



SIMMONS PERRINE  
MOYER BERGMAN PLC

# Minimizing Risk on Problem Ag Loans

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# *Today's Presenter:*



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# Security Agreements and Financing Statements

- Debtor's name on financing statement
  - Individuals
  - Registered Organizations
  - Trusts
- Require borrower to provide a list of buyers of his/her "farm products" – crops, livestock, etc.
- Filed with Iowa Secretary of State
  - Note – some states require the financing statement to be filed with Secretary of State and county where debtor resides (e.g., Minnesota).
- Financing statement should use all encompassing language for farm products.
- After-acquired property.

# Perfecting Uniform Commercial Code (“UCC”)

- Revised Article 9.
- Requires creditors holding an ag lien to file a UCC-1 financing statement.
- Sets specific time period for each ag lien to obtain “super priority”.
- Ag lien becomes perfected when the lien becomes effective and creditor has complied with perfection requirements.

# Perfecting Security Interest in Fixtures

- Personal Property Can Become a Fixture to Real Estate
  - Cornell College v. Crain – 235 N.W. 731 (Iowa 1931)
- Lender Must Record Fixture Filing
- Priority
  - Generally, first to record takes priority
  - Purchase Money Security Interest (“PMSI”)

# Federal Farm Security Act of 1985

- Buyers of farm products (e.g., livestock, crops and other products) will generally purchase products free and clear of lender's lien unless lender provides notice.
- Notice
  - Clear Title States
  - Direct Notice States
- Contents of Notice
- Lender should request a list from borrower of his/her buyers

# Iowa Agricultural Liens

## Landlord Lien – Iowa Code § 570

- Lien
  - Landlords may claim a lien for the rent owed upon all crops grown upon the leased premises, and upon any other personal property of the tenant which has been used or kept on the leased premises during the terms of the lease.
- Perfection
  - Landlord must file a financing statement.
- Priority
  - Landlord will have priority over conflicting liens, including prior liens, provided the landlord files the financing statement within twenty (20) days of the debtor taking possession of the leased premises.
- Unauthorized Sale of Grain – Iowa Code § 570.9
  - If tenant sells grain subject to lien without landlord's written consent, the tenant is guilty of theft.

# Iowa Agricultural Liens

## Agricultural Supply Dealer Lien - Iowa Code § 570A

- Overview
  - Secures payment of farmer to ag supply dealers.
  - Expanded notice and filing requirements in order to protect farmers.
- Lien
  - An ag supply dealer furnishing an ag product to a farmer has an ag lien for the retail cost of the product, including labor for a period of four-hundred ninety (490) days from the date that the farmer purchased the ag product.
  - Lien attaches to all crops which benefited from ag product, or livestock that consumed the product, for a period of sixteen (16) months from the date of perfection.
- Perfection
  - The dealer must file the financing statement within thirty-one (31) days after the farmer purchases the product.



# Iowa Agricultural Liens

## Agricultural Supply Dealer Lien - Continued

- Financial Memorandum
  - Dealer will issue a certified request to the bank with a waiver of confidentiality from borrower.
  - Bank has four (4) business days to respond with a memorandum.
  - Bank must state debtor has sufficient net worth or a line of credit.
- Oyens Feed & Supply, Inc. v. PrimeBank, 808 N.W.2d 186 (Iowa 2011)
- Protecting Against Lien

