

# Guidance On The Iowa Ag Supply Dealer's Lien

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## Overview

A lien gives the lienholder an enforceable right against certain property that can be used to pay a debt or obligations of the property's owner. Most states have laws that give particular parties a lien by statute in specific circumstances. Statutory liens have generally taken priority over Uniform Commercial Code (UCC) perfected security interests. The rationale behind statutory liens is that certain parties who have contributed inputs or services to another should have a first claim for payment. For example, section 9-310 of the UCC states:

“When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.”

Iowa law provides for numerous statutory liens that can arise in an agricultural context – (1) a landlord's lien; (2) a harvester's lien; (3) a forwarding and commission merchant's lien; (4) an artisan's lien; (5) a mechanics lien; (6) a

custom cattle feedlot lien, and (7) a commodity production contract lien.

## Ag Supply Dealer's Lien

Another type of lien that applies specifically in an agricultural context is the ag supply dealer's lien. The theory behind this type of lien is that parties who supply necessary inputs such as seed, fertilizer, chemicals and petroleum products should have a method whereby they are assured of payment for the inputs supplied to agricultural producers. Several state legislatures passed agricultural supply dealer lien statutes during the farm debt crisis of the 1980s when an extraordinarily high number of farm and ranch operators went bankrupt and all of their property was claimed subject to perfected security interests under Article 9, leaving the supply dealer as an unsecured creditor with large unpaid bills.

Agricultural supply dealer lien statutes are rather complex but most follow a common procedure. When a farmer or rancher attempts to purchase supplies on credit or on open account, the supplier (in Iowa, the lien is available to a business engaged in the retail sale of specified agricultural supplies to farmers) can obtain a lien on the crops and/or livestock produced with such inputs. It is not necessary that the supplier have possession of the crops or livestock that secure the lien. But, the supplier must discover what

other parties, if any, have a security interest in the purchaser's crops or livestock. The supplier is required to contact these creditors and inquire about the purchaser's financial abilities. This puts the creditors on notice that the supplier may be attempting to take a statutory lien. The creditors can either agree to finance the purchase or send the supply dealer the buyer's financial records. If the creditors refuse to extend credit, the supply dealer can make the sale and obtain a lien by filing in the appropriate office (in Iowa, it's the Secretary of State's office). Most state statutes provide that the lien is superior to subsequently filed Article 9 security interests, and of equal priority to Article 9 interests already in existence.<sup>1</sup>

### **The Iowa Statute**

Iowa law<sup>2</sup> requires an ag supply dealer<sup>3</sup> to send the lender with whom the farmer has a security interest a "certified request" as to the farmer's financial abilities and sets out a priority scheme based upon when the ag supply dealer "attached" or perfects their lien. An examination of the statutory language of pertinent sections of Ch. 570A and the steps an ag supply dealer must take in filing a properly perfected Ag Supply Dealer's Lien is essential to understanding the disputes that are developing around the state regarding this statute. The lender is to issue, within four business days, a memorandum which states whether or not the farmer has a sufficient net worth or line of credit to assure payment of the purchase price on the terms of the sale.<sup>4</sup> If the lender issues a memorandum stating that the farmer has sufficient net worth, the memo constitutes "an irrevocable and unconditional letter of credit" to the dealer for a certain time. If, on the other hand, the lender issues a memorandum stating that the farmer does not have sufficient net worth to assure payment, the memorandum constitutes a "negative assessment" on behalf of the farmer, and the lender is required to hand over the farmer's "relevant" financial history to the dealer, so the dealer can independently make a decision on whether or not to sell the ag supplies to the farmer.<sup>5</sup> If, within four business days, the lender fails to issue a memo or the memo is incomplete

or a negative assessment is made, then the ag supply dealer may make the sale and secure the purchase price with the Ag Supply Dealer's lien.<sup>6</sup> The lien is "effective" at the time of the credit purchase, and is "perfected" by the filing of a financing statement (UCC-1) with the Iowa Secretary of State within 31 days of the purchase.<sup>7</sup> The lien applies to crops related to the purchased supply or livestock consuming the feed sold to the farmer by the dealer. The amount of the lien is the amount owed to the dealer for the "retail cost of the agricultural supply, including labor."<sup>8</sup>

### **Recent Cases – Statute of Limitations and Statutory Details**

Sometimes questions can arise concerning the total amount of inputs that an ag supply dealer's lien secures, and whether the lien applies to crops "produced" with the supplier's inputs. In a couple of recent cases, other issues arose – the applicable statute of limitations applicable to the ag supply dealer's lien, and the need to follow the statutory requirements to obtain the lien.

