Farmers' Guide to Minnesota Lending Law

Third Edition, March 2019

Farmers' Legal Action Group, Inc.

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Written by Stephen Carpenter

Edited by Lindsay Kuehn

This publication was made possible with the generous support of:

Legal Services Advisory Committee

Otto Bremer Trust

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PUBLISHED BY
Farmers' Legal Action Group, Inc.
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St. Paul, Minnesota 55102-1404

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Acknowledgements

Stephen Carpenter wrote the first edition of this Guide, published in 1996. David Moeller updated and revised the Guide for its second edition in 2003. Stephen Carpenter again wrote this third edition. Lindsay Kuehn provided significant research and edited the entire Guide. Lynn Hayes provided helpful thoughts and insights. Excellent research and editing assistance came from Ellie Bastian, Taylor Gess, Jessica Irwin, Sloan Kessler, and Karen Krub.

Wendy Reid managed the production of the Guide. Her work included the copyediting, layout, and oversight of the publication process.

The team of people here, along with the funders listed on the title page, have contributed to a product that is intended to help thousands of Minnesota farmers understand their legal rights and, hopefully, despite challenging economic times, help keep their families on the land and preserve their farms.

Scott W. Carlson
Executive Director
Farmers' Legal Action Group
March 2019

Dedicated to the memory of Lou Anne Kling.

A member of FLAG's first Board of Directors,

Lou Anne was a strong farm activist,

and a tireless advocate for Minnesota farm families.

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Chapter One

Introduction

I. Credit and farming

Credit is the lifeblood of farming. Serious price, production, and weather difficulties almost always become credit problems. The stark and ongoing reality is that mortgaged farms are lost or nearly lost to foreclosure, property pledged as collateral is repossessed, judgment liens are entered—and the livelihood of family farmers is threatened.

Credit problems are almost always legal problems. In an ideal world, the law would be clear enough and the legal system fair enough that everyone would be on a more or less even footing in legal matters. Unfortunately, the law can be complicated, and even where the law is simple at its core, legal language is confusing and difficult.

Farming without a working knowledge of lending law—or the resources to buy legal assistance—can have devastating results. The aim of this Guide is to give farmers a basic outline of lending law. Because so few legal situations are exactly the same, this Guide can only offer a general outline of the law.

II. Keeping a written record of credit arrangements

The strictly business nature of agricultural credit has long been softened by informality. Informal and unwritten agreements may well still work for some people in some cases, but in general it is important to keep thorough written records of dealings with creditors. As a matter of law, many agreements must be in writing to be legally enforceable. These are discussed briefly in Chapter Two.

Even when it is not required by law, it is a good idea to keep a written record of dealings with creditors. The main problem is not unfair or sharp business practices—although that is common enough—but, instead, simple confusion and misunderstandings. Most disputes about leases, contracts, and other legal agreements are the result of the two basically honest parties having different interests and different ideas about the meaning of the agreement itself. This type of problem is much more common in an age of conservation compliance, government crop programs, and complex security agreements.

Even the most honest and trusting relationships can change through no fault of farmers or their creditors. Banks change hands or are sold out; landlords can pass away or sell the land. The list of possible problems is very long. Keeping good records of dealings with a creditor is a little like buying insurance. It is done not because farmers expect to have problems, or because they want to go to court at the drop of a hat, but because in that rare case that farmers do have serious problems with creditors, it will be extremely important to be able to prove exactly what

happened and when. One way to think about keeping good records is to imagine that they may be needed to prove to a stranger exactly what happened between the farmer and the creditor.

No one's memory is good enough to recall all of the important details. Some suggestions follow.

A. Keep copies of documents

Keep copies of all loan agreements, promissory notes, security agreements, mortgages, contracts for deed, leases, and the like, and note on them the date they were signed, sent, or received.

B. Put important contacts with creditors in writing

Farmers should document every important contact with their creditors. Letters should be written and copies kept.

C. Verify what is sent and received

In many cases, it will be important to show that documents sent were received. There are two simple ways to create proof that someone received a letter or form. First, farmers can mail letters and documents by certified mail, return receipt requested, and keep the evidence of receipt.

A second way to prove that someone received a letter is to bring two copies of the letter or form into the office in person. The person accepting the letter should be asked to write on each copy: (1) "received," (2) the date, and (3) his or her signature. Farmers should keep a signed copy for themselves.

D. Document telephone calls and conversations in writing

Farmers should keep a diary of every conversation they have with creditors. A short notation in a diary of the date and significant details of the conversation can help farmers remember dates and details.

If anything important is said in a telephone call or in a meeting with a creditor, the best strategy is to write a letter to the creditor immediately. The name of the person spoken with should be mentioned along with the date of the call or meeting and what was said. The letter should also include a statement that the understanding of the conversation described in the letter will be presumed correct if no written response is received in "x" number of days.

E. Keep E-mails

Farmers should keep copies of email exchanges they have with creditors.

III. Getting help — attorneys and advocates

While the aim of this Guide is to provide a basic understanding of farm lending issues, it is still important to talk with an experienced attorney or farm advocate about how to handle a specific problem. The law is filled with exceptions and details—and the situation of every farmer is always different—so this Guide can never be a substitute for an experienced look at a farmer's individual case.

> This Guide cannot be a substitute for an experienced attorney or advocate. Each farmer's situation is different and needs an experienced person to look at its specific details.

A. Minnesota Farm Advocates

Located throughout the state are Minnesota Farm Advocates. Advocates are experienced in assisting farmers in financial crisis. They are trained in negotiating with creditors, have a good understanding of creditors' policies, can help farmers identify legal issues, and can help farmers decide if they need to talk with an attorney. If an attorney is needed, advocates can usually refer farmers to one experienced in working with family farmers in financial difficulty. Advocates are also experienced in assisting farmers with financial records, such as cash flows and balance sheets, that are needed during negotiations with lenders and government agencies. Advocates are especially helpful in preparing farmers to participate in farmer-lender mediation. Because Minnesota Farm Advocates are supported by grants and the state legislature, their services are available at no cost.

To find an advocate, call the Farm Advocate Program at 1-800-967-2474, or see https://www.mda.state.mn.us/about/commissionersoffice/farmadvocates.aspx.

B. Attorneys

There are times when debt problems are serious enough and the stakes high enough that farmers need legal advice.[1] An experienced attorney should be able to explain how the laws affect a farmer's individual situation, give legal advice on which choices best fit the farmer's goals, draft the legal papers needed, and, if necessary, represent the farmer in court.

1. Looking for an attorney

There are several things to look for in an attorney. If the farmer does not know the attorney, it makes sense to ask for references from other farmers and friends. A few suggestions about picking an attorney follow.

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[1] STEPHEN CARPENTER and RANDI ILYSE ROTH, *Family Farmers in Poverty: A Guide to Agricultural Law for Legal Services Practitioners,* 29 CLEARING HOUSE REVIEW 1087 (Apr. 1996); CARL FLINK, *Finding a Place for Low-Income Family Farmers in the Legal Services Equation,* 35 CLEARING HOUSE REVIEW 677 (Mar.-Apr. 2002).

a. Experience in helping farmers

Because legal work in the farm area is complicated, experience is necessary. At a minimum, the attorney should be able to consult with someone with more experience. An experienced attorney should be happy to give references from other farmers.

b. Willing to sometimes say they don't know

No matter how good attorneys are, they will not know the answer to everything. Legal work in the farm area is complex. Good attorneys answer some questions by saying they do not know or will need to look it up. Be wary of someone who has a smooth answer to every possible question.

c. Trustworthiness

Trust may be the most important thing when choosing an attorney. A farmer must trust the attorney with private financial documents and must be willing to explain all of the facts to the attorney—even those which might seem embarrassing.

d. Reliability

Much of an attorney's work depends on meeting strict deadlines. Reliability is therefore extremely important.

2. Be clear about the work to be done and the cost

Private attorneys can be very expensive, and fees vary a great deal. A farmer working with an attorney needs to be sure of exactly what work the attorney will be doing and how much it will cost. While the final bill cannot always be predicted very easily, the attorney should be willing to give a good idea of what to expect.

C. Legal referrals

Brief legal advice and referrals are available to Minnesota farmers from Farmers' Legal Action Group, Inc. (FLAG) at 651-223-5400 and at http://www.flaginc.org. The Minnesota State Bar Association has a statewide referral service for people needing an attorney, at http://www.mnbar.org/member-directory/find-a-lawyer.

IV. What this Guide covers

This Guide discusses some of the most important types of credit farmers use and some of the specific problems that may arise if farmers have difficulty paying a debt. One set of terms should be defined at the beginning: the law most often describes the parties in a credit relationship as the debtor and the creditor. The debtor is the person who owes the money. In general, this Guide assumes that the debtor is a farmer. The creditor is the person to whom the debt is owed.

Debtor — The person who owes money. This Guide assumes that the farmer is the debtor.

Creditor — The person to whom the debt is owed.

An explanation of the chapters in this Guide follows.

A. Some agreements must be in writing

Many agreements can be perfectly legal and enforceable even if they are not in writing. For some types of agreements, however, the law requires that the agreement be put in writing to be enforceable. Chapter Two gives a brief summary of the law covering these agreements.

B. Real estate debt

The most common arrangements for farm real estate debt are mortgages and contracts for deed. After a default, mortgages may be foreclosed and contracts for deed may be canceled. Sometimes this requires a court action, but more often the foreclosure or cancellation may go ahead without the creditor needing to go to court. A foreclosure can also lead to a money judgment against the debtor for any amount not recovered from the foreclosed property. Along the way farmers may have statutory rights—a "right of first refusal" and "a right of redemption"— which may allow the farmer to keep part or all of the land. These topics are discussed in Chapter Three.

C. Secured credit

Much farm operating credit is provided by creditors who require farmers to provide "security" for the debts. That is, the farmer signs an agreement allowing the creditor to take some of the farmer's property if the farmer does not pay the debt. These secured debts are largely governed by Minnesota's version of the Uniform Commercial Code (UCC). Some creditors may automatically get a security interest in a farmer's property under the provisions of state law. These "statutory liens" include landlord's liens and mechanics' liens. Secured credit, operating loans, and statutory liens are discussed in Chapter Four.

D. Unsecured credit

Many creditors do not have a security interest in debtors' property. In other words, although the debtor owes the creditor money, the debtor has not given the creditor the legal right to take the debtor's property in case of a default. These creditors still have a legal remedy if the debtor defaults. An unsecured creditor may file a court action against the debtor, win a judgment against the debtor for the amount of the unpaid debt, and obtain a "judgment lien" against the debtor's property for the amount owed. Judgment liens can lead to garnishments, sheriff's levies, and other creditor actions to collect the debt. Unsecured credit is discussed in Chapter Five.

E. Leases

Farmland, equipment, and livestock are now often leased. Chapter Six discusses leases and some of the problems farmers may face using them.

F. Mediation

Farmers who have difficulty with their creditors often have the chance to use Minnesota's farmer-lender mediation program. Chapter Seven discusses mediation and how it can be helpful to farmers.

G. Bankruptcy

For some farmers in financial distress, bankruptcy may be the best option. While some bankruptcies lead to liquidation of the farming operation, others are designed to keep family farmers on the land. Chapter Eight summarizes these options.

H. Taxes

Farm taxes are complicated and are not discussed in this Guide in any detail. Chapter Nine, however, gives some basic information about the way a farmer's credit situation may affect income taxes.

I. Alternative Dispute Resolution (ADR)

All civil lawsuits filed in Minnesota district courts are subject to an Alternative Dispute Resolution (ADR) requirement. Chapter Ten summarizes how the ADR requirement may affect farmers' debtor-creditor relationships.

J. Usury

Minnesota law limits the interest that can be charged by a lender. These rules are described in Chapter Twelve.

K. Scam artists targeting farmers

Chapter Eleven briefly discusses some of the unscrupulous practices used by scam artists targeting farmers in difficult financial circumstances.

L. Glossary

A brief glossary is at the end of the Guide.

V. Current through November 30, 2018

This Guide is current through November 30, 2018.

Chapter Two

Some Agreements Must Be in Writing: The Statute of Frauds

I. Introduction

Many agreements and contracts are legal and enforceable even if they are only made orally. Leaving no written record of such agreements may bring other problems, but as a matter of law, an oral contract can be as legal as the longest and most detailed written contract.[1]

Some agreements, however, must be in writing to be enforceable. Law imposing this requirement is generally called the "statute of frauds." Minnesota's version of the statute of frauds requires that certain kinds of agreements be in writing.[2] In general, for a written agreement to serve as a binding contract, it must be signed and set out the names of the parties involved, the subject matter and terms and conditions of the contract, and the "consideration"—which means the money, service, or other thing of value being offered as payment.[3]

II. What agreements must be in writing

Several types of agreements must almost always be in writing to be legally enforceable. These agreements include the following.

A. Agreements that cannot be completed within one year must be in writing

If it is not possible for the actions required by the contract, by its own terms, to be completed within one year—by the contract's own terms—the agreement must be in writing.[4] Technically, the question is not whether the agreement was actually completed in one year, nor how long the parties thought it would take to complete, but instead whether or not completion of the contract within one year was possible.[5]

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1 See, for example, *Larson v. Archer-Daniels-Midland Co.,* 32 N.W.2d 649, 653 (Minn. 1948), which notes that "While the terms of an oral agreement are more difficult to prove, once its terms are established they are as binding as the terms of a written agreement." In addition, see *Bergstedt, Walhberg, Berquist Assoc. v. Rothchild,* 225 N.W.2d 261, 263 (Minn. 1975), in which the Minnesota Supreme Court held that no legal distinction is made in the effect of an enforceable promise as expressed in writing, orally, in the acts of the parties, or in a combination of means.

2 MINN. STAT. § 513.01.

3 MINN. STAT. §§ 336.2A-201, 513.01. In general, it is the signature of the party who is being forced to fulfill his or her obligations under the contract that must be included.

4 MINN. STAT. § 513.01(1).

5 MINN. STAT. § 513.01(1); *Bussard v. College of St. Thomas, Inc.*, 200 N.W.2d 155, 161 (Minn. 1972).

B. Agreements to transfer land must be in writing

Agreements concerning the transfer of any interest in land, no matter how limited that interest may be, must be in writing.[6] The only exception to this rule is that a real estate lease of one year or less is not required to be in writing.[7]

C. Lease of land for more than one year must be in writing

The lease of land for more than one year must be in writing.[8] Lack of a written agreement makes the contract voidable and unenforceable.[9] If a contract is "unenforceable" it means that one party cannot force the other party to abide by the contract.[10] Leases are discussed in more detail in Chapter Six.

D. Lease of goods with total payments of $1,000 or more must be in writing

An agreement to lease goods with total payments of $1,000 or more must be in writing and must identify the parties to the lease, describe the goods that are being leased as well as the length of the lease and be signed by the party who is trying to avoid fulfilling the terms of the contract. In general, to qualify as "goods," the things to be sold must be movable and may not be services.

E. Agreements to lend money must be in writing

A debtor may not sue to enforce a credit agreement unless the agreement is in writing, states the terms and conditions of the agreement, includes consideration for the payment (in the form of money, services, or other things of value), and is signed by both the debtor and creditor.[11] For example, a borrower claiming that a bank promised to advance additional funds to the borrower in the future must have the agreement in writing before the borrower can try to force the bank to actually loan the money.[12]

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6 MINN. STAT. § 513.04.

7 MINN. STAT. §§ 513.04, 513.05.

8 MINN. STAT. §§ 513.04, 513.05

9 MINN. STAT. § 513.05; *Greer v. Kooiker*, 253 N.W.2d 133, 138 n.2 (Minn. 1977).

10 A void contract, by contrast, means it is as if the contract never came into existence. *Borchardt v. Kulick*, 48 N.W.2d 318, 321 (Minn. 1951). While courts have not always been consistent in their use of the terms "void" and "voidable," the Minnesota Supreme Court has noted that "'void' within the meaning of the statute of frauds has been interpreted as voidable." *Greer v. Kooiker*, 253 N.W.2d 133, 138 n. 2 (Minn. 1977). See also *Schwinn v. Griffith*, 303 N.W.2d 258, 260 n.1 (Minn. 1981).

11 MINN. STAT. § 513.33; (2017) *Rural American Bank v. Herickhoff,* 485 N.W.2d 702, 707-08 (Minn. 1992).

12 *Moody v. Citizens State Bank*, No. C3-02-275 (Minn. Ct. App. Aug. 13, 2002) (unpublished).

F. Sale of goods for $500 or more must be in writing

An agreement to sell goods for a price of $500 or more must be in writing to be enforceable.[13] In addition, the written agreement must identify the parties to the contract, specify the quantity of goods being sold, and must be signed by the party who is being forced to fulfill his or her obligations under the agreement.[14]

In general, to qualify as "goods," the things to be sold must be movable and may not be services.[15] A written agreement is not required, however, in the following situations: if the goods were specially manufactured for the buyer, the buyer admitted that there was an agreement, the buyer accepted and paid for the goods, or the seller accepted payment for the goods.[16]

G. Most security agreements must be in writing

In general, in order for a security agreement to be enforceable against a debtor and other creditors, the agreement must be in writing. However, if the creditor has possession of the collateral, the agreement may be enforced even if it is not in writing." Security agreements must be in writing to be enforceable against the debtor and other creditors unless the creditor has possession of the collateral.[17]

H. Others

Other agreements that generally must be in writing include: (1) a promise to be responsible for another's debt or to pay a discharged or released debt[18]; and (2) any agreement that sets interest at over 6 percent annually.[19]

III. If the agreement is not in writing

In general, failure to put in writing an agreement that falls under the statute of frauds means that the contract is unenforceable.[20] Although the parties are permitted to carry out such an agreement even when there is no written contract, because the oral agreement is unenforceable, neither one could go to court to force the other party to fulfill his or her promises.[21] There are exceptions to this rule, however. If the parties acted as if the contract were valid, for example,

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13 MINN. STAT. § 336.2-201(1).

14 MINN. STAT. § 336.2-201(1).

15 MINN. STAT. § 336.2-105(1). "Goods," under this definition, include an animal's unborn young, as well as growing crops.

16 MINN. STAT. § 336.2-201(3).

17 MINN. STAT. §§ 336.9-203(b), 336.9-102(a)(73).

18 MINN. STAT. § 513.01(2), (4).

19 MINN. STAT. § 334.01. subd. 1. See Chapter Twelve for a short discussion of limits on interest rates.

20 *Thompson v. AFL-CIO Labor Temple Ass'n*, C7-01-1404, 2002 Minn. App. LEXIS 503, at *7 (Minn. Ct. App. May 7, 2002); *Worwa v. Solz Enters., Inc.*, 238 N.W.2d 628, 631 (Minn. 1976); *Dale v. Fillenworth*, 162 N.W.2d 234, 236 (Minn. 1968); *Royal Realty Co. v. Levin*, 69 N.W.2d 667, 671-72 (Minn. 1955); *Michel v. Vogelpohl*, No. A05-1263, 2006 Minn. App. Unpub. LEXIS 395, at *4-5 (Apr. 25, 2006); 44 DUNNELL MINN. DIGEST, *Statute of Frauds*, § 5.01 (5th ed. 2009).

21 *Royal Realty Co. v. Levin*, 69 N.W.2d 667, 671-72 (Minn. 1955).

and one or both parties at least partially fulfilled the contractual promises, the contract may be enforceable even if it is not written down.[22]

[22] *In re Guardianship of Huesman,* 354 N.W.2d 860, 863 (Minn. Ct. App. 1984).

Chapter Three

Mortgages and Contracts for Deed

I. Mortgages and contracts for deed — a basic introduction

Mortgages and contracts for deed are among the most important and most complicated documents that farmers sign.[1] It is important, therefore, to understand the exact terms of these agreements before signing them. This chapter contains only a general discussion of mortgages and contracts for deed and some of their important terms. Each farmer's situation and contract can be different.

Recording real estate documents

Many real estate documents used by farmers—such as mortgages and contracts for deed—are officially recorded. This means whoever is being paid—usually the lender—is responsible for filing them with the registrar of titles or the recorder of the county in which the real estate is located.

A. Mortgages

In a mortgage, the borrower is the mortgagor, and the lender is the mortgagee. The mortgagee can be an individual person, a private bank, the government, Farm Credit Services, or another financial institution.

Mortgagor — The borrower. This Guide assumes that the farmer is the borrower.

Mortgagee — The lender.

Most farm mortgages are given by a farmer borrower to a lender as collateral for a loan, usually to enable the borrower to purchase or improve land. A mortgage gives the lender a claim against real estate identified in the mortgage agreement. The lender can foreclose on the property if the borrower fails to repay the loan or otherwise violates the loan terms.

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[1] Other sources on mortgages and contracts for deed include: PHILLIP L. KUNKEL, JEFFREY A. PETERSON, and JASON THIBODEAUX, *Mortgages and Contracts for Deed,* Farm Legal Series, University of Minnesota Extension (2015), http://www.extension.umn.edu/agriculture/business/taxation/farm-legal-series/mortgages-and-contracts-for-deed/docs/mortgages-and-contracts-for-deed.pdf; and 31 DUNNELL MINN. DIGEST, *Mortgages*, § 1.06(d) (5th ed. 2009 & Supp. 2015).

Although a mortgage allows the lender to foreclose on the land if the borrower defaults, the borrower legally owns the mortgaged land.

1. There are typically two documents in a mortgage transaction

When obtaining a loan secured by a mortgage, borrowers will likely sign two documents: a promissory note and the mortgage itself. Sometimes these agreements are combined.

a. Promissory note

A promissory note is a promise to pay money. It sets the terms of the promise to the lender. This includes the amount owed, the interest rate charged, when payments are due, and so forth. A promissory note may be enforceable even if the mortgage is not, and it may remain valid even after a foreclosure.

b. Mortgage

As mentioned earlier, a mortgage is an agreement giving the lender the right to foreclose on the real estate if the borrower fails to pay the loan or otherwise breaks the terms of the loan. The mortgage gives the lender added assurance that the debt will be repaid because the lender can take property named in the mortgage and sell it to raise funds to reduce or eliminate the unpaid debt.

Mortgages are usually officially recorded, which, if done correctly, gives notice to the general public of the mortgage. Failure to properly record a mortgage can affect the lender's rights in the property in relation to the borrower's other creditors. It does not, however, affect the binding nature of the agreement between the borrower and the lender.

2. Satisfaction of mortgage

When a borrower finishes repaying the loan, he or she can ask the lender for a "satisfaction of mortgage" certificate. The satisfaction of mortgage certificate should say that the lender no longer has a legal interest in the real estate. In general, a lender must give this certificate to the borrower within ten days after it is requested.[2] The borrower should record the satisfaction of mortgage certificate with the recorder of the county where the real estate is located.[3] Until the certificate of satisfaction is filed, the mortgage may impair or affect the legal title of the land. This can hold up sales of the property or make it difficult to obtain another mortgage on the real estate. If the borrower somehow cannot get the lender to provide a certificate of satisfaction, the law provides penalties against the lender.[4] In addition, in some cases, the law permits a "certificate of release" to be filed—without the lender's express authorization—that has

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[2] MINN. STAT. § 507.41.

[3] MINN. STAT. § 507.40. If a mortgage is recorded in more than one county and a "satisfaction of mortgage" certificate can be filed in one of those counties, a certified copy of the certificate may be recorded in another county as if it were the original.

[4] MINN. STAT. § 507.41.

the same effect as a lender's certificate of satisfaction.[5]

B. Contracts for deed

In a typical contract for deed, a buyer purchases land directly from a seller with a binding contract. Often in a contract for deed, the buyer is called the vendee and the seller is called the vendor.

Vendee — The person who buys the property. This Guide assumes that the farmer is the vendee.

Vendor — The seller of the property.

The seller in a contract for deed promises to transfer title to the land after the buyer makes a certain number of payments over a set time period. While the payments are being made, the buyer does not own the land; the buyer does, however, have an "equitable interest" in the land. This means that the buyer can occupy and generate income from the land—for example, by farming it. The contract for deed should list the rights and obligations of both buyer and seller. Buyers must record the contract with the county recorder or registrar of titles in the county where the land is located within four months after the contract is signed.[6] Buyers who fail to record the contract for deed within this time period are subject to a civil penalty equal to 2 percent of the principal amount of the contract debt.[7]

Once all payments are made under a contract for deed, the seller should give the buyer a deed stating that ownership of the real estate passes from the seller to the buyer. The buyer should file the deed with the registrar of titles or the county recorder of the county in which the land is located.[8]

Contract for deed sellers sometimes pledge their interest in a contract for deed—which is the stream of payments until the contract for deed is paid in full—to another party.[9] If these rights are assigned to a third party, the buyer then sends payments under the contract to that third party, while the original seller retains title to the property until the contract is paid in full.[10] If a contract for deed seller has used the stream of payments under the contract as security for a debt, and the seller defaults on that debt, the seller's

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5 MINN. STAT. §§ 507.40 to 507.412. A certificate of release is only allowed for mortgages with an original principal amount of $1,500,000 or less, and may only be done for a borrower by a title insurer after the lender fails to file the release. MINN. STAT. § 507.401.

6 MINN. STAT. § 507.235.

7 For non-farm residential real property, a buyer is not required to record the contract for deed if the seller fails to deliver to the buyer a copy of the contract with recordable original signatures. See MINN. STAT. § 507.235, subds. 1a, 2(a). This provision does not apply to transactions that are subject to Farmer-Lender mediation under MINN. STAT. §§ 583.20-583.32, nor property subject to a family farm security loan. MINN. STAT. § 507.235, subd. 1a(b)(2). A "family farm security loan" refers to a loan under the state's Family Farm Security Program, which was repealed in 2009. MINN. STAT. § 559.201, subd. 3. MINN. STAT. § 507.235, subds. 2, 5.

8 MINN. STAT. § 507.34. This will help ensure the validity of the buyer's deed.

9 MINN. STAT. § 507.236.

10 MINN. STAT. §§ 336.9-607, 336.9-619.

creditor may take steps to formally step into the place of the seller under the contract.[11]

C. Differences between mortgages and contracts for deed

Farmers use both contracts for deed and mortgages to buy real estate. There are important differences between the two. When a commercial lender is involved, mortgages are usually used. Contracts for deed are more common when the transaction is between family members or private individuals. The important differences between the two types of agreements include the following.

1. Buyers can lose money already paid if a contract for deed is canceled

In a contract for deed, the seller keeps legal title to the property until the full contract price is paid. This means that the buyer does not really own the land until the whole contract is paid off and title changes hands. If the buyer defaults and the contract is canceled, the buyer can lose all of the money paid to the seller up to that point. This result, and possible exceptions to it, are discussed below in this chapter.

With a mortgage, the borrower gets legal title to the mortgaged property. If there is a default on a mortgage loan, the borrower will be credited for the amount already paid and the lender will only be entitled to take value from the property up to the amount of the unpaid debt.

2. Contracts for deed can allow sellers to act more quickly after default

In practice, a contract for deed can be canceled more quickly than a mortgage can be foreclosed. This is especially true if the foreclosure is by action. Foreclosures by action are explained below. This may make a contract for deed more attractive to a private seller. In addition, contract for deed purchasers do not have a right of redemption in the case of a cancellation; mortgage purchasers do have this right following a foreclosure. The right of redemption, discussed below in this chapter, can extend a defaulting borrower's right to possess and use the property.

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[11] MINN. STAT. §§ 336.9-607, 336.9-619, 507.236, subd. 3. For more detail about these arrangements, see LARRY M. WERTHEIM, REVISED ARTICLE 9 OF THE U.C.C. AND MINNESOTA CONTRACTS FOR DEED, 28 WM. MITCHELL L. REV. 1483 (2002) *available at* http://open.mitchellhamline.edu/wmlr/vol28/iss4/6. Chapter Four of this Guide discusses secured credit.

3. Income tax differences

Mortgages and contracts for deed can have different income tax consequences. Although the effect on any single person's taxes can vary greatly, for many sellers there is a tax advantage to using a contract for deed because the income from the sale is spread out over time rather than coming in one lump sum.[12]

4. Mortgages can give sellers finality

If the land purchase is financed through a mortgage, the seller is usually completely finished with the transaction when the loan is made. Later, if the borrower has problems making payments, it is the bank or other lender—not the seller—who takes action. With a contract for deed, however, the seller is the one who takes action if there is a default.

5. A contract for deed may be cheaper for the buyer

A contract for deed may be easier for the buyer to arrange financially. Because contracts for deed offer some financial advantages for the seller, interest on a contract for deed is often less than that for a mortgage. In addition, the down payment for a contract for deed is usually lower than the down payment on a mortgage.

II. Mortgages and contracts for deed — basic terms

It is important to read and understand every part of the mortgage and loan agreement, or contract for deed, before signing. Violations of the terms of a mortgage or contract for deed may bring foreclosure or cancellation. Farmers who have questions about any real estate credit transaction, including a mortgage agreement or contract for deed, should talk to a lawyer. Basic rights and responsibilities are explained in the agreement. For example, a contract for deed lists the price of the real estate, the interest rate charged on the remaining balance, and the amount and due date for each installment. Some of the most important terms in mortgages and contracts for deed are discussed below.

A. Real Property, personal property, and fixtures

There are two basic legal categories of property that are important for credit agreements: real property and personal property. The difference can be important because most mortgages and contracts for deed cover only real property. Personal property may be used as collateral for debt and may be repossessed by creditors, but the rules are different.

1. Real property vs. personal property

The difference between personal and real property unfortunately is not always clear, and lawyers can go round and round arguing the fine points of distinction between the two. In general, real property includes land and buildings. A mortgage or contract for

[12] The Internal Revenue Service (IRS) considers contracts for deed a type of "installment sale." 26 U.S.C. § 453(b). For more information, see *Farmer's Tax Guide: For Use in Preparing 2017 Returns*, IRS Publication 225, Chapter 10: Installment Sales (2016), https://www.irs.gov/pub/irs-pdf/p225.pdf.

deed covering real property, therefore, usually includes buildings on the land. Property not completely connected to the land, such as tractors, livestock, cars, and household goods, is usually personal property.

2. Fixtures

Near the dividing line between real property and personal property are "fixtures." Fixtures can be covered by a mortgage or contract for deed.[13] The question of what is or is not a fixture, and therefore whether or not the property is covered by the mortgage or contract for deed, can be complicated. In general, fixtures are something that is attached to the land. Storage bins, some silos, and milking equipment are examples of property that might be fixtures. Whether or not property is a fixture can depend on a number of factors, such as the extent to which the property was attached to the land and the intent of the person putting the fixture in place. The best way to avoid disagreements and confusion about whether a fixture is covered by a lending agreement is to describe in the mortgage or contract for deed exactly what will and will not be covered.[14]

3. Crops

Crops are personal property and therefore are usually not covered by a mortgage or contract for deed. Unless the crops are specifically included, therefore, a lender may not claim an interest in a crop based on a mortgage or contract for deed. A "rents or profits" clause in a mortgage may, however, allow the lender to claim an interest in the farmer's income from the land, including crops grown on the land. Rents or profits clauses are discussed later in this chapter.

B. Description of the property

Before signing a mortgage or contract for deed, farmers should be certain that the description of the real estate and personal property is correct. Farmers who are not sure should ask a professional—such as an appraiser, surveyor, or attorney—to review the legal description.

C. Cross-collateralization or "dragnet" clause

A lender who has made more than one loan to the same borrower may seek the right to take the property used as collateral for one loan as security on the borrower's other outstanding loans. That is, a borrower who obtains a loan to purchase real estate may be asked to include a term in the mortgage allowing the lender to foreclose on the real estate if the borrower defaults on any loan owed to the lender. This is called cross-collateralization, and a provision in a loan agreement giving this right to a lender is sometimes called a "dragnet clause."[15] Under such a clause, the collateral given in one agreement crosses over to cover all of the loans with that lender.

For example, suppose that in 2015 a farmer obtained an operating loan from First Big

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[13] 31 DUNNELL MINN. DIGEST, *Mortgages*, § 1.06(d) (5th ed. 2009 & Supp. 2015).
[14] *Minnesota Valley Breeders Ass'n v. Brandt,* 348 N.W.2d 115, 116-17 (Minn. Ct. App. 1984).
[15] *Kenneally v. Standard Elecs. Corp.*, 364 F.2d 642, 645 (8th Cir. 1966).

Bank. Then, in 2017, First Big Bank gave the farmer another loan secured by a mortgage on the farmer's real estate. The mortgage agreement for the 2017 loan says:

> This Mortgage Agreement serves as security for all existing and future indebtedness of Farmer to First Big Bank, including but not limited to the loan advanced in 2015.

As a result of this sentence, the mortgage will be security for the 2017 loan and the "existing . . . indebtedness" of the "loan advanced in 2015." So, if the farmer defaults on the 2017 loan, First Big Bank will likely be able to take the farmer's real estate to pay what is owed on the 2017 loan even though in 2017 the farmer did not give the bank a mortgage on the real estate for that loan.

The enforceability of cross-collateralization clauses is somewhat unsettled, and whether any particular cross-collateralization clause is legal can be confusing.[16] If a creditor is enforcing a cross-collateralization agreement against a farmer, the farmer should speak with an attorney.

D. Interest

Mortgage loan papers and contracts for deed should set out the rate of interest to be paid. Borrowers should make sure the mortgage loan amount and the interest rate on the loan papers are correct before signing. In a contract for deed, it is important for the buyer to make sure that the installment payments do not add up to more than the agreed-on purchase price plus interest. An amortization schedule, which any bank should have, can help with calculating the proper payments.[17] There are legal limits on the amount of interest many creditors can charge.[18] These are discussed in Chapter Twelve of this Guide.

E. Using the loan money

A mortgage loan agreement may limit the use the borrower may make of the loan money. Violating any of these restrictions may put the borrower in default on the loan.

F. Other payments and penalties

In addition to regular payments and interest, other payments may be required by the mortgage loan or contract for deed. For example, a borrower or buyer may be required to keep current on taxes and assessments, insurance premiums, and payments on other loans

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[16] See REAL ESTATE FINANCING: TEXT, FORMS, TAX ANALYSIS, Vol. 4B, § 3E.05[2], "Dragnet Clauses," Milton Roberts, Annotation, *Debts Included in Provision of Mortgage Purporting to Cover All Future and Existing Debts (Dragnet Clause)—Modern Status*, 3 A.L.R. 4th 690 (1981 & Supp. 2012).

[17] An amortization schedule is a loan schedule that shows the amount of principal and interest that is due at regular intervals over the loan term, as well as the unpaid principal balance that remains after each scheduled payment is made. *Black's Law Dictionary* 89 (9th ed. 2009).

[18] For some creditors, if a loan for under $100,000 is made for an agricultural purpose, the interest may not be more than 4.5 percentage points over the federal discount rate at the time of the loan. MINN. STAT. § 334.011, subds. 1.3. Banks and other financial institutions may charge up to 21.75 percent in interest. MINN. STAT. § 47.59, subd. 3.

or leases affecting the property.[19] If such other payments are required, they are as important as payments on the loan or contract for deed itself, and failure to pay them might be considered a default.

In some cases, mortgage loan papers or contracts for deed allow the lender or seller to charge a penalty or extra interest if certain conditions are not met. For example, the agreement may permit extra charges if the borrower or buyer makes a late payment. In addition, the mortgage loan or contract for deed may say that if the borrower or buyer does not promptly repair damage to buildings on the real estate, the lender or seller can complete the repairs, bill the borrower or buyer for the work, and add a penalty and interest to the amount owed.

Any such extra charges or penalties must be clearly specified in the terms of the loan or contract for deed. It is important to read these documents thoroughly to understand what obligations are included and what the consequences can be for failing to meet any obligations.

G. Acceleration clauses

Real estate purchases usually involve scheduled payments over a long period time—sometimes several decades. One result of a default on a mortgage loan or contract for deed can be that the payment schedule is "accelerated." If a loan is accelerated that means the entire debt becomes due right away. Mortgages and contracts for deed often set out the circumstances in which the lender or seller can accelerate the debt.

H. Due on sale clauses

A "due on sale" clause in a mortgage loan means the lender can accelerate the debt if the borrower sells or transfers part or all of the mortgaged land without the lender's permission.[20] A due on sale clause in a contract for deed has the same effect.

I. Mortgage power of sale clauses

A "power of sale" clause in a mortgage allows the lender to foreclose by advertisement—that is, without filing a lawsuit. If the mortgage does not include a power of sale clause, the lender must file a court action to foreclose on the loan.[21] Foreclosure by advertisement is discussed later in this chapter.

J. Mortgage rents and profits clauses

It is legal for lenders to take as additional security for a debt the rents and profits from mortgaged property, that is, the income generated from the use of the property. If the borrower signs such an agreement, he or she gives as collateral for the loan the income

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[19] Agricultural mortgages executed after July 31, 2001, are exempt from paying the mortgage registry tax assessed by MINN. STAT. § 287.035 if the loan proceeds are used to acquire or improve agricultural property (as classified by state property tax laws at MINN. STAT. § 273.13, subd. 23(a)-(b)). MINN. STAT. § 287.04(i).

[20] *Black's Law Dictionary* 595 (9th ed. 2009).

[21] MINN. STAT. § 580.01; 31 DUNNELL MINN. DIGEST, *Mortgages* § 11.03 (5th ed. 1996 & Supp. 2015).

from the land, as well as the land itself. Such an agreement may make sense for a farmer when the loan is made if, for example, it secures new credit; but a rents and profits clause may prove costly during a foreclosure. A rents and profits clause gives a mortgage lender the right to claim the rents and profits from the land even after a foreclosure and before the end of the borrower's right of redemption. In some cases a rents and profits clause can lead to the borrower's loss of the property during this period. These clauses are discussed in more detail later in this chapter.

K. Warranties of title

Warranties of title are important in real estate purchases because they help ensure that the seller is providing "good" title to the property being purchased. That is, warranties of title help ensure that there are not other parties who claim an interest in the property that conflicts with the seller's interest. Nearly every mortgage and contract for deed, therefore, should include some form of warranty of title. In general, mortgage lenders insist on such a warranty. Contract for deed buyers should make sure that the contract has a warranty of title.

Many legal interests can affect a title to real estate. A common example is an easement.[22] An easement might allow other people to cross the land, for example, or permit a utility to place lines or maintain buried lines on the property. The interests of other creditors, such as previous lenders or those holding a mechanic's lien, can also affect title to real estate. Many such interests can be found with a title search by a lawyer or title insurance company.

L. Types of deeds

When purchasing property, the seller gives the buyer a deed. In a contract for deed situation, the buyer obtains a deed when the purchase price has been paid in full. In a purchase money mortgage situation, the borrower obtains a deed at the beginning when the loan is issued and the seller is paid off. When the deed is recorded, the public is put on notice that the real estate was conveyed to the buyer.[23]

The type of deed received can be important. In general, there are three different types: warranty deeds, limited or special warranty deeds, and quit claim deeds.[24] If the type of deed is not listed in the sales agreement, the seller must provide a warranty deed.[25]

1. Warranty deed

A warranty deed gives the buyer title to the real estate.[26] In addition, the seller promises that: (1) the seller holds title and possession to the real estate and has the right to convey it to the buyer; (2) the real estate is free of other legal interests; (3) the

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22 17 DUNNELL MINN. DIGEST, *Easements* (5th ed. 2005 & Supp. 2015).

23 MINN. STAT. § 507.34.

24 Minnesota Statutes provide model examples of warranty and quit claim deeds. See MINN. STAT. § 507.07. See also 6A MINNESOTA PRACTICE, *What type of deed to use* § 43.3 (3rd ed. 1990 & Supp. 2014).

25 *Building Indus., Inc. v. Wright Prod.,* 62 N.W.2d 208, 210 (Minn. 1953).

26 MINN. STAT. § 507.07.

buyer will have peaceful possession of the property, meaning no other person has a claim to possession of the real estate; and (4) the seller will defend the title to the real estate if anyone else claims an interest in it.[27]

2. Limited or special warranty deed

A limited or special warranty deed usually gives the same warranties as a warranty deed except that the warranties only extend to the period when the seller owned the real estate.[28] Therefore, if it turns out that the seller did not have "good" title, due to something that occurred prior to the time the seller originally purchased the property, the seller is not responsible for defending the buyer from any such claims against the real estate.

3. Quit claim deed

A quit claim deed gives the buyer title to the real estate, but no warranties from the seller.[29] The seller is conveying all of his or her interest in the property, but makes no promises about whether someone else might also have an interest in the property. A quit claim deed gives the buyer only that title to the real estate that the seller has at the time of the sale. There are no warranties with a quit claim deed. If the seller will only give a quit claim deed, the buyer should consider buying title insurance from a title insurance company.[30]

M. Title insurance

Title insurance helps protect the buyer's legal right to the ownership of the real estate. It does not, however, give a guarantee of a clear title. This is true for two reasons. First, the title insurance policy likely will include a number of policy exceptions, which will be listed. For example, many title insurance policies do not cover whether the property is zoned for a particular use. Second, a title insurance policy does not always mean that no one else has an interest in the real estate. Instead, the policy usually is an agreement by the title insurance company to pay for the cost of defending the buyer's legal interest in the real estate if there is a problem. Some policies do cover losses the buyer suffers if rights in the real estate are lost.

N. Environmental contamination

In the last few decades, liability for hazardous wastes on real estate has become a concern for landowners. Both federal and state laws can make owners and other responsible persons pay for environmental cleanup, and cleanups can be very expensive.[31] Both federal

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[27] MINN. STAT. § 507.07; *Bell v. Olson*, 424 N.W.2d 829, 833 (Minn. Ct. App. 1988).

[28] *Blomker v. Magedanz*, No. A13-1119, 2014 Minn. App. Unpub. LEXIS 133, at *11 (Feb. 18, 2014).

[29] MINN. STAT. § 507.06; *Caughie v. Brown*, 93 N.W. 656, 657 (Minn. 1903); *Burgmeier v. Bjur,* No. CX-02-743, 2003 Minn. App. LEXIS 12, at *3 (Ct. App. Jan. 7, 2003). *Burgmeier v. Bjur*, No. CX-02-743, 2003 Minn. App. LEXIS 12, at *3-4 (Ct. App. Jan. 7, 2003).

[30] *Burgmeier v. Bjur*, No. CX-02-743, 2003 Minn. App. LEXIS 12, at *3-4 (Ct. App. Jan. 7, 2003). It passes such rights and interests as the grantor possesses at the time.

[31] 42 U.S.C. § 9607(b); MINN. STAT. § 115B.03; *Gopher Oil Co., Inc. v. Union Oil Co., Inc.,* 955 F.2d 519 (8th Cir. 1992).

and state laws contain exemptions for innocent landowners, but the liability any person may have for environmental damage is hard to predict. As a result, many real estate sale contracts now include an environmental warranty.

1. Mortgage lenders

Congress enacted legislation in 1996 that protects a lender from liability as an "owner or operator" of foreclosed mortgaged property, provided the lender attempts to sell the mortgaged property as soon as possible.[32] However, lenders who actively participate in management of a mortgaged property may still face liability for environmental contamination. To protect themselves, and to preserve the value of their interests in mortgaged property, lenders often require that borrowers promise not to use or store certain chemicals on the real estate and promise to pay the lender for its costs if chemicals are found there.

2. Contract for deed sellers

Buyers using a contract for deed should protect themselves from liability by making sure that they do not buy contaminated real estate. One way to do this is to get a warranty from the seller that no chemicals were used on the real estate and that the seller will pay any costs, including cleanup costs, imposed if chemicals are found there.

A contract for deed seller may also want warranties from the buyer concerning environmental contamination since the buyer will have the ability to pollute the real estate during the term of the contract, while the property is still owned by the seller.

O. General restrictions in mortgages and contracts for deed

Mortgages and contracts for deed often contain restrictions on the use the borrower or buyer can make of the property, as well as restrictions that can affect the borrower's or buyer's business decisions. These restrictions apply only until the mortgage or contract for deed is paid off. These agreements also often require the borrower or buyer to provide certain information to the lender or seller. With the written consent of the lender or contract for deed seller, sometimes a borrower or buyer can be released from restrictions like the ones discussed below.

1. Using the property

Mortgages and contracts for deed often restrict the use of the property while the debt is outstanding. For example, use of the land may be restricted to farming. Other common limitations include preventing the borrower or buyer from: (1) mortgaging or leasing the property, (2) allowing a third party to obtain a lien against the property, or (3) changing the real estate. Agreements also commonly require that the real estate be tended to and kept in good repair so it does not decrease in value.

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[32] 42 U.S.C. § 9601(20)(E)(ii). Minnesota law provides similar liability protection to creditors foreclosing on mortgages and terminating contracts for deed. MINN. STAT. § 115B.03, subds. 6, 7.

2. Business decisions

A mortgage or contract for deed also may restrict certain business decisions or require the consent of the lender or seller before some business actions are taken. It is common, for example, for these agreements to: (1) restrict transfer or mortgaging of the borrower's or buyer's assets, (2) ban bankruptcy filings, and (3) ban changes in the leadership of a corporation or partnership that owns the property. In addition, some contracts for deed restrict the purchaser's right to transfer his or her interest in the property.[33]

3. Providing information

Borrowers and contract for deed buyers may also be required to provide the lender or seller with certain information. For example, lenders may want to see annual financial statements or be notified of lawsuits filed against the borrower or buyer.

P. Default

The definition of a default in loan or contract for deed documents is crucial for two reasons. First, the foreclosure of a mortgage or cancellation of a contract for deed is usually triggered by a default. Second, the law does not define what constitutes a default. Therefore, the definition in the loan documents is legally binding.

Usually, people think of a default as being late with payments. This may be the most common type of default, but a default can include many other problems as well—including some problems that would otherwise not seem that serious, such as being late with a property tax payment. The loan agreement or contract for deed will usually provide a long list of actions by the borrower or buyer that count as a default.

The consequences of a default can be severe. It cannot be emphasized enough that farmers need to know exactly what triggers a default for their particular agreements.

Q. Notice and cure

Mortgages and contracts for deed sometimes include the right to notice and cure. This means that the lender or seller must give notice to the borrower or buyer if there is a default. The lender or seller must then also give the borrower or buyer the right to cure the default within a reasonable amount of time before taking action to enforce the debt or cancel the contract for deed.

R. Remedies for lenders and sellers

If a borrower or buyer defaults, the lender or seller typically has the right to certain

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[33] In *Bank Midwest v. Lipetzky*, 674 N.W. 2d 176, 181-82 (Minn. 2004), the Supreme Court of Minnesota held that contract for deed language prohibiting the buyers from selling, transferring, or assigning their interest in the contract without written permission from the seller was violated when the buyers mortgaged their interests as contract for deed buyers. The Court concluded that the mortgage might well be valid, but said the mortgage constituted a default on the contract for deed because it was an unauthorized transfer of their interest in the contract.

remedies. For example, under some mortgage agreements default by the borrower allows the lender to take over the operation of the farm. While these remedies are limited to some degree by the law, in general the written agreements set out lender or seller options.

III. Mortgage foreclosures

If a borrower defaults on a mortgage, the lender may attempt to foreclose, and the borrower faces losing possession of the real estate.[34] Farmer borrowers may be able to cure a default or negotiate an agreement with the lender, and also may be eligible for farmer-lender mediation. After the foreclosure process begins, a borrower has the chance to reinstate the mortgage by complying with its terms. Reinstatement can prevent a foreclosure sale. If there is a foreclosure sale, the borrower has a right of redemption and perhaps a right of first refusal as well. After foreclosure, a borrower may be required to pay a deficiency judgment if the foreclosure sale does not cover all that was owed to the lender.

Possible steps in a foreclosure

The following is a rough listing of the possible steps in a foreclosure.

1. Default and acceleration.
2. Mediation and possibly notice and cure.
3. Negotiation with the lender—possibly including a deed in lieu of foreclosure or settlement that ends foreclosure.
4. Creditor begins foreclosure process—by action or advertisement.
5. Reinstatement of mortgage—which ends foreclosure.
6. Foreclosure sale.
7. Redemption period.
8. Deficiency judgment if sale of property does not cover the debt.
9. Right of first refusal.

A. Default and acceleration

As discussed earlier, borrowers should carefully review their loan agreements to understand what actions will be considered a default on their mortgage loans. If a default

[34] A helpful resource is PHILLIP L. KUNKEL, JEFFREY A. PETERSON, and JASON THIBODEAUX, *Mortgage Foreclosures,* Farm Legal Series, University of Minnesota Extension (2015), http://www.extension.umn.edu/agriculture/business/taxation/farm-legal-series/mortgage-foreclosures/docs/mortgage-foreclosures.pdf. See, as well, D. CHARLES MACDONALD, Foreclosures, Ch. 24 in MINNESOTA CONTINUING LEGAL EDUCATION, DEBTOR-CREDITOR HANDBOOK (11th ed. 2014, updated 2018, JAMES L. BAILLIE, PHILLIP L. KUNKEL, RYAN T. MURPHY and SAMUEL J.H. SIEGELMAN, eds.).

occurs, the loan agreement should specify what actions the lender may take. This may include demands for special fees and penalties.

Acceleration of all payments is a common result of default on a loan. This is typically the lender's first step in the foreclosure process. Borrowers who receive an acceleration notice should treat it very seriously and are advised to seek legal advice early to better understand their options for responding to the notice.

B. Mediation

Lenders deciding to foreclose on a farm mortgage in Minnesota may be required to serve the borrower with a written notice of the availability of farmer-lender mediation.[35] Chapter Seven of this Guide discusses mediation.

C. Notice and cure

A mortgage agreement might give the borrower a right to notice and cure of a loan default. If a mortgage includes such a provision, the lender must notify the borrower if there is a default and give the borrower the right to cure the default within a reasonable amount of time before taking action to enforce the debt. Borrowers should review their mortgage agreements carefully to determine whether they have a right to notice and cure of any default.

D. Pre-foreclosure counseling if borrower's principal residence is at risk

Since 2008, Minnesota law has required that, before recording notice of a foreclosure by action or notice of pendency of a foreclosure by advertisement against property, including the borrower's principal residence, lenders must notify the borrower of the opportunity to use foreclosure prevention counseling.[36] If this requirement applies, the lender has one week—from the date it sends the notice—to provide the borrower's contact information to an authorized counseling agency that works to prevent foreclosures.[37] The lender must also take part in the counseling discussions, although the lender is not required to reach a resolution regarding the borrower's default.[38]

E. Special procedures for mortgages held by Farm Credit Services and the Farm Service Agency

If Farm Credit Services (FCS) is the lender, it is required to send borrowers a notice that says borrower may apply for restructuring of the loan before the foreclosure.[39] If FCS does not send the policy, the borrower may be able to stop the foreclosure or void the foreclosure sale.[40]

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35 MINN. STAT. § 582.039.

36 MINN. STAT. §§ 580.02, subd. 4, 580.021, 580.022, subd. 1. This counseling requirement applies only if the foreclosure will be on property that contains not more than four family dwelling units, one of which must be the borrower's principal residence.

37 MINN. STAT. § 580.021, subd. 3.

38 MINN. STAT. § 580.021, subd. 4(b).

39 12 U.S.C. § 2202a(b).

40 *Burgmeier v. Farm Credit Bank of St. Paul,* 499 N.W.2d 43, 50 (Minn. Ct. App. 1993).

If the lender is the Farm Service Agency (FSA)—part of the United States Department of Agriculture (USDA)—different rules and procedures apply.[41]

F. Deeds in lieu of foreclosure

Some lenders may suggest that a defaulting borrower voluntarily surrender the land to the lender before foreclosure. Usually this is done through a "deed in lieu of foreclosure." A deed in lieu of foreclosure, therefore, is a substitute for a foreclosure.[42] Borrowers need to understand that their right of redemption, discussed later in this chapter, is lost if a deed in lieu of foreclosure is used to transfer the mortgaged property to the lender.[43] Some factors to consider about deeds in lieu of foreclosure include the following.[44]

1. Borrower loses the entire property and loses it more quickly

In a deed in lieu of foreclosure, borrowers essentially give up any legal arguments they might have used to prevent the foreclosure. They also give up their right to redeem the property, discussed later in this chapter, particularly the right to separately designate and redeem the homestead portion of the property. In addition, borrowers lose land more quickly under a deed in lieu of foreclosure than if there is a foreclosure sale. Foreclosures take some time to enforce, and even after a foreclosure sale many borrowers can remain on the land during the redemption period.

2. It costs less for the lender

If the lender goes ahead with the foreclosure, the borrower may be charged with the cost of the foreclosure action itself, which can be considerable. Although the lender pays the foreclosure costs up front, the lender can try to pass them along to the borrower later. A deed in lieu of foreclosure avoids much of this cost.

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41 For a short summary of borrower rights for FSA Farm Loans from the perspective of FSA, see Farm Loans Fact Sheet: Primary and Preservation Loan Servicing for Delinquent FSA Borrowers (2016), https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/FactSheets/2016/Primary_and_Preservation_Loan_Servicing_for_Delinquent_FSA_Borrowers.pdf. For the federal regulations, see 7 C.F.R. 7 C.F.R. §§ 765-777 (2017). More details are found in the following three FSA Handbooks: 1-FLP (Rev. 1) General Program Administration, 4-FLP, Regular Direct Loan Servicing; 5-FLP, Direct Loan Servicing—Special and Inventory Property Management; and 7-FLP, Direct Loan Servicing–Debt Collection and Resolution, http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk

42 *Travelers Ins. Co. v. Horseshoe Lake Farms, Inc.,* 456 N.W.2d 453, 457 (Minn. Ct. App. 1990).

43 In a few circumstances, a deed in lieu of foreclosure is not legal. This includes, for example, if the lender has taken unconscionable advantage of the borrower, if there is not fair consideration given for the bargain, or if the transaction was intended to provide additional security for the mortgage debt and not as a sale of the real estate. *Gandrud v. Hansen,* 297 N.W. 730, 733-34 (Minn. 1941); *O'Connor v. Schwan,* 251 N.W. 180, 181-82 (Minn. 1933).

44 If the borrower voluntarily surrenders the mortgaged property, the borrower might also lose the right to harvest a crop already planted. *Seifert v. Mutual Ben. Life Ins. Co.,* 281 N.W. 770 (Minn. 1938); *Gunderson v. Hoff,* 209 N.W. 37, 39 (Minn. 1926).

3. It can help in negotiations with the lender

The fact that a deed in lieu of foreclosure is less trouble and expense for the lender, and resolves the whole issue sooner, gives the borrower a negotiating point with the lender. If the borrower agrees to a deed in lieu of foreclosure, the lender might, for example, waive its right to seek a deficiency judgment for any debt that is not covered by the value of the mortgaged property.

G. Foreclosure—by action or by advertisement

Foreclosures in Minnesota come in two types: by action and by advertisement. Most foreclosures are by advertisement because they are quicker and cheaper for the lender. For borrowers, the difference between the two determines the way the lender gives notice of the foreclosure sale and the way the lender gets permission to foreclose.

In general, lenders are more likely to use a foreclosure by action if they want to seek a deficiency judgment against the borrower or there are some legal issues that would make foreclosure by advertisement difficult.

1. Foreclosure by action

Foreclosure by action is technically a lawsuit in which the creditor goes to court to get permission to foreclose on the property.[45]

Possible steps in a foreclosure by action.

1. Summons and complaint
2. Hearing
3. Judgment
4. Notice of sale
5. Sale

a. Summons and complaint

As with most civil actions, when filing the lawsuit in a foreclosure by action, the lender delivers a "summons and complaint" to the borrower.[46] The complaint describes the default and asks the court for a judgment and an order to sell the borrower's real estate to pay off the debt.[47] Notice of the borrower's opportunity to designate property as homestead or as separate agricultural tracts must also be included in the summons and complaint.[48] The borrower has twenty days after

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45 In general, MINN. STAT. §§ 581.01-581.12 govern foreclosures by action.

46 MINN. STAT. § 581.01; MINN. R. CIV. P. 3.01, 3.02. Minnesota court rules allow a summons and complaint to be served by "publication" in mortgage foreclosure cases if the lender is unable to locate the borrower. MINN. R. CIV. P. 4.04(a)(5).

47 MINN. R. CIV. P. 8.01, 8.05.

48 MINN. STAT. §§ 582.041, 582.042.

being served with the summons and complaint to file an answer with the court.[49] The answer should make any legal arguments the borrower has in response to the complaint.[50]

b. Hearing

After the answer is filed, the court will issue a scheduling order that sets out the timeline for how the case will proceed. After the answer is filed, the court may issue a scheduling order that sets out the timeline for how the case will go forward. The scheduling order should include the dates and deadlines for any pre-trial conferences, motions, and hearings. If the court does not issue a scheduling order on its own, any party may request—in a writing that is given to the other parties involved—that the court do so. [51] At the hearing, or sometime after the hearing, the judge will decide whether the lender is entitled to foreclose on the borrower's property. In some cases, the judge may also determine how much money is due to the lender and whether the mortgage is valid. Borrowers are allowed to represent themselves in the foreclosure hearing—something that the courts will refer to as representing oneself *pro se*—but as a general rule, parties representing themselves pro se will be held to the same standards as attorneys.[52] To be effective, however, borrowers will probably need an attorney, both to prepare legal papers and to represent them in court.

c. Judgment

If the borrower does not file an answer to a complaint within twenty days, the lender will generally ask the court for a default judgment.[53] A default judgment means that the lender wins because the borrower "defaulted" by not answering the complaint. If the lender is given a default judgment, or if the borrower challenges the foreclosure in a hearing and loses, the court will enter a judgment and order the sheriff to hold a foreclosure sale to pay the debt.[54]

If the borrower files an answer and the judge agrees with the borrower, the foreclosure will be stopped or at least delayed. In some cases, the judge may only require the borrower to pay part of what the lender is demanding.

d. Notice of sale

If the borrower lives in the same county as the property to be sold in foreclosure, at least four weeks before the sale the lender must deliver notice of the upcoming

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49 MINN. R. CIV. P. 12.01.
50 MINN. R. CIV. P. 12.02
51 MINN. R. CIV. P. 16.01, 16.02. If a party fails to obey a scheduling or pretrial order, fails to appear at a scheduling conference, or does not participate in the process in good faith, the court may order monetary sanctions against that party. MINN. R. CIV. P. 16.06.
52 *Black v. Rimmer*, 700 N.W.2d 521, 527 (Minn. Ct. App. 2005).
53 MINN. R. CIV. P. 55.01.
54 MINN. STAT. § 581.03.

sale to the borrower.[55] If the property includes a homestead, anyone in possession of the homestead must also receive notice.[56]

The notice will describe the court's decision, describe the property, and set out the date, time, and place of the sheriff's sale.[57]

The notice must also be posted and published. Published means that the notice must appear once per week for six weeks in a local newspaper in the county where the mortgaged property is located.[58] If the property includes a homestead, a copy of the judge's order directing the sale must also be recorded with the recorder or registrar of titles for the county where the property is located before the date of the first published notice of the sale.[59]

2. Foreclosure by advertisement

Minnesota law sets out a step-by-step process that lenders may use for foreclosure by advertisement.[60] In this process, the lender does not need to file a lawsuit or seek court approval before foreclosure. Because of the relative simplicity of this process and the lower cost, in most cases lenders choose to foreclose mortgages by advertisement. Unlike in a foreclosure by action, however, any lender choosing to foreclose by advertisement must usually strictly meet the legal requirements. If not, the court may void the foreclosure proceeding.[61]

a. When lenders can use advertisement

If the borrower defaults, a lender can foreclose by advertisement if the following conditions are met.

(1) Power of sale clause

The mortgage must have a power of sale clause that allows foreclosure in case of default.[62]

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55 Pursuant to MINN. STAT. § 581.03, once judgment is entered and a foreclosure sale is ordered, the sale will be treated as a sale on execution, and notice must comply with the requirements of MINN. STAT. § 550.19. The lender must provide the notice in the same manner that is required for a summons and complaint under Minnesota Rule of Civil Procedure 4.

56 MINN. STAT. § 550.19. Any other people who have an interest in the property and have officially recorded a request for notice of the sale must also receive notice. MINN. STAT. §§ 550.19, 580.032.

57 MINN. STAT. § 550.18.

58 MINN. STAT. §§ 550.18(2), 645.11. Posting in three public places within the county in which the property is located satisfies the public posting requirements. MINN. STAT. § 645.12, subd. 1; *Fidelity & Deposit Co. v. Riopelle*, 216 N.W.2d 674, 680 (Minn. 1974).

59 MINN. STAT. § 550.18(3). The notice must be recorded before the first day of publication.

60 In general, MINN. STAT. §§ 580.001-580.30 govern foreclosures by advertisement.

61 See *Ruiz v. 1st Fid. Loan Servicing, LLC*, 829 N.W.2d 53 (Minn. 2013); *Jackson v. Mortgage Elec. Registration Sys. Inc.*, 770 N.W. 2d 487, 494 (Minn. 2009); and *Hunter v. Anchor Bank*, 842 N.W. 2d 10 (Minn. Ct. App. 2013).

62 MINN. STAT. §§ 580.01, 580.02(1).

(2) Default

The borrower must have defaulted on the loan.[63] A default can be failure to make a payment or a number of other conditions that will be set out in the loan agreement.

(3) No other lender recovery action

The lender may not, at the same time, be seeking to recover the debt through a court foreclosure by action against the borrower.[64]

(4) Mortgage is recorded

The mortgage must have been recorded.[65]

b. Required notice

Before a foreclosure by advertisement can take place, the borrower and others must receive several different kinds of notice of the foreclosure. A foreclosure may be invalid if, among other defects, the notice of sale is wrong, or if the notice is not published properly.[66]

(1) Published notice for the public

In order to foreclose by advertisement, the lender must publish a notice of foreclosure in a newspaper in the county where the mortgaged property is located.[67] The notice must be published for six weeks before the sale takes place and must list the date, time, and place of the sale, and other details.[68]

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63 MINN. STAT. § 580.02(1).

64 MINN. STAT. § 580.02(2). If another action has been started by the lender, that action must have been stopped or must have resulted in a judgment that has not been satisfied.

65 MINN. STAT. § 580.02(3). If the mortgage has been assigned to another party, any assignment must also have been recorded. If the mortgage is on what is known as registered land, the mortgage and all assignments must have been registered.

66 See MINN. STAT. §§ 580.20, 580.21, 582.25(3), 582.27(a)(1); *Gallaher v. Titler*, 812 N.W.2d 897, 903 (Minn. Ct. App. 2012).

67 MINN. STAT. § 580.033.

68 MINN. STAT. §§ 580.03, 580.04. The notice must also include: (1) the name of the mortgagor and mortgagee; (2) the original principal amount secured by the mortgage; (3) the date of the mortgage and information on when and where it was recorded or registered; (4) the amount claimed to be due to the lender; (5) a description of the property; (6) the time by law allowed for redemption of the property; and, if the property is an owner-occupied single-family dwelling, (7) the date on which the borrower must leave the property if the mortgage is not reinstated or redeemed. MINN. STAT. § 580.04. There must be at least 42 days from first publication to the date of sale. *White v. Mazal,* 257 N.W. 281, 282-83 (Minn. 1934). Courts are generally strict about these timing rules. See, for example, *Gallaher v. Titler*, 812 N.W.2d 897, 903 (Minn. Ct. App. 2012).

(2) Delivered notice for the property occupier

At least four weeks before the foreclosure sale, the lender must serve a copy of the foreclosure notice on whoever is occupying the property.[69] In addition to the foreclosure notice, the lender may be required to give notice of: (1) the borrower's opportunity to designate some of the mortgaged property as homestead or separate agricultural tracts that may be redeemed separately; (2) the borrower's right of redemption; and (3) the availability of foreclosure advice and information from local organizations. [70]

(3) Recorded notice

The lender must record a "notice of pendency" with the recorder or registrar of titles in the county where the property is located.[71] This notice informs anyone reviewing the property records that the foreclosure is pending. This notice must be recorded before the first day that the published notice begins to appear in the newspaper.[72] It cannot, however, be recorded more than six months before the first date of publication.

3. Court action for the debt

A lender might decide to sue a defaulting borrower to collect the amount due under the promissory note or loan agreement. This is different from a foreclosure. In an action on the debt, the lender is not directly trying to take the mortgaged property. If a lender does seek a personal judgment against a borrower on a promissory note, and the lender holds a mortgage on real property used in agricultural production, the maximum judgment that the lender can get is the difference between the amount due on the note and the fair market value of the property.[73]

In many cases, the lender will not be able to seek both a court judgment for the debt and foreclosure of the mortgage at the same time. Lenders may not, for example, use the foreclosure by advertisement process and at the same time bring any other legal action against the borrower on the same debt.[74]

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69 MINN. STAT. §§ 580.03, 580.04. Tenants in possession of the property must receive the notice of the foreclosure unless either the borrower or another party with a greater interest also occupies the property and receives the required notice. *Farm Credit Bank v. Kohnen*, 494 N.W.2d 44, 48-49 (Minn. Ct. App. 1992).

70 MINN. STAT. §§ 580.03, 580.04, 582.041, 582.042, 580.041.

71 MINN. STAT. § 580.032, subd. 3.

72 MINN. STAT. § 580.032, subd. 3.

73 MINN. STAT. § 582.30, subds. 4, 6. Limits on judgments on after-acquired property and the three-year statute of limitations, mentioned later in this chapter, also apply to these judgments. MINN. STAT. § 582.30, subds. 7, 9. Judgments are discussed in Chapter Five.

74 MINN. STAT. § 580.02(2). In order to foreclose by advertisement, the lender must stop other legal action to collect the debt. If an earlier judgment on the debt was executed but not completed, the lender may use the foreclosure by advertisement process. In addition, if the borrower signed the mortgage before March 23, 1986, and the mortgage is on property used in agricultural production, the lender may either foreclose on the mortgage or seek a judgment and payment on the note, but not both. Minn. State. § 582.31; *Metropolitan Life Ins. Co. v. Christison,* 451 N.W.2d 222, 223-24 (Minn. Ct. App. 1990). This statute only protects a party against whom a lender could have commenced both

4. Defending against foreclosure

In most cases, a lender seeking a foreclosure acts legally. Depending on the circumstances, however, it may be possible for borrowers to challenge foreclosures by showing that the mortgage or foreclosure process used by the lender did not satisfy all legal requirements for a valid foreclosure. For example, if the mortgage is defective because it was drafted incorrectly, was not properly notarized and recorded, or lacks a power of sale clause or an acceleration clause, foreclosure may be invalid.[75] Similarly, a borrower might be able to argue that the lender did not send out required cure notices or failed to fulfill the foreclosure notice requirements.[76] Or, it might be the case that the default claimed by the lender as the basis for the foreclosure is not considered a default under the terms of the note or mortgage.[77] In such situations, the borrower may be able to slow, or in some cases even prevent, a foreclosure.[78] It is probably not realistic for a borrower to try to stop a foreclosure alone. Successfully challenging a foreclosure by a lender will probably require the help of a lawyer.

H. Designating separate parcels for sale and redemption

As mentioned earlier, farm borrowers facing foreclosure should be provided with notices about their rights to designate separate parcels within the mortgaged property—to be sold and redeemed separately—if certain requirements are met. In a foreclosure by action these notices should be provided with the summons and complaint.[79] In a foreclosure by advertisement these notices should be included in the initial foreclosure notice.[80]

It may be to the borrower's advantage to designate real estate to be sold and redeemed separately. That way the borrower can redeem the part of the property he or she most wants to keep without being forced to try to redeem and pay for all of the mortgaged property.

1. Designating homestead property

If the real estate contains the borrower's home, the borrower should receive a homestead designation notice.[81] This notice explains that the home and some of the land surrounding it may be designated as a homestead and that this homestead property can be sold and redeemed separately from the rest of the borrower's real

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actions and not where another party guarantees the mortgage. *Ed Herman & Sons v. Russell*, 535 N.W.2d 803 (Minn. 1995). This statute was held not to apply where FmHA (now FSA) partially released some mortgage notes to facilitate a sale of farm property and the court determined that it was not a foreclosure. *United States v. Nelson,* 101 F.3d 1284, 1286 (8th Cir. 1996).

75 For power of sale, see MINN. STAT. § 580.01, and for recording see MINN. STAT. § 580.02(3).

76 For the various foreclosure notice requirements, see MINN. STAT. §§ 580.03, 580.021, 580.041, 582.041, 582.042.

77 MINN. STAT. § 580.02(1).

78 Courts require lenders to follow foreclosure by advertisement rules closely. If they do not the foreclosure may be voided by the court. *Jackson v. Mortgage Elec. Registration Sys. Inc.*, 770 N.W. 2d 487, 494 (Minn. 2009).

79 MINN. STAT. §§ 582.041, subds. 1, 2(b), 582.042, subds. 1, 2(b).

80 MINN. STAT. §§ 582.041, subds. 1, 2(a), 582.042, subds. 1, 2(a).

81 MINN. STAT. § 582.041, subd. 1.

estate.[82]

The homestead may include any amount of real estate as long as it: (1) includes the home; (2) conforms to local zoning rules; and (3) is "compact" so as not to unreasonably affect the value of the rest of the real estate.[83]

The lender and the sheriff do not have the right to change the homestead designation on their own if they do not like it or think that it is illegal.[84]

2. Designating agricultural tracts

If the borrower's real estate is agricultural land and contains separate tracts—parcels of land with separate legal descriptions—the borrower will receive a designation notice explaining that, if the borrower requests, the tracts will be sold and available for redemption separately.[85]

Tracts designated to be sold separately must: (1) have been previously recorded as separate tracts; (2) meet local zoning ordinance requirements; (3) have an entrance by direct access to a public road or by permanent easement; and (4) not have a shape that unreasonably affects the value of the remaining real estate.[86]

3. How to designate the separate parcels

The procedure for designating parcels—whether homestead property or separate agricultural tracts—is different depending on whether the foreclosure is by action or by advertisement. If the foreclosure is by advertisement, the borrower must serve a copy of the legal descriptions of the separate parcels on the lender, the sheriff, and the county recorder or registrar of titles at least ten business days before the scheduled foreclosure sale.[87] If the foreclosure is by action, the borrower must provide a copy of the legal descriptions of the separate parcels to the court as part of the foreclosure proceeding.[88]

If the legal requirements for a homestead designation or agricultural tract designation are met, the sheriff must offer and sell the parcels separately in the foreclosure sale.[89]

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82 MINN. STAT. § 582.041, subd. 2.

83 MINN. STAT. § 582.041, subd. 3. For example, a designation creating a landlocked parcel could unreasonably affect the value of the remaining land. *Federal Land Bank of St. Paul v. Carlson,* 398 N.W.2d 595 (Minn. Ct. App. 1986).

84 *Federal Land Bank of St. Paul v. Carlson,* 398 N.W.2d 595, 597-98 (Minn. Ct. App. 1986).

85 MINN. STAT. § 582.042, subds. 1-2. "Agricultural land" is not defined in the statute. One court has suggested that borrowers are only eligible for this designation if they qualify as either a family farm or a family farm corporation. *Resolution Trust Corp. v. Lipton,* 983 F.2d 901, 9041 (8th Cir. 1993). The statutory authority for this requirement is not found in MINN. STAT. § 582.042. The court in *Resolution Trust*, nonetheless concluded that farmers should not be eligible for this designation unless they are debtors who are also eligible for farmer-lender mediation under MINN. STAT. § 583.24. *Resolution Trust Corp. v. Lipton,* 983 F.2d 901, 904-05 (8th Cir. 1993).