# *Oyens Feed & Supply v. PrimeBank*

Two important lessons for banks in Iowa

# Perfecting Agricultural Supply Dealer Loans

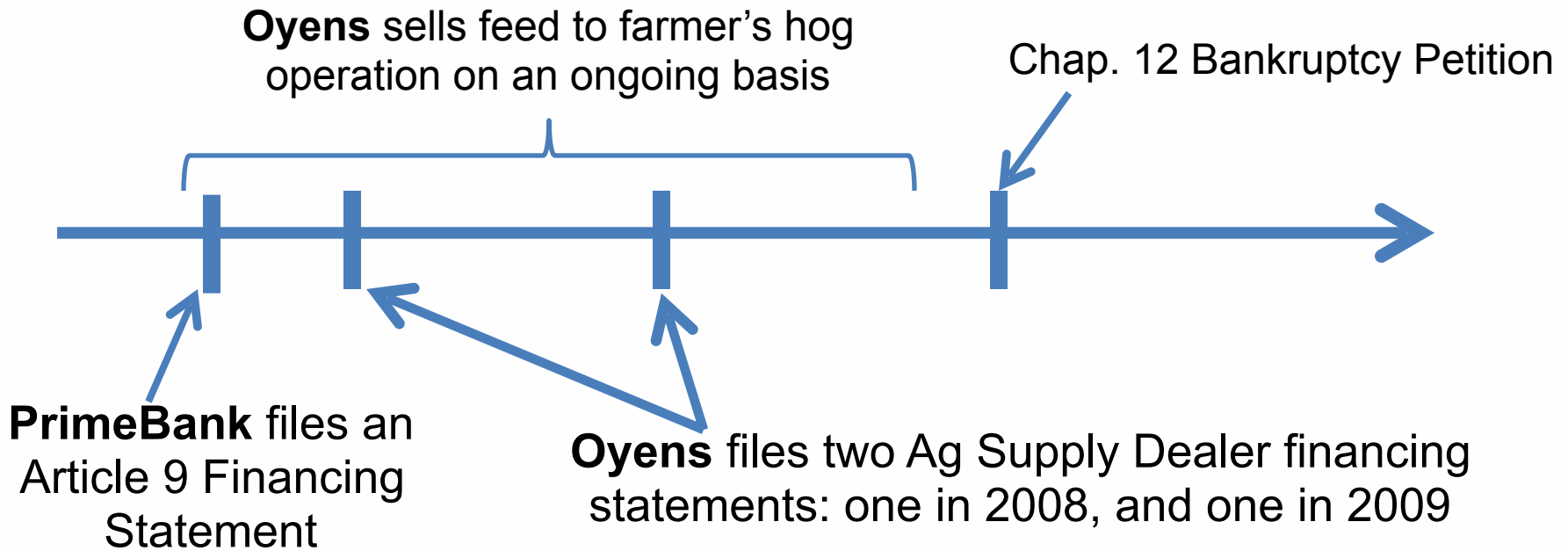
## The Iowa Supreme Court Case

- **Oyens** sold feed to a farmer over several years, and the farmer eventually went into bankruptcy
- Dispute was whether **Oyens** or **PrimeBank** had priority in the proceeds of selling the farmer's hogs

## Iowa Code § 570A.4(2)

- Statute gives Ag Supply Dealers **superpriority** for, among other things, feed sold to raise hogs.
- Statute requires Ag Supply Dealer to file a financing statement “within 31 days” of selling supplies to farmers to **perfect** the superpriority lien.