*Farmers Cooperative Co. v. Swift Pork Co., et al.*<sup>9</sup> In this case, the plaintiff provided feed for a farmer's hog operation. The defendant financed the hog operation, properly perfecting its interest in either late 2002 or early 2003. Eventually, the farmer got behind on his feed bills. When the farmer sold some of his hogs to a packer, the packer made the checks out to the defendant and the farmer, but not the plaintiff. As a result, the plaintiff took the position that the packer had violated its ag supply dealer's lien, which it had properly filed on November 26, 2003, and gave actual notice to the packer and the defendant on December 2, 2003. The farmer sold another group of hogs in mid-December 2003 and late March 2004, but again the plaintiff's name was not included on the check. Instead, the farmer endorsed the packer's check over to the defendant so that his credit line could be paid down. The plaintiff sued the farmer for the unpaid feed bill and received a judgment in mid-2004 for approximately \$145,000, but was only able to recover a bit less than \$3,000. The farmer ultimately filed

bankruptcy and the plaintiff recovered an additional nominal amount from the bankruptcy estate for the unpaid feed bills.

The plaintiff sued the packer and the defendant in August of 2007 to recover the unpaid balance of their feed bill on the basis that they improperly disregarded the plaintiff's ag supply dealer's lien in the farmer's hogs. The plaintiff claimed its supply dealer's lien had priority over the defendant's prior perfected security interest in accordance with Iowa Code §570A.5(3). The defendant moved for summary judgment. The plaintiff claimed, among other things, an affirmative defense that the plaintiff had filed its suit too late – beyond the two-year statute of limitations contained in Iowa Code §614.1(10). That's the statute of limitations applicable to claims that are “founded on a security interest in farm products.” The defendant argued that the statute applied equally to “security interests” and statutory “liens.” Conversely, the plaintiff argued that the five-year statute of limitation set forth in Iowa Code §614.1(4) applied and, as such, the suit was timely filed. The defendant based its argument largely on legislative history. For instance, when the two-year statute of limitation was enacted, the ag supply dealer lien did not exist. When the lien was created in 1984, it was created along with a one-year statute of limitation. But, that statute of limitation was repealed in 2003. So, from the date of enactment of the ag supply dealer's lien until 2003, the two-year statute of limitations had no application to the lien and, the plaintiff argued, only applied to UCC security interests. After 2003, the plaintiff claimed, the five-year statute should apply for two reasons –(1) the legislature could have made reference to the two-year statute of limitations, but did not; and (2) the five-year statute makes sense in light of the five-year effectiveness of a filed financing statement.

The court noted that the issue of what statute of limitations applies to the Iowa ag supply dealer's lien (since repeal of the specific statute of limitation in 2003) was a matter of first impression, and ultimately determined that the two-year statute applied. The court reasoned

that the two-year statute should apply because the ag supply dealer's lien involved a “secured interest in farm products” and best achieved the purpose of the ag supply dealer's lien – to quickly resolve claims founded on the lien. As such, the plaintiff brought its claim more than two years after it knew that the packer had not made the plaintiff a payee on the checks for payment of the hogs, and the defendant was awarded summary judgment.

*In re Crooked Creek Corp.*<sup>10</sup> In this case, a debtor in a Ch. 12 bankruptcy case sought the court's determination of the priority of liens claimed against livestock sales proceeds by the feed supplier and the debtor's lender – a bank which had perfected security agreements in the proceeds securing two promissory notes. The debtor sought the court's determination of priority so that the debtor could perform on its confirmed Chapter 12 reorganization plan.<sup>11</sup>

The debtor conducted a farrow-to-finish hog operation. The debtor filed for Chapter 12 relief on August 18, 2009, at a time when the debtor owned 7,502 head of hogs and owed the bank approximately \$1,000,000 on the two promissory notes.<sup>12</sup> The bank's lien was properly perfected by a filed financing statement with the Iowa Secretary of State, and had been properly continued over the years. The ag supplier, on the other hand, filed and properly perfected an ag supply dealer's lien on May 28, 2009, with the debt secured by the filing of a financing statement with the Iowa Secretary of State which attached the debtor's livestock. Technically, the ag supply dealer's lien went into effect after the bank's lien.

Unfortunately, the ag supplier did not “technically” comply with the statute. Indeed, the ag supplier admitted that it did not send a “certified request” to the bank, as required by Iowa Code §570A.2. The bank was never made aware of the amount of the feed purchase or the terms of the sale so it never obtained a signed “waiver of confidentiality” from the farmer. So, while the ag supplier did not comply with the statutory requirements of the ag supply dealer's

lien, it did file the appropriate financing statement with the Iowa Secretary of State.

The crux of the dispute was that the bank and the ag supplier both interpreted the Iowa ag supply dealer's lien statute differently on the priority issue. The ag supplier argued that feed suppliers enjoy priority to the bank's lien, but the bank argued the "first in time, first in right" doctrine, because their security interest was perfected prior to the ag supplier's lien.

