

# A FIGHTING CHANCE? SMALL FAMILY FARMERS AND HOW LITTLE WE KNOW

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## INTRODUCTION

A chorus is rising: farmers are in crisis, again.<sup>1</sup> Net farm income is expected to decline in 2018, an ongoing trend since 2014 and at an alarming rate.<sup>2</sup> The farm “sector’s solvency ratios are forecast to be at their weakest levels since 2009,”<sup>3</sup> a precarious position that the trade war could exacerbate.<sup>4</sup> Chapter 12 filings have been on the rise since

1. Siena Chrisman, *Is the Second Farm Crisis upon Us?*, CIV. EATS (Sept. 10, 2018), <https://civileats.com/2018/09/10/is-the-second-farm-crisis-upon-us/> (describing how “[f]or well over a year, worries about a new farm crisis have rippled across rural America”); Grant Gerlock, *USDA: Farm Economy on the Upswing, but Not for Everyone*, HIGH PLAINS PUB. RADIO (May 18, 2018, 8:42 AM), <http://hpr.org/post/usda-farm-economy-upswing-not-everyone>; Peggy Lowe, *Farm Economy Downturn Prompts Fears of a ‘Crisis’*, HARVEST PUB. MEDIA (July 23, 2017), <http://harvestpublicmedia.org/post/farm-economy-downturn-prompts-fears-crisis>; Frank Morris, *Farmers Say Current Trade War Mirrors 1980 Russian Grain Embargo*, HARVEST PUB. MEDIA (Sept. 24, 2018, 6:45 AM), <http://netnebraska.org/article/news/1144754/farmers-say-current-trade-war-mirrors-1980-russian-grain-embargo> (“Harvest season isn’t far away for corn and soybean farmers, whose crops are worth less now than when they planted in the spring due to the United States’ trade war.”); Joe Peiffer, *Chapter 12 Bankruptcy Must Be Amended*, ILL. FARMER TODAY (Feb. 6, 2016), [https://www.agupdate.com/illinoisfarmertoday/opinion/chapter-bankruptcy-must-be-amended/article\\_c60b21e5-8ef6-54b9-8c98-98d52b43812e.html](https://www.agupdate.com/illinoisfarmertoday/opinion/chapter-bankruptcy-must-be-amended/article_c60b21e5-8ef6-54b9-8c98-98d52b43812e.html); Tovia Smith, *As Milk Prices Decline, Worries About Dairy Farmer Suicides Rise*, NPR (Feb. 27, 2018, 11:31 AM), <https://www.npr.org/2018/02/27/586586267/as-milk-prices-decline-worries-about-dairy-farmer-suicides-rise>.

2. See ECON. RESEARCH SERV., U.S. DEPT OF AGRIC., U.S. FARM SECTOR FINANCIAL INDICATORS, 2011-2018F (2018), [https://www.ers.usda.gov/media/9983/farmsectorindicators\\_august2018.xlsx](https://www.ers.usda.gov/media/9983/farmsectorindicators_august2018.xlsx) (data as of August 30, 2018). The anticipated net farm income for the coming year, \$65.7 billion, is a little more than half the net farm income seen in 2013. *Id.* (listing a net farm income of \$65.7 billion expected in 2018, down from \$75.5 billion in 2017, \$61.6 billion in 2016, \$81.5 billion in 2015, \$92.4 billion in 2014, and \$123.8 billion in 2013).

3. *Assets, Debt, and Wealth*, U.S. DEPT AGRIC. (Aug. 30, 2018), <https://www.ers.usda.gov/topics/farm-economy/farm-sector-income-finances/assets-debt-and-wealth/>.

4. Carol Ryan Dumas, *National Farm Debt Continues to Rise*, CAP. PRESS (Sept. 24, 2018) (interviewee Brent Glory, a partner at Agricultural Economics Insights, stating that “the situation is not as bad as the dramatic downturn in the ’80s, [but] it does share some of the same elements—with the trade deal reminiscent of the shocks going on at that time”); Bryan Lowry & Tessa Weinberg, *Missouri, Kansas Farmers ‘at the Mercy’ of China and Trump as Trade Fight Escalates*, KAN. CITY STAR (Apr. 4, 2018, 5:23 PM), <https://www.kansascity.com/news/business/article207950629.html> (describing the impact of Chinese tariffs on a variety of agricultural exports); Jeff Stein, *Two U.S. Senators Applying for Bailout Money for Farmers Under White House Program*, WASH. POST (Sept. 28, 2018), [https://www.washingtonpost.com/business/2018/09/28/sen-charles-grassley-apply-bailout-money-farmers-under-white-house-program/?utm\\_term=.c7cdb3d8b8c5](https://www.washingtonpost.com/business/2018/09/28/sen-charles-grassley-apply-bailout-money-farmers-under-white-house-program/?utm_term=.c7cdb3d8b8c5) (“The Agriculture Department confirmed last week it

2013, increasing by nine percent in the last calendar year,<sup>5</sup> while filings under chapters 7 and 13 fell to a ten-year low.<sup>6</sup> Though farm

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has already sent more than 7,800 bailout checks totaling over \$25 million to farmers across the country. The assistance is intended to help farmers survive the trade war with China, which has dramatically widened in scope this month after the U.S. announced it would target another \$200 billion in Chinese goods.”). Eligible farmers or ranchers “whose commodities have been directly impacted by unjustified foreign retaliatory tariffs” will receive direct payments from the Market Facilitation Program administered by the U.S. Department of Agriculture. *Market Facilitation Program*, U.S. DEP’T AGRIC., <https://www.farmers.gov/manage/mfp> (last visited Oct. 1, 2018). Data presented in this Article do not incorporate Market Facilitation Program payments. *See, e.g., Assets, Debt, and Wealth*, *supra* note 3 (“Financial ratios that use net farm income in their derivation . . . do not include a 2018 forecast of Market Facilitation Program (MFP) payments announced on July 24, 2018. . . . At the time the August forecast was developed, ERS did not have sufficient detail regarding payment rates, payment timing, or eligibility criteria to be able to forecast payment levels for 2018.”).

5. ADMIN. OFFICE OF THE U.S. COURTS, TABLE F-2: U.S. BANKRUPTCY COURTS—BUSINESS AND NONBUSINESS CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE 12-MONTH PERIOD ENDING DECEMBER 31, 2017, at 1 (2018) [hereinafter CASES COMMENCED DURING 2017], <http://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2017/12/31> (reporting 501 chapter 12 filings); ADMIN. OFFICE OF THE U.S. COURTS, TABLE F-2: U.S. BANKRUPTCY COURTS—BUSINESS AND NONBUSINESS CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE 12-MONTH PERIOD ENDING DECEMBER 31, 2016, at 1 (2017) [hereinafter CASES COMMENCED DURING 2016], <http://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2016/12/31> (reporting 461 chapter 12 filings); ADMIN. OFFICE OF THE U.S. COURTS, TABLE F-2: U.S. BANKRUPTCY COURTS—BUSINESS AND NONBUSINESS CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE 12-MONTH PERIOD ENDING DECEMBER 31, 2015, at 1 (2016) [hereinafter CASES COMMENCED DURING 2015], <http://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2015/12/31> (reporting 407 chapter 12 filings); ADMIN. OFFICE OF THE U.S. COURTS, TABLE F-2: U.S. BANKRUPTCY COURTS—BUSINESS AND NONBUSINESS CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE 12-MONTH PERIOD ENDING DECEMBER 31, 2014, at 1 (2015) [hereinafter CASES COMMENCED DURING 2014], <http://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2014/12/31> (reporting 361 chapter 12 filings). Going from 461 chapter 12 filings in 2016 to 501 chapter 12 filings in 2017 represents an increase of about nine percent in the last calendar year ((501-461)/461=0.087).

6. CASES COMMENCED DURING 2017, *supra* note 5, at 1 (reporting 486,347 chapter 7 filings and 294,637 chapter 13 filings); CASES COMMENCED DURING 2016, *supra* note 5, at 1 (reporting 490,365 chapter 7 filings and 296,655 chapter 13 filings); CASES COMMENCED DURING 2015, *supra* note 5, at 1 (reporting 535,047 chapter 7 filings and 301,705 chapter 13 filings); CASES COMMENCED DURING 2014, *supra* note 5, at 1 (reporting 619,069 chapter 7 filings and 310,061 chapter 13 filings); ADMIN. OFFICE OF THE U.S. COURTS, TABLE F-2: U.S. BANKRUPTCY COURTS—BUSINESS AND NONBUSINESS CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE 12-MONTH PERIOD ENDING DECEMBER 31, 2013, at 1 (2014) [hereinafter CASES COMMENCED DURING 2013], <http://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2013/12/31> (reporting 728,833 chapter 7 filings and 333,626 chapter 13 filings); ADMIN. OFFICE OF THE U.S. COURTS, TABLE F-2: U.S. BANKRUPTCY COURTS—

BUSINESS AND NONBUSINESS CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE 12-MONTH PERIOD ENDING DECEMBER 31, 2012, at 1 (2013) [hereinafter CASES COMMENCED DURING 2012], <http://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2012/12/31> (reporting 843,545 chapter 7 filings and 366,532 chapter 13 filings); ADMIN. OFFICE OF THE U.S. COURTS, TABLE F-2: U.S. BANKRUPTCY COURTS—BUSINESS AND NONBUSINESS CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE 12-MONTH PERIOD ENDING DECEMBER 31, 2011, at 1 (2012) [hereinafter CASES COMMENCED DURING 2011], <http://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2011/12/31> (reporting 992,332 chapter 7 filings and 406,084 chapter 13 filings); ADMIN. OFFICE OF THE U.S. COURTS, TABLE F-2: U.S. BANKRUPTCY COURTS—BUSINESS AND NONBUSINESS CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE 12-MONTH PERIOD ENDING DECEMBER 31, 2010, at 1 (2011) [hereinafter CASES COMMENCED DURING 2010], <http://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2010/12/31> (reporting 1,139,601 chapter 7 filings and 438,913 chapter 13 filings); ADMIN. OFFICE OF THE U.S. COURTS, TABLE F-2: U.S. BANKRUPTCY COURTS—BUSINESS AND NONBUSINESS CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE 12-MONTH PERIOD ENDING DECEMBER 31, 2009, at 1 (2010) [hereinafter CASES COMMENCED DURING 2009], <http://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2009/12/31> (reporting 1,050,832 chapter 7 filings and 406,962 chapter 13 filings); ADMIN. OFFICE OF THE U.S. COURTS, TABLE F-2: U.S. BANKRUPTCY COURTS—BUSINESS AND NONBUSINESS CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE TWELVE MONTH PERIOD ENDED DEC. 31, 2008, at 1 (2009) [hereinafter CASES COMMENCED DURING 2008], <http://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2008/12/31> (reporting 744,424 chapter 7 filings and 362,762 chapter 13 filings).

Chapter 11 filings increased slightly in recent years but have been trending down since 2007. CASES COMMENCED DURING 2017, *supra* note 5, at 1 (reporting 7,442 chapter 11 filings); CASES COMMENCED DURING 2016, *supra* note 5, at 1 (reporting 7,292 chapter 11 filings); CASES COMMENCED DURING 2015, *supra* note 5, at 1 (reporting 7,241 chapter 11 filings); CASES COMMENCED DURING 2014, *supra* note 5, at 1 (reporting 7,234 chapter 11 filings); CASES COMMENCED DURING 2013, *supra*, at 1 (reporting 8,980 chapter 11 filings); CASES COMMENCED DURING 2012, *supra*, at 1 (reporting 10,361 chapter 11 filings); CASES COMMENCED DURING 2011, *supra*, at 1 (reporting 11,529 chapter 11 filings); CASES COMMENCED DURING 2010, *supra*, at 1 (reporting 13,713 chapter 11 filings); CASES COMMENCED DURING 2009, *supra*, at 1 (reporting 15,189 chapter 11 filings); CASES COMMENCED DURING 2008, *supra*, at 1 (reporting 10,160 chapter 11 filings).

Chapter 12 filings have been on the rise. Diane Davis, *Bankruptcy Filings Hit 10-Year Low, May Rise Again*, BLOOMBERG L. (Oct. 18, 2017), <https://www.bna.com/bankruptcy-filings-hit-n73014471103/> (describing concern expressed by University of North Carolina School of Law Professor Melissa Jacoby due to “the significant increase in Chapter 12 (family farmer) filings even though the overall number is small”). Bankruptcy filings as of June 30, 2017, suggest a slight decrease in chapter 12 filings as of the same date the previous year. Daniel Gill, *Corporate Bankruptcies Up Amid Retail Woes, Consumer Filings Fall*, BLOOMBERG L. (July 25, 2018), <https://news.bloomberglaw.com/bankruptcy-law/corporate-bankruptcies-up-amid-retail-woes-consumer-filings-fall?context=article-related> (reporting decreases in business and non-business bankruptcies overall as compared to June 30, 2017, though chapter 11 increased by 2% and chapter 12 decreased by 1% ((475-482)/482=-0.01)).

sector equity predictably increased in recent decades, inflation-adjusted equity in the last few years suggests that this trend has plateaued.<sup>7</sup> More importantly, farmers cannot service debt with equity alone and continue to farm.<sup>8</sup>

Chapter 12 of the Bankruptcy Code uniquely allows small family farmers to rewrite all of their secured debt in a proposed reorganization plan that does not require a vote.<sup>9</sup> This extraordinary relief was intended to “give family farmers facing bankruptcy a fighting chance to reorganize their debts and keep their land.”<sup>10</sup> While chapter 12 plays an important role in the small farm economy,<sup>11</sup> few families make use of chapter 12 and fewer still report on its effectiveness.<sup>12</sup> Studies of chapter 12 have not asked whether chapter 12 participants maintain their land and continue to farm.<sup>13</sup> Indeed, most evaluations rely on bankruptcy filing data and perspectives of those administering the bankruptcy system, methods that fail to incorporate the lived experiences of farmers.<sup>14</sup> Research for this

7. ECON. RESEARCH SERV., *supra* note 2. Inflation-adjusted farm sector equity is forecasted to remain stagnant in 2018. *Assets, Debt, and Wealth*, *supra* note 3.

8. Todd Neeley, *Farm Business: Ag Lender Expects Increased Chapter 12 Bankruptcies*, AGFAX (Jan. 23, 2018), <https://agfax.com/2018/01/23/farm-business-ag-lender-expects-increased-chapter-12-bankruptcies-dtn/> (discussing the opinion of Joseph A. Peiffer, an agriculture bankruptcy attorney based in Cedar Rapids, Iowa, that if “the farmer loses money, the farmer does not have sufficient money to service debt”); *see also* SCOTT L. HIPPEN & NEIL E. HARL, *THE EXPERIENCE OF CHAPTER 12 BANKRUPTCY FILERS IN IOWA 22* (1995) (on file with the author) (surveying chapter 12 participants who filed shortly after chapter 12’s enactment and finding that “[t]he nonfarm income at filing was markedly higher for those respondents who were successful in using the [chapter 12] plan”).

9. Jan M. Sensenich, *Chapter 12 of the U.S. Bankruptcy Code Turns Thirty*, 42 VT. B.J. 24, 24 (2016); *see* 11 U.S.C. §§ 1123(b)(5), 1222(b)(2), 1225, 1322(b)(2) (2012); *see also infra* Section I.C. A court may not confirm a plan unless unsecured claimants receive as much as they would receive in a liquidation under chapter 7. § 1225(a)(4). If a proposed plan does not surrender property to a secured party and the secured party does not accept the plan, the secured party is entitled to the value of its claim and the plan must provide that the secured party retain a lien securing its claim. § 1225(a)(5).

10. H.R. REP. NO. 99-958, at 48 (1986) (Conf. Rep.); *see* 132 CONG. REC. 28,592 (1986) (statement of Sen. Thurmond) (“It is important, however, that we remember that the family farm provisions of this bill are an extraordinary response to what is, hopefully, a temporary crisis. . . . The legislation is meant to assist those farmers who have the true potential to reorganize and to allow them relief from heavy debt burden, and yet allow farmers to pay creditors what is reasonable under today’s difficult economic situation.”).

