to be eligible for Chapter 12 bankruptcy, family fishermen must have regular annual income sufficient to allow them to make the bankruptcy plan payments.

⁴⁰ National Consumer Law Center, at 519-520.

⁴¹ 11 U.S.C. §§ 1221, 1222, 1225(a)(5). See also, National Consumer Law Center, at 551-557.

⁴² 11 U.S.C. §§ 1222(a)(4), 1225(b).

⁴³ 11 U.S.C. § 1225(b)(2).

⁴⁴ 11 U.S.C. § 507.

⁴⁵ A 1995 study concluded that a large percentage of Chapter 12 filers manage to keep their land and continue farming, and that the financial position of Chapter 12 filers tends to improve markedly after filing. Chris Faiferlick & Neil E. Harl, *Experience Shows Chapter 12 Works*, AGRI FINANCE, October 1995, at 32.

⁴⁶ 11 U.S.C. § 362. See also, National Consumer Law Center, at 135-177.

⁴⁷ See, for example, A.C.A. § 16-66-218 (Arkansas); O.C.G.A. § 44-13-100 (Georgia); and N.D. Cent. Code, §§ 28-22-02, 28-22-03.1 (North Dakota). For a general discussion of exemptions, see National Consumer Law Center, at 185-246.

⁴⁸ 11 U.S.C. § 522(b).

⁴⁹ 11 U.S.C. § 522(b), (d); 11 U.S.C. § 541(b). In general, the fair market value is used for federal exemptions. The maximum values of several federal exemptions are automatically adjusted every three years to reflect inflation. 11 U.S.C. § 104. For property exemption values effective beginning April 1, 2007, see 72 Fed. Reg. 7082 (2007). See also, National Consumer Law Center, at 226.

⁵⁰ 11 U.S.C. § 522(f). See also, National Consumer Law Center, at 215-224. For example, secured creditors will generally be considered secured only to the extent of the fair market value of their collateral. The balance of the debt, if any, will be unsecured.

⁵¹ 11 U.S.C. § 524. See also, National Consumer Law Center, at 407-478.

⁵² 11 U.S.C. § 523(a).

⁵³ 11 U.S.C. §§ 727(a)(11), 1328(g)(1).

⁵⁴ 11 U.S.C. §§ 727(a)(11), 1328 (g)(2).

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- ⁵⁵ 11 U.S.C. § 524(f).
- ⁵⁶ 11 U.S.C. § 524(c), (d). See also, National Consumer Law Center, at 472-476.
- ⁵⁷ See 11 U.S.C. § 524(c), (d), (k). Protections include: (1) requiring, among other things, “clear and conspicuous” statements in the reaffirmation agreement allowing the debtor to rescind the agreement within 60 days after the agreement is filed with the court, or anytime before discharge, and advising the debtor that the agreement is entirely voluntary; (2) for debtors represented by counsel, requiring an affidavit from counsel that the debtor was fully advised of the consequences of the agreement and that the agreement does not pose a hardship; and (3) for debtors not represented by counsel, requiring the judge to hold a hearing to ensure that the debtor is fully advised of the consequences and voluntary nature of the agreement and that the agreement is in the debtor’s best interests.
- ⁵⁸ 15 U.S.C. § 1681c(a)(1).
- ⁵⁹ 11 U.S.C. §§ 541, 1207, 1306. See *In re Boyett*, 250 B.R. 822 (Bankr. S.D. Ga. 2000); *Drewes v. Lesmeister*, 242 B.R. 920 (Bankr. D.N.D. 1999); *Kelley v. Ring*, 169 B.R. 73 (Bankr. M.D. Ga. 1993). But see *In re Bracewell*, 434 F.3d 1234 (11th Cir. 2006); *In re Burgess*, 438 F.3d 493 (5th Cir. 2006); *In re Vote*, 276 F.3d 1024 (8th Cir. 2002) (all refusing to consider disaster payments as part of the estate where the legislation giving rise to the debtor’s right to obtain disaster relief was enacted after the bankruptcy petition was filed).
- Helpful information about how the courts have treated disaster assistance payments for bankruptcy purposes can be found in Susan A. Schneider, *Who Gets the Check: Determining When Federal Farm Program Payments Are Property of the Bankruptcy Estate*, 84 Neb. L. Rev. 469 (2005).
- ⁶⁰ See *In re FarmPro Services, Inc.*, 276 B.R. 620 (D.N.D. 2002); *Mercantile Bank v. Norville*, 248 B.R. 127 (Bankr. C.D. Ill. 2000); *Drewes v. Lesmeister*, 242 B.R. 920 (Bankr. D.N.D. 1999).
- ⁶¹ 11 U.S.C. §§ 361, 363. If the secured creditor does not agree to the use of the payments in the reorganization plan, permission must be obtained from the court. 11 U.S.C. § 363(c)(2); Fed. R. Bankr. Proc. 4001(b).
- ⁶² The enforcement guidelines can be found on the Department of Justice website at: www.usdoj.gov/ust/eo/public_affairs/press/docs/pr20051005.htm.