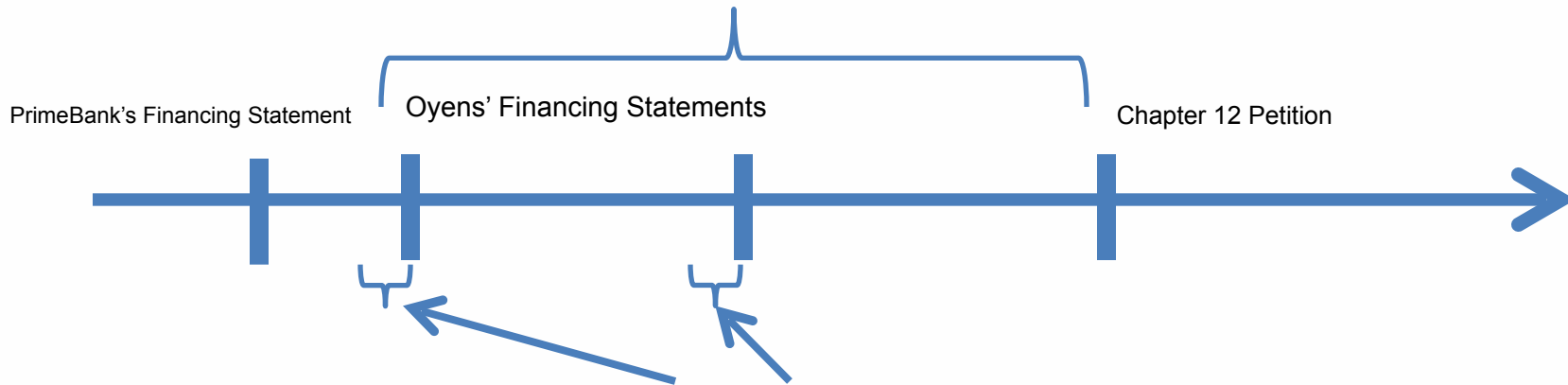
# Timeline in *Oyens*



# Issue in *Oyens*

Does “within 31 days” mean **Oyens** had perfected its superpriority for all of its sales to the farmer, or only for the sales in the 31 days *prior to* filing their two financing statements?

i.e., does **Oyens** have a perfected superpriority in all of these sales . . .



or only in these sales?  
(the sales that occurred 31 days before the financing statement)

# Iowa Supreme Court Decision

The financing statement perfected **Oyens'** superpriority only for the sales 31 days before it was filed

- The Court said the statute's use of "within 31 days" meant that an Ag Supply Dealer's superpriority perfection was limited to only the 31 days preceding the financing statement.
- As a result, **PrimeBank's** security interest had priority for all proceeds outside the two 31-day windows because **Oyens** was unperfected for those times.

Accordingly, Ag Supply Dealers **must** file a financing statement within 31 days of every sale to remain perfected.

## 2. Complying with Discovery

### The Bankruptcy Case

- **Oyens** requested all documents regarding:
  - Actions to enforce personal guarantees on the debts; and
  - Credit extended to the personal guarantors since the Bankruptcy Case was filed
- **PrimeBank's** response:
  - **Oyens** not entitled to the documents
  - **PrimeBank** didn't have the documents
    - (received after **Oyens** filed a Motion to Compel)

# PrimeBank's Dangerous Position

After denying that they had any documents which **Oyens** requested and the **Court** compelled them to produce, **PrimeBank** produced the documents over six months after the Motion to Compel and over one year after the Request for Production of Documents.

- But **Oyens** learned from the guarantors that **PrimeBank** lent them over \$3 million

- Oyens** then filed a Motion for Sanctions



# PrimeBank's Dangerous Position

## PrimeBank's excuses:

- They misinterpreted the request
- They didn't find the documents until **Oyens** specifically asked for them
- **Oyens** wasn't harmed by the failure to produce

# PrimeBank's Dangerous Position

## Court's Responses:

- They misinterpreted the request
  - **PrimeBank** knew what the request was about because **Oyens** attached some of the documentation to the request
- They didn't find the documents until **Oyens** specifically asked for them
  - Same as above
- **Oyens** wasn't harmed by the failure to produce
  - **Oyens** spent substantial time trying to understand the facts obscured by **PrimeBank's** failure to produce

# PrimeBank's Dangerous Position

- Why go through all that trouble?
  - **PrimeBank** had a summary judgment motion pending which “dramatically overstated the amount Debtor still owed them”
- What was the **Court's** response?
  - **PrimeBank** was fined over \$17,500

# Takeaways from *Oyens Feed & Supply*

- Agricultural Supply Dealers should file a financing statement in every single month where they sell supplies to a farmer to remain perfected.
- Banks and others responding to discovery requests should always comply with a Court order.

Failing to do either can be costly.

# Iowa Agricultural Liens

## Harvester's Lien – Iowa Code § 571

- Overview
  - Applies to persons who perform harvesting services (e.g., baling, combining, cutting, picking, husking, etc.).
  - Harvester has ag lien for the reasonable value of his/her services.
  - The lien applies to all crops harvested by harvester.
- Perfection
  - Financing statement must be filed within ten (10) days after services are rendered.
- Priority
  - When perfected, harvester's lien takes priority over landlord's lien.