The bankruptcy court determined that while the statute may seem confusing or ambiguous upon a first reading, as a whole it effectively creates a scheme for the "creation, perfection, priority and enforcement of liens to secure the sale of agricultural supplies in Iowa." The bank argued that there can be no valid ag supply dealer's lien without the issuance of a certified request to the bank. The court disagreed, stating that "the existence of an agricultural supply dealer lien is independent of any requirement of a certified request." However, even though an ag supply dealer lien may be effective and properly perfected by the supplier, if the ag supply dealer tries to enforce the lien secured under Iowa Code §570A.3 the bank will have an "affirmative defense" and "complete proof of superior priority of their lien if they did not receive the certified request and waiver signed by the farmer."

Generally, Iowa's Uniform Commercial Code provides that liens have priority in the order they were perfected. Under Iowa law,<sup>13</sup> "a perfected agricultural lien on collateral has priority over a conflicting security interest... in that same collateral if the statute creating the agricultural lien so provides." Generally, Iowa Code §570A.5 provides that if the ag supply dealer's lien is properly perfected, as required by §570A.4 and according to the terms of Iowa's UCC, the lien will have priority over subsequent liens. If the bank lien was perfected prior to the time the ag supply dealer's lien was perfected, then the ag supply dealer's lien enjoys equal priority to the bank's lien<sup>14</sup> However, there is a caveat for livestock feed suppliers. According to §570A.5(3), an ag supply dealer's "lien in

livestock feed shall have priority over an earlier perfected lien or security interest to the extent of the difference between the acquisition price of the livestock and the fair market value of the livestock at the time the lien attaches or the sale price of the livestock, whichever is greater."

The court determined that although there is a limited priority exception for livestock feed suppliers, ag supply dealer liens generally have equal status priority with the lender, unless the lender can assert the "affirmative defense" that they did not receive a "certified request accompanied by a waiver of confidentiality and a fee, or that they "reasonably" indicated in their memorandum that the farmer did not have a sufficient net worth or line of credit to assure payment of the purchase price. In the event that a lender fails to respond to the certified request or responds incompletely to the ag supply dealer, the ag supply dealer may make the credit sale and enjoy equal priority as the bank. If the lender makes a "negative assessment" as to the farmer's financial condition and their answer did not contain any relevant and probative financial history, the ag supply dealer is essentially left "twisting in the wind" and will obtain the same equal priority status. However, if the lender makes a reasonable "negative assessment" accompanied by the relevant supporting documentation, then the lender will have priority via a prior filed lien.

Thus, because a credit sale of feed was involved, if the ag supply dealer complied with the certified request requirement the ag supply dealer could have enjoyed priority instead of equal standing with the bank. However, that didn't happen. The ag supply dealer never made these requests. As a result, the ag supply dealer lost an opportunity to protect its security interest in the livestock in the event of a bankruptcy.

The court concluded that the bank's lien was prior and superior to the ag supply dealer's lien filed by the feed supplier. The court indicated that had it followed the feed supplier's position, the outcome would have led to an "absurd result." Essentially, if Iowa Code §570A.5(3) is interpreted as independent of the rest of the

requirements of the ag supply dealer lien statute, crop suppliers would have to comply with the statutory requirement of a certified request and confidentiality waiver while livestock feed suppliers would not have to comply- leading to an unfair result.

The court indicated that it was important to balance the rights of the financial institution with the needs of the farmer and the ag supply dealer. Thus, all parties should provide detailed disclosures and essentially work together to protect their interests.<sup>15</sup>

The ag supply dealer appealed the bankruptcy court's order to the federal district court for the Northern District of Iowa. That court certified the following question to the Iowa Supreme Court:

“Is the special priority afforded agricultural supply dealer liens for livestock feed under Iowa Code §570A.5(3) susceptible to the affirmative defense afforded financial institutions under §570A.2(3), or does §570A.5(3) instead operate independently of or as an exception to §570A.2(3), so as to allow an agricultural supply dealer supplying livestock feed to obtain a lien that, pursuant to §570A.5(3), has priority over a financial institution's prior perfected security interest in the same collateral to the extent of the difference between the acquisition price of the livestock and the fair market value of the livestock at the time the lien attaches or the sale price of the livestock, whichever is greater, without the dealer having complied with the requirements imposed by §570A.2(1) and contemplated under §570A.2(3).?”

But, before the Iowa Supreme Court issued its opinion on the certified question in Crooked Creek, a couple of other relevant points should be discussed.

