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## The Farm Lease in Bankruptcy: A Comprehensive Analysis

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During the past five years, the financial condition of many farmers has deteriorated markedly. Three principal factors account for this deterioration: stagnating or even declining land prices; high interest rates; and depressed commodity prices.<sup>1</sup> Stagnating or declining land prices<sup>2</sup> have reduced the value of farmers' equity and pose special problems for landowners who borrowed extensively to purchase land at inflated values. Interest expenses have consumed an increasingly large percentage of farm earnings. In 1978, interest had absorbed approximately one-fifth of the total farm income remaining after all other operating expenses had been subtracted; by 1981 it had absorbed approximately two-fifths.<sup>3</sup> Depressed commodity prices during recent years have decreased net cash farm income from thirty-seven billion dollars in 1979, to an estimated thirty-one billion in 1982.<sup>4</sup>

This decline in farm income has created cash-flow problems for many farmers and has prevented some from meeting their financial obligations. At the end of the 1982 fiscal year, for example, 24.6% of all the Farmers Home Administration active farm-program borrowers, a total of 66,470, were behind in their scheduled payments.<sup>5</sup> During the same year, a record 8,227 borrowers in Farmers Home

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1 See FARM CREDIT ADMINISTRATION, AGRICULTURAL AND CREDIT OUTLOOK '83, at 18 (1983).

2 During the period from February 1981 through April 1982, the average value of farm real estate per acre in the 48 continental states decreased by 1%. See U.S. DEP'T. OF AGRIC. ECONOMIC RESEARCH SERVICE, FARM REAL ESTATE MARKET DEVELOPMENTS 5 (July 9, 1982). In many major agricultural states, however, the decrease was much greater. For example, in Illinois the decrease was 9%; in Indiana, 13%; and in Ohio, 15%. *Id.*

3 See FARM CREDIT ADMINISTRATION, *supra* note 1, at 20.

4 *Id.* at 19.

5 *Id.* at 24.

Administration programs went out of business.<sup>6</sup> Of these, 1,909 voluntarily liquidated their farming operations due to financial difficulties; 6,318 were forced to liquidate under threat of foreclosure.<sup>7</sup> Of those forced to liquidate, 1,245 received discharges in bankruptcy.<sup>8</sup> The American Bankers' Association 1982 Mid-Year Survey of Farm Credit Conditions reveals that during the period from June 1981 through June 1982, 2.2% of the farmers in the lending area of the responding banks went out of business, and 0.75% went through bankruptcy.<sup>9</sup> These statistics indicate that a substantial number of farmer-borrowers in both government-sponsored and private credit arrangements have experienced financial exigencies. Moreover, during the current period of financial stress, a significant number of farmers will undergo, or at least consider, bankruptcy.<sup>10</sup>

The existence of landlord-tenant relationships will often complicate the resolution of these farmers' financial difficulties once they enter bankruptcy. According to the 1978 Census of Agriculture, approximately 40% of the land in farms in the United States is rented.<sup>11</sup> In some states, the percentage is even higher. In Illinois, for example, the figure is over 55%.<sup>12</sup> Farm bankruptcies are likely to disrupt the

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6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.* at 23.

10 The Bankruptcy Code ("Code") is found at 11 U.S.C. §§ 101-151326 (1982). In June 1982, the United States Supreme Court ruled the current bankruptcy system unconstitutional, because bankruptcy judges hold broad power without adequate protection. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Although Congress was to alter bankruptcy law to comport with this ruling, no corrective legislation has yet been enacted. See generally Krasno, *The Bankruptcy Courts — Caught in Limbo?*, 67 JUDICATURE 307 (1984); see also Ginsburg, *The Proposed Bankruptcy Improvements Act: The Creditors Strike Back*, 3 N. ILL. U.L. REV. 1 (1982).

The Code provides that a farmer cannot be forced into bankruptcy. 11 U.S.C. § 303(a) (1982). Section 101(17) defines "farmer" as a person who received more than 80% of his gross income during the taxable year immediately prior to the taxable year of the bankruptcy proceeding from a farming operation owned or operated by such person. Under § 101(18), "farming operation" includes farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state." However, see Marsh, *Farmers' Exemption From Involuntary Bankruptcy*, 15 U.C.C. L.J. 162 (1982), where the author suggests that this exemption, as currently written, does not really protect a significant number of farmers, because off-farm income is such an important component of farm sector economics.

Many farmers facing serious financial difficulties will want to consider bankruptcy. In some situations, bankruptcy may offer the best means of staying in operation through a Chapter 11 reorganization or a Chapter 13 adjustment of debts; in others, it offers the most favorable method of terminating an operation through a Chapter 7 liquidation.

11 See U.S. DEPT COMMERCE, 1978 CENSUS OF AGRICULTURE, Pt. 51, at 124 (1981).

12 *Id.*

very essence of the landlord-tenant relationship, which is often an informal, oral arrangement based on mutual trust. In addition, the bankruptcy of either landlord or tenant raises significant and difficult legal issues.

Agricultural leases are traditionally divided into three general categories: the cash lease; the crop-share lease; and the livestock-share lease.<sup>13</sup> The cash lease involves a cash payment (either a specified sum or an amount determined by formula) for the use of farmland. Although possessing some special features characteristic of farm leases, it does not differ significantly from other commercial lease transactions.<sup>14</sup> Under a typical crop-share lease, the landlord supplies part of the equipment and inputs (seed, fertilizer, and other chemicals) necessary for the tenant to farm the landlord's land. In exchange, the landlord receives a share of the crops as rent. The rent share usually ranges from one-third to one-half, depending on the contributions of farmer and landlord, and local custom. Under a typical livestock-share lease, the landlord and tenant each own one-half of the livestock; they share the cost of farm inputs, and each typically receives one-half of the livestock and crop income.<sup>15</sup>

In light of the number of farm leases, the various types of leasing arrangements, and the current prevalence of financial difficulty in

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13 Two other types of farm leases are the labor-share lease, under which the farmer usually only contributes labor and management, and the net-share lease, under which the landlord receives a cash rent that is a function of annual yields. See F. REISS, FARM LEASES FOR ILLINOIS 5, 10 (University of Illinois at Urbana-Champaign Cooperative Extension Service, College of Agriculture Circular 1199, Mar. 1982). These account for only a small percentage of farm leases and will not be discussed in this article. For example, in Illinois labor-share and net-share leases account for less than 10% of all farm leases. See *id.* at 7-12.

Farm leases can be oral or written; they are usually leases for a fixed term or year-to-year tenancies. Many oral leases can be classified as year-to-year tenancies. In addition, when a farm tenant remains on the land after a written or oral lease for a fixed term has expired, he usually becomes a tenant from year to year. See, e.g., *Butz v. Butz*, 13 Ill. App. 3d 341, 299 N.E.2d 782 (1973); *Norvill v. Dambacher*, 35 Ill. App. 2d 212, 182 N.E.2d 337 (1962); see also 2 R. POWELL & P. ROHAN, THE LAW OF REAL PROPERTY ¶ 255 (1983). As a general rule, the provisions in the expired lease then carry over to the tenancy from year to year. See *id.*

Many states have statutory provisions governing the notice required to terminate a farm tenancy from year to year. These notice periods generally range from one to four months. See, e.g., ILL. REV. STAT. ch. 110, § 9-206 (1983) (four months); KAN. STAT. ANN. § 58-2506 (1976) (one month, except for fall-seeded crops planted prior to notice, in which case the lease does not terminate until August 1 or the last of harvest); VA. CODE ANN. § 55-222 (1981) (three months).

Farm tenancies from year to year are common because the landowner and the farmer usually know each other personally and tend to handle their relationship informally; many of the farm landlord-tenant relationships that bankruptcy courts encounter may be of this type.

14 See generally, 2 J. JUERGENSMEYER & J. WADLEY, AGRICULTURAL LAW § 36.4 (1982).

15 See F. REISS, *supra* note 13, at 7.

the agricultural industry, one must wonder how the bankruptcy of a party to a farm lease—either tenant or landlord<sup>16</sup>—affects rights and obligations under the agreement. In answering this question, bankruptcy courts will be required to determine the rights of both the landlord and the tenant in crops and livestock, as well as the status of their relationship. Moreover, the court's determination will frequently depend on the type of farm leasing arrangements involved. Thus, this article analyzes the legal issues that the bankruptcy of a party to a farm lease engenders.

Instead of entering crop-share leases, some landowners form employer-employee relationships in which the farmer-employee receives a share of the crops as wages. These relationships are known as "cropper contracts," and they share some of the characteristics of farm leases.<sup>17</sup> Sometimes a landowner and farmer will make an informal oral agreement to farm on shares without stating whether they intend the arrangement to be a crop-share lease or a cropper contract. If one of the parties to the agreement subsequently enters bankruptcy, the impact of bankruptcy on the parties will vary considerably depending on how the court construes the agreement. Therefore, this article also examines the effect of bankruptcy on cropper contracts.

### I. Nature of the Relationship

A landowner and a farmer have complete freedom to choose the type of relationship that will govern their farming operation. Their contract can create a landlord-tenant relationship, an employer-employee relationship, a partnership, or a joint venture.<sup>18</sup> The language of their written agreement will be important in determining which type of relationship they have created, and the parties should therefore draft their agreement carefully. Precise conformance with state law will ensure that the court interprets the document to create the type of relationship and corresponding legal results that the parties

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16 Some of these landowners will meet the statutory definition of farmer and thus be excluded from involuntary bankruptcy. See note 10 *supra*. Others, however, particularly those who farm part-time or as a hobby, will not meet the § 101(17) requirement that they receive more than 80% of their gross income from a farming operation that they own or operate. See, e.g., *In re Ballard*, 4 Bankr. 271 (Bankr. E.D. Va. 1980); *In re Beechwood*, 42 F. Supp. 401 (D.N.J. 1942). These individuals can be forced into bankruptcy by their creditors.

17 See 2 R. POWELL & P. ROHAN, *supra* note 13, ¶ 261[3]; Looney, *Legal and Economic Considerations in Drafting Arkansas Farm Leases*, 35 ARK. L. REV. 395 (1981); Note, *Cropping Agreements*, 19 U. CIN. L. REV. 121 (1950).

18 *United States v. Myra Found.*, 382 F.2d 107, 110 (8th Cir. 1967).

desired, should a bankruptcy or other legal action arise. If the lease is not drafted artfully, however, or if the parties, following common farm lease practices, have only entered into an oral agreement, the relationship may not be interpreted as they had intended.

When a bankruptcy court interprets a farm lease, it will also look beyond the language of the agreement to state law.<sup>19</sup> Thus, by giving careful consideration to state law when drafting a lease, the parties can also assess and exercise some control over the impact of any future bankruptcy on their contractual relationship.

Among the three most common types of farm leases,<sup>20</sup> the crop-share lease presents the most significant question of interpretation. A party to a cash lease will find it difficult to argue that the agreement creates anything but a landlord-tenant relationship.<sup>21</sup> In contrast, when a landowner and a farmer agree to farm on shares, they often do not clearly determine the nature of their relationship; if one of the parties later declares bankruptcy, the court is forced to make that determination.

An ambiguous agreement to farm on shares generally raises one of two issues, depending on the jurisdiction and the nature of the agreement. Usually, the court must determine whether the agreement is a cropper contract or a crop-share lease. Sometimes, however, the situation calls for a determination of whether the parties intended to create a crop-share lease or a tenancy in common in the crops. Additionally, some relationships, especially those involving livestock shares, can be interpreted as partnerships. Because the characterization of the farming relationship will significantly affect the result in bankruptcy, it is important at the outset to articulate the distinctions between these legal arrangements.

#### A. *Landlord-Tenant or Employer-Employee?*

A landowner and a farmer may choose to formalize either a tenancy or a cropper contract. Absent a clear indication of their intent,

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19 "In resolving questions of lease vitality bankruptcy courts look to state law. . . . This is consistent with the policy of deference to state law in determination of property rights, absent conflict with the Bankruptcy Statute." *Hazen v. Hospitality Assocs., Inc. (In re Hospitality Assocs., Inc.)*, 6 Bankr. 778, 780 (Bankr. D. Or. 1980); *see also* *Waldschmidt v. Appleton Inv. Co. (In re Zienel Furniture, Inc.)*, 13 Bankr. 264 (Bankr. E.D. Wis. 1981); *Kearny Mesa Crossroads v. Acorn Invs. (In re Acorn Invs.)*, 8 Bankr. 506 (Bankr. S.D. Cal. 1981); *Seidle v. Pan Am. World Airways, Inc. (In re Belize Airways Ltd.)*, 5 Bankr. 152 (Bankr. S.D. Fla. 1980).

20 *See* text accompanying note 13 *supra*.

21 A livestock-share lease raises other issues. *See* text accompanying notes 44-52 *infra*.

the court must characterize their relationship. In *Hampton v. Struve*,<sup>22</sup> the Nebraska Supreme Court distinguished between the two types of arrangements:

A lease of real estate is a hiring or renting of it for a certain time for a named consideration. A tenant rents the land and pays for it either in money or a part of the crops or the equivalent. A cropper is a hired hand who farms the land and who is paid for his labor with a share of the crops he works to produce and harvest. The crop belongs to the owner of the land and he pays for the labor of producing it with a part of the crop. A cropper does not have the right of exclusive possession of the land and has no estate in the crop until he is assigned his share thereof by the owner of the land.<sup>23</sup>

Thus, under a crop-share lease the farmer has an interest in the land and a property right in the crops, whereas under a cropper contract the farmer is an employee who has no interest in the land and who receives a portion of the crops as wages.<sup>24</sup>

When determining whether an agreement to farm on shares is a tenancy or a cropper contract, a court looks to the intention of the parties as inferred from the language of the document and surrounding circumstances.<sup>25</sup> Where the contract to farm on shares is oral and informal, the question of whether the farmer is a tenant or an employee is one of fact.<sup>26</sup>

Courts generally consider an agreement that grants the farmer exclusive possession of the land conclusive evidence of a landlord-tenant relationship.<sup>27</sup> In many instances, however, a farmer with his own land, home, farm buildings and equipment will expand his operation by farming a piece of land that belongs to a neighboring landowner. The farmer will need access to the land to conduct farming operations, but the parties will often not think to articulate the farmer's right to exclusive possession because that right is not currently relevant to their relationship. In these instances, courts can infer a landlord-tenant relationship from the presence of factors such

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22 160 Neb. 305, 70 N.W.2d 74 (1955).

23 *Id.* at 311, 70 N.W.2d at 78 (citations omitted).

24 *Dopheide v. Schoeppner*, 163 N.W.2d 360, 362 (Iowa 1968).

25 *Davis v. Burton*, 126 Mont. 137, 140, 246 P.2d 236, 238 (1952).

26 The solution requires determination of the true intention of the parties. *Dopheide*, 163 N.W.2d at 362; *Smith v. McNew*, 381 S.W.2d 369, 373 (Mo. Ct. App. 1964); *Hampton v. Struve*, 160 Neb. 305, 311-12, 70 N.W.2d 74, 78 (1955); *Cry v. J. W. Bass Hardware*, 273 S.W. 347, 349 (Tex. Civ. App. 1925).

27 *Larson v. Archer-Daniels-Midland Co.*, 226 Minn. 315, 323, 32 N.W.2d 649, 653 (1948); *Davis*, 126 Mont. at 140, 246 P.2d at 238; *Hampton*, 160 Neb. at 312, 70 N.W.2d at 78.

as provisions that specify a fixed term,<sup>28</sup> the surrender of possession at the end of the term,<sup>29</sup> a prohibition against underletting or subletting,<sup>30</sup> a requirement for the farmer to repair improvements on the premises,<sup>31</sup> the right of the farmer to divide the crop,<sup>32</sup> and the farmer's exercise of a large measure of control over his own activity.<sup>33</sup> In contrast, provisions specifying that the landowner will retain possession of the land and title to the crop, exert considerable control over the farmer's activity, and supply most or all of the necessary inputs evidence an intent to create an employer-employee relationship.<sup>34</sup>

As one court acknowledged: "There is much confusion and not a little conflict in the decided cases as to the precise relation of the parties created by a contract [to farm on shares]." <sup>35</sup> This difficulty and the possibility of an unanticipated characterization of the landowner-farmer relationship suggest that a party to a contract to farm on shares should insist that the agreement be carefully drafted.

### B. *Tenancy in Common*

The courts in at least two states, Illinois and Minnesota, have decided that when a contract to farm on shares does not clearly define the nature of the parties' agreement, the agreement creates either a landlord-tenant relationship or a tenancy in common in the crops, depending on the intention of the parties.<sup>36</sup> In *Wheeler v. Sanitary District*,<sup>37</sup> the Illinois Supreme Court explained:

Where one leases land to another for the purpose of raising a single crop, of which the landowner is to have one part for his rent and the cultivator the remaining part for his pay, the ques-

28 See *Larson*, 226 Minn. at 323, 32 N.W.2d at 653; *Hampton*, 160 Neb. at 312, 70 N.W.2d at 78.

29 See *Larson*, 226 Minn. at 323, 32 N.W.2d at 653; *Hampton*, 160 Neb. at 312, 70 N.W.2d at 78.

30 See *Larson*, 226 Minn. at 323, 32 N.W.2d at 653; *Hampton*, 160 Neb. at 312, 70 N.W.2d at 78.

31 See *Larson*, 226 Minn. at 323, 32 N.W. 2d at 653; *Hampton*, 160 Neb. at 312; 70 N.W.2d at 78.

32 See *Dopheide*, 163 N.W.2d at 363.

33 *Id.*; see also *Wood v. Garrison*, 139 Ky. 603, 62 S.W. 728 (1901).

34 *Gibbons v. Huntsinger*, 105 Mont. 562, 570, 74 P.2d 443, 447 (1937) (quoting *Wells-Dickey Co. v. Embury*, 82 Mont. 150, 163, 266 P. 869, 874 (1928)).

35 *Hampton*, 160 Neb. at 311, 70 N.W.2d at 78.

36 *Flowers v. Mehrhoff (In re Estate of Flowers)*, 95 Ill. App. 3d 333, 335, 420 N.E.2d 216, 218 (1981); *Larson*, 226 Minn. at 326, 32 N.W.2d at 655; see also *Wheeler v. Sanitary Dist.*, 270 Ill. 461, 469-70, 110 N.E. 605, 609 (1915); *Alwood v. Ruckman*, 21 Ill. 200, 200-01 (1859).

37 270 Ill. 461, 110 N.E. 605 (1915).



tion whether the relation of landlord and tenant exists or the two are tenants in common depends on the intention of the parties, which is usually to be inferred from the circumstances, of which the possession is, in general, determining. Where it is doubtful whether the possession and control are exclusive in the tenant or joint in the owner and cultivator, and whether the right of entry continues for the year or only until the crop is removed, the inclination is to find in favor of the latter conclusion.<sup>38</sup>

This focus on the parties' intention is consistent with the right of landowner and farmer to determine the legal nature of their relationship. Nonetheless, courts must define carefully the distinctions between the various relationships to avoid inconsistent results. For example, Illinois courts have generally held that a contract to farm on shares creates either a landlord-tenant relationship or a tenancy in common; reported decisions usually have not discussed employer-employee relationships.<sup>39</sup> But in the recent decision of *Flowers v. Mehrhoff (In re Estate of Flowers)*,<sup>40</sup> the Illinois Court of Appeals, after quoting at length from *Wheeler*, looked to decisions from other jurisdictions and held that a contract to farm on shares can create a landlord-tenant relationship, an employer-employee relationship, a tenancy in common, or a partnership, depending on the intention of the parties.<sup>41</sup> The *Flowers* decision's departure from precedent creates confusion and encourages courts to continue giving different interpretations to essentially identical contracts.<sup>42</sup>

Moreover, courts do not always make a clear distinction between leaseholds and tenancies in common. Several courts have held that every contract to farm on shares, whether a crop-share lease or cropper contract, creates a tenancy in common in the crop.<sup>43</sup> Parties

38 *Id.* at 469-70, 110 N.E. at 609 (citation omitted).

39 *See id.* at 469-70, 110 N.E. at 609; *Alwood*, 21 Ill. at 201.

40 95 Ill. App. 3d 333, 420 N.E.2d 216 (1981).

41 *Id.* at 335, 420 N.E.2d at 218.

42 For example, in *Larson v. Archer-Daniels-Midland Co.*, 226 Minn. 315, 32 N.W.2d 649 (1948), the plaintiff alleged that the contract to farm on shares created a tenancy in common, but the defendant argued that it created a landlord-tenant relationship. The court recognized that a contract to farm on shares could create either relationship, depending on the intention of the parties. Nonetheless, the court held that the contract at issue created a landlord-tenant relationship and did not discuss what factors would be evidence of an intent to create a tenancy in common.

43 *See Underhill v. Allis-Chalmers Mfg. Co.*, 15 F.2d 181, 183 (8th Cir. 1926); *Devereaux Mortgage Co. v. Walker*, 46 Idaho 431, 436, 268 P. 37, 39 (1928); *Minneapolis Iron Store Co. v. Branum*, 36 N.D. 355, 380, 162 N.W. 543, 552 (1917); *Fuhrman v. Interior Warehouse Co.*, 64 Wash. 159, 161, 116 P. 666, 667 (1911).

The court in *Devereaux* explained the rationale underlying this approach:

To hold that each party has at all times an ownership in the growing crops propor-

who enter into any type of contract to farm on shares in these states should be aware that courts may so interpret the contract unless the parties clearly show a contrary intent in the agreement.

### C. *Partnership*

In the South Dakota case of *Cedarburg v. Guernsey*,<sup>44</sup> a landowner and a tenant-farmer entered into a contract to farm on shares. The farmer was to farm for five years entirely at his own expense and receive half the proceeds from the sale of all livestock and crops. The plaintiff sued both landlord and tenant to recover the balance due for services and labor performed on the leased land, alleging that both were liable because the contract created a partnership.

