



SIMMONS PERRINE MOYER BERGMAN PLC

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# Minimizing Risk on Problem Ag Loans

September 13, 2018

# *Today's Presenter:*



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# USDA Predicts \$11 Billion Drop in 2018 Farm Income\*

## **U.S. Department of Agriculture (USDA) predicts:**

- Farm income to drop 15% to \$65.7 billion
- Net farm income forecast to decline \$11.4 billion following \$13.0 billion (20.3 percent) in 2017
- Net cash farm income forecast to decline \$14.6 billion to \$91.5 billion

Note: The 2018 forecasts for U.S. farm sector income and finances—including government payments, net farm income, and net cash farm income—do not include payments under the Market Facilitation Program (MFP).

\*Retrieved from Iowa Bankers Exchange E-News (September 7, 2018)



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# USDA Launches Trade Mitigation Programs\*

Trade mitigation package aimed at assisting farmers suffering from damage due to unjustified trade retaliation by foreign nations.

1. Farm Service Agency (FSA) will administer the **Market Facilitation Program (MFP)**.

**Program will provide payments to eligible providers of:**

- Corn, Cotton, Sorghum, Soybeans, Wheat, Dairy and Hogs

Retrieved from <https://www.usda.gov/media/press-releases/2018/09/04/usda-launches-trade-mitigation-programs> (Sept. 4, 2018).



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# USDA Launches Trade Mitigation Programs, *cont.*

## **MFP Eligibility Requirements:**

- Must have an ownership interest in the commodity and be actively engaged in farming;
- have an average adjusted gross income for tax years 2014, 2015 and 2016 of less than \$900,000 per year;
- be in compliance with certain conservation regulations;
- and be able to provide verifiable production records by crop, type, practice, intended use and acres if requested by the Farm Service Agency.

## **Payments:**

- Payments will be based on 50 percent of the farmer or rancher's production and will be capped at \$125,000 per person or legal entity.
- Payments will be sent directly to the applicants. Bankers should direct their customers to [farmers.gov/mfp](http://farmers.gov/mfp) for more information.



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# USDA Launches Trade Mitigation Programs, *cont.*

2. Agricultural Marketing Service (AMS) will administer a **Food purchase and distribution program to purchase.**
  - Program to purchase up to \$1.2 billion in commodities unfairly targeted by unjustified retaliation.
  - AMS will purchase products over four quarters in the new Federal fiscal year, which starts on October 1, 2018.
    - Materials purchased may be adjusted between quarters to accommodate changes.
  - USDA's Food and Nutrition Service (FNS) will distribute these commodities through nutrition assistance programs.



# USDA Launches Trade Mitigation Programs

## 3. Foreign Agricultural Service's (FAS) **Agricultural Trade Promotion Program (ATP)**.

\$200 million will be made available to develop foreign markets for U.S. agricultural products.

- The program will help U.S. agricultural exporters identify and access new markets and help mitigate the adverse effects of other countries' restrictions.
- FAS will accept applications on a rolling basis until November 2, 2018.

Details regarding ATP and how to apply are available at <https://www.fas.usda.gov/programs/agricultural-trade-promotion-program>.



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# Security Interest in MFP Payments

- USDA released the details of its Market Facilitation Program
  - Provides payments to farmers to supplement crop prices
- Issue: Are payments under MFP subject to existing security interests?
  - No guidance regarding assignability of program payments
  - *In re Sunberg*, 729 F.2d 561 (8<sup>th</sup> Circuit 1984) – dealt with different subsidy program but concluded the proceeds of subsidies CAN be subject to existing liens
  - Review collateral description in security agreements and UCC-1



# 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.



# Individual's Legal Name – Alternative A

- **Old rule:** Use the “individual name of the debtor”
  - William, Will, Bill, or Billy?



- **New rule:** Use the individual's name as it appears on an unexpired driver's license issued by the state of residence.
  - Use the old rule when the individual has no license, an expired license, or an out-of-state license.

## **Determining the exact legal name may not be as easy a task as it initially appears to be**

- **Mary Beth Hartman – Is Mary Beth the first name or is Beth the middle name?**



# When in doubt, file under multiple names

- Official Comments 2(d) to 9-503: If there is any doubt about an individual debtor's name, a secured party may choose to file one or more financing statements that provide a number of possible names for the debtor, and a searcher may similarly choose to search under a number of possible names.