11. *See infra* Section II.A.

12. *See infra* Part III.

13. HIPPEN & HARL, *supra* note 8, at 5.

14. *See infra* Part III. Chapter 12 studies also focus on the West, Midwest, and California, despite the prevalence of chapter 12 filings in the South and elsewhere. *Id.*

Article uncovered only a single study exploring the benefits of chapter 12 that surveyed participating farmers.<sup>15</sup>

As illustrated by the small family farm profiled below, chapter 12 filers may not be vulnerable to undersecured debt. Broader economic failures may undercut their fighting chance.<sup>16</sup> Small commercial family farms increasingly compete with large commercial farms.<sup>17</sup> To survive is to be resourceful; most small commercial family farmers supplement farm income with off-farm employment.<sup>18</sup> Yet rural economies where farms operate experience poverty and unemployment at higher rates and for longer periods than their urban neighbors.<sup>19</sup> For the McCollums, who filed under chapter 12 in 2013 in the Middle District of North Carolina, real property appraisals over the pendency of their case indicated that their farm debt was fully secured.<sup>20</sup> While the family attempted to cover costs with off-farm income and sold half of their farm during their case, the McCollums could not service their debt.<sup>21</sup> The family ultimately paid \$14,900 over three years to administer a restructuring effort that converted to a chapter 7 liquidation.<sup>22</sup> In the year they filed, the poverty rate in their county, Rockingham County, North Carolina, was seven percentage points higher than the national average.<sup>23</sup>

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15. See *infra* Part III; see also HIPPEN & HARL, *supra* note 8, at 7 (surveying farmers who filed for chapter 12 in Iowa).

16. See *infra* Part II.

17. ECON. RESEARCH SERV., U.S. DEPT OF AGRIC., AMERICA'S DIVERSE FAMILY FARMS: 2016 EDITION, at 5 (2016), <https://www.ers.usda.gov/publications/pub-details/?pubid=81401>. USDA defines a "family farm" as "any farm where the majority of the business is owned by the operator and individuals related to the operator, including relatives who do not live in the operator's household." U.S. DEPT OF AGRIC., 2012 CENSUS OF AGRICULTURE: FARM TYPOLOGY, at III (2015), [https://www.agcensus.usda.gov/Publications/2012/Online\\_Resources/Typology/typology13.pdf](https://www.agcensus.usda.gov/Publications/2012/Online_Resources/Typology/typology13.pdf); Jacob Bunge, *Supersized Family Farms Are Gobbling Up American Agriculture*, WALL ST. J. (Oct. 23, 2017, 2:04 PM), <https://www.wsj.com/articles/the-family-farm-bulks-up-1508781895>. A small family farm grosses \$350,000 or less in cash farm income; a midsize family farm grosses between \$350,000 and \$999,999. ECON. RESEARCH SERV., *supra*, at 3.

18. ROBERT A. HOPPE, JAMES M. MACDONALD & PENNI KORB, SMALL FARMS IN THE UNITED STATES: PERSISTENCE UNDER PRESSURE 20 (2010), <https://www.ers.usda.gov/publications/pub-details/?pubid=44463>.

19. See *infra* Section II.A.

20. See *infra* Section II.B.2.

21. See *id.*

22. See *id.*

23. See *infra* Section II.A. The 2013 poverty rate for Rockingham County, North Carolina, was 21.2%. *Small Area Income and Poverty Estimates*, U.S. CENSUS BUREAU, [https://www.census.gov/data-tools/demo/saipe/saipe.html?s\\_appName=saipe&map\\_yearSelector=2013&map\\_geoSelector=aa\\_c&s\\_state=37&s\\_county=37157&s\\_year=2016,2013](https://www.census.gov/data-tools/demo/saipe/saipe.html?s_appName=saipe&map_yearSelector=2013&map_geoSelector=aa_c&s_state=37&s_county=37157&s_year=2016,2013) (last visited Nov. 20,

This Article proceeds in three parts. Part I explores the history, purpose, and policies of chapter 12. Part II describes the use of chapter 12, focusing on small commercial family farmers who filed for bankruptcy in the Middle District of North Carolina in 2013: William and Martha McCollum, part owners of Massey Creek Farms. Their case ultimately converted to chapter 7, an outcome representative of other chapter 12 filings. Thus, Part III catalogues pernicious gaps in our understanding of chapter 12 filers and rural economies more broadly. The paper celebrates chapter 12's important and helpful contributions to the small farm economy but uncovers a pronounced need for guidance as to if and how these families successfully keep their land and continue to farm.

#### I. AGRICULTURAL ECONOMICS & CHAPTER 12 IN THEORY

Farmers typically secure an operating line of credit from a single lender by encumbering all or most of their farm assets.<sup>24</sup> Farmers then pay trade suppliers for “seed, feed, chemical[s], and fuel” in advance of their harvest with funds from the operating line.<sup>25</sup> Following harvest and crop marketing, farmers pay their operating loan with proceeds from that season's crops.<sup>26</sup> As compared to other debtors who repay creditors on a monthly or quarterly amortized schedule, farmers may only make one full annual payment on their operating line.<sup>27</sup> Farm businesses face substantial risk in both output and prices. Weather variations or disease outbreaks may unexpectedly impact crop and livestock production, or otherwise hinder planting or

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2018) (filtered by “North Carolina,” then “Rockingham County,” then “2013.”). The official national poverty rate in 2013 was 14.5%. CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2013, at 13 (2014), <https://www.census.gov/library/publications/2014/demo/p60-249.html>.

24. J. David Aiken, *Chapter 12 Family Farmer Bankruptcy*, 66 NEB. L. REV. 632, 635 (1987).

25. *Id.* at 636.

26. *Id.*

27. *Cf.* Mike Lowry, *A New Paint Job on an '85 Yugo: BAPCPA Improves Chapter 12 but Will It Really Make a Difference?*, 12 DRAKE J. AGRIC. L. 231, 234 (2007) (“During the debates leading to enactment [of the Act of 1800], representatives of agrarian interests objected to the bill's involuntary bankruptcy provisions. The argument focused on the fact that farmers paid their creditors when the crops were harvested and as a result payments were generally late.”); Sensenich, *supra* note 9, at 24 (“Chapter 12 allows farmers . . . to structure payments to match their cash flow. The payments do not have to be monthly or even quarterly. In some cases, payments are annual, depending on the debtor's cash flow and production cycles.”).

harvesting efforts.<sup>28</sup> Agricultural prices are also subject to volatility due to imperfect market information and time lags between planting and harvesting, which makes a farmer's "ability to alter supply . . . limited in the short run."<sup>29</sup>

These risks mean farm income can be highly volatile; farming households may experience an annual income that is negative.<sup>30</sup> A panel data study of commercial farms surveyed more than once between 1996 and 2013 found that median farm household income could fluctuate by as much as \$100,000 from one year to another.<sup>31</sup> During that same time period, median income for farm households was also about \$100,000.<sup>32</sup> That is, median farm household income could fluctuate year-to-year by as much as a median farm makes in a single year.<sup>33</sup> Fifty-five percent of commercial farms with less than \$750,000 in farm assets experienced at least one year of negative income over the eighteen-year study period; twenty-four percent of the same group experienced at least two years of negative income.<sup>34</sup> By comparison, nonfarm households surveyed over the same time period saw a median change of only \$11,000 from one year to another, which was only a quarter of their median income.<sup>35</sup>

Small commercial family farms, operated by people who "report farming as their major occupation," represent approximately a third of all U.S. farms.<sup>36</sup> Yet the farm income panel data study introduced above "focuse[d] on larger scale commercial farms," those responsible for the majority of agricultural output.<sup>37</sup> Current economic

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28. NIGEL KEY, DANIEL PRAGER & CHRISTOPHER BURNS, ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., FARM HOUSEHOLD INCOME VOLATILITY: AN ANALYSIS USING PANEL DATA FROM A NATIONAL SURVEY 1 (2017), <https://www.ers.usda.gov/webdocs/publications/82564/err-226.pdf>.

29. *Id.*

30. *Id.* at 1, 18.

31. *Id.* at 10.

32. *Id.*

33. *Id.* at 14, 18.

34. *Id.* at 18.

35. *Id.* at 14.

36. ECON. RESEARCH SERV., *supra* note 17, at 3. USDA defines a "family farm" as "any farm where the majority of the business is owned by the operator and individuals related to the operator, including relatives who do not live in the operator's household." U.S. DEP'T OF AGRIC., *supra* note 17, at III. A small farm grosses \$350,000 or less in cash farm income; a medium farm grosses between \$350,000 and \$999,999. *Id.* Small family farms in total represent almost ninety percent of all U.S. farms. ECON. RESEARCH SERV., *supra* note 17, at 3–4. However, the majority of these farms are not commercial, classified as "retirement farms" in that the farm operators have retired but continue to farm on a small scale. *Id.* at 3. These farms gross less than \$350,000 in cash farm income. *Id.*

37. KEY, PRAGER & BURNS, *supra* note 28, at iii.

scholarship does not explicitly address small farm household income fluctuations over time.<sup>38</sup> Previous point-in-time data on small farm households suggest that these farmers experience less income variability due to their reliance on off-farm income.<sup>39</sup> But a small family farm that sources half or more of its income from off-farm employment does not qualify for relief under chapter 12.<sup>40</sup> Further, small commercial family farms operate with a profit margin of less than ten percent, “indicating a higher risk of financial problems.”<sup>41</sup> The McCollum household operated with an estimated annual profit margin of less than one percent based on their filing data.<sup>42</sup> The absence of sufficient income to cover the expenses of running a small commercial family farm limits a farmer’s ability to pay its debt, perhaps as much as the “[l]arge unplanned income fluctuations”<sup>43</sup> that contributed to bankruptcy legislation on behalf of farmers.<sup>44</sup>

Despite concern for agricultural viability during early bankruptcy discussions in the 1800s, Congress did not permit specialized farm debt restructuring until reorganization proved unrealistic under existing bankruptcy provisions.<sup>45</sup> Following the Great Depression, and again in response to the 1980s farm crisis, Congress developed family farmer bankruptcy provisions to facilitate farm rehabilitation; the most recent provisions became a permanent chapter of the Bankruptcy Code. Today, qualifying small family farmers may file a chapter 12 petition and propose a plan to reorganize, relying on debt restructuring mechanisms unavailable to other bankrupt consumers and businesses.<sup>46</sup>

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38. *Id.* at 2 (“The dearth of information about U.S. farm household income variability largely stems from a lack of data tracking farm household income over time—that is, farm household panel data. Past studies of farm income variability at the national level have relied on either aggregate or cross-sectional data.”).

39. HOPPE, MACDONALD & KORB, *supra* note 18, at 20.

40. *See* 11 U.S.C. § 101(18) (2012).

41. ECON. RESEARCH SERV., *supra* note 17, at 7–8.

42. *See infra* Section II.B.

43. KEY, PRAGER & BURNS, *supra* note 28, at 1; Neeley, *supra* note 8.

44. NAT’L BANKR. REVIEW COMM’N, BANKRUPTCY: THE NEXT TWENTY YEARS 1017–18 (1997) [hereinafter COMMISSION II], <http://govinfo.library.unt.edu/nbrcl/reportcont.html>.

45. *See infra* Section I.A.

46. *See infra* Sections I.A, I.B.

*A. History of Farm Debt Restructuring Legislation*

The first federal bankruptcy law, passed in 1800, created an involuntary process for creditors to hold debtors accountable.<sup>47</sup> The unique challenges faced by farmers concerned

representatives of agrarian interests . . . . The[ir] argument focused on the fact that farmers paid their creditors when the crops were harvested and as a result payments were generally late. . . . [U]rban creditors could easily ruin farmers whose financial lives were dependent upon forces they could not control.<sup>48</sup>

Regardless, farmers did not earn an exemption from being declared bankrupt involuntarily until the passage of the Bankruptcy Act of 1898.<sup>49</sup> Then, when the Great Depression hit farmers early and hard, due in part to “chronic overproduction,”<sup>50</sup> reduced farm incomes combined with highly leveraged farm operations led to extreme mortgage foreclosure rates. “On a single day in April of 1932, one-fourth of all the land in Mississippi was sold at foreclosure auctions.”<sup>51</sup>

To limit farm foreclosures and facilitate rehabilitation, Congress amended the Bankruptcy Act in 1933 with Section 75 to allow “extensions and compositions of farmer indebtedness.”<sup>52</sup> But extensions and compositions fell short: the first mortgage-holder,

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47. Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (repealed 1803); COMM’N ON THE BANKR. LAWS OF THE U.S., REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES 76–77 (1973) [hereinafter COMMISSION I]; David A. Skeel, Jr., *Bankruptcy Lawyers and the Shape of American Bankruptcy Law*, 67 FORDHAM L. REV. 497, 497 (1998).

48. Lowry, *supra* note 27, at 234.

49. S. 1035, 55th Cong. § 3 (1898); Skeel, *supra* note 47, at 497 (citing Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978)); *see also* Lowry, *supra* note 27, at 234. The Bankruptcy Act of 1898 exempted individuals “engaged chiefly in farming or the tillage of soil” from being declared “bankrupt” involuntarily. J. ADRIANCE BUSH, THE NATIONAL BANKRUPTCY ACT OF 1898 WITH NOTES, PROCEDURE AND FORMS 63 (1899), <https://archive.org/stream/cu31924019326432#page/n5/mode/2up>.

50. David Ray Papke, *Rhetoric and Retrenchment: Agrarian Ideology and American Bankruptcy Law*, 54 MO. L. REV. 871, 881 (1989) (“Farm prices fell throughout the [1920s], and by 1929 the per capita income of American farmers was only thirty-six percent of that for all Americans.”).

51. *Id.* at 881–82.

52. John Hanna, *New Frazier-Lemke Act*, 1 MO. L. REV. 1, 1 (1936); *see also* Lowry, *supra* note 27, at 238; Papke, *supra* note 50, at 882.

which usually represented “a majority of creditors holding a majority of claims” could defeat a proposed debt restructuring plan, creating “an absolute veto” to rehabilitation.<sup>53</sup> Congress addressed this shortcoming with the Frazier-Lemke Farm Bankruptcy Act in 1934,<sup>54</sup> permitting a farm debtor with the mortgagee’s consent to repurchase the property at the current appraised value or, if the mortgagee refused the appraised value sale, permitting a federal court to stay collection efforts for five years while the debtor remained in possession, paying annual rent to secured and unsecured creditors.<sup>55</sup> At the end of five years, the debtor could then pay the remaining value of the property at the appraised value.<sup>56</sup> While the U.S. Supreme Court initially found these provisions unconstitutional,<sup>57</sup> later revisions—reducing the five-year rental period to three and permitting a secured creditor to force a public sale and bid at the public sale, and to otherwise retain a lien on the property until the debt was paid<sup>58</sup>—proved constitutionally sound.<sup>59</sup>

While Section 75 “was only . . . temporary . . . and expired in 1949,”<sup>60</sup> the broader bankruptcy scheme initiated by the 1898 Act continued until 1978.<sup>61</sup> Following World War II, mounting consumer bankruptcies prompted Congress to form a Commission in 1970 that studied the bankruptcy system and proposed recommendations.<sup>62</sup> The Commission’s report surveyed several business bankruptcy studies, which were unrepresentative of either agricultural interests or rural economies.<sup>63</sup> Contributory research also excluded qualitative analyses

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53. Hanna, *supra* note 52, at 1; *see also* Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 574–75 (1935).

54. Frazier-Lemke Farm Bankruptcy Act, Pub. L. No. 73-486, 48 Stat. 1289 (1934).

55. *Id.* at 1289–91; *see also* Radford, 295 U.S. at 575–76; Lowry, *supra* note 27, at 238; Papke, *supra* note 50, at 883–84.

56. Radford, 295 U.S. at 575–76; *see also* Lowry, *supra* note 27, at 238.

57. Radford, 295 U.S. at 601–02 (finding Section 75 to unconstitutionally interfere with a secured creditor’s private property rights without just compensation); *see also* Lowry, *supra* note 27, at 238; Papke, *supra* note 50, at 886–87.