**The amount secured, and timing issues.** Sometimes, a question can arise concerning the

total amount of inputs a supply dealer's lien secures. For instance, in *Tracy State Bank v. Tracy-Garvin Cooperative*,<sup>16</sup> a farmer borrowed money from a bank and granted the bank a security interest in the farmer's property. The bank perfected the interest. The farmer obtained feed on credit from a supplier and the supplier filed with the bank a notification of agricultural input lien, listing the lien amount for \$65,000 under Minnesota law. The supplier, however, actually provided the farmer with \$73,748 in feed during the dates listed and the farmer paid on the account during that period such that the debt stood at \$44,682 when the farmer liquidated the farm. The supplier argued that the lien protected a revolving line of credit of up to \$65,000 regardless of the payments made by the farmer so that the entire \$44,682 was covered by the lien. The bank argued that only \$65,000 of the total amount supplied on credit, less the amounts paid by the farmer, was subject to the lien. The court held that, under Minnesota law, the notification stated the retail cost of the anticipated production inputs to be provided. Therefore, the notification statement's listing of \$65,000 established the total limit on the inputs covered by the lien. The court also noted that if a supplier provides more than the notification amount, Minnesota law allows the notification to be amended to provide for priority for the additional amount. Because the plaintiff did not file an amended notification, the lien covered only \$65,000 of the feed less the amounts the farmer actually paid on the debt.

In a Nebraska case, the a court has construed that state's, ag supply dealer's lien to cover crops that were growing within one year of the perfection of the lien.<sup>17</sup>

***In re Shulista*.**<sup>18</sup> The Iowa statute was recently at issue in a bankruptcy case, where the issues involved the amount secured by the lien and the timing of the statutory filing requirement. In *In re Shulista*,<sup>19</sup> The debtors raised hogs individually and through an LLC that they owned. They filed a Chapter 12 bankruptcy in early 2010. Issues eventually arose concerning ownership of the hogs and priority to the sale proceeds of hogs. The debtors executed four

promissory notes in favor of a creditor along with a security agreement which gave the creditor a security interest in the debtors' livestock, other property and all proceeds thereof. The creditor perfected its interest by filing with the Secretary of State, and filed continuation statements to keep its interest perfected. A supplier supplied feed for the debtors' hog operation and sent a certified request for the debtors' financial information to the creditor before selling feed to the debtors. However, the creditor did not respond to the request. From November 6, 2009 through January 8, 2010, the supplier sold \$93,141.42 worth of feed to the debtors. Of that amount, \$51,365.04 was purchased in the 31-day period from November 6, 2009 to December 7, 2009. On December 7, 2009, the supplier filed a financing statement with the Secretary of State's office to perfect its lien. The filing properly listed the debtors and described the collateral as all hogs that the debtors owned and the proceeds thereof. The December 7, 2009, filing was the only filing that the supplier made. In the debtors' bankruptcy case, both the creditor and the supplier filed claims – the creditor for the amounts due under the notes, and the supplier for \$93,141.42 by virtue of its ag supply dealer lien. The creditor brought an adversary proceeding against the supplier (and another creditor) seeking a determination of the extent of the priority of the liens. The creditor argued that the Iowa ag supply dealer lien statute limited the supplier's lien to \$51,365.04 – the amount of feed sold to the debtors in the 31-day period from November 6, 2009 through December 7, 2009.<sup>20</sup> The supplier, of course, argued that Iowa ag supply dealer's lien statute should be read to mean that its single filing at the end of the initial 31-day period during which it sold feed perfected its interest on a continuing basis for all of the feed that it sold to the debtor.<sup>21</sup> As such, the supplier claimed it had a superior interest to the creditor in the amount of \$70,599.50 (the value of the feed contributed as an input to the livestock's market value) and that it was in equal position with the creditor in the amount of \$22,542.42.<sup>22</sup>

There was no question that the supplier acquired its lien in accordance with Iowa law. Because the creditor did not respond to the supplier's request for financial information, the court noted that the supplier was entitled to sell feed and receive a lien. The question was the extent of the lien – a question of first impression. The court noted that perfection of the lien entitles the supplier to "super priority" and, as such, the lien is a form of purchase-money financing.<sup>23</sup> But, the court noted, that "super priority" only applied to the extent of the lien's perfection.<sup>24</sup> Importantly, before amendment in 2003, Section 570A.4 required a supplier to file a lien statement that included an itemized declaration of the amount supplied "which has been or may be furnished." In addition, Section 570A.4 provided that the lien statement had to provide "the last date through" which the supplier had agreed to furnish supplies, and the name and addresses of the farmer for whom supply "was furnished or may be furnished." However, when the provision was amended in 2003 (when liens were brought into the revised Article 9 filing system) the statutory language "has been or may be furnished" was eliminated. As revised, Section 570A.4, subsection 2 read as follows: "In order to perfect the lien, the agricultural supply dealer must file a financing statement in the office of the secretary of state... within thirty-one days after the date that the farmer purchases the agricultural supply."