**UCC FINANCING STATEMENT**

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER [optional]

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (1a or 1b) - do not abbreviate or combine names

1a. ORGANIZATION'S NAME

OR

1b. INDIVIDUAL'S LAST NAME: **Hartman** FIRST NAME: **Lynn** MIDDLE NAME: **Wickham** SUFFIX:

1c. MAILING ADDRESS: **303 Ashland Ct SE** CITY: **Cedar Rapids** STATE: **IA** POSTAL CODE: **52403** COUNTRY:

1d. SEE INSTRUCTIONS ADD'L INFO RE ORGANIZATION DEBTOR 1e. TYPE OF ORGANIZATION 1f. JURISDICTION OF ORGANIZATION 1g. ORGANIZATIONAL ID #, if any  NONE

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (2a or 2b) - do not abbreviate or combine names

2a. ORGANIZATION'S NAME

OR

2b. INDIVIDUAL'S LAST NAME: **Wickham Hartman** FIRST NAME: **Lynn** MIDDLE NAME: SUFFIX:

2c. MAILING ADDRESS: **303 Ashland Ct SE** CITY: **Cedar Rapids** STATE: **IA** POSTAL CODE: **52403** COUNTRY:

2d. SEE INSTRUCTIONS ADD'L INFO RE ORGANIZATION DEBTOR 2e. TYPE OF ORGANIZATION 2f. JURISDICTION OF ORGANIZATION 2g. ORGANIZATIONAL ID #, if any  NONE

3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNOR/SFP) - insert only one secured party name (3a or 3b)

3a. ORGANIZATION'S NAME

OR

3b. INDIVIDUAL'S LAST NAME FIRST NAME MIDDLE NAME SUFFIX

3c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY

4. This FINANCING STATEMENT covers the following collateral:

5. ALTERNATIVE DESIGNATION (if applicable) LESSOR/LESSOR CONSIGNEE/CONSIGNOR BAILEE/BAILOR SELLER/BUYER AG. LIEN NON-UCC FILING

6.  This FINANCING STATEMENT is to be filed (for record) (or recorded) in the REAL ESTATE RECORDS. Attach Addendum (if applicable) 7. Check to REQUEST SEARCH REPORT(S) on Debtor(S) (optional)  All Debtors  Debtor 1  Debtor 2

8. OPTIONAL FILER REFERENCE DATA

FILING OFFICE COPY — UCC FINANCING STATEMENT (FORM UCC-1) (REV. 05/22/02)

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# Seriously Misleading

- A Financing Statement not complying with these rules MAY still be effective, depending on whether it is seriously misleading, and the laws of your state:
  - A filing made that is not in compliance with the Article 9 rules is presumed to be seriously misleading .
  - However, a filing under an improper name may be deemed to not be seriously misleading if such a filing is found when someone performs a search of the filing office records using the correct debtor's name.
    - Please Note: In some states it has been held that failure to comply is seriously misleading, and is not presumed.
  - **Example:** In an Alternative A state, if a filing is made for a debtor using the name "John Doe" and the name appearing on that debtor's driver's license is "John Smith Doe" then the presumption that the filing is seriously misleading might be able to be overcome if a search on the name "John Smith Doe" returns the filing made for "John Doe".
- The ONLY way to ensure a Financing Statement is not seriously misleading is to file it using the proper debtor name as required under Article 9.