In construing the contract, the court rejected the partnership argument.<sup>45</sup> Yet the court acknowledged in dictum that if the farming operation had been conducted at the joint and equal expense of the parties, with the net proceeds equally divided between them, the parties would have been partners. Under this rationale, many livestock-share leases—particularly those in which the landlord and tenant own one-half of the livestock, split the cost of supplies, and receive one-half of the livestock and crop income—would create partnerships. Indeed, other courts have wrestled with the question of whether a livestock-share lease creates a partnership.<sup>46</sup>

Whether a livestock-share lease creates a partnership between farmer and landowner depends, as in the other arrangements, on the

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tionate to the share he will ultimately receive, though the right to the possession be in the producer until harvested, will best effectuate the intention of the parties, and to ascertain intention rather than classify relations created should, it would seem, be the principal concern of the court.

46 Idaho at 440, 268 P. at 40.

44 12 S.D. 77, 80 N.W. 159 (1899).

45 The court explained:

All cropping contracts have, to a certain extent, the element of division of profits, but such contracts are rarely held to be partnership contracts. They lack two of the essential elements of a partnership, namely, that the parties are mutually principals of and agents for each other and that the business is carried on joint account.

*Id.* at 81, 80 N.W. at 160. The court's use of the word "cropping" in the quoted excerpt does not imply that the relationship was a cropper contract instead of a lease.

46 For example, *Drennan v. Peck (In re Estate of Drennan)*, 9 Ill. App. 2d 324, 132 N.E.2d 599 (1956), held that a partnership arrangement could be inferred from the lease agreements through evidence showing that the parties operated a joint venture with an arrangement to share profits. But in *United States v. Farrington*, 244 F.2d 111 (7th Cir. 1957), the United States Court of Appeals for the Seventh Circuit, applying Indiana law, determined that the agreement involved, characterized by the parties as a lease, did not create a partnership.

intention of the parties.<sup>47</sup> In *United States v. Farrington*,<sup>48</sup> a federal court applying Indiana law found that the circumstances did not establish the existence of a partnership, but instead evidenced the parties' intention to create a landlord-tenant relationship.<sup>49</sup> The court defined a partnership as a "voluntary contract of association for the purpose of sharing the profits and losses that arise from the use of capital, skill, or labor in a common enterprise," together with "an intention on the part of the principals to form a partnership."<sup>50</sup> In finding that the contract created a landlord-tenant relationship, the court stressed the following factors: the landowner's lack of control over farm management; the landowner's obligation to pay half the expenses, including those not connected with the livestock; the absence of any joint account or common fund from which expenses were paid; the division and payment of proceeds from the sale of

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47 See, e.g., *Farrington*, 244 F.2d 111 (7th Cir. 1957) (applying Indiana law); *Drennan*, 9 Ill. App. 2d 324, 132 N.E.2d 599 (1956); *Roach v. Rector*, 93 Ark. 521, 123 S.W. 399 (1909). The question of whether a livestock-share lease creates a partnership may be decided in part by reference to the relevant state's version of the Uniform Partnership Act. The Uniform Partnership Act defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit." UNIF. PARTNERSHIP ACT § 6, 6 U.L.A. 22 (1969) [hereinafter cited as UPA]. The Act further clarifies this definition of partnership. A tenancy in common or joint ownership of property does not of itself establish a partnership, even if the co-owners share the profits from use of the property. UPA § 7(2). Sharing gross returns alone is not sufficient to establish a partnership, "whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived." UPA § 7(3). Sharing profits of a business is prima facie evidence of partnership, UPA § 7(4), but a partnership cannot be inferred when a share of the profits was received as payment of rent to a landlord. UPA § 7(4)(b). In some cases, a party will be able to establish that a livestock-share lease does not create a partnership, because the landowner's share of the profits from the sale of the livestock was really rent. But the characterization of the landowner's share of the profits as rent may be conclusory, in the absence of other evidence pointing toward a lease, and thus should not prevent the inference of partnership from shared profits.

48 244 F.2d 111 (7th Cir. 1957).

49 The landowner and tenant-farmer had agreed to an arrangement characterized by the parties as a lease. The farmer was to furnish all necessary tools and equipment. The parties were to own equal shares in all livestock on the farm and to share equally all expenses involved in both the livestock operation and the rest of the farm. On the same day that the farmer signed the lease, he executed a chattel mortgage in his interest in the livestock in favor of the Farmers Home Administration ("FmHA"). Subsequently, the farmer and the landowner delivered animals to livestock commission firms for sale. Upon sale, each received a check for half the proceeds. The FmHA brought an action against the livestock commission firms for conversion. The firms argued that the lease created a dual relationship, with the provisions relating to the livestock operation creating a partnership and the provisions relating to the rest of the farm creating a landlord-tenant relationship. They asserted that the livestock was partnership property with legal title in the partnership rather than in the farmer and the landowner individually.

50 244 F.2d at 113 (quoting *Watson v. Watson*, 231 Ind. 385, 387, 108 N.E.2d 893, 895 (1952)).

livestock to the parties as individuals, not as partners; and the parties' failure to keep partnership books or to file partnership tax returns. This decision is flawed in that the court based its finding of a tenancy on factors extrinsic to the lease, whereas the lease provisions themselves actually created a partnership.<sup>51</sup>

One commentator has suggested that courts should not interpret a livestock-share lease to create a partnership unless the lease demonstrates such a specific intent, or the agreement contains elements that would lead third parties to believe there is a partnership.<sup>52</sup> These elements would include a common fund, common books, shared management, or preparation of partnership income tax returns. Parties who enter a livestock-share lease that contains one or more of these arrangements or provides that they will share profits should be aware of the risk that their relationship may be interpreted as a partnership in the event of a bankruptcy or insolvency.

## II. Treatment of Crops and Livestock in Bankruptcy

The bankruptcy proceeding creates an estate that includes all of the debtor's legal or equitable property interests as of the commencement of the case.<sup>53</sup> Pursuant to section 542(a) of the Bankruptcy Code, a nondebtor entity must turn over to the estate all the debtor's property in its possession, custody, or control. When a party to a

51 See Note, 1957 ILL. L.F. 532. The author reasons that the lease provisions relating to the livestock operation created a partnership because the livestock were owned jointly and both expenses and gross receipts were to be shared.

Compare *Farrington* with *Drennan v. Peck (In re Estate of Drennan)*, 9 Ill. App. 2d 324, 132 N.E.2d 599 (1956), where the court held that a decedent and his two sons had carried on their livestock operation, the subject of an informal oral agreement, as a partnership rather than a landlord-tenant relationship. The court defined a partnership as a relationship in which parties join together to carry on a trade or venture for their common benefit, each contributing property or services and having a community of interests in the profits. *Id.* at 329, 132 N.E.2d at 602. The court articulated several characteristics of the relationship that supported its finding of a partnership: all proceeds of the operation were deposited in one bank account, from which all expenses of the operation were paid; machinery and livestock were traded and purchased in the name of this account; and profits from the operation were withdrawn by all three parties, each receiving approximately one third of the annual profits. *Id.* at 328, 132 N.E.2d at 601.

*Drennan* is not necessarily inconsistent with *Farrington*. In *Drennan*, many of the integral aspects of the business operated from a joint account; in *Farrington* the absence of a joint account helped to negate the conclusion that a partnership existed.

52 See Hannah, *Illinois Farm Tenancy Law—Static or Evolving?*, 1977 S. ILL. U.L.J. 359, 376.

53 11 U.S.C. § 541(a) (1982). On farm bankruptcy generally, see 2 J. JUERGENSMEYER & J. WADLEY, *supra* note 14, at ch. 35; Anderson & Rainach, *Farmer Reorganizations Under the New Bankruptcy Code*, 28 LOY. L. REV. 439 (1982); Landers, *Reorganizing a Farm Business Under Chapter 11*, 5 J. AGRIC. TAX'N & L. 11 (1983); Looney, *The Bankruptcy Reform Act of 1978 and The Farmer: A Survey of Applicable Provisions*, 25 S.D.L. REV. 509 (1980).

farm lease enters bankruptcy, the debtor's property may include crops or livestock that are being grown or raised pursuant to the lease. And regardless of whether the debtor is landowner or farmer, the trustee or debtor in possession<sup>54</sup> will probably try to include crops and livestock produced on the leased property in the debtor's estate.

In some bankruptcy cases, the nondebtor party to the lease will resist inclusion of the crops and livestock in the estate, forcing the bankruptcy court to decide whether these belong to the estate and, if so, whether the nondebtor enjoys any property interest in them. Because the parties' property rights in the crops and livestock arise from the nature of their relationship (e.g. lease, cropper contract, partnership, or tenancy in common), the parties will often interpret their agreement differently. The bankruptcy court will first determine the nature of the relationship, and then ascertain the resulting property rights in the crops and livestock.

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54 The trustee is the official representative of the debtor's estate. 11 U.S.C. § 323(a) (1982). In a Chapter 7 liquidation, the trustee must collect and reduce to money the property of the estate and liquidate the estate as expeditiously as is compatible with the best interest of the parties. 11 U.S.C. § 704 (1982). The trustee must account for all property received and investigate the financial affairs of the debtor. *Id.*

In a Chapter 11 reorganization, the debtor may remain in control of the farming operation and is then called the "debtor in possession." When no trustee is appointed, the debtor in possession has all the rights, powers, and duties of a trustee in a Chapter 11 reorganization. 11 U.S.C. § 1107(a) (1982). At the request of a party in interest, a trustee shall be appointed (1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement; or (2) if the appointment is in the interests of creditors, equity security holders, and other interests of the estate. 11 U.S.C. § 1104(a) (1982). As specified in § 1106(a), the trustee shall investigate the debtor's finances and the desirability of continuing the operation, file a report of debtor fraud, dishonesty, or mismanagement, and perform certain of the duties specified in § 704. The trustee shall also, pursuant to § 1121, file a reorganization plan. A debtor in possession can perform most of the trustee's functions, but he cannot investigate his own finances or report improper behavior. 11 U.S.C. § 1107(a).

In some instances, the party to a farm lease or cropper contract may prefer a Chapter 13 adjustment of debts. Relief under Chapter 13 is available only to an individual or to an individual and spouse, 11 U.S.C. § 109(e) (1982); corporations and partnerships are not eligible. In addition, relief is available only to an "individual with regular income," that is, an individual whose income is sufficiently stable and regular to make payments under a Chapter 13 plan. *Id.* The Code also imposes maximum debt limits for Chapter 13 cases. An individual eligible for Chapter 13 must have unsecured debts of less than \$100,000 and secured debts of less than \$350,000. *Id.* The relatively high debt levels often inherent in modern farming operations may prevent many farmers from qualifying for Chapter 13 relief.

During the Chapter 13 adjustment, a debtor engaged in business may continue the operation, subject to any limitations imposed by the court. 11 U.S.C. § 1304(b) (1982). A debtor engaged in business is a debtor who is self-employed and incurs trade credit in the production of income from that employment. 11 U.S.C. § 1304(a) (1982). The Code provides the means necessary to operate the business: the debtor has most of the power of the trustee under § 363 regarding the use, sale, or lease of property, and all the powers of the trustee under § 364 to obtain credit.

### A. *Liens and Reservation of Title*

#### 1. Statutory liens

Usually, special statutory protections apply to a true landlord-tenant relationship. Many states protect the landlord-party to a farm lease with a lien on the crops for rent<sup>55</sup> and advances.<sup>56</sup> The Illinois lien on crops is typical:

Every landlord shall have a lien upon the crops grown or growing upon the demised premises for the rent thereof, whether the same is payable wholly or in part in money or specific articles of property or products of the premises, or labor, and also for the faithful performance of the terms of the lease.<sup>57</sup>

The lien attaches at the time the crops begin to grow<sup>58</sup> and continues for six months after the expiration of the lease term. It must be enforced in an action of replevin, distress for rent,<sup>59</sup> or foreclosure. Illinois courts initially held that a subsequent purchaser of the crops is subject to the lien, so long as he has knowledge of the tenancy and the origin of the crops.<sup>60</sup> To meet this notice requirement, many Illinois landowners recorded their leases in the county where the crops were grown or gave actual notice of the lease to major grain elevators in the surrounding community. The lien statute was recently amended, however, and now requires the landlord to give actual notice to potential buyers; otherwise, good faith purchasers take the crops free of the landlord's lien.<sup>61</sup>

55 *E.g.*, ALA. CODE § 35-9-30 (1977); ILL. REV. STAT. ch. 110, § 9-316 (1983); WASH. REV. CODE ANN. § 60.12.020 (1961); *see also* statutes cited in 2A R. POWELL & P. ROHAN, *supra* note 13, ¶ 261[2] n.11.

56 *E.g.*, ARK. STAT. ANN. § 51-203 (1971); MO. ANN. STAT. § 441.290 (Vernon 1952); WASH. REV. CODE ANN. § 60.12.020 (1961); *see also* statutes cited in 2A R. POWELL & P. ROHAN, *supra* note 13, ¶ 261[2] n.11.

57 ILL. REV. STAT. ch. 110, § 9-316 (1983). Amendment of the landlord's lien statute in 1983 did not affect the quoted material. *See* note 61 *infra*.

58 *Harvey v. Hampton*, 108 Ill. App. 501 (1903); *Watt v. Scofield*, 76 Ill. 261 (1875).

59 *See* ILL. REV. STAT. ch. 110, §§ 9-301 to -321 (1983).

60 *See Faith v. Taylor*, 69 Ill. App. 419 (1896); *Finney v. Harding*, 136 Ill. 573 (1891).

61 The Illinois legislature amended the notice provisions of the landlord's lien, effective August 16, 1983. Pub. Act 83-70, codified at ILL. REV. STAT. ch. 110, §§ 9-316, 9-316.1 (1983). The amended law provides that a good faith purchaser takes crops free of the landlord's lien unless, within six months prior to the purchase, the landlord provides written notice of his lien to the purchaser by registered or certified mail. The notice must include the names and addresses of landlord and tenant and identify the leased property clearly. *Id.* § 9-316.

To facilitate the landlord's actual notice obligation, the statute provides that the landlord may require the tenant to disclose the name of the person to whom the tenant intends to sell the crops; the tenant may not sell the crops to any other person. *Id.* A tenant who violates the disclosure and sale requirements is subject to criminal prosecution. *Id.* § 9-316.1.

The Illinois lien and similar statutory provisions will not protect a landlord when a tenant enters bankruptcy. Sections 545(3) and 543(4) of the Bankruptcy Code specifically empower the trustee to avoid statutory liens for rent and liens of distress for rent.<sup>62</sup> The definition of "statutory lien" in section 101(38)<sup>63</sup> indicates that the trustee can avoid both statutory and nonstatutory liens of distress for rent.<sup>64</sup> According to relevant House and Senate committee reports, the trustee can avoid the lien even if it has been enforced by sale prior to the filing of the petition.<sup>65</sup> Thus, when a farm tenant enters bankruptcy, the trustee or the tenant as debtor in possession will undoubtedly use section 545 to avoid the statutory lien for rent, as well as any liens of distress for rent in the crops.<sup>66</sup> The trustee can avoid the lien even if it has been perfected prior to the bankruptcy.<sup>67</sup> Similarly, filing the lease in the county office for real estate records should not affect the trustee's avoidance power, for neither the Code nor its legislative history indicates that the trustee's power to avoid statutory

62 11 U.S.C. §§ 545(3), (4) (1982).

63 The Code states:

"[S]tatutory lien" means lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute. . . .

11 U.S.C. § 101(38) (1982).

64 The debtor's estate will consist of property brought back into the estate by the trustee's avoiding powers, as well as property that the debtor turns over to the trustee. The trustee's avoiding powers are an essential part of the bankruptcy proceeding. As one commentator has explained:

These provisions provide the creditors of a bankrupt estate, acting through the trustee in bankruptcy, with the rights and powers necessary to insure that actions by the bankrupt debtor or by aggressive creditors in the immediate prebankruptcy period do not thwart one of the fundamental purposes of the bankruptcy laws, to provide a fair and equal distribution of a bankrupt's assets.

Levin, *An Introduction to the Trustee's Avoiding Powers*, 53 AM. BANKR. L.J. 173 (1979). The trustee can avoid transfers under the following provisions: § 544 ("strong-arm" clause); § 545 (statutory liens); § 547 (preferences); § 548 (fraudulent conveyances); and § 549 (postpetition transfers). In a Chapter 11 reorganization, the debtor in possession also has avoiding powers. 11 U.S.C. § 1107 (1982).

65 See H.R. REP. NO. 595, 95th Cong., 2d Sess. 371, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6327; S. REP. NO. 989, 95th Cong., 2d Sess. 85, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5871.

66 Compare *Driskill v. Hutchinson, Hutchinson and Hudgins (In re Furniture Disc. Stores, Inc.)*, 11 Bankr. 5, 7 (Bankr. N.D. Tex. 1980), where the court held that the Texas statutory lien for rent in the inventory of a bankrupt furniture store was avoidable under § 545.

67 See 4 COLLIER ON BANKRUPTCY, ¶ 67.23[2], at 290-91 (J. Moore 14th ed. 1978).

liens for rent is conditioned on the lack of perfection or the failure to file the lease in the county office for real estate records.

Unlike the typical lien for rent, the laborer's lien may remain valid following bankruptcy. This lien may help a farmer when the landowner enters bankruptcy, particularly if the court interprets the agreement between farmer and landowner as a cropper contract, and the state where the farm is located protects laborers with a statutory lien. For example, the Georgia laborer's lien provides: "Laborers shall also have a special lien on the products of their labor, which lien shall be superior to all other liens except liens for taxes and special liens of landlords on yearly crops."<sup>68</sup> This lien arises on completion of the contract of labor, but will not defeat the claims of bona fide purchasers without notice until it has been executed and levied.<sup>69</sup> The Supreme Court of Georgia has held that a cropper is a laborer within the meaning of the Georgia laborer's lien.<sup>70</sup> Therefore, the Georgia cropper receives a lien on the crops when he completes the terms of the agreement.

If the laborer's lien is executed and levied before the landowner enters bankruptcy, it cannot be avoided. Thus, the trustee's power, under section 545(1), to avoid liens that become effective when the debtor enters bankruptcy or becomes insolvent does not apply to the Georgia laborer's lien, because that lien arises upon completion of the labor contract. Section 545(2) empowers the trustee to avoid statutory liens that are not perfected or enforceable against a bona fide purchaser who purchases the property on the date of the bankruptcy filing; but the Georgia laborer's lien is enforceable against a bona fide purchaser once it has been properly executed and levied.<sup>71</sup>

Several considerations justify the policy of allowing the trustee to avoid the statutory lien for rent, while the statutory laborer's lien is preserved. The laborer has directly enriched the landowner-debtor's estate with identifiable products that he created with his own labor, and it would be unfair to classify him among the estate's other general creditors. Moreover, the enforcement of laborer's liens is consistent with the Code priority for wage claims.<sup>72</sup> In contrast, the landlord does not differ significantly from any of the tenant-

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68 GA. CODE ANN. § 67-1802 (Supp. 1982).

69 *Id.* § 67-1803.

70 *Faircloth v. Webb*, 125 Ga. 230, 53 S.E. 592 (1906).

71 Compare *In re Empire Granite Co.*, 42 F. Supp. 450, 454-55 (M.D. Ga. 1942), where the court said that the Georgia laborer's lien could not be given effect in a bankruptcy proceeding if it had not been executed and levied in accordance with Georgia law.

72 11 U.S.C. § 507(a)(3) (1982). See note 147 *infra* and accompanying text.



debtor's other general creditors. Any lien in favor of the landlord favors a particular class of general creditors, a priority that should not exist in bankruptcy law.

## 2. Consensual liens and reservation of title

Some landowners also try to protect themselves by creating a security interest for the rent in the crops, obtaining the interest in either the farm lease or a separate document. If the security interest is properly created and perfected pursuant to the Uniform Commercial Code ("U.C.C."),<sup>73</sup> the trustee will probably not be able to use section 545 to avoid a consensual lien for rent.<sup>74</sup> The trustee's avoiding powers extend only to statutory liens for rent and liens of distress for rent. Moreover, section 101(38) specifically excludes security interests from the definition of "statutory lien." Preserving the consensual lien in crops supports the policy behind section 545, namely that the trustee should avoid statutory liens that favor certain classes of general creditors.<sup>75</sup> When the lien results from the consent of the parties rather than from the operation of state law, this risk is not present.

Yet the trustee may be able to avoid consensual liens by one of the other bankruptcy avoiding powers. Under section 544(a)(1), for example, the trustee has the rights and powers of a judicial lien creditor over all the debtor's property as of the commencement of the bankruptcy case.<sup>76</sup> Thus, to be effective in bankruptcy, a consensual lien in farm lease crops must comply with the perfection requirements of U.C.C. Article 9. U.C.C. section 9-102(1) states that Article 9 applies to any transaction, regardless of form, intended to create a security interest in goods.<sup>77</sup> As the comment to that section explains, "[t]he main purpose of this Section is to bring all consensual security interests in personal property and fixtures under this Article."<sup>78</sup> Accordingly, several courts have held that a landlord's consensual lien in the tenant's chattels for rent must be perfected according to the

73 See U.C.C. §§ 9-203, 9-303, 9-401 (1972). See also Meyer, *Should Farm Leases Include an Article 9 Security Interest?*, 5 J. AGRIC. TAX'N & L. 60, 61-65 (1983), for an explanation of how to create and perfect a security interest in crops for rent, either in the lease itself or in a separate document. Meyer notes that the security interest may provide limited protection, particularly if the tenant has already executed security agreements covering the crops with other lenders. *Id.* at 66.