58. Wright v. Vinton Branch of Mountain Tr. Bank, 300 U.S. 440, 457–58 (1937); *see also* 8 COLLIER ON BANKRUPTCY ¶ 1200.01[1] (Richard Levin & Henry J. Sommer eds., 16th ed. 2017).

59. Wright, 300 U.S. at 470. An alternative explanation may be the change in voting of Justice Roberts in 1937. *See* William H. Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579, 593–94 (2004).

60. Lowry, *supra* note 27, at 238.

61. Lawrence Shepard, *Personal Failures and the Bankruptcy Reform Act of 1978*, 27 J.L. & ECON. 419, 423 (1984).

62. COMMISSION I, *supra* note 47, at 46, 67.

63. *Id.* at 37, 40.

of debtors as well as the experience of small businesses or sole proprietorships.<sup>64</sup> Similarly, the consumer bankruptcy studies reviewed did not distinguish between urban and rural debtors.<sup>65</sup> Relying in part on the Commission's recommendations, the Bankruptcy Reform Act of 1978 created the Bankruptcy Code in use since 1979, including consolidated business reorganizations in chapter 11 and expanded exemptions for consumer bankruptcies in chapter 13.<sup>66</sup> "Despite the lessons of the twenties and thirties and the fact that the 1978 Reform Act represents the single most extensive revision of bankruptcy law in American history, the Bankruptcy Reform Act did not provide any special protection to farmers."<sup>67</sup> That is, until the farm economy collapsed.

### *B. The 1980s Farm Crisis*

In response to rising commodity prices and expanding export opportunities in the 1970s, farmers planted as advised: "fencerow to fencerow."<sup>68</sup> Optimistic agricultural production led to optimistic agricultural lending and borrowing, secured against "steadily increasing land values."<sup>69</sup> But crop prices turned in the late 1970s, leading to farm operating losses and risky financing. Because lenders remained oversecured based on land prices, which were still rising, they continued to extend credit despite farm debtors operating without positive cash flows.<sup>70</sup>

When farmers began defaulting, lenders cut their operating credit lines, but they did not immediately initiate foreclosure proceedings because their after acquired property clauses entitled them to a "first lien on future crops even with no further credit advances."<sup>71</sup> Farmers that continued to operate relied on credit from trade suppliers by offering to pay after the harvest. Trade suppliers "mistakenly believed they had the first security position on the new crop," but they "were rarely secured."<sup>72</sup> Ultimately farmers defaulted to their trade

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64. *Id.* at 37-38.

65. *Id.* at 43-44. Several studies did document how long debtors had lived in a given city or state. *Id.*

66. Shepard, *supra* note 61, at 423-24.

67. COMMISSION II, *supra* note 44, at 1011.

68. Aiken, *supra* note 24, at 634 (citing Secretary of Agriculture, Earl Butz).

69. *Id.* at 635 ("The rising crop and land prices of the early 1970s along with the economic promise of producing for the new farm export market made farmers and farm lenders bullish regarding agriculture's prospects.")

70. *Id.* at 636.

71. *Id.*

72. *Id.*

suppliers as well, and land values began a precipitous decline. By 1985, a third of operating farms were estimated to be in severe financial distress.<sup>73</sup>

As a result, “agriculture faced conditions reminiscent of the Great Depression,”<sup>74</sup> including an absence of existing bankruptcy procedures to facilitate rehabilitation. Farmers did not have sufficient funds or capital to adequately protect creditor interests under chapter 11; they could not pay their trade suppliers or their operating creditors much less pay post-petition interest on their land. Farmers also did not have unencumbered property to award additional liens to undersecured creditors. When farmers filed a chapter 11 petition, secured creditors motioned for relief from the automatic stay, which was often granted, and creditors initiated foreclosure proceedings on the farmer’s land.<sup>75</sup> Even “[i]f a farmer could survive the relief from the automatic stay, the absolute priority rule virtually” blocked confirmation of a reorganization plan.<sup>76</sup> Because chapter 11 prioritizes unsecured creditors over equity holders, most farmers could not propose a reorganization plan that maintained ownership in their farm and paid unsecured creditors.<sup>77</sup> Chapter 13 debt ceilings prohibited most farmers from qualifying,<sup>78</sup> and most farmers needed more than five years to restructure their debts.<sup>79</sup> Thus, in 1986, Congress enacted chapter 12 of the Bankruptcy Code to enable family farm reorganizations.<sup>80</sup>

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73. Lowry, *supra* note 27, at 239; *see also* COMMISSION II, *supra* note 44, at 1012. “Nominal U.S. average farmland prices fell from a post-World War I high of \$69 per acre in 1920 to a Great Depression low of \$30 per acre in 1933.” JEROME M. STAM & BRUCE L. DIXON, ECON. RESEARCH SERV., U.S. DEP’T OF AGRIC., FARMER BANKRUPTCIES AND FARM EXITS IN THE UNITED STATES, 1899–2002, at 11 (2004), [https://www.ers.usda.gov/webdocs/publications/42532/17750\\_aib788\\_1\\_.pdf?v=](https://www.ers.usda.gov/webdocs/publications/42532/17750_aib788_1_.pdf?v=). Farmland values did not recover to pre-Depression levels until the 1950s. *Id.*

74. Lowry, *supra* note 27, at 239.

75. Aiken, *supra* note 24, at 663.

76. *Id.*

77. COMMISSION I, *supra* note 47, at 254 (“The absolute priority rule is a recognition of the general principle that creditors, in the order of their contractual or judicially obtained priorities, must be satisfied in full from the debtor’s nonexempt assets if equity security holders are to retain any interest in the debtor’s assets. It is a recognition of the principle that a corporation holds its assets as a trust fund charged primarily with the payment of corporate liabilities.”) (internal quotations omitted) (citation omitted).

78. Aiken, *supra* note 24, at 637.

79. Jeffrey Coe, *Making Chapter 12 More Viable for Family Farmers*, AM. BANKR. INST. J. 12, 12 (Dec. 2017).

80. Aiken, *supra* note 24, at 680; Lowry, *supra* note 27, at 239; *see also* Larry Green, *Bankruptcy Law: Farm Saga: Chapter 12 Tells of Hope*, L.A. TIMES (June 23, 1987), [http://articles.latimes.com/1987-06-23/news/mn-10161\\_1\\_bankruptcy-law](http://articles.latimes.com/1987-06-23/news/mn-10161_1_bankruptcy-law).

*C. Chapter 12 of the Bankruptcy Code*

The Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 formally incorporated a family farmer chapter into the Bankruptcy Code,<sup>81</sup> which was made permanent by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”).<sup>82</sup> The family farmer chapter is essentially a “hybrid of” chapters 11 and 13,<sup>83</sup> but it is limited only to those engaged in farming or fishing.<sup>84</sup> Both corporations and individuals may file a chapter 12 petition, so long as their liabilities, as well as their income, largely derive from farming, and their aggregate debt does not exceed chapter 12’s limit.<sup>85</sup>

A small family farm estate typically encompasses real and personal property, including farm assets such as crops or animals.<sup>86</sup> Family farmers usually remain in possession of the estate during the pendency of the case,<sup>87</sup> though a trustee is assigned to protect assets and ensure compliance.<sup>88</sup> While only the debtor may propose a plan of reorganization, family farmers must do so within ninety days of filing their petition.<sup>89</sup> The plan must be completed within five years—although extensions are permitted and payments may extend beyond

81. Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 251, 100 Stat. 3088, 3104–16 (1986).

82. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1001, 119 Stat. 23, 185–89 (2005).

83. Katherine M. Porter, *Phantom Farmers: Chapter 12 of the Bankruptcy Code*, 79 AM. BANKR. L.J. 729, 732 (2005).

84. 11 U.S.C. §§ 101(18)–(19), 109(f) (2012). Chapter 12 of the Bankruptcy Code applies to both farmers and fishermen. § 109(f). Because this Article focuses on a family farm bankruptcy, the analysis is limited to agriculture. The author’s use of “fisherman” reflects the word the Code uses but does not intend to limit this trade to a single gender.

85. § 101(18). The 1986 enactment of chapter 12 created an aggregate debt ceiling of \$1.5 million, Porter, *supra* note 83, at 733–34, which BAPCPA indexed for triennial inflation adjustments, mirroring other Code provisions. § 1002, 119 Stat. at 186; Lowry, *supra* note 27, at 247; Cong. Research Serv., Library of Cong., *S.256 - Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, CONGRESS.GOV (Apr. 20, 2005), <https://www.congress.gov/bill/109th-congress/senate-bill/256>. Other sections of the Code are also indexed for inflation in chapter 1. See 11 U.S.C. § 104 (2012). The current debt limit is \$4,153,150. § 101(18).

86. 11 U.S.C. §§ 541(a), 1207(a) (2012); Aiken, *supra* note 24, at 636 (describing how farm creditors often require a first lien on future crops under an after acquired property clause). As one reviewer noted, collateral that eats.

87. 11 U.S.C. § 1207(b) (2012).

88. 11 U.S.C. § 1202 (2012); see also Elizabeth H. McCullough, *Bankruptcy Trustee Liability: Is There a Method in the Madness?*, 15 LEWIS & CLARK L. REV. 153, 159–61 (2011).

89. 11 U.S.C. § 1221 (2012).

the term of the plan.<sup>90</sup> Until very recently, a family farm debtor proposing property sales in its reorganization remained fully liable for tax claims on those sales, which “effectively offset[] much of the benefit of selling property.”<sup>91</sup> Revisions to the Code in October of 2017 clarified that unsecured claims of a governmental unit against either the debtor or the estate arising as a result of property sales or other dispositions during a chapter 12 bankruptcy are not entitled to priority and are therefore only entitled to a pro rata share of funds available for all unsecured claims.<sup>92</sup>

Chapter 12’s extraordinary relief arises from two provisions in particular. First, family farm debtors may write down, or “strip,” debt secured by a principal residence,<sup>93</sup> an option unavailable to debtors attempting to reorganize under either chapter 11 or 13.<sup>94</sup> Second, family farm debtors may retain their farm even if they are unable to pay creditors. As in chapter 13, creditors are not entitled to a vote, insulating family farmers from chapter 11’s absolute priority rule.<sup>95</sup> Instead, unsecured creditors receive all of the debtor’s disposable income over the life of the plan and must receive at least what they would have received in a chapter 7 liquidation.<sup>96</sup>

Chapter 12 successfully rehabilitates small family farms each year with benefits that extend beyond the bankruptcy process. However, few chapter 12 petitions are filed relative to the prevalence of small family farmers nationally, and those that file and confirm a plan may still convert or be dismissed. As with Massey Creek Farms, a confirmed reorganization plan may fail for lack of payment while family farmers, and rural economies more broadly, continue to face financial struggle.<sup>97</sup>

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90. 11 U.S.C. § 1222(b)(5), (b)(9), (c) (2012); *see also* Jane Kaufman Winn, *Lien Stripping After Nobelman*, 27 LOY. L.A. L. REV. 541, 602 (1994).

91. Porter, *supra* note 83, at 737.

92. Additional Supplemental Appropriations for Disaster Relief Requirements Act, 2017, Pub. L. No. 115-72, § 1005, 131 Stat. 1224, 1232; *see also* Porter, *supra* note 83, at 737–38.

93. *See* 11 U.S.C. § 1222 (2012).

94. 11 U.S.C. §§ 1123(b)(5), 1322(b)(2) (2012); *Till v. SCS Credit Corp.*, 541 U.S. 465, 475 (2004).

95. 11 U.S.C. § 1129(b)(2)(B) (2012).

96. 11 U.S.C. §§ 1225(a)(4), (b)(1)(C), 1325(b)(1) (2012).

97. Katherine Porter, *Going Broke the Hard Way: The Economics of Rural Failure*, 2005 WIS. L. REV. 969, 974–79 (2005).

## II. AGRICULTURAL ECONOMICS &amp; CHAPTER 12 IN PRACTICE

BAPCPA made permanent chapter 12 with little contention.<sup>98</sup> In the intervening years, more than five thousand chapter 12 cases have been filed.<sup>99</sup> Extrapolating from data available in recent years, an estimated forty percent of filed chapter 12 cases reorganize with a confirmed and completed plan.<sup>100</sup> Further, filing and plan completion

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98. Melissa B. Jacoby, *The Bankruptcy Code at Twenty-Five and the Next Generation of Lawmaking*, 78 AM. BANKR. L.J. 221, 226–27 (2004) (describing chapter 12’s “permanence [as] not only uncontroversial, but desirable”); Lowry, *supra* note 27, at 244. The Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 also enjoyed broad support. *See, e.g., Farm Bankruptcy Amendments: Hearing on H.R. 1397 and H.R. 1399 Before the Subcomm. on Monopolies & Commercial Law of the H. Comm. on the Judiciary*, 99th Cong. 18–19 (1985) (statement of Frank Kennedy, Professor, University of Iowa School of Law) (speaking on behalf of the National Bankruptcy Conference and communicating “unanimous approval of the objectives”). Notwithstanding this support, Congress did not make chapter 12 permanent for almost twenty years after its trial period was initiated, instead granting multiple reauthorizations and allowing chapter 12 to “completely lapse four times, often for many months” before passing BAPCPA. Jacoby, *supra* note 98, at 227.

99. CASES COMMENCED DURING 2017, *supra* note 5, at 1 (reporting 501 chapter 12 filings); CASES COMMENCED DURING 2016, *supra* note 5, at 1 (reporting 461 chapter 12 filings); CASES COMMENCED DURING 2015, *supra* note 5, at 1 (reporting 407 chapter 12 filings); CASES COMMENCED DURING 2014, *supra* note 5, at 1 (reporting 361 chapter 12 filings); CASES COMMENCED DURING 2013, *supra* note 6, at 1 (reporting 395 chapter 12 filings); CASES COMMENCED DURING 2012, *supra* note 6, at 1 (reporting 512 chapter 12 filings); CASES COMMENCED DURING 2011, *supra* note 6, at 1 (reporting 637 chapter 12 filings); CASES COMMENCED DURING 2010, *supra* note 6, at 1 (reporting 723 chapter 12 filings); CASES COMMENCED DURING 2009, *supra* note 6, at 1 (reporting 544 chapter 12 filings); CASES COMMENCED DURING 2008, *supra* note 6, at 1 (reporting 345 chapter 12 filings); ADMIN. OFFICE OF THE U.S. COURTS, TABLE F-2: U.S. BANKRUPTCY COURTS—BUSINESS AND NONBUSINESS CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE TWELVE MONTH PERIOD ENDED DEC. 31, 2007, at 1 (2008) [hereinafter CASES COMMENCED DURING 2007], <http://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2007/12/31> (reporting 376 chapter 12 filings); ADMIN. OFFICE OF THE U.S. COURTS, TABLE F-2: U.S. BANKRUPTCY COURTS—BUSINESS AND NONBUSINESS CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE TWELVE MONTH PERIOD ENDED DEC. 31, 2006, at 1 (2007) [hereinafter CASES COMMENCED DURING 2006], <http://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2006/12/31> (reporting 348 chapter 12 filings). From January 1, 2006, to December 31, 2017, 5610 chapter 12 cases have been filed (501+461+407+361+395+512+637+723+544+345+376+348= 5610).