Consequently, the creditor claimed that the supplier was only perfected as to the amount of the feed that the supplier had sold to the debtors in the 31-day timeframe preceding its filing of the financing statement – there was no longer any continuing perfection under the amended statutory provision.<sup>25</sup> The supplier argued that the missing language had been inadvertently lost, and that it was secure and had priority over all amounts supplied to the debtors. The supplier argued that a single financing statement covered all future advances that it made to the debtors for five years after the date of filing.

The court determined that the amended statutory language was clear – the lien was perfected for the amount of supplies that the debtors had

purchased from the supplier *within thirty-one days before the supplier filed the financing statement*. The perfected lien does not continue nor does it cover future advances. Thus, if additional supplies are sold to a debtor after the initial 31-day period, another financing statement must be filed within 31 days of sale to perfect the lien for those additional supplies provided. However, the court noted, the revised statutory language does not limit the amount purchased – even if it is for future periods. The court reasoned that its holding was consistent with common limits placed on liens that grant “super priority” status. Such liens grant super priority status *only to the extent that they are perfected*. Likewise, the court believed that the Iowa legislature had purposefully limited the lien’s value to a specific transaction – a purchase within 31 days of filing. In addition, the court noted that ag liens are distinct from security interests created by consensual security agreements in several ways.<sup>26</sup>

The court also reasoned that its holding would not require multiple filings and multiple certified requests for financial information under Iowa Code §570A.2. More than one filing is required only if the supplier had purchase transactions beyond the 31-day period. The court noted that nothing in the statute limited the amount of supplies that the lien could cover. Thus, for example, a supplier could provide needed inputs for a debtor for a lengthy period of time and have the lien cover that amount under a single filing made within the initial 31-day period. So, as the court pointed out, savvy suppliers could structure a single purchase to cover the debtor’s anticipated supply period. In any event, the court deflected the supplier claim that multiple filings would be necessary by noting that any increased filing burden “could fairly be considered as a reasonable exchange for the super priority status the filing helps to acquire.”

The court also pointed out that the statute creating the lien did not cover future advances as is possible with a traditional UCC Article 9 security agreement and financing statement. Simply alerting a lender via a certified request for financial information that the supplier

intends to supply inputs to a debtor for a certain period of time, the court said, did not suffice for perfection of the lien.<sup>27</sup>

The end result was that the supplier held a perfected ag supply dealer lien that was superior in priority to the creditor’s lien for \$51,365.04, and an unperfected lien in the balance of \$41,776.38. As to priority for the unperfected amount of the lien, the court noted that the feed that was supplied either maintained or increased the creditor’s collateral. Coupled with the apparent likelihood that the creditor knew that the supplier was intending to supply feed for a period of time longer than the initial 31-day period, the court believed that an equitable lien might be appropriate for the unperfected amount of the feed that was supplied. The court stated that this issue would be set for hearing.

***Iowa Supreme Court Opinion in Crooked Creek.*** On the certified question presented to it from the Federal District Court in Crooked Creek<sup>28</sup>, the Iowa Supreme Court held that the ag supply dealer’s lien beat out the bank’s prior perfected security interest in the hogs even though the supply dealer had not did not provide the statutory certified notice to the bank before the feed was sold to the debtor on credit.<sup>29</sup> The court noted that the statutory language at issue did not provide for the certification affirmative defense in the context of a lien in livestock feed sought under Iowa Code §570A.5(3), which the court construed as applying solely to feed dealers. The court was persuaded by the feed dealer’s argument that requiring a feed dealer to comply with the certification requirement would result in a “windfall” for the prior perfected lender who would benefit from the increase in the collateral value (livestock) provided for by a feed supplier.

**Note:** It is hard to imagine that a feed supplier would supply feed on credit to a livestock owner knowing that its interest would be subordinate to a prior perfected lender. It’s also equally hard to imagine that the prior perfected lender would not finance the necessary feed to maintain the value of its collateral, or seek the

bankruptcy court's permission for relief from the automatic stay to liquidate collateral that the debtor can no longer maintain satisfactorily. In no event, however, would the prior perfected lender experience a "windfall" if the feed supplier doesn't get to extend new value to the debtor for feed. Thus, the court's rationale for construing the statute as not requiring the certification rules be followed in the context of livestock feeding is spurious.