86 MINN. STAT. § 582.042, subd. 3.

87 MINN. STAT. §§ 582.041, subd. 3, 582.042, subd. 3.

88 MINN. STAT. §§ 582.041, subd. 3, 582.042, subd. 3.

89 MINN. STAT. §§ 582.041, subd. 4, 582.042, subd. 4.

The borrower may then redeem the parcels separately or redeem all of the property.[90]

I. Reinstatement of the mortgage before the sale

A mortgage may be reinstated any time before the foreclosure sale. Reinstatements eliminate the default that triggered foreclosure in the first place. To reinstate the mortgage, the borrower pays to the sheriff, the holder of the mortgage, or the foreclosing attorney the amount needed to bring the mortgage current.[91] A borrower has a reinstatement right whether the lender sought foreclosure by action or by advertisement.

1. Reinstatement amounts

The amount the borrower must pay to reinstate the mortgage includes all loan payments due up to the time the reinstatement payment is made, any interest owed, and reasonable lender expenses.[92]

Upon request from the borrower, the lender must inform the borrower of the amount needed to reinstate the mortgage.[93] The lender is supposed to respond within three days of receiving such a request by mailing to the borrower notice of the amount needed to reinstate the mortgage. However, so long as the lender mails the notice of reinstatement amount to the requester at least three days before the sale, the sale can go forward.[94] The reinstatement amount is effective for seven days after the lender provides it to the borrower, or until the date of the sale, whichever occurs first.

The sheriff also can request the lender to provide reinstatement amounts and other information, including the identity of the person authorized to act on behalf of the lender.[95] The lender must respond to any such request from the sheriff within seven days. If the lender fails to respond within that time, the sheriff must postpone the sale.[96] If, however, the sheriff makes the request within seven days or less of the sale, and the lender does not respond prior to the sale, the sheriff may conduct the sale without the lender's response.

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90 The redemption period is the same for all of the property. MINN. STAT. §§ 581.041, subd. 5, 582.042, subd. 5.

91 MINN. STAT. § 580.30, subd. 1.

92 MINN. STAT. § 580.30, subd. 1; *First Trust Co. v. Leibman,* 445 N.W.2d 547, 551-52 (Minn. 1989). Reasonable expenses can include insurance or delinquent taxes paid by the lender, attorneys' fees, and other costs. Attorneys' fees are discussed at MINN. STAT. §§ 580.30, 582.01.

93 MINN. STAT. § 580.30, subd. 1.

94 MINN. STAT. § 580.30, subd. 1. The lender does not have to delay the sale if a request for a reinstatement amount is made less than three days before the sale.

95 MINN. STAT. § 580.30, subd. 2.

96 MINN. STAT. § 580.30, subd. 2.

2. Reinstatement after acceleration

Reinstatement is possible even if the mortgage has been accelerated. If the lender accelerated the loan before the foreclosure, the borrower does not need to pay the full, accelerated amount of the loan—only the amount that would have been owed had the lender not accelerated.[97] In other words, the reinstatement amount is the same, regardless of whether the loan has been accelerated or not.

J. Foreclosure Sale

Foreclosure sales are auctions.[98] Sale proceeds are paid to the lender for the mortgage debt, and the borrower gets back any surplus.[99] If the sale proceeds in a foreclosure by advertisement do not fully satisfy the borrower's debt, the lender may seek a deficiency judgment.[100] Similarly, in a foreclosure by action, it the sale proceeds are not as much as the judgment rendered by the court, the lender may seek a deficiency judgment.[101] Deficiency judgments are discussed later in this chapter.[102] Usually, but not always, the highest bidder at a foreclosure sale is the lender. Most lenders seek to add the cost of the foreclosure to the amount the borrower owes under the mortgage. In a foreclosure by advertisement, in order to have a legal right to recover these costs the lender must record an affidavit detailing the costs with the county recorder within ten days after filing for the record of the sale.[103] Costs for a foreclosure by action are handled by the court.[104]

1. Selling parcels separately

The borrower may prefer to have the mortgaged property divided into more than one parcel for the foreclosure sale. For example, if parcels are sold separately, it may be easier to keep part of the farm in the family. Whether farm and homestead property will be sold in separate parcels will usually be controlled by the borrower's redemption designations, discussed earlier.

If the borrower for some reason is not eligible to make those designations, the law still has a preference for selling parcels separately. In a foreclosure by advertisement, if the mortgaged property includes separate and distinct farms or tracts, they should be sold

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97 *Davis v. Davis,* 196 N.W.2d 473, 475 (Minn. 1972).

98 MINN. STAT. §§ 550.20, 580.06. The auction is held in the same county where the real estate is located. Foreclosure sales operate the same way whether the foreclosure is by advertisement or by action.

99 MINN. STAT. §§ 580.10, 581.06. For an example, see *First Minn. Bank v. Overby Dev., Inc.*, No. A08-0813, 2009 Minn. App. Unpub. LEXIS 290, at *7 (Mar. 24, 2009).

100 MINN STAT. § 582.30, subd. 1(a)(1).

101 MINN. STAT. § 582.30 subd. 1(a)(2).

102 MINN. STAT. §§ 580.225, 581.09, 582.30.

103 MINN. STAT. §§ 580.17, 549.04. An excessive claim of costs or interest can result in a triple recovery for the borrower if the borrower brings a successful lawsuit—asserting that the lender charged costs and interest in excess of what the lender actually paid—within one year after the sale. MINN. STAT. § 580.18; *Tran v. Richfield Bank & Tr. Co.,* 435 N.W.2d 151, 152-53 (Minn. Ct. App. 1989); *Pokorny v. Builders Fin.*, C6-93-407, 1993 WL 319048, 1993 Minn. App. LEXIS 851 (Minn. Ct. App. Aug. 24, 1993) (unpublished).

104 MINN. STAT. §§ 581.03, 581.09.

separately unless this option is waived by the borrower.[105] Also, no more farms or tracts should be sold than are needed to satisfy the amount owed.[106] In a foreclosure by action, the assumption is that distinct farms and tracts will be sold separately, but the judge may rule that the whole mortgaged property be auctioned together—if it will be "most beneficial to the interests of the parties."[107] In other words, the court may order the property to be auctioned as one parcel if it benefits both the borrower and the lender.

2. Confirmation of the sale in foreclosure by action

If the foreclosure is by action, after the sale the court will issue an order confirming the sale.[108] The sheriff must then issue a certificate of sale which is to be recorded, presumably by the lender or purchaser, within twenty days.[109]

3. Confirmation of the sale in foreclosure by advertisement

If the foreclosure is by advertisement, the purchaser must receive a certificate containing a description of the mortgage and the property sold, the price paid for each parcel, the time and place of the sale, name of the purchaser, interest rate in effect on the date of the sale, and the timeframe for redemption. This certificate must be recorded within ten days after the sale if there is a five-week redemption period, or within twenty days after the sale in all other cases.[110]

4. Mistakes in the foreclosure sale

If a foreclosure sale is conducted improperly, it may be possible to have the sale set aside.[111] A lender will often be able to foreclose again to correct the error.[112]

K. The right of redemption

If the real estate is sold at a foreclosure sale, the borrower has the right to "redeem" the property. The borrower may, in other words, repurchase the property for the foreclosure sale price, plus interest from the date of the sale and reasonable expenses.[113]

1. Timing — length of redemption period

The right of redemption lasts for a limited time. In general, the borrower will either have six months or twelve months from the date of the sale to redeem.[114] If the

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105 MINN. STAT. § 580.08; *John W. Swenson & Sons, Inc. v. Aetna Life Ins. Co.,* 571 F. Supp. 895, 901-02 (D. Minn. 1983).
106 MINN. STAT. § 580.08. The amount owed includes interest, taxes paid, and costs of the sale.
107 MINN. STAT. § 581.04.
108 MINN. STAT. § 581.08.
109 MINN. STAT. § 581.08.
110 MINN. STAT. § 580.12
111 See MINN. STAT. §§ 580.20, 580.21, 582.25, 582.27.
112 *Gerdin v. Princeton State Bank,* 384 N.W.2d 868, 872 n.7 (Minn. 1986). See also MINN. STAT. § 581.08.
113 MINN. STAT. §§ 580.23, 580.25, 581.10.
114 MINN. STAT. §§ 580.23, 581.10, 582.032.

foreclosure was by advertisement, the redemption period begins on the day of the foreclosure sale.[115] If the foreclosure was by action, the redemption period begins on the day the court issues the order to confirm the sale.[116]

Most farmers, but not all, have a twelve-month redemption period. It is therefore important to verify the correct redemption period. Whether the borrower has a six-month or twelve-month redemption period is determined by the hodgepodge of factors discussed below.

a. Twelve-month redemption period

Borrowers have twelve months to redeem their property if any of the following four circumstances applies to the mortgage.[117]

(1) More than one-third of the principal is paid off

If the borrower has paid off more than one-third of the original principal secured by the mortgage, the borrower has a twelve-month redemption period for that property.[118] The size or use made of the property does not matter.

(2) Mortgaged before July 1, 1987—and over ten acres

If the mortgage was signed before July 1, 1987, and the mortgaged land—at the time of the mortgage signing—covered more than ten acres, the borrower has a twelve-month redemption period for property under that mortgage.[119]

(3) Over forty acres mortgaged

If the mortgaged property—as of the date of the mortgage signing—covered more than forty acres, the borrower has a twelve-month redemption period. The timing of the mortgage and the use of the land do not matter.[120]

(4) Land in agricultural use, over ten acres, but no more than forty acres

The borrower has a twelve-month redemption period if the mortgaged land—as of the day the mortgage was signed—covered more than ten acres, but no more than forty acres, and was in agricultural use.[121] The question of what

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115 MINN. STAT. § 580.23, subds. 1(a), 2.

116 MINN. STAT. § 581.10.

117 MINN. STAT. §§ 580.23, subd. 2, 581.10. The statutes also provide for a 12-month redemption period for any mortgage signed before July 1, 1967, regardless of the size or use made of the property.

118 MINN. STAT. §§ 580.23, subd. 2(2), 581.10. Technically, the amount claimed to be due and owing on the day of the notice of the foreclosure sale must be less than "66-2/3 percent of the original principal amount secured by the mortgage."

119 MINN. STAT. §§ 580.23, subd. 2(3), 581.10.

120 MINN. STAT. §§ 580.23, subd. 2(5), 581.10.

121 MINN. STAT. §§ 580.23, subd. 2(4), (6), 581.10, 273.13, subd. 23(g), 40A.02, subd. 3. It is not required that the borrower directly farm the property to be eligible for this redemption period. Acreage is

land is or is not in agricultural use may be more complicated than it seems at first. Minnesota law uses two different definitions of agricultural use for deciding redemption periods—depending on when the mortgage was signed.[122]

(a) If signed before August 1, 1994

The legal definition of land "in agricultural use" for mortgages signed before August 1, 1994, covers most typical farms. Livestock production, dairying, grain farming, and horticulture qualify. Also included in this definition of land in agricultural use are wetlands, forests, and wildlife land.[123]

(b) If signed on or after August 1, 1994

The legal definition of land "in agricultural use" for mortgages signed on or after August 1, 1994, is based on property tax assessment classifications. Property is defined as "in agricultural use" if at least "a portion" of the mortgaged land is classified for property tax purposes as either agricultural property,[124] or exempt wetland property.[125]

If a mortgage was executed on or after August 1, 1994, it is worth asking the county tax assessor whether at least a portion of the land meets one of the following technical classifications: (1) Class 2a agricultural homestead property; (2) Class 2b rural or agricultural non homestead property; (3) Class 1b agricultural homestead property, or (4) exempt wetlands. If the mortgaged land is ten to forty acres in size and at least a portion meets

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classified as agricultural land for this purpose even if it is operated by a lessee.

[122] Lenders may ask borrowers to sign an affidavit of nonagricultural use that can be recorded with the county records to ensure that the borrower will not later be able to claim that the property was in agricultural use. MINN. STAT. § 580.23, subd. 3.

[123] "Agricultural use" is defined as the production of livestock, dairy animals, dairy products, poultry or poultry products, fur-bearing animals, horticultural or nursery stock, fruits, vegetables, forage, grains, timber, trees, or bees and apiary products. It also includes wetlands, pasture, forest land, wildlife land, and other uses that depend on the inherent productivity of the land. MINN. STAT. § 40A.02, subd. 3.

[124] MINN. STAT. § 580.23, subd. 2(6)(i-iii).Tax classification definitions can be found at MINN. STAT. § 273.13, subd. 23. In general, property qualifies under the tax laws as agricultural land if it is contiguous acreage, of ten acres or more, used during the preceding year for agricultural purposes. MINN. STAT. § 273.13, subd. 23(e). If the acreage is less than ten acres, but that acreage was used exclusively for raising or cultivating agricultural products in the preceding year, the property can qualify as agricultural land. MINN. STAT. § 273.13, subd. 23(f)(1). Finally, contiguous land that includes a residence and is less than 11 acres in size can qualify as agricultural land if no more than an acre is used for a house and garage and the remaining land is used for "intensive" agricultural activities: grain drying and storage, equipment storage to support the landowner's agricultural activities on other parcels, nursery production, and production of fruits, vegetables, or animal products for sale in local markets. MINN. STAT. § 273.13, subd. 23(f)(2).

[125] MINN. STAT. § 580.23, subd. 2(6)(iv). Wetlands exempt from taxation are defined, in part, as land that is mostly underwater, typically produces little if any income, and has no use except wildlife or water conservation. MINN. STAT. § 272.02, subd. 11.

one of these classifications, it will have a twelve-month redemption period.

You are entitled to a twelve month redemption period if:

1. You have at least one-third of the principal paid off; or
2. You mortgaged before July 1, 1987—and have over 10 acres mortgaged; or
3. You have over 40 acres mortgaged; or
4. The land is agricultural land—and over 10 acres but no more than 40 acres.

b. Six-month redemption period

In general, borrowers who do not qualify for a twelve-month redemption period will have a redemption period of six months.[126]

c. Other redemption periods

There are other, very short, redemption periods that are sometimes allowed under the law, but these would almost never apply to an active family farm.[127]

d. Waiving the twelve-month redemption period

In some cases, the lender may ask the borrower to waive the right to a twelve-month redemption period and accept a six-month redemption period instead. Such waivers are only permitted for when the borrower's right to a twelve-month redemption is based on the property being ten to forty acres and used for agricultural purposes.[128] A waiver of this basis for a twelve-month redemption period will be legally enforceable if: (1) the waiver is in writing and in a separate document from the mortgage, or on a separately signed page of the mortgage; (2) the mortgage was signed on or after August 1, 1994; (3) the waiver was signed no later than when the mortgage was signed; and (4) if the waiver is a separate document from the mortgage, the lender records the waiver within ten days after recording the mortgage.[129]

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126 MINN. STAT. §§ 580.23, subd. 1, 581.10.

127 Redemption periods for voluntary foreclosures and vacant property are shorter. The two-month redemption period for a voluntary foreclosure for mortgages executed after August 1, 1993, is not applicable to homestead or property that is in agricultural use. MINN. STAT. § 582.32. "Agricultural use" is defined in MINN. STAT. § 40A.02, subd 3, and "homestead" in MINN. STAT. § 273.124. Vacant and abandoned property may have a five-week redemption period if the mortgage was executed after December 31, 1989, but only if the property—at the time of the foreclosure—was not in agricultural production and the mortgage covers no more than ten acres. MINN. STAT. § 582.032, subd. 1.

128 MINN. STAT. 580.23, subd. 4.

129 MINN. STAT. § 580.23, subd. 4. If the waiver is a separate document, it must be in recordable form and either recite the recorded or filed document number of the mortgage or recite the name of the

2. Exercising the right to redeem

The right to redeem foreclosed real estate is an important one for farm borrowers in financial distress. The law sets out detailed requirements that must be satisfied to exercise this right. Borrowers who are intending or even just considering exercising their right of redemption should make sure that they know exactly what will be required, and when.

The redemption right is exercised against the party who was the highest bidder at the foreclosure sale and holds the certificate of sale issued by the sheriff.[130] As mentioned earlier, in most cases the lender will be the highest bidder and, therefore, the borrower will be redeeming the property back from the lender, as the sheriff's certificate holder. This is not, however, always the case.

a. Amount the borrower pays

A borrower can redeem a parcel of real estate by paying the total of: (1) the amount bid at the sale for that parcel; (2) interest; and (3) other foreclosure-related costs for which the borrower is responsible.[131]

The borrower must pay interest on the bid amount and on other expenses for the period from the foreclosure sale to the time the borrower redeems.[132] The interest rate will be the rate set out in the certificate of sale issued by the sheriff after the foreclosure.[133] If the certificate of sale does not include an interest rate, the rate for the redemption period will be six percent.[134]

Other costs that must be paid as part of the redemption price are those paid by the sheriff's certificate holder. These include taxes, insurance, costs to protect the property from damage or destruction, and any other mortgages on the property at the time of foreclosure.[135] The sheriff's certificate holder must formally file a record of redemption costs with the county sheriff.[136]

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mortgagor or mortgagee, the legal description of the property, and the date of the mortgage.

130 MINN. STAT. § 582.03.

131 MINN. STAT. §§ 580.23, subd. 1(a), 581.10, 582.03, subd. 1.

132 MINN. STAT. §§ 581.10, 582.03, subd. 1 582.031, subd. 3.

133 MINN. STAT. §§ 580.23, 581.02, 581.10.

134 MINN. STAT. §§ 580.23, 581.10.

135 MINN. STAT. §§ 580.23, subd. 1(a), 581.10, 582.03, subd. 1, 582.031, subd. 3

136 MINN. STAT. §§ 582.03, subd. 2, 582.031, subd. 3. Payments such as taxes, assessments, insurance, and mortgage payments, as well as the cost of protecting the property from damage or destruction, must be proved by the sheriff's certificate holder by an affidavit filed with the sheriff of the county in which the sale was held at any time before the end of the redemption period. MINN. STAT. §§ 582.03, subd. 2, 582.031, subd. 3. If the affidavit is not provided to the sheriff more than one business day before the expiration of the redemption period, or if the holder fails to respond within seven days to a written request from the sheriff for an affidavit of allowable costs before the end of the redemption period (if the borrower wishes to redeem early), the sheriff may calculate a redemption amount and issue a certificate of redemption to the borrower that will be binding on the sheriff's certificate holder. MINN. STAT. § 582.03, subd. 2. If the holder provides the required affidavit, but the property is not redeemed within seven days after the affidavit is filed with the sheriff, the holder may file a new affidavit that includes any additional costs incurred during the redemption period.

The holder of the sheriff's certificate is free to accept a redemption payment that is less than the full amount that could be claimed. If the borrower will be submitting the redemption payment through the county sheriff, the sheriff may only accept a payment of less than the full amount due if the sheriff has received, before the end of the redemption period, written confirmation from the sheriff's certificate holder (or the holder's attorney), that the holder has agreed to accept a specific amount of money that is less than the full redemption amount.[137]

b. Payment procedure

The borrower must make payment either directly to the sheriff's certificate holder (the person who purchased the property at the foreclosure sale) or to the sheriff.[138] The payment must be made by end of the six-month or twelve-month redemption period that applies to the borrower.[139] Delivery must be made at the recipient's normal place of business.[140] It must be done during the business week (not on Saturday, Sunday, or a legal holiday) between 9:00 a.m. and 4:00 p.m.[141] Along with the payment, the borrower must provide: (1) a copy of the judgment, recorded deed or mortgage, assignment, or other document under which the borrower claims a right of redemption;[142] and (2) an affidavit—a written, sworn statement—of the amount required to redeem the property.[143] Within twenty-four hours after the redemption, the borrower must record these documents with the county recorder or registrar of titles and deliver copies to the sheriff for public inspection.[144] If the redemption was made at any place other than the county seat, the borrower can satisfy the recording requirement by mailing the documents "forthwith" from the nearest post office to the county recorder or registrar of - titles.[145]

c. Certificate of redemption

After making a redemption payment, the borrower should receive a certificate of redemption from the person from whom the property was redeemed.[146] The certificate should include: (1) the borrower's name, (2) the amount paid, (3) a description of the foreclosure sale and the property redeemed, and (4) a

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137 MINN. STAT. 580.23, subd 1(c).
138 MINN. STAT. §§ 580.24(c), 580.25, 581.02, 582.03.
139 *Sieve v. Rosar*, 613 N.W.2d 789, 794 (Minn. Ct. App. 2000); *Real Estate Equity Strategies, Ltd. Liab. Co. v. IRS*, 540 F.3d 860, 864 (8th Cir. 2008); *Irwin Union Bank & Tr. Co. v. Sheriff of Wash. Cnty.*, No. A04-1329, 2005 Minn. App. LEXIS 417, at *9 (Ct. App. Apr. 19, 2005).
140 MINN. STAT. § 580.23, subd 1(b).
141 MINN. STAT. § 580.23, subd 1(b).
142 MINN. STAT. §§ 580.25(1)-(2), 581.02. Normally this would be a deed or mortgage, but it could in some cases be a copy of the docket of the judgment.
143 MINN. STAT. §§ 580.25(3), 581.02.
144 MINN. STAT. §§ 580.25, 581.02. The sheriff will note the date of the document delivery and make them available for public inspection for six months after the end of the borrower's redemption period.
145 MINN. STAT. §§ 580.25, 581.02.
146 MINN. STAT. § 580.26.

statement of the source of the borrower's right to redeem.[147]

The certificate of redemption must be recorded with the county recorder or registrar of titles of the county where the property is situated within four business days after the borrower's right of redemption expires.[148]

d. Recording requirements

The recording requirements for redemptions are extremely important. If the borrower does not record the certificate of redemption within four business days, for example, the redemption right may be lost.

(1) Within twenty-four hours after redemption

Within twenty-four hours after redeeming the property, the borrower must record with the county recorder or registrar of titles the documents used in making payment.[149] On the same day, the borrower must also provide a copy of these documents to the sheriff of the county where the property is located.

(2) Within four days after the end of the redemption period

The borrower must record the certificate of redemption within four business days after the end of the redemption period.[150] If the borrower fails to record the certificate of redemption, the redemption may be voided by any person who later attempts to redeem the same property.[151]

Three steps to redemption after foreclosure

1. Before your redemption deadline, present:
   a. Payment;
   b. Documentation of your interest in the real estate; and
   c. An affidavit listing the redemption amount.

2. Within 24 hours after you hand over your payment, record the documentation of your interest and the affidavit with the county recorder or registrar of titles.

3. Within four business days after your right of redemption expires, record the certificate of redemption with the county recorder or registrar of titles.

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147 MINN. STAT. § 580.26.

148 MINN. STAT. § 580.26. Under Minnesota law, if the last day of a period of time falls on a Saturday, Sunday, or legal holiday, that day does not count, and the period of time is extended. MINN. STAT. § 645.15; MINN. R. CIV. P. 6.01(a); *Irwin Union Bank & Tr. Co. v. Sheriff of Wash. Cnty.*, No. A04-1329, 2005 Minn. App. LEXIS 417, at *16-17 (Ct. App. Apr. 19, 2005).

149 MINN. STAT. § 580.25; *Sieve v. Rosar*, 613 N.W.2d 789, 792 (Minn. Ct. App. 2000).

150 MINN. STAT. § 580.26; *Tesch v. Drew,* 225 N.W. 815 (Minn. 1929) .

151 MINN. STAT. § 580.26.

3. Effect of redemption

If the borrower properly redeems the property, the foreclosure sale is annulled.[152]

4. What happens to property during the redemption period?

Not all borrowers will want or be able to redeem their foreclosed real estate. Nonetheless, the redemption period is an important time for all borrowers because they will generally be allowed to remain on the foreclosed real estate during that period. The borrower may also be entitled to receive the income from the property during the redemption period, unless the mortgage includes a "rent and profits" clause.

a. Right to occupy the land

Borrowers are usually allowed to live on and use the foreclosed real estate during the redemption period.[153] Borrowers must keep the real estate in reasonably good shape during the redemption period, but in general they may continue to use it as they have in the past.[154] A court, however, may intervene if it determines that the borrower is committing waste—meaning that the borrower is harming the property such that its value could be impaired.[155]

If the property is vacant or unoccupied, the foreclosure buyer (who is often the lender) will have a very limited right to enter the property—for example, to prevent or minimize damage to the property by changing locks, boarding up windows, and the like.[156]

b. Rents and profits from the land

In general, "rents and profits" are the income from the land, including lease payments, federal farm payments, net income from crops, and the like.[157]

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[152] MINN. STAT. §§ 580.27, 581.02.

[153] Minn. Stat. §§ 561.18, 580.12, 581.02, 559.17, subd. 1. See also Mutual Ben. Life Ins. Co. v. Frantz Klodt & Son, Inc., 237 N.W.2d 350, 353 (Minn. 1975); Woodman of World Life Ins. Soc'y v. Sears Roebuck & Co., 200 N.W.2d 181, 184 (Minn. 1972); Gardner v. W. M. Prindle & Co., 240 N.W. 351, 352 (Minn. 1932); Crowell v. Delafield Farmers Mutual Fire Ins. Co., 453 N.W.2d 724, 726 (Minn. Ct. App. 1990).

[154] MINN. STAT. § 561.18. A borrower who damages the property during the redemption period with the intent of reducing its value may risk criminal fines or imprisonment. MINN. STAT. § 609.615.

[155] MINN. STAT. § 561.18; *Ewert v. Anderson*, 359 N.W.2d 293, 297 (Minn. Ct. App. 1984).

[156] MINN. STAT. § 582.031; *U. S. Bank Nat'l Ass'n v. Womack*, No. A17-0082, 2017 Minn. App. Unpub. LEXIS 877, at *17 (Oct. 16, 2017). Upon request, the borrower is entitled to the keys for any lock that the foreclosure buyer puts on the unoccupied or vacant real estate. MINN. STAT. § 582.031, subd. 1(c).

[157] The exact meaning of the "rents and profits" when it comes to farmland could become a point of dispute. For title insurance certification purposes, "assignment of rents and profits" is defined as an "assignment, whether in a separate document or in a mortgage, of any of the benefits accruing under a recorded or unrecorded lease or tenancy existing, or subsequently created, on property encumbered by a mortgage, which is given as additional security for the debt secured by the mortgage." MINN.

Borrowers normally have the right to receive rent, income, and profits from foreclosed real estate during the redemption period.[158] If, however, the mortgage included a "rents and profits" clause, the situation may be very different, and borrowers may lose that potential income source.

(1) How lenders can claim rents and profits

Written agreements are the key to understanding what the lender can do with farm income and property during the redemption period. The loan agreement may give the lender the legal right to the rents and profits from the land. If the rents and profits clause is part of a properly recorded mortgage and it meets the other legal requirements for a security interest, the lender may have a lien on the rents and profits from the land. Chapter Four of this Guide discusses security interests.

It is important to keep in mind that the lien only exists as security to pay back the amount owed to the lender. Therefore, if the entire amount owed is paid, the lender's right to claim rents and profits from the land expires.[159]

(2) Requirements for rents and profits clauses

Not all rents and profits clauses are enforceable, and not all of a borrower's farm is subject to the clause even if it is enforceable. In order for a rents and profits clause to be legally enforceable, all of the following must be true.[160]

(a) Mortgage signed or formally modified after August 1, 1977

For the lender's claim to be enforceable, either the mortgage including the rents and profits clause must have been executed after August 1, 1977, or a legal modification of the mortgage must have been executed after August 1, 1977.[161]

(b) Minimum loan of $100,000

For the lender's claim to be enforceable, the original principal loan amount secured by the mortgage must have been at least $100,000.[162]

STAT. § 507.401, subd. 1(b). In a somewhat different context, a court has ruled that "rents" include payment made by tenants to occupy real estate, and that a "profit" is the "benefit, advantage, or pecuniary gain accruing to the owner or occupant of land from its actual use." *In re Mid-City Hotel Associates,* 114 B.R. 634, 641 (Bankr. D. Minn. 1990). Rents and profits are also discussed in *Seifert v. Mut. Ben. Life Ins. Co.,* 281 N.W. 770, 771 (Minn. 1938).

158 *Mutual Ben. Life Ins. Co. v. Frantz Klodt & Son, Inc.,* 237 N.W.2d 350, 353 (Minn. 1975) ("Minnesota courts have acknowledged that the mortgagor retains his rights to possession and to rents and profits during default and after the foreclosure sale during the redemption period.").

159 MINN. STAT. § 559.17, subd. 3; *Cross Companies, Inc. v. Citizens Mortgage Inv. Trust,* 232 N.W.2d 114, 118 (Minn. 1975).

160 MINN. STAT. § 559.17.

161 MINN. STAT. § 559.17, subd. 2(1).

162 MINN. STAT. § 559.17, subd. 2(2). If the lien is on residential real estate with five or more dwelling

(c) Not homesteaded

The lender's claim to rents and profits is not enforceable against property that was entirely "homesteaded as agricultural property."[163] The statute gives no definition of this term. The likely effect of this provision is that a rents and profits clause will be valid on all non-homesteaded agricultural land. For example, if a bank has a mortgage on 300 acres and 160 of those acres are homesteaded, the rents and profits clause would be valid only for the other 140 acres.

The question remains, however, how to define "homestead" for this purpose. One possible answer is to use the homestead designation from a redemption notice, but it seems possible that the courts could use other definitions.[164]

In practice, this restriction means that if the mortgage includes a rents and profits clause, during the redemption period it is possible the farmer-borrower will not have a legal right to keep the rents and profits from the non-homesteaded portions of the farm.

(3) Receiverships under rents and profits clauses

A rents and profits clause in a loan agreement may give the lender the right to have a "receiver" appointed to manage the property.[165] If properly written and executed, this part of a rents and profits clause can be legally enforceable. A receiver is a third party appointed by the court to control the property, collect the rents, profits, and other income from the property, take a fee, and dispose of the rents and profits as the court orders.[166]

To get a receiver appointed, the lender must go to the court and request one.[167] If the written loan agreement says that a receiver "is to be appointed" after a specific event—for example, the foreclosure—the court will appoint the

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units, the loan may be for less than $100,000.

163 MINN. STAT. § 559.17, subd. 2(3)(i).

164 The advantage for the borrower in using the redemption designation is that it is flexible and can largely be defined by the borrower. MINN. STAT. § 582.041, subd. 3. In some cases, however, other designations, such as those used for exemptions from judgments or federal bankruptcy, might be better. Further, the statute does not explain what happens if the borrower fails to make a homestead designation. For one discussion of how homestead might be defined see *Travelers Ins. Co. v. Westridge Mall Co.*, 826 F. Supp. 289, 293-94 (D. Minn. 1993).

165 MINN. STAT. §§ 559.17, subd. 2(3), 576.24, 576.25, subd. 5.

166 MINN. STAT. §§ 576.21(p), 576.29. Receivers are neutral parties and must be experienced property managers, or retain an experienced property manager. MINN. STAT. §§ 576.25, subd. 5(c), 576.26. The court determines a bond that the receiver must post to ensure that the receiver properly carries out his or her duties according to the court's orders. MINN. STAT. § 576.27. The court, not the lender, chooses the receiver. *Minnesota Hotel Co., Inc. v. ROSA Dev. Co.,* 495 N.W.2d 888, 893 (Minn. Ct. App. 1993).

167 MINN. STAT. § 576.25, subd. 7.

receiver.[168] If no mention is made of a receiver in the agreement, or if the agreement only says that the receiver "may be appointed" by the courts, the court may well decide not to appoint one.[169]

5. What happens to the crops at the end of the redemption period?

If a redemption period ends when there are crops in the ground, there are some complicated rules for sorting out the claims of the borrower and the lender or purchaser of the property.

a. Crops are the personal property of the farmer

Crops that a borrower plants on foreclosed land during a redemption period are the borrower's personal property so long as the borrower had the legal right to plant them.[170] As a result, if the borrower has unharvested crops in the field when the redemption period ends, the borrower is still the planting crop owner—even though redemption of the real estate has become impossible.[171]

b. New owner may have priority in crop proceeds

In 2001, the Minnesota legislature repealed a law that had provided options for how the crops could be harvested at the end of the redemption period because it caused inconsistent lien priorities for certain parties in limited circumstances.[172] Under the law, if the new owner of the property—who is usually the lender—has a properly filed or perfected security interest in the crops, the new owner will have a priority claim to the crops and crop proceeds over any claim of the borrower who is a planting crop owner. [173] Chapter Four discusses security interests and agricultural liens.

L. Deficiency Judgments

If the sale of a borrower's real estate does not bring enough money to pay off the mortgage debt and any other money owed related to the mortgage, the borrower may be subject to a deficiency judgment.[174] In a deficiency judgment action, the lender forecloses on the real estate and also seeks additional money from the borrower to satisfy the debt.

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168 MINN. STAT. § 559.17, subd. 2(3)(ii)(a).

169 MINN. STAT. § 559.17, subd. 2(3)(ii)(b). Traditionally, it has been difficult for lenders to have receivers appointed. *Mutual Benefit Life Ins. Co. v. Frantz Klodt & Son,* 237 N.W.2d 350, 352-53 (Minn. 1975).

170 MINN. STAT. § 557.10.

171 Planting crop owners may also include farmers who had a leasehold interest and a contract for deed buyer's interest. See *State Bank in Eden Valley v. Euerle Farms, Inc.*, No. C9-87-2062, 1988 Minn. App. LEXIS 444, at *4 (Ct. App. May 3, 1988).

172 2001 Minn. Laws ch. 57, § 7 (repealing MINN. STAT. § 557.12).

173 MINN. STAT. § 336.9-334(i). A security interest is a legal claim of a creditor allowing the creditor to take possession of the debtor's property, or claim proceeds from the sale of the debtor's property, if the debtor defaults on the debt. Some security interests are created by law or by court order. Most commonly, however, security interests are agreed to by debtors as part of a credit arrangement.

174 MINN. STAT. § 582.30, subds. 3-5.

Whether or not the lender is eligible for a deficiency payment should affect negotiations with the lender from the first moment the borrower is in default.

1. Availability of a deficiency

Assuming that the proceeds from the foreclosure sale do not cover the full amount owed to the lender, the lender's ability to claim a deficiency hinges on: (1) whether the foreclosure was of rented land where the tenant is not the borrower; (2) whether the foreclosure was by action or advertisement; and (3) the length of the redemption period.[175]

In general, borrowers will be in one of the following four categories of circumstances.

a. Foreclosure of mortgage on rented agricultural property executed on or after May 21, 1999—no deficiency judgment

If the mortgage was executed or amended on or after May 22, 1999, and the mortgaged property is used in agricultural production only by a tenant who is not the borrower, the lender will not have the right to seek a deficiency judgment.[176] This is true regardless of whether the foreclosure is by advertisement or by action.

b. Foreclosure by advertisement and six-month redemption period—no deficiency judgment permitted

If the foreclosure is by advertisement, and the borrower has a six-month redemption period, the lender will not have the right to seek a deficiency judgment.[177] The lender cannot simply extend the redemption period to twelve months in order to become eligible to seek a deficiency.[178]

c. Foreclosure by action—deficiency judgment possible

If the foreclosure is by action, a deficiency judgment is possible.[179] The length of the redemption period does not affect this possibility.

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175 MINN. STAT. §§ 580.225, 581.09, 582.30; *National City Bank v. Lundgren,* 435 N.W.2d 588, 593 (Minn. Ct. App. 1989); *Norwest Bank Hastings v. Franzmeier,* 355 N.W.2d 431, 434-35 (Minn. Ct. App. 1984).

176 MINN. STAT. § 582.30, subd. 1(c).

177 MINN. STAT. § 582.30, subd. 2.

178 In *American Nat'l Bank v. Blaeser,* 326 N.W.2d 163, 165 (Minn. 1982), the court concluded that if a lender wishes to purchase real estate and obtain a deficiency judgment "under facts where the 6-month redemption period applies, it must foreclose by action.

179 MINN. STAT. § 582.30, subd. 2; *Suburban Nat'l Bank v. Kopstein*, C4-94-514, 1994 WL 307892, 1994 Minn. App. LEXIS 882 (Minn. Ct. App. Sept. 6, 1994) (unpublished).

d. Twelve-month redemption period—deficiency judgment possible

If the redemption period is twelve months, a deficiency judgment is possible.[180] Whether the foreclosure is by action or advertisement does not affect this possibility.

Does the lender have the right to seek a deficiency judgment?	Foreclosure by:	
	Action	Advertisement
6-month redemption period	Yes	No
12-month redemption period	Yes	Yes

2. Requirements for obtaining a deficiency judgment for mortgages on agricultural property

If a lender wants to obtain a deficiency judgment resulting from the foreclosure of agricultural property, must file a lawsuit—within ninety days after the foreclosure sale—and ask the court for the judgment and a determination of the fair market value of the property.[181]

a. Reasonable foreclosure

For a deficiency to be available on agricultural land, the court must conclude that the foreclosure sale was conducted in a "commercially reasonable manner."[182] If the foreclosure was not commercially reasonable, no deficiency will be allowed, no matter how short the foreclosure price was of the amount owed to the lender.

b. Maximum amount of deficiency on agricultural property foreclosures

Even if a foreclosure sale is commercially reasonable, it may still result in a bid that is too low in the eyes of the law. The maximum deficiency in a mortgage on agricultural property is limited to the difference between: (1) the fair market value of the property and (2) either the amount remaining on the mortgage, if the foreclosure was by advertisement, or the amount of the judgment, if the foreclosure was by action.[183]

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[180] MINN. STAT. § 582.30. Under MINN. STAT. § 582.30, the only redemption period restrictions for deficiency judgments concern six-month redemption periods. As a result, a deficiency judgment is possible when the redemption period is twelve months.

[181] MINN. STAT. § 582.30, subd. 3(a), 5(a). Agricultural property is property used in agricultural production. To file an action for the deficiency judgment, the lender must serve the borrower with a summons and complaint within 90 days of the foreclosure sale. Merely filing the summons and complaint with the court—without serving the borrower—is not enough. *Federal Land Bank of St. Paul v. Bennett,* 445 N.W.2d 279, 280-81 (Minn. Ct. App. 1989).

[182] MINN. STAT. § 582.30, subds. 3(a), 5(a). The statute does not provide a definition of "commercially reasonable." Perhaps the court would follow the factors used under the Uniform Commercial Code and MINN. STAT. §§ 336.9-610(b), 336.9-627. Chapter Four discusses commercial reasonableness in this context.

[183] MINN. STAT. § 582.30, subds. 3(b), 5(b).

The statute setting this limit notes that the "property may not be presumed to be sold" at the foreclosure sale for "its fair market value."[184] Borrowers have the right to submit evidence establishing the fair market value of the agricultural property. For example, if the borrower owes $200,000 to the lender, and $150,000 was bid at the foreclosure sale, in most foreclosures the borrower might be subject to a deficiency judgment for $50,000. In a foreclosure on agricultural property, however, if the court decides that the fair market value of the property was higher than the amount bid—for example, $180,000—the borrower's deficiency judgment would be limited to $20,000.

c. Limits on enforcing deficiency judgments for mortgages of agricultural property

Minnesota law imposes some additional restrictions on deficiency judgments for mortgage debt on agricultural property. These restrictions limit a lender's ability to collect under such a judgment.

(1) After-acquired property not available to satisfy the judgment

A deficiency judgment to enforce a mortgage debt on property used in agricultural production does not attach or apply to property—either real property or personal property—that is acquired by the borrower after the judgment is entered.[185]

(2) Statute of limitations to collect under the judgment—three years

A lender has only three years to execute a deficiency judgment to collect on a mortgage debt on property used in agricultural production.[186] This is in contrast to the normal ten-year execution period for non-agricultural property.[187] Chapter Five discusses judgments and executions.

3. Deficiency judgment for mortgage on non-agricultural property

The rules for a deficiency judgment on mortgaged property that is not used in agricultural production are similar to the rules discussed here, although the fair market value of the property is not considered, the limitation on attaching after-acquired property does not apply, and there is a longer statute of limitations for executing the judgment.[188]

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184 MINN. STAT. § 582.30, subds. 3(b), 5(b).

185 MINN. STAT. § 582.30, subd. 9.

186 MINN. STAT. § 582.30, subd. 7; *Westchester Fire Ins. Co. v. Hasbargen*, 632 N.W.2d 754, 757 (Minn. Ct. App. 2001). This limit almost certainly does not apply to federal agencies. The United States government is not bound by a statute of limitations unless Congress requires it. *United States v. Summerlin*, 310 U.S. 414, 416-17 (1940). Federal agency collection actions are somewhat limited by a six-year federal statute of limitations under 28 U.S.C. §§ 2415, 2416; *United States v. Sather*, 131 F. Supp. 2d 1146 (D.S.D. 2001).

187 MINN. STAT. §§ 541.04, 550.01.

188 MINN. STAT. §§ 582.30, 541.04, 550.01.

M. Scams Targeting People in Foreclosure

Mortgage scam artists sometimes target people in foreclosure. These scams generally require the borrower to pay up front fees and promise to somehow change the borrower's loan terms, save a home from foreclosure, or retrieve a home through the use of redemption. The state of Minnesota regulates what it calls "foreclosure consultants" and "foreclosure purchasers" that claim to be able to save the homes of borrowers.[189] This regulation applies to farms as well. The Minnesota Attorney General's Office has information on these scams and how to avoid them. [190]

IV. Cancellation of contracts for deed

If a buyer defaults on a contract for deed, the seller will typically have the right to cancel the contract and keep the land.[191] The buyer faces losing not only possession of the real estate but also all of the payments made up to the point of cancellation.

A. Seller's options if the buyer defaults

If the buyer defaults on a contract for deed, the seller might agree to negotiate and restructure the contract terms. Or, after a default, the seller may begin the process of canceling the contract. Damage actions are also possible against a defaulting contract for deed buyer, although the seller may not both cancel the contract and sue to force the buyer to meet the terms of the contract.[192]

1. Action for specific performance and damages

In an action for what the law calls specific performance of a contract for deed, the seller can sue the buyer for money, rather than cancel the contract, in case of default. [193] This remedy is more likely to be used if the contract contains an acceleration clause. The typical contract for deed does not have an acceleration clause, and without a contract clause that allows acceleration of the payment schedule, sellers must sue for each delinquent installment payment as it comes due.[194]

2. Judicial termination

Judicial terminations of contracts for deed are used rarely. Judicial termination requires a declaratory judgment by the court that the contract is terminated. This

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189 MINN. STAT. part 325N.

190 See https://www.ag.state.mn.us/consumer/publications/facingmortgageforeclosure.asp.

191 A helpful resources is PHILLIP L. KUNKEL, JEFFREY A. PETERSON, and JASON THIBODEAUX, *Termination of Contracts for Deed,* Farm Legal Series, University of Minnesota Extension (2015), http://www.extension.umn.edu/agriculture/business/taxation/farm-legal-series/termination-of-contracts-for-deed/docs/termination-of-contracts-for-deed.pdf.

192 *Wayzata Enter., Inc. v. Herman,* 128 N.W.2d 156, 158 (Minn. 1964); *Covington v. Prichett,* 428 N.W.2d 121 (Minn. Ct. App. 1988); *Kosbau v. Dress,* 400 N.W.2d 106, 108 (Minn. Ct. App. 1987). The seller also may not cancel the contract and then sue the buyer for unreasonably abusing or neglecting the land. *Rudnitski v. Seely,* 452 N.W.2d 664, 666-67 (Minn. 1990).

193 *Summit House Co. v. Gershman,* 502 N.W.2d 422, 424 (Minn. Ct. App. 1993).

194 *Kosbau v. Dress,* 400 N.W.2d 106, 108 (Minn. Ct. App. 1987); *Rodeberg v. Weckwerth,* 409 N.W.2d 57, 59 (Minn. Ct. App. 1987).

type of action might be used by a seller if there is some doubt as to whether the contract can be properly terminated under the statute. [195]

3. Deed in lieu of cancellation

If the buyer gives the seller a deed in lieu of cancellation, the buyer gives up the right to purchase the land with that contract

4. Statutory cancellation

Statutory cancellation of a contract for deed occurs when the lender seeks cancellation without any court oversight. Because statutory cancellations are quicker and cheaper, the vast majority of contract for deed sellers use statutory cancellation as a remedy for a default. This remedy is discussed below.

B. Farmer-lender mediation

A seller who wants to cancel a contract for deed may first be required to serve the buyer with a notice of the availability of farmer-lender mediation.[196] Chapter Seven discusses farmer-lender mediation.

C. Notice of cancellation of a contract for deed

Before a seller terminates a contract for deed through statutory cancellation, the seller must personally deliver to the buyer a "notice of termination or cancellation."[197] The notice explains that the contract will be canceled if the buyer does not cure the default according to the procedures in the notice.

The notice must also explain: (1) why the buyer is in default, (2) how to cure the default, and (3) how long the buyer has to cure the default.[198]

The notice should include the name, address, and telephone number of the seller or an attorney authorized to accept payments and should state where the payment can be made.[199]

D. Reinstatement for Statutory Cancellations

The requirements of the notice, and of the buyer's possible cure for the default, vary

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[195] MINN. STAT. §§ 559.21.

[196] MINN. STAT. § 559.209.

[197] MINN. STAT. § 559.21, subd. 4. Notice will be served within the state in the same manner as a summons in district court—see MINN. R. CIV. P. 4.03. Federal and state tax liens on the buyer's interest require separate notices to the taxing authorities. 26 U.S.C. § 7425; MINN. STAT. § 270C.63, subd. 11. Failure to make the required service on the IRS does not void a cancellation and the seller is subject to the tax lien. *Bartels v. Blattner,* 595 N.W.2d 527 (Minn. Ct. App. 1999).

[198] MINN. STAT. § 559.21, subd. 3.

[199] MINN. STAT. § 559.21, subd. 3.

somewhat depending on when the contract for deed was signed. In order for the buyer to cure, or reinstate, the contract for deed, the buyer must take at least three actions. A more recent contract for deed may require one or two additional buyer actions.

1. Reinstatement rules for every contract for deed must follow the steps set out in this section

Every person reinstating a contract for deed must:

a. Eliminate the default

The buyer must eliminate whatever problem is described in the notice as creating a default.[200] Usually—but not always—this will be by paying any late payments. For example, if the buyer has not paid real estate taxes, but was required to do so in the contract and is therefore in default, the buyer must pay the taxes to stop the cancellation.[201]

b. Pay cost of service

The buyer must pay the seller's reasonable costs of serving the notice of cancellation—but only if the seller notifies the buyer of the costs by certified mail to the buyer's last known address at least ten days before the termination date.[202]

c. Pay attorneys' fees

The buyer will likely have to pay for the seller's attorneys' fees that are actually expended or incurred. These fees will be either $100, $200, $250, or $500 depending on when the contract was executed.[203]

2. Additional reinstatement rule for contracts executed after April 30, 1980— pay all due and owing

If the contract for deed was executed on or after May 1, 1980, the payments needed to cure a default may be higher than would otherwise be the case. To cure a default and

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[200] MINN. STAT. § 559.21, subds. 1b(1), 1c(1), 2a(1).

[201] One subtle point is that in order to reinstate the contract, the buyer is required only to make the back payments that are described in the notice—not any payments that came due after the notice but are not included in it. MINN. STAT. § 559.21, subd. 4(c).

[202] MINN. STAT. § 559.21, subds. 4(c)(3), 1b(2), 1c(2), 1d(3), 2a(3).

[203] The different amounts are based on the date the contract was executed. MINN. STAT. § 559.21, subds. 4(c)(5), 1b(3), 1c(3), 1d(4), 2a(5). Amounts are as follows: for mortgages executed before August 2, 1976, the amount is $100; for those executed on or after August 2, 1976, and before May 1, 1980, the amount is $200; for those executed on or after May 1, 1980, and before August 1, 1999, the amount is $250; and for those executed on or after August 1, 1999, the amount is $500. No fees are due on a contract executed after July 31, 1985, unless the contract is in default for at least 30 days before the notice is served. MINN. STAT. § 559.21, subd. 2a(5). On contracts executed on or before July 31, 1985, no fees are due unless the contract is in default for at least 45 days before the notice is served. MINN. STAT. § 559.21, subds. 1b(3), 1c(3), 1d(4). Attorneys' fees are reduced if the amount of the default is less than $1,000.

reinstate a contract covered by this rule, the buyer must make all payments due to the seller under the contract through the date that payment is made.[204]

3. Additional reinstatement rule for contracts executed after July 31, 1985— 2 percent charge

If the contract for deed was executed on or after August 1, 1985, the buyer must also pay an extra charge of 2 percent of any amount in default at the time the notice of cancellation was served.[205]

How to reinstate a contract for deed			
	Contract executed before April 30, 1980	Contract executed between April 30, 1980, and July 31, 1985	Contract executed after July 31, 1985
Cure default through date of notice	X	X	X
Pay cost of service	X	X	X
Pay attorneys' fees	X	X	X
Cure default through date of payment		X	X
Pay 2 percent penalty			X

E. How to make payments for reinstatements

The notice of cancellation of a contract for deed will tell the buyer where to make any payments needed for reinstatement. If, however, the notice was not signed by the lawyer for the seller, and the buyer either cannot find the seller or the seller is not in the state, the buyer can make the payment to the court administrator of the district court in the county where the property is located.[206] The buyer should also file proof that any other defaults have been eliminated.[207]

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[204] MINN. STAT. § 559.21, subd. 4(c)(2).

[205] MINN. STAT. § 559.21, subds. 4(c)(4), 2a(4). This does not include earnest money contracts, purchase agreements, exercised options, final balloon payments, or any taxes, assessments, mortgages, or prior contracts assumed by the purchaser.

[206] MINN. STAT. § 559.21, subd. 4(e).

[207] MINN. STAT. § 559.21, subd. 4(e). If the contract for deed payments were assigned by the seller to a creditor, the buyer should, after receiving notice, send payments to the creditor, who also has the right to enforce the contract for deed. MINN. STAT. §§ 336.9-607(a)(1)(A), 336.9-406.

F. How long the buyer has to reinstate

A notice of cancellation of a contract for deed should also explain how long the buyer has to reinstate the contract. The buyer should have at least thirty days to reinstate after service of the notice, and usually sixty days for more recent contracts.[208]

For somewhat older contracts for deed, the amount of time the buyer has to reinstate the contract varies depending on when the contract was executed and how much the buyer has paid on the purchase price. The following calculations depend on the percent of the purchase price that has been paid. The purchase price includes the down payment. Payments also include the down payment under the contract, but not interest payments.[209]

In general, the reinstatement period depends on when the contract was executed.[210]

1. Contracts executed before August 2, 1976

If the contract was executed before August 2, 1976, the reinstatement period is thirty days in all cases.[211] That is, the buyer has thirty days after service of the notice of cancellation to cure the default and satisfy the reinstatement requirements.

2. Contracts executed from August 2, 1976, to April 30, 1980

If the contract was executed from August 2, 1976, to April 30, 1980, the reinstatement period is: (1) thirty days—if the buyer has paid off less than 30 percent of the contract; (2) forty-five days—if the buyer has paid 30 percent or more of the contract but less than 50 percent; and (3) sixty days—if the buyer has paid off 50 percent or more of the contract.[212]

3. Contracts executed from May 1, 1980, to July 31, 1985

If the contract was executed from May 1, 1980, to July 31, 1985, the reinstatement period is: (1) thirty days—if the buyer has paid off less than 10 percent of the contract; (2) sixty days—if the buyer has paid off 10 percent or more but less than 25 percent of the contract; and (3) ninety days—if the buyer has paid off 25 percent or more of the contract.[213]

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[208] MINN. STAT. § 559.21, subds. 2a, 4.

[209] MINN. STAT. § 559.21, subd. 1e(a). Mortgages, prior contracts for deed, special assessments, delinquent real estate taxes, or other obligations or encumbrances assumed by the buyer are not included as either part of the purchase price or the payments. MINN. STAT. § 559.21, subd. 1e(a).

[210] MINN. STAT. § 559.21.

[211] MINN. STAT. § 559.21, subd. 1b.

[212] MINN. STAT. § 559.21, subd. 1c.

[213] MINN. STAT. § 559.21, subd. 1d.

4. Contracts executed after July 31, 1985

If the contract was executed after July 31, 1985, the reinstatement period normally is sixty days in all cases.[214]

5. Deadlines are strict

The deadlines for curing contract for deed defaults are strictly enforced.[215]

Reinstatement — How long do buyers have to reinstate after receiving the notice of cancellation?					
		30 days	**45 days**	**60 days**	**90 days**
Contract executed before August 2, 1976		X			
Contract executed between August 2, 1976, and April 30, 1980, and the buyer has paid off:	Less than 30% of the principal	X			
	30% or more of principal but less than 50%		X		
	50% or more of principal			X	
Contract executed between May 1, 1980, and July 31, 1985, and the buyer has paid off:	Less than 10% of principal	X			
	10% or more of principal but less than 25%			X	
	25% or more of principal				X
Contract executed after July 31, 1985				X	

G. Seller can waive the right to cancel

Even if the buyer is in default, the seller can voluntarily decide to stop the cancellation process at any time before the period to cure has run.[216]

If after serving the notice of cancellation, the seller voluntarily accepts a payment or some other benefit from the contract, the seller waives the cancellation.[217] For this rule to apply, the payment must be made on the same debt that was cancelled. For the action of the seller to be a waiver of the cancellation right, however, there must be some showing that it was a voluntary action with the seller having full knowledge of the facts and available legal rights, and with the seller's intent to relinquish those rights.[218] For

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[214] MINN. STAT. § 559.21, subd. 2a.
[215] *Extraordinary Learn. & Ed. v. New Bethel Baptist Ch.,* 430 N.W.2d 184, 187 (Minn. Ct. App. 1988).
[216] *Kosbau v. Dress,* 400 N.W.2d 106, 109 (Minn. Ct. App. 1987).
[217] *Thomey v. Stewart,* 391 N.W.2d 533, 535-36 (Minn. Ct. App. 1986).
[218] *Thomey v. Stewart,* 391 N.W.2d 533, 536 (Minn. Ct. App. 1986); *Freitag v. Wolf,* 226 N.W.2d 868,

example, if the seller retains a late payment after service of the notice of cancellation and informs the buyer that other payments are still due, that is not a waiver of the cancellation.[219]

H. Fighting the cancellation

The buyer has a right to contest, in court, the cancellation of a contract for deed. The court can stop the seller's movement toward cancellation with an injunction if the buyer can show any reason why termination should not occur.[220] As a condition of granting the injunction, the court will likely require the buyer to either make some sort of payment, or bond, as a security deposit.[221] Although the buyer is permitted to do this without legal assistance, to be effective, the buyer probably will need the help of an attorney.

I. If a contract for deed is canceled

If the buyer is unable to cure the default or work out an agreement with the seller in mediation or otherwise, the seller can cancel the contract for deed.[222] Until terminated, the terms and conditions of the contract for deed remain in full force and effect. [223] A contract for deed cancellation results in the following.

1. The buyer loses the property

When a contract for deed is canceled, the buyer loses the right to possess the property. If the buyer does not leave, the seller will probably be able to start an unlawful detainer action to remove the buyer.[224]

2. The buyer loses money already paid

If a contract for deed is canceled, the buyer loses all of the money paid on the

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870 (Minn. 1975); *Fraser v. Scharber,* 173 N.W.2d 328, 329-30 (Minn. 1969); *Odegaard v. Moe,* 119 N.W.2d 281, 283-84 (Minn. 1962).

219 *Knutson v. Seeba,* C7-98-1665, 1999 WL 171500, 1999 Minn. App. LEXIS 328 (Minn. Ct. App. Mar. 30, 1999) (unpublished).

220 MINN. STAT. § 559.211, subd. 1. This remedy is in addition to any other rights the buyer has under the contract or in the law. MINN. STAT. § 559.211, subd. 2.

221 MINN. STAT. § 559.211, subd. 1. The courts have broad discretion as to what security, if any, to require of the buyer. Security need not necessarily equal the default amount. *Carlson v. Mixell,* 412 N.W.2d 771, 773 (Minn. Ct. App. 1987). Any ongoing contract payments must be paid either to the seller or the court. *Seger v. DeGardner,* 355 N.W.2d 465, 466 (Minn. Ct. App. 1984). If the injunction is granted, the buyer has another 15 days to cure the default before the contract will be terminated. MINN. STAT. § 559.211, subd. 1.

222 MINN. STAT. § 559.21, subd. 4(d). If a seller cancels a contract for deed, a transfer statement for a contract for deed cannot be used to transfer the seller's interest and the transfer statement is not effective as a conveyance. MINN. STAT. § 336.9-619(a)(E)(vii)(3). A transfer statement is a document that shows a borrower defaulted on an obligation secured by collateral to which all rights have been transferred to the seller. MINN. STAT. § 336.9-619.

223 *Boehm's, Inc. v. Wacholz,* 495 N.W.2d 447, 450 (Minn. Ct. App. 1993).

224 In an unlawful detainer action, the court determines the right to present possession of real estate. See, for example, *Thomey v. Stewart*, 391 N.W.2d 533, 536 (Minn. Ct. App. 1986).

contract.[225]

3. No deficiency judgments

When a contract for deed is canceled, the seller cannot sue the buyer for a deficiency judgment.[226]

4. Unjust enrichment claim possible

In some cases, courts conclude that a contract for deed seller was "unjustly enriched" by payments and improvements made by the buyer before cancellation and the court may order the seller to refund some of the buyer's investment.[227] Usually, however, in order to claim that the seller was unjustly enriched, the buyer must show that the seller somehow misrepresented the situation to the buyer, engaged in fraud, or acted in an immoral manner.[228]

5. Seller can recover personal property covered by the contract

When personal property is included in a contract for deed, cancellation of the contract entitles the seller to recover the personal property.[229]

6. What happens to growing crops if the contract is canceled

If a contract for deed is canceled when there are crops in the ground, some complicated rules for sorting out the claims of the buyer and the seller can occur.

a. Crops are the personal property of the farmer who planted them

Crops that a farmer plants are his or her personal property, as long as the farmer had the legal right to plant them. [230] As a result, if the buyer has unharvested crops in the field after the contract for deed is canceled, the buyer is still the planting crop owner—even though the right to occupy and possess the land is lost.

b. Seller may have priority in crops

In 2001, the Minnesota Legislature repealed the law that provided options for how the crops will be harvested after a contract for deed cancellation. The previous statute created inconsistent lien priorities for certain parties in limited

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[225] *Kosbau v. Dress*, 400 N.W.2d 106, 108 (Minn. Ct. App. 1987).
[226] *Rudnitski v. Seely*, 452 N.W.2d 664, 666 (Minn. 1990) ("one cannot ordinarily cancel a contract by the statutory procedure and then recover benefits due under it.").
[227] *Anderson v. DeLisle,* 352 N.W.2d 794, 796 (Minn. Ct. App. 1984).
[228] *Kosbeau v. Dress,* 400 N.W.2d 106, 108 (Minn. Ct. App. 1987); *Fort Dodd P'ship v. Trooien,* 392 N.W.2d 46, 49 (Minn. Ct. App. 1986); *Anderson v. DeLisle,* 352 N.W.2d 794, 796 (Minn. Ct. App. 1984).
[229] *Rudnitski v. Sely,* 452 N.W.2d 664, 668 (Minn. 1990).
[230] MINN. STAT. § 557.10.

cases.[231] The Minnesota Legislature also repealed the law providing that the seller of a contract for deed retains a lien on any crops grown by the buyer-farmer.[232] In general, under current law, a creditor needs a perfected security interest in crops to have priority over the claims of the owner of the real estate.[233] Landlord liens provide a partial exception to this rule.[234] Chapter Four discusses security interests and agricultural liens.

7. If the buyer gave a promissory note as a down payment

In some cases, the buyer on a contract for deed gives the seller a promissory note as a down payment. If so, the seller may try to enforce the note even though the contract for deed has been canceled.[235] If the note was given as a substitute for a payment, however—rather than as a down payment—the note will likely be canceled along with the contract for deed.[236]

J. If the seller defaults

It is not common for the seller to default on a contract for deed, but it can happen. In such cases, buyers have several possible remedies.

1. Self-help or taking action without court involvement

The seller may have financial problems. For example, he or she may be behind on mortgage payments for the same land. If the seller fails to pay an underlying mortgage, the buyer probably will have the right to make the mortgage payment and offset that amount from the contract for deed payments. If, as a result of the seller's default on the underlying mortgage, the seller begins a cancellation of the contract for deed, the buyer should not withhold payment. Instead, the buyer should seek a court injunction to stop the cancellation.[237]

2. Action for fraud

If the seller has committed fraud or has otherwise violated the contract for deed, the buyer may be able to rescind, meaning cancel, the contract.[238] A court likely will

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231 2001 Minn. Laws ch. 57, § 7 (repealing MINN. STAT. § 557.12).

232 2001 Minn. Laws ch. 57, § 7 (repealing MINN. STAT. § 559.2091).

233 MINN. STAT. § 336.9-334(i).

234 MINN. STAT. § 336.9-334(i). This rule does not hold for a landlord lien if the debtor possesses the property or has an interest of record in the property.

235 Minnesota courts, however, will presume that a promissory note is not a down payment, and therefore in order for the seller to prevail, the seller has the burden to show that the parties intended for the note to serve as a down payment. *Novus Equities Corp. v. Em-ty P'ship,* 381 N.W. 2d 426, 429 (Minn. 1986).

236 *Novus Equities Corp. v. Em-ty P'ship,* 381 N.W. 2d 426, 429 (Minn. 1986); *Nelson v. McBride,* 414 N.W.2d 459, 461 (Minn. Ct. App. 1987). *NC Props., LLC v. Lind*, 797 N.W.2d 214, 218 (Minn. Ct. App. 2011); *Andresen v. Simon*, 213 N.W. 563, 564 (Minn 1927).

237 MINN. STAT. § 559.211. In an action to pursue an injunction, the court will determine the relative rights and responsibilities of the parties.

238 *Gustafson v. Gervais,* 189 N.W.2d 186, 190 (Minn. 1971).

attempt to put the parties back to their original position before the contract was executed. A refund of the payments, less a reasonable rent, is one possible remedy.[239]

3. Specific performance and action for damages

In most instances, a contract for deed buyer seeks specific performance. That is, the buyer wants the promises in the contract to be fulfilled. If the buyer has satisfied his or her obligations under the contract but the seller has not, a court can order the seller to meet the terms of the contract.[240] There may, in addition, be minor damages incurred as a result of the seller's actions.

V. Minnesota right of first refusal

The right of first refusal gives some farmers another chance to buy or rent their farm after it has been lost to a creditor. Two different types are possible: a Minnesota right of first refusal and a federal right of first refusal. Eligibility can be tricky, however, and some problems are hard to predict in advance.

Under the Minnesota right of first refusal, if the farmer lost agricultural land or the farm homestead because a creditor enforced a debt against it, the creditor may not be able to rent or sell that property to anyone else without first giving the farmer a chance to match any offer.[241]

A. Eligibility

Eligibility for first refusal rights hinges on: (1) whether the farmer can qualify as an "immediately preceding former owner"; (2) whether it was a corporation or government agency that took the property from the immediately preceding owner by enforcing a debt; and (3) the type of real estate property taken by the agency or corporation.

For many farmers, eligibility for the right of first refusal is fairly straightforward. In some cases, however, farmer eligibility, especially the ability to qualify as an immediately preceding former owner, can be complicated. In addition, farmers may or may not be eligible based on things over which they have no control. So, while the Minnesota right of first refusal is a very valuable tool to keep farmers on the land, it can be unpredictable and should not be counted on in advance.

1. Must be an immediately preceding former owner

To qualify for first refusal rights, the farmer must be the immediately preceding former owner of agricultural property or a farm homestead.[242] This can be more complicated than it sounds. In general, qualifying as an immediately preceding former owner requires all of the following.

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[239] *Autrey v. Trkla,* 350 N.W.2d 409, 412 (Minn. Ct. App. 1984).

[240] *Gethsemane Lutheran Church v. Zacho,* 104 N.W.2d 645, 648-49 (Minn. 1960); *Schumacher v. Ihrke,* 469 N.W.2d 329, 335 (Minn. Ct. App. 1991).

[241] MINN. STAT. § 500.245.

[242] MINN. STAT. § 500.245, subd. 1(b).

a. Once had legal title to the property

The farmer must have had legal title to the property.[243] For the purposes of the right of first refusal, a contract for deed buyer is assumed to have that legal title.[244]

b. Lost the property due to enforcement of a debt

The farmer must have lost the property because someone enforced a debt against the agricultural land or homestead. This includes a mortgage foreclosure, a deed in lieu of foreclosure, a contract for deed cancellation, or a deed in lieu of a contract for deed cancellation.[245]

First refusal rights do not apply if a lease was terminated due to a default.[246] If the lease included an option to purchase and lease payments were applied to the purchase price, this could be treated as a contract for deed by the courts.[247]

c. Must be a family farmer

An immediately preceding former owner must also be a family farmer, a family farm corporation, a family farm partnership, or a family farm limited liability company.[248]

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[243] MINN. STAT. § 500.245, subd. 1(b).

[244] MINN. STAT. § 500.245, subd. 1(a)-(b). If the farm debtor is in bankruptcy, the farm debtor still qualifies as the immediately preceding former owner even if technically the bankruptcy estate may have had title and lost the property.

[245] MINN. STAT. § 500.245, subd. 1(a)-(b). Farmers have first refusal rights after foreclosure even if they are still in possession of the property during the redemption period. *Harbal v. Federal Land Bank of St. Paul,* 449 N.W.2d 442, 446-47 (Minn. Ct. App. 1989).

[246] MINN. STAT. § 500.245, subd. 1(a).

[247] These issues are dicussed in *Wurdemann v. Hjelm,* 102 N.W.2d 811, 818 (Minn. 1960).

[248] MINN. STAT. § 500.245, subd. 1(b). Because Minnesota law has specific definitions for who qualifies as a family farmer, and what constitutes a family farm corporation, partnership or company, farmers seeking a right of first refusal must be certain they fall within the precise definitions outlined in MINN. STAT. § 500.24. The relevant definitions, stated in more general terms, include the following: (1) A family farm is an unincorporated farming unit owned by one or more people living on the farm or actively farming. MINN. STAT. § 500.24, subd. 2(b). (2) A family farm corporation is founded for the purpose of farming and owning agricultural land. The stock is controlled mostly by family members, and no corporation holds any of the stock. At least one family member lives on or actively operates the farm. MINN. STAT. § 500.24, subd. 2(c). (3) A family farm partnership is a limited partnership formed for the purpose of farming and owning agricultural land. The majority of the partnership is held by family members. At least one family member lives on or actively operates the farm. None of the partners are corporations. MINN. STAT. § 500.24, subd. 2(j). (4) A family farm limited liability company is founded for the purpose of farming and owning agricultural land. A majority of the company's interest, and a majority of the company's members, must be either: (1) a natural persons or (2) current beneficiaries of a family farm trust in which the trustee holds an interest in a family farm limited liability company. The natural persons or beneficiaries must be related to one another. At least one of the related persons must live on the farm and actively farm. The agricultural land may also have been owned by one or more related persons for at least five years before and then have been transferred to a limited liability company. In this case, the members may not be a corporation or

2. The land was taken by a corporation or government agency

First refusal rights also depend on who it was that enforced the debt and took the property. First refusal rights apply if the property was taken by: (1) a state or federal agency; (2) a limited partnership; (3) a corporation; or (4) a limited liability company.[249]

First refusal rights do not apply, however, if the property was taken by an individual, a family farm corporation, or an authorized family farm corporation.[250] For example, if a contract for deed is canceled by a private individual, he or she does not have to offer the buyer the right of first refusal.

3. Creditor sells or leases the property

First refusal rights are triggered when the creditor tries to lease or sell the property. If this is never attempted, the farmer may never have first refusal rights.

4. Property must be agricultural land or farm homestead

First refusal rights apply only if the property in question is either agricultural land or a farm homestead.[251]

a. Agricultural land

For the purposes of Minnesota first refusal rights, agricultural land is defined as land used for producing agricultural products, such as crops, livestock, and milk, as well as fruit and horticultural products. It does not, however, include land used for the production of timber or poultry, nor land used for the feeding and caring for livestock that are delivered to a corporation for slaughter or processing within twenty days of the livestock's slaughter or processing.[252]

b. Farm homestead

A farm homestead is the house and adjoining buildings that are either on the agricultural land used by the farm, or that are somehow used in the farming operation.[253]

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limited liability company. MINN. STAT. § 500.24, subd. 2(l).

249 MINN. STAT. § 500.245, subd. 1(a). Land sold or leased under the Minnesota family farm security program is exempt. MINN. STAT. ch. 41.

250 MINN. STAT. § 500.245, subd. 1(a).

251 MINN. STAT. §§ 500.24, subds. 2(a), 2(g), 2(i), 500.245, subd. 1(a).

252 Agricultural land also does not include land used for processing, refining, or packaging products, or land used for providing spraying or harvesting services to processors or distributors of farm products. MINN. STAT. § 500.24, subds. 2(a), 2(g).

253 MINN. STAT. § 500.24, subd. 2(i). "Farming operation" is not defined, although "farming" is defined as engaging in those activities listed under the definition of "agricultural land" above.

c. Ensuring that the property qualifies

In order to make sure that certain property meets the definition of agricultural land or a farm homestead and is eligible for first refusal rights, a farmer can get a certificate signed by the county assessor that says the land is agricultural land or a farm homestead.[254] The farmer should file a copy of that certificate in the office of the county recorder or registrar of titles. Once this is done, it will be difficult for anyone to claim that the property does not qualify as agricultural land or a farm homestead.

B. When the farmer must be offered the right of first refusal

Farmers who are eligible for first refusal rights will have lost their property to a corporation or government agency. Once the corporation or agency receives an acceptable offer from a third party for the sale or lease of the farmer's property, the farmer must first be offered the chance to purchase or lease the property at a price "no higher" than the acceptable third-party offer.[255]

In some cases, the farmer may never have a right of first refusal. For example, if another creditor redeems the property, this does not trigger the farmer's right of first refusal, although that creditor may still be required to offer the farmer first refusal rights.[256] In addition, if a lender obtained a money judgment and then conducted an execution sale on the property before another lender foreclosed on the mortgage, the farmer may have no right to first refusal at all.[257]

C. Notice of first refusal rights

The creditor agency or corporation must notify the farmer of his or her first refusal rights at least fourteen days before the first refusal property is offered for sale or lease.[258] A notice of offer must say that the property is about to either be sold or leased to a third party. It must also explain that the farmer can buy or lease the property on the same or equivalent terms.

A notice of offer must also include a description of the property, a copy of the acceptable third-party offer that the farmer must match, and the specific terms the farmer must meet.[259]

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[254] MINN. STAT. § 500.245, subd. 1(j).

[255] MINN. STAT. § 500.245, subd. 1(a), (d).