# Iowa Agricultural Liens

## Veterinarian's Lien – Iowa Code § 581

- Overview
  - A veterinarian shall have a lien for the reasonable value of the services rendered in the livestock he/she treated.
- Perfection
  - Veterinarian must perfect within sixty (60) days of treating the livestock.
- Priority
  - If perfected, lien takes priority over all other conflicting liens in the livestock that was treated.
  - If not perfected, Article 9 applies.

# Iowa Agricultural Liens

## Custom Cattle Feedlot Lien – Iowa Code § 579A

- Overview
  - A custom cattle feedlot operator (“CCFO”) shall have a lien upon the cattle and identifiable cash proceeds from the sale of the cattle for the amount of the contract price for the feed and care of the cattle.
  - Lien is effective at the time the cattle arrive at the feedlot.
  - CCFO must file a financing statement within twenty (20) days after the cattle arrive at feedlot.
- Enforcement
  - After the cattle depart, operator may enforce lien against the holder of the identifiable cash proceeds from the sale of the cattle; or
  - Against the processor who has purchased the cattle within three (3) days after cattle depart.

# Iowa Agricultural Liens

## Commodity Production Contract Lien – Iowa Code § 579B

- Overview
  - Protects farmers that are growing crops or feeding livestock that is under contract with another entity.
  - Between 1980 and 1994 the number of Iowa farmers growing crops or raising livestock increased from 2% to over 20%.
- Perfection
  - Livestock
    - Effective when the livestock first arrives.
    - Financing statement must be filed within 45 days of the first arrival unless continuing arrival.
    - If continuing arrival, financing statement must be filed within 180 days of the first arrival.
    - Lien terminates one year after livestock is no longer under authority of farmer.
  - Crops
    - Effective when crop is planted.
    - Financing statement must be filed within 45 days of the crop being planted.
    - Lien terminates one year after crop is no longer under authority of farmer.
- Enforcement
  - Article 9 governs enforcement.



# Participation Agreements

- Lead Banks
  - Limitations on duties and standard of care.
  - Disclaimer of liability other than acts of gross negligence or willful misconduct by lead bank.
- Participant Banks
  - Participant bank should ensure lead bank has staff and expertise to manage credit.
  - Rights of participant during default and workout (e.g., input into restructuring of loan; approach towards liquidation).
  - Acts that require participant banks' approval.
- Default by Lead Bank
  - Ipso facto provision – allows senior minority participant to takeover administration of loan from lead bank in the event of insolvency or government takeover.
    - May be voided by acquiring bank under 12 C.F.R. § 1821(e)(13)(A).

## How Can Bank Protect Against Loss When Different Entities, Family Members, Borrowers?

- Review Loan Documents to make sure cross collateralized and cross guaranteed
- Consider a Collateral Agreement
- If default consider a Forbearance Agreement

# Dragnet Clause – Wells Fargo Bank, N.A. v. Valley Bank & Trust

## ■ Background Facts:

- Debtor executed on the same day two promissory notes (PN1 and PN2) and a mortgage with the Bank. Mortgage contained a dragnet clause stating:
  - “All future advances from Lender to Mortgagor or other future obligations of Mortgagor to Lender under any promissory note, contract, guaranty, or other evidence of debt existing now or executed after this Mortgage whether or not this Mortgage is specifically referred to in the evidence of debt and whether or not such future advances or obligations are incurred for any purpose that was related or unrelated to the purpose of the Evidence of Debt.”
  - PN1 for \$46,500 and stated that it was secured by “Real property shown on the mortgage”. PN2 for \$111,358 and stated that it was secured by assignments of corporate stock of Cars, Inc.
  - Real estate was foreclosed and after satisfying the first lien holder and PN1 there remained a surplus of funds
  - At issue was whether or not Bank’s PN2 was covered by its mortgage. If it did then the PN2 took priority, but if not then another Bank’s loan would have priority over PN2. Lower Court held that PN2 was not secured by the mortgage since it failed to identify the security as the real estate.

