

January 2024

GRAIN MARKETING ISSUES AND SOLUTIONS

Minnesota Organic Agriculture Conference

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With help from Harriet Behar, Organic Farmers Association



**ORGANIC FARMERS
ASSOCIATION**



Short Marketing Grains- corn, beans, small grains through various channels

- Direct to another farmer
- Through a cooperative
- Direct to a processor
- Direct to a broker

Much of the organic grain is sold through brokers, who then clean and bag or bulk package the grain



Contracts with Farmers & Cooperatives

- These tend to give grain farmers more input into delivery dates, payment schedules, and prices received by the grain farmer.



Contracts with Processors & Brokers

- These contracts can be more complicated, with extra fees for poor quality grain or not meeting the exact delivery schedule.
- Bankruptcies have been an issue in the past few years, with a few large organic brokers and processors causing disruption in the organic wholesale grain marketplace.
- Bankruptcies have specific rules and it is not easy to put clauses in your contract to protect yourself from the negative effects of the broker or processor's bankruptcy.



How could a grain buyer's bankruptcy affect those who sell or who have contracted grain to them?

- Clawback letters for payments received within 90 days of the declared bankruptcy
- No/lesser/late payment for grain delivered
- Contract requirements to deliver grain, even if seller fears no/lesser/late payment would be received



Understanding how bankruptcy laws seek to be “fair” to all those that are owed money

- Bankruptcy is a process overseen by the courts to achieve a fair resolution for everyone concerned when a business becomes insolvent:
 - Chapter 7: Trustees manage liquidation process for the benefit of all creditors and the public.
 - Chapter 11: Trustee works to restructure debt so the business can continue operating and paying off debt into the future.



Understanding how bankruptcy laws seek to be “fair” to all those that are owed money

- Principles

- A business **shouldn't be able to pick and choose who gets paid** and who doesn't right before they file for bankruptcy.
- Everyone who received funds from the bankrupt business in the 90 days before filing should have to put that money back so **it can be fairly distributed across ALL similar vendors** who are owed money.
 - (Unless they can show the payment wasn't preferential.)
- Just because a business files for bankruptcy, **that doesn't mean we can break existing, legal contracts** with that business- if we allow that, more damage will happen to more people.



Understanding how bankruptcy laws seek to be “fair” to all those that are owed money

- Principles
 - Just because a business files for bankruptcy, **that doesn't mean we can break existing, legal contracts** with that business- if we allow that, more damage will happen to more people.
 - Especially under Ch 11
 - This doesn't mean vendors have to suffer!



Clawback Letters

- What is it?
- Who writes it?
- Who receives it?
- Must you respond?

July 25, 2022

Via Regular U.S. Mail

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

RE: Pipeline Foods, LLC
Bankruptcy No. 21-11002

Dear Sir or Madam:

Our firm represents Nauri Manty, the court-appointed liquidating trustee of the bankruptcy estate of Pipeline, LLC and its affiliates. The trustee is asserting claims against your company under 11 U.S.C. § 547(b), which allows the trustee to recover payments that Pipeline made to your company within 90 days before it filed bankruptcy.

Pipeline filed bankruptcy on July 8, 2021. Pipeline's books and records show that within the 90 days before that date, Pipeline paid your company \$261,060.58. A further review of the books and records show that your company extended new value to Pipeline in the estimated amount of \$197,772.34, leaving a net preference claim against your company of \$63,288.23. The trustee can avoid and recover the net amount for the benefit of the bankruptcy estate and its creditors. Note that the trustee reserves all rights to reevaluate new value based on any newly discovered information.

Therefore, your company must return \$63,288.23 within 21 days after the date of this letter. The check may be delivered to the address below and made payable to "Nauri Manty, Trustee." If payment is not received within 21 days, we will be forced to take further action against you and will commence litigation.

Responses to Clawback letters

- Argument: payment was not ‘preferential’
 - Make the defense that your transaction occurred in “the ordinary course of business”
 - How do you show your transaction was ordinary?
 - Show that the same product, calculation of payment amount, form of payment, timing of payment had been made many times before
 - Hard to do if you are a new customer or make only a single yearly sale

Responses to Clawback Letters

- **Argument: payment was not “preferential”**

- Make the defense that your transaction occurred in “**the ordinary course of business**”

- **How do you show your transaction was ordinary?**

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Responses to Clawback Letters

- If payment was wired rather than direct deposit, many times this is considered “cash”, can this be clawed back too?
 - **Yes**, any and all payments made in the 90 days before filing can be presumed to be preferential, no matter the form of payment (cash, check, direct deposit, in-kind exchange of real estate, etc.).



