

Part 2: A Guide to Responding to a Demand for Repayment of a Bankruptcy Preference Re: VeraSun

Note: This is a supplement to the original guide, dated 08-30-10, and should be read along with it.

Several additional possible defenses have emerged which farmers may wish to discuss with their counsel to determine if they would apply to their situation.

Third Party Payments

In some cases, farmers received payments from a third party, rather than from one of the companies in the VeraSun bankruptcy cases. If this is true in your case, you may have an absolute defense to the preference demand.

First Business Transactions

If the transaction (or series of transactions) referenced by the demand letter was the first business transaction (or first series of transactions) between the farmer and VeraSun, the farmer might need to rely on the fact that the payment was ordinary within the industry rather than within the relationship between VeraSun and the farmer. The "industry test" was set as a separate stand alone standard under the "ordinary course of business" defense in 2005 and may require the testimony of an expert witness. This defense may also be helpful to farmers who have had previous transactions with VeraSun but for some reason are not able to use the traditional ordinary course of business defense.

Forward Contracts

Farmers may be able to use a unique defense that is generally unavailable in other bankruptcy contexts. This defense arises out of special protections available for "forward contracts", which are generally understood under the Bankruptcy Code to mean any contract (other than a futures contract traded on a commodities exchange such as the Chicago Board of Trade) providing for the sale and purchase of a commodity at a fixed price and in a fixed quantity at some point more than two days after the date upon which the buyer and seller entered into the contract. Most (if not all) contracts providing for the future delivery of corn, entered into between a farmer and an end-user of the corn like VeraSun, may qualify as a forward contract. Thus, in certain circumstances, farmers that received payments under a forward contract from an end-user such as VeraSun may now be immunized from preference liability, given amendments enacted to the Bankruptcy Code in 2005 and 2006.

NOTE: THIS IS NOT INTENDED TO BE LEGAL ADVICE. INFORMATION DISCUSSED IN THIS PAPER MAY REQUIRE ADDITION CONSULTATION WITH YOUR ATTORNEY.

The choice of a lawyer is an important decision and should not be based solely upon advertisements. The ethical rules of some states require us to identify this as attorney advertising material.

This briefing paper was prepared by the National Corn Growers Association with information from David A. Lander, Thompson Coburn LLP St. Louis, Missouri.

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QUESTION 1 - *What should I do about a letter addressed to me that says I received a preference from VeraSun and that I must repay it?*

ANSWER: The best thing to do is to determine PROMPTLY whether the letter is correct or whether you have defenses. If you have good defenses it is wise to respond to the letter and assert those defenses. If you do not respond to the letter it is likely a law suit will be filed against you in Wilmington, Delaware, where the bankruptcy was filed, and you will incur expenses, even if you are successful in winning the suit or convincing the plaintiff to drop the suit before trial. If you have good defenses, usually the least expensive way of disposing of the demand is by a carefully written response to the Demand.

QUESTION 2 - *How do I know if I have defenses?*

ANSWER: Unfortunately these demands are often made without checking into the accuracy of the information or the likelihood of defenses and so you must make this determination. Key issues are:

1. Determine whether the facts stated in the letter are accurate. Is that the correct amount that you received within the ninety day period prior to the filing of the bankruptcy and is the date of the receipt correct? If you received less than the amount demanded during the ninety day period then that is your first defense to the extra amount claimed.
2. Determine whether the payment received was in the "ordinary course of business?" This the primary defense that you need to evaluate. If the payment was made within the terms of the contract or if the payment was received on the same schedule as prior payments then this may provide a good defense. Likewise, if the payment was received within the terms that are routine in the industry that may provide a defense.
3. Other possible defenses include the fact that you shipped grain to the debtor after you received this payment and were not paid for that grain, or if the debtor was not insolvent at the time of the payment or if the payment did not come from the debtor. All of these are pretty technical defenses and there is a great deal of law on these issues so it is likely you will need a lawyer who is experienced in defending preferences to help with this analysis and perhaps in drafting the response.

If you have confidence in a lawyer who is experienced in preference defenses then you should contact that lawyer and hire them as soon as possible.

NCGA and your state organization have a lawyer who is willing to talk with you on the telephone and help you understand preference law. He will not become your lawyer unless and until you hire him and that is your decision, but he can discuss the general principles of preference law with you. He has significant experience with agricultural law issues and with preference law.

Contact: David A. Lander, Thompson Coburn LLP, St. Louis, MO, Telephone: 314-552-6067

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