# Dragnet Clause – Wells Fargo Bank, N.A. v. Valley Bank & Trust, continued...

## ■ **Pertinent Iowa Law:**

- Priority of Advances Under Mortgages – Iowa Code §654.12A states that such dragnet clauses are enforced if certain conditions are satisfied.
- In prior case, Freese Leasing, Inc. v. Union Trust & Savings Bank, the court held that future advances clauses will not apply to subsequent debts unless they are of the “same kind and quality” as the original debt or if they do not “relate to the same transaction or series of transactions as the principal obligation.”

# Dragnet Clause – Wells Fargo Bank, N.A. v. Valley Bank & Trust, continued...

- **Holding:**

- Court held that the future advances clause of the mortgage was intended by the parties to apply to all future advances under any promissory note and specifically disavowed any relatedness requirement.

- **Impact:**

- The language of the dragnet clause should be drafted to specifically disavow the need for the relatedness requirement. Additionally, the court's decision made note in making its opinion that the mortgage at issue was titled "open-end real estate mortgage" giving notice to the Borrower and the dragnet clause itself was not buried in the document in any way that might be misleading or allow for surprise.

# Dragnet Clause – Wells Fargo Bank, N.A. v. Valley Bank & Trust, continued...

- **Dissenting Opinion:** Disagreed with the majority because:
  - The mortgage's cover page states "Notice: This mortgage secures credit in the amount of \$46,500. Loans and advances up to this amount, together with interest, are senior to indebtedness or other creditors under subsequently recorded or filed mortgages and liens."
  - Mortgage also contained a clause that stated that the maximum obligation limit stating that the amount secured at any one time shall not exceed the amount stated above [the \$46,500].
- **Case Citation:**
  - 839N.W.2d 675 (Iowa Ct. App. 2013).

# Pledging Assets in a Revocable Trust

- If spouse signed deed to real estate in revocable trust, make certain that spouse waived elective share (many attorneys may likely remove this boilerplate language from deeds)
- If spouse did not sign deed to transfer assets to revocable trust, then have spouse sign mortgage to waiver spousal rights and elective share
- Best practice will be to have spouse sign mortgage in all cases
- Review Trustee Powers in the Trust
  - Certificate of Trust
  - Abstract of Trust

# Intercreditor and Subordination Agreements

- Debt Subordination
  - Subordinated lender agrees to defer payment of some or all of its claims until senior lender is paid in full
  - Partial vs. Full Debt Subordination
- Lien Subordination
  - Subordinated lender agrees its lien is junior to the lien of another lender.
  - Remedy standstill clauses.
  - Turnover clauses.
- Lien Waiver
  - Commodity Credit Corporation standard document
- Severance Agreement
  - Commodity Credit Corporation form
  - Used for grain bin financing
  - Gives Commodity Credit Corporation right to remove grain bin



# Landlord/Tenant Concerns

## Documents to Consider Changing if Borrower is Tenant

- Access Agreement
- Landlord Waiver
  - Disclaimer of Interest or Subordination
  - Consent to Entry onto Premises
  - Cure Notice to Lender
- Collateral Assignment of Lease

# Subordination, Non-Disclosure and Attornment Agreement (SNDA)

Consider Using if Borrower is Landlord

- Protects the lender from claims of the tenant against landlord following foreclosure.
- Tenant agrees to be bound by terms of lease in the event of lender takes possession of property.
- Lender should include provision allowing it a cure period, following notice from borrower, of any default by landlord.