The Court noted that other courts were split on the issue,<sup>30</sup> but that the nature of input supplies in agriculture supported their conclusion. Specifically, the court reasoned that it was sensible to give superpriority status to livestock feed suppliers without requiring compliance with the certified request procedure because livestock feed is supplied on an ongoing basis whereas sales of crop seed, herbicides and fertilizer are typically in bulk. So, the court concluded that the statutory certification process is simply to "cumbersome" in the context of livestock feed inputs and need not be followed.

The end result was that the superpriority status would apply only to the extent the acquisition value of the livestock is exceeded by the livestock's value at the time the lien attaches or its ultimate sale price. The secured lender, consequently, still has priority up to the livestock's acquisition price. In addition, in accordance with *Shulista*,<sup>31</sup> the supply dealer will only have priority with respect to livestock feed purchased within 31 days before the supplier perfected.

Since *Crooked Creek* was on summary judgment from the bankruptcy court, the court will have numerous issues to sort out when it gets the case back.

### ***In re Coastal Plains Pork, LLC***<sup>32</sup>

Following the Iowa decision in *Crooked Creek*, the issue of how to determine the value of the feed supply dealer's lien to the extent the acquisition value of the livestock exceeds the

livestock's value at the time the lien attached was raised in a Chapter 7 bankruptcy proceeding. The bank filed an adversary proceeding against the two feed suppliers, seeking a determination that the bank's lien took priority over liens the suppliers held. The court held that under Iowa law, the suppliers' liens for grain supplied to feed hogs shipped to Iowa took priority.

Following a determination that the feed suppliers' liens had superpriority status, the suppliers brought summary judgment motions asserting that the net sales price of the debtor's hogs should be used in calculating their liens because the sales price was the only ascertainable value of the hogs. The sales price could then be reduced by the acquisition price of the hogs. The suppliers asserted that the acquisition price should be based on per hog payments made to growers. The suppliers also argued that because the net of the sales price minus the acquisition price of the hogs was greater than their liens that they should recover the entire amount of their liens as well as post-petition interest.

The bank asserted that the supply dealer's lien is intended only to provide a lien in the "new value" added to the livestock based on the feed supplied. Further, the bank claimed the suppliers have the burden of proving the amount of new value created in the hogs by the feed specifically supplied by them. The bank argued that in the present case, the feed not paid for only represented a portion of each hog's weight gain while in Iowa, so the suppliers could not rely on the gross sales report of all revenue of hogs sold in Iowa because the gross sales report includes all hogs sold, not just the hogs that ate the feed supplied by the lienholders for which they had not been paid.

The bankruptcy court agreed that there were questions of fact regarding how to calculate the value of the livestock at the time the liens attached. Relying on the holding of *Oyens Feed & Supply, Inc. v. Primebank*,<sup>33</sup> the bankruptcy court agreed that the superpriority provision of the Iowa statute only allows feed suppliers to

recover ahead of other properly perfected liens "to the extent the acquisition value of the livestock is exceeded by the livestock's value at the time the lien attaches or its ultimate sale price." The bankruptcy court stated that *Oyens* clearly limits the extent of the lien to the difference between the ultimate sales price and the acquisition cost of the livestock. While the liens are to correspond with the increase in value that results from consumption of the feed, the court found that the Iowa Supreme Court's opinion did not provide any direction for determining the acquisition price to determine the value. Based on the lack of guidance, the bankruptcy court held that the parties must "present evidence as to all costs associated with the [debtor's] taking possession of the hogs, the actual number of hogs acquired that consumed feed supplied by the [feed suppliers], and the actual number of hogs ultimately sold" to determine the superpriority status of the liens. Because the feed suppliers did not meet this burden, their summary judgment motions were denied.

The bankruptcy court opined that it seemed likely that the debtor would have kept records of the costs and expenses of raising the hogs. This information, according to the court, could demonstrate how much was invested in each hog before they were shipped to Iowa and whether this amount could be included within the acquisition price for the hogs. In the alternative, the market price of the hogs at the time they were shipped could also be useful in determining whether the price differed from the amount paid to each grower for each hog.

#### ***In re Big Sky Farms, Inc.*<sup>34</sup>**

In 2014, the Bankruptcy Court for the Northern District of Iowa addressed the question of whether the decision in *Shulista* (allowing an agricultural supply lien only for feed purchased during the 31-day period prior to the filing of the financing statement) had been overruled by the Iowa Supreme Court's decision in *Oyens*.<sup>35</sup> The court in *In re Big Sky Farms, Inc.*<sup>36</sup> found that *Oyens* had *not* invalidated *Shulista* and applied the 31-day rule to a feed supplier's claim. The