74 See 4 COLLIER ON BANKRUPTCY, ¶ 545.04[4] (L. King 15th ed. 1983).

75 *Id.*

76 See 11 U.S.C. § 544(a)(1) (1982).

77 U.C.C. § 9-102(1)(a) (1972).

78 *Id.* comment.

requirements of Article 9.<sup>79</sup> Additionally, pre-U.C.C. cases in Illinois applied a similar principle.<sup>80</sup>

The landowner must therefore ensure that the security interest is properly created and perfected pursuant to Article 9.<sup>81</sup> When the debtor is a farmer, filing is the usual method employed to perfect a security interest.<sup>82</sup> If the landlord fails to file, or files in the wrong place, U.C.C. section 9-303 indicates that the security interest will remain unperfected.<sup>83</sup> Although an unperfected security interest is effective against the debtor, U.C.C. section 301(1)(b) provides that the rights of a holder of an unperfected security interest are subordinate to the rights of a person who becomes a lien creditor before the security interest is perfected.<sup>84</sup> Because Bankruptcy Code section 544(a)(1) grants the trustee the rights and powers of a judicial lien creditor, the trustee will have the power to avoid the unperfected security interest in the crops. In *Driskill v. Hutchinson, Hutchinson and Hudgins (In re Furniture Discount Stores)*,<sup>85</sup> for example, the bankruptcy court refused to uphold the landlord's consensual lien for rent in the inventory of the bankrupt furniture store because the lien had not been perfected properly.<sup>86</sup>

Some landowners, dissatisfied with the protection that the con-

79 See *Todsen v. Runge*, 211 Neb. 226, 318 N.W.2d 88 (1982), involving a farm lease providing that the landlord would have a lien on the crops raised on the leased premises until the final rent payments were made; see also *Bank of N. Am. v. Kruger*, 551 S.W.2d 63 (Tex. Civ. App. 1977).

80 See *Gubbins v. Equitable Trust Co.*, 80 Ill. App. 17 (1898); *Packard v. Chicago Title & Trust Co.*, 67 Ill. App. 598 (1896).

81 See Meyer, *supra* note 73. For a thorough discussion of additional problems that may be involved when crops are the collateral for a security interest, see Meyer, "Crops" as Collateral For an Article 9 Security Interest and Related Problems, 15 U.C.C. L.J. 3 (1982) [hereinafter cited as Meyer, "Crops" as Collateral]. Meyer suggests that in a good collateral description for crops:

[O]ne would want to cover all crops growing or to be grown in this year and succeeding years, all harvested crops wherever stored, and any document of title or other document representing a storage obligation, including, but not limited to, warehouse receipts, negotiable or nonnegotiable, which may be received for crops owned by the debtor but stored off the farm.

*Id.* at 14 (footnote omitted). In certain situations, the landowner will also want to include some of the tenant's other personalty, such as livestock and machinery, as collateral. The landowner must then ensure that filing requirements are met for this additional collateral.

82 See Meyer, *supra* note 73, at 63.

83 U.C.C. § 9-303 (1972).

84 U.C.C. § 9-301(1)(b) (1972).

85 11 Bankr. 5 (Bankr. N.D. Tex. 1980).

86 The trustee may also be able to avoid the consensual lien under § 547 regarding preferences and § 548 regarding fraudulent transfers and obligations. For discussion of these provisions of the Code, see G. BRODY, W. TAGGART & G. LEE, *PRACTICING UNDER THE BANKRUPTCY REFORM ACT* 113-64 (1979); Clark, *Preferences Under the Old and New Bankruptcy Acts*, 12 U.C.C. L.J. 154 (1979); Levin, *supra* note 64.

sensual lien provides, prefer to reserve title to all crops in either the lease or the cropper contract. While this provision would seem to give the landowner outright ownership of all the crops on the involved land, some courts have held that such a provision is a chattel mortgage, and they have required filing in accordance with the state statute governing chattel mortgages.<sup>87</sup> Following this precedent, the North Dakota Supreme Court in *Minneapolis Iron Store v. Branum*<sup>88</sup> held that a crop-share lease provision reserving title to the landlord created a lien on the tenant's share that operated like a chattel mortgage to secure any advances the landlord made to the tenant.

Although the cases applying this rationale were decided prior to adoption of the U.C.C., their very existence suggests that a landlord's reservation of title to crops should be perfected under U.C.C. procedures. Indeed, the trustee of a farm debtor may be expected to assert that the reservation of title to crops in a farm lease or cropper contract does not give the landowner outright ownership of the crops, but instead gives him a security interest in the crops for his share, and as such the interest must be perfected pursuant to Article 9 of the U.C.C. To refute this assertion adequately, the contract provision should indicate clearly that the parties intended to reserve ownership of the crops in the landowner, and that they did not intend to create a security interest. Moreover, the cautious landowner will perfect the reservation of title according to Article 9, thereby avoiding the possibility of challenge on these grounds.<sup>89</sup>

### B. *Property Rights in Crops Under Crop-Share Leases and Cropper Contracts*

Once the bankruptcy court has ascertained the nature of the relationship that an agreement to farm on shares created, it must then decide what property rights flow from the relationship. Because crops are often a major asset in a farmer's estate, allocation of the rights in the crops plays a crucial role in the bankruptcy proceeding. In making this determination, the bankruptcy court will look to state

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<sup>87</sup> Nelson v. McDonald, 153 Minn. 474, 191 N.W. 281 (1922); McNeal v. Ryder, 79 Minn. 153, 81 N.W. 830 (1900). But see Pearson v. Lafferty, 193 S.W. 40, 42 (Mo. Ct. App. 1917), where the court rejected the proposition that a contract with such a provision is in effect a chattel mortgage that must be filed for record.

<sup>88</sup> 36 N.D. 355, 162 N.W. 543 (1917).

<sup>89</sup> Compare U.C.C. § 9-102(2) (1972), which provides that title retention contracts create article 9 security interests.

law.<sup>90</sup>

State courts have generally held that under a crop-share lease, title to the crops remains in the tenant until he severs (harvests) the crops and divides them.<sup>91</sup> In contrast, under a cropper contract, title to crops remains in the landowner until he divides them.<sup>92</sup> The parties can alter these general rules by contract.<sup>93</sup>

Courts have employed these property rules primarily in cases involving conversion of crops grown under a contract to farm on shares. Thus, courts have held that under a crop-share lease only the tenant can sue for conversion of crops.<sup>94</sup> The tenant can sue the landlord, or anyone holding through the landlord, for conversion of crops,<sup>95</sup> but the landlord cannot sue the tenant or the tenant's buyer for conversion.<sup>96</sup> Courts have articulated different rules for cropper contracts; because of the different nature of that relationship, only the landowner can sue third parties for conversion of crops.<sup>97</sup> Moreover, when the landowner denies the cropper access to the crops the cropper cannot sue him for conversion, but instead must sue for breach of contract.<sup>98</sup>

Relying on the above precedent, parties have argued that a landlord under a crop-share lease has no property interest in the crops until division.<sup>99</sup> Other courts, however, have recognized that both a landlord under a crop-share lease, and a cropper under a cropper contract, have a property interest in the crops before division. The precise nature of the interest turns on whether the court

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90 See *Hazen v. Hospitality Assocs., Inc. (In re Hospitality Assocs., Inc.)*, 6 Bankr. 778, 780-81 (Bankr. D. Or. 1980).

91 See, e.g., *Grommes v. Town of Aurora*, 37 Ill. App. 2d 1, 185 N.E.2d 3, 7 (1962); *Schoenlau-Steiner Trunk Top & Veneer Co. v. Hilderbrand*, 152 Tenn. 166, 274 S.W. 544, 547 (1925); *Benhart v. Gorham*, 14 Wash. App. 723, 724, 544 P.2d 141, 143 (1976).

92 See, e.g., *Burns v. Vaughan*, 216 Ark. 128, 224 S.W.2d 365 (1949); *Chickasha Gas & Elec. Co. v. Linn*, 80 Okla. 233, 195 P. 769 (1921); *Kelly v. Rummerfeld*, 117 Wis. 620, 94 N.W. 649 (1903).

93 See, e.g., *Benhart*, 14 Wash. App. at 724-25, 544 P.2d at 143.

94 See *Babcock v. Mississippi River Power Co.*, 113 F.2d 398 (7th Cir. 1940) (applying Illinois law); *Grommes v. Town of Aurora*, 37 Ill. App. 2d 1, 185 N.E.2d 3 (1962).

95 See *Townsend v. Bussey*, 4 So. 2d 199 (Ala. 1941); *De Spain v. Coley*, 65 Okla. 31, 162 P. 756 (1916).

96 See *Larson v. Archer-Daniels-Midland Co.*, 226 Minn. 315, 32 N.W.2d 649 (1948); *Schoenlau-Steiner Trunk Top & Veneer Co. v. Hilderbrand*, 152 Tenn. 166, 274 S.W. 544 (1925).

97 See *Burns v. Vaughn*, 216 Ark. 128, 224 S.W. 2d 365 (1949); *Chickasha Gas & Elec. Co. v. Linn*, 80 Okla. 233, 195 P. 769 (1921).

98 See *Taylor v. Riggins*, 129 Okla. 57, 263 P. 146 (1928).

99 See, e.g., *Riddle v. Dow*, 98 Iowa 7, 9, 66 N.W. 1066, 1066 (1896).

holds that every contract to farm on shares, regardless of its particular characterization, creates a tenancy in common in the crops.

Where state law does not find a tenancy in common to exist in all crop-share or cropper relationships, the courts face difficulty in defining the landlord's and farmer's property interests in the crops. For example, in *Riddle v. Dow*,<sup>100</sup> the Iowa Supreme Court had to determine whether the landlord had a mortgagable interest in crops grown pursuant to a crop-share lease prior to the crops' division. The plaintiff judgment creditors, whose right in the crops would be inferior to the mortgagee's if such an interest were recognized, argued that the landlord had no interest in the crops until division. But the court rejected this argument, noting that the cases cited in support of it generally concerned tenant claims that the landlord had converted the crops, or that the landlord's share of the crops did not transfer with the land on conveyance of the property. The court held that

the landlord had a mortgagable interest in the crops in controversy when the mortgage was given; that the interest was made definite and certain when his share was separated and determined; [and] that the mortgage fully attached to that share when it was thus ascertained if it had not been operative before . . . .<sup>101</sup>

Nevertheless, in *Riddle*, the Court did not explain the nature of the landlord's interest or ascertain exactly when it arose.

In *Finley v. McClure*,<sup>102</sup> the Supreme Court of Kansas specifically addressed these issues. An earlier Kansas decision, *Wyandt v. Merrill*,<sup>103</sup> had held that the landlord's title to crops grown pursuant to a crop-share lease did not attach until the crops' maturity. The *Finley* court, in part overruling *Wyandt*, held that "the landlord's [interest in his] share of the crop attaches after the crop is planted and his inchoate interest is one which he may sell before maturity of the crop and which ripens into full ownership with such maturity."<sup>104</sup> As

100 98 Iowa 7, 66 N.W. 1066 (1896).

101 *Id.* at 19, 66 N.W. at 1069. See also *Orcutt v. Moore*, 134 Mass. 48 (1883), where the court stated that the landlord has a mortgagable interest in crops grown pursuant to a crop-share lease, if the contract provides that the specific products are to belong to the parties jointly, and are to be divided, but that the landlord has no such interest if the contract provides that the tenant is to pay as rent a share of the crops, or the equivalent.

102 222 Kan. 637, 567 P.2d 851 (1977).

103 107 Kan. 661, 193 P. 366 (1920), *overruled in part*, *Finley v. McClure*, 222 Kan. 637, 567 P.2d 851 (1977).

104 *Finley v. McClure*, 222 Kan. 637, 642, 567 P.2d 851, 855 (1977). The issue in the case was whether, when a life tenant as landlord leases land pursuant to a crop-share lease and

these decisions indicate, some courts have been willing to recognize

dies before the crop is harvested, the life tenant's estate or the remainderman is entitled to the landlord's share of the crops when divided. As a consequence of recognizing the landlord's inchoate interest in the crops attaching after planting, the court held that the landlord's share of the crop belonged to the landlord life tenant's estate. But see *York v. Jackson* (*In re Estate of North*), 320 S.W.2d 597 (Mo. Ct. App. 1959), where the court held that under similar circumstances, the landlord's share belonged to the remainderman.

In some states, the landlord's share will be apportioned between the life tenant's estate and the remainderman. For example, ILL. REV. STAT. ch. 110, § 9-217 (1983) provides:

When a tenant for life demises any lands and dies on or after the day when any rent becomes due and payable, his or her executor or administrator may recover from the subtenant the whole rent due, but if such tenant for life dies, before the day when any rent is to become due, his or her executor or administrator may recover the proportion of rent which accrued before his or her death, and the remainderman shall recover for the residue.

This statute has been applied to crop-share rentals. See *Wilson v. Hagey*, 251 Ill. 452, 96 N.E. 277 (1911); *Ralston Purina Co. v. Killam*, 10 Ill. App. 3d 397, 293 N.E.2d 750 (1973). For other cases where rent apportionment statutes have been applied to crop-share rentals, see *Silveira v. Ohm*, 33 Cal. 2d 272, 201 P.2d 387 (1949); *Shintaffer v. Bank of Italy Nat. Trust & Sav. Ass'n*, 216 Cal. 243, 13 P.2d 668 (1932); *Ferguson v. Sullivan*, 58 Idaho 428, 74 P.2d 183 (1937).

The application of the Illinois statute and similar state laws to crop-share rentals raises questions about the accrual of rent under a crop-share lease, under which rent is usually due and payable only after the crop has been harvested. In *Silveira v. Ohm*, 33 Cal. 2d 272, 201 P.2d 387 (1949), the court applied the California rent apportionment statute to a crop-share rental. The statute provided that: "When the hiring of a thing is terminated before the time originally agreed upon, the hirer must pay the due proportion of the hire for such use as he has actually made of the thing, unless such use is merely nominal, and of no benefit to him." CAL. CIV. CODE § 1935 (West 1954). The *Silveira* court explained:

There is no greater difficulty in apportioning rent payable in crops than in apportioning rent payable in money. The essential problem in either case is to determine the proportion of the agreed rent that the expired portion of the rental period bears to the entire period. It is true that the crops may never mature or may be destroyed without the fault of either party, or market conditions may render them of little value. . . . Once crops have been harvested, however, as in the present case, the amount of rent agreed upon for the year's use of the land can be readily ascertained by determining the amount of the crops and computing the lessor's proportionate share according to the expired portion of the rental period, as in the case of rent payable in money.

33 Cal. 2d at 276-77, 201 P.2d at 390. Thus, the court appeared to assume that rent under a crop-share lease accrues daily throughout the entire term of the lease.

The same approach has been used by Illinois courts when applying the Illinois statute to crop-share rentals. In *Wilson v. Hagey*, 251 Ill. 452, 96 N.E. 277 (1911), the landlord, who held a life estate in 110 acres of farmland, entered into a crop-share lease for the land. The term of the lease ran from March 1, 1909 to March 1, 1910. On May 24, 1909, the landlord died. The court apportioned the proceeds from the sale of the landlord's share of the crops according to the Illinois statute, with 85/365 of the proceeds going to the landlord's estate and 280/365 of the proceeds going to the remaindermen.

In *Ralston Purina Co. v. Killam*, 10 Ill. App. 3d 397, 293 N.E.2d 750 (1973), the landlord, possessing a life estate in 65 acres of farmland, leased the land on a yearly crop-sharing basis beginning on March 1, 1969. The landlord died on August 12, 1969. Prior to her death, the landlord paid \$152.15 for her share of the fertilizer used in producing the crop. The

that landlords enjoy a property interest in crops grown pursuant to a crop-share lease prior to the crops' division, and that the interest attaches after planting.

When state law does not hold that every contract to farm on shares creates a tenancy in common in the crops, courts are reluctant to recognize that the cropper has a property interest in the crops

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remaindermen paid the 1969 real estate taxes on the land, which amounted to \$714.12. The court affirmed the judgment of the circuit court, which had provided:

[I]nasmuch as the Life Tenant had lived 164 days of the lease period, . . . the Estate of the Life Tenant was entitled to receive 164/365 of the landlord's share of the 1969 crop money, plus 201/365 of the fertilizer expenses advanced by the Life Tenant during her lifetime, less 164/365 of the 1969 real estate taxes paid by the Remaindermen, and . . . the Remaindermen were entitled to receive 201/365 of the landlord's share of the crops, less 201/365 of the fertilizer costs paid by the Life Tenant, plus 164/365 of the 1969 taxes so paid by the Remaindermen.

*Id.* at 399, 293 N.E.2d at 752.

Illinois courts have apparently also assumed that, even though rent under a crop-share lease is usually not due and payable until after the crop has been harvested, the rent accrues on a daily basis throughout the entire lease term. The court in *Silveira v. Ohm*, 33 Cal. 2d 272, 201 P.2d 387 (1949), reasoned that once the landlord's share of the crop had been ascertained after harvest, crop-share rentals can be apportioned in the same way as cash rentals. The application of apportionment statutes to cash farm leases where the cash rent is due and payable after the tenant has harvested and sold the crops, however, also raises questions about the accrual of rent. If the cash farm lease calls for periodic payments of rent throughout the entire lease term, then the rent accrues as each payment becomes due and payable. But both in the situation of crop-share rentals and cash rentals that become due and payable after harvest, the assumption of the courts that the rent accrues daily throughout the entire lease term may be open to question. Although this system usually reaches fair results, other interpretations are possible.

One possibility is that the rent does not accrue until it becomes due and payable after harvest. This interpretation would prevent the application of apportionment statutes to crop-share rentals and cash rentals that become due and payable after harvest, unless the event that triggers the apportionment occurs after the date that the rent becomes due or payable.

Another, but less workable, possibility is that the rent begins to accrue when the crops are planted, and thereafter accrues on a daily basis until the date after harvest when the rent becomes due and payable. Although farm leases are generally for a 12 month term, both parties are aware that the tenant is primarily concerned with renting the land for the productive period between planting and harvest. Furthermore, both parties are aware that the tenant's ability to pay the rent depends on growing and harvesting the crops, directly in the case of a crop-share lease and indirectly in the case of a cash lease, where the tenant will pay the rent from the proceeds from the sale of the crops. Thus a court could hold that the rent accrues daily during the period when the land is productive, and not throughout the entire lease term. This accrual system, however, ignores the farmer's actions prior to the growing season (such as fall plowing and fertilizer application) that contribute directly to crop production, and probably would create injustice in some circumstances. In effect, it would render several months (the period between harvest and spring farming) of ownership valueless, for the land would produce no income to its owner.

Regardless of the rule adopted to govern the accrual of rent due and payable after harvest, however, the court should recognize the existence of this issue and not just assume that rent accrues daily throughout the entire lease term. For other situations where the accrual issue arises, see notes 120, 147, and 261 *infra*.

before division. If the cropper has no transferable interest in the crops before division, the cropper's creditors cannot seize the crops.<sup>105</sup> At least one court, however, has indicated that a cropper has a mortgageable interest in the crops.<sup>106</sup>

Courts holding that every contract to farm on shares creates a tenancy in common in the crops have recognized property interests prior to division in the landlord under a crop-share lease,<sup>107</sup> and in the cropper under a cropper contract.<sup>108</sup> This conclusion follows from the nature of a tenancy in common in the crops, which has been described as "a co-ownership . . . created between the landowner and the grower in all crops grown."<sup>109</sup> The same conclusion should follow whenever a court finds that a particular contract to farm on shares creates a tenancy in common in crops, even if the court does not hold that all such contracts to farm on shares create tenancies in common.<sup>110</sup>

The recognition that both the crop-share landlord and the cropper have property interests in the crops before division is both the best interpretation of the parties' probable intent and the best policy. The landlord under a crop-share lease provides the land on which the crops are grown, a share of the necessary supplies, and often some degree of management. The cropper under a cropper contract provides all the labor to grow the crops; he can also provide a share of supplies and, under some contracts, some management of the operation. Additionally, the parties have contracted in advance to split the crops that result from their joint efforts. Under these circumstances each party surely intends to enjoy a property interest in the crops before division.

Recognition of a property interest in the landlord and the cropper before division also comports with modern agricultural financing practices.<sup>111</sup> In many instances the landlord or cropper may need to

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105 See *Braizier v. Ansley*, 33 N.C. 12 (1850); *Atwood v. Freund*, 219 Wis. 358, 263 N.W. 180 (1935).

106 See *Bourland v. McKnight & Bros.*, 79 Ark. 427, 96 S.W. 179 (1906).

107 See *Underhill v. Allis-Chalmers Mfg. Co.*, 15 F.2d 181 (8th Cir. 1926); *Devereaux Mortgage Co. v. Walker*, 46 Idaho 431, 268 P. 37 (1928).

108 See *First State Bank v. St. Anthony & Dakota Elevator Co.*, 64 N.D. 138, 250 N.W. 778 (1933).

109 *Devereaux*, 46 Idaho at 435, 268 P. at 38.

110 See text accompanying notes 36-43 *supra*.

111 For a discussion of the problems involved when a landlord puts up his share of growing crops as collateral for a loan, see Meyer, "*Crops*" as *Collateral*, *supra* note 81, at 10. Meyer assumes that the landlord has an interest in the crop after planting that he can sell or use for collateral.



use his share of the crops as collateral to finance obligations under the contract. If courts refuse to recognize any property interest in the crops before division, banks will be reluctant to accept shares of the crops as collateral, and farm operations may encounter difficulty in securing necessary sources of financing.

Finally, the recognition of a property interest in the crops before division does not necessarily conflict with decisions holding that the tenant under a crop-share lease, and the landowner under a cropper contract, have title to the crops until division. As previously mentioned, the courts created these rules in cases regarding conversion of crops grown pursuant to contracts to farm on shares.<sup>112</sup> Nevertheless, to avoid conflict with this precedent courts might prefer to follow the lead of *Finley v. McClure*<sup>113</sup> and hold that the landlord's or cropper's interest is inchoate and does not ripen into a right of possession until division. This rule would eliminate the possibility that the landlord, the cropper, or their creditors, particularly lenders who have taken a security interest in the crops, could seize the crops before division.