[256] *Farmers and Merchants Bank of Preston v. Junge,* 458 N.W.2d 698, 700 (Minn. Ct. App. 1990); *Carlson v. Lilyerd,* 449 N.W.2d 185 (Minn. Ct. App. 1989); *Sands v. Production Credit Ass'n,* No. C9-90-1116, 1990 WL 157496 (Minn. Ct. App. Oct. 23, 1990) (unpublished); *Lilyerd v. Carlson*, 499 N.W.2d 803, 809 (Minn. 1993).

[257] *Farm Credit Bank of St. Paul v. Michels,* 513 N.W.2d 7, 9 (Minn. Ct. App. 1994).

[258] They must either personally deliver the notice with a signed receipt, or send it by certified mail with a receipt of mailing to the farmer's last known address. MINN. STAT. § 500.245, subds. 1(a), 1(f), 2, 3.

[259] MINN. STAT. § 500.245, subd. 2(a)-(c). If the property is to be sold, a copy of the purchase agreement, including the price and terms of the third-party's acceptable offer, must be in the farmer's notice. The notice must also include a signed affidavit by the corporation or agency that the purchase agreement is true, accurate, and made in good faith. If the property is to be leased, the notice must include a copy

Notices must also warn the farmer about limits on the farmer's ability to sell the property later. These limits are discussed below.

D. The terms the farmer must meet

The notice will explain the exact terms the farmer must meet to exercise the right of first refusal. The price offered to the farmer must not be higher than the acceptable offer made by the third party.[260]

1. Cash price offer

The price the farmer must pay is straightforward if the third party made an acceptable direct cash price offer.

For example, suppose a third party offered $200,000 cash to a bank that now has the farmer's property after a foreclosure. The first refusal offer to the farmer must also be $200,000 cash. The farmer may be able to arrange financing from another source, but the first refusal payment must be in cash.

2. Time-price offer

If the third party made a time-price offer—such as an offer to purchase under a contract for deed—in which the payments are not all made up front, calculating the price for the farmer's offer can be more complicated. Time-price offers are common. Any lease with payments extending over time is a time-price offer, as is a sale of the property if a bank sells the land and also finances the purchase with a mortgage.

When the acceptable third-party offer is a time-price offer, the corporation or agency has a choice. It may either offer the farmer exactly the same terms, or it may make an equivalent cash offer to the farmer.[261] The calculation of an equivalent cash offer takes into account the present value of payments scheduled to be made over time.

For example, suppose the acceptable third-party offers $200,000, paid out over thirty years, to a bank that now has the farmer's foreclosed property. Because of inflation, a payment of $200,000 stretched out over thirty years is worth less than a $200,000 cash payment today. Therefore, the equivalent cash price, which is figured by a mathematical equation in the statute, will be somewhat less than $200,000, but the farmer must make that payment in cash.

If the corporation or agency makes an offer based on an equivalent cash value, it will say so. Since figuring the equivalent value can be complicated, farmers should ask

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of the lease, including the price and terms of the third-party's acceptable offer. The notice must also include a signed affidavit by the corporation or agency that the lease is true, accurate, and made in good faith.

[260] MINN. STAT. § 500.245, subd. 1(a), (d). An equivalent cash offer is not required if the state participates in an offer to a third party through the Rural Finance Authority.

[261] MINN. STAT. § 500.245, subd. 1(d).

someone familiar with such calculations to check it.

E. Accepting the offer to lease or purchase

Several rules apply when a farmer wishes to accept offers to lease or purchase.

1. Accept in writing

An acceptance form for the right of first refusal should be included in the notice. The farmer should hand deliver the acceptance to the creditor or mail it by certified mail, return receipt requested.[262] If the farmer does not meet the deadlines listed below, the farmer will lose his or her first refusal rights.

2. Accepting offers to lease—fifteen days

The farmer must make use of a right to lease property in writing within fifteen calendar days after an offer is mailed with a receipt of mailing or personally delivered.[263] An offer cannot be initiated until the fourteen-day pre-offer period has expired.[264]

3. Accepting offers to purchase—sixty-five days

The farmer must make use of a right to buy property in writing within sixty-five calendar days after the notice is mailed with a receipt of mailing or personally delivered.[265] An offer cannot be initiated until the fourteen-day pre-offer period has expired.[266]

F. Meeting the obligations—ten days

Within ten calendar days after accepting an offer to lease or purchase the real estate, the farmer must meet his or her obligations under the offer, including making payments due at that time.[267] In a lease, for example, the obligation may be to pay a security deposit and the rent for that month. For a sale, the obligation may be to pay the remainder of the original purchase price. If the farmer does not meet this ten-day deadline, he or she loses first refusal rights.

G. Purchasing or leasing only part of the property

The farmer may want to use the right of first refusal to purchase or lease only a part of the property.[268] If so, the farmer must give written notice to the agency or corporation describing the part of the property to be sold or leased separately. [269] This notice must be

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[262] MINN. STAT. § 500.245, subds.1(i), 2(a).
[263] MINN. STAT. § 500.245, subd. 1(i).
[264] MINN. STAT. § 500.245, subd. 1(a).
[265] MINN. STAT. § 500.245, subd. 1(i).
[266] MINN. STAT. § 500.246, subd. 1(a).
[267] MINN. STAT. § 500.245, subd. 1(i).
[268] MINN. STAT. § 500.245, subds. 1(c), 1(e)(3), 1(i).
[269] MINN. STAT. § 500.245, subd. 1(c).

provided prior to the time the property is first offered for sale or lease.

If the agency or corporation does not want to sell the property in parts, however, the farmer cannot force it to do so. Any separated parts of the property must be compact and connected so that separation does not unreasonably reduce either access to the rest of the land or its value.[270] If the farmer elects to lease or buy only one or more parts of the property, those parts must be described in writing in the farmer's acceptance.[271] If only part of the property is purchased or leased, the farmer will not have a right of first refusal for the remaining property after the farmer gives written notice.[272]

H. Expiration and termination of refusal rights

Eventually, if the corporation or agency owns the property long enough, first refusal rights expire.

1. Lengthy possession by the corporation or agency

The right of first refusal may end if the corporation or agency simply keeps the land for a long time—usually but not always more than five years.[273] Both purchasing and leasing rights expire if this happens.

The farmer cannot force the corporation or agency to sell the property.

2. The farmer rejects an offer to lease — first refusal lease rights are terminated

If the farmer ever rejects an offer to lease first refusal property, the farmer loses the right to lease it from then on. Otherwise, first refusal leasing rights apply each time the property is leased.[274] Therefore, if the farmer accepts an offer to lease the property the first time it is offered, he or she will still have the right of first refusal the next time the property comes up for lease. If the farmer rejects an offer to lease, he or she still keeps first refusal purchase rights.

For example, suppose a farmer lost land to the bank in a foreclosure. In the first year, the farmer is offered first refusal leasing rights and accepts. In the second year, the farmer rejects a first refusal offer to lease the land. In the third year, and anytime thereafter, the farmer will have no first refusal leasing rights. If the bank gets an offer to purchase the land in the fourth year, however, the farmer still has first refusal purchase rights.

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[270] MINN. STAT. § 500.245, subd. 1(c).
[271] MINN. STAT. § 500.245, subd. 1(i).
[272] MINN. STAT. § 500.245, subd. 1(e)(3).
[273] MINN. STAT. §§ 500.24, subd. 2(x); 500.245, subds. 1(e), (g); *Travelers Ins. Co. v. Horseshoe Lake Farms, Inc.,* 456 N.W.2d 453, 457-58 (Minn. Ct. App. 1990); *Gesell Concrete Prods. v. Anderson*, No. A06-513, 2007 Minn. App. Unpub. LEXIS 109, at *8 (Jan. 24, 2007).
[274] MINN. STAT. § 500.245, subd. 1(e)(1).

3. The land is sold

After the land is sold, the farmer loses first refusal rights.[275] Although the statute is not clear on this point, the farmer might not lose any future first refusal rights if he or she rejects a first refusal offer to purchase but for some reason the third party does not buy the property.[276] In such a situation, if the acceptable third-party offer to purchase the land—which triggered the farmer's initial first refusal opportunity to purchase—falls through or is somehow stopped with a default, the farmer should arguably still have the right to first refusal leasing and purchasing rights.

4. Using first refusal on only part of the property

If a farmer purchases or leases only a part of the property, he or she loses the right of first refusal for the remaining property.[277] The statute does not address if the corporation or agency initiates a partial sale or lease of the property. Arguably, in that situation, the farmer should maintain his or her right of first refusal on the parts of the property the corporation or agency does not offer for sale or lease.

I. Waiving first refusal rights

A waiver or contractual limitation of first refusal rights can in some cases be enforceable if the farmer signed an agreement that explained plainly what rights the farmer was giving up.[278] For example, written waivers included in a deed in lieu of foreclosure or contract for deed cancellation are legal.[279] In general, however, waiver of a farmer's right of first refusal as a condition for obtaining a loan is illegal.[280]

If a farmer does grant a legal waiver directly to an agency or corporation that now has the right to own the farmer's land and must otherwise give first refusal rights, the farmer may change his or her mind about the waiver by contacting the agency or corporation in writing within twenty calendar days after signing the waiver.[281]

J. Rights not transferable

The right of first refusal may be inherited but may not be sold or given to someone else.[282]

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275 MINN. STAT. § 500.245, subd. 1(e)(1)-(2).
276 MINN. STAT. § 500.245, subd. 1(e)(2).
277 MINN. STAT. § 500.245, subd. 1(e)(3).
278 MINN. STAT. §§ 500.245, subd. 1(l), 325G.31.
279 MINN. STAT. § 500.245, subd. 1(l)(1)-(2). This is only permitted for agricultural land.
280 MINN. STAT. § 550.42, subd. 1(a). The statute also allows for several other limited waivers of the right of first refusal. These include a waiver in order to cure a title defect, and a waiver if the farmer (as the immediately preceding owner) had expressly conveyed his or her first refusal rights when selling the property under a contract for deed. MINN. STAT. § 500.245, subd. 1(l)(4)-(5).
281 MINN. STAT. § 500.245, subd. 1(l)(3).
282 MINN. STAT. § 500.245, subd. 1(m); *Estate of Smith v. Federal Land Bank of St. Paul,* 424 N.W.2d 312, 313 (Minn. Ct. App. 1988). Only the farmer's heirs at law or devisees named in a will are legally entitled to the first refusal offer notice provided by MINN. STAT. § 500.245.

K. Reselling the first refusal property after purchasing it

Since the purpose of the right of first refusal is to keep the farm in the hands of family farmers, there are strict rules about reselling land after the right of first refusal is used to purchase it.[283] Two important exceptions to these rules will help some farmers.[284]

1. Cannot agree to sell the land beforehand

The farmer may not sell first refusal land to someone else if the farmer negotiated or agreed to the sale before accepting the first refusal offer.[285]

2. Selling first refusal property within 270 days

If the farmer sells first refusal land within 270 days after accepting the first refusal offer, the law makes a "rebuttable presumption" that the farmer has violated the law by negotiating the sale beforehand.[286] This means that even though there may be no other evidence showing that the farmer negotiated or agreed to the sale before accepting the first refusal offer, unless he or she can prove otherwise, a court will assume that the farmer did so.

3. Exceptions to the limit on agreements to sell beforehand

Two separate exceptions limit these restrictions. Both exceptions must be followed carefully.[287]

a. Continue farming first refusal land for one year

A farmer may negotiate to sell some of his or her first refusal land before accepting the first refusal offer if the farmer: (1) is now actively engaged in farming; and (2) agrees to remain actively engaged in farming on part of the first refusal land for at least one year after accepting the first refusal offer.[288]

b. The sale is to a family member

A farmer may negotiate to sell first refusal property before accepting the first refusal offer if the sale negotiated is to a member of the farmer's family.[289] In this case, "family" means the farmer's spouse, parents, sisters, brothers,

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[283] Jonathan F. Mitchell, Comment, *Can a Right of First Refusal Be Assigned?,* 68 U. CHI. L. REV. 985, 990-91 (2001).
[284] MINN. STAT. § 500.245, subd. 1(n). Farmers who violate these restrictions may be liable for damages, and attorneys' fees to a person who is harmed by such a sale.
[285] MINN. STAT. § 500.245, subd. 1(n).
[286] MINN. STAT. § 500.245, subd. 1(n).
[287] *Kjesbo v. Ricks,* 517 N.W.2d 585 (Minn. 1994).
[288] MINN. STAT. §§ 500.24, subds. 2(a), 500.245, subd. 1(n).
[289] MINN. STAT. § 500.245, subd. 1(n).

children, and the spouse's sisters and brothers.[290] If the property is sold to a member of the family and that family member then sells the property to a third party, a court may define this as a sham transaction and rule that the requirement that the sale be to a family member is not met.[291]

L. Wrongful denial of first refusal rights

If the farmer was wrongfully denied first refusal rights, any lawsuit the farmer wishes to file to protect his or her rights must be brought within three years.[292] If fraud is the reason for the lawsuit, meaning there was a representation that was false, the three-year limit does not apply.[293]

VI. Federal right of first refusal for Farm Credit Services (FCS) borrowers

If the lender who acquired the farmer's property is part of the Farm Credit Services (FCS) system, the farmer may also have a separate right of first refusal under federal law.[294] Federal first refusal rights may apply if FCS elects to sell or rent the property. In some cases, the farmer may have more than one chance to exercise first refusal rights. It is possible that the farmer is eligible for first refusal rights under both federal and Minnesota laws. If so, the lender must honor both.[295]

A. Keeping in contact with FCS

If the farmer is eligible for federal first refusal rights, FCS must send the farmer certain notices regarding the sale and how the farmer may use his or her federal first refusal rights.[296] FCS meets its legal notice requirements if it sends the required notices by certified mail to the farmer's last known address.[297] Farmers who think they may be eligible for first refusal rights should make sure FCS has their proper address.

B. Eligibility

In order to be eligible for federal first refusal rights, the lender must be part of the Farm Credit Services (FCS) system, and the farmer must be the previous owner of agricultural real estate that FCS has acquired. Eligibility rules for FCS right of first refusal are set out below.

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290 MINN. STAT. § 500.245, subd. 1(n); *Schumacher v. Ihrke,* 469 N.W.2d 329 (Minn. Ct. App. 1991).
291 *Kjesbo v. Ricks,* 517 N.W.2d 585, 588-89 (Minn. 1994); *Schumacher v. Ihrke,* 469 N.W.2d 329, 333-34 (Minn. Ct. App. 1991).
292 MINN. STAT. § 500.245, subd. 3.
293 MINN. STAT. § 500.245, subd. 3.
294 12 U.S.C. § 2219a.
295 12 U.S.C. § 2219a(h); 12 C.F.R. § 617.7630.
296 12 U.S.C. § 2219a(b)-(d); 12 C.F.R. §§ 617.7610-617.7620.
297 12 U.S.C. § 2219a(g); 12 C.F.R. § 617.7625.

1. The creditor is FCS

First refusal rights apply if the creditor is part of the Farm Credit Services system.[298] A loan that is guaranteed by FCS does not trigger first refusal rights.

FCS has gone through a number of name changes over the years. If the farmer's old loan papers say Federal Land Bank or PCA, for example, the lender is now FCS.[299] AgStar Financial Services, ACA is part of FCS as is Compeer Financial Services, ACA.[300] A list of FCS institutions is available on the internet. [301]

2. FCS must own the property

For FCS first refusal rights to apply, FCS must have acquired the property. This can be a confusing requirement because sometimes lenders—including FCS—make a loan and then sell it. In some cases, when the loan is sold the right to first refusal continues. In some cases it does not.

a. FCS sells loan to another FCS lender

If the lender sells the loan to another FCS lender, the right to first refusal continues.[302]

b. FCS sells loan to a "qualified lender"

If FCS sells the loan to a "qualified lender" the farmer should continue to have a right to first refusal. FCS regulations say that if a qualified lender buys the loan, FCS borrower protections, including first refusal rights, continue.[303] Qualified lenders can include banks and other institutions. [304]

c. Qualified lender sells to nonqualified lender

If a qualified lender sells the loan to a nonqualified lender, FCS rules require that the buyer of the loan must either agree to continue to provide first refusal and other rights to the borrower, or must get the borrower's permission not to provide those rights.[305]

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298 12 U.S.C. § 2219a(a); 12 C.F.R. § 617.7000, "system institution." For an overview of early FCS litigation see James T. Massey, Farmers Home Administration and Farm Credit System Update, 73 Nebraska Law Review 187, 205-10 (1994).

299 For more information about the Farm Credit Servicers system, see https://www.fca.gov/.

300 See http://www.agstar.com/Pages/home.aspx; https://www.compeer.com/Home/Agriculture/Ag-Financing.

301 See https://www.fca.gov/info/directory.html

302 12 C.F.R. § 617.7015(a).

303 12 C.F.R. § 617.7015.

304 12 C.F.R. § 617.7000, "Qualified lender"; 12 U.S.C. § 2015(b)(1).

305 12 C.F.R. § 617.7015(c).

d. FCS sells into secondary market

If FCS sells the loan into what is known as the secondary market, the farmer loses the right to first refusal.[306]

3. Only affects loans made after February 10, 1996.

If a farmer's loan was made on or before February 10, 1996, the restriction based on FCS sale of the loan into the secondary market will not affect the borrower.[307]

a. Notice to farmer if FCS might sell the loan into secondary market

When a borrower applies for a FCS loan, and FCS might sell the loan, FCS must give the borrower notice, in writing, that the loan may be sold.[308] The notice must also say that if the loan is sold a number of borrower rights, including first refusal, will not apply.

b. Farmer can prevent FCS from selling loan into secondary market

The notice to the farmer will also say that the farmer has the right not to have the loan sold.[309] The farmer then has three days from the time of the loan commitment to refuse to allow the loan to be pooled. This action will preserve the borrower's right to first refusal.[310]

c. Agricultural real estate

The right of first refusal only applies to what FCS calls acquired agricultural real estate or property.[311] Federal first refusal rights only apply to agricultural real estate.

d. Acquired through foreclosure or voluntary conveyance

The agricultural real estate must have been acquired by FCS as the result of a foreclosure or a voluntary conveyance.[312]

e. Borrower is "previous owner"

In order to have FCS first refusal rights, the borrower must be what is termed a "previous owner." A farmer can qualify as a previous owner in one of two ways.

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306 12 C.F.R. § 617.7015(b).
307 12 C.F.R. § 617.7015(b).
308 12 U.S.C. § 2279aa-9(B).
309 12 U.S.C. § 2279aa-9(B).
310 If the farmers does allow FCS to sell the loan, the farmer's rights will in part depend on whether the loan is actually sold. 12 U.S.C. § 2202a(a)(5).
311 12 U.S.C. § 2219a(a); 12 C.F.R. § 617.7600.
312 12 C.F.R. § 617.7600, "Acquired agricultural real estate or property."

First, if a person owned the land, borrowed from FCS, and, according to FCS, did not have the financial resources to avoid a foreclosure on the acquired agricultural real estate, that person is a previous owner. [313]

Second, if a person was the prior record owner and was not a borrower, but the acquired agricultural real estate was used as collateral for a loan to FCS, the person is a previous owner. [314]

f. Borrower did not have financial resources to avoid foreclosure or voluntary conveyance

First refusal rights only apply to borrowers who did not have the financial resources to avoid foreclosure or voluntary conveyance. [315] FCS must clearly document in its files whether the borrower the has resources to avoid foreclosure or voluntary conveyance.[316]

C. The farmer's right to buy—FCS elects to sell the property

If a farmer is eligible for federal first refusal rights and FCS elects to sell any part of the acquired property, FCS must, within fifteen days of the decision to sell the property, notify the farmer of the right to buy the property.[317]

FCS will give the farmer two choices. The farmer may either offer to purchase the property at the appraised fair market value or offer to buy the property at less than the appraised fair market value.[318]

1. Making a first refusal offer to FCS—thirty-day deadline

To buy the property, the farmer must give FCS an offer within thirty calendar days after receiving the notice.[319] If the deadline is missed, first refusal rights are lost.

2. Fair market value appraisals

The FCS notice includes a listing of the fair market value of the property.[320] The law requires only that this value be set by an accredited appraiser.[321] As long as the appraiser is accredited, the farmer probably will not be able to challenge the accuracy of the appraisal.

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[313] 12 C.F.R. § 617.7600, "Previous owner" (1).
[314] 12 C.F.R. § 617.7600, "Previous owner" (2).
[315] 12 U.S.C. § 2219a(a); 12 C.F.R. §§ 617.7600, 617.7605.
[316] 12 C.F.R. § 617.7605.
[317] 12 U.S.C. § 2219a(b)(1); 12 C.F.R. § 617.7610(a)(1).
[318] 12 U.S.C. § 2219a(b)(1); 12 C.F.R. § 617.7610(a)(1).
[319] 12 U.S.C. § 2219a(b)(2); 12 C.F.R. § 617.7610(a)(2), (b), (c).
[320] 12 U.S.C. § 2219a(b)(1); 12 C.F.R. § 617.7610(a)(1).
[321] 12 U.S.C. § 2219a(b)(1)(A); 12 C.F.R. § 617.7610(a)(1). In *K Lazy K Ranch, Inc. v. Farm Credit Bank of Omaha,* 127 B.R. 1014, 1020-21 (Bankr. D.S.D. 1991), the court rejected an attack on appraisals conducted by FCS employees, whom a jury determined were accredited appraisers.

3. If the offer is for appraised value—FCS must sell to the farmer

If FCS gets an offer from the farmer to purchase the property at the appraised value, FCS must accept the offer within fifteen calendar days and sell the property to the farmer.[322]

4. If the offer is for less than appraised value—FCS may sell to the farmer

If FCS gets an offer from the farmer to purchase the property at less than the appraised value, FCS may still accept the offer and sell it to the farmer. FCS must, within fifteen calendar days, give the farmer notice of whether it has accepted or rejected the offer.[323]

5. If the offer is for less than appraised value and FCS rejects it

If the farmer's offer was for less than the appraised value and FCS rejects the offer, the farmer may still have first refusal rights. After rejecting a farmer's offer, FCS cannot then accept an offer from another person that is less than or equal to the farmer's initial offer, or on different terms than those initially extended to the farmer, without first affording the farmer another opportunity to purchase the property at the new price, or on the new terms.[324] FCS must send notice to the farmer of the new price and terms, and the farmer has fifteen calendar days to make a new offer to purchase the property.[325]

The farmer's rights hinge on a comparison between the rejected offer and an offer by a third party to purchase the property from FCS.

a. Third party offers more than the farmer

If a third party offers to buy the property and the third party's offer is more than the farmer's earlier rejected offer, FCS may accept the third-party offer. The sale may go forward even if FCS accepts less than the appraised value from the third party.

b. Third party offers same or less than the farmer

If a third party offers to buy the property for an amount equal to or below the farmer's earlier rejected offer, FCS may not sell the property to the third party without first giving the farmer a chance to match the third-party's offer.[326]

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[322] 12 U.S.C. § 2219a(b)(3); 12 C.F.R. § 617.7610(b).
[323] 12 U.S.C. § 2219a(b)(4); 12 C.F.R. § 617.7610(c).
[324] 12 U.S.C. § 2219a(b)(5)(A); 12 C.F.R. § 617.7610(c)(3).
[325] 12 U.S.C. § 2219a(b)(5)(B); 12 C.F.R. § 617.7610(c)(3).
[326] 12 U.S.C. § 2219a(b)(5)(A)(i); 12 C.F.R. § 617.7610(c)(3).

c. Third party offers different terms than the farmer

If a third party offers to buy the property and the offer includes different terms and conditions than those which were extended to the farmer, FCS may not sell the property to the third party without first giving the farmer the chance to match the conditions in the third-party's offer.[327]

For this purpose, financing by FCS is not a term or condition of a sale of acquired real estate.[328] Therefore, if FCS offers to sell the property to a third party for a certain price and offers to finance the purchase with a mortgage, FCS is not required to offer the farmer mortgage financing as well.

6. FCS not required to finance the purchase

FCS is not required to finance any purchases by a farmer, as the previous owner, under the right of first refusal.[329]

D. The farmer's right to rent—FCS elects to lease the property

If FCS decides to lease the property, the farmer also has first refusal rights. If the farmer is eligible for federal first refusal rights and FCS elects to lease any part of the acquired property, FCS must notify the farmer of his or her right to lease the property within fifteen calendar days of FCS's decision to lease the property.[330]

FCS will give the farmer two choices. The farmer may either offer to lease the property at the appraised fair market lease value or offer to lease the property at less than the appraised fair market lease value.

1. Fifteen-day deadline

To lease the property, the farmer must give FCS an offer within fifteen calendar days after receiving the notice.[331] If this deadline is missed, first refusal rights are lost.

2. Fair market value appraisals

The FCS notice of first refusal lease rights should include a listing of the appraised lease value of the property.[332] The law requires only that this value be set by an accredited appraiser.[333] As long as the appraiser is accredited, the farmer probably will not be able to challenge the accuracy of the appraisal.

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[327] 12 U.S.C. § 2219a(b)(5)(A)(ii); 12 C.F.R. § 617.7610(c)(3). However, conditions and terms designed to protect the third party in case the farmer contests the sale may provide an exception to this rule, and not be considered "different terms and conditions" that violate the first refusal statutes. *K Lazy K Ranch, Inc. v. Farm Credit Bank of Omaha,* 127 B.R. 1014, 1018-19 (Bankr. D.S.D. 1991).

[328] 12 U.S.C. § 2219a(e); 12 C.F.R. § 617.7610(d).

[329] 12 U.S.C. § 2219a(f); 12 C.F.R. § 617.7610(d).

[330] 12 U.S.C. § 2219a(c)(1)-(5), (d)(1); 12 C.F.R. § 617.7615(a)(1).

[331] 12 U.S.C. § 2219a(c)(6)(B); 12 C.F.R. § 617.7615(a)(2).

[332] 12 U.S.C. § 2219a(c)(1)(A); 12 C.F.R. § 617.7615(a)

[333] 12 U.S.C. § 2219a(c)(1)(A); 12 C.F.R. § 617.7615(a).

3. The offer is for appraised value—FCS probably will lease to the farmer

If FCS gets an offer from the farmer to lease the property at the appraised value, FCS must usually accept the offer within fifteen calendar days and lease the property to the farmer.[334] If, however, FCS decides that the farmer does not have the resources available to conduct a successful farming operation or cannot meet all of the payments and terms of the lease, FCS may reject the offer.[335]

4. The offer is for less than appraised value—FCS may lease to the farmer

If FCS gets an offer from the farmer to lease the property at less than the appraised value, FCS may still accept the offer and lease to the farmer.[336] FCS must give notice of whether or not it has accepted the offer within fifteen calendar days after it receives the offer.[337]

5. If FCS rejects the offer—future rights to lease

If FCS rejects the farmer's offer to lease the property for less than the appraised value, the farmer still keeps keeps a limited right of first refusal for leasing. After rejecting a farmer's offer to lease, FCS cannot then lease the property to a third party, at a rate less than or equal to the farmer's initial offer or under different terms and conditions, without first sending the farmer notice of the opportunity to lease the property at the new price and under the new terms and conditions.[338] The farmer has fifteen calendar days after receiving the notice to agree to lease the property.[339]

The farmer's rights hinge on a comparison between the farmer's rejected offer and an offer by a third party to lease the property from FCS.

a. Third party offers more than the farmer

If a third party offers to lease the property for more than the farmer's earlier rejected offer, FCS may accept the third-party offer.[340] The lease may go forward even if FCS accepts less than the appraised value from the third party.

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[334] 12 U.S.C. § 2219a(c)(3); 12 C.F.R. § 617.7615(b).
[335] 12 U.S.C. § 2219a(c)(3)(A)-(B); 12 C.F.R. § 617.7615(b)(2).
[336] 12 U.S.C. § 2219a(c)(4); 12 C.F.R. § 617.7615(c)(1)-(2).
[337] 12 U.S.C. § 2219a(c)(5); 12 C.F.R. § 617.7615(c).
[338] 12 U.S.C. § 2219a(c)(6); 12 C.F.R. § 617.7615(c)(3).
[339] 12 U.S.C. § 2219a(c)(6)(B); 12 C.F.R. § 617.7615(c)(3).
[340] 12 U.S.C. § 2219a(c)(6)(A); 12 C.F.R. § 617.7615(c)(3).

b. Third party offers same or less than the farmer

If a third party offers to lease the property for an amount equal to or less than the farmer's earlier rejected offer, FCS may not lease the property to the third party without first giving the farmer a chance to match the third-party's offer.[341]

c. Third party offers different terms than the farmer

If a third party offers to lease the property and the offer includes different terms and conditions than those which were extended to the farmer, FCS may not lease the property to the third party without first giving the farmer the chance to match the conditions in the third-party's offer.[342]

For example, if a farmer offered to pay $100 an acre to lease the property from FCS and FCS rejected the offer, FCS could accept an offer from someone else to rent the same land for $110 per acre without offering refusal rights to the farmer again. If, on the other hand, FCS was about to rent the land to a third party for $90 an acre (or even $100 an acre—the farmer's initial offer), FCS would first have to give the farmer a chance to rent the land for that amount and match any other conditions in the third-party's offer.

E. FCS sells or leases at an auction

A separate federal first refusal right also applies if FCS elects to sell or lease the property through a public auction or some similar competitive bidding process.[343] If this happens, FCS must notify the farmer that the property is available for sale or lease.[344] The notice must list the minimum amount, if any, required to qualify a bid as acceptable to FCS. In addition, the notice must tell the farmer any terms or conditions for the sale or lease.[345]

FCS may not discriminate against the farmer in any way at the auction.[346] If the farmer's bid ties another person's as the highest at the auction, the farmer with first refusal rights wins the bidding.[347]

A farmer's first refusal rights regarding an auction apply in addition to the rest of his or her other federal first refusal rights. This means, for example, that if FCS's first attempt to sell the property is through an auction, the farmer still has the right to buy the property for the appraised value before the auction.[348]

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[341] 12 U.S.C. § 2219a(c)(6)(A)(i); 12 C.F.R. § 617.7615(c)(3).
[342] 12 U.S.C. § 2219a(c)(6)(A)(ii); 12 C.F.R. § 617.7615(c)(3).
[343] 12 U.S.C. § 2219a(d); 12 C.F.R. § 617.7620.
[344] 12 U.S.C. § 2219a(d)(1); 12 C.F.R. § 617.7620(a).
[345] 12 U.S.C. § 2219a(d)(1); 12 C.F.R. § 617.7620(a).
[346] 12 U.S.C. § 2219a(d)(1)(3); 12 C.F.R. § 617.7620(c).
[347] 12 U.S.C. § 2219a(d)(2)-(3); 12 C.F.R. § 617.7620(b).
[348] *Farm Credit Bank of St. Paul v. Halverson (In re Solberg),* 125 B.R. 1010, 1018-19 (Bankr. D. Minn. 1991); *Leckband v. Naylor,* 715 F. Supp. 1451, 1453 (D. Minn. 1988)

F. Reselling federal first refusal property

The farmer may be able to sell land if he or she bought the land through the federal right of first refusal.[349]

VII. Rights of FSA borrowers

Farm Service Agency (FSA) borrowers may have additional rights.[350]

[349] *Weiner v. Farm Credit Bank of St. Louis,* 759 F. Supp. 510 (E.D. Ark. 1991).
[350] See 7 C.F.R. pt. 766.

Chapter Four

Operating and Equipment Loans, Secured Creditors, and Repossession

I. Introduction

Many farm operating and equipment loans include security agreements. These agreements create what the law calls a "security interest" in a debtor's property, and give the creditor the power to take possession of that property in case of a default. This chapter discusses the creation of security interests, their effect on farm operations, and the rights of creditors to take possession of secured property.

Creditors are interested in gaining a security interest in the debtor's property for two reasons. First, it allows them to take possession of the property if the debtor defaults on the debt without having to seek a judgment lien through the courts, as is required for unsecured debts. Second, if the creditor properly files the right documents, the security interest places the secured creditor ahead of other creditors in getting paid from the proceeds from a sale of the debtor's property.

The security agreements discussed in this chapter are largely covered by Minnesota's version of the Uniform Commercial Code (UCC).[1] In general, the UCC covers debts secured by personal property or fixtures.[2] Personal property generally includes all possessions that are not real estate or buildings. This includes machinery, livestock, stored crops, and crops in the ground. Fixtures are goods that have become so related to real estate that they are considered by law to be part of the real estate.[3]

Special care should be taken when thinking about farming in the context of the UCC for at least two reasons. First, in a number of ways, UCC law for agriculture varies from the law that applies in other areas of the economy.[4] Second, UCC law changed significantly in the year 2001,

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1 A good summary of secured transactions in Minnesota is DAVID L. MITCHELL and EMILY M. HENDRICKS, Secured Transactions Under Uniform Commercial Code Article 9, ch. 19, MINNESOTA CONTINUING LEGAL EDUCATION, DEBTOR-CREDITOR HANDBOOK (11th ed. 2014, updated 2018, JAMES L. BAILLIE, PHILLIP L. KUNKEL, RYAN T. MURPHY and SAMUEL J.H. SIEGELMAN, eds.).

2 MINN. STAT. § 336.9-109.

3 MINN. STAT. § 336.9-102(a)(41). Although the UCC covers fixtures, it does not otherwise cover real estate, except to the extent that the transfer of a seller's interest in a contract for deed, including the seller's fee title to the real estate, are covered under the UCC MINN. STAT. §§ 336.9-109(a), (d)(11), 336.9-334, 336.9-619, 507.236, subd. 3. Future payments owed to a debtor—as the seller of a contract for deed, for example—may serve as collateral for a creditor, and are known as "accounts" under the UCC. MINN. STAT. § 336.9-102(a)(2). See also Larry M. Wertheim, *REVISED ARTICLE 9 of the U.C.C. and Minnesota Contract for Deeds*, 28 WM. MITCHELL L. REV. 1483, 1499-1502 (2002).

4 For an overview of farm related issues under REVISED ARTICLE 9, see PHILLIP L. KUNKEL, JEFFREY A. PETERSON, JASON THIBODEAUX, Farm Legal Services Series, University of Minnesota Extension,

particularly within Article 9, which covers secured transactions.[5] The 2001 changes to Article 9 represented some of the most sweeping changes to the UCC since it was first published in 1952. Accordingly, information that farmers learned prior to 2001 may no longer be true.

This chapter will refer to the current Article 9 as "Revised Article 9," but it will not outline all of the many differences that exist between Revised Article 9 and its former version. Debts that use real estate as collateral are discussed in Chapter Three of this Guide, and debts not secured by any collateral are discussed in Chapter Five.[6]

Debtor — The person who owes money. This Guide assumes that the farmer is the debtor.

Creditor — The person to whom the debt is owed.

Collateral — Debtor's property identified in an agreement that is pledged to the creditor if the debtor does not repay the debt.

II. Creating secured debt — loan agreements and promissory notes

Although the combination of documents can vary, debtors usually sign two separate agreements for a secured loan: (1) either a loan agreement or a promissory note, which is a promise to pay the amount of the debt; and (2) a security agreement, which grants a security interest in the debtor's property to the creditor. Since they are legally binding contracts, loan agreements, promissory notes, and security agreements should be read with care, and any confusion or questions should be resolved before signing. Some of these possible concerns are discussed later in this chapter.

Security Interests in Personal Property (2015), https://www.extension.umn.edu/agriculture/business/taxation/farm-legal-series/security-interests-in-personal-property/docs/security-interests-in-personal-property.pdf; LINDA J. RUSCH, *Farm Financing Under REVISED ARTICLE 9,* 73 AM. BANKR. L.J. 211 (1999); DREW KERSHEN & ALVIN C. HARRELL, *Agricultural Finance—Comparing the Current and REVISED ARTICLE 9,* 33 UCC L.J. 169 (2000); JULIAN B. MCDONNELL ET AL., *Farm Financing Under REVISED ARTICLE 9,* vol. 1D, ch. 26 in PETER F. COOGAN ET AL, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE (2016).

5 In 2000, Minnesota enacted what is known as REVISED ARTICLE 9 of the UCC. REVISED ARTICLE 9 makes significant changes to the rules and procedures for secured transactions. These changes took effect in Minnesota on July 1, 2001. For changes see 2000 MINN. LAWS ch. 399 and 2001 MINN. LAWS ch. 195. See, as well, LARRY M. WERTHEIM, *REVISED ARTICLE 9 of the U.C.C. and Minnesota Contract for Deeds,* 28 WM. MITCHELL L. REV. 1483 (2002). Numerous smaller changes have also been made by the legislature over the years.

6 If the security agreement covers both real and personal property, the creditor may use the UCC concerning the personal property or may use real estate law for both. MINN. STAT. § 336.9-604.

A. Types of promissory notes

Usually a promissory note will be one of three types: an installment note, an open-ended note, or a demand note.

1. Installment note

An installment note calls for payments of principal and interest that gradually pay off the loan by some set time in the future—usually specified in years or months. Payments under an installment note are usually scheduled at regular intervals.

2. Open-ended note—lines of credit

An open-ended note is used when a loan is in the form of a line of credit. The debtor gets a line of credit of up to a certain amount and the debtor may use the money as needed for a set period of time.

3. Demand note

A demand note allows the creditor to demand repayment at any time.

B. Terms in loan documents

Loan agreements and promissory notes are contracts between the debtor and the creditor. They include many important terms setting out the rights and responsibilities of both parties, including repayment of the loan, what qualifies as a default, and what action the creditor can take if there is a default.

1. Repayment terms

The loan agreement or promissory note should set out the length of the loan, the amount of each payment, and what dates payments are due.

2. Default

If the debtor defaults on a secured loan, the creditor can take the debtor's collateral. Since the law does not define "default," the security agreement defines what acts—or failures to act—can be considered a default.[7]

3. Rate of interest

The loan agreement or promissory note should state the interest rate to be paid. There are legal limits on the amount of interest creditors can charge.[8]

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7 MINN. STAT. §§ 336.9-601, 336.9-602.

8 For some creditors, if a loan of under $100,000 is made for an agricultural purpose, the interest may not be more than 4.5 percentage points over the federal discount rate at the time of the loan. MINN. STAT. § 334.011, subd. 1. Banks and other financial institutions are allowed to charge up to 21.75 percent interest. MINN. STAT. 47.59, subd. 3. See, for example, *First State Bank v. Van Ruler*, 402 N.W.2d 637, 639 (Minn. Ct. App. 1987). Chapter 12 provides a more detailed discussion of interest

4. Acceleration

An acceleration clause in a loan agreement or promissory note is a clause that allows the creditor to "accelerate" the payment schedule and claim the whole loan amount is due right away if specified events occur. Acceleration clauses are usually triggered by a default on the loan. For example, suppose you borrowed $20,000 with payments of $5,000 scheduled over four years. If you default after the first payment and your loan is accelerated, the creditor can demand the full $15,000 (plus any interest) immediately even though you would otherwise only have had to make the next annual payment. A creditor may only accelerate the loan if the agreement includes an acceleration clause.[9] The secured creditor must accelerate in good faith.[10]

5. Fees and expenses in case of default

Loan documents often say that the creditor can collect from the debtor reasonable attorneys' fees, legal expenses, and costs of collection that result from a default.

6. Inspections

Some agreements allow creditors to inspect the collateral during the term of the loan to ensure that it is still providing adequate security for the debt.

C. Waiving your rights

Many debtor rights are protected automatically by law. It is illegal for a creditor to require a debtor to waive these rights in a contract, loan agreement, or security agreement as a condition of receiving an agricultural loan unless the law specifically makes an exception and allows the debtor to give up those rights.[11]

D. Co-signers and guarantors

A creditor may want someone besides the borrower—such as a family member—to co-sign or guarantee the loan. If someone does so, he or she can be held responsible for the entire loan amount.

III. Creating security interests

In addition to the loan agreement or promissory note, a farmer granting a security interest to a creditor will probably be asked to sign a security agreement and an effective financing statement. Security interests may also be created through a statutory lien.

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rate limits.

9 *Sheet Metal Workers Local No. 76 Credit Union v. Hufnagle,* 295 N.W.2d 259, 263-64 (Minn. 1980).

10 Good faith is required for any actions under the UCC. MINN. STAT. § 336.1-304. In addition, the lender that wishes to accelerate a loan must in good faith believe that the prospect for payment or performance is impaired. MINN. STAT. § 336.1-309.

11 MINN. STAT. § 550.42, subd. 1. Some rights may not be waived or may be waived only in some situations. See MITCHELL & MEYER, Secured Transactions, at 19-35.

Security Interest

A security interest is a legal claim of a creditor allowing the creditor to take possession of the debtor's property, or claim proceeds from the sale of the debtor's property, if the debtor defaults on the debt. Some security interests are created by law or by order of a court. Most commonly, however, security interests are agreed to by debtors as part of a credit arrangement.

A. Security agreements

A security interest is a legal claim of a creditor allowing the creditor to take possession of the debtor's property, or claim proceeds from the sale of the debtor's property, if the debtor defaults on the debt.[12] A security agreement is a contract that gives a creditor a security interest in the debtor's property. Although security interests typically are used to provide assurance of repayment for credit issued at the same time that the security agreement is signed, a security agreement may include language giving the creditor an interest in the debtor's property to secure repayment of future credit advances made by the creditor, or to secure previous credit extensions that are already outstanding when the security agreement is signed. [13]

1. General requirements of security agreements

In general, security agreements must be in writing, must be signed by the debtor, and must include a description of the collateral. [14]

2. Describing the property covered by the security agreement

A security agreement must describe the collateral. A common question is what makes for a sufficient description of the property.[15]

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12 See MITCHELL & MEYER, Secured Transactions, at 19-11 to 19-14.

13 MINN. STAT. §§ 336.1-201(35)("security interest"), 336.9-204; MITCHELL & MEYER, Secured Transactions, at 19-13.

14 MINN. STAT. §§ 336.1-201(b)(37)("signed"), (b)(43)("writing"), 336.9-201(a)(7) ("authenticate"), (c), 336.9-203(b). A debtor's electronic signature meets this requirement. MINN. STAT. § 336.9-102(a)(7)(B). Signatures are not needed if the creditor possesses the collateral. MINN. STAT. § 336.9-203(b)(3)(B).

15 See MITCHELL & MEYER, Secured Transactions, at 19-13.

a. "Supergeneric" descriptions not allowed

Creditors have often attempted to use what the law calls "supergeneric" descriptions of a debtor's property when drafting security agreements. This allows creditors to obtain the maximum amount of collateral.

Examples of supergeneric descriptions of collateral include very general descriptions such as "all debtor assets" or "all the debtor's personal property."[16] Under current law, supergeneric descriptions are not allowed for security agreements.[17] They are allowed for financing statements, which are discussed below.[18]

To be enforceable, the security agreement must "reasonably identify" the collateral.[19] Examples of reasonable identification include a specific listing of the collateral, a category of collateral, a amount of collateral, or a type of collateral.[20] For instance, a security agreement giving all of the debtor's equipment as security is probably valid.[21]

b. Crops – land description not needed, but effective if it is can be included

Under Minnesota's Revised Article 9, creditors seeking a security interest in crops growing or to be grown do not need to include a description of the land on which the crops were planted in the security agreement and financing statement.[22] This allows creditors to gain an interest in all crops grown by a debtor while a security agreement is in effect simply by indicating in the security agreement and financing statement that "crops grown or to be grown" are collateral for the debt.

Although Minnesota law does not require that land descriptions be included in security agreements and financing statements, such descriptions can be useful if a farmer wants to limit the scope of the creditor's interest.

To protect their interests, farmers who do not intend to give a general interest in all crops to a creditor should consider writing in the security agreement a legal description of the land on which the crops that are given as collateral will be grown, or another description that excludes certain farm parcels. Farmers might also consider trying to limit the reach of a creditor's security interest over future crops by using language that specifies certain crop years or an end date, such as

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16 MINN. STAT. § 336.9-108(c).
17 MINN. STAT. § 336.9-108(c).
18 MINN. STAT. §§ 336.9-502(b), 336.9-504.
19 MINN. STAT. § 336.9-108(a)-(c).
20 MINN. STAT. § 336.9-108(b).
21 MINN. STAT. § 336.9-108(b)(2). See 43 DUNNELL MINN. DIGEST, Secured Transactions §1.01(e) (5th ed. 2009) and MITCHELL & MEYER, Secured Transactions, at 19-13.
22 MINN. STAT. §§ 336.9-203(b)(3), 336.9-502(b). If the security interest covers timber to be cut, a description of the land—but not necessarily a legal description—must be included. MINN. STAT. 336.9-203(b)(3)(A). See also 43 DUNNELL MINN. DIGEST, Secured Transactions § 3.02 (5th ed. 2009).

"except crops planted after May 1, 20xx."

B. Financing statements

A UCC financing statement has two main purposes. First, it serves as public notice that the creditor has a security interest in the debtor's property. Second, if two different creditors ever tried to claim the same piece of the debtor's property, the financing statement helps to settle which creditor gets the collateral.[23]

Usually a financing statement, called a UCC-1, includes the legal names of the debtor and the creditor, the addresses of both parties, and a description of the types of collateral[24] The description of the collateral can be very general in a financing statement.[25] If the property is to become a fixture, the financing statement must include a description of the real estate.[26]

1. Debtor's signature not required on financing statements

Unlike security agreements, Revised Article 9 does not require the debtor's signature on financing statements.[27] Even though the debtor's signature is not required, the creditor must still have the debtor's authorization to file the financing statement.[28] In general, anyone who files a financing statement without the debtor's authorization may be liable to the debtor for damages.[29] Debtors should be aware, however, that under Revised Article 9 this authorization is automatic whenever a debtor signs or agrees to become bound by a security agreement.[30] Authorization to file a financing statement may also be included in the language of the security agreement itself.

2. Where financing statements are filed

Under Revised Article 9, financing statements are, with very few exceptions, filed with the Secretary of State in the state where the debtor's principal residence is located.[31] If the debtor is a registered corporation, limited liability company, or limited partnership, the financing statement is filed in the state where the debtor is registered.[32]

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23 Priority among creditors is discussed in MINN. STAT. § 336.9-322.

24 MINN. STAT. §§ 336.9-502(a)-(b), 336.9-503, 336.9-504, 336.9-516(b)(4)-(5); Minn. R. 8280.0040, 0160, 0170. IRS tax numbers are used if the farm is incorporated. Minor errors that are not seriously misleading do not make the financing statement ineffective. MINN. STAT. § 336.9-506. An example of a form UCC-1 is at: http://www.sos.state.mn.us/business-liens/ucc-tax-cns-forms-fees/ucc-lien-filing-forms/.

25 MINN. STAT. §§ 336.9-504, 336.9-108. Even an "all assets" description is allowed for a financing statement. MINN. STAT. 336.9-504(2). See MITCHELL & MEYER, Secured Transactions, at 19-15.

26 MINN. STAT. § 336.9-502(b).

27 MINN. STAT. § 336.9-502. Until 2001, the debtor was required to sign the financing statement. See 2000 Minn. Laws ch. 399, art. 1, sec. 73.

28 MINN. STAT. § 336.9-509(a)-(b). See MITCHELL & MEYER, Secured Transactions, at 19-16.

29 MINN. STAT. § 336.9-625(b), (e)(3).

30 MINN. STAT. § 336.9-509(b).

31 MINN. STAT. §§ 336.9-301(1), 336.9-307(b)(1), 336.9-501(a)(2). The filing location may be different if the collateral is timber, oil, gas, minerals, or certain fixtures. See MINN. STAT. § 336.9-501(a).

32 MINN. STAT. §§ 336.9-307(e) , 336.9-102(a)(71)("Registered organization"). For non-registered organizations, the place

Minnesota law allows county recorder's offices to act as a satellite for the Minnesota Secretary of State for the purpose of filing a financing statement. At present, however, many counties do not have a satellite office.[33] Therefore, the vast majority of financing statements are filed online or mailed to the Office of the Minnesota Secretary of State.

3. Changing or correcting financing statements

A creditor may change the information in a financing statement by filing an amendment.[34]

If a financing statement or an amendment contains incorrect information or was wrongfully filed, the debtor can file what is called an "information statement" that will be kept with the financing statement or amendment.[35] The information statement gives the debtor the opportunity to clarify any inaccuracies or errors in the financing statement, but the original financing statement will remain filed with the Secretary of State's office.[36]

C. Centralized Filing System — effective financing statements and lien notices for farm products

In the 1980s Congress ordered the creation of a centralized computer filing system for liens on farm products.[37] Under the federal Centralized Filing System, a secured creditor protects its interest in farm products and puts others on notice of its claim by filing a specific type of financing statement called an "effective financing statement."[38] Persons who hold statutory liens against farmers can do the same by filing a "lien notice."

Farm products, for the purposes of both the Minnesota and the federal Centralized Filing System, include farm commodities such as corn and soybeans as well as livestock and

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of business or location of the chief executive office will govern where the filing takes place. MINN. STAT. § 336.9-307(b)(2)-(3).

33 MINN. STAT. §§ 336.9-527 to 336.9-530. See MITCHELL & MEYER, Secured Transactions, at 19-17.

34 MINN. STAT. § 336.9-512. The debtor must authorize an amendment. MINN. STAT. § 336.9-509(a)(1).

35 MINN. STAT. § 336.9-518.

36 MINN. STAT. § 336.9-518(e). In addition, under MINN. STAT. § 545.05, a debtor may bring a motion before the court if the debtor believes that a financing statement is fraudulent. This motion does not require the filing of a formal civil complaint. Instead, the court will consider the motion on its own, and review the financing statement. If the court determines that the financing statement is either fraudulent or without merit, the court can issue an order authorizing the removal of the financing statement from the Secretary of State's files. *Purported Fin. Statements v. Juhl*, No. A08-0525, 2009 Minn. App. Unpub. LEXIS 142, at *4 (Feb. 3, 2009). Any person who files a UCC financing statement with the intent to harass or defraud another person may be guilty of a gross misdemeanor. MINN. STAT. § 609.7475.

37 7 U.S.C. § 1631; MINN. STAT. § 336A.04. Before the 1980s, grain dealers who purchased grain from farmers often faced claims from farm creditors who had security interests in the grain. For a general overview see JULIAN B. MCDONNELL, *The Food Security Act and Its Relationship With Article 9*, vol. 1D, ch. 27 in PETER F. COOGAN ET AL., SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE (2016).

38 7 U.S.C. § 1631(c)(4). Minnesota established a central filing system in 1992, codified at MINN. STAT. ch. 336A. An effective financing statement must be properly filed to be valid. MINN. STAT. § 336A.04, subd. 1; 7 U.S.C. § 1631(c)(4)(B); *Fin Ag, Inc. v. Hufnagle, Inc.*, 720 N.W.2d 579, 582 (Minn. 2006).

poultry and unmanufactured crop or animal products, such as milk or eggs.[39]

Effective financing statements and lien notices must include the names and addresses of the debtor and creditor, a description of the property subject to the security interest or lien, the name of the county in which the property is located, and the amount owed.[40] A lien notice must be signed by the lienholder.[41] An effective financing statement must be signed by the debtor and the secured party.[42] It must also include the debtor's Social Security Number or an IRS taxpayer identification number.[43] Both effective financing statements and lien notices must be filed in the computerized filing system operated by the Secretary of State.[44]

Although the purpose of effective financing statements and lien notices is similar to the purpose of UCC financing statements discussed above, the two forms are different and may not be combined in one document.[45]

D. Continuation statements— for financing statements and effective financing statements

A security interest lasts as long as the debt is unpaid. A financing statement, however, is usually only valid for five years.[46] In order to extend the length of a financing statement beyond the initial five years, the creditor must file a continuation statement.[47]

An effective financing statement also lasts for five years.[48] The creditor can extend it by refiling or filing a continuation statement with the Minnesota Secretary of State's Central Filing System.[49]

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39 MINN. STAT. § 336A.01, subd. 9; 7 U.S.C. § 1631(c)(5). To be a farm product, these goods must be in the farmer's possession.

40 MINN. STAT. § 336A.03, subd. 2(a); 7 U.S.C. § 1631(c)(4)(C). If there is a significant change to the information in an effective financing statement or lien notice, the statement or notice must be amended to reflect the change within three months. MINN. STAT. § 336A.03, subd. 4; 7 U.S.C. § 1631(c)(4)(D). Examples of forms for effective financing statements and lien forms are here: http://www.sos.state.mn.us/business-liens/ucc-tax-cns-forms-fees/central-notification-system-cns-forms/.

41 MINN. STAT. § 336A.03, subd. 3.

42 MINN. STAT. §§ 336A.03, subd. 3(2). An effective financing statement can be filed online without the debtor's signature if the debt has already signed a paper version of the effective financing statement for that lien.

43 MINN. STAT. § 336A.03, subd. 2(a)(4); 7 U.S.C. § 1631(c)(4)(A)-(C). An IRS taxpayer number is required only if the farmer is a business entity.

44 MINN. STAT. § 336A.04, subd. 1.

45 MINN. STAT. § 336A.03, subd. 2(c).

46 MINN. STAT. § 336.9-515. A real estate mortgage that also serves as a financing statement for a fixture on the land, however, is valid until a mortgage release or satisfaction is filed. MINN. STAT. § 336.9-515(g).

47 MINN. STAT. § 336.9-515(e).

48 MINN. STAT. §§ 336A.03, subd. 5(a), 336A.06; 7 U.S.C. § 1631(c)(4)(E). The debtor must sign, authorize, or otherwise authenticate that the debtor was aware of the continuation statement. MINN. STAT. § 336A.06.

49 MINN. STAT. § 336A.06; 7 U.S.C. § 1631(c)(4)(E).

E. Termination statements

A termination statement declares that the creditor's security interest is terminated and the creditor no longer has an interest in the debtor's property. Once the debtor has paid off the debt, the creditor must provide a termination statement.[50] If the creditor does not produce a termination statement at the time the debt is paid in full, the debtor should write the creditor and ask for one. [51] If the secured party fails to file the termination statement within twenty days after receiving the debtor's written demand, the debtor may go ahead and file the termination statement as an amendment.[52]

With respect to UCC financing statements, a copy of the termination statement should be filed everywhere the original financing statement was filed.[53] If the creditor fails to file a termination statement, the creditor is liable for any damages caused to the borrower.[54] Under Revised Article 9, the borrower may also recover $500 from the creditor.[55]

For effective financing statements under the federal system, the creditor must file a termination statement within thirty days after its security interest is terminated.[56] If the creditor fails to file a termination statement, the creditor is liable for $100 plus any losses caused to the borrower for the first time there is a failure, and $250 for any subsequent failures that occur within the same calendar year.[57]

IV. Collateral for secured debts

A security agreement must identify at least in general terms the items or categories of property in which the debtor is allowing the creditor to take an interest. This property is then referred to as "collateral" for the debt. It is very important for debtors to understand what items of property are considered collateral for secured loans, and what limitations they may face in making use of any property that is collateral.

A. Types of collateral

In general, a security agreement can use as collateral the debtor's personal property, such as crops, livestock, machinery, bank accounts, and other property such as future government program payments.[58] Forms of collateral important for farming include the following.

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50 MINN. STAT. §§ 336.9-513; 336A.07.
51 MINN. STAT. § 336.9-513(c).
52 MINN. STAT. §§ 336.9-509(d)(2), 336.9-513(c).
53 MINN. STAT. § 336.9-513(d).
54 MINN. STAT. § 336.9-625(b), 336A.07, subd. 4.
55 MINN. STAT. § 336.9-625(e)(4). In some circumstances, other damages are possible. MINN. STAT. § 336.9-625(b).
56 MINN. STAT. § 336A.07.
57 MINN. STAT. § 336A.07, subd. 4.
58 MINN. STAT. § 336.9-109.

1. Proceeds

If the debtor sells or trades collateral, the creditor's security interest usually continues or follows any of the identifiable proceeds from the sale or trade.[59] For example, if a farmer sells crops that are serving as collateral for a loan, the creditor still has a security interest in the money the farmer got from the sale. This is true even if the check from the sale does not have the creditor's name on it.

Use of proceeds in violation of the security agreement is called "conversion," which is discussed below. Debtors should be careful to request written permission from secured creditors if they want to use proceeds from the sale or trade of collateral for anything other than paying the secured debt.

2. After-acquired property

The security agreement may include an "after-acquired property" clause.[60] This clause gives the creditor a security interest in property acquired by the debtor after the security agreement was signed. For example, if farmer's security agreement gives the creditor a security interest in all farm equipment that the farmer currently owns "or will acquire" in the future, that means a tractor the farmer buys the next year will also serve as collateral for the debt secured by that agreement.

3. Security in crops

If a security agreement includes crops as collateral, the creditor's security interest may carry over to future crops.[61] For example, if a secured creditor from last year's crop was not paid in full, that creditor may have a legal claim to this year's crop or other future crops even if the creditor provided no financing for those later crops.

4. Deposit accounts

Creditors are allowed to take a debtor's "deposit accounts" as original collateral for non-consumer debts, meaning those debts that do not arise out of a consumer transaction. [62] This rule applies only to deposit accounts that are used as original collateral. Two terms are important for understanding deposit accounts as security. First, "deposit accounts" include checking, savings, and similar accounts, and certain certificates of deposit ("CDs") that are held at banks and other financial institutions.[63]

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59 MINN. STAT. § 336.9-315(a). The debtor and creditor may agree otherwise. Proceeds include whatever is received upon "sale, lease, license, exchange, or other disposition" of collateral. MINN. STAT. § 336.9-315(a)(1). See, as well, MINN. STAT. § 336.9-102(a)(64)("Proceeds"). MITCHELL & MEYER, Secured Transactions, at 19-33 to 19-34, also discusses proceeds.

60 MINN. STAT. § 336.9-204. See also MITCHELL & MEYER, Secured Transactions, at 19-13 to 19-14.

61 The definitions of "goods," which can be subject to a security interest, includes "unborn young of animals" and "crops grown, growing, or to be grown." MINN. STAT. §§ 336.9-102(a)(44)("Goods").

62 MINN. STAT. § 336.9-109(d)(13).

63 MINN. STAT. § 336.9-102(a)(29). A deposit account does not, however, include investment property, such as stocks or bonds, or accounts evidenced by an instrument. See REVISED U.C.C. § 9-102, Official Comment 12.

Deposit account

Deposit accounts are checking, savings, and similar accounts and certain certificates of deposit maintained with a bank or other financial institution.

Second, "consumer transactions" are transactions in which both the underlying debt, and the collateral used to secure that debt, have a personal, family, or household purpose.[64] A farmer's credit arrangements can qualify as either consumer transactions or non-consumer transactions, depending on the primary purpose of the debt and the type of collateral. For example, if a farmer purchases a lawnmower on credit primarily for use around the family home, this would be a consumer transaction. The same lawnmower purchased on credit but primarily for use in the farming operation would be a non-consumer transaction.[65]

Consumer transaction

Consumer transactions are transactions in which: (1) the debt is taken primarily for personal, family, or household purposes; and (2) the collateral is primarily for personal, family, or household use.

In some cases, a debt that arises out of a business obligation may be secured by collateral that is both personal and business in nature. For example, suppose a farmer signs a security agreement in exchange for credit to purchase a tractor for his or her farm, and the security agreement includes as collateral both the tractor and the farmer's personal savings account. The question then becomes whether the creditor's security interest would attach to the farmer's savings account upon default. In this example, because the security agreement arose out of a business obligation—and a not personal, family or household obligation—it does not constitute a consumer transaction and therefore the creditor's security interest would attach to the savings account. Upon default, the creditor could first attempt to take the funds in the farmer's savings account before going through the difficulty of taking possession of the tractor and reselling it in order to satisfy the debt.[66]

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[64] MINN. STAT. § 336.9-102(a)(24), (26).

[65] MINN. STAT. § 336.9-102(a)(24), (26). The comments to REVISED ARTICLE 9 clarify that a credit arrangement secured by more than one type of collateral may be considered a consumer transactions so long as the primary purpose of the obligation is for personal, family or household use, even if some of the collateral securing that debt is not intended for personal use. See REVISED U.C.C. § 9-102, Official Comment 7.

[66] If the security agreement arose out of a personal obligation, however, and the collateral included both business and personal property, the transaction might nonetheless be considered a consumer transaction, and as such the creditor's security interest would not attach to any of the collateral. See REVISED U.C.C. § 9-102, Official Comment 7, which clarifies that a transaction involving both personal and business collateral may be considered a consumer transaction so long as the primary purpose of the obligation is personal, family-related or household-related.

a. Listing checking and savings accounts in security agreements

If a creditor wants to use deposit accounts as security for repayment of a debt, the security agreement must clearly state that deposit accounts are included as collateral.[67] This will most likely be done in the section of the security agreement that lists or defines collateral for the debt. Although it is possible to name (by type or account number) specific deposit accounts that are being given as security, standard security agreements will likely just state the general category of "deposit accounts" and will not specify individual accounts. Using this general language means that funds held in any deposit accounts owned or acquired by the debtor would be available to the creditor as original collateral for the debt. One possible way for farmers to limit creditors' access to their deposit accounts would be to separate their household accounts from their business/farming accounts and to make sure that the security agreement only lists the business/farming deposit accounts and does not use the general category of "deposit accounts" without limitation.[68] This will almost certainly require making changes to the standard security agreement provided by the creditor.

b. Security interest gives creditors quicker and easier access to debtor's deposit accounts

It is important to remember that using deposit accounts as original collateral for a loan is not the only way that creditors can gain the right to funds in a debtor's accounts. Therefore, listing specific accounts or even removing deposit accounts from the types of collateral given in a security agreement will not provide absolute protection for the farmer's accounts. Creditors can generally claim funds in deposit accounts that are not listed as collateral if the funds are proceeds from the sale of security property (discussed earlier) or if state law otherwise gives the creditor a claim against the account.[69] Under current law, creditors can have relatively easy access to a debtor's deposit accounts and generally need not get a court order to access the funds held in a debtor's accounts.

c. Creditors seeking to access a debtor's deposit account under a security agreement must "control" the account

Even though current law makes it fairly easy for creditors to access a debtor's accounts, there are still some requirements that must be met beyond signing the security agreement if a creditor is to gain access to the funds in the account. Most importantly, to have access to funds in a deposit account that is covered by a security agreement, the creditor must also have "control" over the deposit account.[70] Control has a special meaning for this purpose.

There are three ways that a creditor can take control of a debtor's account.

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67 See REVISED U.C.C. § 9-109, Official Comment 16.

68 Deposit accounts are discussed in BRUCE A. MARKELl, *From Property to Contract and Back: An Examination of Deposit Accounts* and REVISED ARTICLE 9, 74 CHI.-KENT. L. REV. 963, 978 (1999).

69 MINN. STAT. § 336.9-315. INGRID MICHELSEN HILLINGER, DAVID LINE BATTY, RICHARD K. BROWN, *Article: Deposit Accounts Under The New World Order*, 6 N.C. Banking Inst. 1, 13-14 (2002).

70 MINN. STAT. §§ 336.9-314(a)-(b), 336.9-104.

(1) Creditor is the bank where the deposit account is located

First, if the creditor is the bank where the deposit account is located, that creditor will have control of the account.[71]

(2) Creditor's name is on the deposit account

Second, a creditor will be considered to have control of a debtor's account if the creditor's name is also on the account.[72]

(3) Creditor, debtor, and bank have entered into a "control agreement"

The third way that a creditor can take control of a debtor's account, and probably the most common way that this will occur, is for the debtor, the creditor, and the bank to enter into a "control agreement."[73]

A control agreement is a legal document that authorizes a bank to follow a secured creditor's instructions concerning a debtor's account funds, without further approval from the debtor.[74]

The control agreement may also restrict when or if the debtor can get access to any funds from the deposit account without the secured creditor's prior written consent. This could mean the debtor's assets are essentially frozen subject to the instructions of the secured creditor. For example, if a control agreement restricts the debtor's ability to draw funds from the account, any request for payments from the account made by the debtor—such as an automatic payment withdrawal or a check written on the account—may be denied or dishonored by the bank. If this happens, the debtor may be unable to make payments and he or she may also be responsible for charges such as insufficient funds fees.

Debtors are not required by Minnesota law to sign a control agreement. In practice, however, the security agreements farmers sign may require cooperation with respect to obtaining control in the deposit accounts, including requiring farmers to sign control agreements.

A control agreement might require the bank to agree not to sign any other control agreements regarding the debtor's same deposit accounts. If this requirement is included, and the bank signs the control agreement, the deposit accounts covered by the agreement would likely not be available as collateral for any other secured creditor.

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71 MINN. STAT. § 336.9-104(a)(1).
72 MINN. STAT. § 336.9-104(a)(3).
73 MINN. STAT. § 336.9-104(a)(2).
74 MINN. STAT. § 336.9-104(a)(2).

The bank where the deposit account is located cannot be required to enter into a control agreement, even if the debtor as account holder requests it.[75]

Regardless of what is included in a control agreement, farmers should be extremely careful to understand the documents they sign. A control agreement can result in a farmer being unable to access his or her checking and savings account without a creditor's prior written consent.

B. Restrictions on collateral

Many security agreements restrict what debtors can do with the collateral. For example, the debtor may be prevented by the agreement from selling the property, terminating a current lease, or allowing a lien to attach to the property.

1. Restrictions on selling

Loan documents often say that the debtor must get the creditor's permission before selling collateral. Although creditors do not always enforce this requirement, to avoid future problems debtors should get written permission for a sale in advance whenever it is required by the loan agreement. Even if the debtor has sold collateral without the secured creditor's consent in the past and the secured creditor did not object, this does not necessarily mean that the debtor can continue to do so in the future without penalty.[76]

Oral permission to sell collateral—even if the loan agreement requires written permission—should be legally binding on the creditor.[77] To be safe, however, when a debtor gets oral permission to sell collateral, it is wise to follow up with a short letter to the creditor confirming the conversation.

2. Reporting requirements

The security agreement may state that the debtor must provide the creditor with a list of potential buyers for the collateral. Federal law requires the debtor to follow through on this promise by providing the creditor with the names of potential buyers.[78] If the debtor wants to sell the collateral to someone not on the list, the debtor must either notify the creditor in writing at least seven days before the sale and name the new buyer, or pay the creditor the proceeds from the sale within ten days after the sale.[79]

C. Conversion

A debtor selling collateral, making changes to collateral, or using proceeds from the sale of collateral in violation of the security agreement may be accused of conversion.[80] Both civil

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75 MINN. STAT. § 336.9-342.

76 *Wabassso State Bank v. Caldwell Packing Co.,* 251 N.W.2d 321, 324-25 (Minn. 1976).

77 *Citizens Nat'l Bank of Madelia v. Mankato Implement, Inc.,* 441 N.W.2d 483, 486-87 (Minn. 1989).

78 7 U.S.C. § 1631(h).

79 7 U.S.C. § 1631(h)(2). Debtors failing to satisfy this requirement can be fined $5,000, or 15 percent of the value of the property sold, whichever is greater. 7 U.S.C. § 1631(h)(3).

80 In *Integrity Bank Plus v. Talking Sales, Inc.,* No. 04-4523 (RHK/JSM), 2006 U.S. Dist. LEXIS 3622,

and criminal penalties can follow. The key to avoiding conversion is knowing what is required by the security agreement and following those requirements exactly.

D. Two-party checks

When selling farm products, a debtor might be paid with a two-party check made out to both the debtor and a creditor. The debtor then cannot use the proceeds without the creditor's consent.[81] This is intended to ensure that the debtor will use the proceeds for payment on the debt to the creditor. Sometimes it is possible to reach an agreement with the creditor to use part of the proceeds for other expenses—such as a mortgage payment or taxes. If so, the debtor should get a written agreement that explains how the proceeds will be used.

E. Debtor efforts to minimize creditor's claims

Sometimes it is tempting for debtors to maximize the farm output that does not fall under a security interest since those proceeds can be used as the debtor chooses. For example, if your creditor's security interest covers only crops grown on certain property, crops you grow on other land might not be covered under your security agreement. Similarly, if you cash-rent land listed on your security agreement, that rent might not be covered by the agreement and you might be free to use that rent as you choose.

These and other similar strategies are often used in an attempt to free up funds from security interests. In many cases, these strategies can be perfectly legal. Debtors should keep several things in mind, however.

1. Read the security agreement closely

The security agreement may prohibit some of these strategies. If so, pursuing them might be considered a default on the debt. For example, many security agreements do not let the debtor rent the land listed in the agreement. As always, it is important to read written agreements closely.

2. Keep unsecured property separate

Care should be taken to keep collateral separate from the debtor's property in which creditors do not have any security interest. For example, if part of the crop from your farm serves as collateral and part of it does not, you should keep the crops and the proceeds separate. Otherwise the creditor might try to claim all of the crop and crop proceeds.

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at *7 (D. Minn. Jan. 27, 2006), the court noted the general rule that "when a debtor makes an unauthorized transfer of property encumbered by a security interest, the secured party may maintain a conversion action against the transferee." In *Meadowland Farmers Coop. V. Behrendt*, C2-00-1753, 2001 Minn. App. LEXIS 626, at *4 -5 (Minn. Ct. App. June 5, 2001) (unpublished), the court concluded that a farmer who sold hogs that were subject to a security interest—without the creditor's authorization—was liable to the creditor for conversion.

[81] *Meadowland Farmers Coop. v. Behrendt*, C2-00-1753, 2001 Minn. App. LEXIS 626, at *2 (Ct. App. June 5, 2001).

3. Concealing collateral can be a crime

Debtors who—with the intent to defraud a creditor—conceal, remove, or transfer property they know serves as collateral can face criminal penalties.[82]

V. Default and repossession

If the debtor defaults on a secured loan, the creditor may have the right to take possession of the collateral. This section discusses that process.

A. Default

There is no special legal definition of default. Instead, debtors are in default when they violate the terms and conditions of their loan agreement, promissory note, or security agreement.[83] If the debtor does something the creditor does not like, therefore, it is probably not a default unless the loan agreement, promissory note, or security agreement specifically prohibit that action.[84] Default is most commonly caused by failure to make loan payments, but any violation of the loan agreement, promissory note, or security agreement could create a default. Debtors should be aware, however, that although the terms of the parties' loan agreement, promissory note, or security agreement will generally govern what constitutes a default, there are certain rights and obligations that debtors and creditors cannot waive or vary—even in their agreements.[85]

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[82] MINN. STAT. § 609.62, subd. 2(1). At present, the penalty could be up to three years of imprisonment, or fine of up to $6,000, or both.

[83] As Official Comment 3 to the REVISED U.C.C. § 9-601 observes, Article 9 "leaves to the agreement of the parties the circumstances giving rise to default." See, also, MINN. STAT. §§ 336.9-601, 336.9-602; Donald J. Rapson, *Default and Enforcement of Security Interests Under REVISED ARTICLE 9*, 74 CHI.KENT L. REV. 893, 896 (1999), and MITCHELL & MEYER, Secured Transactions, at 19-34 to 19-35, which discusses default.

[84] MINN. STAT. § 336.9-601. Creditors are able to demand that debtors follow security agreements strictly. *Brown v. Weeres Indus., Inc.,* 375 N.W.2d 64, 66-67 (Minn. Ct. App. 1985).

[85] MINN. STAT. § 336.9-602; *Hitachi Capital Am. Corp. v. Envtl. Servs. Co. LLC*, 2012 Minn. Dist. LEXIS 209, *11-12.