100. U.S. TR. PROGRAM, U.S. DEP’T OF JUSTICE, CHAPTER 12 STANDING TRUSTEE FY17 ANNUAL REPORTS (2018) [hereinafter 2017 CHAPTER 12 TRUSTEE REPORT], <https://www.justice.gov/ust/private-trustee-data-statistics/chapter-12-trustee-data-and-statistics> (reporting 259 new chapter 12 cases filed and 122 chapter 12 cases closed with a completed plan); U.S. TR. PROGRAM, U.S. DEP’T OF JUSTICE, CHAPTER 12 STANDING TRUSTEE FY16 ANNUAL REPORTS (2017) [hereinafter 2016 CHAPTER 12 TRUSTEE REPORT], <https://www.justice.gov/ust/private-trustee-data-statistics/chap>

rates alone do not represent chapter 12's influence within the family farm economy; the availability of debt restructuring for farmers increases their leverage outside of bankruptcy proceedings and helps to stabilize land values.<sup>101</sup>

Still, these numbers represent relatively few of the small family farms in operation. In 2017, 501 small family farmers filed a chapter 12 petition,<sup>102</sup> representing approximately 0.08% of the small

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ter-12-trustee-data-and-statistics (reporting 259 new chapter 12 cases filed and 137 chapter 12 cases closed with a completed plan); U.S. TR. PROGRAM, U.S. DEP'T OF JUSTICE, CHAPTER 12 STANDING TRUSTEE FY15 ANNUAL REPORTS (2016) [hereinafter 2015 CHAPTER 12 TRUSTEE REPORT], <https://www.justice.gov/ust/private-trustee-data-statistics/chapter-12-trustee-data-and-statistics> (reporting 194 new chapter 12 cases filed and 154 chapter 12 cases closed with a completed plan); U.S. TR. PROGRAM, U.S. DEP'T OF JUSTICE, CHAPTER 12 STANDING TRUSTEE FY14 ANNUAL REPORTS (2015) [hereinafter 2014 CHAPTER 12 TRUSTEE REPORT], <https://www.justice.gov/ust/private-trustee-data-statistics/chapter-12-trustee-data-and-statistics> (reporting 221 new chapter 12 cases filed and 119 chapter 12 cases closed with a completed plan); U.S. TR. PROGRAM, U.S. DEP'T OF JUSTICE, CHAPTER 12 STANDING TRUSTEE FY13 ANNUAL REPORTS (2014) [hereinafter 2013 CHAPTER 12 TRUSTEE REPORT], <https://www.justice.gov/ust/private-trustee-data-statistics/chapter-12-trustee-data-and-statistics> (reporting 270 new chapter 12 cases filed and 99 chapter 12 cases closed with a completed plan); U.S. TR. PROGRAM, U.S. DEP'T OF JUSTICE, CHAPTER 12 STANDING TRUSTEE FY12 ANNUAL REPORTS (2013) [hereinafter 2012 CHAPTER 12 TRUSTEE REPORT], <https://www.justice.gov/ust/private-trustee-data-statistics/chapter-12-trustee-data-and-statistics> (reporting 347 new chapter 12 cases filed and 88 chapter 12 cases closed with a completed plan); U.S. TR. PROGRAM, U.S. DEP'T OF JUSTICE, CHAPTER 12 STANDING TRUSTEE FY11 ANNUAL REPORTS (2012) [hereinafter 2011 CHAPTER 12 TRUSTEE REPORT], <https://www.justice.gov/ust/private-trustee-data-statistics/chapter-12-trustee-data-and-statistics> (reporting 428 new chapter 12 cases filed and 97 chapter 12 cases closed with a completed plan); U.S. TR. PROGRAM, U.S. DEP'T OF JUSTICE, CHAPTER 12 STANDING TRUSTEE FY10 ANNUAL REPORTS (2011) [hereinafter 2010 CHAPTER 12 TRUSTEE REPORT], <https://www.justice.gov/ust/private-trustee-data-statistics/chapter-12-trustee-data-and-statistics> (reporting 421 new chapter 12 cases filed and 118 chapter 12 cases closed with a completed plan); U.S. TR. PROGRAM, U.S. DEP'T OF JUSTICE, CHAPTER 12 STANDING TRUSTEE FY09 ANNUAL REPORTS (2010) [hereinafter 2009 CHAPTER 12 TRUSTEE REPORT], <https://www.justice.gov/ust/private-trustee-data-statistics/chapter-12-trustee-data-and-statistics> (reporting 264 new chapter 12 cases filed and 125 chapter 12 cases closed with a completed plan). Based on available data, approximately forty percent of chapter 12 cases complete a reorganization plan and close as measured by the number of chapter 12 cases closed with a completed plan divided by the number of new chapter 12 cases filed between January 1, 2009, and December 31, 2017 (the years for which data is available)  $((122+137+154+119+99+88+97+118+125)/(259+259+194+221+270+347+428+421+264)=0.40)$ . These numbers are not fully representative of chapter 12 filings across the country due, at least in part, to two states not participating.

101. See *infra* Section II.A.

102. CASES COMMENCED DURING 2017, *supra* note 5, at 1.

commercial family farms operating that year.<sup>103</sup> Moreover, chapter 12 was never used to the extent expected given the prevalence of financial difficulty facing farmers in the 1980s.<sup>104</sup> In the year following chapter 12's enactment, small family farmers filed only 5,788 bankruptcies.<sup>105</sup> More than 1.8 million family farmers were operating at that time;<sup>106</sup> some reports expected 30,000 filings.<sup>107</sup> Though all of these farms may not have been eligible for chapter 12 based on the debt ceiling and the off-farm income restriction,<sup>108</sup> about 0.3% of operating family farms filed for bankruptcy in the height of the 1980s farm crisis.<sup>109</sup> Chapter 12 debtors also infrequently discharge debt and are often dismissed.<sup>110</sup> Between fiscal years 2009

103. ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., AMERICA'S DIVERSE FAMILY FARMS: 2017 EDITION, at 2 (2017), <https://www.ers.usda.gov/publications/pub-details/?pubid=86197> (501/(506001+110524)=0.0008). The Economic Research Service of the United States Department of Agriculture defines a small family farm as grossing less than \$350,000 in cash farm income. *Id.* Approximately 1.8 million small family farms were in operation in 2017 (366812+860739+506001+110524=1844076). *Id.* Of these, 616,525 report farming as their major occupation (506001+110524=616525). *Id.*

104. U.S. GEN. ACCOUNTING OFFICE, FARM FINANCE: PARTICIPANTS' VIEWS ON ISSUES SURROUNDING CHAPTER 12 BANKRUPTCY 10–11 (1989), <http://archive.gao.gov/d25t7/138655.pdf>; Lowry, *supra* note 27, at 239 (describing severe financial insecurity facing one third of all farms in 1985); *see also* Chris Faiferlick & Neil E. Harl, *The Chapter 12 Bankruptcy Experience in Iowa*, 9 J. AGRIC. TAX'N & L. 291, 302 (1988) ("Nearly 20 percent of the farmers who reside in Iowa and the nine surrounding states . . . would unlikely be able to meet all their loan obligations, even after liquidating their assets.").

105. STAM & DIXON, *supra* note 73, at 18; Porter, *supra* note 83, at 740.

106. U.S. DEP'T OF COMMERCE, 1987 CENSUS OF AGRICULTURE 1 (1989), [http://agcensus.mannlib.cornell.edu/AgCensus/getVolumeOnePart.do?year=1987&part\\_id=113&number=51&title=United%20States](http://agcensus.mannlib.cornell.edu/AgCensus/getVolumeOnePart.do?year=1987&part_id=113&number=51&title=United%20States).

107. U.S. GEN. ACCOUNTING OFFICE, *supra* note 104, at 11.

108. Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 251, 100 Stat. 3088, 3104 (1986) (limiting the aggregate debt to \$1,500,000 and off-farm income to less than fifty percent).

109. STAM & DIXON, *supra* note 73, at 18 (reporting that 5,788 chapter 12 cases were filed in 1987); U.S. DEP'T OF COMMERCE, *supra* note 106, at 1 (reporting that 1,809,323 family farms were in operation in 1987). 5788/1809323=0.003.

110. STAM & DIXON, *supra* note 73, at 17 (discussing how chapter 12 filings in early years received discharge at a rate of fifty percent, but filings between 1988 and 1996 were discharged at a rate of forty-two to twenty-eight percent). Based on available data, approximately forty-seven percent of chapter 12 cases are dismissed as measured by the number of chapter 12 cases dismissed divided by the number of new chapter 12 cases filed between January 1, 2009, and December 31, 2017 (the years for which data is available) ((120+117+139+177+165+124+172+153+89)/(259+259+194+221+270+347+428+421+264)=0.47). 2017 CHAPTER 12 TRUSTEE REPORT; *supra* note 100 (reporting 259 new chapter 12 cases filed and 120 chapter 12 cases dismissed); 2016 CHAPTER 12 TRUSTEE REPORT; *supra* note 100 (reporting 259 new chapter 12 cases filed and 117 chapter 12 cases dismissed); 2015 CHAPTER 12 TRUSTEE REPORT;

and 2017, bankruptcy courts dismissed almost half as many chapter 12 cases as were filed over that period.<sup>111</sup> Questions remain as to if and how small family farms service debt.

### A. Role of Chapter 12

In his letter to the President, the Chief Justice, and the Congress, the Chairman of the 1973 Commission on the Bankruptcy Laws, Chairman Marsh, described how “the efficiency of [the system of bankruptcy] and the rules applied in it have an impact on the entire credit economy which goes far beyond the specific cases involved in the process itself.”<sup>112</sup> In this regard, chapter 12’s greatest contribution to the farm economy may be its “shadow” effect, encouraging

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*supra* note 100 (reporting 194 new chapter 12 cases filed and 139 chapter 12 cases dismissed); 2014 CHAPTER 12 TRUSTEE REPORT; *supra* note 100 (reporting 221 new chapter 12 cases filed and 177 chapter 12 cases dismissed); 2013 CHAPTER 12 TRUSTEE REPORT; *supra* note 100 (reporting 270 new chapter 12 cases filed and 165 chapter 12 cases dismissed); 2012 CHAPTER 12 TRUSTEE REPORT; *supra* note 100 (reporting 347 new chapter 12 cases filed and 124 chapter 12 cases dismissed); 2011 CHAPTER 12 TRUSTEE REPORT; *supra* note 100 (reporting 428 new chapter 12 cases filed and 172 chapter 12 cases dismissed); 2010 CHAPTER 12 TRUSTEE REPORT; *supra* note 100 (reporting 421 new chapter 12 cases filed and 153 chapter 12 cases dismissed); 2009 CHAPTER 12 TRUSTEE REPORT; *supra* note 100 (reporting 264 new chapter 12 cases filed and 89 chapter 12 cases dismissed). These numbers are not fully representative of chapter 12 filings across the country due, at least in part, to two states not participating.

111. Between January 1, 2009, and December 31, 2017, 2,663 chapter 12 cases were filed and 1,256 chapter 12 cases were dismissed ( $1256/2663=0.47$ ). 2017 CHAPTER 12 TRUSTEE REPORT; *supra* note 100 (reporting 259 new chapter 12 cases filed and 120 chapter 12 cases dismissed); 2016 CHAPTER 12 TRUSTEE REPORT; *supra* note 100 (reporting 259 new chapter 12 cases filed and 117 chapter 12 cases dismissed); 2015 CHAPTER 12 TRUSTEE REPORT; *supra* note 100 (reporting 194 new chapter 12 cases filed and 139 chapter 12 cases dismissed); 2014 CHAPTER 12 TRUSTEE REPORT; *supra* note 100 (reporting 221 new chapter 12 cases filed and 177 chapter 12 cases dismissed); 2013 CHAPTER 12 TRUSTEE REPORT; *supra* note 100 (reporting 270 new chapter 12 cases filed and 165 chapter 12 cases dismissed); 2012 CHAPTER 12 TRUSTEE REPORT; *supra* note 100 (reporting 347 new chapter 12 cases filed and 124 chapter 12 cases dismissed); 2011 CHAPTER 12 TRUSTEE REPORT; *supra* note 100 (reporting 428 new chapter 12 cases filed and 172 chapter 12 cases dismissed); 2010 CHAPTER 12 TRUSTEE REPORT; *supra* note 100 (reporting 421 new chapter 12 cases filed and 153 chapter 12 cases dismissed); 2009 CHAPTER 12 TRUSTEE REPORT; *supra* note 100 (reporting 264 new chapter 12 cases filed and 89 chapter 12 cases dismissed). These numbers are not fully representative of chapter 12 filings across the country due, at least in part, to two states not participating.

112. Letter from Harold Marsh, Jr., Chairman of the Comm’n on the Bankr. Laws of the U.S., to the President, the Chief Justice of the United States & the Congress 2 (July 30, 1973), in COMMISSION I, *supra* note 47.

negotiation between small family farmers and lenders.<sup>113</sup> In a study of small family farm filers in Iowa shortly after chapter 12's enactment, bankruptcy attorneys reported negotiating one-third to one-half of their disputes.<sup>114</sup> "The existence of chapter 12 was cited as an influencing factor in [fifty-eight] percent of these successful negotiations."<sup>115</sup> The same study also surveyed the "perceptions in the change of the debtors' negotiating leverage since the implementation of chapter 12."<sup>116</sup> Prior to chapter 12, the attorneys described a farmer's bargaining power as 3.9 on a scale of zero to ten, where ten represents complete control and zero represents no control.<sup>117</sup> Following chapter 12's implementation, according to the attorneys, a farmer's leverage increased to 6.<sup>118</sup> In a successive study of those same filers a decade later, eighteen of twenty respondents who were unable to complete a plan "believed that creditors would not have negotiated a private settlement had Chapter 12 not been in existence."<sup>119</sup> Indeed, even those filers who were unsuccessful in obtaining a privately negotiated settlement "found value in the existence of Chapter 12 because of an altered and improved negotiating position."<sup>120</sup>

Chapter 12's availability also preserves farm values and provides a sense of relief to the family farm debtor who does file without indications of exploitation.<sup>121</sup> In the last farm crisis, "[w]ithout chapter 12, many thousands of family farms would have been foreclosed, and depressed farm values would have sunk even

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113. *Extension of the Family Farmer Bankruptcy Act: Hearing on H.R. 5322 Before the Subcomm. on Econ. & Commercial Law of the H. Comm. on the Judiciary*, 102d Cong. 6 (1992) (statement of Chief Judge Richard L. Bohanon, U.S. Bankr. Court for the W. Dist. of Okla.) ("I think probably most importantly, though, is that the existence of chapter 12 gives the farmer something when he [or she] comes to the negotiating table with the banker. Without that, [the farmer is] virtually helpless. [The farmer] would only be liquidated."); Porter, *supra* note 83, at 743.

114. Faiferlick & Harl, *supra* note 104, at 331.

115. *Id.*

116. *Id.* at 332.

117. *Id.*

118. *Id.*

119. HIPPEN & HARL, *supra* note 8, at 45.

120. *Id.*

121. *Extension of the Family Farmer Bankruptcy Act: Hearing on H.R. 5322 Before the Subcomm. on Econ. & Commercial Law of the H. Comm. on the Judiciary*, 102d Cong. 21 (1992) (statement of Judge A. Thomas Small, U.S. Bankr. Judge, E. Dist. of N.C., representing the Am. Bankr. Inst.) ("In my opinion, chapter 12 met its two primary goals. First, to give family farmers the chance to reorganize and to save their farms and, second, to stabilize farm values. . . . The farmers who have appeared in my court filed petitions because they desperately wanted to save the family farm, not to abuse the system or to gain an unfair advantage over their creditors.").

lower.”<sup>122</sup> The Iowa study that interviewed previous filers found that “[sixty-three] percent . . . felt that chapter 12 was helpful to some extent . . . in dealing with farm finance problems.”<sup>123</sup> Recent amendments to the Code that exempt farm asset sales from capital gains taxes expand financial resources available to the reorganizing family farmer.<sup>124</sup>

The benefits of chapter 12—increased leverage for family farmers, a helpful mechanism and potential safety net amidst financial struggle—suggest costs as well. Several studies predicted that farm lenders would charge higher interest rates on their loans to compensate for anticipated losses under a chapter 12 bankruptcy.<sup>125</sup> In 1989, the General Accounting Office, today’s Government Accountability Office, reported that “over a third [of creditors interviewed] said they ha[d] raised interest rates to farmers as a result of the [c]hapter 12 bankruptcy law.”<sup>126</sup> The availability of chapter 12 may also inhibit public policy efforts that would better meet the needs of small family farmers and the rural economies in which they reside. As suggested by Professor Katherine Porter, “[i]f Americans view [chapter 12] as another form of political favoritism in a system prone to loopholes and abuse, they may be less willing to support other programs that would provide broad-based economic development for rural communities or that would do more to prevent economic distress among farmers.”<sup>127</sup> This concern is especially salient given the reliance of small family farms on off-farm employment for income.<sup>128</sup>

A panel data study of chapter 12 filings from 1987 to 2000 analyzed potential factors correlated with family farm bankruptcy

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122. *Id.*

123. HIPPEN & HARL, *supra* note 8, at 18. “Those who completed the plan and received a discharge had a 16 percent reduction in the number of acres under ownership.” *Id.* at 2.