# Third Parties with Contractual Claims

- Purchasers of the Collateral
- Marketing Agreements
- Production Contracts
- Forward Contracts

# How Can I Protect My Bank's Interest?

- Due Diligence on the Counterparty
- Collateral Assignment of the Contracts
- Control of Collateral Proceeds

# Commodity Accounts

- Who holds the account?
- What interest does that person have in the account?
- Need control agreement for perfection
- Need extra analysis for margin accounts

# Grain Companies

- Warehouse Receipts
  - Perfection by Filing UCC Financing Statement on Grain
  - Perfection by Control of Negotiable Warehouse Receipts
- Electronic Warehouse Receipts

# Forward Contracts

- Overview
  - Allows farmers to sell crops at a fixed rate in the future
  - Can be used as collateral for lender

# Marketing and Other Production Contracts

- Protecting Lender's Interest
  - Collateral Assignment
    - Review borrower's contracts for assignment language
    - Request consent to assignment from purchaser
  - Two-Party Checks
  - Food Security Act Notice
    - Must be served within one year



# Liquidation Issues

# Mediation

- Iowa Code § 654A.6(1)
  - A creditor seeking to foreclose upon ag real estate, forfeit a contract to purchase ag property, enforce a security interest in ag property, or otherwise garnish, attach or execute on ag property must file a request for mediation with the Farm Mediation Service.
  - Prerequisite to litigation
- “Agricultural property” means agricultural land that is principally used for farming and personal property that is used as security to finance a farm operation or used as part of a farm operation including equipment, crops, livestock, and proceeds of the security.
- Applies to secured debt of \$20,000 or more.
- Applies to borrowers who are natural persons operating a farm, or any corporation, trust, or limited partnership.
- Can be waived by the Court if irreparable harm
- 72 day process can run concurrently with 45 day cure notice

# Cure/Demand

Iowa Code § 654.2A requires a creditor to give a Borrower on a mortgage which is secured by agricultural land (land suitable for farming) a notice of the Borrower's right to cure. Iowa State Bank & Trust Co. v. Michel, 683 N.W. 2d 95 (Iowa 2004) provided that the term "suitable for farming" does not require actual production on the land.

- The Borrower has 45 days to cure the default by payment of the non-accelerated balance due plus a delinquency charge of the scheduled annual interest rate plus 5% per annum from the time the notice is given until tender of payment.
- If the Borrower has received a proper notice for two prior defaults, he has no right to cure (no specific timeframe). If the Borrower has received a cure notice for a prior default within the last 12 months, he has no right to cure.
- Iowa Code § 654B(1) now requires that a 14-day demand for payment of the accelerated balance must be made to qualify for an award of attorney's fees.

# Prerequisites to Appointment of Receiver

- A probable right to or interest in the property which is the subject of the controversy.
- The property, or its rents, and profits are in danger of being lost or materially injured or impaired.

The receiver's right to possession prevails even over the right of a mortgagee of a prior mortgage. See Kansas City Life Ins. Co. v. Hullinger, 459 N.W.2d 889 (Iowa App. 1990) where a receiver appointed pursuant to a junior mortgagee's foreclosure had leased the premises, Tenant, a sublessee of the receiver, could not be evicted until given appropriate notice of termination of farm tenancy even by the senior mortgagee after foreclosure of the senior mortgage.

# Case law on Receiver's Leasing Right vs. Debtor's Possession Right

- The court of appeals in Federal Land Bank v. Haworth, 414 N.W.2d 650 (Iowa App. 1987) allowed a receiver to collect rent from the mortgagor during the redemption period because the rents and profits were mortgaged but asserted the receiver had no right to possession under Iowa Code § 628.3.
- In Wellman Saving's Bank v. Roth, 432 N.W.2d 697 (Iowa Ct. App. 1988) when a homestead was pledged and a receiver appointed, the court said the terms of a mortgage could be sufficient to waive mortgagor's right of possession during the redemption period.
- In Community State Bank, Paton v. Cottington, 444 N.W.2d 484 (Iowa 1989) the Court allowed provisions of the foreclosure decree waiving any preference in farming the property to dispossess the mortgagor during the redemption period despite Iowa Code § 628.3.
- In Holliday v. DeBruce Grain, Inc., 650 F.Supp. 2<sup>nd</sup> 877 (SD Iowa 2009), the purchaser at sheriff sale that satisfied the judgment had also been the lessee of the receiver. The receiver was discharged and the court held the mortgagor was entitled to possession during the redemption period.