Questions to consider when seeking secured credit

The most important questions farmers need to ask themselves when seeking secured credit are:

(1) "Have I read the documents I am signing?" and

(2) "Do I understand them?"

It is critical to ask questions if you do not understand what the language in an agreement means. These documents do more than provide access to credit; they establish legal rights and obligations between the creditor and the farmer.

Next, ask yourself exactly what collateral the creditor is taking for the loan. Creditors often attempt to take as much collateral as they can, listing broad categories of property in a security agreement. The collateral listed in the creditor's printed security agreement might include property that a farmer intends to use as collateral for a separate loan or that is not related to this loan. The creditor will have a claim to any property listed as collateral in the security agreement, including property that fits under broad categories of collateral. Try to make sure that the security agreement includes no more collateral than is needed to obtain the loan. For example, if vehicles are listed as collateral, you may want to only include vehicles that you list on the security agreement.

If possible, you may want to consult with an attorney experienced in agricultural credit law when considering the following questions:

After-acquired property

1. Does the security agreement include language such as "property now owned or hereafter acquired" when listing types of collateral? This means that the creditor will have a claim on any future purchases of property of the type listed.

2. Will the creditor make the loan if the "or hereafter acquired" language is struck?

3. If the creditor insists on having after-acquired property as collateral, can the types of property interests or property covered by the "or hereafter acquired" language be limited? For example, can the after-acquired property language cover just equipment or machinery but not any other property?

4. If the after-acquired property language cannot be stricken or limited, are you willing to give the creditor a claim on property interests or property that you acquire between the time the loan is made and when the loan is paid in full?

Deposit accounts

1. Does the security agreement list "deposit accounts" as a category of collateral for the loan? This means checking and savings accounts and some certificates of deposit (CDs).

2. Will the creditor make the loan if deposit accounts are not given as collateral?

3. If the creditor insists on having deposit accounts as collateral, can the accounts covered by the security agreement be limited? For example, can the security agreement list only specific, farm-related accounts as collateral and specifically exclude others, such as "except account #99999 at local Bank" or "except all deposit accounts at local Bank"?

4. If the deposit accounts category cannot be stricken or limited, are you willing to give the creditor a claim on and possible control over all checking and savings accounts in your name until the loan is paid in full?

5. Does the security agreement include language requiring you to sign a control agreement with the creditor and the bank where your accounts are located? For example, language such as, "Debtor agrees to execute any further documents reasonably requested by the creditor to perfect its security interest."

Accounts

1. Does the security agreement list "accounts" as a category of collateral for the loan? This can mean the right to receive contract-for-deed payments, government farm program payments, disaster assistance payments, payments under some crop or livestock production contracts, and other types of income.

2. Will the creditor make the loan if your accounts are not given as collateral?

3. If the creditor insists on having accounts as collateral, can the accounts covered by the security agreement be limited? For example, can the security agreement list only specific types of government farm program payments as collateral and specifically exclude others?

4. If the accounts category cannot be stricken or limited, are you willing to give the creditor a claim on possibly all your contract-for-deed, production contract, and government payments until the loan is paid in full?

Crops

1. Does the security agreement use language such as "to be planted" or "to be grown," indicating that future crops will be taken as collateral for the loan? Does the security agreement use general language covering all crops?

2. Will the creditor make the loan if the language covering future crops is struck? Will the creditor make the loan if only certain crops are covered, using land descriptions to identify particular parcels?

3. If the creditor insists on having future crops as collateral, can the security interest in future crops be limited, either by parcel, by crop year, or both? For example, can the security agreement include language such as "except crops growing or to be grown on [give land description here]" or "including only crops planted before July 1, 2005"?

4. If the language indicating future crops cannot be stricken or limited, are you willing to give the creditor a claim on all crops that you grow until the loan is paid in full? If the language covering all current crops cannot be limited, are you willing to give the creditor a security interest in all of your crops on all property?

CAUTION: Watch for *"including, but not limited to"* language before any list of collateral in a security agreement. This language means that any listed collateral is only an example, and the agreement would cover the entire category of collateral given. If you think a specific list is the only collateral you are giving, be sure that the agreement really says this.

B. Debtor rights and creditor options after default

Before taking any action on the debt, the creditor may be required to serve the debtor with a farmer-lender mediation notice.[86] See Chapter Seven for a discussion of the mediation process. Farm Credit Services (FCS) borrowers are also entitled to receive a notice of debt restructuring before a collection action begins.[87] And FSA borrowers should receive a notice of debt restructuring rights.[88]

When debtors default on their security agreements, creditors have several different options.[89] Sometimes they may use more than one option at the same time.

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86 MINN. STAT. § 336.9-601(h)-(i).
87 12 C.F.R. § 617.7410.
88 7 C.F.R. § 766.101.
89 MINN. STAT. § 336.9-601(c); MITCHELL & MEYER, Secured Transactions, at 19-34 to 19-44, discuss various possibilities.

1. Do nothing or work out an agreement

A creditor can wait long past the time of default before trying to collect. For example, if the collateral is growing crops, the creditor might hold off until the crops are harvested before trying to enforce the debt.

The creditor also may consider an arrangement with other creditors to extend or rearrange payments. Some creditors may be especially willing to try this if they will get more under a modified agreement than they would get if the debtor filed a bankruptcy petition.

2. Sue for the amount owed

The creditor may attempt to collect by filing a lawsuit for the amount owed.[90] Creditors are more likely to try this tactic if seizing and selling the collateral will not bring enough proceeds to cover the debt, and the debtor has other assets available that could be targeted in a court action for a judgment lien. Such lawsuits are discussed in Chapter Five.

3. Accelerate the debt

Sometimes the secured creditor accelerates a loan in default. As discussed earlier, for a creditor to have this power, the loan agreement, promissory note, or security agreement must include an acceleration clause, and the creditors must accelerate in good faith, meaning that the creditor believes payment on the debt is not likely.[91]

4. Take possession of the collateral

Unless the security agreement says otherwise, a creditor may take possession of the collateral if there is a default.[92] In some cases, the creditor may take the collateral without getting permission from a court.[93] Creditors may not seize just any of the debtor's property; it must be the identified collateral for the loan. Debtors have other rights which are discussed below.

C. How creditors take possession of collateral

There are three basic ways for creditors to repossess collateral: voluntary liquidation, creditor self-help repossession, and court-ordered repossession.

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[90] MINN. STAT. § 336.9-601(a)(1).

[91] Good faith is required for any actions under the UCC. MINN. STAT. §§ 336.1-304, .336.1-309; *Sheet Metal Workers Local No. 76 v. Hufnagle,* 295 N.W.2d 259, 263-64 (Minn. 1980).

[92] MINN. STAT. § 336.9-609.

[93] MINN. STAT. § 336.9-609(b)(2).

1. Voluntary liquidation

The creditor may want to make an agreement in which the debtor voluntarily turns the property over to the creditor. It can be difficult for a debtor to decide whether it makes sense to turn property over voluntarily. Although every farmer's situation will be different, some of the following factors might be worth considering.

a. Is sale of the collateral inevitable?

Voluntary liquidation may be sensible if the debtor agrees that he or she owes the full amount and concludes that the liquidation of the collateral is inevitable. If, however, there is a chance to avoid the sale of the collateral altogether, the situation may be different.

b. Voluntary liquidation may be cheaper

The creditor's costs of taking possession of collateral—including storage, sales preparation, labor, trucking, repairs, advertising, auctioneering, clerking, and legal expenses—are added to the debt. A debtor might choose to voluntarily give up the collateral in order to avoid being charged these additional costs.

c. Liquidation may create another default

A liquidation—whether voluntary or not—could put the debtor in default with another creditor who also has a security interest in that property.

d. Liquidation *may encourage the creditor to forgive any remaining debt*

If the collateral's value does not cover the entire amount owed, the creditor could seize the property and still continue legal action against the debtor on the remaining debt. Creditors are sometimes willing to negotiate this point. In return for a voluntary liquidation of collateral, the creditor may forgive the remaining debt. Debtors should be sure to get any agreement like this in writing.

e. Bankruptcy is an option—and a negotiating point

Minnesota farmers in bankruptcy can often protect several thousand dollars' worth of farm machinery from a secured creditor and possibly still continue to farm.[94] This can encourage the creditor to negotiate good terms with the debtor in exchange for a voluntary liquidation of collateral. The possibility of a bankruptcy can work both ways, however. A creditor fearing bankruptcy might try to take the property all the more quickly. Bankruptcy is discussed in more detail in Chapter Eight.

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[94] 11 U.S.C. § 522(d)(1)-(6); MINN. STAT. § 550.37, subds. 4a(a), 5.

2. Self-help repossession

If there is a default, a secured creditor may simply take possession of the collateral.[95] There are significant limits on this power of "self-help repossession."[96]

a. Creditor may not "breach the peace"

In a self-help repossession, creditors may not breach the peace.[97] A breach of the peace is not defined in Minnesota statutes. Minnesota courts, however, tend to be quite strict with creditors in this regard.[98] Creditors taking possession of collateral in a public place or from a driveway probably will not be considered to have breached the peace.[99] To the extent that a creditor uses physical force, makes threats, trespasses, breaks locks, or enters buildings, however, the action begins to look more like a breach of the peace.[100] There can be a breach of the peace even if there is no violence or threat of violence. [101]

If the debtor tells the creditor not to take the property, the creditor must give up self-help repossession on the debtor's property.[102] For example, if a farmer sends a creditor a letter—by certified mail, return receipt requested—saying that the creditor does not have permission to self-help repossession, it should prevent the creditor from entering the debtor's property to take possession, at least for the time being.[103] A copy of the letter should be kept in the farmer's records. If the security agreement grants the creditor self-help repossession rights, "express objection to repossession" should be enough to revoke this consent.

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95 MINN. STAT. § 336.609(a).

96 *Steichen v. First Bank Grand,* 372 N.W.2d 768, 771 (Minn. Ct. App. 1985).

97 MINN. STAT. § 336.9-609(b)(2). See 43 DUNNELL MINN. DIGEST, Secured Transactions §4.06(a) (5th ed. 2009). Parties are not allowed to alter by contractual agreement the creditor's duty not to breach the peace. MINN. STAT. §§ 336.602(6), 336.9-603(b).

98 *Bloomquist v. First Nat'l Bank of Elk River*, 378 N.W.2d 81, 84-86 (Minn. Ct. App. 1985).

99 See *Thompson v. First State Bank*, 709 N.W.2d 307, 312 (Minn. Ct. App. 2006). In this case, a truck was repossessed from an alley and the debtor's driveway, and the court concluded it was not a breach of the peace. An older case, *James v. Ford Motor Credit Co.,* 842 F. Supp. 1202, 1208-09 (D. Minn. 1994), also discusses breach of peace.

100 *Clarin v. Norwest Bank*, No. 97-2003, 1999 U.S. Dist. LEXIS 20844, at *16-19 (D. Minn. March 8, 1999) (unpublished); *Akerlund v. TCF Nat'l Bank*, No. 99-1537, 2001 WL 1631440, 2001 U.S. Dist. LEXIS 22816, at *10 (D. Minn. June 11, 2001) (unpublished).

101 This is true especially if the repossession involves commission of a criminal offense, such as trespass, which violates a law enacted to preserve "peace and good order." *Clarin v. Norwest Bank*, No. 97-2003, 1999 U.S. Dist. LEXIS 20844, at *16 (D. Minn. March 8, 1999) (unpublished); *Bloomquist v. First Nat'l Bank of Elk River*, 378 N.W.2d 81, 85 (Minn. Ct. App. 1985). For additional discussion of breaching the peace, see MITCHELL & MEYER, Secured Transactions, at 19-37 to 19-39.

102 *Clopton v. City of Plymouth*, No. 14-3369 (JRT/SER), 2017 U.S. Dist. LEXIS 594, at *22 (D. Minn. Jan. 3, 2017); *James v. Ford Motor Credit Co.,* 842 F. Supp. 1202, 1209 (D. Minn. 1994); *Bloomquist v. First Nat'l Bank of Elk River,* 378 N.W.2d 81, 84 (Minn. Ct. App. 1985).

103 Certified mail is probably not a requirement. Some cases say the debtor must specifically object to repossession. See, for example, *Clopton v. City of Plymouth*, No. 14-3369 (JRT/SER), 2017 U.S. Dist. LEXIS 594, at *22 (D. Minn. Jan. 3, 2017).

b. Creditor must give notice of strict enforcement if accepted late payments in the past

If a creditor falls into a pattern of accepting late payments from the debtor, the creditor cannot suddenly take possession of collateral upon default without letting the debtor know that the security agreement will now be enforced strictly.[104]

3. Court-ordered assistance: replevin actions

If creditors do not use self-help repossession, they may instead seek a court order allowing them to take possession of the collateral.[105] To do so, creditors file a special kind of lawsuit—called a replevin action or a claim and delivery action. A replevin lawsuit can proceed in one of two ways.[106] Either the case advances directly to a trial on the merits, at which time the court will issue a judgment granting possession of the collateral to either the creditor or the debtor.[107] Or, prior to trial, the creditor can seek an order from the court granting the creditor the ability to temporarily recover, or seize, possession of the property until the trial is held and the court issues its final judgment.[108] In some circumstances, a court will issue a prehearing seizure order without any notice to the debtor.[109] Usually, however, courts do not issue a seizure order until after the debtor has received notice and a hearing has been held.[110]

a. Commencing a replevin action: the summons and complaint

Creditors start the replevin lawsuit by delivering a summons and complaint to the debtor and by filing the complaint with the court.[111] The debtor has twenty days from the day the summons is received to file an answer with the court.[112] Although debtors are allowed to represent themselves in a replevin action, to be most effective, debtors probably need the help of a lawyer to determine how best to answer the complaint.

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[104] *Hinden v. Am. Bank of the N.,* No. A09-404, 2009 Minn. App. Unpub. LEXIS 1259, at *9-11 (Dec. 8, 2009); *McNeill v. Dakota Cnty. State Bank*, 522 N.W.2d 381, 384 (Minn. Ct. App. 1994); *Cobb v. Midwest Recovery Bureau Co.,* 295 N.W.2d 232, 236-37 (Minn. 1980); 43 DUNNELL MINN. DIGEST, Secured Transactions §4.01(b) (5th ed. 2009).

[105] A helpful summary of replevin and delivery is JAMES L. BAILIE, Replevin and Claim and Delivery, ch. 20, Minnesota Continuing Legal Education, Debtor-Creditor Handbook (11th ed. 2014, updated 2018, JAMES L. BAILLIE and PHILLIP L. KUNKEL, eds. 2018).

[106] For a general discussion of how replevin actions work, see *Storms v. Schneider*, 802 N.W.2d 824, 827-29 (Minn. Ct. App. 2011).

[107] MINN. STAT. § 548.04.

[108] MINN. STAT. §§ 565.23, 565.24; *First National Bank of Deerwood v. Gregg,* 556 N.W.2d 214, 216-17 (Minn. 1996). MINN. STAT. ch. 565, entitled "Claim and Delivery," governs the pretrial procedures in a replevin action.

[109] MINN. STAT. § 565.24.

[110] MINN. STAT. § 565.23.

[111] MINN. STAT. § 656.23, subd. 1; Minn. R. Civ. P. 3.01, 3.02.

[112] Minn. R. Civ. P. 12.01.

b. Replevin actions following notice and a hearing

In the vast majority of replevin actions, if the creditor seeks to recover possession of the property before a final trial on the merits, the creditor will first give notice to the debtor of its intention. To do this, the creditor must serve the debtor with the following: (1) a copy of the creditor's affidavit and motion to the court seeking to recover possession of the property; (2) a notice that informs the debtor that he or she may attend a hearing on the issue, and that provides the date, time, and location of the hearing; and (3) legal papers explaining why the creditor believes it should be able to take possession of the property.[113]

The hearing will not be a full trial on the merits of the case. Instead, both sides briefly argue their points, and the court will make a decision about who should have temporary possession of the property, based mainly on whether the creditor is likely to win at the full trial.[114] Unless the debtor has a very strong argument—for example, that the security agreement is not legally valid, or that the debtor is not really in default—courts tend to find that the creditor is likely to win in a full trial, and award the creditor the right to take the property immediately.

In a few cases, even if the creditor demonstrates a probability of succeeding at trial, the court will nonetheless let the debtor keep the property—at least temporarily until the trial is held. This occurs when a debtor is able to show that it has a strong defense against the creditor's claims, and that it would suffer substantially more harm than the creditor if the creditor were granted possession of the property before trail.[115] In addition, the debtor must show that his or her interests would not be sufficiently protected by a monetary bond, which creditors must file if they take possession of property prior to a replevin trial.[116] If a court does permit the debtor to retain the property before trial, the court might order the debtor to make a partial payment into escrow or post a bond,[117] or require that the debtor make the property available for occasional inspection.[118]

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[113] MINN. STAT. § 565.23, subds. 1-2.

[114] MINN. STAT. § 565.23, subd. 3.

[115] MINN. STAT. § 565.23, subd. 3(a), (c).

[116] MINN. STAT. § 565.23, subd. 3(b).

[117] Usually, if debtors want to keep the property until a full trial is held, they must post a large bond amounting to either 1.25 times the fair market value of the property, or 1.5 times the value of the creditor's claim, whichever is less. MINN. STAT. §§ 565.23, subd. 5, 565.25, subd. 2. A narrow exception to this rule allows some debtors to keep or get back the property for up to six months without a bond. MINN. STAT. § 565.251; *Westbrook State Bank v. Aetna Cas. & Sur. Co.*, 437 N.W.2d 738, 741 (Minn. Ct. App. 1989). However, to satisfy this exception, debtors are required to establish that they are unable to make the required payments because of unforeseen economic circumstances beyond their control, and that they depend on the property to make their living. MINN. STAT. § 565.251(1)-(2). In addition, the debtors must insure the property and must make periodic payments to the creditor. MINN. STAT. § 565.251(3)-(5).

[118] MINN. STAT. § 565.23, subd. 4.

c. Replevin actions without notice and a hearing

In certain situations, it is possible for a court to allow a creditor to take possession of the property prior to notice or a hearing.[119] A court will only permit a prehearing seizure of collateral if the creditor can show the court several things. First, the creditor must demonstrate that it made a good-faith effort to inform the debtor that it was seeking a prehearing seizure of the property.[120] Second, the creditor must establish that without a seizure order the creditor's interest in the property would not be protected while awaiting a hearing on the issue.[121] Finally, the creditor must show that it is likely to win possession of the property at the eventual trial, and that the creditor will either face irreparable harm if it cannot seize the property prior to a hearing, or that the debtor—with an intent to harm or defraud the creditor—is about to remove, conceal, damage, or dispose of the property.[122]

It should be noted that the Supreme Court of the United States has warned that replevin actions permitting the seizure of property prior to notice and a hearing can violate the debtor's constitutional right to due process.[123] To date, however, Minnesota's law has not been challenged on constitutional grounds.

d. If the court grants the creditor possession of the property

If the court grants the creditor temporary possession of the property—either prior to notice and a hearing or after—the court will issue an order identifying the property that the sheriff must seize and turn over to the creditor.[124] The court's order must state that the creditor may sell or dispose of the property before trial, but if the creditor chooses to do so it is required to file a bond with the court in an amount totaling one and one half times the fair market value of the property.[125] Depending on the circumstances of the case, the court's order may give the sheriff the power to break into a building to get the property, or it may require that the debtor reveal the location of the property or turn over the property to the creditor.[126]

VI. After repossession—what happens to the property

Once creditors get possession of collateral—after voluntary liquidation, self-help repossession, or upon a final judgment by a court—they either dispose of the collateral and apply the proceeds to the amount the debtor owes, or they keep it to satisfy all or part of the debt.[127] If the collateral

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[119] MINN. STAT. § 565.24, subd. 2.
[120] MINN. STAT. § 565.24, subd. 2(a).
[121] MINN. STAT. § 565.24, subd. 2(d).
[122] MINN. STAT. § 565.24, subd. 2(b).
[123] *Fuentes v. Shevin,* 407 U.S. 67 (1972).
[124] MINN. STAT. § 565.26, subd. 1(a)-(b).
[125] MINN. STAT. §§ 565.25, subd. 1, 565.26, subd. 1(c). If the court determines that the debtor's interests cannot be protected by a monetary bond, the court's order need not grant the creditor the ability to dispose of the property prior to trial. MINN. STAT. §§ 565.25, 565.26, subd. 1(c). Instead of a bond the creditor may also deposit cash or a check with the court. MINN. STAT. §§ 565.25, subd. 4.
[126] MINN. STAT. § 565.26, subd. 2.
[127] MINN. STAT. §§ 336.9-610, 336.9-620, 336.9-621. See also 43 DUNNELL MINN. DIGEST, Secured

is sold and the proceeds do not cover the debt, the creditor may try to get a deficiency judgment from the debtor.[128] If the creditor keeps the property, a partial deficiency judgment may be allowed if certain procedures are followed.[129]

A. Creditor sells the property

In many cases creditors sell collateral taken after default.[130] If so, the creditor must protect and preserve the property before the sale and must sell it in a commercially reasonable way.[131]

1. Auction—public sale

Many creditors selling collateral do so in an auction. The bidding must be open to anyone.[132] This includes the creditor.

2. Private sale

The creditor may sell the property privately, without competitive bidding, but must use a commercially reasonable method.[133] Secured creditors may buy the property themselves if the collateral is customarily sold in a recognized market or is subject to widely distributed price quotations.[134]

3. Notice to the debtor and other secured creditors

In general, before a creditor may dispose of collateral at a public auction or private sale, the creditor must send the debtor, and any secured creditor that has a financing statement on file relating to the collateral, a notice of the upcoming sale.[135] The notice for a non-consumer-goods transaction must describe the debtor, the secured party, the collateral to be sold, and the method of disposition.[136] For a public auction, the notice

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Transactions § 4.07 (5th ed. 2009).

128 MINN. STAT. § 336.9-608.

129 MINN. STAT. §§ 336.9-620(a), (c)(1), 336.9-621.

130 MINN. STAT. §§ 336.9-207, 336.9-601(a), 336.9-610, 336.9-611, 336.9-615.

131 MINN. STAT. § 336.9-610(b).

132 MINN. STAT. §§ 336.9-610(c)(1), 336.9-613(1)(E). According to the REVISED ARTICLE 9 Official Comments, "a 'public disposition' is one at which the price is determined after the public has had a meaningful opportunity for competitive bidding." REVISED U.C.C. § 9-610, Official Comment 7.

133 MINN. STAT. §§ 336.9-610(b), 336.9-627(a)-(b).

134 MINN. STAT. § 336.9-610(c)(2). A "recognized market" is defined in the REVISED ARTICLE 9 Official Comments as "one in which the items sold are fungible and prices are not subject to individual negotiation. For example, the New York Stock Exchange is a recognized market. A market in which prices are individually negotiated or the items are not fungible is not a recognized market, even if the items are the subject of widely disseminated price guides or are disposed of through dealer auctions." REVISED U.C.C. § 9-610, Official Comment 9.

135 MINN. STAT. §§ 336.9-611, 336.9-613.

136 MINN. STAT. §§ 336.9-611, 336.9-613(1)(a)-(c). The Official Comments to Revised UCC clarify that "a notification that lacks some of the information set forth in [paragraph 1 of the statute] nevertheless may be sufficient if found to be reasonable by the trier of fact." REVISED U.C.C. § 9-613, Official Comment 2; MINN. STAT. § 336.9-613(2); *Hitachi Capital Am. Corp. v. Envtl. Servs. Co. LLC*, 2012 Minn. Dist. LEXIS 209, *19 n 6. Debtors signing a default statement waiving this right will not get a

must provide the time and place of the auction.[137] If the creditor uses a private sale, the notice must include the date after which the property will be sold.[138] For non-consumer goods transactions, notice must be sent ten calendar days or more before the sale. [139] The debtor can then pay the debt, find a friendly buyer, or bid on the property.

4. Commercially reasonable sales

A sale or lease of the collateral—whether through an auction or a private sale—must be commercially reasonable in every aspect, including the method, manner, time, place, and terms of the sale.[140]

a. Burden of proof is on the creditor

It is up to the creditor to prove, if challenged, that the sale was done in accordance with Minnesota law, thereby creating a presumption that the sale was commercially reasonable.[141] If the creditor fails to do this—for example, because it did not give proper notice to the debtor—a court might assume that the sale would have brought at least as much as the debtor owes, but will at least say that the debtor is entitled to the difference between the sale price and the fair market value of the collateral. [142]

b. Low price does not always make the sale unreasonable

The fact that the collateral could have brought a better price with a different sale method, or with a sale at a different time, does not necessarily mean that the sale is commercially unreasonable.[143]

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notice. MINN. STAT. § 336.9-624(a). Notice is not required if the property is perishable, may lose value quickly, or is customarily sold on a recognized market. MINN. STAT. § 336.9-611(d). For notice generally, see MITCHELL & MEYER, Secured Transactions, at 19-39 to 19-42.

137 MINN. STAT. § 336.9-613(1)(d).

138 MINN. STAT. §§ 336.9-611, 336.9-613(1)(d).

139 MINN. STAT. §§ 336.9-612(b). See 43 DUNNELL MINN. DIGEST, Secured Transactions §4.07(b) (5th ed. 2009), and MITCHELL & MEYER, Secured Transactions, at 19-39 to 19-41.

140 MINN. STAT. §§ 336.9-610(b), 336.9-627; *Builders Dev. & Fin., Inc. v. Vern Reynolds Constr. Co., No. A13-0972*, 2014 Minn. App. Unpub. LEXIS 463, at *19 (May 12, 2014). See, as well, 43 DUNNELL MINN. DIGEST, Secured Transactions §4.07(c) (5th ed. 2009). The right to a commercially reasonable sale may not be waived by the debtor. MINN. STAT. § 336.9-602(7). Parties may determine by agreement how the commercially reasonable standards are to be measured, and this agreement will be upheld if the standards are not manifestly unreasonable. MINN. STAT. § 336.9-603(a).

141 *Chemlease Worldwide, Inc. v. Brace,* 338 N.W.2d 428, 436-37 (Minn. 1983); *Ford Motor Credit Co. v. Hertzberg,* 511 N.W.2d 25 (Minn. Ct. App. 1994); *Karlstad State Bank v. Fritsche,* 374 N.W.2d 177 (Minn. Ct. App. 1985).

142 MINN. STAT. §§ 336.9-625; *Chemlease Worldwide, Inc. v. Brace,* 338 N.W.2d 428 (Minn. 1983); *Total Equip. Leasing v. LaRue Inv. Corp.,* 357 N.W.2d 347, 350-51 (Minn. Ct. App. 1984). The debtor's right to damages may not be waived. MINN. STAT. § 336.9-602(13). Somewhat different rules apply for consumer goods.

143 MINN. STAT. § 336.9-627(a); *Fedders Corp. v. Taylor,* 473 F. Supp. 961, 973 (D. Minn. 1979); *Citizen's Nat'l Bank of Willmar v. Taylor,* 368 N.W.2d 913, 921 (Minn. 1985); *Builders Dev. & Fin., Inc. v. Vern Reynolds Constr. Co., No. A13-0972*, 2014 Minn. App. Unpub. LEXIS 463, at *19 (May 12, 2014). A low price does suggest, however, that the district court should give closer scrutiny to the sale.

c. If there is a recognized market for the property

If a recognized market exists for the collateral—for example, corn has a recognized market—and the creditor sells the property in the usual manner in that market, or sells the property somewhere else for the same price that the property would have brought in that market, the price of the sale is considered commercially reasonable.[144]

d. If there is no recognized market for the property

If there is not a recognized market for the collateral, the creditor must sell the property using the reasonable commercial practices that dealers of that type of property use.[145]

5. Proceeds from the sale of the property — surplus and deficiency

Proceeds from the sale of the property go first to the reasonable expenses of taking possession of the property and selling or leasing it.[146] This may include reasonable attorneys' fees and legal expenses if they are provided for in the security agreement.[147] The rest of the proceeds go to pay the debt owed to the creditor who took the property, and then, upon a written demand by other creditors, any excess is paid to other creditors who had a security interest in the property.[148] The debtor gets any remaining money.[149]

If the proceeds do not cover the amount the debtor owes the creditor, the creditor may try to get the balance from the debtor through a deficiency judgment.[150] So long as the sale of the collateral was commercially reasonable, according to the law, if the proceeds

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Builders Dev. & Fin., Inc. v. Vern Reynolds Constr. Co., No. A13-0972, 2014 Minn. App. Unpub. LEXIS 463, at *19 (May 12, 2014); REVISED U.C.C. § 9-610 Official Comment 10.

144 MINN. STAT. § 336.9-627(b)(1)-(2).

145 MINN. STAT. § 336.9-627(b)(3); *Piper Acceptance Corp. v. Yarbrough,* 702 F.2d 733, 735 (8th Cir. 1983). In one a court found that the fact "that a better price might have been obtained" is not enough sufficient to make a sale commercially unreasonable. See *Broken Aero Servs. v. Marquette Bank Monticello*, C2-96-550, 1996 Minn. App. LEXIS 1377, at *5 (Ct. App. Dec. 10, 1996). This case relates to an older version of the statue, but the language is nearly the same as the present-day law. The Official Comment 9 to § 9-610 explains that a "recognized market" in this instance, "is one in which the items sold are fungible and prices are not subject to individual negotiation. For example, the New York Stock Exchange is a recognized market. A market in which prices are individually negotiated or the items are not fungible is not a recognized market, even if the items are the subject of widely disseminated price guides or are disposed of through dealer auctions." The Supreme Court of North Dakota concluded that there is not a recognized market for either livestock or farm machinery. *State Bank of Tomner v. Hansen,* 302 N.W.2d 760, 765 (N.D. 1981).

146 MINN. STAT. §§ 336.9-608(a)(1)(A), 336.9-615(a)(1).

147 MINN. STAT. §§ 336.9-608(a)(1)(A), 336.9-615(a)(1).

148 MINN. STAT. §§ 336.9-608(a)(1)(B)-(C), 336.9-615(a)(2)-(3).

149 MINN. STAT. § 336.9-608(a)(4), 336.9-615(d)(1). If the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes, the debtor is not entitled to any surplus. The right to a surplus may not be waived. MINN. STAT. § 336.9-602(5). See also 43 DUNNELL MINN. DIGEST, Secured Transactions §4.02(b) (5th ed. 2009).

150 MINN. STAT. § 336.9-608; *Fedders Corp. v. Taylor,* 473 F. Supp. 961, 972 (D. Minn. 1979).

do not cover the amount the debtor owes to the creditor, the creditor may try to get the balance from the debtor through a deficiency judgment.[151] To get a deficiency, the creditor has the burden of proof to show that the sale of the collateral was commercially reasonable.[152]

B. Creditor decides to keep the property

A creditor sometimes decides to keep collateral in satisfaction of all or part of the debt.[153] In order for a creditor to keep collateral in full satisfaction of a debt, the debtor must either provide its express consent to the arrangement, after the default has occurred, or the creditor must send notice to the debtor explaining its decision and allowing the debtor twenty days within which to object.[154] Regardless of which method the creditor uses to obtain the debtor's consent, the creditor must send notice to any other secured creditor who has filed a financing statement, or any third party who has provided the creditor notice of an interest in the collateral.[155] Those parties who receive a notice have twenty calendar days, from the date the creditor mailed the notice, to send a written objection to the satisfaction.[156] Creditors receiving an objection—from either the debtor or any other third party—must then dispose of the property using commercially reasonable means, as described above. [157] If no one objects, the creditor can keep the property.

Unlike with a full satisfaction, in order for a creditor to keep collateral in partial satisfaction of a debt, the debtor must provide express consent, after the default has occurred, to the terms of the partial satisfaction.[158] The creditor must then send notice to: (1) guarantors who are liable for any of the debtor's debt, (2) other secured creditors who have filed financing statements, and (3) any third parties who provide the creditor with notice of an interest in the collateral.[159] If the creditor does not receive an objection within twenty calendar days of sending notice of the satisfaction, the creditor may keep the collateral and seek a deficiency judgment against the debtor for the remaining debt.[160]

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151 *Ford Motor Credit Co. v. Hertzberg*, 511 N.W.2d 25, 27 (Minn. Ct. App. 1994).

152 MINN. STAT. § 336.9-627.

153 MINN. STAT. §§ 336.9-620, 336.9-622. REVISED ARTICLE 9 allows for partial satisfaction of the debt, while prior Minnesota law provided the creditor could propose to keep the collateral only for full satisfaction of the debt. Debtor rights related to a creditor keeping collateral in satisfaction of the debt may not be waived. MINN. STAT. § 336.9-602(10).

154 MINN. STAT. §§ 336.9-102(66), 336.9-620, 336.9-621. A notice to a debtor need not take any particular form, as long as it sets out the terms under which the secured party is willing to accept collateral in full satisfaction of the debt. REVISED U.C.C. § 9-620, Official Comment 4.

155 MINN. STAT. § 336.9-621(a).

156 MINN. STAT. § 336.9-620(c)(2)(C), (d)(1).

157 MINN. STAT. §§ 336.9-610, 336.9-627. Third parties who are not entitled to receive notification may also object to the creditor's acceptance of collateral as satisfaction for the debt. However, to do so, the third parties must object within twenty days after the creditor's last notification was sent. If no notification is sent, the third parties must object before the debtor consents to the satisfaction. MINN. STAT. § 336.9-620(d)(2); REVISED U.C.C. § 9-620, Official Comment 8.

158 MINN. STAT. § 336.9-620(c)(1). Partial satisfactions are not allowed for any debt that arises out of a consumer credit transaction. MINN. STAT. §§ 336.9-620(g), 325G.21, subd. 2, 325G.22.

159 MINN. STAT. § 336.9-621.

160 MINN. STAT. § 336.9-620(d). Note, however, that because partial satisfactions are not permitted for any debt that arises out of a consumer transaction, a creditor in a consumer transaction may not seek a deficiency judgment if the creditor chooses to retain collateral that is insufficient to cover the full amount of the debt. MINN. STAT. §§ 336.9-620(g). Third parties who are not entitled to receive

If the debtor consents in writing to a creditor's retention of collateral in partial satisfaction of a debt, the creditor may then seek a deficiency judgment for the remaining debt.[161] Because partial satisfactions are not permitted for any debt that arises out of a consumer transaction, a creditor in a consumer transaction may not seek a deficiency judgment if the creditor chooses to keep collateral that is not enough to cover the full amount of the debt.[162]

Guarantors and other secured creditors who have filed financing statements must also consent to the creditor keeping the collateral as partial satisfaction of the debt.[163]

VII. Debtor redemption rights

Debtors have the right to get their property back from a secured creditor by redemption up until the time when the creditor disposes of the property, has contracted to dispose of it, or has gained the right to keep the property by sending the debtor the proper notice described above.[164] Debtor redemption rights may only be waived in writing and may not be waived until after the default.[165]

To redeem property, debtors pay the creditor: (1) the amount owed on the debt; (2) the creditor's expenses for seizing and storing the collateral; and (3) if the security agreement provides for them, the creditor's attorneys' fees and legal expenses.[166]

VIII. Getting new credit

Once much of a farmer's property serves as collateral, it can be harder to get operating credit.[167] For a potential creditor, a key consideration in deciding whether or not to extend credit depends on determining what "priority" the creditor has in the collateral, meaning where the creditor falls in the hierarchy of all creditors with an interest in the collateral Unsecured creditors know that under the UCC priority rules, a secured creditor will generally be paid first if the debtor defaults. This section discusses some ways that debtors can help new creditors jump ahead in the line of priority. Three possible methods are to: (1) seek a subordination from a present creditor; (2) use the UCC priority rules that favor some new creditors; or (3) use statutory liens—such as landlords' liens—that can automatically place a new creditor in a high priority. There are advantages, disadvantages, and technical rules about using these devices. The following discussion explains some of the basics.

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notification may also object to the creditor's acceptance of collateral as satisfaction for the debt. However, to do so, the third parties must object within twenty days after the creditor's last notification was sent. If no notification is sent, the third parties must object before the debtor consents to the satisfaction. MINN. STAT. § 336.9-620(d)(2); REVISED U.C.C. § 9-620, Official Comment 8.

161 MINN. STAT. § 336.9-620(c)(1).

162 MINN. STAT. § 336.9-620(g).

163 MINN. STAT. § 336.9-621(b).

164 MINN. STAT. § 336.9-623.

165 MINN. STAT. § 336.9-624(c). If the debt arises out of a consumer goods transaction, the debtor's redemption rights may not be waived. MINN. STAT. §§ 336.9-602(10), 336.9-624(c).

166 MINN. STAT. §§ 336.9-615(a)(1), 336.9-623(b).

167 The Minnesota Attorney General's Office has a publication, *The Credit Handbook*, that discusses how to use credit. See https://www.ag.state.mn.us/consumer/handbooks/CreditHnbk/default.asp.

Getting new credit

In order to get new credit, farmers with existing security agreements may try using the following:

1. Subordination agreements.

2. UCC creditor priority rules.
a. Purchase money security interests.
b. Purchase money security interests for livestock purchases.
c. Standard UCC security interests.

A. Subordination agreements

In a subordination agreement, a current creditor voluntarily allows another creditor to move ahead in priority.[168] Since subordination agreements are voluntary, debtors often need to convince creditors that it is in the best interests of everyone involved to grant the subordination. For example, a bank with a first priority claim on a crop might be willing to subordinate its interest to an input supplier, especially if the new loan amount is relatively small and the input is essential to getting the crop planted. Subordination agreements should always be in writing. If the creditor is FSA, in many cases the debtor will be entitled to a subordination if certain conditions are met.[169]

B. UCC creditor priority rules

The UCC rules governing the priority of creditors can sometimes cause problems for debtors seeking new credit, but in many cases those same rules can also be used to the debtor's advantage. Usually, priority among creditors is based on timing: the first creditor to gain a security interest in the collateral and to properly file the documents gets first priority in the collateral.[170] UCC rules can sometimes be used to move creditors up the priority list and help get farmers new credit. These include: purchase-money security interests, agricultural input liens, and standard security agreements.

1. Purchase-money security interests

A purchase-money credit arrangement exists when a creditor loans a debtor money to purchase personal property and that personal property is used as collateral for repayment of the loan.[171] As a general rule, a security interest held by a purchase-

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[168] 43 DUNNELL MINN. DIGEST, Secured Transactions § 5.00(c) (5th ed. 2009). See, as well, MINN. STAT. § 336.9-339.

[169] 7 C.F.R. § 765.205.

[170] MINN. STAT. § 336.9-322(a). See 43 DUNNELL MINN. DIGEST, Secured Transactions §5.00 (5th ed. 2009).

[171] MINN. STAT. § 336.9-103. For an overview of purchase-money security interests see Keith G. Meyer, *A Primer on Purchase Money Security Interests Under REVISED ARTICLE 9 of the Uniform Commercial Code*, 50 KAN. L. REV. 143 (Nov. 2001) and 43 DUNNELL MINN. DIGEST, Secured Transactions § 5.01

money creditor is a purchase-money interest that gives the creditor first priority in the acquired personal property, even if other creditors have already filed valid financing statements giving them an interest in the debtor's property.[172] For example, if a bank has a valid security agreement that claims all of a farmer's machinery as collateral, including machinery acquired in the future, if a machinery dealer later sells the farmer a new tractor on credit, the dealer can usually get the top priority claim—even over the bank—in that particular tractor.

Revised Article 9 includes language that is intended to preserve the priority status of purchase-money security interests for non-consumer transactions, even if the debt is refinanced or cross-collateralized.[173] In the case of refinancing, however, the priority status only applies to the amount that is carried over from the original purchase-money arrangement.[174] The comments to Revised Article 9 provide an example of this involving a $10,000 loan secured by a purchase-money security interest. Imagine that the original creditor agrees to refinance the loan and advance the debtor an additional $2,000 secured by the same collateral. In this situation, the creditor will keep its purchase-money priority status, but only up to $10,000, the amount of its original purchase-money interest.[175]

2. Purchase money security interests for livestock purchases

Under Revised Article 9, the priority rule for purchase-money security interests in livestock is similar to the general purchase-money priority rule described above, but with a few additional requirements.[176] A creditor's security interest in livestock will be considered a purchase-money security interest when: (1) the creditor provides financing for the livestock purchase and files a financing statement identifying the livestock as collateral before the debtor receives possession of the livestock, (2) the creditor sends written notice of its interest to the debtor's other creditors who claim an interest in the livestock, (3) the notice is received by the other creditors within six months before the debtor receives possession of the livestock, and (4) the notice states that the creditor sending the notice expects to acquire a purchase-money security interest the debtor's livestock and then describes the livestock.[177]

If the creditor satisfies these requirements, its purchase-money security interest in livestock will have priority over any other security interests in the same livestock and also over any security interests in proceeds from the livestock.[178] By providing for purchase-money security interests in livestock, Revised Article 9 gives creditors who finance livestock purchases priority over all other secured creditors who claim an

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(5th ed. 2009).

172 MINN. STAT. § 336.9-324(a). This rule, however, does not apply if the personal property is inventory or livestock.

173 MINN. STAT. § 336.9-103(f).

174 MINN. STAT. § 336.9-103(b), (e); REVISED U.C.C. § 9-103, Official Comment 7(a)-(b).

175 REVISED U.C.C. § 9-103, Official Comment 7(a).

176 MINN. STAT. § 336.9-324(d).

177 MINN. STAT. § 9-324(d), (e).

178 MINN. STAT. §§ 336.9-315, 336.9-324(d). Priority also exists in the livestock's "identifiable products in their unmanufactured state." The interest in proceeds would still lose out to a perfected interest in the debtor's deposit accounts. MINN. STAT. § 336.9-327.

interest in the livestock. If the debtor defaults on the debt, the purchase-money creditor should be the first to be paid.[179]

3. Creditors can take a standard UCC security interest

Unsecured creditors can usually take a standard UCC security interest in the debtor's crops or other property. That turns them into secured creditors. Creditors need to get a security agreement signed and file the proper papers. The advantage for the creditor is that it gives the creditor a higher priority than all unsecured creditors and later secured creditors. This strategy most likely makes sense if a fairly large sum of money will be owed—for example, rental payments to a landlord.

C. Statutory liens

Statutory liens can help farmers get credit because they allow the farmer to give a high priority to creditors who could not otherwise get a high priority.[180] Sometimes this higher priority can convince someone to provide services, inputs, or rental land even though many of the farmer's assets and future crops are tied up as collateral. Examples of statutory liens in Minnesota include landlords' liens, mechanics' liens, and emergency veterinarians' liens.

1. Introduction

In general, statutory liens give the creditor a higher priority in two ways. First, the lien places the creditor ahead of any other unsecured creditors. Second, the lien puts the creditor ahead of secured creditors who have not yet legally finalized—the legal term is "perfected"—their claim on the debtor's property. The statutory lien, in other words, turns an unsecured creditor into a secured creditor. Some statutory liens, such as the landlord's agricultural lien, put the new creditor ahead of other already secured creditors as well.[181]

a. Possible disadvantages to statutory liens

Although the statutory liens discussed here can help farmers, they also carry some possible disadvantages. First, statutory liens create security interests, and, as the above sections in this chapter explain, creditors with security interests have several possible remedies if the debtor defaults, which are not available to unsecured creditors.[182] Second, it may be the case that other agreements the farmer has signed—possibly including mortgages, contracts for deed, and other

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[179] REVISED U.C.C. § 9-324, Official Comment 10.

[180] Unlike UCC liens, statutory liens exist by operation of law, meaning they occur automatically and without the need for the debtor's authorization. Statutory liens are discussed in JENNIFER G. LARKERS and JEFFREY D. KLOBUCHAR, STATUTORY LEINS AND OTHER SPECIFIC RIGHTS OF CREDITORS, Ch. 16, MINNESOTA CONTINUING LEGAL EDUCATION, DEBTOR-CREDITOR HANDBOOK (11th ed. 2014, updated 2018, JAMES L. BAILLIE, PHILLIP L. KUNKEL, RYAN T. MURPHY and SAMUEL J.H. SIEGELMAN, eds.).

[181] MINN. STAT. §§ 336.9-317(a), 336.9-322(g), 514.964, subd. 7, 514.966, subd. 8; *First Nat'l Bank v. Maus*, C8-95-476, 1995 Minn. App. LEXIS 1555, at *5-6 (Ct. App. Dec. 19, 1995).

[182] MINN. STAT. §§ 514.964, subd. 9, 514.966, subd. 10.

security agreements—will go into default if certain statutory liens are filed against the farmer. As always, it is important to read all agreements closely.

b. Filing lien statements or financing statements

Statutory liens are automatic. After a time, however, each expires unless the creditor files a lien statement or, for those liens covered by Revised Article 9, a financing statement.[183] Creditors should therefore make sure to file within the time provided. The requirements for what must be included in a lien statement or financing statement vary somewhat, so the farmers who are also creditors—for example landlords—will likely want to get some legal advice about what exactly to include in the statement and where to file. In general, lien statements and financing statements are valid even if they contain some minor mistakes.[184] Creditors should also file lien notices in the Centralized Filing System.[185]

2. Agricultural liens and Revised Article 9

Certain agricultural liens—such as landlord's liens, agricultural input liens, breeders' liens, and emergency veterinarians' liens—are covered by Revised Article 9.[186] This means these agricultural lienholders must file a financing statement to ensure the lien's priority against other creditors.[187] Although Minnesota had historically required persons with agricultural lien claims to file lien statements in order to gain priority against the farmer's other creditors, the inclusion of agricultural liens within Revised Article 9 brought changes in the rules governing those liens.[188] Minnesota's state-specific agricultural lien statutes still control what types of agricultural liens can be obtained and which agricultural liens will have special priority, but Revised Article 9 will generally control the lien filing requirements.[189] "For example, to have priority

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183 MINN. STAT. §§ 336.9-310(a), 514.964, subd. 5, 514.966, subd. 6.

184 MINN. STAT. §§ 336.9-506, 514.08, subd. 1(1), 514.74; *Bierlein v. Gagnon,* 96 N.W.2d 573 (Minn. 1959); *Standard Lumber Co. v. Alasker,* 289 N.W. 827 (Minn. 1940); *S.H. Bowman Lumber Co. v. Pierso,* 180 N.W. 106 (Minn. 1920). Most liens should be filed according to MINN. STAT. § 336.9-501. Mechanics' liens should usually be filed with the county recorder where the real estate is located. If the property is registered (sometimes known as Torrens property), filing should be with the registrar of titles. MINN. STAT. §§ 514.08, subd. 1, 514.12, subd. 1; *David Thomas Companies v. Voss,* 517 N.W.2d 341 (Minn. Ct. App. 1994).

185 MINN. STAT. §§ 336A.03, 336A.04, 336A.05.

186 MINN. STAT. §§ 336.9-102(a)(5), 336.9-109(a)(2).

187 MINN. STAT. § 336.9-310(a); MITCHELL & MEYER, Secured Transactions, at 19-3.

188 For an overview of agricultural liens and REVISED ARTICLE 9 issues see generally, SUSAN A. SCHNEIDER, *Statutory Agricultural Liens Under REVISED ARTICLE 9 of the Uniform Commercial Code*, NATIONAL AGLAW CENTER (March 2002) available at: http://nationalaglawcenter.org/publication/download/schneider-statutory-agricultural-liens-under-revised-article-9-of-the-uniform-commercial-code-national-aglaw-center-publications-2002/; DONALD W. BAKER, *Some Thoughts on Agricultural Liens Under the New U.C.C. Article 9*, 51 ALA. L. REV. 1417 (2000); Scott J. Burnham, *Agricultural Liens Under REVISED ARTICLE 9*, 63 MONT. L. REV. 91 (2002); Jo. M. Pasqualucci, *REVISED ARTICLE 9 in South Dakota with Emphasis on Newly Included Agricultural Liens*, 46 S.D. L. REV. 449 (2000); and John Mark Stephens, *Boon or Boondoggle? Proposed Article 9 Revisions Incorporate Statutory Agricultural Liens for Better, Not Worse*, 30 TEX. TECH. L. REV. 1199 (1999).

189 MINN. STAT. §§ 336.9-322, 336.9-334.

over secured creditors and other lienholders, a landlord or livestock breeder in Minnesota must now file a UCC-1financing statement in the Secretary of State's Centralized Filing System.[190]

The inclusion of agricultural liens under Revised Article 9 was accomplished in 2001. Even after this substantial period, there may be areas of confusion that could affect creditors' willingness to extend credit to farmers. In general, however, creditors should have now made the transition and understand the current law.[191]

3. Agricultural landlord's lien

Among the most important statutory liens for farmers is the agricultural landlord's lien, which arises when a landowner leases his or her farmland in connection with a farming operation.[192] In Minnesota, agricultural landlord's liens are created automatically by state law.[193] Under both Minnesota law and Revised Article 9, in order for a landlord to take a top priority claim over secured creditors in the crops grown on the rented land, the landlord must properly file the lien.[194]

By properly filing such a lien, the landlord can take a top priority claim over secured creditors in crops grown on rented land.[195] The lien is for the amount of unpaid rent.[196] The lien covers crops produced on the leased land during the crop year, as well as their products and proceeds.[197] The landlord must file a financing statement within thirty days after the crops begin growing.[198]

Landlords can also take a standard UCC security interest in crops as collateral for rental payments.[199] "Although there can be advantages for the landlord in filing a standard UCC financing statement, the filing of the statutory agricultural landlord's lien usually gives the landlord a higher priority.[200] Some landlords will want to do both.

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190 MINN. STAT. §§ 514.964, subd. 5(a), 514.966, subd. 6.

191 2001 Minn. Laws Ch. 57 (H.F. 285) (codified at MINN. STAT. §§ 514.963, 514.964, 514.965, 514.966). One area of uncertainty may arise if there are inconsistencies between REVISED ARTICLE 9 and the state agricultural lien statutes establishing lien priority and filing requirements. Some inconsistencies in Minnesota law were addressed by legislature. A second area of uncertainty may arise if input providers or landlords do not know how to comply with REVISED ARTICLE 9's filing or enforcement rules. Farmers who want to ensure that their lienholders continue to have priority claims to their collateral may want to consider alerting their landlords and farm input providers that their ability to obtain payment priority may be altered because of REVISED ARTICLE 9.

192 MINN. STAT. §§ 336.9-102(a)(5)(A)(ii), 514.964, subd. 1.

193 MINN. STAT. 514.964, subd. 1.

194 MINN. STAT. §§ 514.964, subd. 7(a); 336.9-334(i). REVISED ARTICLE 9 does not apply to a landlord's lien other than an agricultural landlord's lien. MINN. STAT. § 336.9-109(d)(1).

195 MINN. STAT. §§ 514.964, subd. 7(a); 336.9-334(i).

196 MINN. STAT. § 514.964, subd. 1.

197 MINN. STAT. § 514.964, subd. 4.

198 MINN. STAT. § 514.964, subd. 5(b). The financing statement should be filed in the same manner as a UCC security interest is filed. MINN. STAT. § 514.964, subd. 5(a)

199 The landlord should file a standard security agreement, financing statement, and an effective financing statement, which should include a description of the land and the crop years. MINN. STAT. §§ 336.9-203, 336.9-502, 336.9-504.

200 Unlike a statutory lien, the UCC security interest may be filed at any time and can claim other property as collateral.

4. Harvester's lien

A person who owns or is hired to operate machinery used in harvesting crops gets a lien against the harvested crops for the value of the service provided.[201] To preserve the lien, the creditor must file a financing statement within fifteen calendar days of finishing the work.[202] The lien has priority over other liens, except a perfected crop production input lien for the reasonable cost of the crop's seed, products and proceeds, and a perfected landlord's lien in the same crop.[203] If more than one harvester's lien exists, the conflicting harvester's liens rank equally in proportion to the value of the service provided.[204]

5. Crop production input lien

Suppliers of crop production inputs get a lien against the crops they help produce.[205] Crop inputs include seed and fertilizers, and also include fuel and customized labor.[206] A crop production input lien becomes effective as soon as the supplier provides the inputs.[207] The amount of the lien is the unpaid retail cost of the crop production input provided.[208] To preserve the lien and its priority against other creditors, suppliers must file a financing statement within six months after the last input was furnished, as well as meet additional notice requirements.[209] A crop production input lien puts the creditor above other unsecured creditors, and in some cases may move the creditor ahead of already secured creditors.[210] In addition, a crop production input lien puts creditors above a perfected agricultural landlord's lien and harvester's lien.[211] If more than one perfected crop production input lien exists, the conflicting perfect crop production input liens have priority based upon the order in which they became effective.[212]

6. Veterinarian's lien

A veterinarian who provides emergency services gets a lien on the animals for the value of the services provided.[213] The lien becomes effective as soon as the services are

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201 MINN. STAT. § 514.964, subd. 2. This can include harvesting, grain drying, baling, and other tasks. MINN. STAT. § 514.964, subd. 2(a).
202 MINN. STAT. § 514.964, subd. 5(c).
203 MINN. STAT. § 514.964, subd. 7(b).
204 MINN. STAT. § 514.964, subd. 7(c).
205 MINN. STAT. § 514.964, subd. 3.
206 MINN. STAT. § 514.963, subd. 5. Crop production inputs are defined broadly, and include agricultural chemicals, seeds, petroleum products, the custom application of agricultural chemicals and planting of seeds, and labor used in preparing the land for planting, cultivating, growing, producing, harvesting, drying, and storing crops or crop products.
207 MINN. STAT. § 514.964, subd. 3.
208 MINN. STAT. § 514.964, subd. 3(a).
209 MINN. STAT. § 514.964, subd. 5(d).
210 MINN. STAT. § 514.964, subd. 7(d)-(g).
211 MINN. STAT. § 514.964, subd 7(d)
212 MINN. STAT. § 514.964, subd. 7(e).
213 MINN. STAT. § 514.966, subd. 1. "Emergency veterinary services" include surgical procedures;

provided. [214] To preserve the lien's priority against other creditors, the veterinarian must file a financing statement within 180 calendar days after the last service was provided.[215] Upon filing, the veterinarian will have a perfected veterinarian's lien that will have priority over all secured creditors' and agricultural lienholders' claims in the same animals.[216] If more than one veterinarian's lien is filed, priority is determined by the order in which the liens became effective.[217]

7. Feeder's lien

A person who stores, cares for, or contributes to the keeping, feeding, pasturing, or other care of animals, including shoeing—at the request of the animals' owner—has a lien upon the livestock for the value of the storage, care or contribution, as well as any legal charges against the animals.[218] A feeder's lien becomes effective when the services or contributions are provided.[219] To preserve the lien and its priority against other creditors, the owner must file a financing statement within sixty calendar days after the last date that feeding services were provided.[220] A feeder's lien will have priority over secured creditors' and agricultural lienholders' claims in the same animals, except it will not have priority over a perfected veterinarian's lien in the same animals and their products.[221] If more than one feeder's lien is filed, priority is determined by the order in which they became effective.[222] A feeder's lien can seem similar to a livestock production input lien. In general, feeder's lien applies to someone who provides feed and labor directly to the livestock.[223] A production-input lien applies to someone who provides feed and labor to be used by another person in raising livestock.

8. Breeder's lien

The owner of livestock used for breeding services, or any provider of materials used in artificial insemination, has a lien upon the livestock bred and any resulting offspring for the value of the services provided.[224] To preserve the lien, the owner must file a financing statement within six months after the last date that breeding services were

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administering vaccines, antisera, antibiotics, or other veterinary medicines; and services that protect human health, prevent the spread of animal disease, or preserve animals' health. MINN. STAT. § 514.965, subd. 4.

214 MINN. STAT. § 514.966, subd. 1.

215 MINN. STAT. § 514.966, subd. 6(a)-(b).

216 MINN. STAT. § 514.966, subd. 8(a). The emergency veterinarian's lien does not alter veterinarians' rights of rights of detainer, lien, and sale of animals under MINN. STAT. §§ 514.18 to 514.22. MINN. STAT. § 514.94.

217 MINN. STAT. § 514.966, subd. 8(b).

218 MINN. STAT. § 514.966, subd. 4(a)-(b). If feeding livestock, the person may also get an agricultural producer's lien which gives a lien for the contract price of the agricultural commodity. MINN. STAT. §§ 17.90, subd. 2, 514.945. Agricultural producers' liens are not covered by REVISED ARTICLE 9, though REVISED ARTICLE 9 enforcement rules are used. MINN. STAT. § 514.945, subd. 6.

219 MINN. STAT. § 514.966, subd. 4(c).

220 MINN. STAT. § 514.966, subd. 6(e).

221 MINN. STAT. § 514.966, subd. 8(c).

222 MINN. STAT. § 514.966, subd. 8(d).

223 *First Nat'l Bank v. Profit Pork, LLC,* 820 N.W.2d 592, 595-96 (Minn. Ct. App. 2012).

224 MINN. STAT. § 514.966, subd. 2.

provided.[225] A breeder's lien will have priority over secured creditors' and agricultural lienholders' claims in the same animals, except it will not have priority over a perfected veterinarian's lien and a perfected feeder's lien in the same animals, their products, and proceeds.[226]

9. Livestock production input lien

Suppliers of livestock production inputs get a lien against the livestock they help produce.[227] Livestock inputs include feed and labor used in raising the animals.[228] A livestock production input lien becomes effective when the inputs are provided by the supplier.[229] The amount of the lien is the unpaid retail cost of the input provided.[230] To preserve the lien and its priority against other creditors, suppliers must file financing statements within six months after the last input was furnished, and meet notice requirements.[231] A livestock production input lien puts the creditor above other unsecured creditors and later secured creditors and in some cases may move the creditor ahead of already secured creditors.[232] If more than one livestock production input lien is filed, priority is determined by the order in which they became effective.[233] A livestock production input lien can seem similar to a feeder's lien. In general, a production-input lien applies to someone who provides feed and labor to be used by another person in raising livestock. A feeder's lien applies to someone who provides feed and labor directly to the livestock.[234]

10. Temporary livestock production lien

Temporary livestock production liens were created by the state legislature in 2010.[235] Unlike traditional livestock production input liens, these liens only arise when a supplier provides inputs to a farmer who has filed for farmer-lender mediation.[236] Farmer-lender mediation is described in Chapter Seven.

Suppliers of livestock production inputs to a farmer that has filed a farmer-lender

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225 MINN. STAT. § 514.966, subd. 6(c).
226 MINN. STAT. § 514.966, subd. 7(e).
227 MINN. STAT. § 514.966, subd. 3(a).
228 MINN. STAT. § 514.965, subd. 8.
229 MINN. STAT. § 514.966, subd. 3(a).
230 MINN. STAT. § 514.966, subd. 3(a).
231 MINN. STAT. § 514.966, subd. 6(d). Suppliers must send secured creditors a lien notification statement explaining that the supplier has a livestock input lien. MINN. STAT. § 514.966, subd. 3(b)-(c). The other creditors may either let the supplier keep the lien or instead promise to pay the supplier directly. MINN. STAT. § 514.966, subd. 3(d)-(f). Creditors ignoring the notice lose priority to the supplier. MINN. STAT. § 514.966, subd. 3(f). In *Minnwest Bank v. Arends*, 802 N.W.2d 412, 415-17 (Minn. Ct. App. 2011), a creditor with a prior perfected security interest in feeder pigs retained priority over a feed supplier's perfected livestock production input lien after the supplier failed to strictly follow Minnesota's notice requirements for livestock input liens.
232 MINN. STAT. § 514.966, subd. 3.
233 MINN. STAT. § 514.966, subd. 8(g).
234 *First Nat'l Bank v. Profit Pork, LLC,* 820 N.W.2d 592, 595-96 (Minn. Ct. App. 2012).
235 See 2010 Minn. Laws ch. 333, art. 1, §§ 30-32 (codified at MINN. STAT. § 514.966, subds. 3a, 5, 6(f)).
236 MINN. STAT. § 514.966m, subd. 3a(a).

mediation request gets a lien against the livestock they helped produce.[237] Livestock inputs include feed and labor used in raising the animals.[238] In order to be covered by the lien, the inputs must have been provided to the farmer within forty-five days after the farmer filed a farmer-lender mediation request. [239] The amount of the lien is the unpaid retail cost of the input provided.[240] To preserve the lien and its priority, suppliers must file financing statements within sixty days after the last input was furnished, and must meet notice requirements.[241] A temporary livestock production input lien puts the creditor above other unsecured creditors, other future secured creditors, and current secured creditors.[242]

11. Mechanics' liens—real estate

Mechanics' liens are designed to ensure that laborers and others who work to improve real estate are paid. Anyone contributing to the improvement of real estate by providing labor, materials, or machinery for building, repairing, or removing buildings, fences, ditches, and wells, for example, gets a mechanic's lien.[243] The lien is for the reasonable value of the work done and of the skill, material, and machinery furnished.[244] Unlike other statutory liens, a mechanic's lien is a lien against real estate, not personal property (such as equipment).[245] If the lien is not paid, therefore, it follows the real estate and may make the property difficult to sell. Those claiming a mechanic's lien must file a lien statement against the real estate within 120 days of finishing the work or providing the materials.[246]

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237 MINN. STAT. § 514.966, subd. 3a(a).

238 MINN. STAT. § 514.965, subd. 8.

239 MINN. STAT. § 514.966, subd. 3a(b).

240 MINN. STAT. § 514.966, subd. 3a(a).

241 MINN. STAT. § 514.966, subd. 6(d), (f). Suppliers must send secured creditors a lien notification statement explaining that the supplier has a livestock input lien. MINN. STAT. § 514.966, subds. 3a(c), 3(b)-(f). Minnesota courts strictly construe the statutes governing priority rules—including notice requirements—for agricultural liens. See, for example, *First Nat'l Bank v. Profit Pork, LLC*, 820 N.W.2d 592, 594-95 (Minn. Ct. App. 2012), in which the court notes that in order to preserve the priority of a livestock production input lien, a supplier must satisfy "strict notice requirements." In *Minnwest Bank v. Arends*, 802 N.W.2d 412, 417 (Minn. Ct. App. 2011), the court strictly applied the notice requirements governing the priority of livestock production input liens, and in *Underwood Grain Co. v. Harthun*, 563 N.W.2d 278, 281 (Minn. Ct. App. 1997), the court refused to apply the notice rules for crop production input liens to livestock production input liens.

242 MINN. STAT. § 514.966, subd. 3a(c).

243 MINN. STAT. §§ 514.01 to 514.17 govern mechanic's liens; 31 DUNNELL MINN. DIGest, *Mechanics' Liens* (5th ed. 2001). An "improvement" includes a permanent addition to or betterment of the property that enhances its value and involves spending of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs. Any contribution to real property of labor, skill, material, or machinery for any purpose specified, which includes the alteration of any building, an improvement. *Kloster-Madsen, Inc. v. Tafi's, Inc.*, 303 Minn. 59, 63-64, 226 N.W.2d 603, 607 (1975).

244 MINN. STAT. § 514.01.

245 MINN. STAT. § 514.03, subd. 3.

246 MINN. STAT. §§ 514.08, subd. 1, 514.011. Mechanics' liens should usually be filed with the county recorder where the real estate is located. If the property is registered (sometimes known as Torrens property), filing should be with the registrar of titles. MINN. STAT. §§ 514.08, subd. 1, 514.12, subd. 1; *David Thomas Companies v. Voss,* 517 N.W.2d 341, 342-43 (Minn. Ct. App. 1994). A person who fails to follow the pre-lien notice statutory requirements will not have a valid mechanic's lien.

The mechanic's lien gives the creditor priority over unsecured creditors and, in general, puts the creditor ahead of secured creditors whose mortgage or other documents are filed after the mechanic's lien creditor began working on the property.[247]

12. General possessory lien—mechanic's lien for personal property

Creditors who care for, store, repair, make, or haul personal property have an automatic lien on that property for the price or value of the work or material.[248] This includes, for example, repair work on machinery. A number of exceptions somewhat limit the effect of general possessory liens in farming.[249] Creditors who have possession of the property may generally keep it until payment is made, and after ninety days of nonpayment may sell the property to pay the debt.[250] Creditors losing possession of the property may preserve the lien by filing a lien statement within sixty calendar days of losing possession.[251]

13. Lien for rental value of farm machinery during farmer-lender mediation

A creditor with a security interest in seasonal use machinery may have a special statutory lien if the farmer defaults on the debt and the debt is mediated in farmer-lender mediation.[252] The lien is for either the total payments needed to bring the debt current until the end of mediation, or the reasonable rental value of the machinery that is used for field operation during the mediation, whichever is less.[253] The lien is on the crops the farmer produced in the calendar year of the mediation.[254]

14. Other statutory liens

Many of the other less well known statutory agricultural liens were incorporated into the consolidated agricultural lien statutes, including the interests of people who shoe animals and the lien for the service of male animals.[255] Other statutory liens protect the interests of people who work with logs or timber.[256]

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[247] MINN. STAT. § 514.05, subd. 1.
[248] MINN. STAT. §§ 514.18 to 514.22.
[249] They are not available, for example, for transporting or storing crops or livestock, MINN. STAT. § 514.19(1)-(2).
[250] MINN. STAT. § 514.20. As long as possessory lien creditors, such as a mechanic's lien for personal property, possess the property, they have priority over secured creditors. MINN. STAT. § 336.9-333.
[251] MINN. STAT. § 514.18, subd. 2. This part of the lien does not apply to motor vehicles. MINN. STAT. § 514.18, subd. 4.
[252] MINN. STAT. § 514.661. The default must be on a purchase money loan or contract. MINN. STAT. § 514.661, subd. 2(a). Seasonal use machinery, for the purpose of this lien, means machinery, equipment, or implements used only for planting, row crop cultivating, or harvesting. It does not include tractors, tillage equipment, or utility implements used for general farm purposes. MINN. STAT. § 514.661, subd. 1(b).
[253] MINN. STAT. § 514.661, subd. 2(a).
[254] MINN. STAT. § 514.661, subd. 2(b).
[255] 2001 Minn. Laws Ch. 57 (H.F. 285) (repealing MINN. STAT. §§ 514.23, 514.26, 514.62).
[256] MINN. STAT. §§ 514.40 to 514.58.

Chapter Five

Unsecured Credit and Judgments

I. Introduction

Farmers often do business with people or businesses that advance credit, goods, or services without taking any security interest in the farmer's property. These are unsecured creditors. Unsecured creditors cannot simply seize the debtor's property in case of default, but they may use other means—for example judgments and garnishment—to take money and property from defaulting debtors. This chapter discusses unsecured creditors and the legal actions unsecured creditors may take to collect on unpaid debts. It assumes that the farmer is the debtor.

Dealings with unsecured creditors are often quite informal. To avoid misunderstandings, however, all agreements should be in writing. Purchasers need clear agreements on exactly what is being purchased, the cost, including any interest, and the details of delivery and billing.

II. How creditors get money judgments

Both secured and unsecured creditors can get money judgments against defaulting debtors, but because unsecured creditors have no other direct way to collect the debt, they are especially likely to use them. To get a money judgment in Minnesota, a creditor must file a lawsuit against the debtor seeking payment of the debt. Most often, the case is filed in a Minnesota district court.[1] As the sections below describe several steps must be completed for the creditor to get a money judgment.

A. Summons and complaint

To begin a lawsuit for a money judgment, the creditor files a summons and complaint with the court. In Minnesota, this is usually the district court for the county in which the debtor lives. In these documents, the creditor explains why it believes it is owed money by the debtor. Creditors must also provide a copy of the summons and complaint to the debtor.

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[1] Cases filed in conciliation court and federal court can also lead to money judgments. MINN. STAT. §§ 491A.01 to 491A.03, 548.11. For information on conciliation court, see Mid-Minnesota Legal Aid, Conciliation Court, at https://www.lawhelpmn.org/resource/conciliation-court-1?ref=sghnE#i2D094832-1A30-43E2-9121-9C931B4A3140 (2017). Judgments are discussed in GENE H. HENNING and ADAM M. NATHE, Judgments and Execution, (updated in 2016 by ANDREW STEIL) in JAMES L. BALLIE and PHILLIP K. KUNKEL (eds.), Debtor-Creditor Handbook (11th ed. 2014, updated 2016).

Complaints usually demand that the debtor pay collection costs in addition to the outstanding underlying debt.[2] These costs often include attorneys' fees, although the creditor might not have a right to attorneys' fees unless the debtor agreed to be responsible for them in the loan contract.[3]

In legal terms, the delivery of the summons and complaint on a debtor is called "service" on the debtor.[4] This means that the summons and complaint will be delivered either by a sheriff or any non-party to the legal action who is at least eighteen years old.[5] In either case, the person who delivers the summons and complaint will document the day on which the papers were served."[6]

In some cases, the creditor's lawyer will file a lawsuit in the district court of the county where that lawyer usually does business. Debtors sued, however, have a legal right to be sued in the county where they live or where at least "some part" of the cause of action arose.[7] Debtors must claim this right within twenty days after the summons is served, otherwise the case may proceed in the county in which it was filed.[8]

B. The debtor's answer

After being served with the summons and complaint, the debtor has twenty days to file a legal "answer" to the complaint.[9] In the answer, the debtor makes his or her arguments about the debt and default. A debtor may argue, for example, that he or she does not really owe the money. Debtors who have an argument against the creditor about the debt must present it in the answer.[10] Debtors are allowed to file an answer and argue on their own behalf in court without a lawyer.[11] Representing oneself in district court—where the creditor most likely will have an attorney—is likely to greatly reduce the debtor's chances of success.[12]

If the debtor does not file a legal answer to the complaint, the court will grant the creditor

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2 A complaint, in legal terms, is a type of "pleading." For the specific requirements of what a complaint must include, see MINN. R. CIV. P. 7.01, 8.01.

3 Under Minnesota law, the general rule is that "attorney fees are not recoverable in litigation unless there is a specific contract permitting or a statute authorizing such recovery." *Dunn v. Nat'l Bev. Corp.*, 745 N.W.2d 549, 554 (Minn. 2008).

4 MINN. R. CIV. P. 3, 4.

MINN. R. CIV. P. 3.02, 4.02. There are detailed rules for how service upon a debtor is achieved. See Minn. R. Civ. P. 4.03-4.04.

6 The date of service is often very important in court actions. For example, a debtor must file an answer within 20 days after service of the summons and complaint. See Minn. R. Civ. P. 12.01.

7 MINN. STAT. § 542.09.

8 MINN. STAT. § 542.10; *Standslast v. Reid,* 231 N.W.2d 98 (Minn. 1975).

9 MINN. R. CIV. P. 12.01.

10 MINN. R. CIV. P. 12.02.

11 When a debtor represents himself or herself, it is called acting *pro se*, meaning "for oneself" in Latin.

12 In conciliation court, however, lawyers are rarely involved and thus the chances of success are not as lessoned if the debtor represents himself or herself.

a money judgment by default.[13] It is extremely difficult to overturn a default judgment once it is entered.[14]

C. Judgment

If the court decides the debtor owes the money, or if the debtor fails to answer the complaint, the court will issue a money judgment in favor of the creditor.