### C. *Alternative Dispositions of Crops and Livestock Raised Pursuant to Farm Leases*

When one of the parties to the agreement enters bankruptcy, the disposition of crops and livestock raised pursuant to a farm lease depends on the relationship the lease creates, the resulting property interests in the crops and livestock, which party (landowner or farmer) files for bankruptcy, and the actions of the nondebtor party. Several Bankruptcy Code provisions are critical to this analysis.

With several exceptions, section 365 gives the trustee authority to assume or reject any executory contract or unexpired lease of the debtor, subject to court approval.<sup>114</sup> In a Chapter 7 liquidation case, if the trustee does not assume or reject an executory contract or unexpired lease within sixty days after the order for relief, or within an additional sixty-day period, the contract or lease is deemed rejected.<sup>115</sup> But in a Chapter 11 reorganization or a Chapter 13 adjustment of debts, the debtor's executory contract or unexpired lease may be assumed or rejected at any time before the confirmation of a

112 See text accompanying notes 94-98 *supra*.

113 222 Kan. 637, 567 P.2d 851 (1977).

114 For a discussion of the assumption or rejection of farm leases pursuant to § 365, see notes 173-254 *infra* and accompanying text. Section 1107 also gives the debtor in possession in a Chapter 11 reorganization the authority to assume or reject executory contracts and unexpired leases.

115 11 U.S.C. § 365(d)(1) (1982). The court must approve the additional 60 day period.

plan.<sup>116</sup> The court, however, on request of any party to the contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject the contract or lease.<sup>117</sup> Nondebtor parties to farm leases may need to petition the court to order assumption or rejection within a specified period of time to protect their share of the crops or livestock.

### 1. Tenant bankruptcy under a crop-share lease

If a tenant in a crop-share lease enters bankruptcy at any time between planting and division, the tenant's interest in the crops passes to his estate pursuant to section 541. Either the tenant, as debtor in possession, or the trustee will be able to avoid any statutory lien for rent in the crops under section 545(3).<sup>118</sup> If, according to the relevant state law, the landlord under a crop-share lease has no property interest in the crops before division, the estate has full ownership of the crops until division. Under section 363, the debtor in possession would be able to sell the crops for the estate at any time before division of the crops without seeking the landlord's consent.<sup>119</sup>

Even if the landlord takes no action, he will receive some protection for his share of the crops if the debtor in possession sells the crops. Under sections 507(a)(1) and 503(b)(1)(A), the landlord will have an administrative expense priority claim for rent that accrues during the administration of the bankruptcy estate.<sup>120</sup> As to the rent that accrues before bankruptcy, the landlord will be a general unsecured creditor.<sup>121</sup> If the tenant enters bankruptcy shortly before harvest and then immediately sells the crops, a large portion of the landlord's rent could be a general unsecured debt. In addition, the landlord must not make the mistake of concluding that a debtor in possession who continues to handle the farm operation has assumed the contract. The fact that a debtor in possession continues to perform under a lease and does not reject it after a reasonable time does not mean the lease is assumed, for assumption requires an express

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116 11 U.S.C. § 365(d)(2) (1982).

117 *Id.*

118 See text accompanying notes 62-67 *supra*.

119 See 11 U.S.C. § 363(f)(2) (1982).

120 See text accompanying notes 262-67 *infra* (regarding an administrative priority for rent). Allowance of an administrative priority expense claim for the rent that accrues during administration of the tenant's estate again raises questions about the accrual of rent under a crop-share lease, under which rent is usually due and payable after the crop has been harvested. For a discussion of the possible alternatives, see note 104 *supra*.

121 See 11 U.S.C. § 502 (1982). The landlord with a security interest in the crops may enjoy a somewhat more advantageous position. See text accompanying notes 73-86 *supra*.

court order.<sup>122</sup>

Although the Code offers two forms of protection in this area, the landlord must take the initiative to assert them. First, pursuant to section 365(d)(2) the landlord can request the court to order the trustee or debtor in possession to assume or reject the crop-share lease within a specified period of time.<sup>123</sup> If the debtor in possession assumes the lease, he will be bound by its terms and must make the landlord's share of the crops available at division.<sup>124</sup> If the debtor in possession rejects the crop-share lease or a trustee has been appointed who cannot assume the lease,<sup>125</sup> this rejection is considered a breach of the lease immediately before the date of the bankruptcy petition.<sup>126</sup> If the tenant does not voluntarily vacate the leased premises after rejection, the landlord can pursue state law remedies to protect himself.<sup>127</sup> Both when the tenant is forced to give up possession under state law and when the tenant voluntarily yields possession, the landlord must deliver the remainder of the tenant's share of the crops to the estate, after taking his own share and deducting enough from the tenant's share to pay for any expenses incurred in tending and harvesting the crops after the landlord regained possession.<sup>128</sup>

The landlord is also protected by section 363(e),<sup>129</sup> which requires the debtor in possession to give adequate protection to a party with an interest in property used, sold, or leased. The landlord can request adequate protection for the debtor's use of the land during the period between the bankruptcy filing and assumption or rejection. This right is independent of the landlord's administrative prior-

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122 See 2 COLLIER ON BANKRUPTCY ¶ 365.03[1] (L. King 15th ed. 1979). When the debtor in possession sells all the crops just before harvest, the landlord who has wrongly concluded that the contract was assumed may discover that he is limited to an administrative expense priority claim for rent accruing during administration and an unsecured claim for rent that accrued before bankruptcy.

123 11 U.S.C. § 365(d)(2) (1982).

124 See 2 COLLIER ON BANKRUPTCY, *supra* note 122, ¶ 365.03[2].

125 Because of § 365(c), the trustee cannot assume the crop-share lease if the court classifies it as a personal service contract. See text accompanying notes 201-10 *infra*, for a discussion of this issue.

126 11 U.S.C. § 365(g)(1) (1982).

127 For example, the landlord could bring an action to regain possession because of default. See, e.g., ILL. REV. STAT. ch. 110, §§ 6-101 to -150 (ejectment), 9-101 to -116 (forcible entry and detainer) (1983).

128 Compare ILL. REV. STAT. ch. 110, § 9-318 (1983), which provides that when a tenant abandons crops which have not fully matured, the landlord may cultivate and harvest the crops, sell them, and apply the proceeds to pay the rent and to compensate the landlord for his labor and expenses.

129 11 U.S.C. § 363(e) (1982).

ity claim.<sup>130</sup>

When state law grants the landlord a property interest in the crops before division, he should be fully protected when the tenant enters bankruptcy. Only the tenant's interest in the crops will pass to the estate in bankruptcy, and the landlord will retain his interest. In *Underhill v. Allis-Chalmers Mfg. Co.*,<sup>131</sup> landlord and tenant entered into a crop-share lease under which the landlord was to receive one-third of all wheat grown. After the tenant filed for bankruptcy, the trustee completed threshing and marketing, with some assistance from a bank with a chattel mortgage on the tenant's interest in the crops. The trustee and the bank then refused to pay the landlord his one-third interest in the wheat, arguing that the wheat belonged to the tenant's estate. Overruling the bankruptcy referee, the district court held that the agreement was a lease, that the landlord must receive a portion of the wheat as rent, that the landlord acquired no lien on or title to any part of the wheat, and that his rights were those of a general creditor. The United States Court of Appeals for the Eighth Circuit reversed, holding that the lease created a tenancy in common in the crops. The landlord therefore owned an undivided one-third interest in the wheat, and only the tenant's interest passed to the estate in bankruptcy.

As *Underhill* suggests, in a state where landlords have property rights in crops before division, the landlord will retain his interest in the crops when the tenant enters bankruptcy, and Bankruptcy Code section 363(f)(2) will prevent the debtor in possession from selling the crops for the estate without the landlord's consent.<sup>132</sup>

The landlord should also be fully protected if he has taken a consensual lien for rent in the crops and the lien has been perfected according to the requirements of Article 9 of the U.C.C.<sup>133</sup> Because the landlord's interest is in the form of a lien, the debtor in possession will be able to sell all the crops for the estate without obtaining the landlord's consent as long as the price at which the crops are to be

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130 See Bienenstock, *The Bankruptcy Code and Landlords and Tenants*, LEGAL NOTES & VIEWPOINTS Q., Nov. 1982, at 9, 24-25. Section 361 specifies that adequate protection may be provided by making periodic cash payments to the nondebtor, providing the nondebtor with an additional or replacement lien, or granting other relief to assure the nondebtor party of the "indubitable equivalent" of his interest in the property. 11 U.S.C. § 361 (1982). In practice, however, the landlord's request for adequate protection often forces the debtor in possession into an immediate assumption of the crop-share lease.

131 15 F.2d 181 (8th Cir. 1926).

132 See 11 U.S.C. § 363(f)(2) (1982).

133 This procedure prevents the debtor in possession from avoiding the lien under § 545(2).

sold is greater than the aggregate value of the lien.<sup>134</sup> Under section 363(e), however, the landlord can demand adequate protection for his lien in the crops.<sup>135</sup> This protection could take the form of a lien on the proceeds of the sale.

## 2. Landlord bankruptcy under a crop-share lease

When a landlord enters bankruptcy, the tenant usually continues to pay rent under the lease and the rent is administered as an asset of the landlord's estate.<sup>136</sup> But either the trustee or the landlord as debtor in possession has the authority to reject the lease under section 365.<sup>137</sup> When the landlord enters bankruptcy during the growing season, the tenant will often continue to farm the leased premises, making the landlord's share available to the estate in bankruptcy after division.

Where state law grants the landlord an interest in the crops before division, this interest will pass to the landlord's estate, even if the interest is inchoate.<sup>138</sup> The House and Senate committee reports clearly state that the definition of property that passes to the debtor's estate under section 541 is broad and "includes all kinds of . . . tangible or intangible property."<sup>139</sup> Yet the fact that the landlord's interest passes to his estate in bankruptcy should not affect the tenant, because the landlord is not entitled to possess his share of the crop until division, and because neither the landlord as debtor in possession nor the landlord's trustee can sell all the crops without the tenant's consent.

If the landlord as debtor in possession does reject the lease after entering bankruptcy, section 365(h)(1) allows the tenant the option of treating the lease as terminated, or remaining in possession for the remainder of the lease term.<sup>140</sup> If the tenant chooses to remain in possession, the landlord will not have to comply with any affirmative lease covenants, such as those requiring him to furnish the tenant with farm inputs.<sup>141</sup> In many cases the tenant will elect to remain in possession, but in some situations the tenant will yield possession be-

134 See 11 U.S.C. § 363(f)(3) (1982).

135 11 U.S.C. § 363(e) (1982).

136 See 2 COLLIER ON BANKRUPTCY, *supra* note 122, ¶ 365.09.

137 *Id.*

138 See text accompanying notes 100-04 *supra*.

139 H.R. REP. NO. 595, 95th Cong., 2d Sess. 367, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6323; S. REP. NO. 989, 95th Cong., 2d Sess. 82, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5868.

140 11 U.S.C. § 365(h)(1) (1982).

141 For a discussion of this issue, see text accompanying notes 258-61 *infra*.

cause he lacks the financial resources to purchase supplies that the landlord need no longer furnish.<sup>142</sup>

Normally, when a tenant yields possession after rejection of a lease his only remedy is an unsecured claim for damages.<sup>143</sup> Under a crop-share lease, however, the tenant has a property interest in the crops prior to division which he should not lose when he vacates the leased premises because of the debtor in possession's rejection. The

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142 The doctrine of emblements may apply to the situation where the tenant must leave premises leased pursuant to a crop-share lease because the debtor in possession rejected the lease. According to the court in *Dinwiddie v. Jordan*, 228 S.W. 126, 127 (Tex. Civ. App. 1921):

The doctrine of emblements is the common-law right of tenant, whose lease of uncertain duration has been terminated without his fault and without previous knowledge upon his part, to enter upon the leased premises to cultivate, harvest, and remove the crops planted by him before the termination of the lease.

This common-law right could be classified as a type of tenant "property interest" in the crops that the bankruptcy court should respect. An argument can be made that the doctrine does not always apply when a tenant's lease is rejected in bankruptcy, because the doctrine requires that the tenant's farm lease be of uncertain duration when entered—for example, a lease made by a life tenant landlord or a year-to-year lease. Sometimes the farm lease that is terminated when the landlord enters bankruptcy and rejects the lease is a lease for a specified term, rather than for uncertain duration.

A strong argument can be made, however, that the doctrine of emblements should apply both when the lease is of uncertain duration and when a lease for a term certain is terminated before the end of the lease period through no fault of the tenant. The purpose of the doctrine is to protect against hardships that may result from the unexpected termination of a crop-share lease. *See Miller v. Gray*, 136 Tex. 196, 149 S.W.2d 582 (1941). The same hardships will result whether the lease was originally for an uncertain duration or for a fixed term and prematurely terminated. The court in *James v. Ritter*, 206 Ill. App. 487 (1917), explained the reason for the requirement that the lease be of uncertain duration: "If his [the tenant's] term is certain and does not depend upon a contingency, so that at the time he sows the crop he may know that his term will not continue until he shall have reaped it, he will not be entitled to it as emblements." *Id.* at 491. In the situation where the tenant yields possession after the trustee or the landlord as debtor in possession rejects the lease, the tenant could not have known when he planted the crops that the lease would be terminated before harvest. The tenant's loss of possession because of the rejection of the lease in bankruptcy is clearly the type of situation to which the doctrine of emblements was meant to apply. The Oregon statute on emblements provides that under any farm lease, the tenant has free access to the leased premises, after the termination of the lease, to cultivate and harvest any crop planted before service of the notice to quit. *See OR. REV. STAT. § 91.230* (1981). This statute would likely apply in the bankruptcy situation.

Although theoretical arguments exist to support the application of emblements in bankruptcy, the tenant can obtain little benefit from the doctrine of emblements that he could not also obtain by electing under § 365(h)(1) to remain in possession after the rejection of the lease. All that the tenant obtains under the doctrine of emblements is a right of access to cultivate and harvest the crops, whereas if he refuses the rejection, he remains in full possession of the leased premises. In some circumstances, the less comprehensive right obtained through emblements may be preferred. Financial problems forcing the tenant to yield possession after rejection of the lease might in some circumstances also prevent him from using the doctrine of emblements.

143 11 U.S.C. § 502 (1982).

tenant should still be entitled to his share of the crops, or the proceeds from their sale, minus any expenses saved because of rejection.<sup>144</sup> This policy will undoubtedly dissuade many landlords from rejecting crop-share leases, unless they are certain they can run the operation more productively and economically than the tenant.

When the tenant elects under section 365(h)(2) to remain in possession despite the landlord's rejection of the crop-share lease, he is protected to some extent from the rejection of the landlord's affirmative covenants. Section 365(h)(2) allows the debtor to offset any damages that occur after the rejection against the rent due after rejection.<sup>145</sup> As for the damages that occur before rejection of the lease, the tenant is limited to an unsecured claim.

### 3. Landowner bankruptcy under a cropper contract

When the landowner under a cropper contract enters bankruptcy, his interest in the crops passes to his estate. If, under state law, the cropper has no property interest in the crops until after division, the landowner's estate will have full ownership of the crops until division. At any time prior to division, then, the landowner as debtor in possession would be able to sell all the crops for the estate under section 363 without seeking the cropper's consent. Because the landowner always divides the crops under a cropper contract, the landowner as debtor in possession will always be able to sell all the crops for the estate if he enters bankruptcy before division.

The cropper will not be totally unprotected, however. Because a cropper is considered an employee who receives a share of the crop as wages, the cropper will have a priority claim of up to \$2000 for the portion of the crop representing wages due before bankruptcy.<sup>146</sup> Additionally, the cropper has an administrative expense priority for the portion of the crop that represents compensation for work performed after bankruptcy.<sup>147</sup> A state laborer's lien may also protect

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144 See text accompanying notes 270-72 *infra* (regarding the tenant's damages when the landlord breaches a crop-share lease).

145 See text accompanying notes 258-61 *infra*.

146 11 U.S.C. § 507(a)(3) (1982).

147 11 U.S.C. §§ 507(a)(1), 503(b)(1)(A) (1982). Section 503(b)(1)(A) provides that an administrative expense claim should be allowed for the costs and expenses of preserving the estate, including wages earned after the commencement of the estate. By raising the crops to maturity, the cropper is certainly preserving the property of the estate, and his wages are his share of the crops.

The allowance of a priority wage claim for the cropper's wages before bankruptcy and an administrative expense wage claim for wages during the administration raises an issue similar to the question of when rent accrues under a crop-share lease. See note 104 *supra*. The

the cropper.<sup>148</sup> For the remainder of his share of the crop, the cropper will have an unsecured claim under section 502. When, under state law, the cropper has an interest in the crops prior to division, he will be fully protected. He retains his interest in the crops when the landowner's interest passes to the estate in bankruptcy, and section 363(f)(2) mandates that the debtor in possession obtain the cropper's consent before he can sell the crops.<sup>149</sup>

Under section 365(d)(2), the cropper can also request the court to order the debtor in possession to assume or reject the contract within a specified period of time.<sup>150</sup> If the debtor in possession assumes the contract, the cropper will be assured of receiving his share of the crops. If the debtor in possession rejects the contract, however, the cropper cannot elect to continue to farm under the contract despite the rejection, for section 365(h)(1) refers to "an unexpired lease of real property" and permits the tenant to "remain in possession."<sup>151</sup> The cropper has neither a true lease nor true possession of the land he farms pursuant to the contract. Thus, when the landowner rejects the contract, the cropper becomes limited to the same recovery he has when the debtor in possession sells all the crops: he enjoys a section 507(a)(1) administrative expense priority claim for wages due after filing and before rejection of the contract, a section 507(a)(3) priority claim for wages due before filing, any state laborer's lien, and an unsecured claim for the balance.

Unless the cropper is certain that the debtor in possession will assume the contract, he may not want to risk forcing the debtor in

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cropper usually receives his share of the crops as wages after harvest. Thus, the court will have to decide if and how the cropper's wages accrue prior to the time wages become due and payable after harvest. One alternative is that the cropper's wages do not accrue until the date that the cropper is to receive his share of the crops, and that the cropper therefore has no right to these wage priorities. Courts may be reluctant to adopt a solution with such harsh results.

Another alternative is that the cropper's wages begin to accrue on the date that the cropper begins performance under the contract, and thereafter accrue daily until the date after harvest when the cropper's share of crops becomes due and payable. In determining when rent accrues under a crop-share lease, the court may have to determine whether the relevant accrual period is the land's productive season or the entire lease term. *Id.* Because the cropper is only an employee and does not have possession of the land he farms, the cropper's wages should accrue only during the period he is actually working on the land.

148 See text accompanying notes 68-71 *supra*.

149 11 U.S.C. § 363(f)(2) (1982).

150 11 U.S.C. § 365(d)(2) (1982).

151 11 U.S.C. § 365(h)(1) (1982). The House and Senate committee reports make it clear that the right to remain in possession after rejection refers only to the holders of estates in land. See H.R. REP. NO. 595, 95th Cong., 2d Sess. 359, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6315; S. REP. NO. 989, 95th Cong., 2d Sess. 60, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5846.



possession to assume or reject within a specified period of time. After the bankruptcy filing, the cropper has an administrative expense priority claim for the portion of the crop that represents wages that accrued from the filing to rejection of the contract. After rejection, the cropper only has an unsecured claim for the rest of his share of the crop, with the exception of the \$2000 wage priority claim for the portion of the crop that represents wages accrued before filing. If the debtor in possession allows the cropper to continue to perform, but does not formally assume the contract, the cropper would be fairly well protected. On the other hand, if the landowner rejects the contract, the cropper may be limited to an unsecured claim for a large portion of his crop share. When a landowner under a cropper contract enters bankruptcy, then, he is likely to be the party most concerned with promptly rejecting the executory contract.

When the debtor in possession rejects the cropper contract and state law grants the cropper an interest in the crops before division, the cropper's interest should be fully protected. Like the tenant under a rejected crop-share lease, the cropper should not lose his interest in the crops when the lease is rejected. Instead, the cropper should receive his share of the crops, or the proceeds from the sale of the crops, less expenses saved because of rejection.<sup>152</sup>

#### 4. Cropper bankruptcy under a cropper contract

A bankrupt cropper and his creditors face a difficult situation; the cropper can only hope that the landowner will ignore the bankruptcy and allow him to continue to farm so that his share of crops will pass to his estate after division.<sup>153</sup> Even when state law gives the cropper an interest in the crops before division, his position remains weak. This interest will pass to the cropper's estate, but it does not entitle the estate to possession of the crops. Nor does it entitle the cropper, as debtor in possession, to sell the crops under section 363 without the landowner's consent, because the landowner also has an interest in the crops.

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152 See text accompanying notes 271-72 *infra* (regarding the cropper's damages when the landowner breaches a cropper contract).

153 The bankrupt estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1) (1982). It includes proceeds from property of the estate, except for earnings from services performed by the debtor after the commencement of the case. 11 U.S.C. § 541(a)(6) (1982).

Thus, the post-bankruptcy earnings of the debtor would not normally be part of the estate. This distinction, which applies in situations other than that of cropper bankruptcy, may require difficult apportionment.

In some instances the landowner will undoubtedly exercise his section 363(d)(2) right to force the cropper-debtor in possession to assume or reject the contract within a specified period of time. One reason for this move might be the landowner's desire to ensure that the cropper will continue to work during the harvest season, when it might be difficult to find other farm labor. Another motivation might be the landowner's dissatisfaction with the cropper's performance. If a trustee has been appointed in the case, it is likely that he cannot assume the contract because it involves personal services.<sup>154</sup> After rejection, the cropper will be considered to have breached the lease immediately before the bankruptcy filing, and the landowner will be able to contract with a different cropper to farm the land.<sup>155</sup>

When a cropper's trustee must reject the contract, the cropper's estate may still receive some credit for the cropper's contract performance. After taking his share of the crops, plus the value of the extra expenses that the cropper's breach occasioned, the landowner must make the rest of the cropper's share available to the cropper's estate.