124. Additional Supplemental Appropriations for Disaster Relief Requirements Act, 2017, Pub. L. No. 115-72, § 1005, 131 Stat. 1224, 1232 (amending 11 U.S.C. § 1232).

125. Robert Innes et al., *Chapter 12 and Farm Bankruptcy in California*, 43 CAL. AGRIC. 28, 28 (1989); *see also* ECON. RESEARCH SERV., U.S. DEP’T OF AGRIC., DO FARMERS NEED A SPECIAL CHAPTER IN THE BANKRUPTCY CODE? 3 (1997), [https://www.ers.usda.gov/webdocs/publications/42059/19408\\_aib72409\\_1\\_.pdf](https://www.ers.usda.gov/webdocs/publications/42059/19408_aib72409_1_.pdf) (“A conservative estimate of the incremental impact of chapter 12 over chapter 11 is that it raises indirect bankruptcy costs by about a fourth. To offset the costs chapter 12 imposes on creditors, interest rates to farm borrowers will rise 0.25–1.0 percent on average.”).

126. U.S. GEN. ACCOUNTING OFFICE, *supra* note 104, at 2.

127. Porter, *supra* note 83, at 746.

128. HOPPE, MACDONALD & KORB, *supra* note 18, at 20.

rates using state-level filings across the country. The study found that as income and employment increase, especially the availability of off-farm work, chapter 12 filing rates decrease.<sup>129</sup> BAPCPA modified chapter 12 by increasing the percent of income a family farmer may derive from off-farm employment and still qualify, endeavoring to keep bankruptcy accessible to the financially challenged, yet resourceful, farm debtor.<sup>130</sup> Calls for an increase in “the farm-debt limit and [a] reduc[tion] or eliminat[ion of] the farm-income requirement” would expand chapter 12’s reach given changes in the farm economy.<sup>131</sup> Advances in technology present a tradeoff for family farmers: adopt new technologies and farm more acres with the same labor or maintain smaller farms by “supplement[ing] income with off-farm employment.”<sup>132</sup> But persistent poverty in rural areas means diminished income and employment opportunities for small family farmers attempting to sustain or rehabilitate their farm.

What Porter characterized in 2005 as “nearly three decades [where] the rural poverty rate . . . consistently exceeded the urban poverty rate,”<sup>133</sup> may now be characterized as four: in 2016, the national poverty rate inside metropolitan statistical areas was 13.6% but 16.9% in nonmetropolitan areas.<sup>134</sup> The poverty gap between

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129. Bruce L. Dixon et al., *Factors Affecting State-Level Chapter 12 Filing Rates: A Panel Data Model*, 20 EMORY BANKR. DEV. J. 401, 418 (2004) (“The variables net farm income per farm (NFI) and the unemployment rate (UNEMP) along with WORK, which is not quite significant at the 0.05 level, address the availability of income to pay debts. The signs of NFI and UNEMP indicate very clearly that farmers with more income are better able to pay debts, and filing rates decrease, as we would expect. The negative sign on WORK favors the hypothesis that farmers working off-farm are better able to support the farm.”).

130. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1004, 119 Stat. 23, 186. BAPCPA reduced the aggregate debt limit sourced from farming from eighty percent to fifty percent, which “expand[s] the availability of Chapter 12 to part-time farmers who earn up to half of their income from off-farm work.” Porter, *supra* note 83, at 734.

131. Coe, *supra* note 79, at 12.

132. *Id.* at 92.

133. Porter, *supra* note 97, at 976 (suggesting that “the application of the term ‘crisis’ to the economic problems experienced by rural families in the 1980s” reflects an experience that was not actually “short-lived”); *Rural Poverty & Well-Being*, U.S. DEPT. AGRIC. (Apr. 18, 2018), <https://www.ers.usda.gov/topics/rural-economy-population/rural-poverty-well-being/> (graphing a consistently higher nonmetro poverty rate than metro poverty rate since 1959).

134. *Rural Poverty & Well-Being*, *supra* note 133. In 2016, the poverty rate inside principal cities (16.0%) was on par with the poverty rate in nonmetropolitan areas (15.8%). KAYLA FONTENOT, JESSICA SEMEGA & MELISSA KOLLAR, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2017, at 12 (2018), <https://www.census.gov/library/publications/2018/demo/p60-263.html>.

metro and nonmetro populations is even more pronounced in the South, where almost half of the nation's nonmetro population lives.<sup>135</sup> Southern, nonmetro counties experienced a poverty rate of 21.3% between 2012 and 2016, almost six percentage points higher than southern, metro counties,<sup>136</sup> and five percentage points higher than recent estimates for the poverty rate within principal cities.<sup>137</sup> Of the 353 persistently poor counties in the U.S., 85.3% are nonmetro.<sup>138</sup>

Rural poverty also does not respond as quickly to economic growth. The national poverty rate and the inner city poverty rate decreased from 2014 to 2015, whereas the rural poverty rate increased.<sup>139</sup> While rural poverty decreased in recent years,<sup>140</sup> and rural unemployment increased modestly, urban employment increased twice as fast.<sup>141</sup> "Rural employment remains well below its pre-Recession level . . . . In contrast, job growth in urban areas since

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135. *Rural Poverty & Well-Being*, *supra* note 133 ("[T]he South is particularly important for the overall nonmetro poverty rate because an estimated 42.6 percent of the nonmetro population and 51.1 percent of the nonmetro poor lived in this region in 2012-16.").

136. *Id.*

137. FONTENOT, SEMEGA & KOLLAR, *supra* note 134, at 12 (reporting a poverty rate inside principal cities in 2017 of 15.6%).

138. *Rural Poverty & Well-Being*, *supra* note 133. The Economic Research Service defines "counties as being persistently poor if 20 percent or more of their populations were living in poverty based on the 1980, 1990, and 2000 decennial censuses and 2007-11 [American Community Survey] 5-year estimates." *Id.*

139. BERNADETTE D. PROCTOR, JESSICA L. SEMEGA & MELISSA A. KOLLAR, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2015, at 12 (2016), <https://www.census.gov/library/publications/2016/demo/p60-256.html> (reporting a national poverty rate of 14.8% in 2014 and 13.5% in 2015 (decrease), a poverty rate inside principal cities of 18.9% in 2014 and 16.8% in 2015 (decrease), and a poverty rate outside metropolitan statistical areas of 16.5% in 2014 and 16.7% in 2015 (increase)).

140. FONTENOT, SEMEGA & KOLLAR, *supra* note 134, at 12 (listing 43.6 million below poverty outside metropolitan statistical areas in 2016 as compared with 43 million in 2017); JESSICA L. SEMEGA, KAYLA R. FONTENOT & MELISSA A. KOLLAR, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2016, at 12 (2017), <https://www.census.gov/library/publications/2017/demo/p60-259.html> (listing 44.4 million below poverty outside metropolitan statistical areas in 2015 as compared with 43.4 million in 2016). "The 2016 estimates presented for residence may not match the previously published estimates due to a correction in the assignment of principal city status for a small number of households." FONTENOT, SEMEGA & KOLLAR, *supra* note 134, at 12.

141. ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., RURAL AMERICA AT A GLANCE: 2017 EDITION, at 3 (2017), <https://www.ers.usda.gov/webdocs/publications/85740/eib-182.pdf> ("While the Great Recession's impact was equally severe in urban and rural counties . . . subsequent job recovery has been much slower in rural areas (0.8 percent annual employment growth compared with 1.9 percent in urban areas over 2010-15).").

2010 has more than compensated for job losses during the Recession, resulting in a net gain of 3.6 million jobs since 2007.”<sup>142</sup>

A growing service industry represents approximately half of the jobs in nonmetro counties, including “education and health (25 percent); trade, transportation, and utilities (20 percent); and leisure and hospitality (11 percent).”<sup>143</sup> Manufacturing represents fifteen percent of rural employment, and farming, forestry, fishing, and mining represent nine percent.<sup>144</sup> Farming’s diminished role in rural economies suggests “a myth that most rural Americans are farmers.”<sup>145</sup> Still, most agricultural production takes place in rural communities,<sup>146</sup> even as rural communities experience higher food insecurity rates.<sup>147</sup> Insufficient scholarship describes successful farming models for these families to sell products in their local economy,<sup>148</sup> which would contribute to income stability and address the “increasingly difficult issue of rural food access.”<sup>149</sup>

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142. *Id.* at 4. Rural communities have experienced the unequal impact and recovery from recessions in the past: nonmetro counties experienced “similar rates of job loss” from 2001 to 2003, “followed by more rapid urban employment growth during the recovery” from 2003 to 2007. *Id.* at 3.

143. *Id.* at 4.

144. *Id.* at 4 & n.2–3. The agriculture and mining sector includes “self-employed farm proprietors.” *Id.* at 4 & n.3.

145. Porter, *supra* note 97, at 977.

146. See *Farming and Farm Income*, U.S. DEPT AGRIC. (Aug. 30, 2018), <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essential/farming-and-farm-income/> (“Agricultural production in the 21st century, on the other hand, is concentrated on a smaller number of large, specialized farms in rural areas where less than a fourth of the U.S. population lives.”); *Small and Family Farms*, U.S. DEPT AGRIC., <https://nifa.usda.gov/topic/small-and-family-farms> (last visited Nov. 23, 2018) [hereinafter *Small and Family Farms*] (defining small farms as grossing \$250,000 or less and describing their support of “competitiveness and sustainability of rural and farm economies”).

147. Porter, *supra* note 97, at 981.

148. Mary R. Pershing et al., *The Impact on Farmers Selling into Low-Income Communities: A Literature Review* 21 (June 2015) (unpublished manuscript), <http://rafiusa.org/wp-content/uploads/2015/06/Farmers-and-LIC-A-Literature-Review.pdf> (“Very little information exists on what kinds of models may work in rural areas, especially in rural areas with high levels of food insecurity and low levels of food affordability.”); cf. Jessica Weinkle, *The Looming Trade War Exposes a Dependence on Industrial Farming*, NEWS & OBSERVER (Apr. 12, 2018, 9:37 AM), <https://www.newsobserver.com/opinion/op-ed/article208670884.html> (“Improving accessibility to and support of local food production speaks to deeply rooted shared American values while supporting environmental and human health and well-being.”).

149. Pershing et al., *supra* note 148, at 4 (describing a focused literature review on “small and medium scale farmers [who] are targeting consumers in low-income, rural areas . . . because of the increasingly difficult issue of rural food access”).

In 2013, Rockingham County, North Carolina, where the McCollum family was operating its small farm, experienced a poverty rate of 21.2%.<sup>150</sup> By comparison, on average, nonmetro counties nationally experienced a poverty rate of 18.4% that year;<sup>151</sup> the United States poverty rate for the year was 14.5%.<sup>152</sup> In August 2013, when the McCollums filed their chapter 12 petition for bankruptcy, the unemployment rate in Rockingham County was 9.4%, the lowest unemployment rate in the county since October 2008,<sup>153</sup> and two percentage points higher than the national average.<sup>154</sup> Although chapter 12's expansive restructuring options positively contribute to the small family farm economy, a concern remains: how to "assure that farmers can maintain sufficient income, whether by working on the farm or in another industry."<sup>155</sup>

### B. *In re McCollum*

Massey Creek Farms is a direct-to-market farm in Rockingham County, North Carolina, that "specialize[s] in sustainably grown, grass fed meats and eggs."<sup>156</sup> Garland McCollum, the owner of Massey Creek Farms, "grew up spending summers with his grandparents on their farm in Rockingham County—one that has been in the family since 1749."<sup>157</sup> On August 16, 2013, the senior McCollums, William and Martha, filed a petition for bankruptcy under chapter 12.<sup>158</sup> On the same date, Garland Edward McCollum and Ruby Stafford

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150. *Small Area Income and Poverty Estimates*, *supra* note 23.

151. *Rural Poverty & Well-Being*, *supra* note 133.

152. DENAVAS-WALT & PROCTOR, *supra* note 23, at 12.

153. *One-Screen Data Search: Local Area Unemployment Statistics*, U.S. DEPT LAB., <https://data.bls.gov/PDQWeb/la> (select "37 North Carolina" in "Select a State or Census Reg. & Div." and select "F Counties and equivalents" in "Select one or more Area Types" and select "FCN3715700000000 Rockingham County, NC" in "Select one or more Areas" and click "Get Data") (reporting an unemployment rate of 7.7% in Rockingham County, North Carolina, in October 2008).

154. *National Employment Monthly Update*, NAT'L CONF. ST. LEGISLATORS, <http://www.ncsl.org/research/labor-and-employment/national-employment-monthly-update.aspx> (last visited Nov. 23, 2018) (reporting an unemployment rate of 7.2% in the United States in August 2013).

155. Porter, *supra* note 83, at 745.

156. *Massey Creek Farms*, GREENSBORO FARMERS CURB MKT., <https://www.gsofarmersmarket.org/project/massey-creek-farms/> (last visited Nov. 23, 2018).

157. Katie King, *The Essential North Carolina Grocery List: Eggs*, OUR ST. (May 8, 2018), <https://www.ourstate.com/essential-north-carolina-grocery-list-eggs/>.

158. Chapter 12 Voluntary Petition at 1, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. Aug. 16, 2013).

McCollum filed a petition under chapter 13.<sup>159</sup> The senior McCollums confirmed a reorganization plan on August 8, 2014, but defaulted almost immediately in their payments.<sup>160</sup> Ultimately, in October 2016, Martha McCollum converted the case to chapter 7 following the death of her husband.<sup>161</sup> A few months earlier, the court dismissed Garland's chapter 13 case for lack of payment.<sup>162</sup> This study focuses on the chapter 12 proceeding.

The McCollums owed an estimated \$1 million to five secured creditors.<sup>163</sup> Following a lengthy process determining the fair market value of their real property assets, their confirmed reorganization plan indicates that only two creditors—Wells Fargo Bank, N.A. (“Wells Fargo”) and Vistana Fountains Condominiums Association, Inc. (“Vistana”)—were undersecured in a combined amount of approximately \$101,000.<sup>164</sup> The McCollums did not write down any of their secured debt. In their reorganization, they committed to monthly payments supplemented with property sales. These funds proved insufficient; the converted chapter 7 case closed in 2018.<sup>165</sup>

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159. Chapter 13 Voluntary Petition at 1, *In re McCollum*, No. 13-11098 (Bankr. M.D.N.C. Aug. 16, 2013).

160. Motion to Dismiss at 1, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. Jan. 27, 2015); Order Confirming Chapter 12 Plan at 2–3, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. Aug. 8, 2014).

161. Notice of Conversion from Chapter 12 to Chapter 7 at 1, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. Oct. 26, 2016).

162. Motion and Order Chapter 13 at 1, *In re McCollum*, No. 13-11098 (Bankr. M.D.N.C. July 5, 2016).

163. Summary of Schedules at 18, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. Sept. 18, 2013).

164. See Chapter 12 Plan at 2–5, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. Nov. 14, 2013) (concluding that Federal Financial Services, Inc. held a secured claim in the amount of \$3,624.31 that was fully secured by a 2010 Ford Transit; CitiMortgage, Inc. held a secured claim in the amount of \$157,000.00 that was fully secured by the debtors' residence that had a value of approximately \$168,000.00 (oversecured by about \$11,000.00); Wells Fargo held a secured claim in the amount of \$110,715.05 that was subordinate to the claim of Citi and that was partially secured by the debtors' residence that had a value of approximately \$168,000.00 (secured claim of \$11,000.00 and unsecured claim of \$99,715.05); Carolina Farm Credit, ACA held a secured claim in the approximate amount of \$720,437.28 that was partially secured by real property with a value of \$470,012.00 (secured claim of \$470,012.00 and unsecured claim of \$250,425.28); Vistana held a secured claim in the amount of \$1923.42 that was partially secured by a timeshare valued at \$500)) (99715.05+(1923.42-500)=101,138.47; Order Confirming Chapter 12 Plan, *supra* note 160, at 2–3).