1. Generally enforceable for ten years—renewals possible

Money judgments remain in effect for ten years.[15] If the creditor is unable to recover the judgment amount within the ten years, the judgment can be renewed.[16]

2. Enforceable for only three years for farm-related debts

For some farm debts, the enforceability period for money judgments is shorter than the standard ten years. A judgment for the unpaid balance of a debt on agricultural property owed by a farm debtor may not be executed on real or personal property after three years from the date the judgment was entered.[17]

For purposes of this law, agricultural property is personal property, as opposed to real property, used in a farm operation, and a farm debtor is a person who has incurred debt while operating a family farm.[18]

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13 MINN. R. CIV. P. 55.01.

14 In general, Minnesota law only permits a debtor to be relieved from a final judgment if any of the following occur: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; or (6) "any other reason justifying relief from the operation of the judgment." MINN. R. CIV. P. 60.02. See also 28 DUNNELL MINN. DIGEST, *Judgments,* §§ 4.00, 5.13 (5th ed. 2008).

15 MINN. STAT. §§ 541.04, 548.09, subd. 1, 550.01. This ten-year limit also applies to liens resulting from the judgment, which means the liens are only effective for ten years. These judgment lien limits almost certainly do not apply if the creditor, as the prevailing party, is a federal agency. The United States government is not bound by a statute of limitations unless Congress, through a federal statute, requires it. *United States v. Summerlin,* 310 U.S. 414, 416-17 (1940). Federal agency collection actions are somewhat limited by a six-year federal statute of limitations under 28 U.S.C. §§ 2415, 2416 to file an action on a contract, but the federal government then has at least 20 years to enforce a judgment lien. 28 U.S.C. § 3201. Federal agencies can renew this time period to enforce a judgment lien by one additional period of 20 years. 28 U.S.C. § 3201(c).

16 *Dahlin v. Kroening*, 796 N.W.2d 503, 506 (Minn. 2011).

17 MINN. STAT. § 550.366, subd. 2.

18 MINN. STAT. §§ 550.366, subd. 1(1) defines a "family farm" to also include family farm corporations and authorized farm corporations under MINN. STAT. § 500.24, subd. 2. The Minnesota Court of Appeals has held that a farmer's default on a grain supply contract with an ethanol cooperative created debt involving agricultural personal property, within the meaning of Minn. Stat. § 550.366, and therefore was subject to the three-year limitation on enforcement. *Westchester Fire Ins. Co. v. Hasbargen,* 632 N.W.2d 754, 758 (Minn. Ct. App. 2001). In addition, the Minnesota Court of Appeals has held that so long as a debtor incurs a debt while operating a family farm, the debtor is entitled to the three-year limitation protection of MINN. STAT. §§ 550.366, subd. 2, regardless of whether the debtor later leaves the profession of farming. *Glacial Plains Coop. v. Hughes*, 705 N.W.2d 195, 197-98

3. Not enforceable against after-acquired property for farm-related debts

Usually when a creditor gets a money judgment, the creditor can enforce the judgment by seizing and selling property acquired by the debtor both before and after the judgment was issued.[19] A judgment for an unpaid debt on agricultural property owed by a farm debtor, however, cannot be enforced against property that the farm debtor acquires after the judgment is issued.[20]

4. Likely enforceable against the debtor's property in other states

A money judgment issued by a court in one state will generally also be enforceable in another state—called a foreign jurisdiction—where a debtor has property.[21] Usually, the creditor will not have to file a new lawsuit but can simply file a certified copy of the original money judgment with the other state's court administrator.

III. Effects of a money judgment

Once a creditor has a money judgment against the debtor, the creditor is able to take the next steps toward collecting the debt.

A. Judgment lien against real property

After the court officially finalizes a money judgment—in legal terms, the judgment is said to be "docketed"—a judgment lien is created in favor of the creditor.[22] The lien applies only to real property of the debtor that does not qualify for an exemption.

1. Only applies to real property

A judgment lien is a lien on real estate.[23] The debtor's personal property—such as machinery, livestock, vehicles, and household items—is not directly affected.[24]

(Minn. Ct. App. 2005).

19 MINN. STAT. §§ 550.02, 550.03.

20 MINN. STAT. § 550.366, subd. 3.

21 See, for example, MINN. STAT. § 548.27.

22 MINN. STAT. § 548.09, subd. 1. The process is somewhat different for what is known as registered, or Torrens land. MINN. STAT. §§ 508.25, 508.63, 508A.63. Torrens land, unlike most real estate in Minnesota, has a certificate of title issued in favor of the owner of the property. If farmers are not sure whether their property is Torrens property, they can check with the county registrar of titles where the original certificate for each property is maintained.

23 MINN. STAT. § 548.09, subd. 1.

24 A judgment lien generally applies to real estate owned at the time the money judgment is docketed. It also affects the debtor's interest as a buyer under a contract for deed, because the buyer may need to take action to protect the buyer's homestead rights to the property. *Hook v. Northwest Thresher Co.,* 98 N.W. 463, 463-64 (Minn. 1904).

Real property vs. personal property

Money judgments affect property differently, depending on whether it is real property or personal property. In general, real property includes land and buildings. Personal property includes most other farm property, such as livestock, machinery, and crops. Chapter Three discusses the differences in more detail.

2. Does not apply to debtor's exempt property

The judgment lien only applies to nonexempt real property.[25] This means, for example, that the debtor's homestead should not be affected by the lien.[26] Exemptions are discussed later in this chapter.

3. Affects debtor's rights in the property

The judgment lien does not in itself give the creditor the right to take the real estate, although the creditor may acquire that right later through a sheriff's levy and sale, discussed below. The judgment lien does affect the debtor's rights in the real estate.[27] As a practical matter, as long as the lien is in place, it will be difficult for the debtor to sell the property or to get a mortgage on the property.[28] Not only will a debtor be unlikely to be able to use the property covered by a judgment lien as collateral for future credit, but the creation of a judgment lien against the debtor might put the debtor in default on existing loans.

B. Writ of execution

The most important effect of a money judgment is that it can be used by the creditor to get a writ of execution.[29] A writ of execution is issued by the court and gives the sheriff, the

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25 MINN. STAT. §§ 510.01, 510.05.

26 Technically, the judgment is a lien on the homestead property, but the lien is not enforceable under the Minnesota Constitution. Minn. Const., art. 1, § 12. Even though the judgment lien is not enforceable against homestead property, the homestead exemption can be lost if the debtor stops occupying the property. MINN. STAT. § 510.07, *Denzer v. Prendergast,* 126 N.W.2d 440, 442-43 (Minn. 1964). Because of this possibility, the money judgment creates something of a cloud over exempt homestead property. Purchasers, for example, may worry that the homestead exemption was at one point lost before the sale and refuse to buy unless the judgment is paid. While a corporation is not entitled to a homestead exemption, the owner-occupants of a farm who place their land in a family farm corporation do not lose their homestead exemption. Cargill, Inc. v. Hedge, 375 N.W.2d 477, 1985 Minn. LEXIS 1214 (Minn. 1985).

27 MINN. STAT. § 548.09, subd. 1; 28 DUNNELL MINN. DIGEST, *Judgments* § 14.04 (5th ed. 2008).

28 A properly docketed judgment lien gives the creditor priority over later-filed liens, such as mechanics' liens and other judgment liens. If the debtor later sells the real estate, the purchaser will buy it subject to the judgment lien. MINN. STAT. § 507.34.

29 MINN. STAT. § 550.01; 22 DUNNELL MINN. DIGEST, *Execution* § 1.00(a) (6th ed. 2017).

creditor, or the creditor's attorney the power to seize and sell the debtor's property—both real and person—and pay the creditor the proceeds.[30] Unless the debtor appeals the court's decision to grant a money judgment, a writ of execution is likely.[31] Writs of execution are the legal trigger for sheriff's sales, garnishments, and other methods used to seize the debtor's property and money.

A writ of execution may be delayed during an appeal if, within ten days after the judgment is entered, the debtor files a bond equal to the judgment amount.[32] The bond may be a lesser amount if the court agrees that it is in the interests of justice to reduce the bond amount. The bond will delay execution of the judgment for the duration of the appeals process. If the debtor prevails on appeal, the bond money will be returned to the debtor, but if the debtor does not prevail, the debtor will be required to pay the creditor the initial judgment amount in addition to any interest that accrued during the period of delay.[33]

A writ of execution is valid for 180 days.[34]Additional writs may be issued at any time during the period that a judgment is in effect.[35]

C. Garnishment authorized

Once a creditor has been awarded a money judgment, the creditor has the power to begin the process of garnishing earnings, money, and property that are held by a third party for the debtor, or are owed to the debtor by another party.[36] Garnishment is discussed in detail later in this chapter.

IV. Farmer-lender mediation must be offered before enforcement of a judgment

If the debtor is eligible for farmer-lender mediation, the creditor cannot take action to enforce a money judgment against agricultural property, for example, in the form of a writ of execution or a levy, until the creditor serves the debtor with a mediation notice. [37] Mediation is discussed in Chapter Seven.

V. Enforcing money judgments

There are four ways that a creditor can satisfy its claim under a money judgment: (1) a sheriff's levy and sale, (2) garnishment, (3) attorney summary execution, and, in rare cases, (4) attachment.

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30 MINN. STAT. §§ 550.04, 550.10.

31 The Minnesota Rules of Civil Procedure state that the process to enforce a judgment for the payment of money must be a writ of execution unless the court says otherwise. MINN. R. CIV. P. 69.

32 MINN. STAT. § 550.36. An appeal can also delay execution.

33 MINN. STAT. § 550.36.

34 MINN. STAT. § 550.051, subd. 1.

35 MINN. STAT. § 550.01

36 MINN. STAT. § 571.71. Garnishment is authorized even before the money judgment is issued if the court so orders or the debtor fails to file an answer to the complaint.

37 MINN. STAT. § 550.365.

A. Sheriff's levy and sale

A writ of execution typically directs the sheriff to satisfy the judgment by taking and selling the debtor's property.[38] Technically, this is known as a "sheriff's levy and sale." The writ can also order the sheriff to deliver the property to the creditor.[39]

1. The sheriff's levy

When the sheriff levies upon the debtor's property, the sheriff either takes physical possession of the property or puts the property under his or her control. In the time between a levy and sale, therefore, the debtor's right to use or sell the property is taken away. There are several important points to note about this process.

a. Exempt property may not be levied upon

Only some of the debtor's property can be taken by a sheriff's levy and sale. The law sets aside some property as exempt from seizure by the sheriff.[40] Exemptions are discussed in more detail later in this chapter.

b. Sheriff may not use force to levy upon property

There are limits on the force the sheriff may use in executing the writ. Sheriffs may not break into a home, for example, and may not enter the debtor's home against the debtor's will.[41]

c. Personal property levied upon before real estate

The writ of execution directs the sheriff to satisfy the judgment out of the debtor's personal property first.[42] If the sheriff cannot find enough nonexempt personal property to satisfy the debt, the sheriff then levies upon any of the debtor's real property owned on the date that the money judgment was docketed in the county.

d. Procedures for levying upon specific types of property

The sheriff will have to follow different procedures depending on the type of property being levied upon.

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38 MINN. STAT. §§ 550.04, 550.08. If the debtor has property in more than one county, the court may issue a writ of execution for each county. MINN. STAT. § 550.07.

39 MINN. STAT. § 550.03.

40 MINN. STAT. § 550.37. Only attached property may be seized by the sheriff. Exempt property is discussed below.

41 21 DUNNELL MINN. DIGEST, *Execution* § 3.04 (5th ed. 2006); *Welsh v. Wilson,* 24 N.W. 327 (Minn. 1885).

42 MINN. STAT. §§ 550.04 (1).

(1) Personal property

In a levy upon personal property, the sheriff usually actually takes the property into possession.[43] If the property is too bulky to be moved easily, the sheriff may levy upon the property without actually removing it from the debtor's possession.[44] The levy applies all the same, whether or not the debtor continues to possess the property.

(2) Real estate

Real estate is levied upon by the sheriff filing a certificate with the county recorder saying that he or she has made a levy upon the real estate.[45]

(3) Bank deposits

The sheriff may levy upon the debtor's deposits in a bank or other financial institution.[46] This is done by sending the bank a writ of execution and an exemption notice. If the funds are in the name of a natural person—and not a business entity—important exemptions apply.[47] The sheriff may not take money from certain income sources—Social Security is one—and there are limits as to how much the sheriff may take from the debtor's earnings. [48] These exemptions are discussed in detail later in this chapter.

Within two days after receiving the exemption notice, the bank must send the debtor two copies of the exemption notice, along with instructions, by first class mail.[49] If the debtor does not return an exemption claim within fourteen days after the exemption notice copies were mailed, the funds are subject to the levy and must be given to the sheriff within six business days after the fourteen-day period has run.[50]

If the debtor wishes to claim an exemption, the debtor must complete and sign the exemption notice and provide one copy to both the bank and the

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43 MINN. STAT. §§ 550.08, 550.12.

44 MINN. STAT. §§ 550.13, 336.9-501; *Springfield Farmers Elevator Co. v. State Bank of Springfield,* 360 N.W.2d 402 (Minn. Ct. App. 1985). Under the process set forth in MINN. STAT. § 550.13, the sheriff leaves a copy of the writ of execution and a notice explaining that the property is levied upon and files a notice of the levy at the office of the county recorder or the Secretary of State, as set forth in MINN. STAT. § 336.9-501.

45 MINN. STAT. § 550.180. A levy on real estate is also discussed in 21 DUNNELL MINN. DIGEST, *Execution* § 4.01 (6th ed. 2017) and Fidelity & Deposit v. Riopelle, 216 N.W.2d 674 (Minn. 1974).

46 MINN. STAT. §§ 550.143.

47 MINN. STAT. § 550.143, subd. 3.

48 MINN. STAT. § 550.143, subd. 3c.

49 MINN. STAT. § 550.143, subd. 4.

50 MINN. STAT. § 550.143, subd. 4.

creditor's lawyer.[51] The debtor must provide these copies within fourteen days from the postmarked date on the exemption notice that the bank sent to the debtor, otherwise the money remains subject to the execution levy.[52] The creditor has six business days, after the date postmarked on the envelope containing the debtor's exemption claim, or the date of personal delivery to the creditor, to object to the exemption.[53] If the creditor does not object, all money that the debtor claimed as exempt must be released to the debtor.[54]

If a creditor objects to the debtor's exemption, the creditor must mail—within the six days—two forms to both the bank and the debtor: a Notice of Objection and a Notice of Hearing.[55] The creditor must also file those forms with the court, at which time the court administrator will schedule a hearing on the matter.[56] The court then decides the fate of the levied money.

Debtors should note, however, that if the court decides the debtor claimed an exemption in bad faith, the creditor will be awarded costs, attorney's fees, actual damages, and a fee of not more than $100.[57] Similarly, if the court decides that the creditor disregarded, in bad faith, a debtor's claim of exemption, the debtor will be awarded costs, attorney's fees, actual damages, and a fee.[58]

(4) Earnings

The sheriff may levy upon the debtor's earnings.[59] This process works very much like a garnishment, discussed later in this chapter, except that the debtor's earnings are turned over to the sheriff and then to the creditor. In general, when levying upon a debtor's earnings the sheriff directs an employer or someone else who owes the debtor money to give the money to the sheriff. Earnings that may be taken by the sheriff include pay from an employer as well as payments to a farmer for the sale of agricultural products such as milk or livestock.[60]

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51 MINN. STAT. § 550.143, subd. 4.
52 MINN. STAT. § 550.143, subd. 4.
53 MINN. STAT. § 550.143, subd. 4, 5.
54 MINN. STAT. § 550.143, subd. 4.
55 MINN. STAT. § 550.143, subds. 5-7.
56 MINN. STAT. § 550.143, subds. 5-7. The court will typically schedule the hearing for anywhere between five and seven business days from the date the creditor files the Notice of Objection and Notice of Hearing. MINN. STAT. § 550.143, subd. 5 (b).
57 MINN. STAT. § 550.143, subd. 10.
58 MINN. STAT. § 550.143, subd. 10.
59 MINN. STAT. §§ 550.136, 550.135, subd. 3.
60 MINN. STAT. §§ 550.135 subd. 3, 550.136, subd. 2(a)(2).

(a) Notice

At least ten days before the sheriff serves the writ of execution on the third party who has the debtor's earnings, typically, the debtor's employer, the creditor must provide the debtor with an earnings exemption notice and a notice warning that the levy may happen.[61]

(b) Exemptions

There are strict limits on the earnings that the sheriff may levy upon.[62] For exemptions to be effective, however, they must be claimed by the debtor.[63]

(c) The levy upon earnings

If the creditor does not receive an exemption statement from the debtor within ten days after the debtor is served the receives the earnings exemption notice, the creditor may tell the sheriff to serve the writ of execution on whomever is holding the debtor's earnings.[64] Within five days of service of the writ of execution on the third party holding the debtor's earnings, the creditor must send a copy of the writ of execution to the debtor, along with a copy of all of the legal papers used to take the debtor's earnings.[65]

The third party must hold the debtor's earnings through the last payday to occur within the seventy days (70) following the service of the writ of execution.[66] The third party has ten days from that last payment within which to provide the debtor's earnings to the sheriff.[67]

It is illegal for an employer to penalize a debtor for a sheriff's levy on earnings.[68]

(5) Unharvested crops

The sheriff may levy upon unharvested crops, but the crops will not be sold

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61 MINN. STAT. § 550.136, subd. 6. If the writ of execution has not been served on the third party holding the debtor's earnings within one year after service on the debtor of the earnings exemption notice, the creditor must serve the debtor with another notice of levy before levying upon the debtor's earnings. MINN. STAT. § 550.136, subd. 7.

62 MINN. STAT. § 550.136, subd. 3-4.

63 MINN. STAT. § 550.136, subd. 8.

64 MINN. STAT. § 550.136, subd. 8.

65 MINN. STAT. § 550.136, subd. 11.

66 MINN. STAT. § 550.136, subd. 12.

67 MINN. STAT. § 550.136, subd. 12.

68 MINN. STAT. § 550.136, subd. 13.

until they are fit to be harvested.[69]

(6) If the property to be levied upon is collateral for another creditor

The sheriff is free to levy upon personal property that serves as collateral for another of the debtor's creditors.[70] The creditor receiving the property must pay the secured creditor out of the proceeds as set out in the security agreement.

e. Debtor may satisfy the judgment and have property returned

After the sheriff levies upon the debtor's property, the debtor may still satisfy the judgment by paying the debt. If this happens, the debtor has the right to have the levied property returned in the same condition it was in at the time it was taken, except for the usual wear and tear of removal and preservation.[71]

2. Sheriff's execution sale

The writ of execution will also typically direct the sheriff to sell the levied property.[72] The sheriff must first give notice of the sale directly to the debtor and to the public.[73]

For personal property, the sale notice must be posted in three obvious places in the county for at least ten days before the sale.[74] In addition, if the debtor is a resident of the county, the debtor must be served with a copy of the notice as well as of the execution and inventory.[75] For real estate, the notice must be posted and published in a legal paper for six weeks before the sale.[76] For real property, if the debtor is a resident of the county, the debtor must also be served a copy of the sale notice at least four weeks before the scheduled sale.[77]

The sheriff's sale is a public auction.[78] The sheriff must sell only the minimum amount of the property needed to satisfy the judgment.[79] If the debtor has multiple parcels of real property, the law requires that each parcel be sold separately when

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69 MINN. STAT. § 550.17; *Gillit v. Truax,* 8 N.W. 767 (Minn. 1881). The execution of a levy on crops may be completed at any time within thirty days after the crops are fit to be harvested. MINN. STAT. § 550.17.

70 MINN. STAT. § 550.16.

71 21 DUNNELL MINN. DIGEST, *Execution* §§ 3.00, 4.20 (6th ed. 2017); *Banker v. Caldwell,* 3 Minn. 94 (1859).

72 MINN. STAT. §§ 550.04(2), 550.10.

73 MINN. STAT. §§ 550.18, 550.19, 645.12.

74 MINN. STAT. § 550.18(1).

75 MINN. STAT. § 550.19.

76 MINN. STAT. § 550.18(2); Minn. R. Civ. P. 4.04.

77 MINN. STAT. § 550.19; Minn. R. Civ. P. 4.03.

78 MINN. STAT. § 550.20.

79 MINN. STAT. § 550.20.

satisfying the levy.[80] Personal property must be sold in the sight of those at the sale.[81]

The proceeds from a sheriff's sale must first be used to cover all reasonable expenses involved in enforcing the order and holding the sale, as well as any taxes the creditor may have paid after attachment of the real property.[82] The creditor's debt is paid next, along with any accrued interest.[83]

B. Garnishment

Creditors sometimes use garnishment to recover debts. Garnishment forces a garnishee—a bank, employer, or other third party who owes money to the debtor or has the debtor's money—to hold the debtor's money and then turn it over to the creditor.[84] A creditor may garnish at any time after entry of a money judgment, but a court may authorize the garnishment before the issuing the judgment.[85]

Garnishee

In a garnishment, the garnishee is the third party who owes money to the debtor or is holding the debtor's money. Banks and the debtor's employers are common garnishees.

Garnishment can affect bank accounts and wages; it can also affect other payments to farmers, such as milk checks. Debtors can exempt some money from garnishment, and they also have notice rights, although debtors sometimes learn about garnishments after the fact.

At some point in the garnishment, three things happen, although the order of these events may vary: (1) the creditor sends a summons to the garnishees telling them to hold the debtor's money, (2) the debtor receives a copy of the garnishment summons as well as an exemption notice so that the debtor may claim exemptions, and (3) the creditor collects the money from the garnishees.[86]

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80 MINN. STAT. § 550.20; *Zetah v. Isaacs,* 428 N.W.2d 96, 101 (Minn. Ct. App. 1988).

81 MINN. STAT. § 550.20.

82 MINN. STAT. §§ 550.051, subd. 1, 550.04.

83 MINN. STAT. §§ 550.051, subd. 1, 550.04.

84 MINN. STAT. § 571.71. Garnishment is discussed in THOMAS E. HOFFMAN, Garnishment, in JAMES L. BALLIE and PHILLIP K. KUNKEL (eds.), Debtor-Creditor Handbook Chapter 9 (11th ed. 2014, updated 2018).

85 MINN. STAT. § 571.71 (1), (3).

86 In all cases, the debtor must be served with copies of the garnishment summons and other papers that the creditor served on the garnishee, within five days after service on the garnishee. MINN. STAT. § 571.72, subd. 4. If a creditor is garnishing the debtor's earnings, an earnings exemption notice must be served on the debtor at least ten days before service of the garnishment summons on the debtor's employer; for all other garnishments, the debtor must be served with an exemption notice when the debtor is served with a copy of the garnishment summons. MINN. STAT. § 571.72, subd. 8.

1. Garnishing earnings

Creditors may garnish the debtor's earnings.[87] This is similar to the levy upon earnings discussed earlier in this chapter, but in a garnishment, the creditor rather than the sheriff takes the earnings.

a. Steps in the process

(1) Notice to the debtor

Before a creditor may garnish a debtor's earnings, the debtor must be served personally or by first class mail with an earnings exemption notice at least ten days prior to service on the creditor of the garnishment summons.[88] The debtor can return the form to the creditor and claim a wage exemption if some or all of the debtor's earnings fall within the categories of protected earnings that cannot be garnished.[89] If the creditor does not receive an exemption claim within ten days after the earnings exemption notice is served, the creditor may go ahead and serve the garnishee with a garnishment summons.[90] Once the creditor has been served with the garnishment summons, the creditor has five days within which it must serve by mail a copy of the summons on the debtor. [91]

Even if the creditor has gone ahead with the garnishment, the debtor does not necessarily lose the right to claim an exemption. If a proper exemption claim is made after the garnishment takes place, the debtor's money will eventually be returned to the debtor.[92] The process for claiming exemptions is explained in more detail below.

(2) Summons to the garnishee

The garnishment is triggered when the creditor sends a garnishment summons to the garnishee.[93] In general terms, the summons informs the garnishee that it must retain—for later disbursement to the creditor—the debtor's qualifying, garnishable earnings.[94]

b. Defining earnings

For the purposes of garnishment, earnings include pay from a job as well as a

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87 MINN. STAT. §§ 571.92, 571.921(a).
88 MINN. STAT. §§ 571.72, subd. 8, 571.924, subd. 1.
89 MINN. STAT. § 571.72, subds. 8, 10.
90 MINN. STAT. § 571.72, subd. 2.
91 MINN. STAT. § 571.72, subd. 4.
92 MINN. STAT. § 571.926; *Burns v. Einess*, Nos. A11-448, A11-707, 2011 Minn. App. Unpub. LEXIS 1013, at *9-10 (Nov. 21, 2011).
93 MINN. STAT. § 571.72, subd. 2.
94 For an example of a garnishment summons, see MINN. STAT. § 571.74.

payment for family farm production that is still held by a third party.[95] This means that milk checks and payment for the sale of livestock and other agricultural products can be garnished as earnings.[96]

c. Limits on wage garnishment

Creditors may only garnish a part of the debtor's "disposable earnings." Disposable earnings are defined as the earnings that are left after legally required deductions—such as Social Security and federal and state income tax withholdings—are taken out of the debtor's paycheck.[97]

As a general rule, garnishees must retain all nonexempt disposable earnings, indebtedness, money, and/or property owned by the debtor in an amount up to—but not exceeding—110 percent of the debtor's unpaid money judgment.[98]

In addition to this general cap on the amount of earnings that a creditor may garnish, there is another limitation on the earnings that creditors may take. This additional limitation stops a creditor from garnishing, from any single paycheck, an amount that is more than either of two different amounts.

First, the garnishment cannot be more than 25 percent of the debtor's disposable earnings,[99]

Second, the garnishment cannot be more than the amount by which the debtor's disposable earnings per week is more than forty times the federal minimum hourly wage.[100] With the current minimum wage at $7.25 per hour, this calculation totals $290 ($7.25 X 40 = $290). Essentially, this requirement ensures that a debtor's paycheck—after garnishment—will not be below what a person making the federal minimum wage would earn during a forty-hour work week.

So, suppose that a debtor's disposable income is $500 per week. The creditor's maximum garnishment of the debtor's paycheck would therefore be the lessor of:

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95 MINN. STAT. §§ 571.921(a)(1)-(2), 500.24, subd. 2.

96 MINN. STAT. §§ 571.921(a)(2), 500.24, subd. 2. When the debtor-farmer is a family farm, family farm corporation, or an authorized farm corporation, within the meaning of MINN. STAT. § 500.24, subd. 2, earnings include money already paid or owed for the sale of agricultural products, livestock, or milk.

97 MINN. STAT. § 571.921(b)

98 MINN. STAT. § 571.72, subd. 2(5).

99 MINN. STAT. § 571.922(a)(1).

100 MINN. STAT. § 571.922(a)(2). The minimum amount of disposable earnings that a debtor must have free from garnishment per week is 40 times the federal minimum hourly wage. When the pay period is more than a whole number of weeks, each day is counted as a fraction of a week. At present, the federal minimum wage is $7.25 per hour. 29 U.S.C. § 206(a)(1).

(1) $125.This is 25% of the debtor's $500 paycheck; or
(2) $210. This is the amount by which the debtor's $500 disposable income is more than $290—the calculation of forty times the federal minimum wage.

In this example, the creditor cannot garnish more than $125 from each of the debtor's paychecks.

d. Wage exemptions—some earnings cannot be garnished

Some earnings are completely exempt from garnishment.[101] These include: (1) Social Security benefits; (2) unemployment insurance; (3) veteran's benefits; (4) accident, disability, or retirement pensions or annuities; (5) life insurance proceeds; (6) earnings of a minor child; and (7) social welfare relief based on need, such as Minnesota Family Investment Program (MFIP) and Supplemental Security Income (SSI). These funds remain exempt even after they have been deposited in a bank or other financial institution.[102]

In tracing exempt funds that are in a bank or financial institution, the first-in, first-out accounting method is used.

First-in, first-out accounting

In tracing exempt funds that have been deposited in a bank account, the law applies what is known as a "first-in, first-out" method of accounting.

Suppose, for example, a debtor has $500 of previously-deposited nonexempt money in an account. The debtor then deposits $1,000 of exempt income in the same account, and later deposits $2,000 more in nonexempt money. The total balance in the debtor's account is therefore $3,500, of which $1,000 is exempt.

If the debtor then spends $800 of the money in the account, the total balance would be $2,700, of which only $700 remains exempt. In coming to this total, the first-in, first-out accounting method assumes that the $800 comes first from the $500 nonexempt money, because it was deposited first, and the remaining $300 would come out of the $1000 in exempt income that was deposited second.

[101] MINN. STAT. §§ 550.37, 571.72, subd. 8.
[102] MINN. STAT. §§ 550.37, subd. 13, 571.913.

e. Seventy days of earnings can be garnished

Garnishment of earnings continues for each payday that falls within the seventy-day period following the date on which the garnishment summons was served on the garnishee.[103]

f. If earnings already serve as collateral for a secured creditor

If the debtor's earnings already serve as collateral for a secured creditor, the secured creditor has priority over the garnishment creditor in the earnings.[104] This means that if a debtor has $1,000 in nonexempt earnings, and a secured creditor has a claim of $800 on those earnings, the garnishment creditor could claim no more than $200.

g. Employers may not retaliate

An employer may not fire or discipline an employee as a result of a garnishment.[105] If this happens, the employee may bring a civil legal action against the employer within ninety days of the employer's unlawful action.[106] If an employer is found to have violated this law, a court may order the reinstatement of the employee and other necessary relief.[107]

2. Garnishing money in a bank account

A creditor may garnish money that is deposited at a bank or other financial institution.[108]

a. A creditor can garnish all funds in a joint account

A creditor may serve a garnishment summons and attach the funds in a joint account to satisfy the obligations of the judgment debtor.[109] This is true for a sole account and for a joint account, and is true even if the other account holders are not judgment debtors.[110]

In a garnishment case under Minnesota law, the court begins with the

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103 MINN. STAT. § 571.73, subd. 3(1).

104 MINN. STAT. § 571.81, subd. 2. This applies to all garnished assets, earnings, property, etc. A debtor's assignment of a security interest in his or her earnings, within ten days before a garnishment, is invalid. MINN. STAT. § 571.81, subd. 2.

105 MINN. STAT. § 571.927, subd. 1. The right not to be fired or disciplined as a result of a garnishment cannot be altered or waived by an employment contract. MINN. STAT. § 571.927, subd. 3.

106 MINN. STAT. § 571.927, subd. 2.

107 MINN. STAT. § 571.927, subd. 2. If an employer-employee relationship existed before any unlawful discipline or discharge, the employee must recover twice the amount of actual wages lost as a result of the unlawful action.

108 MINN. STAT. § 571.91.

109 *Savig v. First Nat'l Bank*, 781 N.W.2d 335, 341 (Minn. 2010).

110 *Savig v. First Nat'l Bank*, 781 N.W.2d 335, 341 (Minn. 2010).

assumption that a judgment debtor owns all of the funds in a joint account. [111] Therefore, the burden is placed on the account holders to disprove this assumption, and establish the net contribution of each account holder.[112] If the assumption is not proved wrong, all of the funds in the joint account will be subject to garnishment for the judgment debtor's debts.[113]

b. Bank receives a summons and retains the debtor's money

To garnish money in a bank account, the creditor must first send legal papers, including a garnishment summons, to the bank.[114] The bank must retain up to 110 percent of the creditor's claim against the debtor.[115] The debtor cannot withdraw this money, and checks written on the account may bounce.

c. Bank notifies debtor

Within two business days after the bank receives the garnishment summons, it must notify the debtor of the garnishment by first class mail.[116] This notice must include a copy of the garnishment summons, two copies of the exemption notice form, and information explaining that the bank is holding the debtor's money.[117]

d. Exemptions

Debtors should read the exemption notice carefully. Claiming exemptions explained in the notice may result in at least some of the held money being released to the debtor.[118] Exemptions from bank account garnishment include money that would have been exempt from garnishment as earnings, such as Social Security benefits, unemployment insurance, workers' compensation, veteran's benefits, life insurance proceeds, and the earnings of a child.[119]

e. Claiming an exemption from a bank account garnishment

To claim an exemption for funds held in a bank account, the debtor must fill out, sign, and mail or deliver the exemption form to both the bank and the creditor's lawyer.[120] When delivering the exemption form to the creditor's lawyer, the debtor must also include copies of bank statements from the last

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111 *Savig v. First Nat'l Bank*, 781 N.W.2d 335, 347-48 (Minn. 2010).
112 *Savig v. First Nat'l Bank*, 781 N.W.2d 335, 347-48 (Minn. 2010); MINN. STAT. § 524.6-203(a).
113 *Savig v. First Nat'l Bank*, 781 N.W.2d 335, 348 (Minn. 2010).
114 MINN. STAT. §§ 571.911, 571.912.
115 MINN. STAT. § 571.911.
116 MINN. STAT. § 571.913.
117 MINN. STAT. §§ 571.912, 571.913.
118 MINN. STAT. §§ 571.912, 571.913.
119 MINN. STAT. § 571.912.
120 MINN. STAT. §§ 571.912, 571.913.

sixty days.[121] If the creditor does not have an attorney, the papers should be sent to the creditor.[122] So long as the debtor returns the exemption form within fourteen days of the date the bank sent the exemption notices to the debtor, the bank should still be holding the money.[123] If the exemption form is returned after fourteen days, the bank may have released the money to the creditor.[124] The debtor can still possibly get the money back, but it will take longer.[125] If the creditor does not object to the exemption within six business days after the bank receives the exemption claim, the bank should release the money to the debtor.[126]

f. Creditors can challenge the exemption

A creditor may challenge the debtor's exemption claim by objecting to the claimed exemptions within six business days of receiving the debtor's exemption claim.[127] If the creditor does so, the bank will not release the money the debtor claimed as exempt until a court rules on the issue or the creditor drops the objection.[128] The objection to the exemption must be sent to the debtor in a form called a Notice of Objection.[129] The Notice of Objection should explain why the creditor does not think the debtor deserves an exemption.[130] The creditor's objection should also include a Notice of Hearing, informing the debtor the date on which the court will hold a hearing to consider the debtor's exemption claim.[131]

g. Debtors defend exemption

If the creditor challenges the exemption, the debtor must defend the exemption by providing supporting documents and materials in order to keep the exemption.[132]

The court will set a hearing date for between five and seven business days from when the creditor objection is filed.[133] The debtor may request that the hearing date be rescheduled. The debtor must contact the court and the creditor with this request.[134] The court will then set a new hearing date for anytime within

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121 MINN. STAT. §§ 571.912, 571.913.
122 MINN. STAT. §§ 571.912, 571.913.
123 MINN. STAT. §§ 571.912, 571.913.
124 MINN. STAT. §§ 571.912, 571.913.
125 MINN. STAT. § 571.913.
126 MINN. STAT. §§ 571.912, 571.913, 571.914.
127 MINN. STAT. §§ 571.912, 571.913, 571.914.
128 MINN. STAT. § 571.914, subds. 2, 4.
129 MINN. STAT. § 571.914, subds. 1, 2.
130 MINN. STAT. § 571.914, subd. 2.
131 MINN. STAT. §, 571.914, subd. 2.
132 MINN. STAT. § 571.914, subd. 2.
133 MINN. STAT. § 571.914, subd. 1.
134 MINN. STAT. § 571.914, subd. 1.

seven days from the original hearing date. [135]

The debtor should bring to the hearing any records that support the claim for an exemption.[136] At the hearing, the court will listen to the reasons the debtor thinks some income should be exempt, and the reasons the creditor thinks the income should not be exempt. The court will also look at the records that have been submitted. Within three days of the hearing the court will decide whether the debtor's income is exempt.[137] In general, the bank will hold the debtor's money until the court makes a decision.[138]

h. Bad faith

Both the debtor and creditor must act in good faith when making the case and against an exemption.[139] If the debtor is found by the court to have made a claim for an exemption in bad faith, the court can order the debtor to pay costs, actual damages, attorney fees, and an additional one hundred dollars.[140] Similarly, if the court finds that the creditor made a bad faith objection to an exemption claim, the court can order the creditor to pay costs, actual damages, attorney fees, and an additional one hundred dollars.[141]

An example of bad faith by a debtor is if the debtor claimed that he or she had income from a government benefit when the debtor actually did not have that income.[142] This part of the law does not define bad faith, but in general, a person acting in bad faith is trying to mislead, deceive, or interfere with the garnishment process.[143] Good faith, on the other hand, means that even if someone makes an error, the error was an honest mistake.

3. Garnishing other personal property

Garnishment may be used by the creditor to get third parties to turn over to the creditor other personal property owned by the debtor.[144]All nonexempt personal

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135 MINN. STAT. § 571.914, subd. 1.

136 MINN. STAT. § 571.914, subd. 2. The debtor can also send a copy of the records to the creditor. There is some chance the creditor will drop the objection to the exemption and there will be no need for a hearing.

137 MINN. STAT. § 571.914, subd. 1.

138 MINN. STAT. § 571.914, subd. The debtor and creditor may come to an independent agreement among themselves as to how the bank should handle the funds it is retaining. Under MINN. STAT. 571.915, if either party informs the bank in writing that the bank may release the funds to the other party, the bank is required to do so. The bank will also release the funds of both parties agree to, or if the garnishment lapses due to time. See MINN. STAT. § 571.79.

139 MINN. STAT. § 571.912, subd. 2.

140 MINN. STAT. §§ 571.72, subd. 6, 571.912, subd. 2.

141 MINN. STAT. §§ 571.72, subd. 6, 571.912, subd. 2.

142 MINN. STAT. § 571.912, subd. 2.

143 MINN. STAT. §§ 571.924, subd. 1, 571.925; Black's Law Dictionary, "good faith," "bad faith" (10th ed. 2014).

144 MINN. STAT. § 571.73, subd. 3(3).

property may be taken this way. As with other garnishments, the debtor must receive an exemption notice and a copy of the garnishment summons and notice.[145] The exemptions for this garnishment include the same basic exemptions discussed in this chapter for judgment liens, such as a homestead, a motor vehicle, and farm machinery.[146] A court may order the garnishee to give the property to the creditor.[147]

4. Prejudgment and pre-default garnishments

In very limited circumstances, the law allows a creditor to get a garnishment even before the court issues a money judgment or enters a default judgment.[148] This is called a prejudgment garnishment.[149] There are two types of prejudgment garnishment—those that occur after notice to the debtor and a hearing on the garnishment,[150] and those that occur without either notice to the debtor or a hearing.[151]

In a prejudgment garnishment that occurs without notice and hearing, the debtor does not have the opportunity to argue his or her case before a judge, and therefore this type of prejudgment garnishment is rare, and only allowed in extraordinary circumstances.[152] The creditor must be able to show the court that the debtor is likely to take actions that will somehow defraud the creditor and unfairly prevent the creditor from collecting under the normal procedures.[153] This might include, for example, providing proof to the court that the debtor has tried to remove or hide property that could be taken by the creditor in a garnishment.[154] A number of other rules apply for this form of garnishment. [155]

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145 MINN. STAT. §§ 571.72, subd. 4, 571.74.

146 MINN. STAT. §§ 550.37, 571.72, subd. 8, 571.73, subd. 3.

147 MINN. STAT. § 571.84.

148 MINN. STAT. §§ 571.71 (1)-(2), 571.93, subd. 1. With respect to a pre-default garnishment, a creditor may pursue a garnishment so long as the creditor could have obtained a default judgment, and the debt is based upon a contract for the payment of money only. MINN. STAT. § 571.71 (2). This means that a creditor can commence a garnishment at any time—45 days or more—after service of the summons and complaint upon the debtor, if the debtor fails to provide an answer to the creditor's complaint. Under this law, the debtor must be served with both a notice of intent to garnish and an exemption form, at some time 20 days or more following service of the summons and complaint. The debtor then has 25 additional days within which to provide an answer. If the debtor fails to answer, the creditor may proceed with a pre-default garnishment.

149 MINN. STAT. § 571.93, subd. 1.

150 MINN. STAT. §§ 571.93, subd. 2, 571.932.

151 MINN. STAT. §§ 571.93, subd. 2, 571.931.

152 For purposes of a prejudgment garnishment, extraordinary circumstances exist when the creditor is otherwise unable to protect its interests while waiting for a hearing, and therefore a prehearing seizure of the debtor's property is necessary. MINN. STAT. § 571.931, subd. 2(4).

153 MINN. STAT. §§ 571.93, subd. 1, 571.931, subd. 2(4); *Ertle v. Press,* No. 3-95-90 at n.1 (D. Minn. May 3, 1995) (unpublished).

154 MINN. STAT. § 571.93, subd. 1.

155 See, for example, MINN. STAT. § 571.04, 571.932.

C. Summary executions

In addition to a sheriff's levy and sale and a garnishment, a creditor may also recover a debt by a process known as a "summary execution," when a money judgment is issued to the creditor's lawyer for execution, instead of to the sheriff. [156]

1. $10,000 limit

Summary executions are limited to $10,000 per execution.[157]

2. Targets earnings and bank deposits—not other property

In a summary execution, the creditor's lawyer gets a writ of execution from the court and sends it to the third party who has the debtor's money—most often a bank, although it can be an employer or anyone else who holds the debtor's earnings and deposits.[158] In general, the third party has fifteen days from receipt of the writ of execution to give the debtor's money directly to the creditor.[159] Additional rules and different timeless apply if the third party is a bank or other financial institution,[160] or if the writ of execution is for the debtor's nonexempt earnings, including earnings from selling agricultural products such as milk.[161]

3. Exemptions apply

The summary execution process is limited by the same debtor exemptions that apply to both a sheriff's levy and sale and to a garnishment.[162] Summary executions also require notice to the third party.[163]

D. Attachment

In an attachment, a creditor who has started a lawsuit seeking a judgment against a debtor may get a court order to seize—technically known as "attach"—the debtor's property.[164] Attachment, like a prejudgment garnishment, is different from most other creditor actions because it happens before the creditor wins any judgment. In other words, it allows the creditor to take the debtor's property before the court decides for certain that the debtor owes the alleged debt to the creditor.

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156 MINN. STAT. ch. 551.
157 MINN. STAT. §§ 551.01, 551.04, subd. 6, 551.041.
158 MINN. STAT. §§ 551.04, subd. 4, 551.041.
159 MINN. STAT. § 551.04, subd. 6.
160 MINN. STAT. § 551.05.
161 MINN. STAT. § 551.06.
162 MINN. STAT. §§ 551.04 subds. 2, 3.
163 MINN. STAT. §§ 551.04 subd. 4, 551.041.
164 MINN. STAT. § 570.02. Attachment is discussed in JAMES L. BAILLIE, ATTACHMENT, Ch. 5, MINNESOTA CONTINUING LEGAL EDUCATION, DEBTOR-CREDITOR HANDBOOK (11th ed. 2014, updated 2018, PHILLIP L. KUNKEL, RYAN T. MURPHY and SAMUEL J.H. SIEGELMAN, eds.).

Similar to prejudgment garnishments, attachments can occur absent notice to the debtor and a hearing.[165] Courts should only allow a pre-hearing attachment to occur if it is shown that the debtor acted fraudulently, or if the court is convinced that the debtor is about to remove or sell nonexempt property with the intention of defrauding the creditor.[166] If the court grants the creditor the right to an attachment, nonexempt personal property, wages, and nonexempt real estate may be taken. [167] Attachments are limited by the same exemptions that apply to levies, garnishments and summary executions. Attachment may also trigger farmer-lender mediation.[168] Chapter Seven discusses farmer-lender mediation.

VI. Discovering assets

Sheriffs usually do not engage in detailed investigative work to find a debtor's property. Instead, the creditor or the creditor's lawyer is expected to tell the sheriff where to find the property. If the sheriff is not able to find the debtor's property and returns the writ of execution unsatisfied, the power of the writ ends and a new one must be issued to try again.[169] This process may be repeated for as long as the judgment is in effect.

If a creditor is having a hard time finding the debtor's assets, the creditor may use several legal tools against the debtor and others with information related to the whereabouts of the debtor's assets.[170] For example, the creditor may demand a deposition, which requires the debtor to answer questions under oath about his or her assets.[171] Other people who might know where to find the debtor's assets may be subject to deposition as well.[172] The creditor can also force the debtor to produce documents and other material about the debtor's assets.[173] This might include, for example, records, tax returns, or canceled checks.[174] If the sheriff returns an execution either unsatisfied, or without full repayment, the creditor may also ask the judge to bring the debtor to court to answer questions under oath about the debtor's assets.[175] Debtors who do not cooperate with discovery requests or court orders can be sanctioned or fined and eventually subject to contempt of court and arrest.[176]

VII. Satisfied judgments

If the debtor's property is sold and the creditor is paid in full, the judgment is deemed satisfied.

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165 MINN. STAT. §§ 570.025, 570.026.
166 MINN. STAT. §§ 570.02, 570.025, subd. 2.
167 MINN. STAT. §§ 550.037, 570.025, 570.026, 570.051, 570.061.
168 MINN. STAT. § 583.26, subd. 5(a).
169 MINN. STAT. § 550.051.
170 MINN. R. CIV. P. 69; *Anchor Gas, Inc. v. Border Black Top, Inc.*, 381 N.W.2d 96, 98 (Minn. Ct. App. 1986).
171 MINN. R. CIV. P. 26.02, 30, 69.
172 MINN. R. CIV. P. 30.01, 69.
173 MINN. R. CIV. P. 34.
174 MINN. R. CIV. P. 34.
175 MINN. STAT. §§ 575.02, 575.04.
176 MINN. STAT. § 575.03; MINN. R. CIV. P. 37.

If the judgment is paid or otherwise satisfied, the creditor must give the debtor a certificate of satisfaction within ten days after the satisfaction or within thirty days of payment by check.[177]

VIII. Right of redemption

A right of redemption means that the debtor has the right to repurchase real property that is sold at a sheriff's sale.[178] Personal property may not be redeemed.[179]

In general, the right of redemption may last for one year.[180] If the property is abandoned, the redemption period can be reduced to five weeks.[181]

To redeem property, a debtor must pay the purchaser of the property from the sheriff's sale, or the officer who made the sale, the amount that the purchaser paid—in excess of any homestead exemption—plus any interest.[182] If the purchaser was a creditor, the redeeming debtor must pay the purchase price plus the amount of the creditor's lien that is greater than any homestead exemption, in addition to costs incurred by the creditor and any interest.[183] A debtor's redemption payment may be made directly to the purchaser, or to either the sheriff or the court administrator for the county in which the real property is located.[184] The debtor must also provide to the purchaser the same documentation that is required when real property is foreclosed on by advertisement and then redeemed.[185] These documents must then be filed with the county recorder.[186]

If the debtor redeems, he or she should receive a certificate of redemption from the person the debtor paid. If the debtor who redeems is the owner of the property, the debtor must record the certificate of redemption within four days after the one-year redemption period would normally expire.[187] If the debtor fails to record the certificate of redemption, the redemption may be voided by any person that later attempts to redeem the same property.[188]

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177 MINN. STAT. § 548.15, subd. 1.

178 MINN. STAT. §§ 550.24 to 550.35; *Sardeson v. Menage,* 43 N.W. 66 (Minn. 1889); *Henricksen v. Bruckelmyer*, No. C5-02-732, 2002 Minn. App. LEXIS 1320, at *10 (Ct. App. Dec. 3, 2002).

179 MINN. STAT. § 550.24.

180 MINN. STAT. § 550.24(b). The debtor may redeem within one year of the day of the sale or of the order confirming the sale if the property is a homestead.

181 MINN. STAT. §§ 550.24(d), 582.032, subd. 5.

182 MINN. STAT. § 550.24(b). With respect to calculating the interest owed, if an interest rate is specified on the certificate of sale, that rate is used. If there is no rate on the certificate of sale, the interest rate is the judgment rate in effect then, or 6 percent, whichever is less. The interest rate on judgments is set each year by the state court administrator. MINN. STAT. § 549.09, subd. 1(c).

183 MINN. STAT. § 550.24(b). In this instance, the interest rate is the judgment rate. MINN. STAT. § 549.09, subd. 1(c). Costs are those allowed under MINN. STAT. §§ 582.03, 582.031.

184 MINN. STAT. § 550.26; *In re in re Nelson*, 495 N.W.2d 200, 202 (Minn. 1993)

185 MINN. STAT. § 550.26. For a full description of the documents required under the foreclosure by advertisement laws, see MINN. STAT. § 580.26.

186 MINN. STAT. § 550.26.

187 MINN. STAT. §§ 550.27, 580.26.

188 MINN. STAT. §§ 550.27, 580.26.

IX. Exemptions under Minnesota law

Debtors are never required to lose all of their property to unsecured creditors. Minnesota law sets out a number of exemptions that protect certain property from seizure by creditors.[189] All of the methods of taking the debtor's property are limited by these exemptions.[190] The debtor must, however, claim the exemptions.[191] Debtors should never assume that the exempt property is automatically protected.

Any time a debtor receives an exemption notice, it is important to read the notice carefully and follow the directions in it. In general, courts should liberally interpret the exemptions to favor the debtor.[192]

Three types of exemptions apply: the homestead exemption, the wage exemption, and general statutory exemptions.

A. Exemptions do not apply to property given as collateral

Debtors sometimes offer exempt property as collateral to a creditor. When this happens, the creditor may enforce this debt without regard for exemptions.[193]

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189 MINN. CONST. art. I, § 12; MINN. STAT. §§ 550.37, 571.73, subd. 4. Exemptions are discussed in RYAN T. MURPHY, Exemptions, in JAMES L. BALLIE and PHILLIP K. KUNKEL (eds.), Debtor-Creditor Handbook (11th ed. 2014, updated 2016). For a general discussion of Minnesota and North Dakota debtor exemptions, see LOWELL P. BOTTRELL, *Comfortable Beds, a Church Pew, a Cemetery Lot, One Hog, One Pig, One Sheep, One Cow, a Yolk of Oxen or a Horse, and Your Notary Seal: Some Thoughts About Exemptions,* 72 N. DAK. L. REV. 83 (1996) and KIP M. KALER, *Exemptions and Some Necessary Pigeon Holes,* 72 N. DAK. L. REV. 651 (1996).

190 MINN. STAT. § 550.37, subd. 1.

191 MINN. STAT. § 550.37, subd. 17.

192 *In re Seifert*, 544 B.R. 670, 672-73 (BANKR. D. MINN. 2016); 22 DUNNELL MINN. DIGEST, *Exemptions* § 1.00 (5th ed. 2006).

193 121, 124-25 (Minn. Ct. App. 1989).

193 *Marine Credit Union v. Detlefson-Delano*, 830 N.W.2d 859, 866 (Minn. 2013); *Benning v. Hessler,* 175 N.W. 682, 682-83 (Minn. 1920).

193 MINN. STAT. §§ 510.01, 510.07.

193 MINN. STAT. § 550.175.

193 MINN. STAT. § 550.175, subds. 3, 4.

193 MINN. STAT. §§ 510.08, 510.09, 550.175, subds. 3, 4.

193 For a more detailed analysis of how courts define "occupy," see *Denzer v. Prendergast,* 126 N.W.2d 440, 444 (Minn. 1964). See also, 24 DUNNELL MINN. DIGEST, *Homestead* § 2.09 (5th ed. 2017).

193 MINN. STAT. § 510.07; 24 DUNNELL MINN. DIGEST, *Homestead* §§ 2.10, 2.11 (5th ed. 2017).

193 *Lieberman Music Co. v. Hagen*, 404 N.W.2d 290, 292 (Minn. Ct. App. 1987).

193 MINN. STAT. § 510.07; *In re Holman*, 286 B.R. 882, 886 (BANKR. D. MINN. 2002); *Lieberman Music Co. v. Hagen*, 404 N.W.2d 290, 292 (Minn. Ct. App. 1987); *Muscala v. Wirtjes*, 310 N.W.2d 696, 698 (Minn. 1981).

193 MINN. STAT. § 510.07; *In re Holman*, 286 B.R. 882, 886 (BANKR. D. MINN. 2002), a court noted that "It is undisputed that she left the property a long time ago and did not file a notice of intention to preserve her homestead interest in the same. Accordingly, the Debtor is presumed to have abandoned the property as her homestead." See, as well, *Muscala v. Wirtjes,* 310 N.W.2d 696, 698 (Minn. 1981), in which the court rules that a homestead exemption ceased to exist when six months of nonoccupancy expired without the filing of a notice." If the debtor does not live in the homestead for

B. Homestead exemption

In general, creditor judgments cannot be used to take the debtor's homestead.[194] This includes a house owned and occupied by the debtor as a dwelling place, together with the land where it is located.[195] For most family farmers, incorporation of the farming business should not affect the right to use a homestead exemption.[196]

1. Waiving a Homestead Exemption

It is possible for a borrower to waive a homestead exemption – that is to give up the homestead exemption in advance. This waiver, however, must be clear, in writing, and explain the specific homestead exemption being waived.[197]

2. Homestead exemptions are confusing

The law concerning homestead exemptions can be especially confusing. This is true for several reasons.

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five years after filing a notice claiming the real estate as his or her homestead, the exemption is lost.

193 MINN. STAT. §§ 510.02, subd. 1, 510.05.

193 MINN. STAT. §§ 510.02, subd. 1, 510.05; *In re Kyllonen,* 264 B.R. 17 (BANKR. D. MINN. 2001).

193 The test for whether property is classified as agricultural for purposes of the homestead exemption revolves around whether it is urban or rural. This test is more fully explained in *In re Becker,* 215 B.R. 585, 586-87 (8th Cir. B.A.P. 8th Cir. 1998) (citing *National Bank v. Banholzer,* 71 N.W. 919 (Minn. 1897)).

193 MINN. STAT. § 510.02, subd. 2.

193 2013 Minn. Laws ch. 135, at. 2, sec. 8 (codified at MINN. STAT. § 510.02, subd. 1). Previous changes occurred in 1993 and 2007. See 1993 Minn. Laws ch. 79; 2007 Minn. Laws chs. 105, 106.

193 MINN. STAT. §§ 510.02, subd. 1, 510.05.

193 In *Baumann v. Chaska Bldg. Ctr., Inc.,* 621 N.W.2d 795, 799 (Minn. Ct. App. 2001), the Minnesota Court of Appeals concluded that "the phrase 'value of the homestead exemption' used in section 510.02 refers to the value of the debtor's equity in the property." And in *In re Bame,* 271 B.R. 354, 360-61 (BANKR. D. MINN. 2001), a federal bankruptcy court limited collection against a homestead to a non-farm debtor's equity above the statutory exemption limit, which, in 2001, was $200,000 for non-agricultural homesteads. Other references to the value of the property can be found at MINN. STAT. §§ 510.01, 550.175, subds. 3, 4(d). See also 24 DUNNELL MINN. DIGEST, *Homestead* § 2.13 (5th ed. 2017).

193 The first limit on the value of a homestead took effect in 1993, and for agricultural homesteads the limit was $500,000. See 1993 Minn. Laws ch. 79, § 2.*Moyer v. International State Bank,* 404 N.W.2d 274, 276-77 (Minn. 1987); *McPherson v. University Motors, Inc.,* 193 N.W.2d 616, 619 (Minn. 1972); 22 DUNNELL MINN. DIGEST, *Exemptions* § 1.00 (5th ed. 2006).

194 MINN. STAT. § 510.01; 22 DUNNELL MINN. DIGEST, *Exemptions* § 1.02(v) (5th ed. 2006). Proceeds from the sale of crops are likely not exempt.

195 MINN. STAT. § 510.01.

196 *Cargill, Inc. v. Hedge,* 375 N.W.2d 477 (Minn. 1985); *State Bank v. Euerle Farms, Inc.,* 441 N.W.2d 121, 124-25 (Minn. Ct. App. 1989).

197 *Marine Credit Union v. Detlefson-Delano*, 830 N.W.2d 859, 866 (Minn. 2013); *Benning v. Hessler,* 175 N.W. 682, 682-83 (Minn. 1920).

a. Homestead exemptions used for two purposes

Homestead exemptions can be used for two different purposes: either to prevent the sale of the homestead, or, if the real estate upon which a homestead is located is to be sold by the sheriff, to make sure that the homestead is sold separately from the rest of the property so that the homestead may later be redeemed separately by the debtor.

(1) Preventing the sheriff from selling the homestead

If properly claimed, the homestead exemption can be used to make sure that creditors never force the sheriff to execute on the debtor's homestead.[198] Used in this way, therefore, a part of the debtor's home property cannot be taken or sold.

(2) Separate sale and redemption rights

If the sheriff does execute on real estate that contains a homestead, and is preparing to sell the real estate at an auction, the debtor still may use a homestead exemption.[199] This exemption allows the debtor to designate that the homestead part of the property be sold separately at the auction—which will allow the debtor to redeem the homestead property separately.[200]

b. Different definitions and rules are used for each purpose

These dual purposes of the homestead exemption are confusing. In addition, the two purposes of homestead rights have different definitions of a homestead, and seem to require different steps to claim the homestead right.[201]

c. Farmers using the homestead exemption should be careful

The following sections explain some of the more confusing parts of the law. While courts have untangled some of this confusion, debtors need to be very careful in exercising their homestead exemption.

3. Defining the homestead — requirements that always apply

The following must always be true for the debtor to claim a homestead exemption for any purpose.

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198 MINN. STAT. §§ 510.01, 510.07.
199 MINN. STAT. § 550.175.
200 MINN. STAT. § 550.175, subds. 3, 4.
201 MINN. STAT. §§ 510.08, 510.09, 550.175, subds. 3, 4.

a. Debtor must live there and cannot abandon the property

For the property to qualify as a homestead, the debtor must live there and occupy the property as a home.[202]

If the debtor abandons the homestead, the exemption can be lost for that real estate.[203] Temporary absences from a homestead, however, do not mean the property has been abandoned.[204] Instead, for a homestead to have been abandoned a court must find that the debtor has not occupied the home for more than six straight months.[205]

A debtor may protect the homestead exemption—even if the debtor plans to leave the homestead for more than six straight months—but the debtor must file the following with the county recorder for the county in which the homestead is located: a notice that must be executed, witnessed, and acknowledged in the same way as a real estate deed that describes the real estate, and claims the real estate as the debtor's homestead.[206]

b. Value of no more than $975,000 — if used for agriculture

At present, in order to claim a homestead exemption, the value of a homestead may not be more than $1,050,000 if it is used primarily for agricultural purposes.[207] For all other homesteads, the value of the property may not be more than $420,000.[208] This Guide assumes that the homestead is used primarily for agricultural purposes.[209]

The dollar amount limits on the homestead exemption are subject to change

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202 For a more detailed analysis of how courts define "occupy," see *Denzer v. Prendergast,* 126 N.W.2d 440, 444 (Minn. 1964). See also, 24 DUNNELL MINN. DIGEST, *Homestead* § 2.09 (5th ed. 2017).

203 MINN. STAT. § 510.07; 24 DUNNELL MINN. DIGEST, *Homestead* §§ 2.10, 2.11 (5th ed. 2017).

204 *Lieberman Music Co. v. Hagen*, 404 N.W.2d 290, 292 (Minn. Ct. App. 1987).

205 MINN. STAT. § 510.07; *In re Holman*, 286 B.R. 882, 886 (BANKR. D. MINN. 2002); *Lieberman Music Co. v. Hagen*, 404 N.W.2d 290, 292 (Minn. Ct. App. 1987); *Muscala v. Wirtjes*, 310 N.W.2d 696, 698 (Minn. 1981).

206 MINN. STAT. § 510.07; *In re Holman*, 286 B.R. 882, 886 (BANKR. D. MINN. 2002), a court noted that "It is undisputed that she left the property a long time ago and did not file a notice of intention to preserve her homestead interest in the same. Accordingly, the Debtor is presumed to have abandoned the property as her homestead." See, as well, *Muscala v. Wirtjes,* 310 N.W.2d 696, 698 (Minn. 1981), in which the court rules that a homestead exemption ceased to exist when six months of nonoccupancy expired without the filing of a notice." If the debtor does not live in the homestead for five years after filing a notice claiming the real estate as his or her homestead, the exemption is lost.

207 MINN. STAT. §§ 510.02, subd. 1, 510.05.

208 MINN. STAT. §§ 510.02, subd. 1, 510.05; *In re Kyllonen,* 264 B.R. 17 (BANKR. D. MINN. 2001).

209 The test for whether property is classified as agricultural for purposes of the homestead exemption revolves around whether it is urban or rural. This test is more fully explained in *In re Becker,* 215 B.R. 585, 586-87 (8th Cir. B.A.P. 8th Cir. 1998) (citing *National Bank v. Banholzer,* 71 N.W. 919 (Minn. 1897)).

periodically.[210] As of the time this Guide was written, several questions remained about how it will operate.

(1) Value is equity value

If the land is agricultural, the homestead property may not have a value of more than $1,050,000.[211] Although the statute does not say so directly, the Minnesota Court of Appeals has ruled that the value cap is based on the debtor's equity in the homestead, not the homestead's fair market value.[212] For example, if the homestead's fair market value is $1,575,000 but the farmer has a mortgage debt on the homestead of $700,000, the farmer's equity is $875,000 and the whole homestead would be exempt.

(2) Is the $1,050,000 limitation retroactive?

A dollar limit on the homestead exemption has been in effect for a number of years. [213] It is not clear whether the limits, first established in 1993, apply to older debts and judgments. If the statute is not applied retroactively, debts incurred before then may not be subject to a dollar limit. In theory, a court analyzing the homestead exemption could apply the law that was in place at the time the debt was incurred, at the time the creditor got the judgment, or at the time the creditor tries to execute on the homestead.[214]

(3) Farmers with high-value homesteads should investigate

Farmers subject to a judgment and facing the possibility that their homestead property has a value of over $1,050,000 should consult with an attorney to find out whether, and how, the courts have resolved these issues.

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210 MINN. STAT. § 510.02, subd. 2.

211 MINN. STAT. §§ 510.02, subd. 1, 510.05.

212 In *Baumann v. Chaska Bldg. Ctr., Inc.,* 621 N.W.2d 795, 799 (Minn. Ct. App. 2001), the Minnesota Court of Appeals concluded that "the phrase 'value of the homestead exemption' used in section 510.02 refers to the value of the debtor's equity in the property." And in *In re Bame,* 271 B.R. 354, 360-61 (BANKR. D. MINN. 2001), a federal bankruptcy court limited collection against a homestead to a non-farm debtor's equity above the statutory exemption limit, which, in 2001, was $200,000 for non-agricultural homesteads. Other references to the value of the property can be found at MINN. STAT. §§ 510.01, 550.175, subds. 3, 4(d). See also 24 DUNNELL MINN. DIGEST, *Homestead* § 2.13 (5th ed. 2017).

213 The first limit on the value of a homestead took effect in 1993, and for agricultural homesteads the limit was $500,000. See 1993 Minn. Laws ch. 79, § 2.

214 A statute should not be applied retroactively unless "clearly and manifestly so intended by the legislature." MINN. STAT. § 645.21. Several cases concerning changes to homestead exemption laws, both in terms of the dollar limits and acreage limits, have applied changes retroactively. *In re Johnson,* 69 B.R. 988, 993-94 (BANKR. D. MINN. 1987) The homestead exemption, however, is designed to "secur[e] the home against the uncertainties and misfortunes of life even at the sacrifice of just demands" and should be construed liberally in favor of the debtor. *In re Haggerty,* 448 N.W.2d 363, 367 (Minn. 1989).

a. Proceeds from sale and insurance claims included in exemption

If the debtor sells a homestead, the proceeds are exempt from creditors for one year.[215] This gives the debtor time to reinvest the proceeds in another homestead. Similarly, the proceeds from an insurance claim for the homestead are exempt for one year.[216]

b. Rent and receipts

Rent and all other income taken from a homestead are exempt from creditor action. [217] Crops growing on the homestead may be exempt, although the proceeds from the sale of the crops may not be.[218]

4. No larger than 160 acres—sometimes a requirement

There may be a size limitation on a homestead exemption—depending on the type of homestead exemption claimed. If the debtor wants to make sure the homestead is not sold at the sheriff's sale, a homestead may be no more than 160 acres.[219] If the debtor wants to use the homestead designation to force the sheriff to sell the homestead separately, there is no acreage limit on the homestead, but the exemption dollar amount limits still apply.[220]

5. Claiming the homestead exemption

The law sets up a step-by-step process for the creditor and the courts to follow if the creditor wants to execute on property that includes a homestead. As with the definition of a homestead, the process of claiming a homestead exemption can be confusing.

a. Creditor must send notice

Before executing on the real estate, the creditor must send the debtor a notice setting out how the debtor can go about designating part of the property as a homestead.[221] The notice must explain that if the debtor properly claims the homestead—by sending notice to the creditor, the sheriff, and the county

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215 MINN. STAT. § 510.07. An exception to this rule applies for child support. If the debtor sells a homestead through a contract for deed, however, the exemption on proceeds in MINN. STAT. § 510.07 only applies to the payments the debtor received the first year. *In re Ehrich,* 110 B.R. 424, 427-29 (BANKR. D. MINN. 1990).

216 MINN. STAT. § 510.07.

217 *Denzer v. Prendergast*, 126 N.W.2d 440, 443 (1964).

218 *Schuchard v. St. Anthony & Dakota Elevator Co.*, 222 N.W. 292, 293 (Minn. 1928); *In re Friedrich,* 199 F. 193, 194 (D. Minn. 1912); *Sparrow v. Pond,* 52 N.W. 36, 37 (Minn. 1892); 22 DUNNELL MINN. DIGEST, *Exemptions* § 1.02(v) (5th ed. 2006); 21 DUNNELL MINN. DIGEST, *Executions* § 4.20 (6th ed. 2017).

219 MINN. STAT. § 510.02; *In re Estate of Riggle,* 654 N.W.2d 710, 716 (Minn. 2002).

220 MINN. STAT. §§ 510.02, subd. 1, 550.175, subds. 3-4.

221 MINN. STAT. § 550.175, subd. 1a.

recorder—the designated homestead will be sold separately from the rest of the property and may be redeemed separately.[222] This means that after the sheriff's sale, the debtor has the right to buy back the separated homestead from the highest bidder.

b. A proper homestead designation can keep the sheriff from selling it

If the debtor claims a homestead that that has a greater value than is allowed for a homestead, the sheriff may execute on the whole property.[223] The debtor can then deliver to the sheriff a homestead designation

c. Small homestead properties should not be subject to execution at all

The law is clear that a valid homestead designation is generally exempt from seizure or sale.[224]

d. Designating a homestead

In general, debtors must officially designate the homestead they want to claim as exempt. To do this, a debtor must serve a copy of the homestead designation on the executing creditor, the sheriff, and the county recorder at least ten business days before the sale is scheduled.[225]

(1) Debtor must estimate the value of the property

The debtor must include, along with the legal description of the homestead property, an estimate of the value of the property.[226] While it is not completely clear whether the debtor should estimate the value of all of the land or only the homestead, the law seems to require that the debtor estimate the value of the homestead only.[227]

(2) Designation cannot unreasonably affect the value of the rest of the property and must be contiguous

The homestead designation must be compact, must include the home, and must not unreasonably affect the value of the nonexempt part of the property.[228] The designation must also conform to local zoning laws.[229] The homestead exemption does not protect land that is noncontiguous with the

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222 MINN. STAT. § 550.175, subds. 1a, 2.
223 MINN. STAT. § 550.175, subd. 4.
224 MINN. STAT. §§ 510.01, 510.05, 510.08(a).
225 MINN. STAT. § 550.175, subd. 3.
226 MINN. STAT. § 550.175, subd. 3.
227 MINN. STAT. § 550.175, subd. 3.
228 MINN. STAT. § 550.175, subd. 3.
229 MINN. STAT. § 550.175, subd. 3.

land on which the home is located.[230] In other words, for a homestead consisting of two or more separate tracts of land to be exempt, the parcels must be contiguous, and situated so that they may be occupied and cultivated as one body of land.[231]

(3) Designation cannot cause significant injury to the creditor

In addition, the homestead designation may not unreasonably affect the value of the remaining property.[232] This could be a limitation for some debtors. For example, suppose that the whole property includes 165 acres. Once the homestead is taken out, the property available to the creditor may only be five acres. If the remaining five acres are relatively valueless, the creditor might try to challenge the homestead designation.[233]

e. Deadlines for designation

An especially confusing part of the law concerning a homestead is deadlines. Deadlines are mentioned in two different statutory sections that say two different things.

(1) Ten business days before the sale

When a creditor decides to execute on a debtor's real estate, the creditor must notify the debtor of the debtor's right to have the homestead auctioned and redeemed separately from any non-homestead property.[234] That notice says that the debtor must give a copy of the debtor's homestead designation to the creditor, the sheriff, and the county recorder at least ten business days before the sale.[235]

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[230] For example, in *Michels v. Kozitza*, 610 N.W.2d 368, 371-72 (Minn. Ct. App. 2000), a farmer-debtor and his brother co-owned a 40-acre parcel of land which they partitioned. The farmer-debtor received 20 acres that were not contiguous with the parcel that included the farmer-debtor's home. Because the court found the language of MINN. STAT. § 510.01 clear that property must be contiguous, the court held that the homestead exemption did not apply. In addition, see *Peoples' State Bank v. Stenzel (In re Stenzel),* 301 F.3d 945, 948 (8th Cir. 2002), and *In re Kyllonen,* 264 B.R. 17, 28-29 (BANKR. D. MINN. 2001).

[231] *Brixius v. Reimringer,* 112 N.W. 273, 273 (Minn. 1907).

[232] MINN. STAT. § 550.175, subd. 3-4.

[233] MINN. STAT. § 510.09 and § 550.175, subd. 3 states that a homestead designation must be compact so that it does not unreasonably affect the value of the remaining property. It is possible, therefore, that a creditor could use these statutes as a basis for challenging a homestead designation that leaves a remaining parcel of very little value. For additional context, see *Title Ins. Co. v. Agora Lease, Inc.,* 320 N.W. 2d 884 (Minn. 1982), in which the Minnesota Supreme Court addressed this issue in the context of an earlier version of the law, which only provided for area limits on homesteads, and not value limits.

[234] MINN. STAT. § 550.175, subds. 1a, 2.

[235] MINN. STAT. § 550.175, subds. 2, 3. If the creditor objects to the debtor's homestead designation, the creditor may bring a motion before the district court, and the court will determine the proper designation of the homestead. MINN. STAT. § 550.175, subd. 4.

(2) Twenty days after the notice of the levy

Another part of the statute says that if the homestead designation is not made within twenty days after the debtor gets notice of the levy, the sheriff will have the land surveyed and set the boundaries of the homestead designation.[236] This part of the statute seems to suggest, therefore, that if the debtor fails to designate a homestead within twenty days, the sheriff will designate one, and the homestead will still not be sold at the sheriff's sale.

(3) Following both statutes

There is no law that reconciles these two statutes. Therefore, a debtor should attempt to avoid violating either statute. To do so, a debtor that receives notice of an execution or a sheriff's levy and sale of the debtor's real estate should provide his or her homestead designation to the creditor, the sheriff, and the county recorder within twenty days of receiving the notice, or at least ten days before the date of the sale—whichever is earlier.

f. Creditor can object to designation

The creditor can object to either the homestead designation itself or the estimated value of the homestead.[237] If the creditor challenges the debtor's homestead exemption designation—by objecting to the debtor's right to the exemption, the designation of the homestead property, or by claiming that the valuation exceeds the allowable homestead exemption amount, the sheriff will not sell the homestead separately.[238] The creditor cannot force the sale of the whole property unless the court approves.[239]

If the creditor objects to the fair market value estimate of the homestead, the court must look at any appraisals submitted by the debtor and creditor, and it may also order an independent appraisal.[240]

g. The court's response

If the creditor objects to the debtor's homestead designation, the court has a role.