## 5. Bankruptcy under the livestock-share lease

As previously mentioned, the bankruptcy court might interpret a livestock-share lease as a partnership.<sup>156</sup> Bankruptcy treatment of crops grown and livestock raised pursuant to a livestock-share lease depends, in part, on the characterization of the lease.

### *a. Livestock-share lease as partnership*

If the court decides that the lease creates a partnership, it will look to state law to ascertain the bankrupt partner's interests in the crops and livestock. In his treatise on partnership, Rowley summarized the results of a partner's bankruptcy under the Uniform Partnership Act:

[T]he bankruptcy of a partner dissolves the firm, and the non-bankrupt partners have the right to wind up. The non-bankrupt partners, after having wound up the affairs of the partnership, and upon accounting to the trustee, will turn over to the trustee in bankruptcy of the estate of the individual bankrupt partner the share of the assets belonging to the bankrupt partner. There will be such a share only if the claims of all creditors of the partnership firm have been fully satisfied. If creditors have not

154 See text accompanying notes 201-06 *infra*.

155 11 U.S.C. § 365(g)(1) (1982).

156 See text accompanying notes 44-52 *supra*.

been fully satisfied those with provable claims may file their proofs of claim in the bankruptcy proceeding.<sup>157</sup>

This procedure is clearly different from the bankruptcy of either party under a crop-share lease or cropper contract.

When a livestock-share lease is interpreted to create a partnership, the bankrupt partner's share of the surplus is distributed to his estate after the partnership liabilities are satisfied. In some cases, little surplus will remain regardless of whether the debtor is landowner or farmer. Any security interests that the partners created in crops or livestock, and partnership liabilities for seed, equipment, fertilizer, and other chemicals must be satisfied before distribution of surplus can be made. If the proceeds from crops, livestock, and other property do not satisfy these liabilities, the bankrupt partner's estate will receive nothing from the partnership, but instead will face additional claims, either from the nonbankrupt partner or partners for contribution, or directly from partnership creditors. On the other hand, when the bankrupt partner has already paid for the livestock, seed, cattle, equipment, fertilizer, or other chemicals that he contributed to the partnership, and the proceeds from the sale of the partnership assets do not compensate him for these contributions, the bankrupt partner's trustee can bring a contribution action against the nonbankrupt partners for their proportionate share of the partnership's liability to the bankrupt partner.<sup>158</sup>

b. *Livestock-share lease as tenancy*

When the court decides that a livestock-share lease creates a landlord-tenant relationship, the bankruptcy treatment of the crops grown pursuant to the lease is different from the treatment of the livestock. Because the agreement for the crops in a livestock-share lease is generally the same as in an ordinary crop-share lease, the bankruptcy treatment of the crops should also be similar. As in a crop-share lease, the treatment will depend on whether state law gives the landlord an interest in the crops before division.<sup>159</sup>

The situation is different, however, with regard to the livestock. Under some livestock-share leases, each party holds title individually to one-half of the livestock. Under others, each party owns an undivided one-half interest in all the livestock. If each party to the lease owns one-half of the livestock, the bankruptcy of a party should have

157 2 R. ROWLEY, ROWLEY ON PARTNERSHIP § 46.11 (2d ed. 1960) (citations omitted).

158 See generally UPA §§ 2, 18, 30, 31, 34, 35, 36, 37, 40.

159 See text accompanying notes 118-45 *supra*.

little impact on the ownership of the livestock. But if each party has an undivided one-half interest in the livestock, the interest of the bankrupt party passes to his estate. Because the nonbankrupt party has an interest in the livestock, the debtor in possession cannot sell the livestock for his estate under section 363 unless the nondebtor consents.<sup>160</sup> Moreover, neither landlord nor tenant rejection of the livestock-share lease after bankruptcy should affect livestock ownership. For example, when a tenant under a crop-share lease enters bankruptcy and thereafter rejects the lease, the landlord will re-enter the leased premises, finish cultivating and harvesting the crops, and turn over to the tenant's estate only those crops remaining after the landlord has taken his share plus the expenses incurred in cultivating and harvesting the crops.<sup>161</sup> When the tenant under a livestock-share lease enters bankruptcy and his trustee must reject the lease,<sup>162</sup> the landlord will be in the same position as the crop-share landlord as to the crops. But because ownership of the livestock is separate from possession of the land on which the livestock operation is located, the landlord will retain only his undivided one-half interest in the livestock.

If the tenant rejects the lease, someone must tend the livestock until the animals are ready for market. When the landlord tends the livestock, the expenses he incurs actually lower the rent he receives by decreasing the profit included in his share of the proceeds. The landlord should therefore have a claim against the tenant's estate for expenses incurred in tending the livestock after the trustee's rejection. For one-half of these expenses, the landlord should assert an administrative expense priority claim under section 507(a)(1), because the expenses were necessary to preserve the tenant's one-half interest in the livestock.<sup>163</sup>

Clearly, the crops and livestock will be treated differently in bankruptcy, depending on whether the livestock-share lease creates a partnership or a landlord-tenant relationship. If the arrangement is a partnership, the bankrupt partner's estate will receive only the proceeds from the partnership liquidation remaining after all partner-

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160 See 11 U.S.C. § 363(f)(2) (1982); see also text accompanying notes 119, 142, and 149.

161 See text accompanying note 130 *supra*.

162 The tenant under a livestock-share lease, just like the tenant under a crop-share lease, will almost always prefer either to assume the lease or to continue to perform under the lease without assuming or rejecting it. As in the case of the crop-share lease, however, if a trustee is appointed who cannot assume the lease, and the landlord forces the tenant to assume or reject, the trustee will have to reject the lease. See text accompanying notes 201-06 *infra*.

163 See 11 U.S.C. § 503(b)(1)(A) (1982).

ship liabilities have been satisfied. The estate may be liable for partnership debts that nonbankrupt partners have incurred and may be able to collect contributions from the nonbankrupt partners. On the other hand, if the arrangement is a landlord-tenant relationship, bankruptcy should not affect the parties' ownership interests in the livestock. The result as to the crops will depend on which party enters bankruptcy, as well as the parties' property rights in the crops under state law.

## 6. The cash lease

When a party under a cash farm lease enters bankruptcy, the court rarely faces difficulties concerning the crops. If the tenant, as debtor in possession, continues to farm the leased premises after filing, an administrative expense priority claim under section 507(a)(1) will protect the landlord's portion of the cash rent that accrued after bankruptcy.<sup>164</sup> He will also have an unsecured claim under section 502 for the portion of cash rent that accrued before filing.<sup>165</sup> Under section 365(d)(2), the landlord has the power to request the court to order the trustee or the debtor in possession to assume or reject the cash lease within a specified period of time.<sup>166</sup> But if a trustee has been appointed, the trustee may not be able to assume the cash lease if the court holds that it constitutes a personal service contract.<sup>167</sup> The debtor in possession will almost always assume the lease, unless he is certain that the proceeds from the sale of the crops will not exceed the rent owed the landlord. When the trustee or debtor in possession does assume the lease, he is obligated to pay the cash rent pursuant to the terms of the lease.<sup>168</sup>

In the rare event that the trustee or debtor in possession rejects the lease, the landlord can re-enter the leased premises. He will have an administrative expense priority claim under section 507(a)(1) for the portion of the cash rent that accrued after filing and before rejection of the lease.<sup>169</sup> He will also have an unsecured claim for rent that accrued before filing. In addition, he will have possession of the farmland and growing crops. Proceeds from the sale of these crops should be applied first toward expenses the landlord incurred in tending, harvesting, and marketing the crops, and then toward the

164 See 11 U.S.C. § 507(a)(1) (1982).

165 11 U.S.C. § 502 (1982).

166 11 U.S.C. § 365(d)(2) (1982).

167 See note 210 *infra*.

168 See 2 COLLIER ON BANKRUPTCY, *supra* note 122, ¶ 365.03[2].

169 11 U.S.C. § 507(a)(1) (1982).

landlord's claim for rent. Any remaining proceeds should be remitted to the tenant's estate.

When the landlord under a cash lease enters bankruptcy, the tenant will generally continue to farm the leased premises and pay the rent due to the landlord's estate. If the landlord as debtor in possession decides to reject the lease, the tenant will almost always elect, under section 365(h)(1), to remain in possession despite the rejection, unless he is certain that the profit from the sale of the crops will not exceed the cash rent due under the lease.<sup>170</sup> If the tenant does yield possession under these circumstances, he will not have a claim for damages, because a tenant's damages for landlord's breach of a cash lease are the profits he would have received from the sale of the crops, less the cash rent reserved under the lease and any other expenses saved,<sup>171</sup> which in this case would be zero. After rejection, the debtor in possession will be able to re-enter the leased premises and cultivate, harvest, and market the crops.<sup>172</sup>

### III. Assumption of Farm Leases and Cropper Contracts

#### A. *Mechanics of Assuming and Assigning*

##### 1. Assumption without default

As the discussion above indicates, section 365 gives the trustee the power, subject to court approval, to assume or reject any executory contract or unexpired lease of the debtor, and section 1107 gives the same power to a debtor in possession under Chapter 11.<sup>173</sup> The Code does not define the terms "executory contract" and "unexpired lease," but the House and Senate Committee reports explain that "[t]hough there is no precise definition of what contracts are executory, it generally includes contracts on which performance remains due to some extent on both sides."<sup>174</sup> Moreover, Professor Vern

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170 Unlike the tenant under a crop-share lease, who usually receives supplies from the landlord (and in losing them at rejection may be forced to yield possession), the tenant under a cash lease does not normally receive supplies from the landlord. Therefore, his ability to farm the leased premises should not be financially impaired if the debtor in possession rejects the lease. The only condition that would lead the tenant to yield possession if the landlord rejected (namely, the fact that profit from the sale of the crop would probably not exceed rent due under the lease) will also lead the landlord to assume instead of reject the lease. Thus, in practical terms, the tenant under a cash lease will probably never yield possession after rejection of the lease.

171 See text accompanying note 283 *infra*.

172 See text accompanying notes 125-28 *supra*.

173 See text accompanying notes 114-17 *supra*.

174 H.R. REP. NO. 595, 95th Cong., 2d Sess. 347, *reprinted in* 1978 U.S. CODE CONG. & AD.

Countryman defined an executory contract as "a contract under which the obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other."<sup>175</sup> Courts have tended to adopt the Countryman definition.<sup>176</sup>

Thus, when a party to a farm lease or cropper contract enters bankruptcy, the court's treatment of the agreement as an unexpired lease or an executory contract will depend on whether both parties still must fulfill substantial and material obligations.<sup>177</sup> Whether lease or contract, any agreement to farm on shares should remain unexpired or executory at least until the crops are harvested or the livestock are raised to market weight. A cash farm lease should remain executory as long as the lease term has not expired.

The Bankruptcy Code limits the time in which the trustee may assume or reject the contract or lease. As already noted, the trustee in a Chapter 7 case generally must assume or reject an executory contract or unexpired lease within sixty days after the order for relief. Otherwise, the contract or lease is deemed rejected.<sup>178</sup> Under Chapters 11 and 13, the Code permits assumption or rejection in the plan itself or any time before confirmation of a plan. Additionally, on request of any party to the contract or lease, the court may set a specific time limit.<sup>179</sup> In setting the time period, courts should consider that many farm leases or cropper contracts are one-year agreements and that the growing season is relatively short. Moreover, if the tenant is the debtor and he rejects the lease or contract, the landowner may have to find someone else to harvest the crops. In some

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NEWS 5963, 6303; S. REP. NO. 989, 95th Cong., 2d Sess. 58, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5844.

175 Countryman, *Executory Contracts in Bankruptcy*, 57 MINN. L. REV. 439, 460 (1973).

176 See, e.g., *Northwest Airlines v. Klinger (In re Knutson)*, 563 F.2d 916 (8th Cir. 1977); *In re Fashion Two Twenty, Inc.*, 16 Bankr. 784 (Bankr. E.D. Ohio 1982). But see *In re Booth*, 19 Bankr. 53 (Bankr. D. Utah 1982), which rejected the Countryman test as the sole determinant of an executory contract in a reorganization case. *In re Booth* involved a contract for a deed, and the debtor was the buyer. See Weintraub & Resnick, *From the Bankruptcy Courts: What is an Executory Contract? A Challenge to the Countryman Test*, 15 U.C.C. L.J. 273 (1983).

177 See *In re Fashion Two Twenty, Inc.*, 16 Bankr. at 786.

178 11 U.S.C. § 365(d)(1) (1982).

179 11 U.S.C. § 365(d)(2) (1982); see also 11 U.S.C. § 1124(b)(2) (1982). This time period must be reasonable, see *Philadelphia Co. v. Dipple*, 312 U.S. 168, 174 (1941); *Central Manhattan Props. v. D. A. Schulte, Inc.*, 91 F.2d 728, 729 (2d Cir.), *cert. denied*, 302 U.S. 743 (1937); *In re Chase Commissary Corp.*, 11 F. Supp. 288, 289 (S.D.N.Y. 1935); and it should depend upon the individual circumstances of each case, see *In re Chase Commissary Corp.*, 11 F. Supp. 288 (S.D.N.Y. 1935).

instances the nondebtor will have no protection if the lease is not assumed or rejected before division of the crops.<sup>180</sup>

The Code does not provide the trustee with any standards for assuming or rejecting executory contracts or unexpired leases. The courts' most favored rule for making this determination is the "business judgment" rule, first articulated in the Supreme Court case of *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*<sup>181</sup> In that decision, the Court concluded that "the question whether a lease should be rejected and, if not, on what terms it should be assumed is one of business judgment."<sup>182</sup> Factors that will influence the judgment include the debtor's plans to liquidate or reorganize, and the stage in the growing season that the debtor entered bankruptcy. If bankruptcy occurs before or just after planting, the debtor, whether landowner, tenant, or cropper, may face difficulty in assuming the lease or cropper contract if he cannot provide the necessary inputs. If the debtor cannot successfully reorganize without assuming the lease or contract, he will undoubtedly make every effort to find financing for his share of the inputs. In contrast, if bankruptcy occurs shortly before harvest the lease or cropper contract is more likely to be assumed notwithstanding whether the party plans to liquidate. Most of the expenses have already been incurred, and the trustee or debtor in possession will want to ensure receipt of the debtor's share of the crops.

Significantly, once the trustee or debtor in possession assumes a lease or a contract, he will not have to provide the nondebtor with

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180 See text accompanying notes 119-22 *supra*.

181 318 U.S. 523 (1943). The other view is that the trustee can reject a contract or lease only if the contract or lease in fact involves some loss or detriment to the estate. *E.g.*, *Rivercity v. Herpel (In re Jackson Brewing Co.)*, 567 F.2d 618 (5th Cir. 1978); *American Brake Shoe & Foundry Co. v. New York Rys.*, 278 F. 842 (S.D.N.Y. 1922); 2 COLLIER ON BANKRUPTCY, *supra* note 122, ¶ 365.03.

182 318 U.S. at 550. The "business judgment" rule was approved more recently in *Control Data Corp. v. Zelman (In re Mingos)*, 602 F.2d 38, 43 (2d Cir. 1979), in which the court explained:

We believe that such a flexible test for determining when an executory contract may be rejected, however termed (and "business judgment" is as good a label as any), is most appropriate. For in bankruptcy proceedings, the trustee, and ultimately the court, must exercise their discretion fairly in the interest of all who have had the misfortune of dealing with the debtor. A rigid test, permitting rejection only where the executory contract will cause a net loss to the debtor's estate if performed, might work a substantial injustice in cases where it can be shown that the non-debtor contracting party will reap substantial benefits under the contract while the debtor's creditors are forced to make substantial compromises of their claims.

For further discussions of the business judgment rule, see 2 COLLIER IN BANKRUPTCY, *supra* note 122, ¶ 365.03; Bienenstock, *supra* note 130, at 34.



adequate assurance under section 365(b) if the debtor has not defaulted.<sup>183</sup> For example, if a tenant under a crop-share lease, who was not in default, entered bankruptcy during the middle of the growing season, he could assume the lease without giving the landlord adequate assurance as long as he had continued to perform his lease obligations until the time of assumption.

## 2. Assumption after default

If the trustee or debtor in possession decides to assume a lease or contract on which the debtor has defaulted, he must first comply with the requirements of section 365(b). This section provides that at the time of assumption, the defaulting debtor or the trustee must either cure the default, provide adequate assurance of prompt cure, or provide adequate assurance of prompt compensation to a nondebtor party for any actual pecuniary loss resulting from the default. In addition, he must provide adequate assurance of future performance under the contract or lease.<sup>184</sup> And section 365(b) applies in this situation regardless of whether the debtor's default occurred before or after the commencement of the bankruptcy proceedings.<sup>185</sup>

The elements of prompt cure and adequate assurance depend on the facts of each case.<sup>186</sup> In most decisions discussing adequate assurance of future performance under an unexpired lease of real property, the courts have focused on the debtor's ability to meet his financial obligations under the lease.<sup>187</sup> Thus, in *In re Lafayette Radio Electronics Corp.*,<sup>188</sup> the court held that the debtor-tenant's prospective income (generated by the debtor's sublease program), the introduction of a probable merger partner for the debtor, and the viability of the proposed sublessee's other operations gave the landlord adequate assurance of future performance. In *Seidle v. Pan American World Airways, Inc. (In re Belize Airways, Ltd.)*,<sup>189</sup> adequate assurance of future

183 See *In re Perretta*, 6 BANKR. CT. DEC. (CRR) 1201 (Bankr. N.D. Ill. 1980); 2 COLLIER ON BANKRUPTCY, *supra* note 122, ¶ 365.04[1].

184 See 11 U.S.C. § 365(b) (1982).

185 See 2 COLLIER ON BANKRUPTCY, *supra* note 122, ¶ 365.04[1].

186 See *In re U.L. Radio Corp.*, 19 Bankr. 537, 542 (Bankr. S.D.N.Y. 1982); *In re Lafayette Radio Elecs. Corp.*, 9 Bankr. 993, 998 (Bankr. E.D.N.Y. 1981); *In re Sapolin Paints, Inc.*, 5 Bankr. 412, 420-21 (Bankr. E.D.N.Y. 1980); Bienenstock, *supra* note 130, at 21. The Code defines adequate assurance of future performance only for leases of real property in a shopping center. See 11 U.S.C. § 365(b)(3) (1982).

187 But see text accompanying notes 227-38 *infra*, where the issue is discussed in the context of how much a debtor assuming or assigning a lease may alter the lease terms.

188 9 Bankr. 993 (Bankr. E.D.N.Y. 1981).

189 5 Bankr. 152 (Bankr. S.D. Fla. 1980).

performance was premised on the landlord's receipt of a \$75,000 security deposit, equal to approximately three month's rent. And in the case of *In re Sapolin Paints, Inc.*,<sup>190</sup> the landlord was held to have adequate assurance because the difference between the lease rent and the prevailing rents in the area was over \$1,000,000 for the remainder of the lease term.

A bankrupt party to a farm lease will also have the option to cure any defaults with cash payments, while providing security deposits as adequate assurance of future performance. Few parties to farm leases, however, are likely to have the financial ability to make these arrangements. In these situations the debtor can probably best cure a default and provide adequate assurance by agreeing to alter the rights of the parties in the crops. For example, a debtor-landlord who has failed to provide his share of the inputs could agree to allow the tenant a larger share of the crops after harvest, thereby curing the default; the additional share would permit the tenant to finance needed inputs, and the tenant's possession of the crop until division would provide him with adequate assurance of future performance. The same type of agreement is feasible if a bankrupt tenant has defaulted on the crop-share lease. If applicable state law gives the landlord no interest in the crops until division, the tenant could grant the landlord a security interest in the crops for his share. Landowners and croppers under cropper contracts could enter similar agreements. In some instances, however, this method of providing adequate assurance will be unavailable because the debtor will have granted a security interest, often to obtain a production loan, in his share of the crops prior to entering bankruptcy.

Another provision of section 365(b) may apply when the tenant under a crop-share lease enters bankruptcy. Section 365(b)(4) provides that if a debtor-tenant has defaulted on an unexpired lease, the trustee or debtor in possession may not require a lessor to provide incidental services or supplies before assumption unless the lessor is compensated under the lease terms.<sup>191</sup> Thus, when a tenant who has defaulted on a crop-share lease enters bankruptcy, the tenant as debtor in possession cannot require the landlord to furnish his share of the supplies without properly compensating him. The very nature of a crop-share lease—in which the landlord's share depends on the

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<sup>190</sup> 5 Bankr. 412 (Bankr. E.D.N.Y. 1980).

<sup>191</sup> 11 U.S.C. § 365(b)(4) (1982). According to its legislative history, this provision is intended "to make clear that a debtor in possession 'may not require a lessor to supply services or materials unless the lessor is compensated as provided in the lease.'" 124 CONG. REC. 32396 (1978).

size of the crop and is usually not paid until the crops are divided—may pose problems for the debtor in determining how to compensate the landlord in compliance with the lease terms. Nevertheless, the landlord should demand section 365(b)(4) compensation if the debtor in possession attempts to force him to provide supplies before assuming the contract. Moreover, the statutory directive to ensure compensation should encourage courts to fashion compensation plans that will adequately protect the landlords.

### 3. Clauses prohibiting assignment and bankruptcy termination clauses

Many leases or executory contracts contain provisions that either prohibit assignment or terminate the agreement upon the bankruptcy of a party. The effectiveness of a reorganization, however, may depend on the ability of the trustee or debtor in possession to assume the lease or contract. Particularly in a farm lease situation, the lease is critical to the business undergoing reorganization; without the farmland, successful reorganization will be impossible. Recognizing the difficulties that clauses prohibiting assignment or terminating the agreement on bankruptcy pose, the Code specifically addresses these situations.