165. See *infra* Sections II.B.2, II.B.3.

## 1. McCollum Finances

The McCollums filed a voluntary petition under chapter 12 on August 16, 2013. Following an extension, they filed their schedules on September 18, 2013, listing three real property tracts: a fifty-acre cell phone tower tract with an estimated value of \$163,000, a 303-acre farm and eighty-acre hog facility worth an estimated \$529,000, and a principal residence on eight acres valued at \$168,009.<sup>166</sup> The McCollums also listed a timeshare worth \$500 in Orlando, Florida.<sup>167</sup> On October 7, a revised schedule of assets incorporated the cell phone tower tract with the hog facility and farm for a combined value of \$529,000.<sup>168</sup> An ongoing challenge in the McCollum bankruptcy involved valuation of real property assets. Table 1 on the following page summarizes the McCollum assets as reflected in their amended schedules.

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166. Summary of Schedules, *supra* note 163, at 3.

167. *Id.*

168. Schedule A - Real Property - Amended at 1, *In re* McCollum, No. 13-11092 (Bankr. M.D.N.C. Oct. 7, 2013) [hereinafter Amended Schedules].

Table 1: McCollum Family Farm Scheduled Assets

Asset	Value of Debtors' Interest	Value of Secured Claim
Cell phone tower tract, hog facility & farm (433 acres)	\$529,000.00	\$681,759.85
Residence & lot (8 acres)	\$168,009.00	\$267,444.87
Timeshare	\$500.00	\$1,923.42
Checking account	\$2,000.00	Not collateral
Household goods & clothing	\$1,625.00	Not collateral
Life insurance policies	\$20,846.77	Not collateral
Massey Creek Farms, LLC	\$8,750.00	Not collateral
Twin Oaks Grocery, account receivable [uncollectable]	No value	Not collateral
2009 State tax refund [\$278, applied to taxes due]	No value	Not collateral
2009 Federal tax refund [\$881, applied to taxes due]	No value	Not collateral
2004 Honda Odyssey	\$2,800.00	Not collateral
2000 Honda Accord	\$1,957.50	Not collateral
2010 Ford Transit	\$4,500.00	Not collateral
1999 Ford F250	\$750.00	Not collateral
2003 Saturn Vue	\$1,957.50	Not collateral
2004 Homestead trailer	\$500.00	Not collateral
2002 Ford F450	\$5,000.00	Not collateral
1995 Plymouth Van	\$50.00	Not collateral
<b>Total</b>	<b>\$748,245.77</b>	<b>\$951,128.14</b>

The McCollums originally estimated their personal property interests at \$72,000.<sup>169</sup> A revised schedule updated Massey Creek

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169. Summary of Schedules, *supra* note 163, at 7.

Farms LLC to a value of \$8,750 and reduced the Twin Oaks Grocery account receivable, previously valued at \$30,000, to zero, because Twin Oaks Grocery closed operations.<sup>170</sup> Their final estimate of personal property interests totaled about \$50,000.<sup>171</sup>

The McCollums's largest debt was secured by their farm: \$737,000 owed to Carolina Farm Credit ("CFC"), including a \$55,000 fully secured claim on the cell phone tower tract and a \$682,000 claim on the farming operations encompassing the eighty-acre hog facility, 303-acre farm, and any remaining value in the cell phone tower tract.<sup>172</sup> The McCollums listed this debt as undersecured in the amount of \$153,000 based on a consolidated farmland valuation of \$529,000.<sup>173</sup> CitiMortgage's lien on the McCollum residence and eight-acre tract secured a debt of \$157,000, which was also fully secured given an estimated property value of \$168,000.<sup>174</sup> Wells Fargo extended an equity line of credit to the McCollums secured by the family residence and the same eight-acre tract. This second priority lien secured a debt of \$110,000, which was undersecured in the amount of \$99,000.<sup>175</sup> The McCollums owed Federal Financial Services ("FFS") \$3,900 for a fully secured purchase-money security interest on their Ford Transit Connect Wagon and Vistana \$1,900 for a partially secured timeshare valued at \$500.<sup>176</sup> Additionally, the McCollums also owed approximately \$19,000 in unsecured priority tax claims to the Internal Revenue Service ("IRS"), the North Carolina Department of Revenue ("NC DOR"), and Rockingham County.<sup>177</sup>

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170. Amended Schedules, *supra* note 168, at 3.

171. *Id.* at 5.

172. Summary of Schedules, *supra* note 163, at 16–17.

173. *Id.* at 17.

174. *Id.*

175. *Id.* at 18.

176. *Id.* at 17–18.

177. *Id.* at 22. The McCollums listed a debt of \$1,218.10 to Rockingham County for 2011 taxes as "nonpriority" in Schedule E. *Id.* at 21.

Table 2: McCollum Family Farm Secured Debts &amp; Unsecured Priority Debts

<b>Creditor</b>	<b>Priority</b>	<b>Claim</b>	<b>Collateral</b>	<b>Value</b>	<b>Deficiency</b>
FFS	Secured	\$3,947.95	2010 Ford Transit	\$4,500.00	None
CitiMortgage	Secured	\$157,000.00	Residence	\$168,009.00	None
Wells Fargo	Partially secured, second priority	\$110,444.87	Residence	\$168,009.00	\$99,435.87
CFC	Secured	\$55,305.06	Cell phone tower tract	\$163,000.00	None
CFC	Partially secured	\$681,759.85	Cell phone tower tract, hog facility & farm	\$529,000.00	\$152,759.85
Vistana	Partially secured	\$1,923.42	Timeshare	\$500.00	\$1,423.42
Rockingham County	Unsecured Priority	\$6,952.90	None	Not applicable	Not applicable
IRS	Unsecured Priority	\$9,776.00	None	Not applicable	Not applicable
NC DOR	Unsecured Priority	\$2,726.00	None	Not applicable	Not applicable
<b>Total Secured &amp; Unsecured Priority Debt</b>				<b>\$1,033,018.00</b>	<b>\$253,619.14</b>

The McCollums owed \$90,000 in general unsecured claims, primarily as credit card debt (approximately \$79,000).<sup>178</sup> Additional debts arose from services rendered and products purchased from local companies.<sup>179</sup>

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178. *Id.* at 23–25.

179. *Id.*

Table 3: McCollum Family Farm Unsecured Nonpriority Debts

<b>Creditor</b>	<b>Service or Product</b>	<b>Claim</b>
Rockingham County Taxes	2011 unpaid taxes	\$1,218.10
Barry Z. Dodson, CPA	Services rendered	\$4,960.00
Big Apple Farm Supply, Inc.	Product	\$515.26
Chase Bank	Credit card purchases	\$11,536.43
Chase Health Advance	Credit card purchases	\$1,266.06
Citibank/Sears	Credit card purchases	\$6,764.26
Collie Equipment Co.	Product	\$2,512.31
Discover Card	Credit card purchases	\$14,740.52
John Beliczky	Services rendered	\$9,940.00
Kallam Oil and Gas Co., Inc.	Product	\$1,282.58
M.J. Davenport, Esq.	Services rendered	\$357.01
Wells Fargo	Overdraft	\$56.91
Wells Fargo	Credit card purchases	\$15,541.70
Wells Fargo Card Services	Credit card purchases	\$20,732.73
<b>Total Unsecured Nonpriority Debt</b>		<b>\$91,423.87</b>

The McCollums also filed monthly operating reports for the months of September 2013 through May 2014.<sup>180</sup>

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180. Amended Monthly Operating Report for Massey Creek Farms, LLC – Month: September, 2013, at 1, *In re* McCollum, No. 13-11092 (Bankr. M.D.N.C. Jan. 7, 2014); Amended Monthly Operating Report for Massey Creek Farms, LLC – Month: October, 2013, at 1, *In re* McCollum, No. 13-11092 (Bankr. M.D.N.C. Jan. 7, 2014); Monthly Operating Report for Massey Creek Farms, LLC – Month: November, 2013, at 1, *In re* McCollum, No. 13-11092 (Bankr. M.D.N.C. Jan. 7, 2014); Amended Monthly Operating Report for Massey Creek Farms, LLC – Month: December, 2013, at 1, *In re* McCollum, No. 13-11092 (Bankr. M.D.N.C. Mar. 31, 2014); Monthly Operating Report for Massey Creek Farms, LLC – Month: January, 2014, at 1, *In re* McCollum, No. 13-11092 (Bankr. M.D.N.C. Mar. 31, 2014); Monthly Operating Report for Massey Creek Farms, LLC – Month: February, 2014, at 1, *In re* McCollum, No. 13-11092 (Bankr. M.D.N.C. Mar. 31, 2014); Monthly Operating Report for Massey Creek Farms, LLC – Month:

Table 4: McCollum Monthly Operating Income &amp; Expenses

Month	Income	Expenses	Profit
September, 2013	\$14,851.15	\$13,848.32	\$1,002.83
October, 2013	\$18,580.49	\$20,628.71	\$(2,048.22)
November, 2013	\$19,234.86	\$16,870.38	\$2,364.48
December, 2013	\$19,057.90	\$17,521.93	\$1,535.97
January, 2014	\$14,155.76	\$16,640.58	\$(2,284.82)
February, 2014	\$17,627.59	\$17,015.55	\$612.04
March, 2014	\$18,461.93	\$19,369.75	\$(907.82)
April, 2014	\$28,234.57	\$28,275.18	\$(40.61)
May, 2014	\$20,820.36	\$19,388.46	\$1,431.90
<b>Total</b>	<b>\$171,024.61</b>	<b>\$169,558.86</b>	<b>\$1,465.75</b>

Monthly income and expense fluctuations for the McCollums track the annual income variability inherent to commercial farming: their monthly profit fluctuates month to month by as much as they may earn in a single month. Using an average monthly income and expense estimate for unreported months, their estimated annual percent profit margin was 0.86%. Over the nine-month period, the McCollums averaged a monthly profit of \$163. Apparently the McCollums attempted to cover some of their bankruptcy costs with off-farm income made available by Garland's wife, Ruby, who works in banking.<sup>181</sup>

At the start of their bankruptcy, the McCollums listed \$30,000 from an account receivable at Twin Oaks Grocery.<sup>182</sup> Their son, Garland, owned a quarter of Twin Oaks Grocery and served as its manager until the business was administratively dissolved in 2010.

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March, 2014, at 1, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. Apr. 24, 2014); Monthly Operating Report for Massey Creek Farms, LLC – Month: April, 2014, at 1, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. May 30, 2014); Monthly Operating Report for Massey Creek Farms, LLC – Month: May, 2014, at 1, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. June 30, 2014).

181. Interview with Garland McCollum, Part Owner, Massey Creek Farms, at the Greensboro Farmers Curb Mkt., Greensboro, N.C. (Feb. 24, 2018).

182. Summary of Schedules, *supra* note 163, at 5.

Twin Oaks Grocery operated as a gas station and convenience store,<sup>183</sup> and sold agricultural products for Massey Creek Farms and other local growers.<sup>184</sup> The McCollums needed more than \$30,000 to satisfy their monthly debt obligations, but the loss of this income stream likely contributed to their financial decline.<sup>185</sup>

## 2. Reorganizing

In September, about a month after filing, the McCollums moved to sell approximately eight acres of the fifty-acre cell phone tower lot to Rockingham County to pay their tax debt.<sup>186</sup> CFC initially objected, moving for assurance that its lien on the remaining forty-two acres would be unaffected and that net proceeds after taxes and closing costs would be paid directly to CFC.<sup>187</sup> The court granted the sale on October 15, 2013, stipulating to CFC's security interest in the remaining collateral and receipt of net proceeds.<sup>188</sup> The property sold for \$58,988,<sup>189</sup> of which CFC received at least \$55,500.<sup>190</sup>

In November, exactly ninety days after filing their petition,<sup>191</sup> the McCollums proposed a chapter 12 reorganization plan.<sup>192</sup> Their reorganization proposed \$935 in monthly payments to the trustee to be disbursed to secured claimants except for CFC, which the McCollums would pay \$3,147 directly on a quarterly basis for nineteen equal payments with a final balloon payment of all

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183. See *Twin Oaks Grocery*, FACEBOOK, <https://www.facebook.com/pages/Twin-Oaks-Grocery/121374627911126> (last visited Nov. 4, 2018).

184. See *Massey Creek Farms*, EAT WELL GUIDE, <https://www.eatwellguide.org/listings/55708> (last visited Nov. 23, 2018).

185. Dixon et al., *supra* note 129, at 418 (finding that bankruptcy filing rates diminish as income and employment increase).

186. Motion to Assume Executory Contract, Approve Sale of Property and Transfer Liens to Proceeds at 1–2, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. Sept. 18, 2013). The chapter 12 filing by the McCollums created the first estate; the chapter 13 filing by Garland McCollum created the second estate.

187. Limited Objection by Carolina Farm Credit, ACA to Motion by Debtors to Assume Executory Contract, Approve Sale of Property and Transfer Liens to Proceeds at 1–2, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. Sept. 24, 2013).

188. Order Authorizing Debtor to Assume Executory Contract, Approving Sale of Property and Transferring Liens to Proceeds at 2–3, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. Oct. 15, 2013) [hereinafter Order Granting Motion for Private Sale].

189. Objection by Carolina Farm Credit, ACA to Confirmation of Chapter 12 Plan at 1–2, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. Nov. 20, 2013) [hereinafter CFC Objection to Confirmation].

190. Order Granting Motion for Private Sale, *supra* note 188, at 2.

191. 11 U.S.C. § 1221 (2012).

192. Chapter 12 Plan, *supra* note 164, at 1.

outstanding principal and accrued interest.<sup>193</sup> The plan provided for sixty payments to the trustee and twenty payments to CFC over a five-year period.<sup>194</sup> The McCollums remained current on their monthly mortgage payments to CitiMortgage and Wells Fargo and therefore proposed continued payments outside of the plan to these secured creditors.<sup>195</sup> Finally, the plan proposed surrendering the timeshare to Vistana.<sup>196</sup>

The McCollums attempted to strip down the value of the collateral securing the debt owed to CFC to \$470,000 and to bifurcate the remaining claim into two claims: \$190,000 secured by 200 acres and \$280,000 secured by 225 acres.<sup>197</sup> The McCollums proposed a reamortization over thirty years at 5.25% per year on the first claim, on which they would pay \$3,147 quarterly to CFC.<sup>198</sup> The McCollums proposed a sale of the 225 acres securing the second claim for \$440,000.<sup>199</sup> CFC's deficiency of \$267,000 was to be paid pro rata with other general unsecured claims; however, the McCollums did not anticipate any payment to general unsecured creditors.<sup>200</sup>

CFC objected to the valuation of the tracts securing its claims, arguing that the fair market value of its collateral was well above \$470,000.<sup>201</sup> Over almost eight months, the McCollums and CFC engaged in a lengthy process of real estate valuation, including the employment of additional appraisers and several extended hearings.<sup>202</sup> The docket lists fifty-three separate entries—extensions,

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193. *Id.*

194. *Id.*

195. *Id.* at 2–3.

196. *Id.* at 4.

197. *Id.* at 3.

198. *Id.*

199. *Id.* at 4.

200. *See id.* at 4–5.

201. CFC Objection to Confirmation, *supra* note 189, at 1–2 (“[I]t defies reason that the plan would propose to afford CFC a total secured claim of \$470,000 and yet sell 225 acres for \$440,000. Based on such math, the remaining [seventy-eight] acres on the farm, the [eighty] acre hog facility, and the [fifty] acre cell phone tract would only be worth \$30,000, which is clearly not the case.”). CFC submitted an appraisal of the farm and hog facility at \$600,000, representing a per acre value of \$1,567. *Id.* at 2. CFC further argued that because 7.8 acres of the cell phone tower tract sold the previous month for \$58,988, the remaining acreage was worth approximately \$318,000 (42 acres at \$7,562 an acre). *Id.* CFC stipulated its claim of \$722,000 to be fully secured. *Id.* CFC also objected to the proposed eighteen-month marketing period for the sale, arguing that a nine-month period would be sufficient. *Id.* Garland McCollum explained in a personal conversation that the lower estimate reflected an anticipated cost of \$100,000 to clean up the remaining hog lagoons. Interview with Garland McCollum, *supra* note 181.