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236 MINN. STAT. § 510.09. The sheriff may also designate the homestead if the creditor objects to the debtor's designation. The debtor may set the starting point for the sheriff's designation. The cost of the sheriff's survey is added to the debt and paid out of the proceeds of the sale.

237 MINN. STAT. §§ 550.175, subds. 4(a)-(b), 510.9.

238 MINN. STAT. § 550.175, subd. 4(a). The sheriff likely needs to get the court's approval under MINN. STAT. § 550.175, subd. 4(b).

239 MINN. STAT. § 550.175, subd. 4.

240 MINN. STAT. § 550.175, subds. 4(b)-(c).

(1) The court can change the designation

If the creditor objects to the homestead designation, the court can either approve the debtor's designation, or have the property surveyed and appraised in order to determine its designation and value.[241] If the court rejects the debtor's designation, and instead makes the new designation, it must try to match the debtor's request as closely as possible while still meeting other legal requirements for a homestead.[242]

(2) The court can order the whole property sold together

The court will most likely order the whole property sold together if the court decides that either: (1) the value of the designated homestead is greater than the current exemption value limit; or (2) the property cannot be divided without material injury to the creditor.[243]

h. If the whole property is sold together by the sheriff

If the whole property is sold together, the debtor has a right to receive those proceeds that equal the current exemption value of the homestead. The sheriff will hold those proceeds for the debtor until the debtor vacates the property or the redemption period expires, whichever comes first.[244] The sheriff will not accept any bids unless they are over the maximum homestead exemption amount.[245]

6. Reminder—no homestead exemption for mortgaged property and certain liens

No homestead exemption is possible for mechanics' liens, tax liens, or mortgages on the homestead.[246]

C. Earnings exemptions

All earnings not subject to garnishment are exempt.[247] This earnings exemption may not be waived by the debtor.[248] As discussed earlier in this chapter, exempt wages that are

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[241] MINN. STAT. § 550.175, subd. 4(b), (f). The debtor may be charged for the costs of the survey and appraisal if the homestead was not properly designated.
[242] MINN. STAT. § 550.175, subds. 3, 4(b).
[243] MINN. STAT. §§ 550.175, subd. 4(d), 510.08(b).
[244] MINN. STAT. § 550.206.
[245] MINN. STAT. § 550.175, subd. 4(e).
[246] MINN. STAT. §§ 510.01, 510.05. Claims filed for medical assistance benefits and state hospital care are also not subject to the exemption. MINN. STAT. §§ 246.53, 256B.15.
[247] MINN. STAT. §§ 550.37, subd. 13, 571.922; 22 DUNNELL MINN DIGEST, *Exemptions* § 1.02(l) (5th ed. 2006).
[248] MINN. STAT. §§ 550.37, subd. 13, 571.926.

deposited in a bank account keep their exempt status for twenty days after deposit.[249] To trace earnings, the courts use the first-in, first-out accounting method.[250] First-in, first-out accounting is described earlier in this chapter.

D. General exemptions

Property covered by a general exemption may not be taken by creditors through attachment, garnishment, or sale by order of any court.[251]

1. How general exemptions work

There are a number of complicated rules for determining the availability and amount of a general exemption from creditor claims.

a. Debtor picks the property

The decision of which of the debtor's qualifying possessions are exempt in each category is the debtor's, not the creditor's.[252] For example, only one car can be exempt. If the debtor owns two cars and either could be exempt, the debtor gets to pick which car is exempt.

b. Individual ownership

Usually, to be exempt, property must be owned by an individual person and cannot be owned by a partnership or business.[253] The exception to this rule is farm equipment, which may be owned by a partnership of people that are related to one another.[254]

c. Waiving exemptions

Most exemptions discussed in this section can be waived by the debtor.[255] Exemptions for personal goods and earnings, however, may not be waived.[256] Farm machinery and motor vehicle exemptions may only be waived with a written statement. [257]

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249 MINN. STAT. § 550.37, subd. 13.
250 MINN. STAT. § 550.37, subd. 13.
251 MINN. STAT. § 550.37, subd. 1.
252 MINN. STAT. § 550.37, subd. 17; 22 DUNNELL MINN. DIGEST, *Exemptions* § 1.03 (5th ed. 2006).
253 MINN. STAT. § 550.37, subd. 18; 22 DUNNELL MINN. DIGEST, *Exemptions* § 1.02(0) (5th ed. 2006).
254 MINN. STAT. § 550.37, subd. 5; *In re Zimmel,* 185 B.R. 786, 789-90 (BANKR. D. MINN. 1995).
255 MINN. STAT. § 550.37, subd. 19; 22 DUNNELL MINN. DIGEST, *Exemptions* § 1.04 (5th ed. 2006).
256 MINN. STAT. § 550.37, subds. 4, 13, 19; 22 DUNNELL MINN. DIGEST, *Exemptions* § 1.05 (5th ed. 2006). Personal goods may not be waived except for a purchase money security interest. Earnings exemptions may not be waived.
257 MINN. STAT. § 550.37, subd. 19. *Moyer v. International State Bank,* 404 N.W.2d 274 (Minn. 1987); *Georgens v. Fed. Deposit Insurance Corp*, 406 N.W.2d 95, 98-99 (Minn. Ct. App. 1987).

d. When exempt money is deposited in a bank

Since several exemptions cover money or monetary benefits, such as insurance proceeds, earnings of a minor child, and employee benefit payments, an important question is what happens when the exempt funds are deposited in a bank or other financial institution. The first-in, first-out accounting method is used to determine the exemption status of funds in an account.[258] First-in, first-out accounting is described earlier in this chapter.

e. How the sheriff separates out exempt property

Several categories of exemptions include dollar limits that place a maximum value on the allowable exemption for that category.[259] Often the debtor has more of that type of property than the dollar limit allows. If the sheriff believes this is the case, he or she may levy upon all of that type of property and have it appraised by two appraisers.[260] If the appraisers agree that the property is worth more than the exemption allows, the debtor may select the specific property that he or she wishes to be exempt—up to the exemption dollar limit—and the sheriff will keep the rest.[261] If the property cannot be easily divided and it is worth more than the exemption limit, the sheriff will sell all of the property and pay the exemption amount to the debtor while retaining the remainder of the proceeds for the creditor.[262]

2. Types of general exemptions

For each exemption category that includes a dollar limit, the limits are based on the current fair market value of the property, not the replacement cost.[263] This may be especially important for property that has little fair market value but would be expensive to replace.

a. Farm equipment and assets

A farmer debtor may claim exemptions for farm equipment, machines, implements, and livestock used in farming, as well as the debtor's farm produce and standing crops.[264] Up to $13,000 in property can be claimed with this

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[258] MINN. STAT. § 550.37, subd. 20.
[259] MINN. STAT. § 550.41.
[260] MINN. STAT. § 550.41.
[261] MINN. STAT. § 550.41.
[262] MINN. STAT. § 550.41.
[263] MINN. STAT. § 550.37, subd. 21. Several exemption values change with inflation. MINN. STAT. § 550.37, subd. 4a(b). For levels set in 2018 (see https://mn.gov/commerce/industries/financial-institutions/interest-rates/dollar-amounts.jsp. The next published adjustment is scheduled for April 30, 2020, or sooner, to be effective July 1, 2020. The value for farm machinery does not change. MINN. STAT. § 550.37, subd. 4a(a).
[264] MINN. STAT. § 550.37, subds. 4a(a), 5; *In re Flitter,* 181 B.R. 938 (BANKR. D. MINN. 1995). For this exemption to apply, the debtor must be principally engaged in farming. *In re Zimmel,* 185 B.R. 786, 789 (BANKR. D. MINN. 1995).

exemption.[265] This amount will not change with inflation.[266] If the farm assets are owned in partnership within the farm family, they are still exempt for the individual debtors.[267]

If exempt farm equipment is combined with exempt business property, also known as tools of the trade, the total combined value may not be more than $13,000.

Exempt farm equipment and business property may not have a combined value of more than $13,000.[268] For example, if $5,000 worth of business property is exempt, only $8,000 in farm equipment may be claimed as exempt. This combined total maximum does not change with inflation.[269]

b. Business property: tools of trade

Tools, implements, machines, instruments, and furniture used for business, are known as tools of trade, and are exempt, as of 2018, up to $12,000.[270] This exemption limit for business property changes with inflation.[271]

Exempt farm equipment and business property may not have a combined value of more than $13,000.[272] For example, if $5,000 worth of business property is exempt, only $8,000 in farm equipment may be claimed as exempt. This combined total does not change with inflation.[273]

c. Clothes, food, utensils, a watch

All clothes, food, utensils, and one watch of the debtor's and debtor's family are exempt.[274] There is not limit on the value of these good.

d. Household possessions: furniture, appliances, televisions, etc.

Household furniture, household appliances, phonographs, radios, and televisions of the debtor and debtor's family are exempt up to $10,800 in

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265 MINN. STAT. § 550.37, subd. 5.
266 MINN. STAT. § 550.37, subd. 4a(a).
267 MINN. STAT. § 550.37, subd. 5; *In re Zimmel,* 185 B.R. 786, 795 (BANKR. D. MINN. 1995).
268 MINN. STAT. § 550.37, subds. 4a(a), 7.
269 MINN. STAT. § 550.37, subds. 4a(a), 7.
270 MINN. STAT. § 550.37, subds. 4a(a), 6. For levels set in 2018 see https://mn.gov/commerce/industries/financial-institutions/interest-rates/dollar-amounts.jsp. The next published adjustment is scheduled for April 30, 2020, or sooner, to be effective July 1, 2020.
271 MINN. STAT. § 550.37, subds. 4a(a), 6.
272 MINN. STAT. § 550.37, subds. 4a(a), 7.
273 MINN. STAT. § 550.37, subds. 4a(a), 7.
274 MINN. STAT. § 550.37, subd. 4(a). These exemptions may not be waived except by a purchase money security interest. MINN. STAT. § 550.37, subd. 4.

value.[275] This value changes with inflation.[276]

e. Mobile home

A mobile home, also called a manufactured home, is completely exempt if the debtor lives in it.[277]

f. Motor vehicle

A debtor may claim one motor vehicle as exempt from execution.[278] The vehicle may not have a value of more than $4,800, but if the vehicle is altered to accommodate someone who is disabled, the value limit is higher.[279] The value of this exemption changes with inflation.[280]

The value of the motor vehicle exemption is determined by the debtor's equity in the vehicle.[281] For example, a debtor could exempt a $5,000 car if he or she owes $1,400 against it, because the debtor only has equity of $3,600 in the car.

g. Insurance benefits

Certain levels of insurance proceeds are exempt from creditor action.[282]

(1) Life insurance

For a debtor's surviving spouse or child, life insurance proceeds are exempt up to $48,000.[283] The $48,000 exemption is increased by $12,000 for each

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275 MINN. STAT. § 550.37, subds. 4(b), 4a(a). For levels set in 2018 see https://mn.gov/commerce/industries/financial-institutions/interest-rates/dollar-amounts.jsp. The next published adjustment is scheduled for April 30, 2020, or sooner, to be effective July 1, 2020.

276 MINN. STAT. § 550.37, subd. 4a(a).

277 MINN. STAT. § 550.37, subd. 12. A mobile home is defined at MINN. STAT. §§ 168.002, subd. 16, . 327.31, subd. 6.

278 MINN. STAT. § 550.37, subd. 12a.

279 MINN. STAT. §§ 550.37, subd. 12a. For levels set in 2018 see https://mn.gov/commerce/industries/financial-institutions/interest-rates/dollar-amounts.jsp. The next published adjustment is scheduled for April 30, 2020, or sooner, to be effective July 1, 2020. If modified for disability, the amount of the exemption is at present $48,000. To qualify for the modification exemption, it must have cost at least $3600 to modify the vehicle. Both of these amounts change with inflation.

280 MINN. STAT. § 550.37, subds. 4a(a).

281 The relevant statute is MINN. STAT. § 550.37, subds. 12a, 21. In *In re Setley,* 11 B.R. 106, 107 (BANKR. D. MINN. 1981), the federal bankruptcy court held: "The debtor's only value in the automobile is her equity. The value of the automobile is only the extent by which the secured interest is exceeded by the fair market value. The debtor has no value in collateral that is secured. That value belongs to the creditor holding the security interest. This Court concludes that MINN. STAT. § 550.37 subd. 12a applies to the equity of the debtor in the automobile and that the Minnesota Legislature intended value to mean equity under that section."

282 MINN. STAT. § 550.37, subd. 10; 22 DUNNELL MINN. DIGEST, *Exemptions* § 1.02(h) (5th ed. 2006).

283 MINN. STAT. § 550.37, subd. 10. For levels set in 2018 see

dependent of the surviving spouse or child.[284] This money remains exempt when deposited in a bank.[285] These values increase with inflation.[286]

(2) Accident or disability insurance

The proceeds from any accident or disability insurance policy are exempt for the beneficiary.[287]

h. Public assistance

All government relief based on need, and the earnings or salary of someone who receives government relief based on need, are exempt.[288]

i. Earnings of a minor child

The earnings of a debtor's minor child, and any child support paid to the debtor, are exempt.[289] Money from this exemption remains exempt when deposited in a bank.[290]

j. Employee benefits

The debtor's rights to future payments under a pension, individual retirement account, or similar plan or contract on account of illness, disability, or length

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https://mn.gov/commerce/industries/financial-institutions/interest-rates/dollar-amounts.jsp. The next published adjustment is scheduled for April 30, 2020, or sooner, to be effective July 1, 2020.

284 MINN. STAT. § 550.37, subds. 10. For levels set in 2018 see https://mn.gov/commerce/industries/financial-institutions/interest-rates/dollar-amounts.jsp. The next published adjustment is scheduled for April 30, 2020, or sooner, to be effective July 1, 2020.

285 MINN. STAT. § 550.30, subd. 20. The accrued value of interest under or loan value of an unmatured life insurance policy is also exempt up to $9,600. MINN. STAT. § 550.37, subds. 23. For levels set in 2018 see https://mn.gov/commerce/industries/financial-institutions/interest-rates/dollar-amounts.jsp. The next published adjustment is scheduled for April 30, 2020, or sooner, to be effective July 1, 2020. MINN. STAT. § 550.37, subds. 4a(a), 23.

286 MINN. STAT. § 500.37, subd. 4a(a).

287 MINN. STAT. § 550.37, subd. 22. This exemption also applies to any proceeds from an accident or disability clause in a life insurance policy. MINN. STAT. § 550.39.

288 MINN. STAT. § 550.37, subd. 14; *In re Tomczyk,* Bky. No. 02-55534, 295 B.R. 894, 895-96 (BANKR. D. MINN. Apr. 2, 2003) (unpublished); *Burns v. Einess*, Nos. A11-448, A11-707, 2011 Minn. App. Unpub. LEXIS 1013, at *12 (Nov. 21, 2011).

289 MINN. STAT. § 550.37, subd. 15.

290 MINN. STAT. § 550.37, subd. 20.

of service are exempt.[291] The maximum value of this exemption is $72,000.[292] Money from this exemption remains exempt when deposited in a bank or other financial institution.[293] This value increases with inflation.[294]

k. Veterans' benefits

All veterans' benefits the debtor receives—either from the State of Minnesota or the United States—are exempt for one year.[295]

l. Other specific exemptions

A family Bible, library, musical instruments, a burial plot, and a seat or pew in a house of worship are exempt.[296]

Money that a debtor receives from a claim of damage or destruction to exempt property is also exempt.[297]

2. Proceeds from sale of exempt property generally not exempt

If exempt property is voluntarily sold for money, the proceeds are not exempt—except for the sale of a homestead.[298]

E. Garnishment exemptions

In addition to the general exemptions listed above, certain property is specifically exempt from garnishment from a third party.[299]

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[291] MINN. STAT. § 550.37, subd. 24(a). The United States Bankruptcy Appellate Panel for the Eighth Circuit held that a debtor's interest in his former wife's retirement account was not exempt under MINN. STAT. § 550.37, subd. 24, because he obtained an interest in those funds through his divorce settlement and not through his own employment. The court also found that even though the retirement account was funded through the family farming operation instead of a separate employer, it made no difference. *In re Anderson,* 269 B.R. 27 (B.A.P. 8th Cir. 2001) (citing *Deretich v. City of St. Francis,* 128 F.3d 1209 (8th Cir. 1997)).

[292] MINN. STAT. § 550.37, subd. 24(a). For levels set in 2018 see https://mn.gov/commerce/industries/financial-institutions/interest-rates/dollar-amounts.jsp. The next published adjustment is scheduled for April 30, 2020, or sooner, to be effective July 1, 2020. MINN. STAT. § 550.37, subds. 4a(a).

[293] MINN. STAT. § 550.37, subd. 20.

[294] MINN. STAT. § 550.37, subd. 4a(a).

[295] MINN. STAT. § 550.38.

[296] MINN. STAT. § 550.37, subds. 2, 3. MINN. STAT. § 354A.11.

[297] MINN. STAT. § 550.37, subds. 9, 20. The money from this exemption remains exempt if deposited in a bank or other financial institution.

[298] MINN. STAT. § 550.175, subd. 4.

[299] MINN. STAT. § 571.73, subd. 4.

1. Contingent debts

If, at the time of the garnishment summons, a debtor is owed any money, property, or other debt that is contingent—meaning not absolutely due—that money, property, or other debt is exempt from garnishment.[300]

2. Judgments in favor of the debtor and against the garnishee

If a judgment is entered in favor of the debtor, and against the garnishee, that judgment is exempt from garnishment if the garnishee's property is liable on an execution levy resulting from the judgment.[301]

3. Negotiable instruments

Any debt owed by the garnishee to the debtor, for which a negotiable instrument has been issued or endorsed by the garnishee, is exempt from garnishment.[302] In this context, a "negotiable instrument" would be an unconditional promise or order by the garnishee to pay a fixed amount of money (with or without interest) to the debtor, that is payable either upon demand of the debtor, or at a definite time. [303]

4. Debts with a value of less than $10

Any money, property, or other debts due to the debtor that have a cumulative value of less than $10 are exempt from garnishment.

F. Failing to claim an exemption

A failure to claim a right to an exemption at the time of a levy does not prevent the debtor from claiming the right later, as long as the debtor claims the exemption before the sheriff's sale and as long as no one is adversely harmed by the claim.[304]

G. Converting nonexempt assets into exempt assets

Debtors faced with a money judgment or other creditor problems may be tempted to sell nonexempt assets and invest the proceeds in property that would be exempt. Many such transactions can be perfectly legal. Some such transfers, however, can be illegal, especially if they are intended to hinder, delay, or defraud a creditor, or if the assets are

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[300] MINN. STAT. § 571.73, subd. 4(1). In determining whether a contingency exists, Minnesota courts determine whether there exists any uncertainty as to the garnishee's liability to the debtor, such that the garnishee's obligation to the debtor may never actually come due. *Aratex Servs. v. Blue Horse*, 497 N.W.2d 283, 285 (Minn. Ct. App. 1993) (citing *S. T. McKnight Co. v. Tomkinson*, 296 N.W. 569, 570 (Minn. 1941)).

[301] MINN. STAT. § 571.73, subd. 4(2).

[302] MINN. STAT. § 571.73, subd. 4(3).

[303] MINN. STAT. § 336.3-104(a).

[304] *McAbe v. Thompson,* 6 N.W. 479, 480 (Minn. 1880); 22 DUNNELL MINN. DIGEST, *Exemptions* § 1.02(zz) (5th ed. 2006).

not sold for a fair price that reflects their value."[305] Unfortunately, the difference between what is legal and what is illegal can be tricky. It is extremely important, therefore, to get qualified legal advice before converting nonexempt assets into exempt assets.

[305] *Kangas v. Robie,* 264 F. 92, 93-94 (8th Cir. 1920); *In re Curry,* 160 B.R. 813, 817-818 (BANKR. D. MINN. 1993); *In re Tveten,* 402 N.W.2d 551, 555-56 (Minn. 1987). In Minnesota, the question of whether the exchange of nonexempt property for exempt property defrauds the creditor is governed by state statute. See MINN. STAT. §§ 513.41 to 513.41.51.

Chapter Six

Lease Agreements

I. Introduction

As the number of farmers who rent land, equipment, and livestock grows, leases play an increasing role in agriculture. This chapter reviews both real estate leases and equipment and livestock leases.[1]

In every lease there are at least two parties: the lessor and the lessee. The lessor owns the property, and the lessee rents the property from the lessor. These definitions apply to both real estate leases and leases of goods.

Basic lease terms: lessor and lessee

The **lessor** owns the property.

The **lessee** rents the property from the lessor.

A. Putting leases in writing is usually a good idea

It is almost always a good idea to put a lease in writing. Many farmers have used oral lease agreements for years without problems. These leases can be perfectly legal and, in the right situation, may be the best way for farmers to rent property. As with other types of agreements, however, putting a lease in writing helps to prevent confusion and ensure that the agreement will be legally enforceable.

1. Written leases help eliminate confusion

Usually the problem with an oral lease is not that one person tries to get the best of the other in an unfair way. More common are honest misunderstandings and confusion.

Written leases help to prevent problems by laying out exactly what is expected from the lessor and lessee. While this may be especially important if the parties do not know each other well, it also usually makes sense for friends and family members. Although the risk of a misunderstanding may be small in any given year, the cost of just one

[1] A source of information on lease agreement legal issues is PHILLIP L. KUNKEL ET AL., FARM LEASES (2015), https://www.extension.umn.edu/agriculture/business/taxation/farm-legal-series/farm-leases/docs/farm-leases.pdf.

problem could be very large.

2. Written agreements are needed to make some leases legal

Some leases are legally unenforceable if not in writing.

a. *Real estate leases for more than one year must be in writing*

As discussed in Chapter Two of this Guide, under Minnesota's version of the statute of frauds, a real estate lease for more than one year must be in writing.[2] If not in writing, the lease of land for more than one year is legally void.[3] A tenancy from year to year—which is defined below—may be enforceable if made orally.[4]

(1) "Year" means twelve months

The law defines a year as a calendar year.[5] This means that if the lease covers one crop year but the crop year covers more than twelve months, the law considers the lease to cover more than one year. This means that the lease should be covered by the statute of frauds and must be in writing.

(2) Partial performance exception

An unwritten lease of land for more than one year might be enforceable if either the landlord or tenant at least partially fulfills the requirements of the lease.[6] The partial performance exception may apply, for example, if the tenant takes possession of the land and makes improvements on it, such as doing significant work in the field, especially if the landlord knew about the work but did not stop it.[7] Courts are reluctant to use the partial performance exception, so tenants should never plan on using it as a way of preserving a lease.[8] If a tenant does have an oral lease of more than a year and the landlord refuses to meet the terms of the oral lease, the courts might enforce the lease if they are convinced that it would be especially unjust and unfair to void the lease.[9]

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2 MINN. STAT. § 513.05; *Bruder v. Wolpert,* 227 N.W. 46, 47 (Minn. 1929).

3 MINN. STAT. §§ 513.04, 513.05; 30 DUNNELL MINN. DIGEST, LANDLORD AND TENANT §§ 2.02(a), 2.08 (5th ed. 2009), 44 DUNNELL MINN. DIGEST, STATUTE OF FRAUDS §§ 2.02(f)-(h), 2.05 (5th ed. 2009); *Bergstrom v. Sambo's Rests., Inc.,* 687 F.2d 1250 (8th Cir. 1982); *Hoppman v. Persha,* 248 N.W. 281 (Minn. 1933); *Millis v. Ellis,* 122 N.W. 1119 (Minn. 1909); *Alexander v. Holmberg,* 410 N.W.2d 900 (Minn. Ct. App. 1987).

4 *Larson v. Archer-Daniels-Midland Co.,* 32 N.W.2d 649, 653-54 (Minn. 1948).

5 30 DUNNELL MINN. DIGEST, LANDLORD AND TENANT § 2.02(a) (5th ed. 2009).

6 44 DUNNELL MINN. DIGEST, STATUTE OF FRAUDS §§ 4.02(b), 4.03(c) (5th ed. 2009); *Atwood v. Faye,* 273 N.W. 85 (Minn. 1937); *Biddle v. Whitmore,* 158 N.W. 808 (Minn. 1916); *In re Guardianship of Huesman,* 354 N.W.2d 860 (Minn. Ct. App. 1984); *Nelson v. Smith,* 349 N.W.2d 849, 852-53 (Minn. Ct. App. 1984).

7 *Atwood v. Faye,* 273 N.W. 85 (Minn. 1937); *Biddle v. Whitmore,* 158 N.W. 808 (Minn. 1916).

8 Courts, however, do apply the partial performance exception to the statute of frauds more liberally to leases than to real estate purchase agreements. *Biddle v. Whitmore,* 158 N.W. 808 (Minn. 1916).

9 *Dale v. Fillenworth,* 162 N.W.2d 234 (Minn. 1968); *Nelson v. Smith,* 349 N.W.2d 849, 852-53 (Minn. Ct. App. 1984).

b. Leases for goods with total payments of $1,000 or more must be in writing

As discussed in Chapter Two, an agreement to lease goods with total payments of $1,000 or more must be in writing to be legally enforceable.[10]

(1) What Payments are counted

The value of the lease is the total of all payments to be made under the lease contract. Payments for options to renew the lease or buy the leased goods are not counted.[11]

(2) Exceptions to the writing requirement

A lease of goods with payments of more than $1,000 does not need to be in writing to be enforceable if one of the following two exceptions applies.[12]

(a) The goods are accepted

If the leased goods are received and accepted by the lessee, the lessee cannot then claim the lease is invalid because it is not in writing.[13]

(b) Admitting the contract existed in court

If either the lessor or lessee admits in legal documents or in court that a lease was made, they cannot later claim that the lease is unenforceable because it is not in writing.[14]

c. What must be included in the written lease: formal contract not always required

When a written lease is required by law, only basic information is needed and no special words are required.

(1) Minimum requirements when a written lease of land is required

To satisfy the requirements when a written lease of land is required by law there must be a written contract or some other note or other memorandum that creates evidence of the lease.[15] The document should explain that the

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10 MINN. STAT. § 336.2A-201.

11 MINN. STAT. § 336.2A-201(1)(a).

12 MINN. STAT. §§ 336.2A-201(4)(a)-(c). In addition, if the goods were specially manufactured for the lessee and are not suitable for lease or sale to others in the ordinary course of the lessor's business, the lease can be enforceable even if it is not in writing.

13 MINN. STAT. § 336.2A-201(4)(c).

14 MINN. STAT. § 336.2A-201(4)(b).

15 MINN. STAT. §§ 513.05, 513.04; *Bergstrom v. Sambo's Rests., Inc.*, 687 F.2d 1250 (8th Cir. 1982); 30 DUNNELL MINN. DIGEST, LANDLORD AND TENANT §§ 2.00(a)-(c), 2.02(a), 2.03 (5th ed. 2009); 44 DUNNELL MINN. DIGEST, STATUTE OF FRAUDS §§ 2.02(f), 3.00, 3.01(a) (5th ed. 2009).

land is being rented, name the landlord and tenant, and explain that rent or some other benefit is being paid.[16] The lease needs to have the landlord's signature but does not necessarily need the signature of the tenant, especially if the tenant acts in ways to show that he or she agrees to the lease or if the tenant accepts possession of the written lease.[17]

(2) Minimum requirements when a written lease of goods is required

If a lease of goods must be in writing, it does not need to be extensive or detailed. Besides explaining that a lease contract has been made, to be enforceable the lease must be signed, must state the length of the lease, and must contain a reasonable description of the goods.[18]

Technically, a lease for goods does not need to have the signatures of both parties. It does need to be signed by the party against whom enforcement of the lease is sought.[19] For example, suppose a farmer and an equipment dealer agree to a tractor lease. If the farmer wants to force the equipment dealer to meet the terms of the lease, a court will only be concerned with whether the equipment dealer signed the lease. On the other hand, if the dealer is trying to force the farmer to carry out the lease, it is the farmer who must have signed the lease.

d. If the lease is not in writing — not legally enforceable

If a lease is required to be in writing but it is not, the lease is technically void. If there is any problem with the lease, the lessor and lessee cannot go to court to have the agreement enforced. For example, if a landlord decides to back out of an oral land lease before the lease term actually begins in order to accept an offer of higher rent, the tenant likely would not have any legal recourse.

(1) Sometimes, no practical effect

Often, the fact that a lease is legally unenforceable has no practical effect. If the lessor and lessee both keep the agreement and there are no misunderstandings about the specifics of the agreement, a technically void lease can be carried out without any problem.

(2) If a tenant takes possession of land under an oral lease — possible tenancy at will

A tenant who takes possession of land under an unenforceable oral lease may

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16 MINN. STAT. § 513.05 (2016); 44 DUNNELL MINN. DIGEST, STATUTE OF FRAUDS § 3.01(a) (5th ed. 2009); *Greer v. Kooiker*, 253 N.W.2d 133 (Minn.1977).

17 MINN. STAT. § 513.05.

18 MINN. STAT. §§ 336.2A-201(2), 336.2A-204; 44 DUNNELL MINN. DIGEST, STATUTE OF FRAUDS § 3.01(d) (5th ed. 2009). If the court determines that the parties intended to enter into a lease, some terms can be left open or can be indefinite and the lease will still be valid. MINN. STAT. § 336.2A-204.

19 MINN. STAT. § 336A.2A-201(1)(b).

become what is technically known as a "tenant at will," which is discussed below.[20] If this happens, the tenant must pay rent but may be forced to leave the land after a short time.[21] The landlord may terminate a tenancy at will by giving notice to the tenant.

The time between the notice and the termination must be at least as long as the interval between rental payments, or three months, regardless of which is less.[22] As a result, while the unwritten lease will not control how long the tenant may remain on the land, it does control the amount of rent charged.[23]

3. Canceling or modifying written agreements

A farmer should never assume that an oral change to a written lease or an oral cancellation is valid. It is always best to get the change in writing.

In some cases, oral changes in a lease might be legally enforceable—for example, if both parties act on the modification—but the law makes this difficult.[24] A final written lease typically cannot be changed by an oral agreement made at the same time the written contract is signed.[25] For example, if a landlord and tenant sign a lease that calls for a rent of $100 per acre but orally agree at the time they sign the lease that the rent will really only be $90 per acre, the oral change is probably legally void.

If the lessor and lessee orally agree to change the contract sometime after the written lease is signed and then both obviously accept the new lease terms, there is a greater chance that the change might be enforceable.[26] In such cases, there would generally need to be strong evidence showing that both the lessor and lessee agreed to change the lease; otherwise, an oral change to a written lease is almost always void. For example, if the landlord and tenant orally agree to change the terms of the contract and the landlord knows that the tenant is acting on the changes but does not object, the landlord generally cannot later claim that he or she is not bound by the oral modification of the lease.[27]

B. Negotiating a lease

Farmers can negotiate with lessors to get the best possible deal in agreement. Commercial

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20 MINN. STAT. § 504B.001(13).

21 *Fisher v. Heller,* 207 N.W. 498 (Minn. 1926); *Fisher v. Heller,* 219 N.W. 79 (Minn. 1928); 30 DUNNELL MINN. DIGEST, LANDLORD AND TENANT § 4.01(h) (5th ed. 2009); 44 DUNNELL MINN. DIGEST, STATUTE OF FRAUDS § 2.02(i) (5th ed. 2009).

22 MINN. STAT. § 504B.135(a).

23 30 DUNNELL MINN. DIGEST, LANDLORD AND TENANT § 4.01(h) (5th ed. 2009).

24 MINN. STAT. § 336.2A-208; 44 DUNNELL MINN. DIGEST, STATUTE OF FRAUDS § 2.05 (5th ed. 2009). The courts may conclude, however, that the ongoing negotiations and typical transactions between the two parties and other evidence may be used to interpret a written lease.

25 30 DUNNELL MINN. DIGEST, LANDLORD AND TENANT §§ 2.08, 3.17 (5th ed. 2009); MINN. STAT. § 336.2A-208.

26 *Nord v. Herreid,* 305 N.W.2d 337 (Minn. 1981).

27 *Mitchell v. Rende,* 30 N.W.2d 27 (Minn. 1947); *In re Guardianship of Huesman,* 354 N.W.2d 860 (Minn. Ct. App. 1984).

lessors typically have their own standard lease forms, and many landlords now use photocopied or downloaded form leases. Lessees do not have to accept the standard language of these agreements. Like all other printed contracts changed in writing on the lease itself, the changes are binding if both the lessor and lessee agree.

II. Real estate leases

Nearly half of all Minnesota farmland is rented.[28] This section discusses the law concerning real estate leases, especially leases of farmland.

A. Lease terms

In addition to the minimum terms needed for a written land lease of more than one year to be enforceable, most leases address other important issues.

1. Description of the land

Disputes sometimes arise over what land is actually covered by a lease. Leases should be clear about whether they cover buildings, nontillable land, and acreage enrolled in state or federal farm programs or conservation programs. Leases should also specify who is responsible for insurance coverage, including crop insurance, and who is entitled to the proceeds in case of loss. If the number of acres is included in the lease, the lease should explain whether or not the acreage is for tillable acres, since tillable acres can change from year to year depending on the weather.

2. Rental payments

The rent for a farm lease can be figured in any number of ways. The two most common are cash leases and crop share leases.

a. Cash lease

In a cash lease, the tenant makes a set payment in cash in exchange for use of the land.

b. *Crop share Lease*

In the usual crop share lease, the landlord supplies some of the equipment and some of the inputs for the crops planted on the leased land. The landlord gets a share of the crops as rent. The landlord's rent share usually ranges from one-third to one-half of crop value, depending on local custom and on the contributions of the tenant and landlord.

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[28] There are roughly 26 million acres of land in farms in Minnesota, and about 11.5 million acres are rented. CENSUS OF AGRICULTURE, STATE DATA, MINNESOTA, tbl. 70, at 220 (2012), https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Minnesota/st27_1_070_070.pdf.

c. Mixed lease

Farm leases sometimes require a minimum cash payment as well as a crop share interest.

3. Farming practices

Farm leases often specify the farming practices that the tenant must or must not use on the leased land. If the lease does not require specific practices, tenants are generally free to farm in ways that are commonly accepted in the community. Tenants do not need to leave the leased land in exactly the same condition they found it unless the lease requires so.[29]

a. Tenant prohibited from damaging the property

A tenant cannot commit "waste."[30] This is true whether or not waste is mentioned in the lease. In general, this means that the tenant must not allow the real estate to be permanently or severely damaged. For example, the tenant may not remove valuable topsoil from the property.

b. Conservation practices

Disputes over conservation practices can create problems in a farm lease.[31] If the landlord wants certain crops either to be grown or avoided, the lease should say so since the type of crop planted may affect eligibility for certain programs. The same is true if the landlord wants some land to remain uncultivated. Landlords and tenants also need to be clear between themselves about required conservation compliance practices.

4. Farm residences

Many farm leases include a house that the tenant will use as a home. Landlords of residential buildings have significant legal duties.[32] For example, landlords must keep the premises in reasonable repair and meet health and safety laws of the state and local governments, including maintenance of water supplies and sewage disposal.[33] The landlord may not force the tenant to be responsible for the upkeep and maintenance on the house unless the tenant agrees to do so in writing and the tenant gets some money

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29 A tenant who installed drainage tile without prior written consent of the landlord, as required in the lease, was in breach of the farm lease. *Skoberg v. Huisman*, No. C9-01-1131, 2002 WL 417185 (Minn. Ct. App. Mar. 19, 2002) (unpublished).

30 MINN. STAT. § 561.17; 49 DUNNELL MINN. DIGEST, WASTE (5th ed. 2009).

31 Eligibility for federal farm programs can be affected by tenant practices. See, for example, 7 C.F.R. § 12.9 (2016).

32 MINN. STAT. §§ 504B.145, 504B.161(1)-(2), 504B.178; 30 DUNNELL MINN. DIGEST, LANDLORD AND TENANT § 3.12 (5th ed. 2009). For a general overview of residential landlord-tenant issues see, Lawrence R. McDonough, *Public Interest Law: Improving Access to Justice: Wait a Minute! Residential Eviction Defense Is Much More than "Did You Pay the Rent?",* 28 WM. MITCHELL L. REV. 65 (2001).

33 MINN. STAT. § 504B.161.

for the extra work, such as reduced rent.[34] Landlords must pay interest on any security deposits for residential property, and leases for residential property may not provide for automatic lease renewal without notice to the tenant.[35]

A landlord may enter residential leased property only for a reasonable business purpose and after making a good faith effort at giving the tenant prior notice. [36]

5. Default

Most written leases define what is considered a default under the lease.

B. Lease renewal

One of the most confusing aspects of farm leases is renewal. Renewals are largely controlled by the terms of the lease but in some cases are determined by how the landlord and tenant act once the lease expires.

1. Renewals may be controlled or limited in the lease itself

Renewals may be controlled or limited by the terms of the lease.[37] It is possible, for example, for the lease to be renewable at the option of the landlord or to depend on some other specified event.

2. Tenancy for years and tenancy at will

Almost all farm leases will be either a tenancy for years or a tenancy at will. The difference between the two is important for understanding when and how leases are renewed. A tenancy for years ends automatically at the end of the lease's term. No notice is required. A tenancy at will, on the other hand, continues until it has been terminated by proper notice from one party to the other.

Tenancy for years: A tenancy for a fixed period, such as two years.

Tenancy at will: A tenancy with no fixed term.

a. Tenancy for years

A tenancy for years is a tenancy for a fixed period.[38] For example, if a tenant and

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34 MINN. STAT. § 504B.161(2).

35 MINN. STAT. §§ 504B.145, 504B.178.

36 MINN. STAT. § 504B.211; 30 DUNNELL MINN. DIGEST, LANDLORD AND TENANT § 3.00 (5th ed. 2009); *Cardinal Estates v. City of Morris,* CX-02-1505, (unpublished) 2003 Minn. App. LEXIS 435*, 2003 WL 1875487 (Minn. Ct. App. Apr. 15, 2003).

37 30 DUNNELL MINN. DIGEST, LANDLORD AND TENANT § 2.09 (5th ed. 2009); *Knight v. McGinity*, 868 N.W.2d 298 (Minn. Ct. App. 2015).

38 30 DUNNELL MINN. DIGEST, LANDLORD AND TENANT § 1.09(c) (5th ed. 2009).

landlord agree to a lease for two years, this is a tenancy for years. Technically, a tenancy for years does not have to be set in years; it can be for a certain number of months, or for a year and a half, and so forth. For example, a lease for five months, if the term is set in the agreement, is still a "tenancy for years."

(1) Tenancy for years does not automatically renew itself

A tenancy for years does not automatically renew itself.[39] In other words, if a tenancy for years is for one year, the tenant cannot assume that the lease will be renewed for another year.

(2) No notice of nonrenewal required

A tenancy for years ends automatically at the end of the term without any requirement of notice.[40] A landlord, therefore, is not required to give the tenant notice that the lease will not be renewed, and, likewise, a tenant is not required to give notice to a landlord.

b. Tenancy at will

Two main features identify a tenancy at will: the lack of a fixed term, and the right of either the landlord or the tenant to terminate the lease at any time with proper notice. These leases are also sometimes called month-to-month tenancies or year-to-year tenancies.

(1) No fixed term

A tenancy at will does not have a fixed term or time limit.[41] For example, if the agreement between a landlord and tenant sets out the rent and other aspects of the lease but does not set out the total length of the lease, it is a tenancy at will.

(2) Either party may terminate the lease

In a tenancy at will, either the landlord or the tenant has the right to terminate the agreement if proper notice is given.[42]

(3) Three-month notice required for termination of most farm tenancies at will

Most farm tenancies at will are from year to year. If either the landlord or the tenant wants to terminate a tenancy at will, they must generally give notice

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39 *Crain v. Baumgartner,* 256 N.W. 671 (Minn. 1934).

40 30 DUNNELL MINN. DIGEST, LANDLORD AND TENANT § 5.01(c) (5th ed. 2009); *Engels v. Mitchell,* 14 N.W 510 (Minn. 1883).

41 MINN. STAT. § 504B.001(13); 30 DUNNELL MINN. DIGEST, LANDLORD AND TENANT § 1.09(d) (5th ed. 2009).

42 30 DUNNELL MINN. DIGEST, LANDLORD AND TENANT §§ 1.09(d), 5.01(d) (5th ed. 2009).

three months before the desired termination date.[43] If the tenant is required to make rental payments monthly, termination of the tenancy at will requires only a one-month notice.[44] If the tenant refuses to pay rent or neglects the property, the landlord may terminate a tenancy at will lease with fourteen days' written notice.[45]

A landlord waives his or her right to terminate a tenancy at will after sending a termination notice if the landlord and tenant agree that the tenant can stay in spite of the notice or if the landlord otherwise shows that the right to terminate is waived—for example, by accepting rent.[46]

c. *Creating a tenancy for years or a tenancy at will*

Tenancies are either created expressly or by implication.

(1) Tenancy created expressly

A tenancy is created expressly when the landlord and tenant agree to it in direct, explicit terms. For example, if the landlord and tenant agree to a written one-year lease, they have expressly created a tenancy for years. Or, if the landlord and tenant agree that the tenant will rent the land for as long as it is agreeable to both parties, they have expressly created a tenancy at will. Landlords and tenants can expressly create a tenancy either with a written lease or with a verbal lease. As long as they make an explicit agreement, they have created the tenancy expressly.

(2) Tenancy created by implication

A legally binding tenancy can also be created by implication if the landlord and tenant do not create one expressly. For example, if the landlord and tenant agree to a lease but the agreement does not include a length of time to be covered by the lease, the law holds that a tenancy at will has been created by implication.[47] If the courts are convinced that a tenancy at will was implied in the agreement between the landlord and tenant, it will be legally enforced as a tenancy at will.

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43 MINN. STAT. § 504B.135(a)(2016); *State Bank of Loretto v. Dixon*, 7 N.W.2d 351 (Minn. 1943); *Bongard v. Premium Tax Servs., Inc.*, *No.A13-1666,* 2014 Minn. App. (unpublished) LEXIS 397,*16, 2014 WL 1660967 (Minn. Ct. App. Apr. 28, 2014); *State Auto Ins. Co. v. Knuttila,* 645 N.W.2d 475 (Minn. Ct. App. 2002); 30 DUNNELL MINN. DIGEST, LANDLORD AND TENANT §§ 1.09(f), 5.01(d)-(g), 5.05 (5th ed. 2009).

44 MINN. STAT. § 504B.135(a). If the rent is payable at periods of less than three months, notice must be at least as long as the time between payments.

45 MINN. STAT. § 504B.135(c).

46 30 DUNNELL MINN. DIGEST, LANDLORD AND TENANT § 5.05(c); *Kahn v. Am. Ins. Co.,* 162 N.W. 685 (Minn. 1917); *Arcade Inv. Co. v. Gieriet*, 109 N.W. 250 (Minn. 1906); *Koenig v. Koenig*, A11-920 2012 Minn. App. Unpub. LEXIS 201,*27, 2012 WL 762306 (Minn. Ct. App. Mar. 12, 2012).

47 MINN. STAT. § 504B.001(13).

If a land lease is void for any reason—including failure to satisfy the minimum requirements under the statute of frauds—and the tenant has already taken possession of property, a tenancy at will has probably been created.[48]

3. Holdover tenancies

Sometimes a tenant remains on leased land after the lease has ended. If this is done without the consent of the landlord, it is called "holding over."[49] For example, suppose that a lease has a definite term of one year and the landlord and tenant have never reached an express agreement to renew the lease. If the tenant continues to occupy the property after the year has ended, the tenant is a holdover.

a. Tenants should avoid holdover tenancies

The most important point to be made about holdover tenancies is that they should be avoided by tenants. Although there will be cases in which a holdover tenant has the right to stay on the land, this will not always be the case. Tenants assuming that their tenancy for years will be extended take a large risk that they will be subject to eviction actions or lease terms and conditions that are not favorable.[50] As a tenancy for years comes to an end, tenants should always have a clear agreement with the landlord before assuming that they can stay on for another year.

b. If a tenant holds over — three possible outcomes

If a tenant who has a lease with a definite term holds over by staying on the property after the lease term ends, one of three legal results will occur: (1) the landlord and tenant can agree to a new lease; (2) the tenant can be treated as a trespasser; or (3) a tenancy at will can be created by implication.[51]

(1) Landlord and tenant can agree to a new lease

A holdover tenant and the landlord might agree explicitly to a new lease. The landlord cannot simply impose new terms on a tenant who is holding over—there must be an agreement.[52]

(2) Landlord may treat the tenant as a trespasser

A landlord does not have to agree to a new lease with a holdover tenant. When a tenant in a tenancy for years holds over after the term of the lease has ended, the landlord may treat the tenant as a trespasser and seek to evict the tenant.[53] If the landlord decides to treat the tenant as a trespasser, the

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48 *Hagen v. Bowers,* 233 N.W. 822 (Minn. 1930); 30 DUNNELL MINN. DIGEST, LANDLORD AND TENANT §§ 1.09(f), 5.01(d) (5th ed. 2009).

49 *Gardner v. Board of County Comm'rs,* 21 Minn. 33, 38 (Minn. 1874).

50 *Hendrickson v. Wendt,* C1-90-1353, 1990 WL 211839 (Minn. Ct. App. Dec. 24, 1990) (unpublished).

51 *Johnson v. Johnson,* 64 N.W. 905 (Minn. 1895); *Unity Investors Ltd. P'ship v. Lindberg,* 421 N.W.2d 751 (Minn. Ct. App. 1988).

52 30 DUNNELL MINN. DIGEST, LANDLORD AND TENANT §§ 5.12(c), 5.13(a) (5th ed. 2009).

53 30 DUNNELL MINN. DIGEST, LANDLORD AND TENANT §§ 5.12(b)-(c) (5th ed. 2009).

landlord cannot try to recover rent from the tenant for the time the tenant held over.[54] If the landlord accepts rent for the holdover period, the landlord cannot treat the tenant as a trespasser. [55]

(3) A tenancy at will may be created by implication

Because a tenancy at will can be created by implication—without any explicit agreement between the landlord and tenant—a holdover tenancy can turn a tenancy for years into a tenancy at will. [56] If so, the terms of the original lease regarding rent and other specifics remain the same.[57] If the tenant started out with a tenancy for years, the tenant holds over, and the lease became a tenancy at will, the rules regarding renewals of tenancies at will—such as three-month notice—then apply.[58] Subsequent lease violations are not waived, and a lessor may bring an eviction action based on continuing breaches.[59]

C. Who owns the crop even after a lease ends

It can matter a great deal who owns a crop that has been planted on rented farmland.

1. Minnesota statute

Minnesota state statute says that crops growing are the personal property of the farmer that has the right to plant the crops.[60] It would seem to follow that crops grown on leased land are the personal property of the tenant. If there is a cash lease, the tenant definitely owns the crop. If the lease is a crop share the question may be more complicated.[61] The current statute, passed in 1986, seems to favor the tenant.[62] Courts have sometimes held that when the lease is on shares, the landlord and tenant are co-owners of the crop, although these cases tend to be very old.[63] Further, some of the old cases turn on the wording of leases common a century ago, but not necessarily in use today. The exact wording of lease in question would be important for a court.

2. If the crop is not harvested and the lease ends

The ownership of the crop has an important practical effect if the tenant is somehow

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54 *Priordale Mall Investors v. Farrington,* 411 N.W.2d 582 (Minn. Ct. App. 1987).
55 *Oak Glen v. Brewington,* 642 N.W.2d 481 (Minn. Ct. App. 2002).
56 *Northern Display Adver. v. Aultman, Inc.,* 191 N.W. 413 (Minn. 1923); 30 DUNNELL MINN. DIGEST, LANDLORD AND TENANT § 5.13(a) (5th ed. 2009).
57 *Hildebrandt v. Newell,* 272 N.W. 257 (Minn. 1937); *Trainor v. Schultz,* 107 N.W. 812 (Minn. 1906).
58 *Northern Display Adver. v. Aultman, Inc.,* 191 N.W. 413 (Minn. 1923).
59 *Gluck v. Elkan,* 30 N.W. 446 (Minn. 1886).
60 MINN. STAT. § 557.10.
61 See PHILLIP L. KUNKEL ET AL., FARM LEASES (2015), https://www.extension.umn.edu/agriculture/business/taxation/farm-legal-series/farm-leases/docs/farm-leases.pdf.
62 1986 MINN. LAWS, ch. 398, art. 12, sec. 2 (codified at MINN. STAT. § 557.10).
63 See the cases cited in 30 DUNNELL MINN. DIGEST, LANDLORD AND TENANT §§ 5.13(d), 11.01, 11.04, 11.06 (5th ed. 2009).

prevented from harvesting a crop. The most common causes of this situation are bad weather that prevents the fall harvest and a tenant default in the middle of the lease term.

Even if the tenant is no longer in possession of the property when the crop is harvested, the tenant should have the right to remove the crop.[64] This right also applies to holdover tenants who still have crops in the field after the end of the lease term.[65] Several results are possible in this situation.

a. Leases may be renewed

If the problem is a delay in the harvest, it is possible that the lease will be renewed. In such cases, the tenant should get an agreement with the landlord as soon as possible.

b. Landlord may let the tenant harvest the crop

If the lease is not renewed the landlord may nevertheless let the tenant harvest the crop. If so, the tenant must pay fair market value rent for the use of the property for the period of time until the harvest.[66]

c. Landlord may harvest the crop and pay the tenant for the crop value

If the landlord does not allow the tenant to harvest the crop and instead takes responsibility for the harvest, the landlord must pay the tenant the net value of the crop.[67]

D. If the landlord sells the land

In general, if the landlord sells the leased land, the lease continues under the new owner.[68] If the lease says otherwise, however, the tenant may have to move, although the tenant still has a right to remove or be paid for the crop.[69]

E. Eviction

If the tenant defaults, the landlord may be able to terminate the lease and evict the tenant through an eviction action.[70] Terminations of leases and eviction actions do not trigger

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64 MINN. STAT. §§ 559.14, 557.10.

65 *Roehrs v. Thompson,* 240 N.W. 111 (Minn. 1932); *Gallager v. Nelson,* 383 N.W.2d 424 (Minn. Ct. App. 1986).

66 *Woodcock v. Carlson,* 43 N.W. 479 (Minn. 1889).

67 *Aultman & Taylor Co. v. O'Dowd,* 75 N.W. 756 (Minn. 1898).

68 *Jennison v. Priem,* 278 N.W. 517 (Minn. 1938); *Glidden v. Second Ave. Inv. Co.,* 147 N.W. 658 (Minn. 1914); *Farmers Ins. Exch. v. Ouellette,* C8-97-1504, 1998 Minn. App. LEXIS 226*, 1998 WL 74243 (Minn. Ct. App. Feb. 24, 1998) (unpublished).

69 MINN. STAT. § 557.10(2017); 30 DUNNELL MINN. DIGEST, LANDLORD AND TENANT §§ 5.13(d), 11.01, 11.04 (5th ed. 2009).

70 MINN. STAT. §§ 504B.285, 504B.291, 504B.365 (2017); 30 DUNNELL MINN. DIGEST, LANDLORD AND TENANT §§ 4.08(e), 7.01-7.06 (5th ed. 2009). Eviction actions were formerly called unlawful detainer actions.

farmer-lender mediation.[71]

Landlords may use an eviction action in several situations, including when the tenant continues to occupy the land after a lease for years has ended, after termination by notice to quit a tenancy at will, or if the tenant fails to pay rent or otherwise breaks the terms of the lease.[72] An evicted tenant still has the right to harvest or be paid the value of any crop planted on the leased land before the eviction judgment was entered.[73]

If a landlord is trying to evict a tenant for nonpayment of rent, the tenant may be able to stop the eviction by paying the rent due, along with interest and costs.[74]

III. Leases of goods — equipment and livestock

The law treats leases of personal property, or "goods," somewhat differently than leases of real estate.[75] Goods include all farm equipment and livestock.[76]

A. Sometimes what seems like a lease is really a security interest

Many farmers leasing equipment or livestock sign detailed written leases. Depending on the terms of the agreement, however, some of these leases will really be considered sales with a security agreement.[77] For a description of security agreements, see Chapter Four.

1. The difference between a lease and sale can be important in many ways

Whether a lease agreement is really an agreement to create a security interest may seem at first like a legal technicality. In fact, the difference can be important to lessees for several reasons. Most significant is the availability of farmer-lender mediation.

a. Farmer-lender mediation not available under leases

Repossession of property under a lease does not trigger mandatory farmer-lender mediation.[78] Enforcement of a security agreement through seizure of the debtor's property, on the other hand, can trigger farmer-lender mediation.[79] Farmers who

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71 MINN. STAT. § 583.22(2).

72 MINN. STAT. § 504B.285; 30 DUNNELL MINN. DIGEST, LANDLORD AND TENANT §§ 7.01(a), 7.02(a) (5th ed. 2009). Additional rules apply if the lease if for a term of more than twenty years. MINN. STAT. § 504B.291(2).

73 MINN. STAT. § 559.14.

74 MINN. STAT. § 504B.291(1); 30 DUNNELL MINN. DIGEST, LANDLORD AND TENANT §§ 7.01(a), 7.02(a) (5th ed. 2009).

75 This section discusses the law applicable to leases of goods that took effect on or after January 1, 1990.

76 MINN. STAT. § 336.2A-103(1)(h).

77 Because so little Minnesota case law exists on this topic, reference to secondary materials may be helpful. See, for example, James C. Smith, *Leases of Personal Property, in* Peter F. Coogan et al., 1D SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE §§ 30.02-30.05 (2012).

78 MINN. STAT. § 583.22(2).

79 For the purposes of farmer-lender mediation agricultural property does not include "property that is leased to the debtor other than removable agricultural structures under lease with option to purchase." MINN. STAT. § 583.22(2). In one case, for example, the court denied mediation rights to a farmer who leased a combine that was repossessed. *Deutz-Allis Credit Corp. v. Jensen,* 458 N.W.2d 163 (Minn. Ct. App. 1990).

are facing repossession of leased property by a lessor and who believe that the lease is really a security agreement can request farmer-lender mediation whether or not they received a mediation notice.[80] Farmer-lender mediation is discussed in more detail in Chapter Seven.

b. Rights of the lessee or debtor after repossession

The rights of a farmer who has had property repossessed are roughly similar whether the repossession resulted from enforcement of a security interest or default on a lease. There are a few differences that could be important, however, and the secured debtor has more rights than a lessee.[81] First, secured creditors that have taken possession of a debtor's property must give the debtor advance notice if the property is to be sold.[82] Second, secured creditors that have taken possession of a debtor's property may in some cases be forced to sell the seized property and apply the proceeds to the debt rather than keeping the property.[83] Neither of these rights are available to lessees who had property repossessed under a lease.[84] Secured debtors' rights in seized property are discussed in more detail in Chapter Four.

c. Income tax differences

Whether an agreement is really a sale or a lease may also have tax implications for both parties. In general, if a farmer leases property, the lease payment is deductible; if the transaction is really a sale, the farmer's deductions are for depreciation and interest.[85] The benefits of either are likely to vary with different agreements. Unfortunately, the Internal Revenue Service (IRS) determination of whether a transaction should be defined as a lease or a conditional sale may be somewhat different from the determination under Minnesota law that is discussed in this chapter.[86] Before making any decisions based on the tax code, farmers should always consult a professional tax planner.

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80 MINN. STAT. § 583.26(2)(c).

81 In *Deutz-Allis Credit Corp. v. Jensen,* 458 N.W.2d 163 (Minn. Ct. App. 1990), the court limited this difference somewhat by ruling that a lessor who repossesses property from a lessee must use due diligence to mitigate damages. In this case, reasonable diligence meant minimizing losses when selling a repossessed combine. The court observed that even though "there is no secured transaction involved, the UCC's concept of commercial reasonableness is, to an extent, borrowed from common law doctrines of mitigation of damages and the rule of unavoidable consequences. Thus, although the UCC may not be directly controlling, it may be helpful in determining mitigation of damages issues." 458 N.W.2d at 166.

82 MINN. STAT. § 336.9-611(b).

83 MINN. STAT. § 336.9-620(e).

84 For a brief discussion, see Smith, *Leases of Personal Property* § 30.05[8]-[9].

85 For basic information on the taxation of leases, see Internal Revenue Service, Publication 225, Farmer's Tax Guide: For Use in Preparing 2016 Returns 20-22 (2016), https://www.irs.gov/pub/irs-pdf/p225.pdf.

86 For a brief discussion of this problem, see Richard L. Barnes, *Distinguishing Sales and Leases: A Primer on the Scope and Purpose of Article 2A,* 25 U. MEM. L. REV. 873, 875-77 (1995).

d. Other creditors and bankruptcy

Whether the agreement created a lease or a security interest is of great importance to the relationship between the lessor and other third-party creditors of the lessee. If the agreement actually created a security interest and the lessor did not make all of the proper legal filings, the lessor may lose priority in the property to the lessee's other creditors. Other similar problems can continue for the lessor if the lessee files for bankruptcy.[87]

2. Determining when agreements create a security interest — not a lease — in the eyes of the law

Minnesota law sets out a way to decide whether an agreement will be considered a lease or a security agreement.[88]

a. The general principle — if little economic value is returned to the lessor, it is a security agreement

In general, the law looks at the agreement to see if leased property will be returned to the lessor at the end of the lease and, if it is returned, whether it will have any remaining meaningful economic value.[89] If at the end of a lease there is very little value left to transfer back to the lessor, the agreement will typically be considered a security interest for legal purposes.

b. Conditions creating a security interest

If the agreement calls for the lessee to pay for the right to possess and use the property and the lessee cannot terminate the lease without paying the full rental amount, the agreement creates a security interest if any of the following four conditions is true.[90]

(1) The agreement is for the remaining economic life of the property

If the term of the agreement covers the whole economic life of the goods, the agreement is legally a security interest.[91] For example, if a farmer signs an agreement to lease a piece of machinery for eight years and the equipment

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87 In bankruptcy, a lessor's rights may be reduced to an unperfected security interest. For a short discussion, see Paul H. Shur, *Reclaiming Possession of Leased or Sold Goods,* 26 UCC L.J. 111, 113-15 (1993).

88 Minnesota law regarding the definition of leases as compared to a sales agreement changed on January 1, 1990. The discussion in this chapter focuses on agreements that began on that date or later.

89 MINN. STAT. § 336.1-203(b).

90 MINN. STAT. § 336.1-203(b). This provision creates an assumption that a disguised security interest exists where the parties' agreement results in one of these four economic realities.

91 MINN. STAT. § 336.1-203(b)(1). Such an agreement will create a security interest even if the agreement contains no option to purchase or lease.

has an expected useful economic life of only six years, legally this agreement is a sale with a security interest, not a lease.

(2) The lessee must either become owner of the property or renew the lease

If at the end of the lease the lessee is bound either to become the owner of the goods or to renew the lease for the remaining economic life of the goods, the agreement creates a security interest, not a lease. This condition is met, for example, if the farmer signs a one-year lease for a piece of machinery that has an expected economic life of eight years and the lease also requires that the farmer renew the lease for seven more one-year lease periods.

(3) The lessee has the option to renew for no consideration or nominal consideration

If after meeting the terms of the lease the lessee has an option to renew the lease for the remaining economic life of the goods for either no additional cost or only "nominal consideration," the agreement is a security interest, not a lease.[92]

(4) The lessee has the option to buy for no consideration or nominal consideration

If after meeting the terms of the lease agreement the lessee has the option to become owner of the property for either no additional cost or only "nominal consideration," the agreement creates a security interest, not a lease.[93]

c. *Defining terms — "economic life of the goods" and "nominal consideration"*

Minnesota statutes refer to the "economic life" of the leased property and "nominal consideration." The definition of these terms can be tricky.

(1) Economic life of goods

Exactly how the economic life of leased goods should be determined is not explained in the statute. The statute does say that it should be determined at the time the parties enter into the transaction.[94] This means that when figuring the economic life of the property, the focus should be on the expected life of the property calculated at the time the agreement was made.

The remaining economic life of goods and reasonably predictable fair market rent, fair market value, or cost of performing under the lease agreement must be determined with reference to the fact and circumstances at the time the

[92] MINN. STAT. § 336.1-203(b)(3).
[93] MINN. STAT. § 336.1-203(b)(4).
[94] MINN. STAT. § 336.1-203(b)(2).

transaction is entered into.[95]

(2) Nominal consideration

Additional consideration is nominal if it is less than the lessee's reasonably predictable cost for performing the lease if the option is not exercised.[96]

Additional consideration is not nominal if when the option to renew the lease is granted to the lessee, the rent is slated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is performed.[97]

Additional consideration also is not nominal if when the option to become the owner of the good is granted to the lessee, the price is stated to be the fair market value for the goods determined at the time the option is to be performed.[98]

There is no exact definition of "nominal consideration" in the statute. "Nominal" literally means "in name only" and suggests insignificance. "Consideration" is a legal term meaning any money, service, or other thing of value given in exchange for promises in a contract.

In light of these definitions, a very small amount of money will obviously be nominal consideration, while payment of fair market value would certainly be more than nominal. In between these two extremes, the definition remains hazy.

(a) Very small payments are obviously nominal

When an agreement calls for a payment of a very small amount, courts will certainly see this as nominal consideration. For example, if an agreement gives the lessee the option to buy a dairy cow at the end of a lease for $5 or $10, this would be nominal consideration.

(b) Option to buy or lease at fair market value is more than nominal

The statute points out that if there is an option to renew or purchase the leased goods for fair market value—to be determined at the time the option is made available—the option price is not nominal consideration.[99] For example, if an agreement says that at the end of a lease the lessee has the right to buy the leased equipment for fair market value, this price is more than nominal.

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95 MINN. STAT. § 336.1-203(e).
96 MINN. STAT. § 336.1-203(d).
97 MINN. STAT. § 336.1-203(d)(1).
98 MINN. STAT. § 336.1-203(d)(2).
99 Additional consideration also is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised.

(c) Relative comparisons likely

If the agreement calls for a payment between these two extremes, it is likely that a court would try to make some sort of relative economic comparison between what should be offered for a certain product and what is actually offered.[100]

(d) The sensible lessee test

As one writer has observed, an option price should be considered nominal if "the sensible lessee would in effect have no choice and, in making the only sensible choice," would exercise the option.[101] Under this view, if the lessee is left with no real economic choice but to exercise the option, the price of taking the action is nominal; if reasonable people would differ over whether exercising the option is a sensible economic choice, the price is more than nominal.

d. Considering other factors

If the requirements described above are met, a court should rule that the agreement creates a security interest without looking any further. It is possible, however, that if the test described above is not met, courts could look at other factors to conclude that an agreement is a security interest. Several factors thought to be important under previous law—such as whether the lessor or lessee pays for the taxes on the property—do not automatically create a security interest but might be considered by a court taking a closer look at an agreement.

e. Other terms that DO NOT make an agreement a security interest

Agreements sometimes include terms that might make one think that the agreement is really a sale and security agreement. The following terms, on their own, DO NOT make the agreement a sale and security agreement.[102]

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[100] For example, one court ruled that a purchase of a used combine for $9,000, which was the estimated fair market value of the combine, was clearly more than nominal consideration. *Deutz-Allis Credit Corp. v. Jenkins,* 458 N.W.2d 163, 166 (Minn. Ct. App. 1990). In an Alabama bankruptcy case, the farmer leased 35 Holstein heifers. The agreement included an option to purchase for the fair market value of the cattle at the time the option was exercised. The calves born during the lease term, however, became the property of the farmer-lessee at no additional cost. The court held that the value of the calves made the fair value of the original cows nominal. *In re Mitchell,* 44 B.R. 485 (Bankr. N.D. Ala. 1984).

[101] Richard L. Barnes, *Distinguishing Sales and Leases: A Primer on the Scope and Purpose of Article 2A,* 25 U. MEM. L. REV. 873, 885-86 (1995). For more discussion of possible ways to define this term, see Smith, *Leases of Personal Property* § 30.02[4][c][iii].

[102] MINN. STAT. § 336.1-203(c).

(1) Present value of payments equal to fair market value of goods

In some agreements, payments made the by lessee to the lessor are equal to or greater than the fair market value of the goods at the time the agreement is entered into.[103] If so, this does not necessarily mean the agreement is actually a sale and security interest.

(2) Lessee assume risk for loss

In some agreements, the lessee assumes the risk of loss of the goods. This does not necessarily make the agreement a sale and security agreement. [104]

(3) Lessee pays taxes, maintenance and other costs

If the agreement calls for the lessee pays for taxes, insurance, service or maintenance costs, and other similar costs, it does not mean that the agreement is a sale and security agreement.[105]

(4) Option to renew or option to own

If the agreement gives the lessee the option to renew the lease or the option to own the goods, this does not necessarily mean the agreement is a sale and security interest.[106]

(5) Option to renew for fixed rent for fair market price of use of goods at renewal

In some agreements, the lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market value for the good at the time the option is to be performed. If so, this does not necessarily mean the agreement is a sale and security agreement.[107]

(6) Option to buy for fixed price at fair market value at time of becoming owner

The agreement may have an option for the lessee to become the owner of the goods for a fixed price that is equal to or greater than that reasonably predictable fair market value of the goods at that time the option is to be performed. If so, this does not necessarily mean the agreement is a sale and a security agreement.[108]

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[103] MINN. STAT. § 336.1-203(c)(1).
[104] MINN. STAT. § 336.1-203(c)(2).
[105] MINN. STAT. § 336.1-203(c)(3).
[106] MINN. STAT. § 336.1-203(c)(4).
[107] MINN. STAT. § 336.1-203(c)(5).
[108] MINN. STAT. § 336.1-203(c)(6).

B. Lease agreement

Farmers leasing goods will probably be asked to sign a lease agreement. Because the lease agreement is a contract and its terms control the parties' rights and obligations, it should always be read carefully.[109] As mentioned above, the length of the lease term and a description of the goods should be included in the lease.[110] Although it is not legally required, leases of goods should also normally address other issues, such as those listed below.

1. Location of the goods

The lease should explain where the goods are to be located. Moving the goods without permission may put the farmer in default.

2. Grounds for termination of the lease

The lease should list situations in which either party can terminate the lease.

3. Other costs

The lease should explain who is responsible for insuring, maintaining, and repairing the goods; who will transport and install the goods, if applicable; and who must pay for these costs.

4. Liability

A lessor may want the lessee to sign a release of liability for any injury to persons or property caused by the goods. Farmers should check with their insurance company, and possibly with a lawyer, about the effects of such a provision in a lease.

5. Transfer of the lease

Sometimes a lease will say that the lease can only be transferred with the lessor's consent. Farmers may want to make sure that a lease containing such a provision also says that such consent may not be unreasonably withheld.[111]

C. Warranties for leased goods

When someone leases goods, several warranties—legally binding promises about the goods—may apply. Some warranties are implied, which means they exist whether or not the warranty is ever mentioned or written down in the lease; and some warranties are

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109 MINN. STAT. § 336.2A-301.

110 MINN. STAT. § 336.2A-201.

111 If consent cannot be unreasonably withheld, the lessor can deny consent only if the transfer would defeat the purpose of the lease or a similar justification is present. *Medinvest Co. v. Methodist Hosp.,* 359 N.W.2d 714 (Minn. Ct. App. 1984).

express, which means they are a result of statements made by the lessor.

1. Implied warranties

The two most important implied warranties are a warranty of fitness and a warranty against interference.[112]

a. Warranty of fitness

When the lessor knows at the time the lease is made that the goods are to be used by the lessee for a certain purpose and knows that the lessee is relying on the lessor's skill or judgment to pick out the goods, there is an implied warranty that the goods are fit for that purpose.[113]

b. Warranty against interference

The lessor must not have given anyone else a legal claim to the goods that interferes with the lessee's use of the goods.[114] Interference includes, for example, the repossession of the goods by a creditor of the lessor. This warranty is not available if the lessee had reason to know that the goods were subject to a claim or interest.[115]

c. Waiving implied warranties

The lessor may add a sentence to the lease which says that the lessee waives—or gives up—the right to implied warranties. For the waiver to be valid, it must usually be in writing, and it must be easily noticeable in the agreement.[116] Words that waive all warranties include "as is" or "with all faults."

d. No implied warranties for defects missed in lessee's examination of the goods

If the lessee fully examines the goods—or could have but chose not to—there is no implied warranty for defects that the examination ought to have revealed.[117]

2. Express warranties

Statements by the lessor about the goods sometimes can be legally binding as an

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[112] For a general discussion of implied warranties, see John Levin, *Lease Terms Implied Under UCC 2A,* 27 UCC L.J. 227 (1994).

[113] MINN. STAT. §§ 336.2A-213, 336.2A-214. A waiver of this implied warranty must say, "There is no warranty that the goods will be fit for a particular purpose."

[114] MINN. STAT. § 336.2A-211.

[115] MINN. STAT. § 336.2A-214(4).

[116] MINN. STAT. §§ 336.2A-214(2)-(3), 336.1-205. Implied warranties may, however, be waived or modified by the common and accepted practices of business between parties. MINN. STAT. § 336.2A.214(3)(c).

[117] MINN. STAT. § 336.2A-214(3)(b).

express warranty. This includes statements made to try to convince the farmer to lease the goods.

a. A basis of the bargain

To create an express warranty, the lessor's statements must become part of the "basis of the bargain."[118] This means that the lessee must have relied on the statement as a reason for deciding to lease the goods.

b. Claims of fact, a promise, or a description

If the lessor makes a claim of fact or a promise to the lessee relating to the goods or describes the goods, and these statements become a part of the basis of the bargain, an express warranty has been created.[119] This means that if the claim of fact or promise turns out not to be true, or the description is not accurate, the legally binding warranty has been violated.

A warranty can be created even though the lessor does not use words such as "guarantee" or "warranty."[120] In fact, the lessor does not even need to have intended to create the warranty.[121] On the other hand, if the lessor only affirms the value of the goods, or makes a statement purporting to be his or her opinion only—not a fact, promise, or description—this does not create a warranty.[122]

D. Default

Several types of actions can be considered a default of a lease. In most cases, default is defined in the lease agreement, although the law defines some actions as a default whether or not they are in the lease.[123]

1. No right to notice of default in a lease of goods

In general, there is no right to notice of a default with a lease of goods, which implies there is also no right to cure.[124]

2. Lease may limit remedies

If one party defaults on a lease of goods, the other party may cancel the lease or enforce the lease obligations with "self-help" actions such as repossession or a lawsuit.[125] The

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118 MINN. STAT. § 336.2A-210(1).
119 MINN. STAT. § 336.2A-210. In addition, any sample or model that becomes part of the basis of the bargain creates an express warranty that the equipment conforms to the sample or model.
120 MINN. STAT. § 336.2A-210(2).
121 MINN. STAT. § 336.2A-210(2).
122 MINN. STAT. § 336.2A-210(2).
123 MINN. STAT. § 336.2A-501.
124 MINN. STAT. § 336.2A-502.
125 MINN. STAT. § 336.2A-501(3).

lease agreement may, however, limit either party's remedies in case of default.[126] It is therefore important to read the lease closely.