# Common Questions Regarding Filing for Individuals

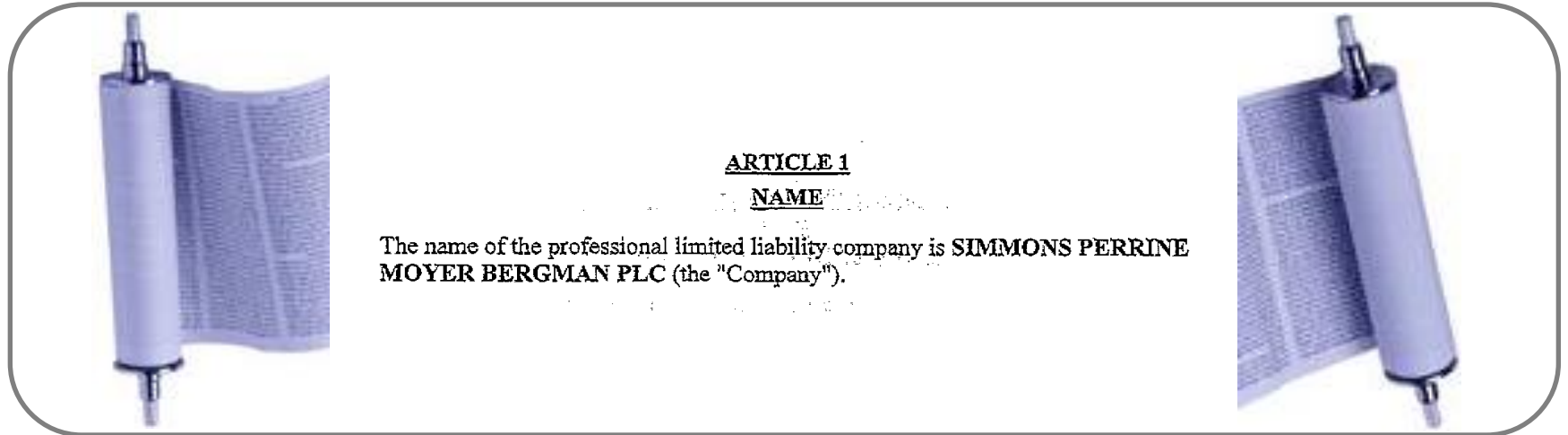
- **Should a secured party file just using the First and Last Name on the Driver's License?**
  - No, the name on the filing should be *exactly as it appears on the driver's license*.
- **What if someone's driver's license is incorrect?**
  - Still file under the incorrect driver's license name. Recommend filing a second filing under the correct name.
- **What if someone has multiple unexpired driver's licenses, in the same state, with different names?**
  - Use the name listed in the most recent unexpired driver's license and consider filing under other names.
- **What if someone has multiple driver's licenses from different states with different names?**
  - Use the driver's license issued in the state of domicile and consider filing under other names.





# Organization's Legal Name

- **Old rule:** Use the name “indicated on the public record of the debtor’s jurisdiction”
  - & or and; LLC or L.L.C.; Inc. or Incorporated?



- **New rule:** Use an organization’s “public organic record”
  - Choose the formation document most recently filed with the state not the Secretary of State’s database entry



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# Determining Name of Registered Organizations

- Registered Organizations include Corporations, Limited Partnerships, and Limited Liability Companies.
- Name to be used is the exact name stated on the “public organic record” most recently filed in the state where the organization is organized.
  - Examples of public organic records: Articles of Incorporation, Certificates of Limited Partnership, Articles of Organization, Amendments or Restatements to such.
- Important to note, the name(s) listed in a certificate of good standing or on the Secretary of State’s website is not sufficient. The organization’s name must match the actual public organic record.
  - **Illustration:** Certificate of good standing and Secretary of State’s website identifies debtor as: “Property Disposals, Inc.” and the Articles of Incorporation states: “Property Disposal, Inc.” (without any other filings)
  - **Filing should use the name of “Property Disposal, Inc.”**
- When filing continuation statements, the name used on such statements must match the “public organic record.”



# Organization's Legal Name

- Do not use organization's name listed on the Secretary of State's website database entry:



**IOWA SECRETARY OF STATE**  
*Matt Schultz*

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## Business Entities Results

[print](#)

Searched: **Simmons Perrine**

Results 1 - 5 of 5

Business No.	Name	Status	Type
<a href="#">177200</a>	SIMMONS, PERRINE, ALBRIGHT & ELLWOOD, L.L.P.	Inactive	Legal
<a href="#">181871</a>	SIMMONS, PERRINE, ALBRIGHT & ELLWOOD, P.L.C.	Active	Legal
<a href="#">181871</a>	SIMMONS PERRINE MOYER BERGMAN PLC	Active	Fictitious name
<a href="#">181871</a>	SIMMONS PERRINE MOYER BERGMAN PLC	Active	Legal
<a href="#">181871</a>	SIMMONS PERRINE P.L.C.	Active	Legal