202. *See generally* Order Confirming Chapter 12 Plan, *supra* note 160.

continuations, orders granting additional appraisers—prior to plan confirmation on August 8, 2014, almost a year after filing.<sup>203</sup> In the meantime, the McCollums moved to sell 172 acres for \$395,000,<sup>204</sup> with an estimated per acre value of \$2,300, substantially more than CFC’s earlier appraisal. However, the motion was later withdrawn due to the buyer terminating the deal because “the property [was] not perking pursuant to the [contract].”<sup>205</sup>

The confirmed reorganization plan, following negotiations in open court between CFC and the McCollums, treated CFC’s claim as fully secured in the amount of \$762,900 as of June 2, 2014.<sup>206</sup> The McCollums committed to monthly payments, which included expenses and attorney fees, following reamortization over twenty years at 5.25% in annual interest.<sup>207</sup> The McCollums elected to pay CFC directly until September 2020, when all remaining debts would be due.<sup>208</sup> Any future sale proceeds would be applied to CFC’s debt.<sup>209</sup>

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203. *See generally id.*

204. Amended Motion to Approve Sale of Property and Transfer Liens to Proceeds at 1, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. July 8, 2014).

205. Withdrawal of Motion at 1, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. July 24, 2014). “Perking” reflects an inability of the land to absorb excess water as needed for the installation of a septic system. *See, e.g., Frequently Asked Questions*, FOOTHILLS SOIL CONSULTING, PLLC, <http://www.ncsoilinfo.com/faqs.htm> (last visited Nov. 23, 2018). Cities and counties require a septic system permit before land development or building construction may proceed. *Id.*

206. Order Confirming Chapter 12 Plan, *supra* note 160, at 2.

207. *Id.*

208. *Id.*

209. *Id.*

Table 5: McCollum Family Farm Confirmed Plan

<b>Creditor</b>	<b>Claim</b>	<b>Collateral</b>	<b>Summary &amp; Treatment</b>	<b>Monthly Installment</b>
FFS	\$3,624.31	2010 Ford Transit	Fully secured, current & continue	\$68.81
CitiMortgage	\$157,000.00	Residence	Fully secured, current & continue outside of plan	None
Wells Fargo	\$110,715.05	Residence	Subordinate to Citi, current and continue outside of plan	None
CFC	\$762,900.29	Remaining cell tower lot, hog facility, & farm	Fully secured, reamortize over twenty years	\$5,213
Vistana	\$1,923.42	Timeshare	Debtors shall surrender, no payment	None
Rockingham County	\$6,952.90	None	Taxes 2011–2013	\$136.86
IRS	\$9,776.00	None	Taxes 2010–2011	\$175.66
NC DOR	\$2,726.00	None	Taxes 2010–2011	\$51.44
CE Robertson & Associates, PC	\$6,960.00	None	Paid by trustee	Not applicable
Tommy Davis, ASA	\$1,200.00	None	Paid by trustee	Not applicable
Administrative claims	\$25,000.00	None	Paid by trustee	Not applicable
General Unsecured	\$91,423.87	None	Paid by trustee if funds available; estimated zero percent	None

The plan also provided for administrative payments as well as a lifting of the automatic stay to allow CFC to credit the McCollums for any patronage dividends received each year.<sup>210</sup> All other sections of the proposed reorganization plan remained intact; final allocations

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210. *Id.*

required the McCollums to make monthly payments of \$5,213 to CFC and \$1,575 to the trustee for disbursement to other creditors,<sup>211</sup> in addition to their ongoing mortgage payments.

The McCollums initially proposed paying the trustee \$935 per month and CFC \$3,147.30 quarterly,<sup>212</sup> roughly \$23,800 annually; their confirmed plan required an estimated \$86,649 annually.<sup>213</sup> The McCollums defaulted in their payments almost immediately, failing to pay CFC its October installment just two months after confirmation.<sup>214</sup> The McCollums likely anticipated supplanting their farm income with real estate sales, but subsequent property sales proved insufficient.

In November, the McCollums moved to sell 151 acres.<sup>215</sup> In December, CFC objected to the sale due to plan payment defaults for October, November, and December and the sale motion providing for payment to the appraisers from the proceeds.<sup>216</sup> The court granted the sale on February 4, 2015, but sustained CFC's objection and required that all net proceeds from the sale, less any necessary closing fees, be paid directly to CFC.<sup>217</sup> The debtors offered the 151 acres for \$2,200 per acre, resulting in an approximate purchase price of \$332,000.<sup>218</sup> On February 4, 2015, CFC consented to the McCollums paying one of the land appraisers \$5,800 out of the proceeds of the sale, which the court approved.<sup>219</sup> The McCollums successfully sold 151 acres, approximately half of the 303-acre farm.<sup>220</sup> CFC received \$303,721 from the sale.<sup>221</sup> Pursuant to the plan, the outstanding debt to CFC was reamortized over the remaining twenty-year period at 5.25%

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211. Limited Objection to Amended Motion to Approve Sale of Property and Transfer Liens to Proceeds at 1, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. Dec. 31, 2014) [hereinafter Limited Objection to Amended Motion]; Order Confirming Chapter 12 Plan, *supra* note 160, at 2.

212. Chapter 12 Plan, *supra* note 164, at 1.

213. Order Confirming Chapter 12 Plan, *supra* note 160, at 2.

214. Limited Objection to Amended Motion, *supra* note 211, at 1.

215. *Id.*

216. *Id.*

217. Amended Order Approving Amended Motion to Sale Property and Transfer Liens to Proceeds at 3, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. Feb. 4, 2015) [hereinafter Amended Order Approving Amended Motion].

218. *Id.* at 2. This portion of the property excluded the hog lagoons. Interview with Garland McCollum, *supra* note 181.

219. Amended Order Approving Amended Motion, *supra* note 217, at 2–3.

220. Motion by Carolina Farm Credit, ACA for Relief from the Automatic Stay of 11 U.S.C. § 362(a) at 2, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. May 6, 2015) [hereinafter Motion by CFC for Relief].

221. *Id.*

interest, reducing monthly payments to \$3,336 beginning March 5, 2014.<sup>222</sup>

### 3. Conversion

Between September 2014 and January 2015, the McCollums owed \$7,875 to the trustee but paid only \$1,500.<sup>223</sup> The McCollums also defaulted on the monthly payments to CFC as described above.<sup>224</sup> The trustee first moved for dismissal on January 27, 2015, but requested continuances following payment by the McCollums.<sup>225</sup> When the McCollums again defaulted on their payments to CFC in April and May, CFC moved for relief from the automatic stay to initiate foreclosure.<sup>226</sup> Following several hearings, the court entered a consent order on CFC's motion for relief on July 2, 2015, outlining a new repayment schedule as agreed to by the McCollums.<sup>227</sup> The Internal Revenue Service ("IRS") had seized \$9,000 from the Massey Creek Farms business bank account, and the farm also lost a high-paying client.<sup>228</sup> Following a compromise with the IRS and the return of the high-paying client, the McCollums expected to make timely payments to the trustee and CFC.<sup>229</sup> The consent order provided that if the McCollums defaulted on any payments over the next year, and if the default was not cured within ten days, then upon filing of written notice with the court, the automatic stay would be modified and lifted: CFC would be allowed to foreclose on the real property pursuant to the deed of trust and nonbankruptcy law.<sup>230</sup> The court also granted

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222. *Id.* at 1–2.

223. Motion to Dismiss at 1, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. Jan. 27, 2015).

224. *Id.*

225. *Id.* The trustee withdrew this motion a year later on January 26, 2016, without prejudice. Withdrawal of Motion to Dismiss at 1, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. Jan. 26, 2016).

226. Motion by CFC for Relief, *supra* note 220, at 2.

227. Consent Order on Motion by Carolina Farm Credit, ACA for Relief from the Automatic Stay of 11 U.S.C. § 362(a) at 2–3, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. July 2, 2015). The court initiated a new timeline for the payments, assigning the June 5, 2015 payment to be made on or before July 13, 2015. *Id.* at 2. The July 5th payment would be paid on or before July 29th. *Id.* The August 5th payment would be paid on or before August 15th. *Id.* September's installment and all subsequent payments were to be paid on the 5th of each month as originally stipulated in the confirmed plan. *Id.*

228. Hearing June 2, 2015, PDF File with Audio File Attachment, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. June 3, 2015).

229. *Id.*

230. *Id.*

CFC 180 days to file a deficiency claim based on the liquidation of the acreage.<sup>231</sup>

The McCollums made their first payment but failed to pay their July installment and failed to cure this default within the ten-day grace period.<sup>232</sup> On August 11, 2015, CFC filed a notice of default, which lifted the automatic stay per the court's previous order.<sup>233</sup> Hearings continued regarding the trustee's previous motion to dismiss for lack of payments, which the trustee withdrew without prejudice on January 26, 2016.<sup>234</sup> On June 9, 2016, Wells Fargo filed a motion for relief from the automatic stay, alleging several missed mortgage payments between January and May.<sup>235</sup> The court denied Wells Fargo's motion on August 4, finding that the McCollums had cured their mortgage debts.<sup>236</sup>

On October 26, 2016, Martha Faye McCollum voluntarily converted her chapter 12 case to chapter 7, following the death of her husband a month earlier.<sup>237</sup> She also filed a statement of intent to surrender all outstanding property securing all outstanding debt,<sup>238</sup> retaining property exemptions under state law in the amount of \$36,146.27.<sup>239</sup> The trustee filed a second motion to dismiss the case on November 10, 2016, citing payment defaults as well as the passing of Mr. McCollum senior.<sup>240</sup> The court granted the dismissal as to William Edward McCollum on November 29.<sup>241</sup>

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231. *Id.*

232. Notice of Default of Consent Order at 1, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. Aug. 11, 2015).

233. *Id.*

234. Withdrawal of Motion to Dismiss at 1, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. Jan. 26, 2016).

235. Motion for Relief from Automatic Stay or in the Alternative Adequate Protection at 1-2, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. June 9, 2016).

236. Order Denying Motion for Relief from Stay at 1, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. Aug. 4, 2016).

237. Notice of Conversion from Chapter 12 to Chapter 7 at 1, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. Oct. 26, 2016). All of the chapter 12 documentation is docketed under the chapter 7 docket because the debtor remains the same.

238. Chapter 7 Individual Debtor's Statement of Intention at 3, *In re McCollum*, No. 16-19005 (Bankr. M.D.N.C. Oct. 26, 2016).

239. Chapter 7 Trustee's Final Account and Distribution Report Certification that the Estate Has Been Fully Administered and Application to be Discharged (TDR) at 1, *In re McCollum*, No. 16-19005 (Bankr. M.D.N.C. July 3, 2018) [hereinafter Chapter 7 Trustee's Final Account].

240. Motion to Dismiss Case for Failure to Make Plan Payments at 1, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. Nov. 10, 2016).

241. Notice of Order Dismissing Debtor at 1, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. Nov. 30, 2016).

The trustee paid a total of \$24,625 on behalf of the McCollums: administrative and attorney fees totaled \$14,897; principal secured debt payments totaled \$3,645 plus \$1,702 in interest, reflecting property taxes for Rockingham County and vehicle payments to FFS for the Ford Transit; principal unsecured priority debt payments totaled \$4,069 plus \$311 in interest, all of which was paid to the IRS.<sup>242</sup> In total, the trustee disbursed \$9,728 to creditors.<sup>243</sup> At conversion, all outstanding debt transferred to the chapter 7 case.<sup>244</sup> No funds transferred from the chapter 12 case to the chapter 7 case.<sup>245</sup> The chapter 12 case closed on February 17, 2017.<sup>246</sup> The chapter 7 estate abandoned assets worth \$711,095 and discharged \$190,450 in claims without payment.<sup>247</sup> The estate received \$10,000 in insurances proceeds from William Edward McCollum's death, which covered less than sixty percent of the costs of administering the chapter 12 and chapter 7 cases.<sup>248</sup> The chapter 7 case closed on July 16, 2018.<sup>249</sup>

### C. Discussion

Chapter 12 developed in the wake of an agricultural crisis created in part from plummeting land values. Debt restructuring, including the opportunity to write down debt owed on a principal mortgage, was necessary as a means "to give family farmers facing bankruptcy a fighting chance to reorganize their debts and keep their land."<sup>250</sup> But if family farming is not vulnerable to financial demise based on undersecured debts, then chapter 12's specialized features are not sufficiently helpful. The McCollums initially proposed to write down the debt owed to CFC, but the value of their real property assets fully secured the \$763,000 owed on their operating line of credit. It is unclear from the court filings why the McCollums opted not to write down the second lien on their principal residence, a feature uniquely

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242. Chapter 12 Trustee's Final Report and Account at 1–3, *In re McCollum*, No. 16-19005 (Bankr. M.D.N.C. Jan. 13, 2017).

243. *Id.* at 3.

244. COLLIER ON BANKRUPTCY, *supra* note 58, ¶ 1208.01.

245. Form 1 – Individual Estate Property Record and Report at 3, *In re McCollum*, No. 16-19005 (Bankr. M.D.N.C. Apr. 7, 2017).

246. Final Decree at 1, *In re McCollum*, No. 13-11092 (Bankr. M.D.N.C. Feb. 17, 2017).

247. Chapter 7 Trustee's Final Account, *supra* note 239, at 1.

248. *Id.* at 2–3.

249. Final Decree at 1, *In re McCollum*, No. 16-19005 (Bankr. M.D.N.C. July 16, 2018).

250. H.R. REP. NO. 99-958, at 48 (1986) (Conf. Rep.); Innes et al., *supra* note 125, at 3.1.

available to chapter 12 debtors.<sup>251</sup> Such a write down would have reduced their monthly expenses. It is also unclear how much the McCollums paid to the IRS following the sale of 151 acres of their farm, an expense that would now be classified as a general unsecured claim under Congress's recent amendment to the Code. In the end, the McCollum chapter 12 filing functioned as an expensive and circuitous route to a chapter 7 proceeding.

The McCollum chapter 12 bankruptcy, where the debtors did not discharge unsecured debt and ultimately converted to chapter 7, tracks the outcome of other family farm bankruptcies based on available research. A study comparing closed chapter 12 cases filed between 1986 and 2001 found that while debtors experienced a fifty percent discharge rate during the farm crisis, only thirty to thirty-five percent of closed cases discharged debt by the 1990s.<sup>252</sup> The same study found a chapter 7 conversion rate of twelve to thirteen percent of closed cases.<sup>253</sup> Declining discharge rates could result from increased negotiations between family farmers and their creditors or from an improved farm economy. In other cases, family farmers could be teetering on equity without a viable economic model.

Of the two additional chapter 12 cases filed in the Middle District of North Carolina in 2013,<sup>254</sup> one converted first to a chapter 13 and then ultimately to a chapter 7 case.<sup>255</sup> David and Karen Garner filed the other chapter 12 petition in the Middle District in 2013; they confirmed a reorganization plan and completed their plan in July of 2018.<sup>256</sup> Similar to the McCollums, the Garners owed close to \$800,000 to Carolina Farm Credit, a claim fully secured by their real property

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251. A survey of case law and secondary sources did not reveal why this option would be unavailable to the McCollums. The website of a practicing bankruptcy attorney based in San Jose, California, suggests that stripping a junior mortgage lien may have been unavailable to the McCollums because the first mortgage was not undersecured. *Chapter 12*, L. OFFICES DAVID A. BOONE, <http://attorneyforbankruptcy.com/blog/types-of-bankruptcy/chapter-12/> (last visited Nov. 24, 2018) (describing how a family farm debtor may “strip junior liens if the property is worth less than [is owed] on the first mortgage”).