3. If the farmer-lessee defaults

If the lessee fails to make rent payments or otherwise defaults on the lease, the lessor may cancel the lease contract, withhold delivery of the goods not yet delivered, and repossess goods already delivered.[127] The lessor may also use any other remedies listed in the lease and may file a lawsuit for damages resulting from the default.[128] The lessor also has the right to disable the equipment if it is left on the lessee's property.[129] If the lease allows it, the lessor may require the lessee to gather the goods and make them available to the lessor to repossess it in a way that is reasonably convenient for both parties. These actions can be done as "self-help" measures as long as the lessor does not breach the peace. This generally means that the lessor may not use physical force, break locks, enter buildings, or trespass on the lessee's property. If the lessor cannot recover the goods without breaching the peace, he or she will likely need to file a lawsuit.

The lessor may also sue the defaulting lessee for unpaid rent and other damages.[130] Lessors with reasonable grounds to fear that the rent will not be paid may, at any time during the term of the lease, demand assurance that the rent will be paid.[131]

4. If the lessor defaults

If the lessor fails to deliver the goods as agreed in the lease contract or the farmer rightfully rejects or revokes acceptance of the goods, the lessor is in default.[132] The lease may also specify other lessor actions that would be considered a default.

Once a lessee has accepted delivery of the leased goods, it is more difficult for the lessee to claim that they are not the right goods or are defective. Still, farmers discovering that leased goods are defective or otherwise do not conform to the lease agreement have the right to reject the goods within a reasonable period of time.[133]

If the lessor is in default, the lessee can cancel the contract, probably recover some of the money already paid, perhaps sue for damages, and take other actions that may be allowed by the lease.[134] In some cases, if the lessor fails to deliver the goods, it may be

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126 MINN. STAT. § 336.2A-503.
127 MINN. STAT. §§ 336.2A-401, 336.2A-501(1), 336.2A-523, 336.2A-525, 336.2A-528 to 336.2A-530. For a general discussion, see Paul H. Shur, *Reclaiming Possession of Leased or Sold Goods,* 26 UCC L.J. 111 (1993).
128 MINN. STAT. §§ 336.2A-501(1), 336.2A-503, 336.2A-505.
129 MINN. STAT. § 336.2A-525(2).
130 MINN. STAT. §§ 336.2A-505, 336.2A-103(1)(b).
131 MINN. STAT. § 336.2A-401.
132 MINN. STAT. § 336.2A-508.
133 MINN. STAT. §§ 336.2A-517(4)-(5), 336.2A-516(3)(a)-(c).
134 MINN. STAT. §§ 336.2A-505(1), 336.2A-508, 336.2A-513, 336.2A-519, 336.2A-520(2)(b).

possible to force the lessor to actually deliver the goods.[135] The lessor may have the right to cure the default.[136]

E. A lease of fixtures

Anyone leasing a fixture—that is, goods that will attach to real estate—should file a fixture financing statement with the county recorder or registrar of titles in the county where the real estate is located.[137] The statement generally protects the lessee against the lessor's creditors who may want to take the property.

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135 MINN. STAT. § 336.2A-508(2).
136 MINN. STAT. § 336.2A-513.
137 MINN. STAT. §§ 336.2A-309, 336.9-502.

Chapter Seven

Farmer-Lender Mediation

I. Introduction

Many types of farm credit problems trigger the provisions of Minnesota's Farmer-Lender Mediation Act.[1] The Mediation Act requires that before a creditor enforces a debt against agricultural property by taking any of several actions described in this Guide—such as foreclosing on a mortgage or executing a judgment—the farmer and the creditor must meet and try to resolve the problem through mediation.[2] In mediation, the farmer and the creditor meet with an unbiased mediator and try to work out an agreement about payment of the farmer's debts. While the mediation process is open, the creditor cannot take collection action against the farmer's property. The creditor must also release farm proceeds to pay for family living expenses and necessary farm operating expenses.

The Farmer-Lender Mediation Program, which began in 1986, has been renewed by the state legislature through June 30, 2022.[3]

The main parties in farmer-lender mediation

Farmer — Who owes a debt and is also therefore a debtor.

Creditor — One or more of the farmer's creditors.

A. Mandatory and voluntary farmer-lender mediation

This chapter primarily discusses the mandatory farmer-lender mediation process. When

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1 For general overview of agricultural mediation, see GARY D. CONDRA, REPRESENTING AGRICULTURAL CLIENTS IN MEDIATION, 73 NEB. L. REV. 154 (1994); CHERYL L. COOPER, THE ROLE OF MEDIATION IN FARM CREDIT DISPUTES, 29 TULSA L. REV. 159 (1993); SONJA TROM EAYRS, PROTECTING AMERICA'S FARMERS UNDER STATE MEDIATION LAWS AND CHAPTER 12: WHO'S BEING PROTECTED?, 72 MARQ,. L. REV. 466 (1989); JEFFREY L. DAWSON, CONSTITUTIONALITY OF MANDATORY FARMER-LENDER MEDIATION: THE MINNESOTA PLAN – LAUE V. PRODUCTION CREDIT ASSOCIATION, 1988 J. DISP. RESOL. 237 (1988); FARMERS' LEGAL ACTION GROUP, INC., MEDIATION FROM THE FARMER'S PERSPECTIVE (1988). For additional information on the Farmer-Lender Mediation Program, see MATTHEW C. BERGER and DEAN M. ZIMMERL; FARMER-LENDER MEDIATION ACT, Ch. 3, MINNESOTA CONTINUING LEGAL EDUCATION, DEBTOR-CREDITOR HANDBOOK (11th ed. 2014, updated 2018, JAMES L. BAILLIE, PHILLIP L. KUNKEL, RYAN T. MURPHY and SAMUEL J.H. SIEGELMAN, eds.).

2 See FARMER-LENDER MEDIATION ACT, MINN. STAT. §§ 583.20 to 583.32.

3 MINN. STAT. § 583.215 (amended by 2017 Minn. Laws, ch. 88, art. 2, sec. 81).

mediation is mandatory, this means only that the creditor is required to offer mediation to the farmer. Farmers are not required to accept the offer to mediate with a creditor.[4]

B. Mediation of USDA collection actions and other agency decisions

United States Department of Agriculture (USDA) agencies can be subject to Minnesota's mandatory farmer-lender mediation process if they qualify as a creditor trying to enforce a debt against agricultural property.[5] For example, if the Farm Service Agency (FSA) is attempting to enforce a judgment against a farmer (as described below) for a delinquent loan, FSA is required to go through the same mandatory farmer-lender mediation process as any other creditor would.

The Minnesota Farmer-Lender Mediation Program also offers voluntary mediation services as part of the administrative appeals process for farmers challenging decisions made by USDA agencies.[6] Various USDA agencies offer mediation as one step in the review of administrative decisions.[7] Although Minnesota's Farmer-Lender Mediation Program is authorized to conduct these voluntary mediations of USDA agency administrative decisions, it is important to keep in mind that these voluntary mediations of USDA agency decisions are not the same as mandatory farmer-lender mediation required by Minnesota law, and they do not use the process described in this chapter.

C. The relationship between mandatory farmer-lender mediation and other forms of Alternative Dispute Resolution (ADR)

Mandatory farmer-lender mediation, which is discussed in this chapter, is a special dispute resolution process created by the Minnesota Legislature specifically for Minnesota farmers and their creditors. Outside of this mandatory process, however, Minnesota farmers are free to pursue other forms of dispute resolution. Many kinds of legal and business disputes are now resolved by some form of Alternative Dispute Resolution (ADR). ADR methods include arbitration—where a neutral arbitrator makes a binding decision—and mediation—where a neutral mediator helps the parties work out their dispute.

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4 MINN. STAT. § 583.26, subd. (2)(b).

5 MINN. STAT. § 583.24, subd. 1(a)(1).

6 For these mediation services see 7 U.S.C. §§ 5103(a)(1)(A), 5101 (c)(2)(B)(i); 7 C.F.R. pt. 785; and *Agricultural Mediation Program*, USDA, https://www.fsa.usda.gov/Internet/FSA_File/ag_mediation_program.pdf. For other information see, TIMOTHY J. SULLIVAN, USDA EXPANDS THE SCOPE OF CERTIFIED STATE MEDIATION PROGRAMS, 11 FARMERS' LEGAL ACTION REPORT 3 (1996) (see http://nationalaglawcenter.org/publication/sullivan-usda-expands-the-scope-of-certified-state-mediation-programs-113-farmers-legal-action-report-8-14-1996/); CHESTER A. BAILEY, THE ROLE OF MEDIATION IN THE USDA, 73 NEB. L. REV. 142 (1994), and CHERYL L. COOPER, THE ROLE OF MEDIATION IN FARM CREDIT DISPUTES, 29 TULSA L. REV. 159 (1993).

7 For example, for the Farm Service Agency (FSA) see 7 C.F.R. § 780.9 and https://www.fsa.usda.gov/Internet/FSA_File/ag_mediation_program.pdf; for the Natural Resources Conservation Service (NRCS), see 7 C.F.R. § 614.11, and https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/alphabetical/camr/?cid=nrcs143_008444; for the Federal Crop Insurance Corporation (FCIC) and Risk Management Agency (RMA) see 7 C.F.R. § 400.94 and https://www.rma.usda.gov/regs/mediation.html; and for several other agencies, see 7 C.F.R. § 1900.55(c).

If a farmer and creditor agree that they want to use ADR to resolve an issue, they are generally free to do so. They may choose to use the voluntary mediation process under the Farmer-Lender Mediation Program, or they may make their own ADR arrangements.[8] Voluntary mediation request forms are available at county extension offices and county recorder offices. Voluntary mediation under the Farmer-Lender Mediation Program is also available for certain non-credit disputes and for rural residents other than farmers.[9]

In general, anyone who is a party in a legal action might be required to participate in ADR before the case will proceed.[10] This is part of an effort by state and federal courts to reduce caseloads and resolve legal disputes outside of lawsuits. This ADR requirement, which applies to any party in a civil case—whether a farmer or not—is different from mandatory farmer-lender mediation and is discussed in Chapter Ten.

D. Farmers' rights to mandatory mediation generally not waivable

In general, creditors may not ask farmers to waive their rights under the mandatory Farmer- Lender Mediation Program.[11] For example, a creditor may not ask a farmer to sign a loan agreement that says that the farmer does not have the right to seek mediation in case of a default. If a farmer signs such an agreement, the waiver is not legally enforceable.

II. Eligibility for mandatory farmer-lender mediation

The mandatory farmer-lender mediation process is required in a limited number of circumstances. The following sections explain when mediation is legally required.

A. Creditors that must offer farmer-lender mediation

Creditors whose actions are governed by the mandatory farmer-lender mediation process include United States government agencies, corporations, partnerships, other business entities, and individual persons.[12]

B. Creditor actions that trigger mediation

The Farmer-Lender Mediation Act sets out types of creditor actions that will trigger the

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8 MINN. STAT. § 583.25.

9 The Farmer-Lender Mediation Act encourages the voluntary use of the Farmer-Lender Mediation Program to resolve disputes in rural areas. MINN. STAT. § 583.311. This voluntary dispute resolution is open to all rural residents for a variety of issues. MINN. STAT. § 583.311. The intent is to allow voluntary participation in the Farmer-Lender Mediation Program to resolve disputes that are not required to go through farmer-lender mediation.

10 MINN. GEN. R. PRAC. 114.01. This requirement is a result of an action by the Supreme Court of Minnesota and is authorized by MINN. STAT. § 484.76.

11 MINN. STAT. § 583.305. Exceptions to this rule must be expressly allowed under the Farmer-Lender Mediation Act. At present, there are no expressly allowed exceptions.

12 MINN. STAT. § 583.24, subd. 1(a). One unpublished Minnesota Court of Appeals decision held that USDA was not required to participate in a mediation where it was the guarantor of a farm loan. *Norwest Bank Minnesota West v. Kostrzewski,* No. C7-89-1349, WL 1990 25113 (Minn. Ct. App. Mar. 13, 1990) (unpublished).

mandatory farmer-lender mediation process. In general, any creditor action to enforce a debt against a farmer's agricultural property will trigger the process.[13]

1. Mortgage foreclosure and cancellation of a contract for deed of agricultural property

A foreclosure of a mortgage on agricultural property—either by advertisement or action—triggers mandatory farmer-lender mediation, as does cancellation of a contract for deed to purchase agricultural property.[14] For a general discussion of mortgage foreclosures and contract for deed cancellations, see Chapter Three.

2. Repossession of agricultural property

A secured creditor's attempt to take possession of agricultural property that serves as collateral for a debt or to seek a court order for possession triggers mandatory farmer-lender mediation.[15] Secured credit is discussed in detail in Chapter Four.

3. Executing a judgment

Mandatory farmer-lender mediation is not triggered when a creditor seeks a monetary judgment against a debtor to recover the debt. Any effort, however, by the creditor to execute a judgment and collect against a farmer-debtor's agricultural property or the proceeds from a sale of agricultural property will trigger mediation.[16] Collection efforts that will trigger mediation include garnishment, levy, and attachment or seizure of agricultural property. For a general explanation of judgments, see Chapter Five.

C. Agricultural property must be the target of the creditor action

For mandatory farmer-lender mediation to be triggered, the property against which the creditor is taking action must be agricultural property.[17]

1. What is included as agricultural property

For the purposes of mandatory farmer-lender mediation, the law strictly defines agricultural property.[18] It can include real estate, personal property, and some other types of property.

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13 MINN. STAT. § 583.26, subd. 1(a)-(b).

14 MINN. STAT. §§ 582.039, 583.26, subd. 1(a). For the purpose of mediation, creditors include holders of mortgages on agricultural property and vendors of contracts for deed of agricultural property. MINN. STAT. § 583.22, subd. 4.

15 MINN. STAT. § 583.26, subd. 1(a). Creditors using MINN. STAT. §§ 336.9-601 to 336.9-628 to enforce a debt on agricultural property trigger mediation. Creditors, for the purposes of mediation, include creditors with a lien or security interest in agricultural property. MINN. STAT. § 583.22, subd. 4.

16 MINN. STAT. § 583.26, subd. 1(a). For the purposes of mediation, creditors include a judgment creditor with a judgment against a farmer with agricultural property. MINN. STAT. § 583.22, subd. 4.

17 MINN. STAT. § 583.26, subd. 1.

18 MINN. STAT. § 583.22, subd. 2.

a. Real estate

Under the Farmer-Lender Mediation Act, agricultural property includes real property that is principally used for farming.[19] This includes, for example, real estate used for producing crops, livestock, milk, poultry, fruit, and horticultural products.

b. Personal property

For the purposes of mandatory farmer-lender mediation, agricultural property includes personal property that: (1) serves as collateral for a loan for the farm operation; or (2) is used in the farm operation, including equipment, crops, livestock, and proceeds from collateral.[20] Since agricultural property includes proceeds from collateral, if a creditor has a security interest in grain or milk and the debtor sells that grain or milk, the proceeds from the sale continue to be agricultural property for the purposes of mediation.[21] If the creditor attempts to take those proceeds, that would be considered an action against agricultural property. It might be possible to argue that if a creditor forces a farmer to sign over a proceeds check to the creditor, this triggers mediation.[22]

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19 MINN. STAT. §§ 583.22, subd. 2, 500.24, subd. 2(a). Farming includes the production of agricultural products and livestock products, including poultry products and milk products, and fruit or other horticultural products. MINN. STAT. § 500.24, subd. 2(a). Farming does not include: (1) the processing, refining, or packaging of farm products; (2) the provision of spraying or harvesting services by a processor or distributor of farm products; or (3) the production of timber or forest products. MINN. STAT. § 500.24, subd. 2(a). Farming also does not include the production of poultry or poultry products, or the feeding and caring for livestock that are delivered to a corporation for slaughter or processing for up to twenty days before slaughter or processing. MINN. STAT. § 500.24, subd. 2(a). In *Mayer v. Countrywide Home Loans*, 647 F.3d 789 (8th Cir. 2011), the Eighth Circuit Court of Appeals held that a mortgaged parcel of land containing a farm homestead and pole shed used for storing farm equipment was not agricultural property subject to the Farmer-Lender Mediation Act because the homestead was used exclusively as a residence, and not principally used for farming as the Act requires. The pole shed accounted for only 720 square feet of the 6.21 acre parcel. In *Rengstorf v. Richards*, 417 N.W.2d 138 (Minn. Ct. App. 1987), a Minnesota appeals court found that a 133-acre parcel was not principally used for farming because hay was raised on only 25 acres.

20 MINN. STAT. § 583.22, subd. 2.

21 MINN. STAT. § 583.22, subd. 2. Collateral includes the proceeds to which a security interest attaches, MINN. STAT. § 336.9-102(a)(12)(A), and "proceeds" are "whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral," MINN. STAT. § 336.9-102(a)(64)(A). For example, in *Border State Bank, N.A. v. AgCountry Farm Credit Servs., FLCA,* 535 F.3d 779, 782-83 (8th Cir. 2008), the Eighth Circuit Court of Appeals affirmed a lower court's finding that an agency's security interest in a dairy's collateral continued after the collateral was purchased by a second dairy, and later attached to the proceeds of sale when the second dairy sold the collateral. While it is possible for proceeds to lose their identity—for example, by being deposited in a bank account—so long as the deposited proceeds can be traced to a creditor's security interest, they should constitute identifiable proceeds for purposes of MINN. STAT. § 336.9-102(a)(64)(A), and accordingly for purposes of mediation. See, for example, *Firstar Eagan Bank, NA. v. Marquette Bank Minneapolis,* 466 N.W.2d 8 (Minn. Ct. App. 1991).

22 Mediation is triggered if agricultural property is "seize[d]," according to MINN. STAT. § 550.365, subd. 1. In addition, mediation is triggered when a secured creditor, after default, "tak[es] possession" of collateral under MINN. STAT. § 336.9-609. MINN. STAT. § 583.26, subd. 1(a).

c. Removable farm structures

Agricultural property under mandatory farmer-lender mediation includes removable agricultural structures that are leased with an option to buy, such as silos, grain bins, or other types of removable farm buildings.[23]

2. What is not included as agricultural property

For the purposes of farmer-lender mediation, the following are specifically not considered agricultural property, and therefore they are not subject to mandatory mediation.

a. Personal property subject to a possessory lien

Agricultural property under mandatory farmer-lender mediation does not include personal property subject to a possessory lien.[24] A creditor may have a possessory lien if the farmer has not paid someone who stores, cares for, or contributes to the preservation, care, or enhancement of the property, and the person—the creditor—has possession of the personal property. For example, an implement dealer's machine shop that holds a tractor on the premises until the tractor's owner pays for the repairs may have a possessory lien.

b. Leased property

Agricultural property under mandatory farmer-lender mediation does not include leased property unless the property is a removable agricultural structure under lease with an option to buy.[25] Determining whether an agreement creates a lease or a security interest, and therefore whether creditor action will trigger mediation, can be harder than it may seem. For a discussion of the differences between leases and secured sales, see Chapter Six of this Guide.

c. Custom work farm machinery

Farm machinery that is used primarily for custom field work does not qualify as agricultural property under mandatory farmer-lender mediation.[26]

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23 MINN. STAT. § 583.22, subd. 2.

24 MINN. STAT. § 583.22, subd. 2.

25 MINN. STAT. § 583.22, subd. 2. Where the lease of a combine was true lease, it was not subject to the requirements of the Farmer Lender Mediation Act. *Deutz Allis Credit Corp. v. Jensen,* 458 N.W. 2d 163 (Minn. Ct. App. 1990).

26 MINN. STAT. § 583.22, subd. 2.

D. Farmer eligibility for farmer-lender mediation

To be eligible for mandatory farmer-lender mediation, the debtor must be a family farmer and the farming operation must be of at least a certain size.

1. Must be a family farmer

To qualify for mandatory farmer-lender mediation, the debtor must operate a family farm, a family farm corporation, or an authorized farm corporation.[27] Almost all farmers who would generally be thought of as family farmers will qualify. According to one unpublished Minnesota Court of Appeals decision, absentee landlords of farm property are not eligible for mandatory mediation under the Farmer Lender Mediation Act.[28]

2. Must meet minimum acreage or sales requirements

Farmer-lender mediation is not required if the farmer: (1) owns and leases a total of less than sixty acres; and (2) had less than $20,000 in gross sales of agricultural products the preceding year.[29] If either one of these conditions is not present, the farmer is eligible for mandatory farmer-lender mediation.[30] This means that farmers who own and lease less than sixty acres but sold over $20,000 in farm products in the previous year may be eligible for mandatory farmer-lender mediation. Similarly, farmers who had less than $20,000 in sales of farm products in the previous year may still qualify for mandatory farmer-lender mediation if they own and lease a total of at least sixty acres.

E. Minimum debt amount

Mandatory farmer-lender mediation is available only if the amount of the debt in question is more than a certain amount.

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27 MINN. STAT. § 583.24, subd. 2. A family farm is a farming unit that is not incorporated and is owned by one or more persons who reside on the farm or are actively engaged in farming. MINN. STAT. § 500.24, subd. 2(b); *Fed. Land Bank v. Wessels*, No. C7-88-2233, 1989 WL 38400 (Minn. Ct. App. Apr. 25, 1989) (unpublished). The definition of "family farm corporation" limits majority ownership of the company to family members, at least one of whom must reside on the farm or be actively engaged in farming the land. MINN. STAT. § 500.24, subd. 2(c). The ownership structure of an authorized farm corporation is also limited. MINN. STAT. § 500.24, subd. 2(e). In *Resolution Trust Corp. v. Lipton,* 983 F.2d 901 (8th Cir. 1993), the Eighth Circuit Court of Appeals held that a partnership will only be eligible for mandatory farmer-lender mediation if it is a "family farm" as defined in MINN. STAT. § 500.24, subd. 2(b). That is, one or more of the partners must reside on the farm or be actively engaged in farming the land.

28 *Bornhorst v. Budzik,* No. C8-90-393, 1990 WL 119348 (Minn. Ct. App. Aug. 9, 1990) (unpublished).

29 MINN. STAT. § 583.24, subd. 2(b).

30 At least one court has suggested otherwise, but this interpretation is almost certainly incorrect. See *Northern State Bank v. Efteland,* 409 N.W. 2d 541 (1987). A later Minnesota Court of Appeals decision seems to doubt that this is the correct interpretation of the statute. See *Rengstorf v. Richards,* 417 N.W. 2d 139 (1987). And, a United States District Court expressed "considerable doubt" as to whether this was the correct interpretation of the state. See *Mayer v. Countrywide Home Loans*, No. 08-1071 (JMR/RLE), 2008 U.S. Dist. LEXIS 123406, at *27 (D. Minn. June 4, 2008) (unpublished).

1. $15,000 as of August 1, 2017

The minimum debt amount to trigger mandatory farmer-lender mediation is $15,000.[31] This amount applies to debt that is subject to a farmer-lender mediation that is initiated on or after August 1, 2017.[32]

2. $5,000 before August 1, 2017

The minimum debt to trigger mandatory mediation is $5,000 for debts that are subject to a farmer-lender mediation that was initiated before August 1, 2017.[33]

3. $15,000 amount might change in the future – but no guarantee

Beginning in 2022 and every five years after 2022, the Commissioner of Agriculture, in consultation with the director of farmer lender-mediation, must report to the Minnesota Legislature regarding what the dollar amount of the minimum debt amount would be if it were adjusted for inflation.[34] There is no guarantee the legislature will act on this report.

4. Contracts for deed

The cancellation of a contract for deed to purchase agricultural property triggers mandatory farmer-lender mediation only if the remaining balance on the contract is for at least the minimum amount.[35] As noted above, as of 2017, that means either $15,000 or $5,000.[36]

5. Mortgages

The foreclosure of a mortgage on agricultural property requires farmer-lender mediation only if the amount of outstanding debt secured by the mortgage is at least the minimum amount.[37] As noted above, as of 2017, that means either $15,000 or $5,000.[38]

6. Attachment, execution, levy, and seizure

The attachment, execution, levy, or seizure of agricultural property triggers mandatory farmer-lender mediation only if the creditor has a judgment against the debtor of at

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31 MINN. STAT. § 583.24, subd. 5.
32 2017 Minn. Laws, ch. 88, art. 2, sec. 83.
33 Minn. Stat. §§ 559.209, subd. 1 (2016) (amended by 2017 Minn. Laws, ch. 88, art. 2, sec. 79), 582.039, subd. 1 (2016) (amended by 2017 Minn. Laws, ch. 88, art. 2, sec. 80), 550.365, subd. 1 (2016) (amended by 2017 Minn. Laws, ch. 88, art. 2, sec. 78), 336.9-601(h)(2016) (amended by 2017 Minn. Laws, ch. 88, art. 2, sec. 76).
34 MINN. STAT. § 583.24, subd. 5.
35 MINN. STAT. § 559.209, subd. 1; MINN. STAT. § 583.24, subd. 5.
36 The $5,000 limit was previously found in MINN. STAT. § 559.209, subd 1.
37 MINN. STAT. § 582.039, subd. 1; MINN. STAT. § 583.24, subd. 5.
38 The $5,000 limit was previously found in MINN. STAT. § 582.039, subd 1.

least the minimum amount.[39] As noted above, as of 2017, that means either $15,000 or $5,000.[40]

7. Enforcing a security interest

If a creditor seeks to enforce a security interest in collateral that is agricultural property—for example, by taking possession of a tractor—this action triggers mandatory farmer-lender mediation only if the amount of debt secured by the property is at least the minimum amount.[41] It is not clear from the language of the statute whether the minimum applies to the amount of the original debt or the amount still outstanding at the time of the creditor action.[42] As noted above, as of 2017, the minimum amount is either $15,000 or $5,000.[43]

F. Farmers who have converted security may be ineligible for mediation

A farmer who has converted security property may be ineligible for mandatory farmer-lender mediation.[44] The farmer may face other legal problems as well, including possible criminal charges.

For the purpose of farmer-lender mediation, a farmer commits conversion when the farmer: (1) knows a creditor has a security interest in his or her agricultural property; (2) fraudulently conceals, removes, or transfers the property in violation of the security agreement; and (3) does not pay the proceeds to the creditor.[45]

1. Conversion before mediation starts

A secured creditor who believes that a farmer has converted security property may petition the Minnesota district court in the county where the debtor resides for an order allowing the creditor to use collection actions without offering mediation.[46] The creditor must petition the court within one year of the conversion and before providing a notice of farmer-lender mediation rights to the farmer.[47] The court will issue a summons within seven days of the creditor's petition, telling the farmer to appear in court to answer the creditor's claim.[48] The court will then decide whether the farmer is eligible for mandatory farmer-lender mediation.

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39 MINN. STAT. § 550.365, subd. 1; MINN. STAT. § 583.24, subd. 5.
40 The $5,000 limit was previously found in MINN. STAT. § 550.365, subd 1.
41 MINN. STAT. § 336.9-601(h); MINN. STAT. § 583.24, subd. 5.
42 The statute refers to agricultural property that "has secured a debt of more than . . . ." MINN. STAT. § 336.9-601(h).
43 The $5,000 limit was previously found in MINN. STAT. § 336.9-501, subd. 6.
44 MINN. STAT. § 583.27, subd. 7.
45 MINN. STAT. § 583.27, subds. 4(a), 7.
46 MINN. STAT. § 583.27, subd. 7.
47 MINN. STAT. § 583.27, subd. 7.
48 MINN. STAT. § 583.27, subd. 7. The farmer will be required to appear no more than seven and no less than 14 days after the summons is issued.

2. Conversion during the mediation process

If a creditor believes that a farmer has converted security property during the mediation period, the creditor can seek an affidavit of bad faith from the mediator.[49] If the mediator agrees that conversion has occurred and issues the affidavit of failure to act in good faith, the creditor will be allowed to immediately proceed with action against the farmer's property.[50]

G. Some debts are not eligible for farmer-lender mediation

Creditor action on some debts does not trigger mandatory farmer-lender mediation.

1. If the same debt has already been the subject of a mediation

If a debt has already been subject to mandatory farmer-lender mediation, a creditor is not required to offer farmer-lender mediation on that same debt again.[51] This restriction applies whether the earlier mediation resulted in an agreement or was unresolved.[52] It also applies if the creditor provided a mediation notice for the debt, the farmer failed to request mediation, and the creditor is taking action within sixty days after the deadline for the farmer to request mediation.[53]

2. If the farmer has filed for bankruptcy

If the farmer has filed for bankruptcy and the debt was listed as a scheduled debt, or a creditor filed a proof of claim form on the debt, the creditor is not required to offer farmer-lender mediation before enforcing the debt.[54] Creditor actions may be limited by bankruptcy rules. Bankruptcy is discussed in Chapter 8 of this Guide.

3. If the debt is for rent of seasonal use farm machinery during a prior mediation

Farmer-lender mediation is not required if a creditor is making a claim against a farmer's crops to pay for the reasonable rental value of certain seasonal use farm machinery during a prior mediation.[55] This type of claim arises when a farmer has defaulted on a "purchase money" loan for "seasonal use farm machinery."[56] If that debt

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49 MINN. STAT. § 583.27, subd. 4.

50 MINN. STAT. § 583.27, subd. 4(b).

51 MINN. STAT. § 583.24, subd. 4(2); *Burgmeier v. Farm Credit Bank*, 499 N.W.2d 43, 50 (Minn. Ct. App. 1993) (holding that under Minn. Stat. § 583.24, subd. 4(2), a lender who sought a second foreclosure of a property was not required to offer mediation because the same mortgage and note had been the subject of mediation during the first foreclosure action).

52 MINN. STAT. § 583.24, subd. 4(2).

53 MINN. STAT. § 583.24, subd. 4(3).

54 MINN. STAT. § 583.24, subd. 4(1).

55 MINN. STAT. §§ 583.24, subd. 4(5), 514.661, subds. 2, 8.

56 MINN. STAT. § 514.661, subd. 2(a). In the context of the Farmer-Lender Mediation Act, a purchase money loan exists when a creditor loans a farmer money to purchase seasonal use farm machinery, and that machinery is the collateral for repayment of the loan. MINN. STAT. § 336.9-103.

is subject to farmer-lender mediation, the farmer is allowed to keep possession of any such machinery needed "for field operation" during the mediation period.[57] The creditor is then entitled to a lien against the farmer's crops in the amount of the reasonable rental value of the machinery.[58] If the creditor later attempts to enforce the lien and collect the rental amount, that action will not trigger mandatory farmer-lender mediation.[59]

Under this restriction, seasonal use machinery means machinery, equipment, or implements that are used only for planting, row crop cultivating, or harvesting.[60] It does not include tractors, tillage equipment, or utility implements used for general farm purposes. [61]

As noted above, a farmer should be only allowed to retain possession of seasonal use machinery that is needed during the mediation period.[62]

4. New in 2017 -- some loans made as a result of mediation

Under changes made by the legislature in 2017, farmer-lender mediation is not mandatory if a creditor is making a claim against a new line of credit, loan, or other debt that was extended by a creditor as a result of a farmer-lender mediation that ended within the previous two years.[63]

After two years, this mediation restriction ends, and the debt could become subject to mandatory farmer-lender mediation. The two years are measured from the time a mediation termination statement is issued by the mediator. [64]

This restriction on mediation applies to debt that is subject to a farmer-lender mediation that is initiated on or after August 1, 2017. [65] If the mediation was initiated before August 1, 2017, this new restriction does not apply.

III. Farmer-lender mediation notices

If farmer-lender mediation is required, the creditor must send the farmer an official mediation notice.[66] The notice may be by personal service, certified mail using return receipt signed by the farmer, or actual delivery with a signed receipt.[67]

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57 MINN. STAT. § 514.661, subd. 2(a).

58 MINN. STAT. § 514.661, subd. 2(a). If the amount needed to bring the loan current during the mediation period is less than the reasonable rental value of the machinery, the lien will be limited to that amount.

59 MINN. STAT. § 514.661, subd. 8.

60 MINN. STAT. § 514.661, subd. 1(b).

61 MINN. STAT. § 514.661, subd. 1(b).

62 MINN. STAT. § 514.661, subd. 2(a) (". . . the reasonable rental value of seasonal use machinery that is used for field operation during mediation").

63 MINN. STAT. § 583.24, subd. 4(6).

64 MINN. STAT. § 583.24, subd. 4(6).

65 2017 Minn. Laws, ch. 88, art. 2, sec. 82.

66 MINN. STAT. §§ 583.26, subd. 1, 583.22, subd. 8.

67 MINN. STAT. §§ 583.26, subd. 1(a), 583.22, subd. 8. If these are unsuccessful, the creditor may send

A. Contents of the notice

The mediation notice must describe the amount of outstanding debt and the property subject to the creditor's action.[68] Actions except for attachments, levys, and liens must include the collection action that the creditor plans to take and a description of the debt owed by the farmer.

The notice must also include the following language:[69]

> You have the right to have [the debt] reviewed for mediation. If you request mediation, a debt that is in default will be mediated only once. If you do not request mediation, this debt will not be subject to future mediation if the [creditor] enforces the debt.[70]
>
> If you participate in mediation, the Farmer-Lender Mediation Program will provide an orientation meeting and a financial analyst to help you prepare financial information.[71] If you decide to participate in mediation, it will be to your advantage to assemble your farm finance and operation records and to contact a County Extension office as soon as possible. Mediation will attempt to arrive at an agreement for handling future financial relations.

B. If the farmer does not receive the notice

If the creditor starts a collection against a farmer and the farmer has not received a mediation notice, the farmer can start mediation on his or her own by filing a mediation request form with the Farmer-Lender Mediation Program.[72] The request must state that the farmer has not received a mediation notice.[73] If the creditor was required to offer mediation, the farmer's mediation request stops the creditor's collection actions and sets the mediation process in motion.[74]

C. If more than one person is liable for the same debt

If more than one person is liable for the same debt on a piece of agricultural property, a single mediation is used for all of the farmers.[75]

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the notice by mail, with a certificate of mailing, to the farmer's last known address. MINN. STAT. § 583.22, subd. 8. The farmer is considered to have been served five days after the date on the certificate of mailing. MINN. STAT. § 583.22, subd. 8.

68 MINN. STAT. §§ 336.9-601(h)-(i), 550.365, 559.209, 582.039.

69 MINN. STAT. §§ 336.9-601(h)-(i), 550.365, 559.209, 582.039.

70 The statutory mediation notice for a contract for deed cancellation uses the language "begins remedies to enforce the debt." MINN. STAT. § 559.209, subd. 2.

71 The statutory mediation notices say these actions will be taken by the "Director of the Agricultural Extension Service." MINN. STAT. §§ 336.9-601(h)-(i), 550.365, 559.209, 582.039. This language does not reflect the change in administration of the Farmer-Lender Mediation Program.

72 MINN. STAT. § 583.26, subd. 2(c).

73 MINN. STAT. § 583.26, subd. 2(c).

74 MINN. STAT. § 583.26, subd. 5.

75 MINN. R. 1502.0017, subpt. 1.

D. If the same farmer receives notices from more than one creditor

The same farmer might receive mediation notices at about the same time from more than one creditor. If so, all mediation notices received before the first mediation meeting will be combined by the Farmer-Lender Mediation Program into the same mediation process.[76] If the farmer receives another mediation notice from a different creditor after the first mediation meeting and before the end of the mediation process, it is up to the Farmer-Lender Mediation Program to decide how to proceed.[77]

IV. Requesting mediation

Once farmers receive a mediation notice, they must decide whether to participate in the farmer-lender mediation process. If they wish to, a "request for mediation" form must be filed.[78] Mediation request forms are available from the county recorder or county extension office.

A. Deciding whether to request mediation

In some cases, it may not be in the farmer's interest to request mediation. Some debts may simply be too small to make mediation worth the time and effort. In other cases, mediation simply might not be the best strategy. For example, suppose a farmer is in default on a mortgage to the bank but is making progress in negotiations with the bank. During these negotiations, an implement company serves the farmer with a mediation notice regarding late payments for machinery. If the farmer requests mediation of the machinery debt, the bank will likely file a claim and the mortgage debt will also be mediated at that time. In this case, the farmer might choose not to request mediation with the implement company, which will allow the farmer to continue negotiating with bank while also preserving the right to mediate the mortgage in the future if negotiations with the bank do not succeed.

B. Mediation requests must be filed within Fourteen days of notice

A farmer must file a mediation request form with the Farmer-Lender Mediation Program within fourteen days after receiving the mediation notice.[79] Mediation requests must be filed with the Farmer-Lender Mediation Program by either certified mail using return receipt or by actual delivery of the mediation request with a signed receipt from the Farmer-Lender Mediation Program.[80]

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76 MINN. STAT. § 583.26, subd. 1(c); MINN. R. 1502.0017, subpt. 2.
77 MINN. R. 1502.0017, subpt. 2.
78 MINN. STAT. § 583.26, subd. 2(a).
79 MINN. STAT. § 583.26, subd. 2(a); MINN. R. 1502.0007.
80 MINN. R. 1502.0010. For the purpose of mediation, filing means to deliver by the required date by certified mail or another method acknowledging receipt. MINN. STAT. § 583.22, subd. 6.

C. What the farmer must include in the request for mediation

The request for mediation filed by the farmer must include certain information. Failure to include the required information, particularly the list of all known secured creditors, can put the farmer's mediation rights at risk.

1. List all known secured creditors

The request for mediation must include a list of all of the farmer's known creditors with debts secured by agricultural property.[81]

2. List any unsecured creditors necessary for the farm operation

The request for mediation must also include a list of unsecured creditors that the farmer believes are necessary for the farm operation.[82] The statute expressly states that it is up to the farmer to decide which unsecured creditors are necessary for the operation. [83]

Under a provision that went into effect in 2017, the statute says that the mediation notice will also tell the farmer that the if the farmer leaves out a "significant unsecured creditor" this could lead to the farmer being found to have failed to mediate in food faith.[84] Good faith, which is discussed in more detail below, is required in farmer-lender mediation.

3. State the date notice of mediation was served

In addition, the request for mediation must state the date that the mediation notice was served on the farmer.[85]

4. New 2017 requirement -- permission for credit report

Beginning in 2017, when the farmer requests mediation he or she must give the Farmer-Lender Mediation Program permission to obtain the farmer's credit report.[86] The requirement applies to debt subject to mediation initiated on or after August 1, 2017.[87]

D. Withdrawing a mediation request

Farmers can withdraw a request for mediation at any time before the end of the fourteen

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81 MINN. STAT. § 583.26, subd. 2(a).
82 MINN. STAT. § 583.26, subd. 2(a).
83 MINN. STAT. § 583.26, subd. 2(a).
84 MINN. STAT. § 583.26, subd. 2(a). The requirement applies to debt subject to a mediation initiated on or after August 1, 2017. 2017 Minn. Laws, ch. 88, art. 2, sec. 84.
85 MINN. STAT. § 583.26, subd. 2(a).
86 MINN. STAT. § 583.26, subd. 2(a).
87 2017 Minn. Laws, ch. 88, art. 2, sec. 84.

day filing period.[88] A withdrawal must be in writing. In general, farmers withdrawing a mediation request waive their right to mediate the debt that triggered the serving of a mediation notice to begin with.[89] If farmers choose, however, they may file the mediation request again, as long as they do so within the fourteen days allowed for filing the original mediation request.[90]

E. Failure to request mediation

If the creditor serves a mediation notice for a debt and the farmer does not request mediation within the fourteen day request period (or makes a request and then withdraws it), the farmer loses the right to mediate the debt.[91] In such cases, the Farmer-Lender Mediation Program will send a copy of a Failure to Request Mediation form to the farmer and creditor who served the mediation notice.[92]

1. Creditor can enforce the debt

Once a Failure to Request Mediation form has been issued, the creditor will be allowed to proceed with the collection actions—such as foreclosure or repossession—that originally triggered the mediation notice.[93]

2. Creditor must act within sixty days or resend mediation notice

After a Failure to Request Mediation form has been issued, the creditor must begin collection actions against the debtor within sixty days.[94] Creditors who fail to begin a collection action within sixty days must file another mediation notice before enforcing the debt.

F. Canceling mediation if the problem is solved

In some cases, the problem that triggered the mediation notice in the first place is solved before mediation meetings even begin. If the creditor who served the mediation notice reaches an agreement with the farmer before the first mediation meeting, the farmer and the creditor should send a written statement to the Farmer-Lender Mediation Program. The Farmer-Lender Mediation Program will then cancel the mediation proceeding.[95]

Similarly, if the farmer cures the default of the debt described in the creditor's first mediation notice before the first mediation meeting, the farmer and creditor should send a written statement to the Farmer-Lender Mediation Program explaining that the default has been cured. The Farmer-Lender Mediation Program will then cancel the mediation

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88 MINN. R. 1502.0007.
89 MINN. R. 1502.0007.
90 MINN. R. 1502.0007.
91 MINN. STAT. §§ 583.24, subd. 4(3), 583.26, subd. 2(b); MINN. R. 1502.0007.
92 MINN. R. 1502.0008.
93 MINN. STAT. §§ 583.24, subd. 4(3), 583.26, subd. 2(b); MINN. R. 1502.0008.
94 MINN. STAT. §§ 583.24, subd. 4(3), 583.26, subd. 2(b). The 60-day deadline begins with the farmer's failure to make a timely request for mediation.
95 MINN. R. 1502.0009, subpt. 2.

proceeding.[96]

V. Mediation proceeding notice — sent to farmer and all identified creditors

Within ten days after a farmer has filed a request for mediation, the Farmer-Lender Mediation Program must send a "mediation proceeding notice" to the farmer and to all creditors identified in the mediation request.[97] The Farmer-Lender Mediation Program will also send the notice to other secured creditors that are identified.[98] The mediation proceeding notice sets out the basic process for the mediation and informs creditors of their rights and obligations during the mediation period.

A. Meeting times and places

The mediation proceeding notice must state the name and address of the farmer, the time and place of the mediation orientation session (discussed later in this chapter), and the time and place for the initial mediation meeting.[99] The initial meeting must be held within twenty days of the mediation proceeding notice.[100]

Initiating creditor

In the mandatory farmer-lender mediation process, the initiating creditor is the creditor who sent the initial mediation notice to the farmer. That is, it is the creditor whose intent to collect a debt by taking action against the farmer's agricultural property triggered the mandatory farmer-lender mediation process.

B. Mediator selection process

The mediation proceeding notice should also set out the process for the farmer and creditor whose intent to take action on a debt triggered the mediation—called the "initiating creditor"—to select the mediator.[101] Mediator qualifications and the selection process are discussed later in this chapter.

C. Creditor responsibilities

The mediation proceeding notice informs creditors of the stay, or prohibition, on enforcing debts against the farmer while the mediation process is open, and their duty to provide the farmer with specified financial statements related to the farmer's debts by the time of the

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96 MINN. R. 1502.0009, subpt. 1.
97 MINN. STAT. § 583.26, subd. 4(a).
98 MINN. STAT. § 583.26, subd. 4(a). The additional creditors will be those identified from the farmer's credit report.
99 MINN. STAT. § 583.26, subd. 4(b)(1), (3), (4).
100 MINN. STAT. § 583.26, subd. 4(c).
101 MINN. STAT. § 583.26, subd. 4(b)(6), 4(d).

initial mediation meeting.[102] These obligations apply to all of the creditors identified by the farmer in the mediation request—not just the initiating creditor.

In addition to the mediation proceeding notice, any secured creditor identified by the farmer will receive a claim form.[103] As discussed later in this chapter, if the creditor believes that the debt is not subject to mandatory farmer-lender mediation, the creditor must return the claim form and indicate the basis of that belief.[104]

VI. Mediation suspends creditor actions to collect debt

From the farmer's perspective, one of the most powerful aspects of the mandatory Farmer-Lender Mediation Program is that it prohibits creditors from taking action to enforce a debt while the mediation process is open. This is intended to allow the parties to meet and discuss the problems freely, without the farmer worrying that the creditor will take immediate action and without the creditor worrying that some other creditor will be able to seize the farmer's property.[105]

As powerful as the stay of creditor collection actions is, it has some important limitations. Farmers who are participating in mandatory farmer-lender mediation should be sure that they understand exactly what the prohibition means and how long it is in effect.

A. General suspension of creditor collection actions

In general, the Farmer-Lender Mediation Act prohibits creditors from proceeding to enforce a debt against a farmer's agricultural property until the mediation process is complete.[106] Prohibited actions include proceedings to enforce a debt against agricultural property by foreclosure, termination of a contract for deed, repossession, garnishment, levy execution, seizure, or attachment.[107]

1. The initiating creditor — collection prohibited from the time mediation is triggered

An initiating creditor is prohibited from taking action to enforce a debt against a farmer's agricultural property from the time the farmer-lender mediation process is triggered.[108]

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[102] MINN. STAT. § 583.26, subds. 4(b)(8), (9), 5(a), (d).
[103] MINN. STAT. § 583.26, subd. 4(a).
[104] MINN. STAT. § 583.26, subd. 4(f).
[105] Farmers who are facing harassment from creditors, including repeated phone calls or calls late at night, may report a violation of state law to the Minnesota Attorney General's Office at https://www.ag.state.mn.us/Consumer/Publications/DebtFactSheet.asp.
[106] MINN. STAT. § 583.26, subd. 4(b)(8).
[107] MINN. STAT. § 583.26, subds. 1(a)-(b), 5(a)-(b).
[108] MINN. STAT. § 583.26, subd. 1(a).

2. Other creditors — collection prohibited after receipt of the mediation proceeding notice

For creditors other than the initiating creditor—that is, those creditors identified in the farmer's mediation request—collection actions are prohibited after the mediation proceeding notice has been received.[109] These creditors may not begin any new collection action against the debtor, and if any collection action has already been started, the creditor may not continue the action.

B. Creditor actions suspended for ninety days

The prohibition on creditor collection actions under the Farmer-Lender Mediation Act generally lasts for ninety days after the farmer files a mediation request.[110] In some cases, however, the suspension may last for less time or for more time.

1. Suspension ends if the farmer fails to act in good faith

If the mediator issues an affidavit finding that the farmer has not acted in good faith, creditor collection actions will no longer be suspended and the creditor will be able to immediately proceed with collection.[111] The definition of good faith is explained later in this chapter.

2. Suspension ends if the farmer signs an agreement allowing creditor remedies

The farmer and creditor may sign an agreement allowing the creditor to enforce a debt against agricultural property before it would otherwise be allowed. Such an agreement must be signed by both the farmer and the creditor, and the creditor must wait for five days after the agreement is signed to take this action.[112] During this five-day period, either the farmer or creditor may reconsider and rescind the agreement.[113]

3. Court-supervised mediation may extend suspension of collection actions

In certain circumstances, the district court of the county where the farmer resides may assume supervision of the mandatory farmer-lender mediation process.[114] Creditor collection actions will also be suspended during any such "court-supervised mediation."[115] At the end of the court-supervised mediation period, if the court decides that a creditor has not participated in good faith, that creditor may be prohibited from taking collection action for another 180 days.[116] Court-supervised mediation is

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109 MINN. STAT. § 583.26, subd. 5(a)-(b).
110 MINN. STAT. § 583.26, subds. 4(b)(8), 5(a)-(b).
111 MINN. STAT. §§ 583.26, subd. 5(c)(1), 583.27, subd. 4(b).
112 MINN. STAT. § 583.26, subds. 5(c)(2), 9(c).
113 MINN. STAT. § 583.26, subds. 5(c)(2), 9(c).
114 MINN. STAT. § 583.27, subds. 3, 6(b).
115 MINN. STAT. § 583.27, subd. 3.
116 MINN. STAT. § 583.27, subd. 3.

discussed in more detail later in this chapter.

Figuring deadlines in mediation

A number of deadlines are important in mediation. They should be calculated using three rules.

First, when an act or event triggers a time period, the day the act or event occurs does not count among the days in the time period. For example, a farmer has fourteen days after receiving a mediation notice to file a request for mediation. If the farmer receives the mediation notice on Wednesday the thirteenth, Thursday the fourteenth counts as the first day of the fourteen day period, Friday the fifteenth counts as the second day, and so forth.

Second, if the last day for a time period lands on a Saturday, Sunday, or legal holiday, the time period is extended until the end of the next day that is not a Saturday, Sunday, or holiday. For example, if a farmer has fourteen days after receiving a mediation notice to file a request for mediation, and the fourteenth day falls on Saturday the twenty-third, the deadline is extended until the end of the day on Monday, the twenty-fifth. If Monday the twenty-fifth is a legal holiday, the deadline is extended yet again to the end of the day on Tuesday the twenty-sixth.

Third, if the time period in question is less than seven days, Saturdays, Sundays, and legal holidays do not count in the calculation.

MINN. R. 1502.0013.

VII. The mediator

Mediators in the Farmer-Lender Mediation Program are people who have been trained in mediation and have some background in farm finance.[117] The law sets out how they are selected, their role in the mediation, and how they can be removed.

A. Selecting the mediator

The farmer and the initiating creditor are allowed to participate in the selection of the mediator from a list of persons working with the Farmer-Lender Mediation Program. The Farmer-Lender Mediation Program will attempt to select a mediator based in part on proximity to the farmer and the creditor in order to avoid long-distance travel and scheduling problems. Co-mediators may be appointed for complex cases.[118] The parties may also choose to hire their own outside mediator.

[117] MINN. R. 1502.0004(A).
[118] MINN. R. 1502.0015, subpt. 3. This likely would only happen in complicated cases.

1. The farmer and initiating creditor are given a list of three names

As part of the mediation proceeding notice, the Farmer-Lender Mediation Program is required to send the farmer and the initiating creditor the names of three mediators who may be assigned to conduct the mediation.[119] The notice must also set out biographical information on each mediator, including a record of mediation cases assigned and the number of agreements that were signed.[120]

The farmer and initiating creditor may each exclude one mediator from the list of three.[121] They must do this by sending notification of the exclusion to the Farmer-Lender Mediation Program within three days of receiving the mediation proceeding notice.[122]

2. No conflicts of interest

Anyone with a conflict of interest with either the farmer or creditor that does not allow them to be impartial is not eligible to be a mediator in that case.[123]

3. Outside professional mediators possible

If the farmer and at least one creditor agree, they can select and pay for a professional mediator who is not on the Farmer-Lender Mediation Program list.[124]

4. If the mediator withdraws from the case

If after mediation begins the appointed mediator withdraws from the case, the Farmer-Lender Mediation Program will select another mediator.[125]

B. Mediator duties

The Farmer-Lender Mediation Act sets out a detailed list of mediator duties.

1. Specific mediator duties

At mediation meetings, it is the job of the mediator to:[126]

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119 MINN. STAT. § 583.26, subd. 4(b)(5).
120 MINN. STAT. § 583.26, subd. 4(b)(5).
121 MINN. STAT. § 583.26, subd. 4(b)(6), (d); MINN. R. 1502.0015, subpt. 1.
122 MINN. STAT. § 583.26, subd. 4(b)(6), (d); MINN. R. 1502.0015, subpt. 1.
123 MINN. STAT. § 583.26, subd. 6(a). A conflict of interest includes being a current officer or board member of the initiating creditor. MINN. STAT. § 583.26, subd. 6(a).
124 MINN. STAT. § 583.26, subd. 4(b)(7), (e). The Farmer-Lender Mediation program must approve the mediator. Additional requirements apply before such a mediator can be approved. MINN. STAT. § 583.26, subd. 4(e).
125 MINN. R. 1502.0015, subpt. 2. The mediator will be picked by the Farmer-Lender Mediation Program from those not previously stricken from the mediator list. If an unstricken mediator is not available an available mediator—that is subject to the disapproval of either the debtor or initiating creditor if it can be shown that the mediator has a conflict of interest—will be selected. MINN. R. § 1502.0015, subpt. 2.
126 MINN. STAT. § 583.26, subd. 6(b).

(1) listen to the farmer and the creditors;
(2) attempt to mediate between the debtor and the creditors;
(3) advise the farmer and creditors of assistance programs available;
(4) attempt to arrive at an agreement to fairly adjust, refinance, or pay the debts; and
(5) advise, counsel, and assist the farmer and creditors in attempting to arrive at an agreement for the future conduct of financial relations among them.

In addition, the mediator should:[127]

(1) review for the parties the farmer's and creditors' rights and obligations in the mediation process;
(2) explain the rules of conduct for mediation meetings;
(3) explain the confidentiality of mediation; and
(4) facilitate written agreements on: (a) money to be released for necessary farm operating expenses; (b) money to be released for and necessary living expenses; and (c) the creditors, if any, responsible for releasing the money.

2. No duty to explain legal rights

Mediators do not have a duty to advise either farmers or creditors about the law or to encourage or assist them in reserving or establishing their legal rights.[128]

C. Removing a mediator

In some cases, a party to the mediation may wish to remove an acting mediator.

1. Either the farmer or creditor can remove the mediator

Either the farmer or the initiating creditor may request that the mediator be removed at any time.[129] The request must be in writing and sent to the Farmer-Lender Mediation Program.[130] The farmer and creditor may each remove only one mediator

2. Replacing a removed mediator

The Farmer-Lender Mediation Program will remove the mediator and name a replacement.[131]

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127 MINN. R. § 1502.0016.
128 MINN. STAT. § 583.26, subd. 7(a).
129 MINN. R. 1502.0018, subpt. 1.
130 MINN. R. 1502.0018, subpt. 1. The rule does require that the debtor or creditor provide a reason for the removal.
131 MINN. R. 1502.0018, subpt. 1. The mediator will be picked by the Farmer-Lender Mediation Program from those not previously stricken from the mediator list. If an unstricken mediator is not available the Farmer-Lender Mediation Program appoints an available mediator that is subject to the disapproval of either the debtor or initiating creditor if it can be shown that the mediator has a conflict of interest. MINN. R. 1502.0018, subpt. 1.

3. Each party may remove only one mediator

The farmer and initiating creditor may each remove only one mediator using this method during a single mediation process.[132]

4. Length of mediation not affected

The removal of a mediator does not affect the length of the mediation period.[133]

D. Mediators immune from liability

Mediators are immune from civil liability for actions falling within their job as mediator.[134]

VIII. Preparing for mediation

Preparation is crucial for a successful mediation. Financial analysts and farm advocates are available to assist farmers as part of the Farmer-Lender Mediation Program. Depending on the complexity of the issues and the value of the property at stake, a farmer might also want to seek legal advice.

A. Financial analysts

Within three business days after receiving the farmer's mediation request, the Farmer-Lender Mediation Program will send the farmer the name of a financial analyst who is available to meet with the farmer.[135] The financial analyst is someone who is knowledgeable in agricultural and financial matters and can help the farmer in preparing the financial information needed for mediation.[136] The financial analyst can review and, if necessary, help prepare the farmer's financial records before the initial mediation meeting.[137]

B. Farm advocates

After receiving the mediation request, the Farmer-Lender Mediation Program will also send the farmer a list of farm advocates and an explanation of the services provided by the Minnesota Farm Advocate Program.[138] Farm advocates provide one-on-one assistance for Minnesota farmers who face crisis caused by a natural disaster or financial problems.[139]

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[132] MINN. R. 1502.0018, subpt. 2.

[133] MINN. R. 1502.0018, subpt. 3. In particular, the removal of a mediator does not affect any of the existing time periods, deadlines, and so forth, in the mediation.

[134] MINN. STAT. § 583.26, subd. 7(a); for a more in-depth discussion of mediator immunity, see *Schaffer v. Agribank, FCB,* No. C7-96-1273, 1997 WL 40739 (Minn. Ct. App. Feb. 4, 1997) (unpublished).

[135] MINN. STAT. § 583.26, subd. 3(a).

[136] MINN. STAT. § 583.22, subd. 6a. The financial analyst may be a county extension agent, adult farm management instructor, technical college instructor, or another person able to carry out these duties.

[137] MINN. STAT. § 583.26, subd. 3(a).

[138] MINN. STAT. § 583.26, subd. 3(b); MINN. R. 1502.0012.

[139] See the information on Minnesota Farm Advocates, at https://www.mda.state.mn.us/about/commissionersoffice/farmadvocates.aspx:, and the brochure

They are trained and experienced in agricultural lending practices, mediation, lender negotiation, farm programs, crisis counseling, and disaster programs, and they have been trained to recognize the need for legal and social services. At present, farm advocates provide services without charge to the farmer.[140]

C. Creditors must provide information before the initial meeting

Creditors receiving a mediation proceeding notice must provide farmers with the following information by the initial mediation meeting: (1) copies of notes and contracts for debts subject to mediation; (2) a statement of the interest rates on the debts, delinquent payments, and the unpaid principal balance and interest balances; (3) a list of collateral securing debts and an estimate of the collateral's value; and (4) any debt restructuring programs available to the farmer.[141]

D. Appraising real estate for mediation

An important issue during the mediation process may be the value of the farmer's real estate. If the farmer and the creditors disagree over the value of real property involved in mediation, the market value will be determined by an appraisal.[142] This appraisal will set the fair market value to be used in the mediation and must be accepted by all parties.[143] The cost of the appraisal will be divided evenly between the principal creditor and the farmer.[144]

E. Mediation planning

For mediation to be successful, it is important for farmers to decide what they want to accomplish in mediation and to develop a plan that meets those goals.

For farmers who want to continue farming, the farmer should ask the financial analyst to try to prepare a cash flow plan to show that the farm operation will produce sufficient income to pay debts and cover production costs.

A cash flow plan could contain a variety of options, including loan re-amortization, deferral of principal or interest payments, or other debt restructuring, including forgiveness of some debt. It could also contain changes in the farm operation, the sale of some assets, or voluntarily turning some assets over to creditors.

Minnesota Farm Advocates, at https://www.mda.state.mn.us/about/commissionersoffice/~/media/Files/about/farmadvocates.pdf Minn. Regulation allow a charge for farm advocate services.

140 MINN. R. 1502.0012; MINN. R. 1502.0027.

141 MINN. STAT. § 583.26, subds. 4(b)(9), 5(d).

142 MINN. STAT. § 583.27, subd. 8. The appraisal must be performed by an accredited appraiser and made within 45 days of the dispute. The mediator will submit three names of accredited appraisers to the principal creditor and farmer. Each may strike the name of one appraiser. The appraiser not eliminated will do the appraisal.

143 MINN. STAT. § 583.27, subd. 8(3).

144 MINN. STAT. § 583.27, subd. 8.

IX. The mandatory farmer-lender mediation process

Although mandatory farmer-lender mediation is a rather informal process, there are some basic requirements and limitations under the statute.

A. Orientation session

An orientation session must be held at least five days before the first mediation meeting.[145] The farmer, the financial analyst, and a mediator must attend the orientation session.[146] Creditors participating in the mediation may attend the orientation session if they choose, although the farmer may meet privately with the financial analyst.[147] Sometimes these orientation sessions are held by telephone conference call.

At the orientation session, the financial analyst will review the farmer's financial and inventory records to make sure that they are complete and will explain what additional records are needed.[148]

The mediator will explain to the farmer the requirements for mediation.[149] This will include the requirement that the farmer participated in good faith by addressing, before the initial mediation meeting, any inadequacies that have been identified by the financial analyst.[150] The mediator will also remind the farmer that he or she has the right to seek a lawyer or other expert for advice on the legal and tax consequences of any mediation agreement.[151]

Farmers going to the orientation session should bring financial and inventory records, including, if possible: (1) a depreciation schedule for major farm assets; (2) agricultural production and financial income records for the past three years; (3) a current financial statement; and (4) a projected farm budget for the current year.[152]

B. Mediation meetings

The Farmer-Lender Mediation Act sets out some general requirements for mediation sessions, but the specific details of the process—such as the number of meetings and how the meetings are conducted—will be different from case to case.

1. Scheduling meetings

The first mediation meeting must be held within twenty days after the mediation proceeding notice is issued.[153] The date and time of the first meeting will be included in

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145 MINN. STAT. § 583.26, subd. 3a.
146 The mediator present at the orientation session might not be the one who is assigned to the mediation. MINN. STAT. § 583.26, subd. 3a.
147 MINN. STAT. § 583.26, subd. 3a; MINN. R. 1502.0014.
148 MINN. STAT. § 583.26, subd. 3a.
149 MINN. STAT. § 583.26, subd. 3a
150 MINN. STAT. § 583.26, subd. 3a.
151 MINN. R. 1502.0014.
152 MINN. STAT. § 583.26, subd. 3a; MINN. R. 1502.0024.
153 MINN. STAT. § 583.26, subd. 4(c).

the mediation proceeding notice.[154] The mediator will schedule any additional mediation meetings during the mediation period, which lasts up to sixty days after the initial mediation meeting.[155] The meetings must be held at a convenient and neutral place at times as convenient as possible for the mediator, the farmer, and the creditors attending, including nights and weekends.[156]

2. Meeting procedures

The mediator may set rules and procedures for the meetings in order to encourage an orderly exchange of information and views.[157]

Financial analysts, farm advocates, and attorneys are allowed to attend mediation meetings if they are invited by the farmer, creditor, or mediator.[158]

Representatives of a creditor or farmer are allowed to speak on behalf of that creditor or farmer.[159] A financial analyst, farm advocate, or attorney may not attend in place of a farmer or creditor unless the mediator decides a farmer or creditor is unable to attend and the attendance of someone in his or her place is beneficial to mediation.[160]

C. Length of mediation period — up to sixty days

Mediation may continue through several sessions, as needed, and may last up to sixty days after the initial mediation meeting.[161]

Mediation agreements are legally binding.

If an agreement is reached in farmer-lender mediation and the parties put it in writing, the mediator will sign the written mediation agreement and witness it being signed by the farmer and creditors.[162] The mediator may hold a final meeting for the purpose of signing the mediation agreement.[163] Copies of the signed agreement are sent to all creditors who have filed claim forms.[164]

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154 MINN. STAT. § 583.26, subd. 4(b)(4).
155 MINN. STAT. § 583.26, subd. 8; MINN. R. 1502.0017, subpt. 3.
156 MINN. R. 1502.0017, subpt. 3.
157 MINN. STAT. § 583.26, subd. 6(b); MINN. R. 1502.0016, MINN. R. 1502.0017, subpt. 4.
158 MINN. R. 1502.0017, subpt. 4.
159 MINN. R. 1502.0017, subpt. 4.
160 MINN. R. 1502.0017, subpt. 4.
161 MINN. STAT. § 583.26, subd. 8.
162 MINN. STAT. § 583.26, subd. 9(a).
163 MINN. R. 1502.0019, subpt. 1.
164 MINN. R. 1502.0019, subpt. 2. This happens within three days of the farmer and creditors signing the agreement.

It is important to get mediation agreements in writing

In most cases, it will benefit the farmer to get the mediation agreement in writing. If the agreement is not in writing, it may be very difficult for the farmer to enforce it legally.

The farmer and the creditors—both those who approved the mediation agreement and those who filed claim forms and then did not object to the mediation agreement—are bound by the terms of the mediation agreement.[165] It has the effect of a legal contract and can be enforced by Minnesota district courts.[166]

D. End of mediation — termination statements

When mediation ends, the mediator must sign and serve to the parties a termination statement.[167] The termination statement does two main things. First, it explains that mediation has ended and the date on which it ended.[168] Second it describes or refers to agreements, if any, reached among the farmer and the creditors.[169] This would include a new line of credit, loan or other debt issued by the creditor as a result of the mediation.[170] It also includes any agreements reached among the creditors.[171] Mediation agreements may be included as part of the termination statement. [172]

E. Unsuccessful mediation

The mediation period may end without an agreement. Creditors will then be allowed to begin collection and enforcement actions against the farmer's property.[173]

Farmers do not lose legal defenses to collection or debt enforcement by requesting mediation. For example, redemption rights and the right of first refusal will still be available even though the farmer sought mediation and mediation was not successful. Also, farmers may still bring challenges that a debt is not enforceable or the creditor is claiming the wrong amount.

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165 MINN. STAT. § 583.28, subd. 1.

166 MINN. STAT. §§ 583.26, subd. 9(b), 583.31. The mediation agreement may be used as a defense against an action contrary to it. MINN. STAT. § 583.26, subd. 9(b)(3). If the mediation agreement is poorly drafted or leaves out issues that were discussed, it may be open to various interpretations by the parties. If a court determines the mediation agreement is ambiguous, it will apply rules of contract interpretation in deciding how the mediation agreement should be enforced. For an example of a mediation agreement analyzed under contract law, see *Bartos v. Farm Credit Bank,* No. CX-89-1524, 1990 WL 32385 (Minn. Ct. App. Mar. 27, 1990) (unpublished).

167 MINN. STAT. § 583.26, subd. 10.

168 MINN. STAT. § 583.26, subd. 10(b)(1).

169 MINN. STAT. § 583.26, subd. 10(b)(2).

170 MINN. STAT. § 583.26, subd. 10(b)(2).

171 MINN. STAT. § 583.26, subd. 10(b)(2).

172 MINN. STAT. § 583.10, subd. 10(c).

173 MINN. STAT. § 583.26, subds. 1, 5.

X. Obligations during mandatory mediation

Both farmers and creditors have certain obligations in the mandatory farmer-lender mediation process.

A. The farmer's obligations

Farmers have several legal obligations during farmer-lender mediation. Among the farmer's obligations in mediation are the following.

1. Attend meetings

The farmer must attend and participate in all mediation meetings.[174]

2. Provide financial information

The farmer must provide full and complete information about his or her financial obligations.[175] In general, information gathered by a mediator in the farmer-lender mediation process is confidential.[176]

3. State reasons for rejecting restructuring proposals

If the creditor submits a debt restructuring plan and the farmer decides not to accept it, the farmer must state in writing his or her reasons for rejecting the proposal.[177] This statement should explain exactly which parts in each proposal are unacceptable and explain the specific reason for rejecting each of them.[178]

4. Inspection of secured property

Farmers requesting mediation must allow secured creditors who are participating in the mediation to inspect the farmer's secured agricultural property.[179] If the farmer does not allow this inspection or destroys the security property, this will be considered evidence of a lack of good faith and the farmer may be denied further mediation rights.[180]

5. Provide documents requested by the mediator

Farmers in mediation must provide several records and documents if the mediator

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174 MINN. STAT. § 583.27, subd. 1(a)(1).
175 MINN. STAT. § 583.27, subd. 1(a)(2); MINN. R. 1502.0024.
176 MINN. STAT. §§ 583.29, 583.26, subd. 7(b), 13.02, subds. 9, 12; MINN. R. 1502.0017, subpt. 5.
177 MINN. STAT. § 583.27, subd. 1(a)(4); MINN. R. 1502.0020.
178 MINN. STAT. § 583.27, subd. 1(a)(4); MINN. R. 1502.0020.
179 MINN. STAT. § 583.27, subd. 5(a). The property must be under the farmer's control, the creditor must give twenty-four hours of notice of the inspection, and the inspection must be made during normal business hours. Normal business hours means 8:00 a.m. to 6:00 p.m. Monday through Saturday but excludes legal Minnesota and United States holidays. MINN. STAT. § 583.27, subd. 5(a).
180 MINN. STAT. § 583.27, subd. 5(b).

decides they are needed. This includes the following documents.[181]

(1) a current signed financial statement of assets and liabilities;
(2) the farmer's most recent depreciation schedule;
(3) farm record books for the past three years or other evidence of crop and livestock production;
(4) a projected farm budget for the current twelve months;
(5) copies of a FINPACK printout analysis of the farm operation, where applicable;
(6) any appraisals of the farmer's property; and
(7) copies of any other legal documents that are necessary for the mediation and pertain to the farm business.

B. Creditors' obligations

Creditors have several legal obligations in mediation.

1. Provide financial documents

As mentioned earlier, by the first mediation meeting, all of the creditors listed on the mediation request form must provide: (1) copies of all notes and contracts for debts subject to mediation; (2) a statement of interest rates on the debts, delinquent payments, and unpaid principal and interest balances; and (3) the creditor's valuation of the collateral securing the debts.[182]

In addition, if the mediator decides that it is necessary for the mediation, the creditor must provide: worksheets on foreclosure cost analysis, if any have been done by the lender; appraisals of the farmer's property; and copies of any other legal documents that are necessary for the mediation and pertain to the farm business.[183]

Refusal to provide these documents may lead the mediator to find that the creditor has not participated in good faith.[184]

2. Describe debt restructuring programs available

By the first mediation meeting, all of the creditors listed on the mediation request form must provide a statement of any debt restructuring programs offered by the creditor.[185]

3. Rejection of restructuring proposals must be in writing

If a creditor rejects a farmer's proposal to restructure a debt, the creditor must explain its reasons for the rejection in writing.[186] The written statement must explain why each alternative is unacceptable and explain the specific reasons for rejecting each of

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181 MINN. R. 1502.0024.
182 MINN. STAT. § 583.26, subd. 4(b)(9).
183 MINN. R. 1502.0024.
184 MINN. R. 1502.0024.
185 MINN. STAT. § 583.26, subd. 4(b)(9).
186 MINN. STAT. § 583.27, subd. 1(a)(4); MINN. R. 1502.0020.

them.[187]

4. Must release funds for necessary living and farm operating expenses

For farmers in financial difficulty, obtaining release of farm income by creditors can be one of the most important concerns during mediation. During the mandatory farmer-lender mediation process, creditors must release funds from the sale of farm products to be used for necessary living and operating expenses.[188] Failure to do so is a failure to act in good faith.[189]

a. Necessary family living expenses

During the mediation period, creditors must release money from the sale of farm products for the farmer to use for family living expenses.[190]

(1) New rules for family living releases

Rules concerning release of family living expenses changed with legislative action in 2017.[191] The change affects debt that is subject to a mediation that is initiated on August 1, 2017, or after.[192] Old rules apply for mediations that are initiated up to July 31, 2017.[193]

(2) Old rules – mediations initiated before August 1, 2017

For debts subject to mediations that are initiated before August 1, 2017, figuring necessary living expenses takes into account two factors. First, creditors must release an amount equal to one and half times the amount the family would be receiving if it were eligible for Minnesota Family Investment Program (MFIP).[194] Second, creditors are not required to release more than $1600 per month, less the farmer's off-farm income.[195]

(3) New Rules – mediations initiated on or after August 1, 2017

For debts subject to mediations that are initiated on or after August 1, 2017, creditors are not required to release more than $3600 per month, less the

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187 MINN. STAT. § 583.27, subd. 1(a)(4); MINN. R. 1502.0020.
188 MINN. STAT. § 583.27, subd. 1(a)(5).
189 MINN. STAT. § 583.27, subd. 1(a)(5).
190 MINN. STAT. §§ 583.27, subd. 1(a), (d); for a more detailed explanation of the court's power to release living expenses, see *Wieweck v. United States Dep't of Agric.,* 930 F.2d 619 (8th Cir. 1991).
191 MINN. STAT. § 583.27, subd. 1(b); 2017 Minn. Laws, ch. 88, art. 2, sec. 89.
192 2017 Minn. Laws, ch. 88, art. 2, sec. 89.
193 2017 Minn. Laws, ch. 88, art. 2, sec. 89.
194 Minn. Stat. § 583.22, subd. 7b (2016), (repealed by 2017 Minn. Laws, ch. 88, art. 2, sec. 93). For laws relating to the MFIP, see MINN. STAT. ch. 256J. MFIP is also described on the Minnesota Department of Human Services website, https://mn.gov/dhs/people-we-serve/children-and-families/economic-assistance/income/programs-and-services/mfip.jsp.
195 MINN. STAT. § 583.27, subd. 1(b) (2016), (amended by 2017 Minn. Laws, ch. 88, art. 2, sec. 89).

farmer's off-farm income.[196] With the 2017 legislative changes, creditors are no longer required to release an amount equal to one and one-half times the amount the family would receive if it were eligible for MFIP.[197]

b. Necessary farm operating expenses

During mediation, creditors must release money from the sale of farm products for necessary farm operating expenses for any farm operations begun before the farmer received a notice of default.[198]

Creditors are not required to release funds for expenses that will increase the size of the farming operation or be used to plant additional crops. [199] Otherwise, there is no limit on the amount that must be released for farm operating costs.[200]

c. If the farmer and creditor cannot agree — petition to court

If the farmer and creditor cannot agree on the amount that should be released for necessary living expenses or farm operating expenses, either party can seek a court determination of the amount that should be released.[201]

(1) Necessary living expenses decided by conciliation court

Disputes about the amount that should be released for necessary living expenses can be resolved by the conciliation court in the county where the farmer resides.[202]

(2) Necessary operating expenses or living and operating expenses decided by district court

Disputes about the amount that should be released for farm operating expenses, or for necessary living and operating expenses, can be resolved by the district court in the county where the farmer resides.[203]

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196 MINN. STAT. § 583.27, subd. 1(b). Beginning in 2022 and every five years after 2022, the Commissioner of Agriculture, in consultation with the director of farmer lender mediation, must report to the Minnesota Legislature regarding what the dollar amount would be if it were adjusted for inflation. MINN. STAT. § 583.27, subd. 1(b). There is no guarantee the legislature will act on this report.