# Foreclosure Sale

# Sale in Parcels

- Under Iowa Code § 654.16, the mortgagor of agricultural land may, by a date set by the Court, but not later than ten days before sale, designate to the court the portion of the land which the mortgagor claims as a homestead. The court shall determine the fair market value of the homestead and the mortgagor may redeem the homestead by tendering the lesser of the fair market value determined by the court or the amount separately bid for the designated homestead at sheriff's sale.
- In Federal Land Bank of Omaha v. Arnold, 426 N.W.2d 153 (Iowa 1988) the court held an attempt to apply this code section retroactively unconstitutional. The statute could not apply to a foreclosure when the sale had occurred prior to effective date of the act but the redemption period had not yet expired.
- In Federal Land Bank of Omaha v. Bryant, 445 N.W.2d 761 (Iowa 1989) and Federal Land Bank of Omaha v. Sleister, 444 N.W.2d 504 (Iowa 1989) the Court held that interest and real estate taxes accrued through the redemption period would be added to the fair market value to determine the redemption amount.

# Platting of Homestead

Pursuant to Iowa Code § 626.84 the Mortgagor may provide a plan for division of the land in parcels to the sheriff and the sheriff must then offer the land according to the plan and sell only what is necessary to satisfy the debt and costs. Iowa Code § 626.84.

The sheriff must give notice to the owner to plat an unplatted homestead prior to sale and the sheriff shall plat a homestead for the Debtor even should the Debtor fail to do so himself. Iowa Code § 561.5. However, in First National Bank in Fairfax v. Diers, 430 N.W.2d 412 (Iowa 1988) the sheriff's sale in accordance with the Debtor's plan relieved the sheriff of the necessity of platting the homestead under § 561.5.



# Right of Redemption

Iowa Code § 654.16 provides that the homestead designated by the Mortgagor may be redeemed for one (1) year from the date of foreclosure by tendering the fair market value determined by the court. Federal Land Bank of Omaha v. Bryant, 445 N.W.2d 761 (Iowa 1989) and Federal Land Bank of Omaha v. Sleister, 444 N.W.2d 504 (Iowa 1989), make it clear that interest, real estate taxes and attorney's fees and costs are added to the fair market value.

# Right of First Refusal to Repurchase Agricultural Land

Iowa Code § 654.16A gives the owner of agricultural land the right of first refusal to repurchase the land after the issuance of a sheriff's deed.

- No later than the time the sheriff's deed is recorded (which must be within one year and 60 days from the date of sheriff's sale), the Grantee of the sheriff's deed must notify the Mortgagor of this right.
- The grantee of the sheriff's deed must give notice to the mortgagor of the terms and price of the proposed private sale or the date, time, place and procedure of any public auction. Notice by certified mail is enough, restricted certified mail is not required. Wild v. Buresh, 533 N.W.2d 565 (Iowa 1995). The mortgagor has 10 business days to exercise its option to purchase on the same terms at private sale. Notice is required for a public auction, but the mortgagor has no right of first refusal.
- The right of first refusal is not assignable but may be exercised by the mortgagor's successor in interest, receiver, personal representative or heir only in case of bankruptcy, receivership or death of the mortgagor.

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- White Collar Exemption Rule, June 15, 2016
- Capital Financing Options for Hospitals, Iowa Hospital Association, May 19, 2016
- Historic Tax Credits: A Guide for Lenders, March 22, 2016
- Minimizing Risk on Problematic Ag Loans, November 3, 2015
- Timely Changes Impacting Financial Institutions, July 14, 2015
- Lender Liability, May 20, 2015 (Presentation)
- Overview of Qualified 501(c)(3) Bonds; Electronic Signatures, November 4, 2014
- New Rules for Consumer Mortgage Loan Servicing and Loss Mitigation; 2014 Legislative Update, Enforcing Non-Compete and Non-Solicitation Agreements Practical Strategies, July 31, 2014
- Revised Article 9, May 6, 2014
- Iowa Case Law Update, Title Insurance and Regulatory Update, March 18, 2014
- Mechanics Lien, Iowa Banking Case Law Update, and Revised Article 9, December 6, 2012

# *Questions?*



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