

Chapter 12: the Underused—and Hard to Use—Chapter of Bankruptcy

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Chapter 12 of the Bankruptcy Code concerns family farming and fishing operations. As of October 27, 2010, 15 Chapter 12 bankruptcies had been filed in the Eastern District of Wisconsin since January 1, 2009, and 43 in the Western District during the same time period. Of those filings, four have been dismissed in the Eastern District (26.66%) and eight in the Western District (18.6%). Only ten of the 43 Chapter 12 plans in the Western District had been confirmed.

Qualifications to File

Section 109 of the Bankruptcy Code states: "Only a family farmer or family fisherman with regular annual income may be a debtor under chapter 12 of this title."¹ If the debtor is a married individual or a married couple, four requirements must be met:

1. The debtor must be engaged in a farming operation or a commercial fishing operation;
2. The total debts of the debtor's operation must not exceed a set limit (\$3,237,000 for farming; \$1,500,000 for fishing);
3. At least 50% of the total fixed debts (exclusive of the debts for the debtor's home) must be related to the operation (the figure rises to 80% for fishermen); and
4. More than 50% of the gross income of the individual or couple for the preceding tax year (or for the second and third prior tax years for family farmers) must have come from the farming or fishing operation.²

Similar requirements exist for corporations or partnerships to file under Chapter 12. There are further requirements that stock cannot be publicly traded, at least half of the outstanding stock or equity in the corporation or partnership must be owned by a family or its relatives, and 80% or more of the value of the entity must be related to the operation.³

Concerns That Cause Breakdowns During the Filing or Plan Confirmation Processes

Beyond the traditional requirements to file bankruptcy, such as credit counseling, preparation of bankruptcy schedules, and obtaining the necessary tax returns and proof of income, the specific qualifications for Chapter

12 bankruptcy frequently prevent those who could benefit from the chapter's flexibility from availing themselves of those benefits.

Chapter 12 debtors have 90 days from the date of filing to submit a proposed plan.⁴ With exceptions, priority claims, such as child support, alimony, and taxes owed to the government, must be paid in full; debtors must cure arrears on secured debt; and they must pay unsecured creditors at least what they would have received in a Chapter 7 liquidation.⁵ The plan spans no less than three and no more than five years.⁶ This is roughly similar to a Chapter 13 filing.

But family farmers are in a unique position compared with the average wage earner. The typical Chapter 13 debtor might have a mortgage or two on a primary residence, a loan on a vehicle, some general unsecured credit card and medical debt, and other common debt to reorganize. Family farmers, however, may have a lien on their crops or livestock, expensive farm equipment with high equity, and severely fluctuating income, all of which may deter a plan's confirmation.

If spouses file a petition under Chapter 12, they may opt to file a single plan and petition.⁷ Further issues could arise, however,

if one spouse is actively engaged in the family farming operations while the other is employed in a traditional job away from the farm. Even if the income of the non-farming spouse is modest, it is highly probable that the income is greater than the farming income of the couple, which makes them ineligible for Chapter 12. On the other hand, if the non-farming spouse's income is low, and the farm income is also low or in flux, it becomes difficult to show feasibility of the plan and to fund enough to properly treat secured and priority creditors.

The economic realities of supporting a farming operation entail extraordinary strain and require both planning and good fortune. The operation also requires substantial investment in equipment. Even with generous federal or state equity exemptions, farmers are left in a situation in which they cannot have too much equipment paid off, or they will be required to pay their unsecured creditors more than they would have been required to pay from disposable income. Conversely, if the equipment is over-secured, the debtors will be forced to pay heavily over a five-year period to satisfy the lien, or may have to surrender the equipment necessary to the success of the farming operation.

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Marquette law student Rob Catey moderates a discussion with recent law school graduates about their experiences practicing in Milwaukee. The panelists at this MBA-sponsored event at the Law School were Rufino Gaytan, Elizabeth Miles, and Michael Ryan.

“Israeli John Marshall and Earl Warren Wrapped Into One” Delivers Hallows Lecture

Attorney Mariya Basin, Croen & Barr



Aharon Barak

Aharon Barak, a prominent Israeli legal scholar who served as President of the Israeli Supreme Court for 11 years, gave the First Hallows Lecture at Marquette University Law School's new Eckstein Hall on November 1. Barak spoke in the expansive, wood-paneled Appellate Courtroom before an audience of students, faculty, and members of the bar and bench. The annual Hallows Lecture is named in honor of the late E. Harold Hallows, who was, for many years, a Marquette Law School Professor and, later, Chief Justice of the Wisconsin Supreme Court.