197 MINN. STAT. § 583.22, subd. 7b (2017) (repealing Minn. Stat. § 583.22, subd. 7b (2016)).

198 MINN. STAT. §§ 583.22, subd. 7a, 583.27, subd. 1(a).

199 MINN. STAT. § 583.22, subd. 7a.

200 MINN. STAT. § 583.22, subd. 7a.

201 MINN. STAT. § 583.27, subd. 1(c)-(d).

202 MINN. STAT. § 583.27, subd. 1(c). The conciliation court is to make a determination within ten days of receiving the petition.

203 MINN. STAT. § 583.27, subd. 1(d). The district court is to make a determination within ten days after receiving the petition.

(3) Asking the district court to decide the release amount is risky

If the district court is asked to decide how much income should be released for farm operating expenses or living and operating expenses, the court is authorized to penalize any party that it determines was not acting in good faith in its position on the release of income.[204] First, the court may either add or subtract ten days to the time in which the creditor cannot take collection action against the farmer's property. Second, the court can make one party pay the other party's attorneys' fees and costs for the release-of-income dispute.[205]

5. Participation requirements

Whether or not a creditor must actually participate in the mediation meetings depends on how the creditor was brought into the process and what degree of protection the creditor is seeking.

a. Initiating creditor must participate

The creditor who first served the mediation notice must participate in mediation.[206]

b. Creditor that believes its debt is not subject to mediation must make a case to the mediator

A secured creditor believing that the debt owed to it is not subject to mediation must return the claim form and other supporting documents to the Farmer-Lender Mediation Program and explain why it believes the debt is not subject to mediation.[207] The Farmer-Lender Mediation Program will decide whether mediation of the debt is required and will notify the farmer, creditor, and mediator of the decision.[208]

c. Other creditors are not required to participate

Other creditors identified by the farmer in the mediation request may choose not to attend the mediation meetings.[209] Some creditors may not want to participate in mediation, especially if the debt is relatively small. Unless these creditors file a claim form, however, they will be bound by any mediation agreement even

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[204] MINN. STAT. § 583.27, subd. 1(d).
[205] MINN. STAT. § 583.27, subd. 1(d).
[206] MINN. STAT. §§ 583.27, subd. 1(a), 583.28, subd. 1; MINN. R. 1502.0026, subpt. 1. This means that the initiating creditor is not allowed to file a proof of claim form instead of attending meetings.
[207] MINN. STAT. § 583.26, subd. 4(f); MINN. R. 1502.0011, subpt. 1. The creditor must include documents supporting the view that the lender is not subject to farmer-lender mediation. MINN. R. 1502.0011, subpt. 1.
[208] MINN. R. 1502.0011, subpt. 2.
[209] MINN. STAT. § 583.28.

though they did not participate in mediation.[210]Creditors that do not participate in mediation but do file a claim form will have the right to object to any mediation agreement, and there may be additional mediation meetings to deal with these creditors' objections.[211]

(1) If the creditor files a claim form

Creditors who admit that their debt is subject to mediation may, instead of participating in the mediation process, file a notice of claim and proof of claim with the mediator before the initial mediation meeting.[212] A creditor filing a claim form agrees to be bound by a mediation agreement reached between the farmer and the participating creditors unless the creditor files a written objection to the agreement.[213]

(a) Opportunity to make written objection to any mediation agreement

The mediator will notify creditors who have filed claim forms of the terms of any mediation agreement.[214] Each such creditor will have ten days after receiving the mediation agreement to serve (on the mediator and the farmer) a written objection to the terms of the agreement.[215] The written objection must identify the particular parts of the agreement that are unacceptable and state the specific reason for rejecting each item.[216]

(b) New mediation meetings to address objections

Upon receiving an objection to a mediation agreement, the mediator will meet again with the farmer and creditors to mediate a new agreement.[217] These mediation meetings will take place within ten days of the receipt of the written objections to the mediation agreement.[218]

(c) Objecting creditor must attend new mediation meetings

Creditors that do not attend mediation meetings but file written objections to the mediation agreement must attend and participate in the new mediation meetings that take place after the objection.[219] The mediator, however, has discretion to determine whether there is a good reason why the creditor is unable to attend, and accordingly to allow the

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210 MINN. STAT. § 583.28, subd. 1.
211 MINN. STAT. § 583.28, subd. 2.
212 MINN. STAT. § 583.28, subd. 1.
213 MINN. STAT. § 583.28.
214 MINN. STAT. § 583.28, subd. 1.
215 MINN. STAT. § 583.28, subd. 2.
216 MINN. STAT. § 583.28, subd. 2; MINN. R. 1502.0026, subpt. 3.
217 MINN. STAT. § 583.28, subd. 2; MINN. R. 1502.0026, subpt. 4.
218 MINN. STAT. § 583.28, subd. 2; MINN. R. 1502.0026, subpt. 4.
219 MINN. R. 1502.0026, subpt. 5.

creditor to be absent from a new mediation meeting.[220]

(2) If the creditor does not file a claim form

Creditors that are notified of the initial mediation meeting and do not either participate in the mediation or file a claim form will be bound by the mediation agreement and may not object to it.[221]

d. Participating creditor must send a person with authority to make commitments

If a creditor does participate in mediation, the creditor must send to the mediation meetings a person who has authority to make binding commitments to fully settle or compromise debts within twenty-four hours of the mediation meetings.[222]

C. All parties' obligation — mediate in good faith

All parties are required to mediate in good faith.[223] This includes creditors filing claim forms instead of attending mediation meetings.[224]

1. New rule: mediator must explain good faith obligation

Before the first mediation meeting the Farmer-Lender Mediation Program must notify all parties in writing to say that each party has an obligation to participate in the mediation in good faith. The consequences of failing to participate in the mediation in good faith must also be explained.[225]

This requirement applies to all debt subject to a mediation that was initiated on or after August 1, 2017.[226]

2. Defining the lack of good faith

Not participating in good faith includes the following. This list is not exhaustive. The statute states that other "similar behavior" also may be taken as evidence of lack of good faith.[227]

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220 MINN. R. 1502.0026, subpt. 5.
221 MINN. STAT. § 583.28, subd. 1.
222 MINN. STAT. § 583.27, subd. 1(a)(3).
223 MINN. STAT. § 583.27, subd. 1.
224 MINN. R. 1502.0026, subpt. 2.
225 MINN. STAT. § 583.27, subd. 1(a)
226 2017 Minn. Laws, ch. 88, art. 2, sec. 89.
227 MINN. STAT. § 583.27, subd. 1(a)(6).

a. Failure to attend and participate

Regular or continued failure to attend and participate in mediation sessions without cause is a failure to act in good faith.[228]

b. Failure to provide information

Failure to provide full information regarding the financial obligations of the parties and other creditors is a failure to act in good faith.[229]

In 2017 the legislature clarified that this information must be provided no later than the initial mediation meeting.[230] This part of the good faith requirement applies to all debt subject to a mediation that is initiated on or after August 1, 2017.[231]

c. Creditor failure to designate a representative

A creditor in the mediation process must be represented by a person with the authority to make binding commitments within one business day to fully settle, compromise, or otherwise mediate the matter.[232] Failure to do so is to fail to act in good faith.

d. Creditor failure to provide written statement explaining restructuring alternatives

Failure by a creditor to provide a written statement of debt restructuring alternatives is a failure to act in good faith.[233]

e. Failure to explain why a restructuring proposal is unacceptable

Failure by either the farmer or a creditor to explain in writing why a proposed restructuring plan is unacceptable is evidence of a lack of good faith.[234]

f. Creditor failure to release funds

A creditor's failure to release funds from the sale of farm products to the farmer for necessary living and farm operating expenses is a failure to act in good

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228 MINN. STAT. § 583.27, subd. 1(a)(1).

229 MINN. STAT. § 583.27, subd. 1(a)(2). This includes the obligation of a creditor to provide information to the farmer under MINN. STAT. § 583.26, subd. 5(d), including copies of notes and contracts for debts subject to the Farmer-Lender Mediation Act, as well as statements of the principal balance and interest rates on those debts, any delinquent payments on the debts, and a list of all collateral (including the creditor's estimated value of the collateral) securing the debts.

230 MINN. STAT. § 583.27, subd. 1(a).

231 2017 Minn. Laws, ch. 88, art. 2, sec. 89.

232 MINN. STAT. § 583.27, subd. 1(a)(3).

233 MINN. STAT. § 583.27, subd. 1(a)(4).

234 MINN. STAT. § 583.27, subd. 1(a)(4).

faith.[235]

g. Farmer concealment or transfer of secured agricultural property during mediation

Farmers will be found to not be mediating in good faith if during mediation they fraudulently conceal, remove, or transfer agricultural property in which they know a creditor has a security interest.[236]

h. Farmer failure to allow inspection of secured property

If the farmer does not allow inspection of secured agricultural property, or destroys it, this is evidence of a lack of good faith.[237]

i. Abusive behavior

Lack of good faith during mediation may include abusive behavior on the part of the farmer or a creditor or a person assisting the farmer or creditor.[238]

3. Creditor unwillingness to restructure debt is not bad faith

A creditor's refusal to agree to reduce, restructure, refinance, or forgive debt is not, in itself, evidence of a lack of good faith.[239]

4. Mediator decides if a party acts in good faith

In general, the mediator will decide whether a party to the mediation has failed to act in good faith.[240] Mediators believing that a party is not acting in good faith will file an affidavit—a signed legal document—with the Farmer-Lender Mediation Program and the parties involved.[241] The affidavit should give reasons why the mediator believes a party is not acting in good faith.[242]

A farmer who believes a creditor is not negotiating in good faith should therefore ask the mediator to issue an affidavit making such a finding. The request to the mediator should be in writing and should explain how the creditor is mediating in bad faith.

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235 MINN. STAT. § 583.27, subd. 1(a)(5).
236 MINN. STAT. § 583.27, subd. 4(a). The concealment, removal, or transfer must be in violation of a security agreement without remitting the proceeds to the secured party and must have occurred during the mediation period. MINN. STAT. § 583.27, subd. 4(a). A creditor who receives a mediator affidavit of a debtor's lack of good faith may immediately seek creditor remedies on the debt. MINN. STAT. § 583.27, subd. 4(b).
237 MINN. STAT. § 583.27, subd. 5.
238 MINN. R. 1502.0021.
239 MINN. STAT. § 583.27, subd. 1.
240 MINN. STAT. § 583.27, subd. 2; MINN. R. 1502.0022.
241 MINN. STAT. § 583.27, subd. 2; MINN. R. 1502.0022.
242 MINN. STAT. § 583.27, subd. 2; MINN. R. 1502.0022.

5. Courts provide limited review of mediator decisions about good faith

Parties believing that a mediator's decision regarding good faith is mistaken may ask a court to review the mediator's decision.[243] Review is limited, however, to whether the mediator committed an abuse of discretion in filing or failing to file an affidavit of lack of good faith.[244] Review for an abuse of discretion is very limited, and courts only rarely reach this conclusion.[245] It will therefore likely be very difficult to overturn a mediator's determination regarding a lack of good faith.

a. Creditor may proceed with collection action while court is reviewing mediator decision

If a mediator issues an affidavit of lack of good faith against a farmer, the creditors can immediately proceed to take action against the farmer's property.[246] This is true even if the farmer seeks court review of the affidavit.

b. If the court reverses the mediator

If the court finds that the mediator committed an abuse of discretion in filing or failing to file an affidavit of lack of good faith, the court has several options. It may: (1) reinstate mediation and renew the stay preventing creditors from taking action against the farmer, (2) order court-supervised mediation, or (3) allow the creditor to proceed right away with action against the farmer.[247]

6. If the creditor fails to act in good faith

If the mediator decides that a creditor has failed to act in good faith, several consequences follow.

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[243] MINN. STAT. § 583.27, subd. 6(a).

[244] MINN. STAT. § 583.27, subd. 6(a); see also *Obermoller v. Federal Land Bank,* 409 N.W.2d 229, 231-32 (Minn. Ct. App. 1987), holding that the trial court did not abuse its discretion in finding that a mediator's failure to file an affidavit of bad faith made it very difficult for a court to later reach such a conclusion. A mediator may offer testimony but is not required to testify as part of the court's review. MINN. STAT. § 583.27, subd. 6(c); *Holasek v. Holasek*, No. A04-2199, 2005 WL 2008721 (Minn. Ct. App. August 23, 2005) (unpublished). The court must hear the petition within ten days. MINN. STAT. § 583.27, subd. 6(a). Events outside of mediation are not a factor in deciding if a party is acting in good faith, unless those events prevent a party from acting in good faith during the mediation process. *Production Credit Ass'n of Worthington v. Springwater Dairy Farm, Inc.,* 407 N.W.2d 88, 91-92 (Minn. 1987); *Rengstorf v. Richards,* 417 N.W.2d 138 (Minn. Ct. App. 1987).

[245] See, for example, *Herbst v. Princeton Bank,* No. C3-96-1903, 1997 WL 309441 (Minn. Ct. App. June 10, 1997) (unpublished), dismissing farmers' complaint seeking court-supervised mediation due to the creditor's alleged lack of good faith.

[246] MINN. STAT. § 583.27, subd. 4(b). If the court later finds in the farmer's favor and rejects the affidavit, the court may reinstate the stay of creditor action by reopening the mediation process or ordering court-supervised mediation. MINN. STAT. § 583.27, subd. 6(b).

[247] MINN. STAT. § 583.27, subd. 6(b).

a. Court-supervised mediation possible

If the mediator finds that the creditor has not been negotiating in good faith, the farmer can request court-supervised mediation.[248]

(1) Requesting court-supervised mediation

A request for court-supervised mediation is made by the farmer by: (1) filing the mediator's affidavit, along with a request for supervised mediation, with the district court of the county where the farmer resides; (2) serving a copy of the request on the creditor; and (3) sending a copy of the affidavit to the Farmer-Lender Mediation Program.[249]

The request must be filed with the court within ten days of the farmer's receipt of the lack of good faith affidavit or within ninety days after the farmer filed the mediation request with the Farmer-Lender Mediation Program, whichever is later.[250]

(2) How court-supervised mediation works

In court-supervised mediation, the court requires the mediation process to begin again.[251] Court-supervised mediation may last for up to sixty days.[252] During court-supervised mediation, creditor collection actions are again suspended and the court may issue orders necessary to compel good faith mediation.[253]

If the court decides that a creditor has failed to mediate in good faith during court-supervised mediation, the court may suspend the creditor's collection actions for an additional 180 days.[254]

b. Creditors must pay farmer's costs and attorneys' fees

If the mediator decides that a creditor has not participated in good faith in the original mediation, the creditor must pay the farmer's attorneys' fees and costs resulting from the request for court-supervised mediation or a request for further suspension of the creditor's collection actions.[255]

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248 MINN. STAT. § 583.27, subd. 3.
249 MINN. STAT. § 583.27, subd. 3; MINN. R. 1502.0023.
250 MINN. R. 1502.0023.
251 MINN. STAT. § 583.27, subd. 3. If requested to do so by the court, the Farmer-Lender Mediation Program will provide the court with a list of mediators to be used in the selection of the mediator for the court-supervised mediation. MINN. R. 1502.0025, subpt. 1.
252 MINN. STAT. § 583.27, subd. 3.
253 MINN. STAT. § 583.27, subd. 3; MINN. R. 1502.0025, subpt. 2.
254 MINN. STAT. § 583.27, subd. 3.
255 MINN. STAT. § 583.27, subd. 3.

7. If the farmer fails to act in good faith

If the mediator decides that the farmer has not mediated in good faith, the mediator will issue an affidavit of lack of good faith and the creditor will be able to immediately proceed with all available debt enforcement actions, such as foreclosure, repossession, and the like.[256]

[256] MINN. STAT. § 583.27, subd. 4(b).

Chapter Eight

Bankruptcy

I. Introduction

In some cases, it makes sense for farmers in financial difficulty to consider filing a bankruptcy petition. This chapter provides a general discussion of bankruptcy, but it is only a brief overview and should not be used to answer specific questions. As much as any other topic discussed in this Guide, bankruptcy requires the advice of an expert.[1]

II. The purpose of bankruptcy

Everyone agrees that whenever it is possible, debtors should repay money owed. It is also true, however, that when someone is buried in debt and realistically cannot pay it all back, it is important to have a system that erases part of the debt, reorganizes the remaining debt, and gives people caught in debt a chance to free themselves and continue productive lives. One of the primary purposes of bankruptcy, as the Supreme Court of the United States has explained, 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 pre-existing debt."[2] The right to bankruptcy is guaranteed in the law and in fact is provided by the United States Constitution.[3]

III. Planning for bankruptcy

For bankruptcy to work effectively, it is essential for farmers to think ahead and have a plan in place. Deciding whether to use bankruptcy and, if so, which type of bankruptcy to use can be very complicated. In addition, for bankruptcy to work well, it is important for farmers to plan business decisions well before filing bankruptcy, if possible.

A. Pre-filing strategies

Many strategies for managing assets and debts before filing for bankruptcy are beneficial

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1 A helpful source for farm bankruptcy is PHILLIP L. KUNKEL and JEFFREY A. PATTERSON, Farm Legal Series: Bankruptcy: The Last Resort (University of Minnesota Extension) (2016), https://www.extension.umn.edu/agriculture/business/taxation/farm-legal-series/bankruptcy-the-last-resort/docs/bankruptcy-the-last-resort.pdf. For a detailed discussion of bankruptcy from a borrower point of view, see Henry J. SOMMER, *Consumer Bankruptcy Law and Practice*, National Consumer Law Center (11th ed. 2016). SUSAN A. SCHNEIDER edits a lengthy chapter in the same two-volume publication on Chapter 12 bankruptcy.

2 Williams v. U.S. Fidelity & G. Co., 236 U.S. 549, 554-555 (1915); *Local Loan Co. v. Hunt,* 292 U.S. 234, 244 (1934).

3 U.S. Const. Art. I, § 8, cl. 4.

and perfectly legal. For example, it is sometimes possible to arrange a farmer's finances and assets to maximize the exemptions available to the farmer. Some actions a farmer might take before filing for bankruptcy, however, are illegal. These illegal actions and can both ruin the bankruptcy, and subject the farmer to possible criminal penalties.[4] Unfortunately, recognizing the difference between legal and illegal pre-bankruptcy planning strategies can be tricky.[5] It is extremely important, therefore, for the farmer to get qualified expert advice well before filing for bankruptcy.

B. Last-minute filing

In some cases, a farmer may have no choice but to file for bankruptcy without much planning. Filing for bankruptcy may be needed to at least temporarily stop a repossession or foreclosure. In such a case, it is possible to file a bankruptcy petition very quickly.[6]

IV. Two general types of bankruptcy — liquidation and reorganization

Two general types of bankruptcy are available to farmers: reorganization bankruptcy and liquidation bankruptcy. The bankruptcy code provides for several specific types of bankruptcy—commonly known as chapters. Chapters 7, 11, 12, and 13 are types of bankruptcy that may be used by farmers. Chapter 12 reorganization bankruptcy was designed specifically for family farmers.

A. Chapter 7 liquidation bankruptcy

Chapter 7 liquidation bankruptcies—sometimes called straight bankruptcies—are what come to mind most often when people think of bankruptcy.[7] In a Chapter 7 bankruptcy, the debtor's nonexempt assets are typically sold or distributed to creditors.[8] Asset exemptions are discussed below in this chapter. The proceeds from this liquidation sale are used to pay the debtor's creditors. Eventually, the debtor receives a "discharge" of most of the rest of the debts, which means the debtor is no longer legally required to pay the debts. Mortgages and other security interests, however, survive even after discharge. With careful pre-bankruptcy planning, farmers may be able to keep significant assets and may even be able to continue a farming operation after a Chapter 7 bankruptcy.

B. Chapter 11, 12, and 13 reorganization bankruptcy

In a reorganization bankruptcy, the debtor proposes a plan to pay some or all of his or her debts over a period of time. The plan is then carried out under court supervision. In a

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4 For example, some transfers can be defined as fraudulent. 11 U.S.C. §§ 548; 727(a)(2); 18 U.S.C. § 152.

5 For example, in *In re Curry,* 160 B.R. 813 (Bankr. D. Minn. 1993), the court discussed the difficulty of determining fraud under the homestead exception to a chapter 7 bankruptcy petition, and in *In re Johnson,* 880 F.2d 78 (8th Cir. 1989), the court held that the mere use of a homestead exemption did not constitute fraud, and the factors determining fraudulent intent as they apply to other exemptions do not apply when evaluating homestead exemptions.

6 See 11 U.S.C. § 301; Fed R. Bank. P. 1007(a)(1), (c), 3015.

7 A helpful source for Chapter 7 farm bankruptcy is PHILLIP L. KUNKEL and JEFFREY A. PATTERSON, Farm Legal Series: Bankruptcy: Chapter 7 Liquidations (University of Minnesota Extension) (2015), https://www.extension.umn.edu/agriculture/business/taxation/farm-legal-series/bankruptcy-chapter-7-liquidations/docs/bankruptcy-chapter-7-liquidations.pdf.

8 11 U.S.C. §§ 701-727.

successful reorganization bankruptcy by a farmer, the farming operation continues. Farmer bankruptcy reorganizations generally will be under either Chapter 12 or Chapter 11. A Chapter 13 bankruptcy is also possible.

1. Chapter 13 wage-earner reorganization bankruptcy

Chapter 13 bankruptcy is designed for individuals.[9] The debtor carries out a court-approved plan to make payments on debts and agrees to commit all disposable income to repaying his or her creditors. The plan must be the debtor's best good faith effort to repay creditors. The plan also should result in unsecured creditors receiving as much as if the debtor filed a Chapter 7 liquidation bankruptcy. Secured creditors should receive at least the value of their security property. After the three-to five-year reorganization plan is completed, the debtor's remaining debts are discharged.

As of 2017, to qualify for Chapter 13 bankruptcy, the debtor must have regular income, his or her unsecured debts must be less than $394, 725, and his or her secured debts must be less than $1,184,200.[10] Although not designed with farmers in mind, Chapter 13 can sometimes be the best bankruptcy option, especially for farmers with smaller operations or who for some reason cannot qualify under Chapter 12.

2. Chapter 11 reorganization bankruptcy

Chapter 11 is a reorganization bankruptcy for businesses. The business continues to operate and the debtor files a plan to reschedule the business's debts over time.[11] Chapter 11 is the most complex and costly form of bankruptcy and, in some important ways, is better suited for a large corporation than a family farm. In general, therefore, Chapter 11 bankruptcy should only be used by family farmers if Chapter 12 bankruptcy is not available.

3. Chapter 12 farmer reorganization bankruptcy

Chapter 12 is a reorganization bankruptcy specifically for family farmers.[12] To qualify for a Chapter 12 bankruptcy, the debtor must be engaged in a farming operation and must have a regular annual income that is stable enough to make the payments under the plan.[13] Further eligibility requirements for Chapter 12 bankruptcy are: (1) no more

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9 11 U.S.C. §§ 1301-1330.

10 11 U.S.C. § 109(e). These limits change with inflation. They were effective in 2016, and will remain in place until April 1, 2019. For a full explanation see, SOMMER, *Consumer Bankruptcy Law and Practice*, vol. 1, at 311.

11 11 U.S.C. §§ 1101-1146.

12 11 U.S.C. §§ 1201-1232. On Chapter 12, see PHILLIP L. KUNKEL and JEFFREY A. PATTERSON, Farm Legal Series: Bankruptcy: Chapter 12 Reorganization (University of Minnesota Extension) (2015), https://www.extension.umn.edu/agriculture/business/taxation/farm-legal-series/bankruptcy-chapter-12-reorganizations/docs/bankruptcy-chapter-12-reorganization.pdf. Originally enacted in 1986, Chapter 12 was repeatedly extended by Congress and then made permanent in 2005. See SOMMER, *Consumer Bankruptcy Law and Practice*, vol. 1, at 583.

13 11 U.S.C. §§ 109(f), 101(18)-(21). 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 the requirement that more than 50 percent of the stock or equity is held by one family and their relatives and that family conducts the farming operation. *See*

than $1.5 million in total debt; (2) at least 80 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 the tax year preceding the bankruptcy.[14]

Chapter 12 bankruptcy often provides the best alternative for farmers who meet its eligibility requirements because of the lower debt limits and other restrictions on using Chapter 13, and the difficulties and expense of Chapter 11. This is especially true given the significant leeway that Chapter 12 gives a farmer in dealing with secured creditors.[15] Even farmers who do not file a bankruptcy petition have found that having a Chapter 12 bankruptcy as a fallback option helps to encourage creditor negotiations.

In general, Chapter 12 allows a farmer to reorganize if the farmer can propose a plan to:

(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.[16] The reorganization plan must be the farmer's best good faith effort to repay creditors. In addition, it must provide that the unsecured creditors will be paid any excess income, above the farmer's reasonable operating and living expenses, the farmer receives during the term of the plan (three to five years). The goal—which often is achievable—is to restructure the debts on farm assets and allow the farmer to keep those assets and continue farming.[17]

V. Important bankruptcy features

Several of the important features of a bankruptcy are described in the following sections.

A. The automatic stay — stopping creditor actions

Once a debtor files a bankruptcy petition, the debtor immediately gets the benefit of an automatic stay of creditor actions.[18] The automatic stay temporarily stops creditors from taking a number of actions against the farmer 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 bankruptcy case is closed or dismissed, a discharge is granted or denied, or the creditor gets permission from the court to act.

For farmers acting at the last possible moment, an automatic stay may be the only way to prevent a foreclosure or other action.

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11 U.S.C. § 101(18)(B).

14 11 U.S.C. § 101(18).

15 11 U.S.C. §§ 1221, 1225.

16 SOMMER, *Consumer Bankruptcy Law and Practice*, vol. 1, at 617-634.

17 One study concluded that a very 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,* AGRIFINANCE, October 1995, at 32.

18 11 U.S.C. § 362; SOMMER, *Consumer Bankruptcy Law and Practice*, vol. 1, at 135-190.

B. Exemptions — the minimum that can be protected from unsecured creditors

As discussed in Chapter Five, Minnesota law exempts a number of a debtor's possessions from creditor actions to enforce unsecured debt. These exemptions also come into play in bankruptcies.[19] For example, in a Chapter 7 bankruptcy, exempt assets will not be taken or sold for the benefit of unsecured creditors.

The debtor in bankruptcy can choose from either the Minnesota exemptions (described in Chapter Four) or the exemptions set out in federal law.[20] Federal exemptions include the equity value (up to certain limits) of a homestead, a motor vehicle, household goods, and other property, including the implements and tools of the debtor's trade.[21] Federal exemptions tend to be far less favorable to the debtor than Minnesota exemptions.[22] For that reason, many farmers choose Minnesota exemptions.

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 against the secured creditor. Sometimes, however, a debtor can use bankruptcy "lien avoidance" provisions to reduce or remove a creditor's security interests.[23]

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 legally be required to pay them.[24] 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.[25] These will remain the debtor's obligation even after the bankruptcy is complete.

D. Voluntary payments and reaffirmation of debts

After a bankruptcy, some farmers may wish to make payments on debts that were discharged in 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 if the farmer wishes to pay the creditor those debts. Such payments, however,

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19 SOMMER, *Consumer Bankruptcy Law and Practice*, vol. 1, at 191-256.

20 11 U.S.C. § 522(b); MINN. STAT. § 550.371, subd. 1; *In re Stenzel,* 301 F.3d 945, 947 (8th Cir. 2002).

21 11 U.S.C. § 522(d); In general, the fair market value is used to value federal exemptions. For further information on the federal tools of the trade exemption, see HARRISON M. PITTMAN, *Husband and Wife Farmers in Agricultural Bankruptcies: The "Tools of the Trade" Exemption,* NATIONAL AG LAW CENTER (Oct. 2002), http://nationalaglawcenter.org/wp-content/uploads/assets/articles/pittman_toolsoftrade.pdf.

22 In 1994, the maximum value of several federal exemptions was doubled, and the value of the exemptions is adjusted for inflation every three years. *See* 11 U.S.C. § 104*;* SOMMER, *Consumer Bankruptcy Law and Practice*, vol. 1, at 196.

23 11 U.S.C. § 522(f)(2); SOMMER, *Consumer Bankruptcy Law and Practice*, vol. 1, at 223-255.

24 11 U.S.C. §§ 524, 727; SOMMER, *Consumer Bankruptcy Law and Practice*, vol. 1, at 316-336, 461-548.

25 11 U.S.C. § 523(a).

are never legally required.

It is a completely different matter, however, if a debtor "reaffirms" a debt.[26] Reaffirmation is a promise to pay a debt despite its discharge. Reaffirmation eliminates the benefits of the discharge. It is important to note that voluntary payments do not necessarily mean a debt is reaffirmed.[27] Reaffirmation of debt should only be done in rare cases.

E. Effect on future credit

A bankruptcy can be listed in a debtor's credit history for up to ten years.[28] It can affect a farmer'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 therefore 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 a farmer's income taxes. The tax implications of a bankruptcy are important and often complicated. It is quite possible, for example, to lose much of the benefit of a bankruptcy due to taxes owed. Chapter Nine of this Guide discusses taxes briefly, but it is extremely important to get expert, individualized tax advice before filing for bankruptcy.

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[26] 11 U.S.C. § 524(c); SOMMER, *Consumer Bankruptcy Law and Practice*, vol. 1, at 132-33, 533-541.
[27] 11 U.S.C. § 524(f).
[28] 15 U.S.C. § 1681c(a)(1); SOMMER, *Consumer Bankruptcy Law and Practice*, vol. 1, at 68, 133-134.

Chapter Nine

Income Tax Considerations

I. Introduction

The tax implications of many debtor-creditor problems faced by farmers can be significant and extremely complicated. If not planned correctly, for example, a farm bankruptcy or non-bankruptcy workout can result in a financial disaster in which the farmer ends up with a huge federal income tax liability. The tax code may be the most confusing part of the law, and it can change quickly.[1]

This chapter briefly discusses some of the possible federal income tax issues that should be of concern to farmers in financial difficulty. It does not mention other significant problems, such as state income taxes. This short chapter should therefore not be used to answer specific questions about income tax problems. It is crucial for farmers to find expert advice when confronted with the issues discussed in this chapter.

Consult an attorney to get tax advice on your specific situation.

II. Debt forgiveness can create a tax liability

Whenever a debt is reduced or canceled, there is a potential for tax liability. If a farmer works out an agreement with a lender to reduce his or her debt, this will often result in an income tax obligation for the farmer.

A. General rule — debtor has income in amount of canceled debt

In general, cancellation of a debt results in taxable income to the debtor in the amount of debt canceled.[2] For example, if a farmer signs over a piece of property appraised at $65,000

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[1] An excellent short summary is PHILLIP A. KUNKEL, JEFFREY A. PETERSON, and S. SCOTT WICK, FARM LEGAL SERIES: TAX CONSEQUENCES IN LIQUIDATION AND REORGANIZATIONS, University of Minnesota Extension (2015), https://www.extension.umn.edu/agriculture/business/taxation/farm-legal-series/tax-considerations-in-liquidations-and-reorganizations/docs/tax-considerations-in-liquidations-and-reorganizations.pdf. An essential resource is IRS, Farmers' Tax Guide, Publication 225 (2016), https://www.irs.gov/pub/irs-pdf/p225.pdf. Older, but still useful resources are GREGORY E. STERN, TAX ASPECTS OF RESTRUCTURING FINANCIALLY TROUBLED BUSINESSES (2009); and WILLIAM TATLOCK, DISCHARGE OF INDEBTEDNESS, BANKRUPTCY, AND INSOLVENCY (1995).

[2] 26 U.S.C. § 61(a)(1-12).

in full payment of a $73,000 debt, the farmer would likely have $8,000 in debt-cancellation income.

Computing the actual tax liability for a debt reduction or cancellation can be quite complicated. For example, a debtor is not required to declare the income until the debt is actually canceled, but the timing of the debt cancellation can be difficult to pinpoint.[3]

B. Exceptions to tax liability for debt cancellation

Despite the general rule, there are several circumstances in which the cancellation of debt does not create taxable income.[4] Some of the most common exceptions to the debt-cancellation income rule are discussed here. Other exceptions may apply in some cases. Using any of the exceptions can be very complicated. Consult a tax expert regarding your specific circumstances.

1. Tax-deductible debt payments

No income is realized from the cancellation of a debt to the extent that payment of the debt would have made the debtor eligible for a deduction.[5]

2. Some types of debt cancellation in bankruptcy

Some debt cancellation in bankruptcy may not be taxable as income.[6]

3. Insolvent debtor

If the debtor is technically "insolvent," some discharge of debt might not be taxable. A debtor is insolvent if his or her debts exceed the fair market value of his or her assets.[7] When filing an income tax return, an insolvent debtor can generally exclude debt-cancellation income from gross income up to the amount of his or her excess debts.[8] Determining whether insolvency exists, however, can be more difficult than it first appears. Only assets against which the debtor's creditors have claims are included in determining insolvency, because the cancellation of debt does not release those assets from the creditors' claims.[9] Minnesota law controls which assets can be claimed by creditors. Chapters Four and Five discuss creditors' claims.

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3 *See* GREGORY E. STERN, RESTRUCTURING FINANCIALLY TROUBLED BUSINESSES, at A-1 to A-2. If there is more than one debtor, the tax implications can be even more complicated. Other aspects of the debt cancellation can be equally complicated. See, for example, STERN, at A-2 to A-6.

4 26 U.S.C. § 108.

5 26 U.S.C. § 108(e)(2).

6 26 U.S.C. § 108(a)(1)(A).

7 26 U.S.C. § 108(d)(3). This calculation is made based on the value of the debtor's assets and liabilities just prior to the cancellation.

8 26 U.S.C. § 108(a)(1)(B), (a)(3).

9 See WILLIAM TATLOCK, DISCHARGE OF INDEBTEDNESS, at A-21 to A-22.

4. Qualified farm indebtedness

Some debt cancellation might not be taxable as income if the debt is defined as "qualified farm indebtedness."[10] This debt must have come directly from the farming operation, and at least 50 percent of the debtor's total gross income for the previous three years must have come from farming.

5. Qualified real property business indebtedness

Debtors that are not incorporated might not be taxed on the cancellation of "qualified real property business indebtedness."[11] Qualified real property business indebtedness is debt that is taken on in connection with real property used in a trade or business and is secured by that property.[12] Debts taken on after January 1, 1993, will only be considered qualified real property business indebtedness if they were taken on for the purpose of acquiring, constructing, or substantially improving real property.[13]

III. Sale or transfer of assets — including surrender of property to creditors and foreclosures

The sale or transfer of property can create income and therefore have tax consequences.[14] Differences in the method of a sale, such as the difference between selling real estate all at once or through a contract for deed, can be important.

In addition, the general rule is that when a creditor takes property in satisfaction of a debt, the transfer will be treated for tax purposes as if the debtor sold the property for the amount of debt satisfied. This is true whether or not any cash changes hands and whether the debtor voluntarily surrenders the property or the creditor seizes it.

IV. Taxes and bankruptcy

The tax consequences of filing for bankruptcy can vary greatly, depending on a number of factors—beginning with the type of bankruptcy filed.

A. Tax obligations in bankruptcy

In general, the act of voluntarily filing for bankruptcy creates a separate entity—called an "estate"—that takes ownership of the debtor's assets.[15] When the estate sells property or

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[10] 26 U.S.C. § 108(a)(1)(C), (g)(2). The amount of the canceled debt excluded from income as qualified farm indebtedness cannot exceed the sum of what are known as the debtor's adjusted "tax attributes" and the adjusted basis of the qualified property.

[11] 26 U.S.C. § 108(a)(1)(D), (c). Qualified real property business indebtedness does not include qualified farm indebtedness; 26 U.S.C. § 108(c)(3).

[12] 26 U.S.C. § 108(c)(3)(A-C).

[13] 26 U.S.C. § 108(c)(3)(B), (c)(4). The amount excluded from the debtor's gross income is generally capped by the amount that the principal owing on the canceled debt exceeds the fair market value of the property securing the debt; 26 U.S.C. § 108(c)(2)(A).

[14] Gains or losses on property used in a business are generally governed by 26 U.S.C. § 1231.

[15] 11 U.S.C. § 541(a). The debtor's interest in certain exempt assets—such as a home, personal vehicle, furnishings, and tools of his or her trade—are generally not taken into the bankruptcy estate; 11

when debt is canceled, it may be that the estate and not the debtor will owe taxes on the income.[16] Sometimes, however, income from the transfer or sale of property or cancellation of debt in bankruptcy may still be taxable to the debtor.

A debtor using either Chapter 7 or 11 bankruptcy has the option of stopping the tax year on the day the bankruptcy petition is filed and dividing the normal tax year into two separate parts.[17] This can be an extremely important—and complicated—decision for farmers and should only be made with advice from an experienced expert. Large tax liabilities can hang in the balance if this process is not executed properly.

B. Relieving tax debts in bankruptcy

In some cases, taxes owed to a government entity can be discharged in bankruptcy as if they were a debt owed to any other creditor.[18] The extent to which this is possible depends on a number of factors, including in some cases how long the taxes have been owed. As with all other aspects of bankruptcy and taxation, however, farmers need to seek a qualified expert to investigate these possibilities.

V. More information

For more information, call the Internal Revenue Service at 1-800-829-1040. The IRS website is available for reference at https://www.irs.gov.

In addition, there are a number of changes that will go into effect for 2018 that will not be reflected in some materials published in 2017.

A number of IRS publications that might be helpful:

- Pub. 225, Farmer's Tax Guide[19]
- Pub. 536, Net Operating Losses[20]
- Pub. 544, Sales and Other Dispositions of Assets[21]
- Pub. 908, Bankruptcy Tax Guide[22]

U.S.C. § 522(b).

16 26 U.S.C. § 1398(c), (f)(1); 11 U.S.C. § 346(b).

17 26 U.S.C. § 1398(a), (d).

18 26 U.S.C. § 52.

19 https://www.irs.gov/pub/irs-pdf/p225.pdf.

20 https://www.irs.gov/pub/irs-pdf/p536.pdf.

21 https://www.irs.gov/pub/irs-pdf/p544.pdf.

22 https://www.irs.gov/pub/irs-pdf/p908.pdf.

Chapter Ten

Alternative Dispute Resolution (ADR)

I. Introduction

As of July 1, 1994, most civil lawsuits filed in Minnesota district courts are subject to an Alternative Dispute Resolution (ADR) requirement.[1] Since 1998, the United States District Court for the District of Minnesota has also imposed ADR requirements.[2] ADR is intended to give both parties a chance to resolve their dispute outside of the courtroom.[3] ADR requirements are different from, and in addition to, farmer-lender mediation (described in Chapter Seven). This chapter briefly discusses the ADR requirements in Minnesota district courts.

II. Types of ADR

The legal description of various ADR processes is generally quite vague. The two most commonly used ADR methods are mediation and arbitration.[4]

A. Mediation

In mediation, a neutral third party facilitates communication between the parties in an

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[1] MINN. GEN. R. PRAC. 114. This requirement is a result of an action by the Supreme Court of Minnesota and is authorized by MINN. STAT. § 484.76. In 1996 the rule was amended to add limitations of ADR on family law matters.

[2] These requirements are authorized by 28 U.S.C. § 651(b) (the Alternative Dispute Resolution Act of 1998). D.MINN. LR 16.5. Within 45 days prior to trial, each federal civil case not exempted must go through a mediated settlement conference before a magistrate judge. D.MINN. LR 16.5(a)(2). The full-time magistrate judges constitute the panel of neutrals that are available to the parties. D.MINN. LR 16.5(a)(4). At the discretion of the federal court, ADR before other persons may be conducted. D.MINN. LR 16.5(b).

[3] For further information on ADR, see the *Mediation Center at Mitchell Hamline College of Law*, available at https://mediationcentermn.org.

[4] MINN. GEN. R. PRAC. 114.02(a). A number of other ADR methods are available under the Minnesota requirement. These include: *(1) Consensual Special Magistrate*. The case is sent to a neutral who makes a binding and appealable judgment. *(2) Early Neutral Evaluation (ENE)*. Attorneys present the par- ties' core arguments to a neutral evaluator who assesses the case and helps narrow the dispute. *(3) Mediation-Arbitration*. In this hybrid method, if there is an impasse in mediation, the parties can arbitrate. *(4) Mini-Trial*. A mini-trial helps to define issues and get a realistic assessment for settlement negotiations. The opinion of the neutral third party will be binding if the parties agree to this beforehand *(5) Neutral Fact Finding*. The neutral investigates and analyzes the case and issues a non-binding report or recommendation. *(7) Summary Jury Trial*. The case is presented to a mini-jury, which issues a non-binding advisory opinion. The parties may also agree to create their own ADR process, so long as they explain that process to the court.

effort to promote a settlement of the dispute. Mediators do not impose their own judgments on the issues.

B. Arbitration

In arbitration, each party presents its position before a neutral third party.[5] The neutral third party then issues a decision, which may include an award. Arbitration is typically a binding form of ADR. Under the Minnesota ADR requirement, however, the parties are free to proceed to trial after arbitration unless they agree in advance that the arbitrator's decision will be binding.[6]

III. When the ADR requirement is triggered

The Minnesota ADR requirement is triggered by the filing of a civil lawsuit.

A. Civil cases — including foreclosures, money judgments, and replevin actions

ADR is required only for civil cases.[7] For the purposes of a farmer's debtor-creditor relationships, the ADR requirement is most likely to apply in three types of cases. First, it will apply in any foreclosure by action. The ADR requirement, however, will not apply in a foreclosure by advertisement. Foreclosures, including the differences between a foreclosure by action and a foreclosure by advertisement, are explained in Chapter Three. Second, if a creditor seeks a money judgment against a debtor in a court action, this triggers the ADR requirement. Money judgments are explained in Chapter Five. Third, if a creditor uses a replevin action or another related action to take possession of a debtor's property, this will also trigger the ADR requirement.[8] Creditor actions to take possession of debtor property are discussed in Chapter Four.

Some civil cases do not require ADR. The most important of these exceptions are cases filed in conciliation court and eviction actions.[9] An eviction action is most often used by landowners to remove people—such as former tenants—who do not have a legal right to be on the land.

B. Triggered by actual filing of the civil action

ADR is required only when a civil case is filed with the court.[10] It is the actual filing of a lawsuit that is important. Letters threatening a lawsuit, or even the service of legal papers

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5 MINN. GEN. R. PRAC. 114.02(a)(1); 114.09.

6 MINN. GEN. R. PRAC. 114.02(a)(1).

7 MINN. STAT. § 484.76; MINN. GEN. R. PRAC. 111.01, 114.01; see also MCFARLAND and KEPPEL, MINNESOTA CIVIL PRACTICE, § 434 (4d ed. 2008).

8 In some cases, it may be possible for the creditor to take possession of the debtor's property before the ADR process is completed.

9 A number of other types of civil cases, including guardianship cases, civil commitments, harassment restraining orders, and juvenile cases are also excluded. MINN. STAT. § 484.76, subd. 1; MINN. GEN. R. PRAC. 111.01.

10 MINN. STAT. § 484.76; MINN. GEN. R. PRAC. 111.01, 114.01; see also MCFARLAND and KEPPEL, MINNESOTA CIVIL PRACTICE, § 434 (4th ed. 2008).

to another party, do not trigger the ADR requirement.

C. A judge can excuse the parties from ADR

Although the use of ADR will normally be required for qualifying civil cases, judges have the ability to excuse parties from the requirement.[11] A judge can determine that ADR is "inappropriate" for a particular case.[12] There is no real explanation or criteria for when ADR may or may not be appropriate.

IV. How ADR works

Detailed information about Minnesota's ADR requirement can be found in the Minnesota General Rules of Practice for the District Courts.[13] A general overview of the process is given here.

A. Selecting the ADR process and neutral

After a case has been filed, the court will provide the parties with information about ADR processes and a list of neutrals who provide ADR services in the county.[14] Generally, the parties in the lawsuit select one of the ADR processes available and decide on a schedule.[15] In addition, the parties select a third-party neutral to conduct the ADR process.[16] If the parties cannot agree on an ADR process or timing, or are unable to pick a neutral, the court will either pick the ADR method and neutral or refuse to order ADR at all.[17]

B. ADR proceedings

The neutral will schedule the ADR process for the parties.[18] The ADR proceedings will typically be closed to the public unless all of the parties agree otherwise.[19] The Minnesota General Rules of Practice set out some detailed guidance for arbitration proceedings, including a list of arbitrator powers and procedures for taking evidence.[20] For other forms of ADR and for arbitration issues not addressed in the rules, the neutral is responsible for formulating the process.[21]

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[11] MINN. STAT. § 484.76, subd. 1.
[12] MINN. GEN. R. PRAC. 114.04(c).
[13] These rules should be available from any district court and can be found on the Internet at https://www.revisor.mn.gov/court_rules/chapter.php?type=dc.
[14] MINN. GEN. R. PRAC. 114.03(a).
[15] MINN. GEN. R. PRAC. 114.04.
[16] MINN. GEN. R. PRAC. 114.05. Neutrals must have completed training and education requirements, MINN. GEN. R. PRAC. 114.02(b); 114.13.
[17] MINN. GEN. R. PRAC. 114.04(b), 114.05(a).
[18] MINN. GEN. R. PRAC. 114.06(b).
[19] MINN. GEN. R. PRAC. 114.07(a).
[20] MINN. GEN. R. PRAC. 114.09.
[21] See MINN. GEN. R. PRAC. 114.09, Implementation Committee Comments (1993).

C. When ADR is complete

If the parties resolve their dispute through ADR, the underlying lawsuit will be dismissed. If the parties do not resolve their dispute through ADR, the neutral will report the lack of agreement to the court and the case will proceed.[22]

The ADR processes required for Minnesota civil lawsuits are non-binding.[23] The parties may agree to be bound by the decision of a neutral or ADR jury, but they cannot be required to do so. For arbitrations, however, a party who disagrees with the arbitrator's decision must file a request for trial within twenty days after the arbitrator's decision is filed with the court.[24] If the request for trial is not filed within twenty days, the arbitrator's decision will be binding.

D. Confidentiality of the ADR process

In general, statements made and evidence submitted in an ADR process will be confidential and cannot be used in later proceedings, including a trial.[25] This rule is specifically aimed at ADR processes that are intended to result in the compromise and settlement of the case. If the ADR process is binding, or if an arbitration decision becomes binding due to the parties' failure to request a trial within twenty days, evidence from the ADR process may be submitted in later proceedings.[26]

V. Paying for ADR

The parties involved in ADR must pay for its costs.[27] The parties and the third-party neutral together decide on the proper fee. The law generally assumes that the two parties will split the cost of the ADR process, although the parties may agree to a different arrangement.[28] If the two parties cannot agree on a way to divide up the costs of ADR, the court has the power to "determine a final and equitable allocation of the costs."[29]

The Minnesota Supreme Court's Implementation Committee for ADR, whose views are not

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22 MINN. GEN. R. PRAC. 114.10(d)(1).
23 MINN. STAT. § 484.76.
24 MINN. GEN. R. PRAC. 114.09(d)(2), (f).
25 MINN. GEN. R. PRAC. 114.08; Neutrals may not be required to testify about ADR proceedings, MINN. STAT. § 595.02, subd. 1a, states that: "No person presiding at any alternative dispute resolution proceeding established pursuant to law, court rule, or by an agreement to mediate, shall be competent to testify, in any subsequent civil proceeding or administrative hearing, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to any statement or conduct that could: (1) constitute a crime; (2) give rise to disqualification proceedings under the rules of professional conduct for attorneys; or (3) constitute professional misconduct." This also applies in Minnesota federal court ADR where no "confidential dispute resolution communication" may be used outside the ADR proceeding without the consent of the party that made the communication, D.MINN. LR 16.5(d)(2).
26 MINN. GEN. R. PRAC. 114.08(c). Sworn testimony from a summary jury trial may also be used in later proceedings, MINN. GEN. R. PRAC. 114.08(d).
27 MINN. GEN. R. PRAC. 114.11(a).
28 MINN. GEN. R. PRAC. 114.11(b).
29 MINN. GEN. R. PRAC. 114.11(b).

legally binding, has taken the position that parties with limited financial resources "should not be denied access to ADR because of an inability to pay for a neutral" and that judges and ADR providers "should consider the financial abilities of all parties and accommodate those who are not able to share equally in costs."[30]

VI. ADR and farmer-lender mediation

ADR requirements for civil lawsuits are completely separate from the farmer-lender mediation requirements discussed in Chapter Seven. Participation in farmer-lender mediation does not automatically satisfy the ADR requirements for civil cases. If a farmer has participated in farmer-lender mediation on a particular issue and the dispute is later brought to court, the judge may decide that ADR on the same issue is not necessary—but this conclusion is not required. It is also possible that one set of issues could be discussed during farmer-lender mediation—such as the possibilities for restructuring the debt—and a completely different set of problems could be addressed concerning the same debt by ADR. For example, ADR could address the validity of the mortgage or the amount of debt that was actually secured. Or, a judge could waive the ADR requirement when a creditor seeks to foreclose by action but later require ADR if the creditor seeks a deficiency judgment on the same debt.

As discussed in Chapter Seven, mediation services under the Farmer-Lender Mediation Act are available as a form of voluntary ADR to resolve disputes in rural areas that are not subject to mandatory farmer-lender mediation.[31] Although the voluntary ADR process under the Farmer-Lender Mediation Program is not specifically identified as a possible neutral for the ADR requirement in civil cases, it is likely that this process would satisfy the ADR requirement if the parties choose to use it.

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[30] MINN. GEN. R. PRAC. 114.11, Implementation Committee Comments (1993).

[31] MINN. STAT. § 583.311. The statute states that: "The administrator shall establish procedures and measures to ensure maximum use of alternative dispute resolution under this chapter for disputes in rural areas. Referrals may be accepted from courts, state agencies, local units of government, or any party to a dispute involving rural land, regulation, rural individuals, businesses, or property, or any matter affecting rural quality of life. The legislature encourages state and federal agencies and governmental subdivisions to use the services provided by the administrator under this chapter and to cooperate fully when matters under this jurisdiction are subjected to alternative dispute resolution methods. The administrator may set fees for participation in voluntary procedures to pay all or part of the costs of providing such services."

Chapter Eleven

Scam Artists Targeting Farmers

For years, a number of unscrupulous scam artists have targeted financially distressed farmers for fraudulent credit schemes of one sort or another.

In one common scam, con artists promise to find farm loans at very low interest rates with no questions asked—but the farmer must pay a large fee up front. Then the loan money never comes, and there is no refund of the fee. While there are completely legitimate loan finders, large up-front fees should serve as a warning sign for farmers. As government credit programs become less available, these types of frauds seem likely to appear more often.

Another scam includes the promise of a lawsuit on behalf of farmer borrowers.[1] One group traveled through the upper Midwest, including Minnesota, allegedly promising a gigantic money award—and the return of land lost by farmers to foreclosure—from a class action lawsuit filed in Colorado. The catch was that farmers had to pay several hundred dollars up front to get in on the award. The group mixed this effort with extreme right-wing political views.

They claimed, for example, that much federal government activity has been illegal since the 1930s when the government went off the gold standard and that the monetary system has been unconstitutional since then. Even after the case was thrown out of court, the group continued to claim that it had won a multi-billion-dollar judgment. Unfortunately, hundreds of farmers were tricked into contributing at least $300 each. Several people associated with the group have been charged with various crimes, and at least one has already pled guilty.

It is not hard to see why such a group can be successful. It can be easy to imagine that a single lawsuit can solve everything, especially when farmers feel that they have been treated unfairly. Courts, after all, do unexpected things all the time, and in fact some large lawsuits have benefited struggling farmers. In addition, offbeat and out-of-the-mainstream political views have a long and important history in the United States, and individuals and groups have every right to push for changes in the country's laws. However, promises of a very large court award based on government conspiracies should make farmers very cautious. Before contributing money to such an effort, it is important to check out the group or lawyers making the promises.

These various scams continue today.

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[1] Farmers who think they have been the victim of a scam or who want to learn more about how to protect themselves may call the Minnesota Attorney General's Office at 651-296-3353.

Chapter Twelve

Usury

Limits on the rate of interest that may be charged by creditors

I. Introduction

Usury laws limit the amount of interest a creditor can charge. These rules are complicated, and the discussion here only addresses a small part of that complexity.[1] Farmers believing that the interest charged by a creditor may be illegally high should contact a lawyer.

In general, Minnesota law sets a very low limit on interest rates that can be charged but also sets out several broad exceptions to the low limit. In fact, the exceptions apply far more often than the general rule. The practical effect of this system is a confusing and inconsistent set of usury laws. This appendix briefly explains the basic interest rate limits in Minnesota and several exceptions that are likely to be most important for farming operations.

II. General rule — maximum of 6 or 8 percent annual interest

Minnesota law sets a very low interest rate maximum as a general rule. In general, creditors may charge no more than 8 percent interest per year on loans or forbearances.[2] If there is no written agreement between the debtor and creditor stating the interest rate, interest is set at 6 percent per year.[3]

III. Exceptions to the general rule

A number of exceptions lessen the practical value of these interest rate limits.[4] When an exception to the general rule applies, the exception sometimes creates a different, higher interest rate maximum. Sometimes, however, the exception creates no other maximum interest rate. If this is the case, there may be no effective limit on the interest rate that can be charged by the creditor.

The following exceptions are most likely to be important for a farming operation.

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1 For a general summary, see 48, DUNNELL MINN DIGEST, USURY (5th ed. 2013).

2 MINN. STAT. § 334.01, subd. 1.

3 MINN. STAT. § 334.01, subd. 1.

4 In addition to the exceptions listed in this appendix, there may be exceptions to interest rate limits for certain federal banking institutions, including Farm Credit System banks. See 12 U.S.C. §§ 2016, 2075(c), 2131 (stating that Farm Credit Banks and Production Credit Associations can make loans at any rate authorized by their board of directors, regardless of state limits); John L. Brown, *Federal Preemption of the State Regulation of Agricultural Credit*, 7 DRAKE JOURNAL OF AGRICULTURAL LAW 563 (Fall 2002).

A. If the borrower is an organization — no effective limit on interest

Loans to organizations are exempt from the general interest rate limits.[5] Organizations include the government, corporations, trusts and estates, partnerships, joint ventures, cooperatives, limited liability companies, and associations.[6] The law does not set a higher interest rate limit to take the place of the general limit. As a result, if a farm is incorporated, there may be no effective limit on the interest that a creditor can charge.

B. If the loan is for less than $100,000 and is for agricultural or business purposes — substitute maximum interest rate

If a loan or forbearance is for less than $100,000 and is for an agricultural or business purpose, the loan is exempt from the general interest rate limit.[7] The definition of "agricultural purpose" for this exception includes almost anything normally thought of as farming.[8] An agricultural and business purpose does not, however, include a loan used to finance the purchase or maintenance of real estate used principally for the borrower's residence.[9]

Although a loan of under $100,000 for agricultural or business purposes does not fall under the general interest rate limit, the law does set a different maximum interest rate for these loans.

Creditors making loans for agricultural or business purposes may charge a rate of interest of not more than 4.5 percentage points over the Federal Reserve's discount rate at the time the loan is made.[10] For example, if the discount rate is 6 percent, interest charged for this type of loan may not be more than 10.5 percent per year.

C. If the loan is for $100,000 or more — no limit on interest if the rate is agreed to in writing

A contract for a loan or forbearance of $100,000 or more is exempt from the 8 percent

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5 MINN. STAT. § 334.022; *Velocity Express Corp. v. Bayview Capital Partners*, 2002 WL 980502 (D. Minn. May 9, 2002) (unpublished); *Jones v. Nelson*, 432 N.W.2d 792, 796 (Minn. Ct. App. 1988); *Midwest Fed. Sav. & Loan Ass'n v. West Bend Mut. Ins. Co.*, 407 N.W.2d 690, 695 (Minn. Ct. App. 1987).

6 MINN. STAT. § 334.022.

7 MINN. STAT. § 334.011, subd. 1.

8 MINN. STAT. § 334.011, subd. 1. Agricultural, for this purpose, means the production, harvest, exhibition, marketing, transportation, processing, or manufacture of agricultural products, including horticultural, viticultural, and dairy products, livestock, wildlife, poultry, bees, forest products, fish and shellfish, and any parts thereof, including processed and manufactured products, and any and all products raised or produced on farms and any processed or manufactured products thereof. MINN. STAT. § 334.011, subd. 1. Business means "a commercial or industrial enterprise which is carried on for the purpose of active or passive investment or profit." MINN. STAT. § 334.011, subd. 1.

9 MINN. STAT. § 334.011, subd. 1.

10 MINN. STAT. § 334.011, subds. 1, 3; *In re Donnay,* 184 B.R. 767, 780 (Bankr. D. Minn. 1995).

interest rate limit.[11] If there is no interest rate set in writing, the interest on debt of $100,000 or more is still 6 percent per year. As a result, as long as a loan is for $100,000 or more, there may be no legal limit on the rate of interest, as long as the two parties agree to the interest rate in writing.

Sometimes there may be a question as to whether a loan qualifies for this exception, particularly if the lender makes several separate operating advances with a total value of $100,000 or more. In these cases, this exemption should apply if there is a contractual agreement to lend a total of $100,000 or more. If several smaller notes are consolidated into a single note and the total amounts to $100,000 or more, the new consolidated note should also qualify for the exception.

D. If the lender is a bank or other financial institution — maximum interest rate is much higher

Banks and other financial institutions fall under two special exemptions to the general interest rate limit.[12]

First, Minnesota law allows banks and most other financial institutions to make loans at interest rates of up to 21.75 percent per year.[13]

Second, banks and other financial institutions may also charge an interest rate of up to 4.5 percentage points higher than the federal discount rate charged at the Minneapolis Federal Reserve Bank at the time the loan is made.[14] These two exceptions work together in favor of the bank.

For example, if interest rates in general are fairly low, banks can always charge up to 21.75 percent annual interest. If interest rates generally are higher, banks can charge up to 4.5 percentage points over the federal discount rate even if the rate charged is more than 21.75 percent per year.

In addition, banks may take advantage of the other exceptions mentioned above if they apply. For example, if a bank makes a loan to a corporation, or if it makes a loan of $100,000 or more, there may be no legal limit to the interest rate charged.

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[11] MINN. STAT. § 334.01, subd. 2; *Negaard v. Miller Constr. Co.*, 396 N.W.2d 833 (Minn. Ct. App. 1986); *In re Donnay*, 184 B.R. 767, 781-83 (Bankr. D. Minn. 1995).

[12] This exemption applies to banks, savings banks, savings associations, and credit unions organized under state law; and national banks or federally chartered savings banks, savings associations, and credit unions. MINN. STAT. § 48.195.

[13] MINN. STAT. § 47.59, subd. 3(a). Interest on open-ended credit extended through a credit card may not be more than 18 percent. An even higher rate of interest may be charged on very small loan amounts.

[14] MINN. STAT. § 48.195.

Glossary of Important Minnesota Lending Law Terms

Accelerate. A creditor's action to claim the total balance of a debt is due immediately.

Acceleration clause. A provision in a mortgage or other credit agreement where there has been a default by the debtor and that then requires the debtor pay the entire debt immediately.

Affidavit. A written statement or declaration, sworn before a person having authority to administer an oath, often a notary public.

After-acquired property. Property of the debtor acquired after security transaction covering property already owned is perfected.

Agricultural lien. A lien against agricultural products or services to secure money or payment for the agricultural products or services.

Answer. In a lawsuit, a statement that must be filed by a part who has been served with a summons and complaint by a plaintiff. There are short time deadlines to file an answer with the court. If a party fails to file an answer, a default judgment will be entered by the court.

Attachment. A legal process that allows a creditor who has started a lawsuit seeking a judgment against a debtor to get a court order to seize or "attach" the debtor's property.

Automatic stay. Immediately upon a debtor filing a bankruptcy petition, the debtor gets the benefit of preventing the continuation of creditor collection activities.

Bankruptcy. A legal process that allows debtors to address insurmountable debt through a set of procedures while receiving protection from continued collection activity.

Collateral. Debtor's property identified in an agreement that is pledged to the creditor if the debtor does not repay the debt.

Complaint. The first document or "pleading" filed with a court that begins a lawsuit.

Consumer transaction. Transactions in which: (1) the debt is taken primarily for personal, family, or household purposes, and (2) the collateral is primarily for personal, family, or household use.

Contract. A written or oral agreement between two or more parties that is enforceable by law.

Contract for deed. An agreement by a seller to deliver the deed to a buyer when specified conditions have been met, usually completion of payments to the seller.

Creditor. The person or business to whom the debt is owed.

Cross-collateralization. A lender who has made multiple loans to the same borrower may

seek the right to take the property obtained with the funds from one loan as security in case of a default on the borrower's other outstanding loans. That is, a borrower who obtains a loan to purchase real estate may be asked to include a term in the mortgage allowing the lender to foreclose on the real estate if the borrower defaults on any loan owed to the lender.

Damages. The monetary value a person is entitled to recover by law for injuries suffered.

Debtor. The person who owes money. This book assume that the farmer is the debtor.

Deed in lieu of foreclosure. A procedure where the owner/borrower voluntarily gives the lender the deed to the property in order to prevent a foreclosure on the property. A deed in lieu of foreclosure, therefore, is a substitute for a foreclosure.

Default. Failing to meet the requirements of an agreement, often a loan or credit agreement. Most defaults involve being late with payments. However, there are other types of defaults, including being late with a property tax payment, failure to maintain enough insurance, or failure to maintain collateral. The loan agreement or contract for deed will usually provide a long list of actions by the borrower or buyer that count as a default.

Default judgment. A judgment entered against a party who did not meet the legal requirements of case, often for a party's failure to file an answer by the required deadline.

Deficiency judgment. After a foreclosure sale or repossession of personal property that failed to yield the full amount of debt due, a judgment is entered against the debtor to collect payment for the difference.

Deposit account. Checking, savings, and similar accounts and certain certificates of deposit maintained with a bank or other financial institution.

Discharge (debt). A document that terminates a debtor's obligation to pay a debt. For example, a debtor can get a discharge of a mortgage debt after the mortgage is fully paid off.

Discovery. The process during a lawsuit by which the parties obtain information from each other and documents related to the case.

"Dragnet" clause. A provision in a loan agreement giving the lender the right to take the property obtained with the funds from one loan as security in case of a default on the borrower's other outstanding loans.

Due on sale clause. A due on sale clause in a mortgage loan means the lender can accelerate the debt if the borrower sells or transfers part or all of the mortgaged land without the lender's permission.

Enforceable. A contract provision that can be required by a party to the contract to be performed.

Equity. The value of a property remaining after subtracting mortgages, liens and other debts

against it.

Eviction. A legal process terminating a person's right to occupy a home or business property, most commonly the removal of a tenant.

Execution. The process to carry out the terms of a legal document. For example, execution of a judgment lien involves seizing and selling the property subject to the judgment lien.

Exempt property. Property that state or federal law allows debtors to keep up to a certain amount when faced with collection of an unsecured debt. In bankruptcy proceedings exempt property is protected from being sold to pay claims of creditors.

Exemptions. The laws that give debtors the right to maintain exempt property.

File (documents). To deliver to the custody of a court or a public office documents, often court pleadings or real estate certificates.

Financing statement. Often called a UCC-1, serves as public notice that the creditor has a security interest in the debtor's property. It also provides that if two different creditors ever tried to claim the same piece of the debtor's property, the financing statement helps to settle which one gets the collateral, usually based on which one is filed first.

Fixtures. In general, fixtures are something that is attached to the land. Storage bins, some silos, and milking equipment are examples of property that might be fixtures. Whether or not property is a fixture can depend on a number of factors, such as the extent to which the property was attached to the land and the intent of the person putting the fixture in place.

Foreclosure. A legal process to terminate a person's ownership of real estate that is collateral for a debt, based on a mortgage. In Minnesota this is done through either a foreclosure by action or foreclosure by advertisement.

Fraudulent transfer. When debtors give away property to keep it out of the hands of creditors.

Garnishment. A legal process where a person's money that is under the control of another (such as a bank account) is taken for payment of a debt.

Hearing. A court proceeding (though generally not a trial) in which the court hears witnesses and evidence presented.

Homestead exemption. The right to treat a person's residence as exempt property that cannot be sold to satisfy claims of unsecured creditors. It also means the right to make sure the homestead is sold separately by the sheriff during a foreclosure sale so that later the homestead may be redeemed separately by the debtor.

Judgment. A determination by a court as to the outcome of a lawsuit, often directing the payment of money.

Judgment lien. A lien that attached to a debtor's property as the result of a judgment that is entered by a court.

Lien. A legal interest taken by creditors in a debtor's property to secure repayment of a debt. In some situations, is called a "security interest."

Mortgage. An agreement giving the lender the right to foreclose on the real estate if the borrower fails to pay the loan or otherwise violates the terms of the loan.

Mortgage power of sale clause. A provision in a mortgage that allows the lender to foreclose by advertisement, that is, without filing a lawsuit.

Mortgage rents and profits clause. A provision in a mortgage that gives the mortgage lender the right to claim income from the borrower's property after a foreclosure and before the end of the borrower's right of redemption.

Mortgagee. The lender of money who receives the mortgage.

Mortgagor. The borrower of money who gives the mortgage.

Notice (public). Informing the entire community of a legal occurrence, most commonly by publishing in a local newspaper of general circulation.

Notice and cure. This means that the lender or seller must give notice (information) to the borrower or buyer if there is a default. The lender or seller must then also give the borrower or buyer the right to cure (correct) the default within a reasonable amount of time before taking action to enforce the debt or cancel the contract for deed.

Perfection. In secured credit transactions, the legal process where a security interest is protected against competing claims to the collateral, usually by giving public notice through filing in a governmental office.

Personal property. Property other than real estate. Personal property is not completely connected to the land, such as tractors, livestock, cars, and household goods.

Proceeds. Whatever is received upon the sale, lease, license, exchange, or other disposition of collateral.

Purchase-money credit security interest. A purchase money security credit arrangement exists when a creditor loans a debtor money to purchase personal property, and that personal property is used as collateral for repayment of the loan. A security interest held by a purchase-money creditor is a purchase-money interest, which gives the creditor first priority in the acquired personal property, even if other creditors have already filed valid financing statements giving them an interest in the debtor's property.

Reaffirmation. An agreement between a debtor and a creditor in a bankruptcy process to pay back a debt that would otherwise be discharged in bankruptcy.

Real property. Land and anything permanently attached to the property such as buildings and fences.

Recording real estate documents. Many real estate documents used by farmers—such as mortgages and contracts for deed—are officially recorded. This means whoever is being paid, typically the lender, is responsible for filing them with the registrar of titles or the recorder of the county in which the real estate is located.

Redeem. To buy back property from a mortgage or pledge by paying the debt plus costs.

Redemption. The right of the debtor (or other creditors) to purchase from a buyer at a forced or foreclosure sale property of the debtor that was sold to pay of judgment or claim against the debtor.

Replevin. The legal process in which a creditor seeks to recover (repossess) personal property on which the creditor claims a lien.

Repossession. When the creditor takes back or seizes collateral after the debtor's default, usually without court permission. Often called "self-help" repossession.

Right of first refusal. Minnesota and federal law provides that some farmers that lost agricultural land or the farm homestead because a creditor enforced a debt against it receive an opportunity to buy or rent the farm. The creditor is restricted from renting or selling the property to anyone else without first giving the farmer a chance to match any offer.

Satisfaction. A legal document that states a debt has been full paid or that partial payment has been accepted as payment in full.

Secured creditor. A creditor that has collateral for a debt.

Secured debt. A debt for which the creditor has collateral.

Security agreement. A contract that gives a creditor a security interest in the debtor's property.

Security interest. A security interest is a legal claim of a creditor allowing the creditor to take possession of the debtor's property or claim proceeds from the sale of the debtor's property if the debtor defaults on the debt. Some security interests are created by law or by order of a court. Most commonly, however, security interests are agreed to by debtors as part of a credit arrangement.

Self-help. Taking an action, such as recovery of property, without going through a judicial process.

Service. The delivery of the summons and complaint to a defendant, usually by personally delivering a copy to the defendant.

Statute of frauds. Laws imposing requirements that some agreements, such as sales of real estate and leases for more than one year, must be in writing to be enforceable.

Statute of limitations. A statute stating the period of time in which a claim must be brought before a court.

Subordination agreement. A current creditor voluntarily allows another creditor to move ahead in priority.

Summons and complaint. A summons is the legal document that is provided at the beginning of a lawsuit setting out what is requested of the defendant and how the defendant must respond. A complaint is a statement of all the claims raised by the person or company bringing the lawsuit. These documents are served together.

Title insurance. Insurance against losses resulting from defects of title for a specific parcel of real property.

Unsecured creditor. A creditor that has no collateral for the debt owed.

Unsecured debt. A debt that does not involve collateral.

Vendee. The person who buys the property. This book assumes that the farmer is the vendee.

Vendor. The seller of the property.

Void. A document or transaction that is without legal force or effect and nothing can cure the defect.

Voidable. Something that may be avoided or declared void, but that is not absolutely void itself. For example, a voidable contract is one where one or more parties have the power to avoid abiding by the contract.