In general, the Code provides that executory contracts and unexpired leases can be assigned in bankruptcy. Notwithstanding a provision in the agreement or a relevant state statute that prohibits, restricts, or conditions the assignment of the agreement, the trustee or debtor in possession may assign the contract or lease under certain circumstances.<sup>192</sup> First, the trustee or debtor in possession must assume the agreement in accordance with the provisions of section 365.<sup>193</sup> The assignee of the contract or lease must provide the nondebtor party with adequate assurance of future performance, regardless of whether the debtor has defaulted.<sup>194</sup> Assignment of a contract or lease assumed under section 365 relieves both the trustee or debtor in possession and the estate of any liability for any breach of the contract or lease occurring after the assignment.<sup>195</sup>

The Code excepts personal service contracts from the general right to assign contracts and leases. Section 365(c) provides that a trustee may not assume or assign a personal service contract if appli-

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192 See 11 U.S.C. § 365(f) (1982).

193 11 U.S.C. § 365(f)(2)(A) (1982).

194 11 U.S.C. § 365(f)(2)(B) (1982).

195 11 U.S.C. § 365(k) (1982).

cable law excuses a nondebtor party from accepting performance from, or rendering performance to, the trustee or an assignee.<sup>196</sup> But the trustee may assume or assign such a personal service contract if the nondebtor party consents.<sup>197</sup>

While a trustee cannot assume a personal service contract that falls within the prohibition of section 365(c), the debtor in possession can assume such a contract because he is the same party with whom the nondebtor agreed to accept or render performance. Neither the trustee nor the debtor in possession, however, would be able to assign that personal service contract to someone other than the original farmer.

In addition to its provisions on assignment, the Code also states that after the commencement of the bankruptcy case, a debtor's executory contract or unexpired lease may not be terminated or modified solely because of a provision in the contract or lease conditioned on the debtor's bankruptcy.<sup>198</sup> Nevertheless, a contract or lease can be terminated or modified because of a bankruptcy termination clause if it is a personal service contract.<sup>199</sup> The debtor or assignee must also recognize that the breach of a bankruptcy clause after assumption or assignment of an unexpired lease, and after the bankruptcy case is closed, will result in a modification or termination of the lease, pursuant to the terms of the clause.<sup>200</sup>

### B. *The Contract to Farm on Shares: A Personal Service Contract?*

The determination of whether a contract to farm on shares qualifies as a personal service contract under section 365(c) becomes par-

196 11 U.S.C. § 365(c) (1982).

197 11 U.S.C. § 365(c)(1)(B) (1982).

198 11 U.S.C. § 365(e)(1) (1982). This section lists three specific conditions that cannot trigger the termination or modification of the lease or contract:

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

*Id.*

199 11 U.S.C. § 365(e)(2)(A) (1982).

200 The House and Senate committee reports declare:

This subsection does not limit the application of an ipso facto or bankruptcy clause if a new insolvency or receivership occurs after the bankruptcy case is closed. That is, the clause is not invalidated in toto, but merely made inapplicable during the case for the purposes of disposition of the executory contract or unexpired lease.

H.R. REP. NO. 595, 95th Cong., 2d Sess. 349, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6305; S. REP. NO. 989, 95th Cong., 2d Sess. 59, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5845.

ticularly significant when one of the contracting parties enters bankruptcy. For example, if a tenant under a crop-share lease files a Chapter 11 reorganization, assumption of the lease may be essential for successful reorganization. If the court appoints a trustee who cannot assume the crop-share lease because it has been classified as a personal service contract, the tenant's attempt to reorganize could be doomed from the start. Because the situations of the tenant and landlord are somewhat different, the issue of whether a crop-share lease is a personal service contract must be examined from the perspective of each party.

### 1. Tenant bankruptcy

As a general rule, a bankrupt tenant (not necessarily a farmer) has the right to assign the lease absent a restrictive provision.<sup>201</sup> But a crop-share arrangement is precisely the type of lease that the landlord enters in reliance on the personal characteristics of the tenant.<sup>202</sup> The share of crops that the landlord receives as rent depends on the tenant's knowledgeable and diligent cultivation of the rented land. For this reason, almost every state court that has directly faced the issue has held that a crop-share lease is an unassignable personal service contract.<sup>203</sup> As the Michigan Supreme Court in *Randall v.*

201 See 2 R. POWELL & P. ROHAN, *supra* note 13, ¶ 246[1].

202 F. REISS, *supra* note 13, at 1, explains that picking the proper tenant is perhaps the most important decision a farm landlord will make. He suggests that good tenants are likely to have the following traits:

(1) honesty; (2) knowledge of how to care for all the crop and livestock enterprises to be included in the farm business; (3) the ability and energy to do good work in proper season; (4) sufficient equipment and financial backing to operate the farm effectively according to the terms of the lease; (5) a favorable attitude toward the adoption of new methods and practices as rapidly as their merit is established; (6) interest in preventing the spread of weeds, diseases, and insect pests; (7) pride and interest in farm and community life; (8) a willingness to make minor repairs around the farm; (9) a willingness to enter into cooperative planning with respect for the specific wishes of the landlord; and (10) a willingness to keep good records and to make timely reports to the landlord.

*Id.* at 2.

203 See *Crump v. Tolbert*, 210 Ark. 920, 198 S.W.2d 518 (1946); *Edison v. Babka*, 111 Mich. 235, 69 N.W. 499 (1896); *Lewis v. Sheldon*, 103 Mich. 102, 61 N.W. 269 (1894); *Randall v. Chubb*, 46 Mich. 311, 9 N.W. 429 (1881); *Greeson v. Byrd*, 54 N.C. App. 681, 284 S.E.2d 195 (1981); *Myer v. Roberts*, 50 Or. 81, 89 P. 1051 (1907); *Meyer v. Livesley*, 45 Or. 487, 78 P. 670 (1904); *Tipton v. Martzell*, 21 Wash. 273, 57 P. 806 (1899). See also 4 A. CORBIN, CORBIN ON CONTRACTS § 865 (1951), where Corbin cites the crop-share lease as an example of personal service contract for which the tenant has no power to delegate performance to a substitute. *But see Glanz v. Halperin*, 251 Ill. App. 572 (1929).

The cases where the court did not so hold are generally distinguishable on their facts. For example, in *California Packing Corp. v. Lopez*, 207 Cal. 600, 279 P. 664 (1929), the issue

*Chubb*<sup>204</sup> explained:

[T]he very nature and character of the lease or agreement shows that it was a personal one to the defendant and could not be assigned by him to a third party without the consent of his lessor. The rent or share which the latter would receive, must depend very much on the character of the lessee, and the latter could not place a party in possession of the premises, who might not be a good husbandman, and who might not be able to carry on the farm operations in a good, careful, and proper manner. Under such a lease the landlord has a right to choose his tenant, and he may be willing to lease upon shares to one man, and yet be wholly unwilling to let another have possession upon any terms.<sup>205</sup>

Applying this same rationale, cropper contracts might be similarly classified as personal service contracts if circumstances indicate that the landowner relied on the character and ability of the cropper.<sup>206</sup>

State law classifications of crop-share leases as nonassignable personal service contracts generally prevent the trustee from assum-

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was whether the administrator of the estate of the tenant under a crop-share lease could assume the lease, or whether the lease called for such personal service by the tenant to render it terminable at his death. The court reversed the verdict of the lower court, which had been directed for the landlord. The court noted, however, the fact that the original tenant, who had assigned the lease to the decedent with the landlord's consent, was a copartnership, was evidence that the lease did not call for personal services of any one individual. In addition, the court questioned whether the landlord might not be estopped from claiming that the lease terminated at the tenant's death, because it had allowed the administrator of the tenant's estate to remain in possession for many months. In *Dworak v. Graves*, 16 Neb. 706, 21 N.W. 440 (1884), the court allowed assignment when the tenant had fully raised the crops, even though the crops had not yet been harvested. In *Cupples v. Level*, 54 Wash. 299, 103 P. 430 (1909), the crops had already been harvested and marketed.

204 46 Mich. 311, 9 N.W. 429 (1881).

205 *Id.* at 429.

206 *Flowers v. Mehrhoff (In re Estate of Flowers)*, 95 Ill. App. 3d 333, 420 N.E.2d 216 (1981), focused on whether the personal representative of the estate of a farmer who had entered into an agreement to farm on shares could complete performance under the agreement, or whether the agreement terminated at the farmer's death. The court remanded the case to the trial court for the factual determination of the exact nature of the relationship created by the agreement. The court held that if the trial court found that the relationship was that of landlord-tenant, the leasehold continued because the landlord had not served the personal representative with notice of termination as required by state statute for farm tenancies from year to year. (See note 13 *supra* regarding that statute in Illinois.) In addition, the court stated that if the trial court found that the agreement was a cropper contract, it would also have to decide whether such a contract was a personal service contract that the personal representative could not assume.

The court did not discuss the issue of whether a crop-share lease is a nonassumable personal service contract. It apparently assumed that as long as the agreement was a farm tenancy from year to year, the landlord could not prevent the personal representative from performing under the agreement without complying with the statutory notice requirement.

ing the lease if the tenant enters bankruptcy, and neither the trustee nor the tenant as debtor in possession will be able to assign the lease to another farmer. In some cases, this restriction could prevent the tenant from reorganizing successfully. Although unfortunate, that situation must be viewed in light of the unfairness that might result if the landlord were forced to accept performance from the trustee or an assignee. When, as in a crop-share lease, the landlord enters the relationship in reliance on the personal characteristics of the tenant, the landlord should not have to accept an undesired substitute merely because the tenant enters bankruptcy.

Because the courts in many states have not faced this specific issue, the tenant's trustee might argue for the right to assume a crop-share lease, relying on the general rule that absent a restrictive lease provision, the tenant has a right to assign a lease. A landlord who does not want to accept performance from a substitute tenant should stress the absence of state precedent on the issue of whether a crop-share lease is a nonassignable personal service contract and focus attention on the authority in other states holding crop-share leases nonassignable.

Although this issue is important in a theoretical sense, it may arise rarely in practice. In all likelihood, a tenant attempting reorganization will plan to assume the lease and farm the land personally. Moreover, even a trustee would probably assume the lease to facilitate the farmer's continued use of the property. Thus, one could argue that personal service contracts should be assumable when circumstances indicate that the original tenant will farm the property; in this situation, the landlord's expectations would be fulfilled and the tenant's successful reorganization furthered.

## 2. Landlord bankruptcy

When a landlord under a crop-share lease enters bankruptcy, the trustee or landlord as debtor in possession may want to assume or assign the lease. For example, the landlord may need the lease to complete a Chapter 11 reorganization successfully, or the landlord may have decided to reduce his holdings and hopes to assign the lease to the purchaser of the leased premises.

The extent of a landlord's involvement in a farm operation depends on the individual crop-share agreement. Under some crop-share leases, the landlord may participate significantly in the day-to-day operation of the farm. The landlord's regular and significant participation in the farm's operation may be evidence that the tenant

entered into the crop-share lease in reliance on the landlord's personal characteristics, thus supporting the conclusion that the lease is a nonassumable contract.<sup>207</sup> On the other hand, as one author has explained, "the landlord's participation is usually limited to making decisions about the use of land, seed, and fertilizer and to sharing in fertilizer costs, crop expenses, and the care and maintenance of improvements."<sup>208</sup> Landlord participation to the limited extent typical of many crop-share leases would tend to indicate that the tenant did not rely on the landlord's personal characteristics, thus supporting the argument that the lease is not a personal service contract.

This analysis comports with the determination of whether the tenant can assign such a lease. Unless the landlord's participation in the day-to-day operation of the farm affects the level of production, the size of the tenant's crop share will not depend on the landlord (assuming the landlord complies with the lease provisions regarding inputs and improvements).<sup>209</sup> If the landlord does not actively participate in the farming, either the trustee or landlord as debtor in possession should be able to assume or assign the lease. If the landlord does participate significantly, the debtor in possession, but not a trustee, should be able to assume the lease, and neither should be

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207 In defining what constitutes significant participation in the day-to-day operation of the farm, a court might look to I.R.C. § 2032A regarding special use valuation of farm real property for estate tax purposes. For real property to qualify for special use valuation under I.R.C. § 2032A, the decedent or a member of the decedent's family must have materially participated in the operation of a farm for five of the eight years preceding decedent's death, retirement or disability. I.R.C. § 2032A(b)(1)(C)(ii) (West Supp. 1983); I.R.C. § 2032A(b)(4)(A) (West Supp. 1983). In addition, the heir or a member of his family must continue to participate materially in the operation of the farm. *See* I.R.C. § 2032A(c)(6)(B) (West Supp. 1983). For more information on the meaning of material participation, see Treas. Reg. §§ 1.1402(a)-4(b)(3)(iii), 20.2032A-3(c)(2) (1983).

208 *See* F. REISS, *supra* note 13, at 9.

209 The same basic approach can be used in deciding whether a cropper contract is a personal service contract that the landowner cannot assign.

The statement that the employer can assign his right to the promised service does not mean that he can by assignment change in any material way the service to be rendered. . . . If the service is to be rendered under the personal supervision and direction of the employer, he can assign his right to such service; but his own readiness and willingness to supervise and direct is still a condition precedent to the servant's duty to proceed with the service, just as it was prior to the assignment. In such a case, the death of the employer, or his refusal to perform the condition of supervision, will operate to discharge the employee from further duty.

4 A. CORBIN, *supra* note 203, at 438-39 (footnotes omitted). In many cropper contracts, the landowner may have reserved the right to supervise and direct the cropper personally. The landowner probably should not be able to assign such a contract, absent a willingness to continue to supervise and direct the cropper personally after assignment.



able to assign the lease.<sup>210</sup>

C. *Effect of Bankruptcy on State Law Remedies For Tenant's Default*

If a farm tenant defaults on his lease obligations, the landlord may normally pursue state law remedies. For example, if an Illinois tenant under a crop-share lease has stopped cultivating growing crops, the landlord can proceed under the Illinois statute permitting him to seize, cultivate, and harvest the crops.<sup>211</sup> Once the tenant files a bankruptcy petition, however, the landlord can no longer bring an action pursuant to that statute. Section 362(a)(3) provides that the bankruptcy petition operates as a stay of any act to obtain possession of property of or from the estate.<sup>212</sup> Moreover, the filing of a bankruptcy petition will stay any judicial proceeding against the debtor that was initiated prior to filing.<sup>213</sup>

Because the automatic stay undermines state law remedies for tenant's default, the landlord should be cognizant of the protections available in the bankruptcy proceedings. The trustee's or debtor in

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210 The answer to the question of whether a livestock-share lease is a personal service contract that the trustee cannot assume or assign should be the same as for the crop-share lease. Just as in the case of a landlord under a crop-share lease, the landlord under a livestock-share lease undoubtedly enters a lease with a particular tenant in reliance on the tenant's personal characteristics, so the lease should be classified as a personal service contract that the tenant's trustee cannot assume or assign. Whether the livestock-share lease is a personal service contract of the landlord will depend on the extent to which the landlord participates in the day-to-day supervision of the livestock operation. Many landlords under livestock-share leases participate heavily in the day-to-day supervision of the livestock operation; if one of these landlords enters bankruptcy, his trustee should not be able to assume or assign the lease.

The issue of whether a cash farm lease is a nonassignable personal service contract will be difficult to resolve. On one hand, the size of the landlord's rent does not depend on the personal characteristics of the tenant, and the landlord does not normally participate in the management of the farm. The argument can therefore be made that the cash farm lease is not a personal service contract from the perspective of the landlord or the tenant. Nonetheless, the personal characteristics and abilities of the tenant will significantly affect the husbandry of the landlord's property. Farm landlords often select tenants in part on the basis of the tenant's probable level of care for their land. Under most cash leases, such as the lease of office space, the business of the tenant does not focus on the care of the landlord's property. Under a cash farm lease, however, the tenant's business is the care of the landlord's farmland. Thus, the farm landlord relies on the personal characteristics and abilities of the tenant much more than in other cash leases. So, in many instances when a tenant under a cash farm lease enters bankruptcy, the lease should be considered a nonassignable personal service contract.

211 See ILL. REV. STAT. ch. 110, § 9-318 (1983).

212 11 U.S.C. § 362(a)(3) (1982). See *In re Christopher Michaels Ristorante, Inc.*, 9 Bankr. 149 (Bankr. S.D. Fla. 1981), where the court held that the tenant's filing of a bankruptcy petition stayed any further attempts on the part of the landlord to terminate the tenant's lease. See also 2 COLLIER ON BANKRUPTCY, *supra* note 122, ¶ 365.04.

213 See 11 U.S.C. § 362(a)(1) (1982).

possession's rights to cure lease defaults and assume the lease,<sup>214</sup> as well as the nondebtor's right to petition the court to order assumption or rejection of the lease within a specified period of time,<sup>215</sup> have been described above. Alternatively, the landlord can wait until the trustee or debtor in possession has had a reasonable time in which to assume or reject the lease<sup>216</sup> and then seek relief from the automatic stay under section 362(d), so that he can pursue state law remedies for the tenant's default.<sup>217</sup>

If the tenant has defaulted on the lease before bankruptcy, the lease may have been terminated under state law before the automatic stay took effect. Nonetheless, if the tenant is still in possession of the premises at filing, the automatic stay will prevent the landlord, at least initially, from regaining possession of the premises.<sup>218</sup> In these cases, the court should not allow the trustee to cure and assume the lease because it has been terminated, and thus is not unexpired.<sup>219</sup> Because the lease cannot be assumed, the court should grant the landlord relief from the automatic stay so he can regain the

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214 See text accompanying notes 184-91 *supra*.

215 See text accompanying notes 173-77 *supra*.

216 See cases cited in note 179 *supra*; see also 2 COLLIER ON BANKRUPTCY, *supra* note 122, ¶365.03[1]. Section 108(b) provides that the trustee has up to 60 days after the order of relief to cure any defaults. 11 U.S.C. § 108(b) (1982). Presumably, the reasonable time that the landlord must wait before seeking relief from the automatic stay can be less than 60 days, because 60 days is the maximum length of time that the trustee has to cure the default, and the court may determine that, under the circumstances, a reasonable time in which to cure and assume the lease is less than 60 days. On the other hand, if the court determines that a reasonable time in which to cure and assume is more than 60 days, the court has the power under § 105(a) to allow the trustee more than 60 days to cure the default. See 11 U.S.C. § 105(a) (1982); see also 2 COLLIER ON BANKRUPTCY, *supra* note 122, ¶ 365.04[1].

217 See 2 COLLIER ON BANKRUPTCY, *supra* note 122.

218 See 11 U.S.C. § 362(a)(2), (3) (1982); *Kearny Mesa Crossroads v. Acorn Invs. (In re Acorn Invs.)*, 8 Bankr. 506 (Bankr. S.D. Cal. 1981); *Marriott Corp. v. Chuck Wagon Bar-B-Que (In re Chuck Wagon Bar-B-Que, Inc.)*, 7 Bankr. 92 (Bankr. D.D.C. 1980); *Construction Clearing House, Inc. v. Mulkey of Missouri, Inc. (In re Mulkey of Missouri, Inc.)* 6 BANKR. CT. DEC. (CRR) 310 (Bankr. W.D. Mo. 1980).

219 See *Kearny Mesa Crossroads v. Acorn Invs. (In re Acorn Invs.)*, 8 Bankr. 506 (Bankr. S.D. Cal. 1981), where the landlord had obtained a final default judgment that terminated the tenant's right to possession of the premises before the tenant entered bankruptcy. The automatic stay, however, prevented the landlord from regaining possession of the premises. The court held that the fact that the lease had been terminated meant that it was an expired lease not subject to assumption under § 365: "It is clear that a lease which has been terminated prior to the filing of a Chapter 11 petition has 'expired,' or ceased to be executory, within the meaning of Section 365 of the Code. Such a lease is not assumable." *Id.* at 510.

Another recent case involved the pre-petition termination of a month-to-month tenancy. The court decided that the debtor had no right in the premises, even though essential for a Chapter 11 reorganization. *308 West Randolph Bldg. Venture v. Victory Pipe Craftsmen, Inc. (In re Victory Pipe Craftsmen, Inc.)*, 8 Bankr. 635 (Bankr. N.D. Ill. 1981); see also *Marriott Corp. v. Chuck Wagon Bar-B-Que (In re Chuck Wagon Bar-B-Que, Inc.)*, 7 Bankr. 92

premises.<sup>220</sup> In deciding whether the lease has been terminated, the court will look to state law<sup>221</sup> and will usually take advantage of any available method to avoid a lease forfeiture if the lease termination was not completed when the debtor entered bankruptcy.<sup>222</sup>

Even if the lease was not terminated prior to bankruptcy, section 362(d)(1) provides that the court must grant the landlord relief

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(Bankr. D.D.C. 1980); *Hazen v. Hospitality Assocs., Inc.* (*In re Hospitality Assocs.*), 6 Bankr. 778 (Bankr. D. Or. 1980); 2 COLLIER ON BANKRUPTCY, *supra* note 122, ¶ 365.02.

But see *Construction Clearing House, Inc. v. Mulkey of Missouri, Inc.* (*In re Mulkey of Missouri, Inc.*), 6 BANKR. CT. DEC. (CRR) 310 (Bankr. W.D. Mo. 1980), where a state court had issued a judgment ordering the landlord to be restored to the possession of leased premises on or before January 18, 1980. On January 11, 1980, however, the tenant filed a bankruptcy petition; thus, the automatic stay prevented enforcement of the state court judgment. The bankruptcy court rejected the argument that there was no lease in existence for the debtor to cure and assume. The court stressed that assumption of the lease was absolutely essential for the debtor to reorganize successfully. It held that "the nullification of the means of enforcement of a pre-petition judgment necessarily erases the effect of the state court judgment for possession," 6 BANKR. CT. DEC. (CRR) at 311, and that the debtor could assume the lease if it cured the default and offered the landlord adequate protection.