252. Jerome M. Stam et al., *Sixteen Years of Chapter 12 Bankruptcy: Evolution of Filing and Disposition Rates*, 63 AGRIC. FIN. REV. 93, 101 (2003) (“In 1986 and 1987, the discharge rates are clearly the highest at 52% and 51%, respectively. After 1987, the discharge rates decline to 28% in 1996.”).

253. *See id.* at 102–04.

254. CASES COMMENCED DURING 2013, *supra* note 6, at 1.

255. Notice of Conversion from Chapter 13 to Chapter 7 at 1, *In re Kelly*, No. 13-11020 (Bankr. M.D.N.C. Apr. 17, 2014).

256. Notice of Completion of Chapter 12 Plan Payments to Chapter 12 Trustee at 1, *In re Garner*, No. 13-11342 (Bankr. M.D.N.C. July 19, 2018).

assets.<sup>257</sup> Based on their monthly operating report, the Garners supplemented their farm income with off-farm employment.<sup>258</sup> The Garners operated their farm in Randolph County,<sup>259</sup> where the poverty rate in 2013 was 19.8%<sup>260</sup> and the unemployment rate was 8.6%,<sup>261</sup> both at least a percentage point lower than the rates for poverty and unemployment in Rockingham County in the same year.

If small family farms are rural,<sup>262</sup> and if successful small family farms rely on off-farm employment to stabilize their income,<sup>263</sup> their resiliency may be interdependent on the resiliency of their local, rural economy. Yet legal institutions and corresponding research struggle to address the experience of rural communities broadly and their financial circumstances.<sup>264</sup> Similarly, the chapter 12 studies profiling the filings of family farmers across the country fail to incorporate the perspective of farmers themselves, the uniqueness of their geographies, or their relationship with the local economy.

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257. Order Confirming Chapter 12 Plan at 2, *In re Garner*, No. 13-11342 (Bankr. M.D.N.C. Mar. 20, 2014).

258. Monthly Operating Report – Month: September, 2017 at 2, *In re Garner*, No. 13-11342 (Bankr. M.D.N.C. Oct. 27, 2017).

259. Chapter 12 Voluntary Petition at 1, *In re Garner*, No. 13-11342 (Bankr. M.D.N.C. Oct. 9, 2013).

260. *Small Area Income and Poverty Estimate*, U.S. CENSUS BUREAU, [https://www.census.gov/data-tools/demo/saie/saie.html?s\\_appName=saie&map\\_yearSelector=2013&map\\_geoSelector=aa\\_c&s\\_state=37&s\\_county=37151&s\\_year=2016,2013](https://www.census.gov/data-tools/demo/saie/saie.html?s_appName=saie&map_yearSelector=2013&map_geoSelector=aa_c&s_state=37&s_county=37151&s_year=2016,2013) (last visited Nov. 24, 2018) (filtered by “North Carolina,” then “Randolph County,” then “2013.”).

261. *Local Area Unemployment Statistics*, U.S. DEPT. LAB., <https://www.bls.gov/lau/#tables> (last visited Nov. 24, 2018) (scroll down to “County Data” and click “Labor force data by county, 2013 annual averages”). The 2013 annual average for Rockingham County was 9.7%. *Id.*

262. *Farming and Farm Income*, *supra* note 146; *Small and Family Farms*, *supra* note 146.

263. HOPPE, MACDONALD & KORB, *supra* note 18, at 20.

264. Porter, *supra* note 97, at 970 (describing “[a]n unspoken assumption [in legal] scholarship [that] the impact of laws should be measured exclusively in terms of how the legal system operates in America’s cities and suburbs,” supported by an analysis of rural financial failure made more difficult by the administration of legal institutions). *But see, e.g., Agriculture of the Middle*, U. WIS., <http://agofthemiddle.org/> (last visited Nov. 24, 2018) (representing a consortium of academics pursuing “[r]esearch, education and policy strategies that keep farmers and ranchers on the land”); *Food Law and Policy Clinic*, HARV. L. SCH., <http://hls.harvard.edu/dept/clinical/clinics/food-law-and-policy-clinic-of-the-center-for-health-law-and-policy-innovation/> (last visited Nov. 24, 2018); *Resnick Center for Food Law & Policy*, UCLA. SCH. L., <https://law.ucla.edu/centers/social-policy/resnick-program-for-food-law-and-policy/about/> (last visited Nov. 24, 2018).

## III. RECOMMENDATIONS: REVISITING RURAL AMERICA

In its 1973 report, the Commission on the Bankruptcy Laws described how “[s]tagnant or declining economic conditions, such as found in inner cities, are likely to produce business failure, especially among economic units unable to relocate to growing suburbs or otherwise to adjust to loss of favorable business climate in their immediate areas.”<sup>265</sup> The Commission recognized a shortcoming of its own research—a “need for further study to determine to what extent business failure rates—and business bankruptcy rates—are tied to local or regional economic conditions.”<sup>266</sup> Legal scholarship continues, however, to focus on the experience of metro and suburban communities to the detriment of rural communities.<sup>267</sup>

Specific to farming, which largely takes place in rural areas,<sup>268</sup> studies of chapter 12 filers fail to incorporate the experience of the farmer and the variety of geographies endeavoring to sustain small family agriculture. When the then General Accounting Office studied chapter 12 filings in 1989 at the request of Congress, its study relied on interviews with fifty-nine individuals: trustees, debtor attorneys, creditor attorneys, and creditors; and not a single farmer.<sup>269</sup> Similarly, legal professionals discussing family farm bankruptcies often cite a study of chapter 12 filers in Iowa from 1987.<sup>270</sup> But this study did not interview a single farmer either.<sup>271</sup> An additional study profiled California chapter 12 filers in 1989, again analyzing filing information and the impressions of legal professionals without incorporating the perspective of the individuals for whom the legislation was crafted: farmers.<sup>272</sup> In combination, these three studies represent small family farmers in six states, all but one of them in California, the West, or

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265. COMMISSION I, *supra* note 47, at 39.

266. *Id.*

267. Porter, *supra* note 97, at 970.

268. See *Farming and Farm Income*, *supra* note 146.

269. U.S. GEN. ACCOUNTING OFFICE, *supra* note 104, at 4–5, 55–58. The absence of farmer input is especially disconcerting given the title of the report issued to Congress: “Farm Finance: *Participants’ Views on Issues Surrounding Chapter 12 Bankruptcy.*” *Id.* at cover page (emphasis added).

270. See, e.g., Dixon et al., *supra* note 129, at 418 (citing Faiferlick & Harl, *supra* note 104, at 307); Innes et al., *supra* note 125, at 29 (citing Faiferlick & Harl, *supra* note 104, at 332); Porter, *supra* note 83, at 743 (citing Faiferlick & Harl, *supra* note 104, at 331).

271. Faiferlick & Harl, *supra* note 104, at 303–05.

272. Innes et al., *supra* note 125, at 29 (describing a survey of Chapter 12 case filings in Sacramento and Fresno bankruptcy courts, which “handle most of the farm bankruptcies in the state”).

the Midwest.<sup>273</sup> Only the General Accounting Office study included an analysis of a state in the South: Louisiana, specifically western Louisiana.<sup>274</sup> Available research does not seem to address chapter 12 filings in the southeastern part of the country despite relatively high filings in these federal circuit districts.<sup>275</sup>

Research for this Article uncovered only one study that surveyed family farm debtors: Professor Neil Harl, who co-authored the 1987 filer study in Iowa, also co-authored a study that mailed questionnaires to the chapter 12 filers from the previous research.<sup>276</sup> The study focused on the “ultimate impact of Chapter 12 on farm survival” seven years after filing.<sup>277</sup> Of the 141 chapter 12 filers that responded, “118 farm operations (83.69 percent) continue[d] to function, own land, or operate a livestock operation.”<sup>278</sup> On average, the filers owed \$318,485 in land-secured debt and wrote off \$125,543.<sup>279</sup> Farmers with a higher average gross income were more likely to confirm a reorganization plan and more likely to receive a discharge,<sup>280</sup> and those farmers that continued to farm after bankruptcy discharged more debt in their bankruptcy, on average, than farmers who did not continue to farm.<sup>281</sup> Importantly, even the unsuccessful filers, including those unsuccessful filers who failed to negotiate a private settlement, “found value in the existence of Chapter 12 because of an altered and improved negotiating position.”<sup>282</sup> Farmers had two recommendations based on their experiences: enhance access to operating credit in bankruptcy and

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273. U.S. GEN. ACCOUNTING OFFICE, *supra* note 104, at 11 (reviewing a single bankruptcy court from each of four states, including in Colorado, Western Louisiana, Minnesota, and Nebraska); Faiferlick & Harl, *supra* note 104, at 331 (studying Iowa); Innes et al., *supra* note 125, at 29 (describing a study of filings in California).

274. U.S. GEN. ACCOUNTING OFFICE, *supra* note 104, at 11.

275. Porter, *supra* note 83, at 741 n.71 (“While the Seventh Circuit had the highest number of filings with twenty-one cases in 2004, the recent profile of [c]hapter 12 debtors does not satisfy the vision of diversified midwestern farmers that motivated Congress to pass [c]hapter 12.”). In 2016, the least amount of chapter 12 filings took place in the third district with thirteen. CASES COMMENCED DURING 2016, *supra* note 5, at 1. The most chapter 12 filings took place in the eighth district with seventy-six. *Id.* Twenty-eight chapter 12 cases were filed in the fourth district, which is where the McCollum case was filed in 2013. *Id.* Fifty-seven cases were filed in the eleventh district. *Id.*

276. HIPPEN & HARL, *supra* note 8, at 47.

277. *Id.* at 5, 7.

278. *Id.* at 11.

279. *Id.* at 42.

280. *Id.* at 35.

281. *Id.* at 42.

282. *Id.* at 45.

examine the necessity of a trustee given the capacity of secured creditors to protect their interests.<sup>283</sup> The study concluded: “Chapter 12 is working and should be preserved . . . . Indeed, the most compelling argument for making Chapter 12 bankruptcy a permanent chapter in the Bankruptcy Code is the importance of maintaining Chapter 12 on a standby basis.”<sup>284</sup>

The continued and increased use of chapter 12, and its shadow effect, support this finding. That a majority of filers continued to farm is both encouraging and insightful, albeit isolated and dated. Absent a better understanding of small commercial family farm debtors in recent years, from representative geographies, and from the viewpoint of farmers themselves, our policies may be driven more by popular media than by lived experiences.<sup>285</sup> Indeed, current U.S. Secretary of Commerce Wilbur Ross in the spring of 2017 encouraged farmers to “plant as much as [they] can logically plant,”<sup>286</sup> even though overproduction contributed in part to the 1980s farm crisis.<sup>287</sup> As of August 2018, the Department of Agriculture plans to purchase “up to \$1.2 billion in [surplus] commodities” due to escalating tariffs on exports.<sup>288</sup>

The McCollum case study describes an economy unable to support small commercial family farms. Their viability may be interdependent on the economic health of their local, rural community. Research studies designed to understand the financial stress of small family farming should focus on the quantitative and qualitative experience of small family farmers within the context of their local economy, including the retail businesses and service providers on which they, their families, and their neighbors rely for income and employment.<sup>289</sup> Such research should explore the nexus between rural poverty, unemployment, food insecurity, and small family farm failure,

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283. *Id.* at 49–51.

284. *Id.* at 50–51 (internal quotation omitted).

285. Porter, *supra* note 83, at 746.

286. Chris Clayton, *Commerce Secretary to Farmers: Plant as Much as Possible*, PROGRESSIVE FARMER: AG POLY BLOG (Apr. 29, 2017, 1:27 PM), <https://www.dtnpf.com/agriculture/web/ag/perspectives/blogs/ag-policy-blog/blog-post/2017/04/29/commerce-secretary-farmers-plant> (quoting Commerce Secretary Wilbur Ross).

287. *See supra* Sections II.A, II.B.

288. Press Release, U.S. Dep’t of Agric., USDA Announces Details of Assistance for Farmers Impacted by Unjustified Retaliation (Aug. 27, 2018), <https://www.usda.gov/media/press-releases/2018/08/27/usda-announces-details-assistance-farmers-impacted-unjustified>.

289. *See supra* Section II.A; *see also* Porter, *supra* note 97, at 1011–15 (work in journal); Pershing et al., *supra* note 148, at 5 (unpublished material not forthcoming).

particularly in underrepresented geographies and from the perspective of farmers themselves.

#### CONCLUSION

Farmers may again be facing a crisis, this time with a bankruptcy chapter designed to meet their reorganizing needs. Bankruptcy filings under chapter 7 and 13 hit a ten-year low last year (chapter 11 filings have risen slowly since 2014).<sup>290</sup> Chapter 12 filings hit a five-year peak last year.<sup>291</sup> Available data and research suggest that those farms with sufficient income will successfully reorganize, some inside and some outside of bankruptcy. Yet important questions remain: do successful small commercial family farms, in bankruptcy or outside, have sufficient income due to a uniquely resilient farming model or due to other factors linked to their local economy? What are the characteristics of resilient small commercial family farming models? What are the characteristics of resilient rural economies? Most importantly, do chapter 12 filers keep their land and continue to farm?

Congress began its national experiment with specialized agricultural bankruptcy provisions almost 150 years ago. Recent

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290. CASES COMMENCED DURING 2017, *supra* note 5, at 1 (reporting 486,347 chapter 7 filings, 7,442 chapter 11 filings, and 294,637 chapter 13 filings); CASES COMMENCED DURING 2016, *supra* note 5, at 1 (reporting 490,365 chapter 7 filings, 7,292 chapter 11 filings, and 296,655 chapter 13 filings); CASES COMMENCED DURING 2015, *supra* note 5, at 1 (reporting 535,047 chapter 7 filings, 7,241 chapter 11 filings, and 301,705 chapter 13 filings); CASES COMMENCED DURING 2014, *supra* note 5, at 1 (reporting 619,069 chapter 7 filings, 7,234 chapter 11 filings, and 310,061 chapter 13 filings); CASES COMMENCED DURING 2013, *supra* note 6, at 1 (reporting 728,833 chapter 7 filings, 8,980 chapter 11 filings, and 333,626 chapter 13 filings); CASES COMMENCED DURING 2012, *supra* note 6, at 1 (reporting 843,545 chapter 7 filings, 10,361 chapter 11 filings, and 366,532 chapter 13 filings); CASES COMMENCED DURING 2011, *supra* note 6, at 1 (reporting 992,332 chapter 7 filings, 11,529 chapter 11 filings, and 406,084 chapter 13 filings); CASES COMMENCED DURING 2010, *supra* note 6, at 1 (reporting 1,139,601 chapter 7 filings, 13,713 chapter 11 filings, and 438,913 chapter 13 filings); CASES COMMENCED DURING 2009, *supra* note 6, at 1 (reporting 1,050,832 chapter 7 filings, 15,189 chapter 11 filings, and 406,962 chapter 13 filings); CASES COMMENCED DURING 2008, *supra* note 6, at 1 (reporting 744,424 chapter 7 filings, 10,160 chapter 11 filings, and 362,762 chapter 13 filings); *see also* Davis, *supra* note 6 (describing data as of September 30, 2017).

291. CASES COMMENCED DURING 2017, *supra* note 5, at 1 (reporting 501 chapter 12 filings); CASES COMMENCED DURING 2016, *supra* note 5, at 1 (reporting 461 chapter 12 filings); CASES COMMENCED DURING 2015, *supra* note 5, at 1 (reporting 407 chapter 12 filings); CASES COMMENCED DURING 2014, *supra* note 5, at 1 (reporting 361 chapter 12 filings); CASES COMMENCED DURING 2013, *supra* note 6, at 1 (reporting 395 chapter 12 filings); CASES COMMENCED DURING 2012, *supra* note 6, at 1 (reporting 512 chapter 12 filings).

legislation improves the availability of financial resources for the reorganizing small commercial family farm. Calls to increase the debt limit, and reduce or eliminate the off-farm income restriction would expand chapter 12's reach. But if farm assets maintain their value while farm incomes decline, success rates of the past may not repeat. Future chapter 12 evaluations should ask farmers if—and how—they weather financial distress.