Can we avoid Clawback Letters?

Some farmers are considering options to receive smaller payments, as clawing back small payments are less efficient for the trustees, and they have an obligation to the public to be efficient with time and resources

- Split up payments to different entities (not husband and wife)
- Can have smaller deliveries to have smaller payments
- Share payments with landlord who rents the land to the farmer



Can we avoid Clawback Letters?

THESE STRATEGIES HAVE COMPLICATIONS:

- **Split up payments to different entities (not husband and wife):**
 - Can't write the check to Uncle Bob if he's not an owner and not party to the sales contract.
- **Can have smaller deliveries to have smaller payments:**
 - The costs can become larger than the benefits
- **Share payments with landlord who rents the land to the farmer**
 - This is fine if you have a crop share lease.



Can we ignore Clawback Letters?

SOME FARMERS OPTED TO IGNORE THE LETTER

- One farmer did not respond to the Pipeline bankruptcy clawback letter, was taken to court and the judge dismissed the case. (Hard to say why case was dismissed- not a normal outcome.)
- If you do not receive a clawback letter or response to your answer to the clawback letter fighting the clawback payment within 2 years, then you do not need to worry that you will need to give back the payment.



What happens after a Clawback Process?

THE TRUSTEES TAKE ALL THE FUNDS AVAILABLE AND GIVE THEM TO THE CREDITORS, FAIRLY.

- If very little money is available, creditors may get pennies on the dollar or very long repayment terms.



How can farmers be made whole?

EXPLORE YOUR STATE'S PROTECTIONS:

- State grain indemnity funds
 - 11 states have an indemnity fund
- Bonding obligations
 - 30 states have a bond program

BUILD A RELATIONSHIP WITH YOUR ELECTED STATE REPRESENTATIVES AND DEPARTMENTS OF AG.

- Licensing
 - 31 states have a licensing process that can be used to control the entity and create security



How can farmers be made whole?

WHAT ABOUT THE PART WHERE FARMERS STILL HAD TO DELIVER GRAIN TO A BANKRUPT BUYER?

- Sellers are always entitled to “**demand adequate assurance**” of the buyer’s ability to pay
- You can refuse to deliver until you get adequate assurance.



Protecting yourself from future grain buyer bankruptcies

DON'T BECOME A CREDITOR

- Get paid when you deliver the grain.
- Negotiate in your contract for the payment to be a “contemporaneous exchange” with a small gap between delivery and payment

BECOME A “SECURED CREDITOR”

- Secured creditors are first in line for payment under bankruptcy
- Follow rules for an agricultural lien, available in many states that do not have indemnity or bond programs.
 - Generally, you have a secured interest in the buyer’s assets for 20 days
 - if you file with the Secretary of State, the lien lasts longer.
 - Generally not available if the state has an indemnity/bond fund

Protecting yourself from future grain buyer bankruptcies

- Know the rules when growing grain in one state, and selling grain over state lines
- What protections do you have in these type of sales?
- Get to know your state representatives and work with them for more legal protections in your state (examples?)



Protecting yourself from future grain buyer bankruptcies

- **Don't put all of your eggs in one basket !**
- Sell to a variety of grain buyers
- Build relationships with long-term established companies who have a good reputation for paying on-time
- If someone is paying higher than market prices for your grain, be suspicious



Protecting yourself from future grain buyer bankruptcies

JOIN WITH OTHER FARMERS AND FARMERS ASSOCIATIONS THAT ARE WILLING TO HELP YOU DEVELOP PROTECTIONS BOTH BEFORE AND AFTER POSSIBLE GRAIN BUYER BANKRUPTCIES.

Organic Farmers Association

www.Organicfarmersassociation.org

farmerhelp@organicfarmersassociation.org

Helpline number (833) 724-3834

Provide these entities with your stories so they understand the impacts and can work on solutions.



Thank You!

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