It seems open to question whether the court's holding in *Mulkey*, that the automatic stay nullifies the means of enforcing a state court judgment terminating a lease, effectively nullifies the judgment itself. Equally open to question is the policy of allowing the cure and assumption of terminated leases. As the court stressed in *Marriott Corp. v. Chuck Wagon Bar-B-Que* (*In re Chuck Wagon Bar-B-Que, Inc.*), 7 Bankr. at 95:

There clearly must come a point in time when the parties to a lease are entitled to legitimate expectation of finality in connection with their business dealings. It is clearly inequitable to permit a debtor to attempt to cure and remedy a contractual obligation that has already expired. To permit a debtor to assert rights under an already expired lease by resort to the equitable provisions of the Bankruptcy Code would undermine confidence not only in the certitude of contracts, but in the judicial system itself. Such a result was clearly not envisioned by the framers of Section 365. That section itself clearly relates to and refers to "an unexpired lease of the debtor;" and it clearly envisions that there be an on-going relationship between the landlord and tenant over which the court can properly exercise its jurisdiction.

The stay should not actually nullify the means of enforcing the judgment, or the judgment itself, but only conditionally prevent its enforcement. That § 362(d) permits the court, under appropriate circumstances, to grant relief from the stay, supports this argument. Thus, a court should not use the stay to revive a lease properly terminated prior to bankruptcy.

220 See *Kearny Mesa Crossroads v. Acorn Invs.* (*In re Acorn Invs.*), 8 Bankr. 506 (Bankr. S.D. Cal. 1981), where the court held that no possibility of curing and assuming a terminated lease constituted sufficient cause to grant relief from the automatic stay under § 365(d)(1). See also *Marriott Corp. v. Chuck Wagon Bar-B-Que* (*In re Chuck Wagon Bar-B-Que, Inc.*), 7 Bankr. 92 (Bankr. D.D.C. 1980).

221 See *Kearny Mesa Crossroads v. Acorn Invs.* (*In re Acorn Invs.*), 8 Bankr. 506 (Bankr. S.D. Cal. 1981); *Marriott Corp. v. Chuck Wagon Bar-B-Que* (*In re Chuck Wagon Bar-B-Que, Inc.*), 7 Bankr. 92 (Bankr. D.D.C. 1980); *Seidle v. Pan Am. World Airways, Inc.* (*In re Belize Airways, Ltd.*), 5 Bankr. 152 (Bankr. S.D. Fla. 1980); *Hazen v. Hospitality Assocs., Inc.* (*In re Hospitality Assocs., Inc.*), 6 Bankr. 778 (Bankr. D. Or. 1980).

222 See *Seidle v. Pan Am. World Airways, Inc.* (*In re Belize Airways, Ltd.*), 5 Bankr. 152 (Bankr. S.D. Fla. 1980); *In re Sapolin Paints, Inc.*, 5 Bankr. 412 (Bankr. E.D.N.Y. 1980); 2 COLLIER ON BANKRUPTCY, *supra* note 122, ¶ 365.02.

from the automatic stay if his interest in the leased property is not adequately protected. In addition, the court must grant relief from the stay if the tenant has no equity in the leased property and the property is not necessary to an effective reorganization.<sup>223</sup> In some instances, the landlord's request for relief from the stay may cause the tenant immediately to cure and assume the lease. In these cases, the assurance that the tenant must offer pursuant to section 365(b)(1) provides the landlord with adequate protection.<sup>224</sup> If the tenant under a farm lease does not cure and assume the lease after the landlord requests relief from the stay, the landlord has a strong argument that he is not receiving adequate protection. For example, if a tenant under a crop-share lease stops cultivating the crops and then enters bankruptcy, the landlord can assert that he will not receive rent if the crops are not cultivated and harvested; even if the tenant eventually decides to assume the lease, the harvest (and with it, the landlord's share) will be meager for want of proper cultivation.

In practice, whether the landlord can receive relief from the stay depends on whether the leased property is necessary—as it will be in many farm tenant bankruptcies—to an effective reorganization. Yet, in addition to demonstrating that the leased property is essential, the tenant must show that he will be able to reorganize successfully. The court in *Guaranty-First Trust Co. v. Accent Associates (In re Accent Associates)*<sup>225</sup> explained: "The case law interpreting Section 362(d) appears to consistently hold that there must be a reasonable possibility of an *effective* reorganization within a reasonable time."<sup>226</sup> Thus, if the tenant cannot show that the leased property is essential for a successful reorganization, that there is a likelihood of effective reorganization within a reasonable time, and that the tenant has equity in the leased property, the court must grant the landlord relief from the automatic stay. Once this relief is granted, the landlord will be free to pursue state law remedies to recover the property.

223 See 11 U.S.C. § 362(d)(1), (2) (1982). At least one court, however, has declared that a tenant has equity in the leased property if the lease's market value is more than the agreed rental rate. See *Seidle*, 5 Bankr. at 156. But in many instances a farm lease's market value will be the same as the agreed rental rate, in part because the percentage shares of the parties to crop-share leases are frequently regionalized. For example, in the fertile areas of central and northern Illinois, the prevailing rent share is one-half of the crops, whereas on less productive land in southern Illinois, the prevailing rent share is one-third. See F. REISS, *supra* note 13, at 17.

224 See *Seidle*, 5 Bankr. at 156.

225 8 Bankr. 933 (Bankr. D. Mass. 1981).

226 *Id.* at 936 (emphasis in original).

D. *Assumption, Assignment, and Modification of Lease Terms*

1. Power of the bankruptcy court to modify lease terms

When a party to a lease enters bankruptcy and thereafter decides to assume or assign the lease pursuant to section 365, a new issue arises: whether the debtor must assume or assign the lease strictly according to its terms, or whether the court should allow modification of the lease to facilitate the assumption or assignment.<sup>227</sup> As previously mentioned, if the debtor assumes a lease after default, the debtor must offer the nondebtor party adequate assurance of future performance; and, if the debtor assigns the lease, the assignee must also offer adequate assurance of future performance, even if the debtor has not defaulted.<sup>228</sup>

Significantly, the Code does not define "adequate assurance of future performance," but instead allows a case-by-case analysis.<sup>229</sup> Regarding protection for the nondebtor party to the lease, the House and Senate committee reports discussed the unenforceability of ipso facto or bankruptcy clauses under section 365(e)(1), and indicated that courts must be sensitive to the rights of the nondebtor party to executory contracts and unexpired leases: "If the trustee is to assume a contract or lease, the courts will have to insure that the trustee's performance under the contract or lease gives the other contracting party the full benefit of his bargain."<sup>230</sup>

Although the Code provides that the nondebtor party must receive adequate assurance of future performance, and the legislative history clearly mandates that the nondebtor must receive the full benefit of his bargain, neither the Code nor the legislative history explicitly answers the question of whether the lease terms can be modified to facilitate assumption or assignment. If a court decides that the lease terms can be modified, it must then decide the extent to which the terms can be modified without depriving the nondebtor party of the full benefit of his bargain.

In the case of *In re Pin Oaks Apartments*,<sup>231</sup> the court refused to allow the debtor to modify a lease to facilitate assumption. In *Pin Oaks*, the debtor tenant had leased a large apartment complex. The

227 See Simpson, *Leases and the Bankruptcy Code*, 38 BUS. LAW. 61 (1982), for a thorough discussion of this issue.

228 See text accompanying notes 184-91 *supra*.

229 See text accompanying notes 192-200 *supra*.

230 H.R. REP. NO. 595, 95th Cong., 2d Sess. 348, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6304-05; *see also* S. REP. NO. 989, 95th Cong., 2d Sess. 59, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5845.

231 7 Bankr. 364 (Bankr. S.D. Tex. 1980).

lease agreement prohibited subleasing without the landlord's written consent and included a percentage rental provision. The tenant wanted to assume the lease, sublet the complex, replace the percentage rental provision with a fixed annual rent, and make several other minor changes in the lease. Reasoning that Congress had expressly included the power to abrogate contractual rights between a debtor and nondebtor only with regard to anti-assignment and ipso facto clauses, the court construed the failure to articulate additional rights to modify or ignore provisions in existing leases as congressional intent to deny these rights.<sup>232</sup> Thus, the court refused to allow the tenant's trustee to modify the lease, holding that "[g]eneral principles of law in connection with executory contracts in bankruptcy proceedings require a trustee assuming a lease to assume all the terms and conditions therein."<sup>233</sup>

Another decision, however, rejected the *Pin Oaks* rationale. In the case of *In re U.L. Radio Corp.*,<sup>234</sup> the bankrupt tenant had been operating the leasehold as a television sales and service store. The lease restricted the tenant's use of the leased premises to television service and electrical appliance sales. The tenant proposed to assume the lease and assign it for use as a small bistro, but the landlord objected to the proposed assignment on the grounds that it violated the use clause. After examining the requirements of adequate assurance, the legislative history of section 365, and the *Pin Oaks* decision,<sup>235</sup> the court concluded that adequate assurance of future performance does not require an assignee to comply literally with every lease term. Thus, a court could permit deviations from strict enforcement of any lease provision, including a use clause.<sup>236</sup> The *U.L. Radio* court then

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232 *Id.* at 367.

233 *Id.* at 370.

234 19 Bankr. 537 (Bankr. S.D.N.Y. 1982).

235 The court noted that the view of the *Pin Oaks* court (that if Congress had intended to give the court or the trustee the power to modify the contract, it would have done so expressly) frustrates the express policy of Congress favoring assignment. The court explained:

Under the *Pin Oaks* reasoning, lessors could employ very specific use clauses to prevent assignment and thus circumvent the Code. Section 365(f), in broad language, empowers the Court to authorize assignment of an unexpired lease and invalidate any lease provision which would terminate or modify the lease because of the assignment of that lease. . . . Any lease provision, not merely one entitled "anti-assignment clause," would be subject to the court's scrutiny regarding its anti-assignment effect. The court could render unenforceable any provision whose sole effect is to restrict assignment, "as contrary to the policy of [subsection (f)(3)]."

*Id.* at 543 (citations omitted).

236 The court explained:

Section 365 expresses a clear Congressional policy favoring assumption and assignment. Such a policy will insure that potential valuable assets will not be lost by

found that the landlord would not suffer any actual and substantial detriment from the requested change in use, primarily because the building in which the unexpired leasehold was located already contained a restaurant, a laundry, and a liquor store.

Several authors have concurred that debtors should be allowed to modify lease terms to facilitate assumption or assignment as long as the nondebtor parties receive adequate assurance of future performance.<sup>237</sup> Thus, adequate assurance is viewed as a substitute for strict adherence to all the lease terms.<sup>238</sup> Both congressional policy and the importance of modification to debtors' reorganization support this argument. Nonetheless, courts that allow such modifications should ensure that the assurance of future performance gives the nondebtor the full benefit of his bargain.

## 2. Termination and assumption of farm tenancies from year to year

A substantial number of farm leases are tenancies from year to year. Moreover, the unique nature of a tenancy from year to year—continuation from one year to the next, absent proper termination—raises special issues in the bankruptcy situation. The basic characteristics of these tenancies have already been discussed, along with state statutes that require timely notice to terminate them.<sup>239</sup> In Illinois, for example, the notice period is four months.<sup>240</sup> The typical lease year in Illinois begins on March 1, so to terminate the lease either party must give written notice before November 1 of the preceding year. If the year-to-year tenant enters bankruptcy prior to November 1, the court faces several questions regarding the effect of the bankruptcy on the tenancy.<sup>241</sup>

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a debtor who is reorganizing his affairs or liquidating assets for distribution to creditors. This policy parallels case law which disfavors forfeiture. . . . To prevent an assignment of an unexpired lease by demanding strict enforcement of a use clause, and thereby contradict clear Congressional policy, a landlord or lessor must show that actual and substantial detriment would be incurred by him if the deviation in use was permitted.

*Id.* at 544 (citations omitted).

237 See 2 COLLIER ON BANKRUPTCY, *supra* note 122, ¶ 365.04[1]; Simpson, *supra* note 227, at 75.

238 Simpson, *supra* note 227, at 75.

239 See note 13 *supra*.

240 See ILL. REV. STAT. ch. 110, § 9-206 (1983).

241 Farmers tend to enter bankruptcy in the spring before planting, in part because of the tendency to file for bankruptcy only after exhausting all hope of receiving financing for another year.

a. *Termination*

The court must determine whether the automatic stay under section 362 prevents the landlord from giving effective written notice of termination before the November deadline.<sup>242</sup> Because section 362(a)(3) provides that the filing of the petition operates as a stay of *any act* to obtain possession of property of or from the estate, the landlord may be prevented from giving effective written notice of termination until he receives relief from the stay pursuant to section 362(d). If the tenant enters bankruptcy just before November 1, the landlord may not have time to obtain relief from the automatic stay before the deadline. The landlord should give written notice of termination, however, even if he is sure that the court will not have time to grant relief from the automatic stay. If relief from the stay is granted, the landlord should assert that the notice of termination was made effective by the granting of relief.<sup>243</sup>

In seeking the stay, the landlord therefore faces a dilemma: he cannot argue that relief is appropriate under state law<sup>244</sup> because the tenancy cannot be terminated under state law until written notice of termination is given. But the landlord may claim that relief from the stay is appropriate under section 362(d)(1) because he does not have adequate protection for his interest in the leased land. The landlord can assert his need to know whether he can terminate the tenancy

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242 If the court classifies a contract to farm on shares as a cropper contract instead of as a farm tenancy from year to year, the cropper is not entitled to the termination notice required by statute for tenancies from year to year. See *Flowers v. Mehrhoff* (*In re Estate of Flowers*), 95 Ill. App. 3d 333, 420 N.E.2d 216 (1981); *Gibbons v. Huntsinger*, 105 Mont. 562, 74 P.2d 443 (1937); *Clark v. Harry*, 182 Va. 410, 29 S.E.2d 231 (1944). If the cropper and the landowner entered into a cropper contract for one year, the landowner should be able to inform the cropper at any time (either before or after the cropper enters bankruptcy) that he does not want the cropper to farm his land for another year. Because § 362(a)(3) operates as a stay of any act to obtain *possession* of property from the debtor's estate, and the cropper is not strictly speaking "in possession of" the land that he farms, the stay, at least in theory, should not affect the landowner's right to discontinue the relationship.

243 Compare *Original Sixteen To One Mine, Inc. v. Sixteen To One Mining Corp.* (*In re Sixteen to One Mining Corp.*), 9 Bankr. 636 (Bankr. D. Nev. 1981), where the court held that § 362(a)(3) does not stay the giving of notices of default.

A landlord is entitled to put a lessee on notice of where and when the lessee is failing in performance. Otherwise there may be no knowledge of the default which the landlord expects to be cured in the event of assumption of the lease. The giving of a notice in January 1980 that there was a default and describing it is only valid for what it is—notice. The landlord cannot obtain possession without an order of the Court pursuant to 11 U.S.C. § 362(d), or by abandonment, rejection of the lease or stipulation.

*Id.* at 638.

244 See text accompanying notes 211-26 *supra*.



and seek a different tenant, and his need for time to find a capable tenant who will provide a crop-share from a good harvest. This argument may convince the court to lift the stay, unless the tenant offers to continue the tenancy, a situation that might adequately protect the landlord's interest. Thus, the court must decide whether to lift the stay and enable the landlord to terminate the tenancy, or to allow the tenant as debtor in possession to continue the tenancy.

Generally, a landlord can terminate a farm tenancy from year to year for any reason, so long as he complies with the statutory notice requirement. But in many year-to-year farm tenancies, the landlord-tenant relationship is long standing and mutually profitable. Relying on this successful relationship and having no expectation of termination, the tenant may have invested in improvements on the rented land, such as modifications to farm buildings, drainage systems, or carryover fertilizer. The landlord may not have mentioned, or even considered, terminating the tenancy until after the tenant entered bankruptcy. Under these circumstances, and especially when the leased property is essential for the tenant's successful reorganization, the court should allow the tenancy to continue despite the landlord's desire to terminate. Indeed, the Code's invalidation of ipso facto clauses, which usually articulate the landlord's intention to terminate the lease at bankruptcy, supports this conclusion.

#### b. *Assumption*

Under the laws of most states, a tenancy from year to year is inferred from the situation in which occupation of property is permitted, yearly rent is reserved, and either party can terminate the relationship after the required notice.<sup>245</sup> Therefore, the tenant should be able to assume an unexpired year-to-year tenancy under section 365, just as he could assume an unexpired written lease. But at times a court is confronted with the troublesome question of whether the tenant should be able to assume the tenancy for another year in spite of the landlord's desire to exercise his lawful right to terminate. The court's power to allow the tenant to modify a lease to facilitate assumption has been discussed previously.<sup>246</sup> Yet allowing a tenant to assume a year-to-year farm tenancy contrary to the landlord's wishes has a far greater impact on the landlord's rights than allowing the tenant to modify the lease to facilitate its assumption.

Through judicious use of its equity powers, the court may be

<sup>245</sup> See 2 R. POWELL & P. ROHAN, *supra* note 13, ¶ 254.

<sup>246</sup> See text accompanying notes 227-38 *supra*.

able to allow the tenant to assume the tenancy in this situation. Bankruptcy courts have the power under section 105(a) to issue any order necessary or appropriate to carry out the provisions of the Code.<sup>247</sup> For example, section 70b of the Bankruptcy Act had specifically provided that an express covenant to terminate the lease upon the bankruptcy of a party was enforceable.<sup>248</sup> But in *Queens Boulevard Wine & Liquor Corp. v. Blum*,<sup>249</sup> the United States Court of Appeals for the Second Circuit held that a bankruptcy court could exercise its equitable powers to deny enforcement of a bankruptcy termination clause when continuation of the lease would not injure the landlord and termination would make an otherwise promising reorganization impossible. In *Helgesen v. Hough Manufacturing Corp. (In re Hough Manufacturing Corp.)*,<sup>250</sup> the court listed the five factors that the *Queens Boulevard* court and others have considered when permitting a bankruptcy court to deny enforcement of such a clause:

- (1) a termination of the lease would terminate the business of the defendant;
- (2) a public interest in the business of the defendant would be lost;
- (3) a public investment in the stock of the defendant would be lost;
- (4) a termination of the lease would not save the landlord from any injury but only provide him the opportunity to obtain a higher rent or to acquire improvements or fixtures and equipment of the defendant;
- (5) a history of prompt rental payment by the defendant and a large security deposit held by the landlord to secure defendant's obligations under the lease suggest unfairness to the lessee if the lease is terminated.<sup>251</sup>

Thus, in certain instances bankruptcy courts can exercise their equitable powers to deny enforcement of lease provisions otherwise enforceable under state and bankruptcy laws.

The tenant who wants to prevent termination can assert that if the court has the equitable power to deny enforcement of a clause specifically enforceable under the bankruptcy laws, it also has the

247 11 U.S.C. § 105(a) (1982); see also Simpson, *supra* note 227, at 89.

248 See 11 U.S.C. § 110(b) (1976) (repealed 1979).

249 503 F.2d 202 (2d Cir. 1974); see also *In re D. H. Overmeyer Co.*, 510 F.2d 329, 332 (2d Cir. 1975); *Pennsylvania Real Estate Inv. Trust v. Fountainebleau Hotel Corp. (In re Fountainebleau Hotel Corp.)*, 515 F.2d 913, 914 (5th Cir. 1975); *Weaver v. Hutson*, 459 F.2d 741, 744 (4th Cir.), *cert denied*, 409 U.S. 957 (1972); *In re Fleetwood Motel Corp.*, 335 F.2d 857, 862 (3d Cir. 1964).

250 1 Bankr. 69 (Bankr. W.D. Wis. 1979).

251 *Id.* at 73.

power to allow the tenant to assume the tenancy despite the landlord's desire to terminate. The farm tenant will usually meet several of the *Hough* criteria.<sup>252</sup> He should show that if he cannot continue the tenancy, he will not be able to reorganize successfully. The wide variety of federal and state laws designed to improve the financial condition of farmers demonstrates the keen public interest in keeping farmers in business. Moreover, allowing the landlord to terminate the tenancy would not necessarily prevent injury to the landlord but would only permit him to lease to another farmer, perhaps at a higher rent.<sup>253</sup> The tenant can also point to section 365(e)(1) of the current Code, the provision that prohibits bankruptcy termination clauses, as evidence of a strong congressional policy disfavoring termination of landlord-tenant relationships solely because one of the parties entered bankruptcy.<sup>254</sup>

Thus, the tenant has a strong argument for assuming the farm tenancy from year to year, despite the landlord's desire to terminate the tenancy. This argument is compelling unless the landlord can demonstrate that he had planned to terminate the tenancy before the tenant entered bankruptcy for reasons entirely unrelated to the tenant's financial difficulties, or that he would suffer actual and substantial injury from the tenant's assumption of the tenancy.

#### IV. Damages Resulting From the Breach of Farm Leases and Cropper Contracts

##### A. *Code Provisions Regarding Damages*

When a party to a lease enters bankruptcy and decides to reject the lease pursuant to section 365, the debtor's rejection is treated as a breach of the lease, and the nondebtor has an unsecured claim for the resulting damages.<sup>255</sup> Section 502(b), however, limits both a landlord's claim for damages resulting from termination of a lease and an employee's claim resulting from termination of an employment contract.<sup>256</sup> But no statutory limit is placed on the tenant's

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252 This reasoning assumes that the tenant is the party to a long-standing landlord-tenant relationship that has been profitable to both parties and that the tenant has not defaulted on any obligations under the tenancy. A tenant of short duration or one who has defaulted would not be a good candidate for equitable relief.

253 In some instances, the tenant will be able to show that he invested in improvements on the landlord's land in expectation that the tenancy would continue, and that the landlord would acquire the improvements on termination of the lease.

254 11 U.S.C. § 365(e)(1) (1982).

255 11 U.S.C. § 365(g) (1982).