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# Organization's Legal Name

- Do not use organization's name listed on the Secretary of State's Certificate of Existence:

**IOWA SECRETARY OF STATE  
MATT SCHULTZ**



**CERTIFICATE OF EXISTENCE**

Date: 7/23/2013

Name: SIMMONS PERRINE MOYER BERGMAN PLC (489DPL - 181871)

Date of Incorporation: 1/1/1995

Duration: 1/1/2045



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# Other Legal Name Situations

- **General Partnership**
  - List the general partners using the individual and organization rules, as applicable.
  
- **Limited Liability Partnerships**
  - Treat general partners of a limited liability partnership as you would general partners in a general partnership.
  - It is advisable when filing against the limited liability partnership itself to rely on the name of the partnership in the “Statement of Qualification” filed on the Secretary of State’s website (or the most recent amendment to such). If informed that the partnership name is different than the name on the Statement of Qualification, then advisable to file under that name as well.





# A REVIEW OF IOWA AG LIENS



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# Perfection of Ag Liens

- Governed under revised Article 9.
- Requires creditors holding an ag lien to file a UCC-1 financing statement.
- Filed with Iowa Secretary of State
  - Some states require the financing statement to be filed with Secretary of State and county where debtor resides
  - Perfection is where farm products are located
- 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.



# Iowa Ag Liens

- Landlord's Lien
- Agricultural Supply Dealer's Lien
- Custom Cattle Feedlot Lien
- Commodity Production Contract Lien
- Veterinarian's Lien
- Lien for Service of Animals





# 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 farmer's payment 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)

- Priority
  - Lien has priority over lien or security interest created after perfection.
  - Equal priority for liens/security if certified request sent to lender.
- 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*



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# Perfecting Agricultural Supply Dealer Loans

## The Iowa Supreme Court Case

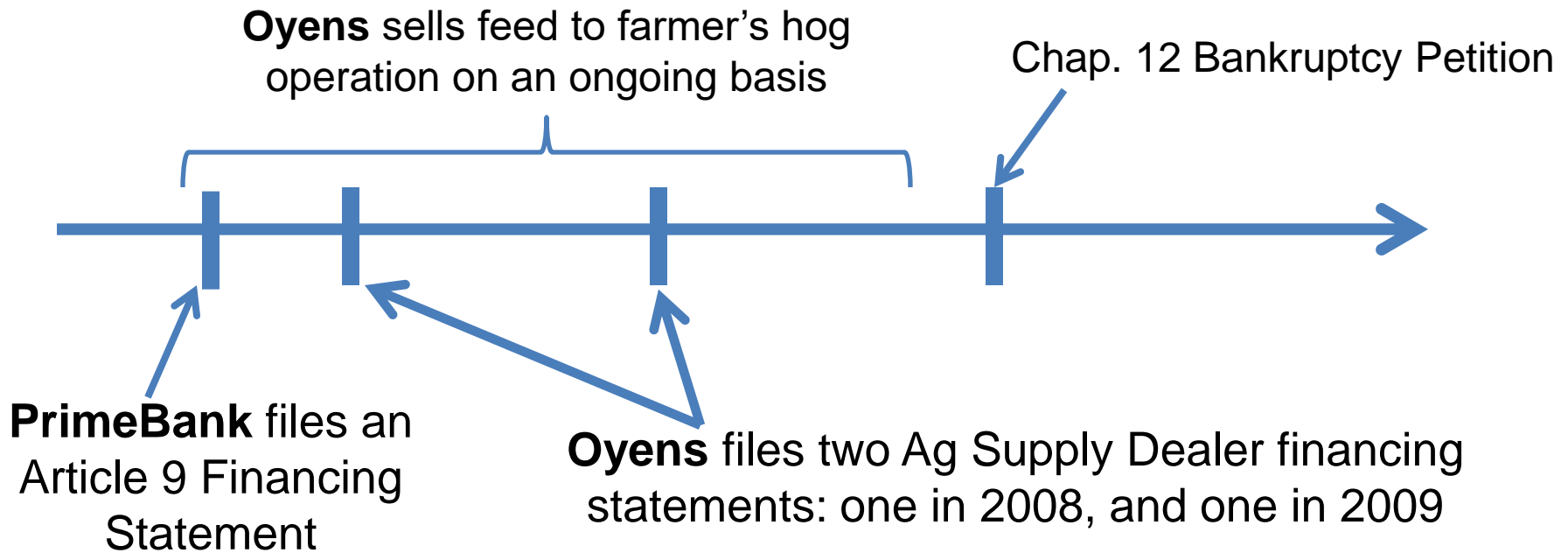
- **Oyens** sold feed to a farmer over several years, and the farmer eventually went into bankruptcy.
- Dispute was whether **Oyens** or **PrimeBank** had priority in the proceeds of selling the farmer's hogs.