debtor was a Canadian company operating part of its hog business in Iowa. The debtor filed for bankruptcy protection in Canada in 2012, and the Canadian court appointed a receiver, which filed a Chapter 15 petition. The receiver was authorized to liquidate the debtor's hogs and distribute the \$1.5 million in proceeds to creditors. The feed supplier submitted a proof of claim for \$120,444.51, and the receiver paid the supplier only \$74,045.15, arguing that the remainder of the claim was not perfected as a super-priority agricultural lien under Iowa Code §570A because the supplier did not file its financing statement within 31 days of selling the feed to the debtor. The supplier filed an adversarial action, alleging that *Shulista* had been overruled by *Oyens*. The court found that the *Oyens* decision was not dispositive because that case addressed only the supplier's failure to send a statutorily-required certified request and not the 31-day filing requirement. The court found that the plain language of the statute required a supplier to file the financing statement within 31 days of purchase. *Oyens* did not eliminate every requirement for establishing priority of an agricultural lien in favor of the policy of enhancing a fluid feed market. The court found that the supplier had a perfected, super-priority agricultural supply lien for feed purchased during the 31 days preceding the filing of their financing statement (\$20,404.03 of the outstanding balance).

#### ***In re Schley***

The same court on the same day addressed the question of whether an agricultural supply lien extends to the proceeds of the input supplied.<sup>37</sup> In a case of first impression, the court ruled that it does.

In *In re Schley*, the debtors ran a feeding-to-finish pig operation. Two creditors held security interests in the debtor's livestock and after-acquired property. A farm service company provided feed for many of the debtors' hogs. The creditors and the feed supplier had properly filed financing statements. Six months before the debtors filed for Chapter 12 bankruptcy protection, they sold hogs, and the \$209,412.24

proceeds were placed into escrow. After the debtors filed their action, the creditors and the supplier all claimed first priority status in the proceeds. The creditors argued that the Iowa Code §570A.5 agricultural supply lien (which was what the feed supplier asserted) extended only to the livestock, not to the proceeds. As such, they argued that the supplier had no interest in the proceeds of the sale of the livestock. This pre-petition sale, they argued, was different from those cases where a court had ordered livestock sold and the proceeds distributed. Although it found the creditors' arguments persuasive, the court ruled (in this case of first impression) that an agricultural lien does extend to proceeds.

The court found that this position best supported the intent of the legislature to encourage a fluid feed market and remove an incentive to suppliers to race to the court house for repossession of livestock. The court again found consistently with *In re Shulista*, and *In re Big Sky Farms* that agricultural supply liens are limited to the 31-day look back period immediately preceding the filing of a financing statement.

## Summary

In an attempt to assist suppliers to agricultural operations, various state legislatures created lien provisions intending to give suppliers "super priority" status if certain conditions are satisfied. The various statutory provisions are complex, as recent Iowa cases have illustrated with respect to the Iowa provision. Attention to detail is critical.

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<sup>1</sup> However, Minn. Stat. §514.952 (1994) provides that upon a supplier providing a lender a lien notification

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statement and the lender refuses in writing within 10 days to issue a letter of commitment, the rights of the lender and supplier are unaffected. *See, e.g., Underwood Grain Co. v. Harthun*, 563 N.W.2d 278 (Minn. Ct. App. 1997)(lender with prior perfected interest in cattle had priority over agricultural production input lien upon refusal to issue letter of commitment).

<sup>2</sup> Iowa Code §570A.

<sup>3</sup> Under Iowa Code §570A.2(1), an ag supply dealer is defined as a person "engaged in the retail sale of agricultural chemicals, seed, feed, or petroleum products used for an agricultural purpose" that is considering selling a farm supply to a farmer *on credit*, "prior to or upon the sale." Such an ag supply dealer must make a "certified request" to a financial institution (typically a local bank), which has a security interest in collateral owned by the farmer. The "certified request" must state the amount of the ag supply purchase, terms of the sale, and must be accompanied by a financial confidentiality waiver and a \$15 fee.

<sup>4</sup> Iowa Code §570A.2(1).

<sup>5</sup> The financial history will most likely include a record of current loans and amounts, loan payment records, current liens, and the farmer's most recent financial statement.

<sup>6</sup> Iowa Code §570A.2(2).

<sup>7</sup> Iowa Code §570A.2(2) and §570A.3.

<sup>8</sup> *Id.*

<sup>9</sup> 602 F. Supp. 2d 1095 (N.D. Iowa 2009)

<sup>10</sup> 427 B.R. 500 (Bankr. N.D. Iowa 2010).

<sup>11</sup> If the bank's lien was found to be prior to the ag supplier's lien, the ag supplier's claim would be unsecured.

<sup>12</sup> The notes were secured by inventory, farm products and livestock whether born or unborn.

<sup>13</sup> Iowa Code §554.9322(7).

<sup>14</sup> Iowa Code § 570A.5(2). Although not relevant for our discussion of this case, the statute also states that a landlord's lien or a harvester's lien that conflicts with an ag supply dealer's lien will have priority over the ag supply dealer's lien.