256 See 11 U.S.C. § 502(b) (1982). Section 502(b)(8) limits damages resulting from the

claim for damages resulting from the lease termination. Thus here, as elsewhere, the characterization of a multi-year farming agreement as a lease or a cropper contract will be significant.<sup>257</sup>

### 1. Landlord bankruptcy and lease rejection

The Code does contain some exceptions to these general rules. As already noted, section 365(h) contains special provisions for cases in which a bankrupt landlord rejects an unexpired lease.<sup>258</sup> These provisions allow the tenant to decide whether to surrender possession. If the tenant chooses to remain in possession, he may offset damages occurring after the rejection of the lease against the rent due for the balance of the term.<sup>259</sup> Damages resulting from the landlord's rejection of lease covenants to provide supplies before rejection of the lease, however, will be unsecured claims under section 502.<sup>260</sup>

In some instances where the landlord rejects a crop-share lease and the tenant elects to remain in possession, the tenant's right to offset damages after rejection may enable him to find financing for inputs that the landlord does not provide. On the other hand, a tenant who cannot afford to purchase inputs that the landlord does not supply may be forced to acquiesce in the landlord's rejection.<sup>261</sup>

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termination of an employment contract to unpaid compensation and the compensation provided by the contract for one year. Section 502(b)(7) limits the landlord's claim to unpaid rent plus the rent reserved by the lease for the greater of one year, or 15% (not to exceed three years) of the remaining term of the lease.

257 See text accompanying notes 22-35 *supra*.

258 See text accompanying notes 140-45 *supra*.

259 See 2 COLLIER ON BANKRUPTCY, *supra* note 122, ¶ 365.09. The tenant, however, does not have a claim against the estate for any damages arising after the date of the rejection other than the offset. 11 U.S.C. § 365(h)(2) (1982).

260 See 11 U.S.C. § 502 (1982). Examples of these damages might be the landlord's failure to furnish seed, fertilizer, and pesticide. See *Control Data Corp. v. Zelman (In re Minges)*, 602 F.2d 38 (2d Cir. 1979), where the circumstances under which the landlord's trustee could reject lease covenants to supply utilities and janitorial service to the landlord's office building were at issue. The court held that the trustee could reject the covenants if, as a matter of business judgment, rejection of the burdensome covenants might benefit the estate. *Id.* at 43. Thus, the court implicitly recognized the trustee's rights to reject such covenants when the tenant remained in possession. See also *American Brake Shoe & Foundry Co. v. New York Rys. Co.*, 278 F. 842 (S.D.N.Y. 1922) (Under certain circumstances, the landlord could reject executory covenants, such as covenants to supply heat and electricity, when the tenant remained in possession.); Krasnowiecki, *The Impact of the New Bankruptcy Reform Act on Real Estate Development and Financing*, 53 AM. BANKR. L.J. 363, 371 (1979).

261 For example, if the landlord under a crop-share lease entered bankruptcy on April 1 and refused to provide half of the seed and fertilizer as required by the lease, the tenant would quickly have to find some means of replacing these supplies. Until the landlord rejected the lease, the tenant could not offset damages resulting from the landlord's failure to provide the supplies against crop rental.

Another problem that may result from the application of § 365(h) to crop-share leases is

## 2. Tenant bankruptcy and lease rejection

Another exception to the general rules for damages in section 502 applies when the tenant files bankruptcy. Under section 507(a)(1), the landlord has an administrative expense priority claim for the tenant's use and occupancy of the premises from the date of bankruptcy until the date the trustee or the tenant as debtor in possession rejects the lease.<sup>262</sup> During this interim period, the tenant is liable for the reasonable value of the use and occupancy of the leased premises.<sup>263</sup> In the absence of other evidence, reasonable value is presumed to be the amount of rent fixed in the lease.<sup>264</sup> Because these reasonable use and occupancy payments<sup>265</sup> are among the actual, necessary costs of preserving the estate allowable as administrative expenses under section 502(b)(1)(A), the landlord can assert an administrative priority expense claim for the payments under section 507(a)(1).<sup>266</sup> The landlord's claim will be valid unless the tenant can prove that the reasonable value for the use and occupancy of the leased land is less than the rent fixed in the lease.<sup>267</sup>

### B. *Ascertaining the Damages Resulting From Breach of Farm Leases and Cropper Contracts*

How the damages resulting from the breach of farm leases and cropper contracts will be treated in bankruptcy depends to a great extent on whether the debtor enters bankruptcy and rejects the lease or contract before the planting, or after planting and harvesting the crops. If, for example, the debtor enters bankruptcy and rejects a farm lease in early spring before planting any crops, the nondebtor party would have an unsecured claim under section 502 for the damages resulting from the breach of the lease.<sup>268</sup> If, on the other hand,

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the determination of the rent for the balance of the lease term after the date of rejection, against which the tenant may offset damages. This problem again raises the issue of when rent accrues under a crop-share lease. For a discussion of this issue, see note 104 *supra*.

<sup>262</sup> 11 U.S.C. § 507(a)(1) (1982).

<sup>263</sup> See *Philadelphia Co. v. Dipple*, 312 U.S. 168, 174 (1941); *In re Schnabel*, 612 F.2d 315, 317 (7th Cir. 1980); *In re H & S Mfg., Inc.*, 13 Bankr. 692 (Bankr. E.D.N.Y. 1981); *In re Standard Furniture Co.*, 3 Bankr. 527, 533 (Bankr. S.D. Cal. 1980); 2 COLLIER ON BANKRUPTCY, *supra* note 122, ¶ 365.03[02].

<sup>264</sup> *In re Schnabel*, 612 F.2d 315, 318 (7th Cir. 1980).

<sup>265</sup> See *In re Standard Furniture Co.*, 3 Bankr. 527, 533 (Bankr. S.D. Cal. 1980).

<sup>266</sup> *Id.* at 529-30, 533; Bienenstock, *supra* note 130, at 25.

<sup>267</sup> See note 104 *supra*, for a discussion of how rent accrues under a crop-share lease for a § 507(a)(1) priority claim.

<sup>268</sup> The one major exception would be when the landlord rejected the lease and the tenant elected to remain in possession pursuant to § 365(h). See text accompanying notes 223-25 *supra*.

the debtor enters bankruptcy after planting and the crops are eventually harvested, the treatment of damages will depend on which party enters bankruptcy and when that party breached the lease.<sup>269</sup> The same general rules for determining the amount of the nondebtor's damages will apply, however, regardless of when the debtor enters bankruptcy.

Courts have generally held that when a landlord breaches a crop-share lease by denying the tenant possession, wrongfully evicting the tenant, or refusing to provide supplies thereby forcing the tenant to abandon the leased premises, the measure of damages resulting from the landlord's breach is the value of the tenant's share of crops that would have been harvested, less the expenses avoided by not performing under the lease.<sup>270</sup> Courts have also generally applied the same measure of damages when a landowner breaches a cropper contract, but they have held that because the cropper is the landowner's employee, he has a duty to mitigate damages by seeking other employment.<sup>271</sup> The courts disagree on the issue of whether the value of the labor which the tenant or cropper labor did not perform after breach should be subtracted from the value of the crops in determining damages.<sup>272</sup>

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269 See text accompanying notes 114-72 *supra*. If, however, the debtor first assumed and then defaulted on the farm lease, the nondebtor party would have an administrative expense priority claim under § 507(a)(1) for the damages resulting from the default. See 2 COLLIER ON BANKRUPTCY, *supra* note 122, ¶ 365.08[1]. If a Chapter 11 or 13 debtor assumes the lease, and thereafter converts to a Chapter 7 liquidation and rejects the lease, the lease will be breached as of immediately before the date of conversion. See 11 U.S.C. § 365(g)(2)(B)(i) (1982).

270 See *Dopheide v. Schoeppner*, 163 N.W.2d 360, 366-67 (Iowa 1968); *McHargue v. Scott*, 305 S.W.2d 929, 931 (Ky. Ct. App. 1957); *Hawkins v. Reynolds*, 467 S.W.2d 791, 796 (Tenn. Ct. App. 1971); see also *Agrinetics, Inc. v. Stob*, 90 Ill. App. 3d 107, 110-11, 412 N.E.2d 714, 717 (1980). This measure of damages is consistent with § 347 of the Restatement (Second) of Contracts, which provides:

Subject to the limitations stated in §§ 350-53, the injured party has a right to damages based on his expectation interest as measured by

(a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus

(b) any other loss, including incidental or consequential loss, caused by the breach, less

(c) any cost or other loss that he has avoided by not having to perform.

RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981).

271 See *T.L. Farrow Mercantile Co. v. Riggins*, 14 Ala. App. 529, 535-36, 71 So. 963, 965-66 (1916); *Martin v. Stiers*, 165 F. Supp. 163, 167 (M.D.N.C. 1958), *aff'd*, 264 F.2d 795 (4th Cir. 1959) (applying North Carolina law); *Crews v. Cortez*, 102 Tex. 111, 116-17, 113 S.W. 523, 525-26 (1908); *Smith v. Hamilton*, 237 S.W.2d 774, 776-77 (Tex. Civ. App. 1951); *Matthews v. Foster*, 238 S.W. 317, 318 (Tex. Civ. App. 1922).

272 Compare *Matthews v. Foster*, 238 S.W. 317 (Tex. Civ. App. 1922) (value of farmer's

When the tenant or cropper breaches the lease or contract and the landlord or landowner consequently receives no crops, courts have generally held that the measure of damages is the value of the share of the crops that the landlord or landowner would have received, less expenses for the supplies that the landlord or landowner did not have to provide.<sup>273</sup> The court is actually awarding the non-breaching party his lost profits in this instance.<sup>274</sup> In addition, at least one court has awarded a landlord damages for injury to land that was idled and became overgrown with weeds because of the breach.<sup>275</sup>

Some courts have refused to allow the tenant lost profits in a situation where the landlord breached the crop-share lease by refusing the tenant possession, employing the rationale that the amount of lost profits was uncertain, speculative, and conjectural.<sup>276</sup> One court, faced with the situation in which a landlord wrongfully evicted the tenant during the second year of a five-year crop-share lease, agreed that the tenant's measure of damages for the breach is the tenant's lost profits; nonetheless, that court denied the tenant lost profits for the last three years of the lease because those amounts were too conjectural.<sup>277</sup>

The policy of refusing to allow a nonbreaching party lost profits under a crop-share lease or cropper contract must be questioned. Lost profits can usually be ascertained without undue difficulty. For example, to determine lost profits the court can admit testimony as to the yield and value of crops raised during the same year on similar lands in the neighboring area,<sup>278</sup> as well as expert testimony as to probable yields and expenses.<sup>279</sup> Section 352 of the *Restatement (Sec-*

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labor should not be deducted), *with* *McHargue v. Scott*, 305 S.W.2d 929, 931 (Ky. Ct. App. 1957)(value of the labor should be deducted).

273 *See* *Chambers v. Belmore Land & Water Co.*, 33 Cal. App. 78, 164 P. 404 (1917); *Allen v. Los Milinos Land Co.*, 25 Cal. App. 206, 143 P. 253 (1914).

274 *See* *Meer v. Cerati*, 53 Cal. App. 497, 200 P. 501 (1921); *Parkinson v. Langdon*, 36 Cal. App. 80, 171 P. 710 (1918).

275 *Cully v. Taylor*, 62 Neb. 651, 87 N.W. 334 (1901). *See also* *RESTATEMENT (SECOND) OF CONTRACTS* § 347(b) (1981), which provides that the injured party is entitled to damages for any consequential losses. Consequential losses are defined as including "such items as injury to person or property resulting from defective performance." *RESTATEMENT (SECOND) OF CONTRACTS* § 347, comment c (1981). Thus, consequential losses should include injury to the land that results when the land is left idle because of the breach.

276 *Mullins v. Brown*, 87 Ohio App. 427, 94 N.E.2d 574 (1950).

277 *McHargue*, 305 S.W.2d at 931.

278 *Cully*, 62 Neb. at 655, 87 N.W. at 335.

279 *Meer*, 53 Cal. App. at 508, 200 P. at 506, where the court explained:

Under all the authorities, the testimony given by the experts as to the probable yield of rice on the lands in question for the year 1919 was undoubtedly competent

*ond) of Contracts* provides: "Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty."<sup>280</sup> But, according to comment *b* accompanying that section:

The difficulty of proving lost profits varies greatly with the nature of the transaction. . . . Furthermore, if the transaction is more complex and extends into the future, as where the seller agrees to furnish all of the buyer's requirements over a period of years, proof of the loss of profits caused by the seller's breach is more difficult. If the breach prevents the injured party from carrying on a well-established business, the resulting loss of profits can often be proved with sufficient certainty. Evidence of past performance will form the basis for a reasonable prediction as to the future. . . . However, if the business is a new one or if it is a speculative one that is subject to great fluctuations in volume, costs or prices, proof will be more difficult. Nevertheless, damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like.<sup>281</sup>

Thus, if the crop-share lease or cropper contract continues for only one year, the court should not deny the non-breaching party lost profits on the grounds that they are too conjectural. By the testimony of neighboring farmers and experts, the nonbreaching party can usually establish both the quantity of crops that would have been produced and the value of those crops with reasonable certainty.<sup>282</sup> When the landlord breaches a cash farm lease, the tenant will have to introduce similar evidence to establish his lost profits

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for that purpose. Indeed, the only and the very best character of evidence for the establishment of the fact of loss of future profits in a case such as the one here must of necessity, as a general rule, come from the testimony of experts or persons who, from long experience in the same line of business, have acquired such a knowledge of the results of the operations of such business as to enable them to state with at least approximate accuracy what, in the way of profits under given conditions, the future potentialities of the business may be. It is, of course, to be conceded that prospective profits, as damages, are incapable of being shown with that accuracy with which the ordinary questions of fact can be established.

280 RESTATEMENT (SECOND) OF CONTRACTS § 352 (1981).

281 *Id.*, comment *b*.

282 Nevertheless, one may question the time at which the value of the crops should be ascertained. One court has held that harvest is the correct time, *Goforth v. Smith*, 206 Okla. 394, 244 P.2d 304 (1952); another has focused on the time that the landlord would have received his share, *Parkinson v. Langdon*, 36 Cal. App. 80, 171 P. 710 (1918). Although harvest and delivery are usually close together, the latter time is probably preferable for ascertaining value, because only after delivery could the landlord in turn deliver his share to a purchaser.



with reasonable certainty. This evidence will consist of the value of the crops he would have raised, less the cash rent and other expenses he does not incur.<sup>283</sup>

When a crop-share lease is multi-year, however, the court may be justified in denying lost profits for the years subsequent to the year of breach. Realistically, though, because of the limitations of section 502(b)(7) on a landlord's claim for damages, and section 502(b)(8) on a cropper's claim for damages,<sup>284</sup> a bankruptcy court will only face this issue when a landlord breaches a multi-year crop-share lease before the last year of the lease. In Illinois, much farmland is rented only for a year at a time,<sup>285</sup> and the same undoubtedly holds true in other states. Even if the tenant offers expert testimony on lost profits for the remainder of the lease, the court may find that the evidence does not establish the lost profits for the years after the year of the breach with reasonable certainty. Varying weather conditions make it impossible to determine probable crop yields under the lease and widely fluctuating crop prices pose difficulties in predicting the value of the crops even if the yield could be determined. Nevertheless, damages based on crop yield and price predictions may be no more speculative than other types of damages. And, these difficulties certainly would not prevent the court from awarding lost profits for the year of the breach.

If the court refuses to allow the tenant lost profits for future years when the landlord breaches a crop-share lease, the tenant may seek the difference between the fair rental value of the leased land and the rent provided by the lease as an alternative measure of damages.<sup>286</sup> Two problems may render this measure of damages of little assistance to the tenant. First, in many crop-share leases the fair rental value of the land will be the same as the rent, so the tenant would receive no damages. More importantly, as the *Restatement (Second) of Contracts* explains:

Damages based on fair rental value include an element of profit

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283 *Cross v. Ramdullah*, 274 F. 762, 770-71 (9th Cir.), *cert. denied*, 257 U.S. 655 (1921). If the tenant breaches a cash farm lease, the landlord's damages will depend on the cash rent established in the lease and any injury to the land that results when the land is left idle. See note 275 *supra*.

284 See note 256 *supra*.

285 See F. REISS, *supra* note 13, at 43.

286 *Watson v. Lewis*, 272 N.W.2d 459, 465 (Iowa 1978). See also RESTATEMENT (SECOND) OF CONTRACTS § 348(1) (1981), which provides: "If a breach delays the use of property and the loss in value to the injured party is not proved with reasonable certainty, he may recover damages based on the rental value of the property or on interest on the value of the property."

since the fair rental value of property depends on what it would command on the market and this turns on the profit that would be derived from its use. For this reason, uncertainty as to profits may result in uncertainty in fair rental value.<sup>287</sup>

Because fair rental value for a crop-share lease is based on the crop yield, and the value of these crops and lost profits are determined with the same factors, a court holding that the evidence does not establish lost profits with reasonable certainty would likely conclude that the evidence does not adequately establish fair rental value.

If the tenant cannot receive his lost profits or fair rental value, he still has a right to damages based on his reliance interest, as do the landlord and a landowner or cropper under a cropper contract.<sup>288</sup> This reliance interest includes expenditures made in preparation for or in actual performance.<sup>289</sup> Thus, for the tenant or cropper under a crop-share lease or cropper contract, the reliance interest would include the cost of supplies and equipment purchased in anticipation of performance. Because of the nature of the reliance interest, however, if the tenant seeks damages for the breach of a multi-year crop-share lease, his recovery often will not include damages for the years after the breach because the tenant will not yet have made expenditures in preparation for performance in those years.<sup>290</sup>

The bankruptcy court will face several additional problems in deciding how the nondebtor's claim for damages should be treated. For example, if a crop-share tenant enters bankruptcy, state law grants the landlord no property interest in the crops before division, and the tenant as debtor in possession sells all the crops before division, the landlord's claim for damages will generally amount to the value of the share of crops he would have received, minus any expenses saved. As for the portion of damages that represents rent accrued before bankruptcy filing, the landlord will have only an unsecured claim under section 502; for the portion that represents rent after filing, the landlord will have an administrative expense pri-

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287 RESTATEMENT (SECOND) OF CONTRACTS § 348, comment b (1981).

288 See RESTATEMENT (SECOND) OF CONTRACTS § 349 (1981). See also *Watson v. Lewis*, 272 N.W.2d 459, 465 (Iowa 1978), where the court awarded the tenant his reliance interest as damages when the landlord breached the crop-share lease.

289 See RESTATEMENT (SECOND) OF CONTRACTS § 349 (1981).

290 In some instances, however, the tenant may have made expenditures in preparation for performance in future years, and those expenditures should be included as reliance damages. For example, in the first year of a five-year lease the tenant may have purchased expensive equipment, such as a corn picker or combine, in reliance on the lease. Or he may have applied fertilizer intended for crops in growing seasons after the year of application.

ority under section 507(a)(1).<sup>291</sup> As previously mentioned, the court will also have to decide how to apportion the damages between the unsecured claim and the administrative priority claim.<sup>292</sup>

Similarly, if the landowner under a cropper contract enters bankruptcy and rejects the contract before harvest, and state law grants the cropper no interest in the crops before division, the cropper's claim for damages generally will equal the value of the share of the crops that he would have received, less any expenses saved. For the portion of damages representing wages that accrued before the landowner entered bankruptcy, the cropper will have a wage priority claim under section 507(a)(3) for the first \$2,000, and an unsecured claim under section 502 for the rest; as for the portion of damages representing wages that accrued between filing and rejection, the cropper will have an administrative expense wage priority claim under section 507(a)(1); and for the rest of the damages the cropper will have an unsecured claim under section 502.<sup>293</sup> Because the cropper's wages consist of his share of the crops, the court must apportion the value of the crops that the cropper would have received to accurately represent the wages that he accrued during the different periods.<sup>294</sup>

The bankruptcy court will face a different issue when the landlord under a crop-share lease enters bankruptcy during the growing season and rejects the lease, and the tenant subsequently elects to yield possession. Because the tenant always has an interest in the crops prior to division, he should still receive his share of the crops after harvest.<sup>295</sup> The court will have to determine the exact size of that share. When a landlord breaches a crop-share lease, the measure of damages is generally the value of the share of the crops that the tenant would have received, less any expenses saved. This same measure should be used to determine the size of the tenant's share when the landlord rejects the lease and the tenant yields possession, because if the tenant had completed performance, he would have had to make those expenditures to receive his share of the crops. If the lease is multi-year and the court awards the tenant lost profits for the years after the breach, the tenant will have only an unsecured claim under section 502 for these damages, because no property interest in the future crops has yet come into existence.

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291 See text accompanying notes 120-21 *supra*.

292 See note 104 *supra*.

293 See text accompanying notes 146-48 *supra*.

294 See note 104 *supra*.

295 See text accompanying notes 143-44 *supra*.

## V. Conclusion

The bankruptcy of a farm landlord or tenant affects the entire farm community. Machinery, seed, and chemical dealers who have extended credit to the debtor will be affected, as will lenders who have advanced funds for land purchases and production costs. The farm operator's bankruptcy may also affect other, nonagricultural creditors with whom the farmer and his family have done business.

Among those who have done business with the debtor, the debtor's landlord or tenant is the most likely to have enjoyed a personal, as well as financial, relationship with the debtor. Landlord and tenant may have cooperated over a period of years to plan and carry out long-term farm improvements. Moreover, each may have relied in substantial measure on the other for his livelihood or investment income.

As this article has indicated, the nature of the farm lease (as well as the alternative arrangements for farming on shares) raises a number of specific legal issues in bankruptcy proceedings. The treatment of crops and livestock, the principles governing assumption of unexpired leases, and the damages resulting from breach of a farm lease need special consideration in bankruptcy. This article has focused on legal issues inherent in the bankruptcy of a farm landlord or tenant and has applied principles from the Bankruptcy Code to the farm tenancy relationship. Because of the close relationship of landlord and tenant and the crucial significance of the farm lease to a successful reorganization, it is particularly important that both parties be treated equitably. It is to be hoped that an understanding of the Code as it applies in the farm tenancy situation will further the successful reorganization of farm debtors' businesses and encourage the continued productive use of agricultural land.