The soft-spoken, grey-haired, and bespectacled Barak, speaking with a distinct Hebrew accent, looked and sounded every bit the part of the distinguished jurist that he is. His career has included positions as Dean of Faculty of Law at Hebrew University, legal adviser to the Israeli delegation during the Camp David Accords, Attorney General of Israel, Justice of the Supreme Court of Israel, and, most recently, President of the Supreme Court of Israel. Since taking mandatory retirement from that court in 2006, Barak has returned to academia, and currently holds several teaching positions in Israel, Canada, and the United States.

Barak is widely credited with reshaping the role of Israel's highest court, and Israeli courts in general, through what he calls the “Constitutional Revolution.” One of his major contributions to Israeli law has been the emergence of the view that Israel's Basic Laws, which guarantee basic human rights, amount to a constitution. In the absence of a formal constitutional document, Barak sees the Basic Laws as a basis for challenging, and potentially striking down, laws passed by the Knesset (Israel's parliament) if such laws contravene the tenets of the Basic Laws. Through this ascendancy of the Basic Laws to constitutional status, Barak sees Israel as having been transformed from a parliamentary democracy to a constitutional parliamentary democracy.

The topic of Barak's Hallows Lecture was

“Society, Law, and Judging,” and he used the opportunity to explain his philosophy of judging, as well as his views on the role of judges in society and law. Throughout his 28-year tenure on the Israeli Supreme Court, Barak espoused a “purposive” (as opposed to a “textual”) interpretation of the law, which holds that judges, in interpreting legislation, should consider the purpose for which that legislation was written. As part of that approach, Barak has championed a proactive judiciary, a position for which he has earned both praise and criticism in Israel and abroad. In his Hallows Lecture, Barak argued that while the vast majority of cases requires that a judge merely declare the current law and apply it to the facts of a given case (with the law thus being the same after the decision as before it), a small minority of cases calls for what he termed “judicial creativity,” his name for judicial lawmaking, in which the law before the decision differs from the law after the decision. Barak also asserted that “judicial interpretation without judicial discretion is a myth.” He argued that such discretion is necessary to resolve ambiguities inherent in the natural language used to draft legislation, and to determine how the drafters of the law would have wanted it to be applied in situations they could not have anticipated when drafting the law.

The question of the proper role of judges is, of course, much debated in this country, as well. Barak's views on the role of the judiciary have recently engendered controversy during the public hearings following the nomination of now-Justice Elena Kagan to the U. S. Supreme Court. As readers might recall, Kagan named Barak as her “judicial hero” during her confirmation hearings before the Senate, which generated much heated discussion in both the political and legal worlds. The “judicial hero” characterization, however, appears well in keeping with the words Wisconsin Supreme Court Chief Justice Shirley S. Abrahamson used to describe Barak during his visit to Milwaukee: “an Israeli John Marshall and Earl Warren wrapped into one.” Marquette Law School Dean Joseph D. Kearney concurred in that description as he introduced Barak to the Hallows Lecture audience.

In his private life, Barak is husband to his high-school sweetheart Elisheva Ososkin—

herself an attorney and former Deputy President of the National Labor Court in Israel—and father to their four children, all of whom are attorneys. The children followed not only their parents, but also their grandfather, Barak's father, into the legal profession: Zvi Brick was an attorney in Kaunas, Lithuania, where Aharon was born in 1936. Barak survived three years in the Kovno ghetto during World War II, before his mother, Leah Brick, and his father were able to smuggle him out in a sack. In 1947, after wandering through post-war Europe for several years, the Brick family immigrated to what would become Israel.

Milwaukeeans will be gratified to know that at the conclusion of his Hallows Lecture, Mr. Barak noted that Milwaukee is well known in Israel as the former home of Golda Meir, the fourth Prime Minister of Israel.

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Conclusions

If a petitioning client strikes the right balance between debt and income, reorganization under Chapter 12 can be a success and revitalize the operation. The creditors will cooperate and get paid, and the debtor will be able to emerge with significantly less debt after plan completion. Practical considerations affecting farmers and farming operations in Wisconsin, however, have resulted in very few successful filings and an underutilization of Chapter 12. If family farmers in other states are experiencing the same handicaps in qualifying for and successfully completing Chapter 12 plans, Congress should explore ways to make that chapter more debtor-friendly.

¹¹ U.S.C. § 109(f)

²¹ U.S.C. § 101(18)(A)

³¹ U.S.C. § 101(18)(B)

⁴¹ U.S.C. § 1221

¹¹ U.S.C. § 1222, 1225(a)(4)

⁶¹ U.S.C. § 1222(a)(2)

⁷¹ U.S.C. § 302(a)

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