## 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.



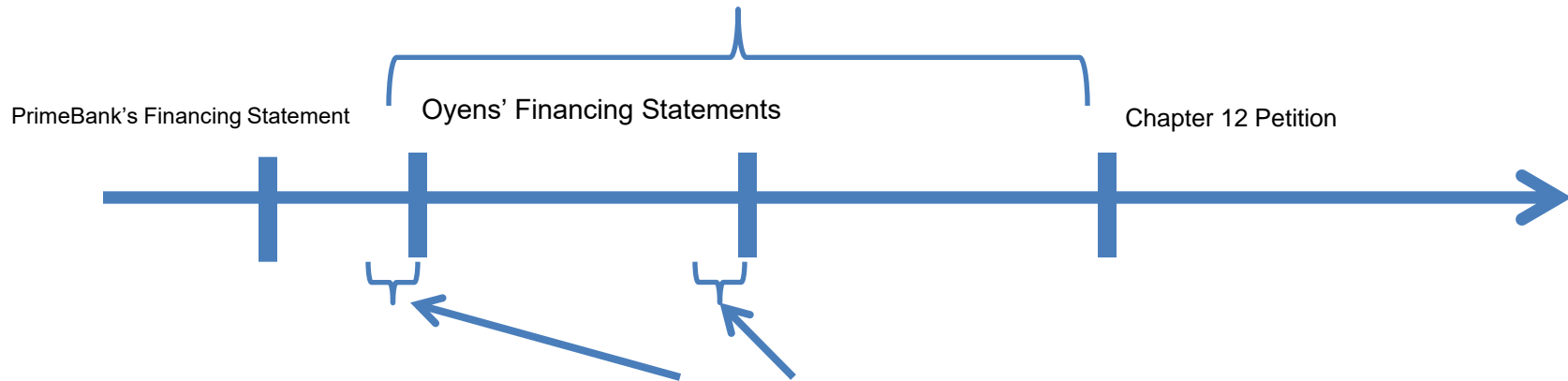
# Timeline in *Oyens*



# 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.

Agricultural Supply Dealers should file a financing statement in *every single month* where they sell supplies to a farmer to remain perfected.





# 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

## 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.



# 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

## Lien for Services of Animals – Iowa Code § 580

- Overview
  - The owner or keeper of any stallion, bull or jack kept for public service, or any person firm, or association which invokes pregnancy of animals for the public by means of artificial insemination shall have a prior lien on the progeny to secure the amount due for the service.
- Period of Lien
  - Attaches at birth and remain in force on such progeny for one year.
- Foreclosure
  - Affidavit filed with Sheriff
  - Demand for Foreclosure served upon owner at least 10 days before sale.



# Summary of Perfection Requirements

Lien	Filing Deadline
Landlord's Lien	20 days from debtor taking possession
Ag Supply Lien	31 days of debtor purchasing product / Every 31 days for subsequent purchases
Harvester's Lien	10 days after services are rendered
Custom Cattle Feedlot Lien	20 days after the cattle arrive at feedlot
Commodity Production Contract Lien (Livestock or Raw Milk)	45 days after first arrival unless continuing / 180 days after first arrival if continuing
Commodity Production Contract Lien (Crops)	45 days after crop is planted.
Veterinarian's Lien	60 days after treatment of livestock
Lien for Services of Animals	N/A



# 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.



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# 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



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# 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*



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# 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. Cottingham, 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.



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