<sup>15</sup> Although the court concluded that the statute was not ambiguous, there are cases pending before other Iowa courts on the issue. The matter is made more difficult due to the lack of legislative history behind Iowa Code §570A and little to no prior case law.

<sup>16</sup> 573 N.W.2d 393 (Minn. Ct. App. 1998).

<sup>17</sup> *In re Schlote*, 177 B.R. 315 (Bankr. D. Neb. 1995).

<sup>18</sup> 451 B.R. 867 (Bankr. N.D. Iowa 2011).

<sup>19</sup> *Id.*

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<sup>20</sup> Remember, perfection of the lien requires the filing of a financing statement with the Secretary of State's office within 31 days of the purchase of the supplies. Iowa Code §570A.2(2) and §570A.3. The lien applies to crops related to the purchased supply or livestock consuming the feed sold to the farmer by the dealer.

<sup>21</sup> The portion of the statute in question was Iowa Code §570A.4.

<sup>22</sup> These amounts were computed, the supplier claimed, in accordance with the formula set forth in Iowa Code §570A.5(2). Thus, according to the supplier, the supplier and the creditor shared pro rata in the remaining sale proceeds after deducting the supplier's \$70,599.50 priority interest.

<sup>23</sup> In addition, the court reasoned that the statute was to be applied in a manner that would maximize the creditor's protection.

<sup>24</sup> The court noted that Iowa's version of U.C.C. Art. 9 specified that "[a] perfected agricultural lien on collateral has priority over a conflicting security interest in or agricultural lien on the same collateral if the statute creating the agricultural lien so provides." Iowa Code §554.9322(7).

<sup>25</sup> Thus, the supplier's lien was perfected for only \$51,365.04 of feed that it sold during the 31-day period before filing its financing statement.

<sup>26</sup> The court noted, for example, that the method of creating and perfecting ag liens is not the same as security interests under Article 9, noting that Iowa Code §570A.4 states that "except as provided in this section, a financing statement filed to perfect an agricultural supply dealer lien shall be governed by Chapter 554, Article 9, Part 5. In addition, the UCC refers back to the statutes creating agricultural liens. See Iowa Code §554.9322(7).

<sup>27</sup> The court also noted that its holding was consistent with a court decision in another state interpreting a similar lien statute. *See, e.g.,* In re Bernstein, 230 B.R. 144 (Bankr. D. N.D. 1999).

<sup>28</sup> 451 B.R. 867 (Bankr. N.D. Iowa 2011)

<sup>29</sup> Oyens Feed & Supply, Inc., No. 11-0532 (Iowa Sup. Ct. Dec. 30, 2011).

<sup>30</sup> In Doon Elevator Co. v. American State Bank, No. LACV022572 (Sioux County District Court, Iowa, Mar. 29, 2010)(holding that the livestock feed supplier had superpriority status as opposed to other ag input suppliers who enjoyed only equal priority status with prior perfected lenders); Farmers Cooperative Society of Sioux Center v. First National Bank of Omaha, No. 7:10-CV-202-H (E.D.N.C. Sept. 15, 2011); but see In re Coastal Plains Pork, LLC, 438 B.R. 845 (Bankr. E.D.N.C. 2010)(feed input

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suppliers must comply with the certified request process to attain superpriority status).

<sup>31</sup> 451 B.R. 867 (Bankr. N.D. Iowa 2011).

<sup>32</sup> *In re Coastal Plains Pork, LLC*, No. 09-08367-8-RDD, 2012 Bankr. LEXIS 5784(Bankr. E.D. N.C. Dec. 17, 2012).

<sup>33</sup> *Oyens Feed & Supply, Inc. v. Primebank*, 808 N.W.2d 186 (Iowa 2011).

<sup>34</sup> *Farmers Coop. Co. v. Ernst & Young, Inc. (In re Big Sky Farms Inc.)*, No. 12-01711, 2014 Bankr. LEXIS 1725 (Bankr. N.D. Iowa Apr. 18, 2014).

<sup>35</sup> *Oyens Feed & Supply, Inc.*, No. 11-0532 (Iowa Sup. Ct. Dec. 30, 2011).

<sup>36</sup> *In re Big Sky Farms Inc.*, No. 12-01711, 2014 Bankr. LEXIS 1725 (Bankr. N.D. Iowa Apr. 18, 2014).

<sup>36</sup> *Oyens Feed & Supply, Inc.*, No. 11-0532 (Iowa Sup. Ct. Dec. 30, 2011).

<sup>37</sup> *In re Schley*, No. 10-032522014, Bankr. LEXIS 1724 (Bankr. N.D. Iowa Apr. 18, 2014).