



SIMMONS PERRINE MOYER BERGMAN PLC

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Iowa Agricultural Mortgage Foreclosure and Related Issues

July 24, 2018

Summer Ag Law Webinar Series

Register at: www.spmblaw.com/agwebinar

Thursday, September 13, 2018 | 12:00 - 1:00 PM

Lynn Hartman and Christopher Loftus will give an update on minimizing risk on problematic ag loans. They will focus on the risks and pitfalls of ag lending and provide helpful reminders to lenders on working with their farmers and other lenders.



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Today's Presenters:



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Ag. Loan Review

Update loan file:

- Financial Statements
- Tax Returns
- Cash Flow – Identify income generating assets

Loan document review:

- Security Agreement collateral description
- Legal descriptions on Mortgages
- Security Agreement and Mortgage cross-collateralization
- UCC and Record Mortgage Priority
- Future Advance clauses and limitations
- Homestead statutory language
- Entity Names and Guarantees

Ag. Loan Review, cont.

Consider Farm Debtor Options:

- Cash flow and profitability
 - Terminating over-priced leases
 - Marketing grain
 - Liquidating performing assets limits new finance potential
- New farm financing
 - Total take-out
 - Operating take-out
 - Term debt potential
- Voluntary Liquidation
 - Non-judicial foreclosure
 - Deed in lieu
 - Value of time
 - Cost savings

Ag. Loan Review, cont.

Consider Farm Debtor Options:

- Forced Liquidation
 - Foreclosure
 - Foreclosure Receiver & Debtor option to rent
 - Automatically delayed Sheriff's sale
 - Redemption and right of first refusal on sale out of REO
 - Counterclaims and defenses
- Bankruptcy
 - Chapter 11
 - Chapter 12 – cash flow and liquidation analysis
 - Chapter 7
 - A combination of bankruptcies?
 - 90 day preference concerns

Tax Consequences of Liquidation:

- Inability to defer grain income
- Capital gains and depreciation recapture

Mandatory Mediation

Mediation release is a requirement to access Courts

- Debtor “actively engaged in farming”
- \$20,000 or more owed

Mediation request to Iowa Mediation Service

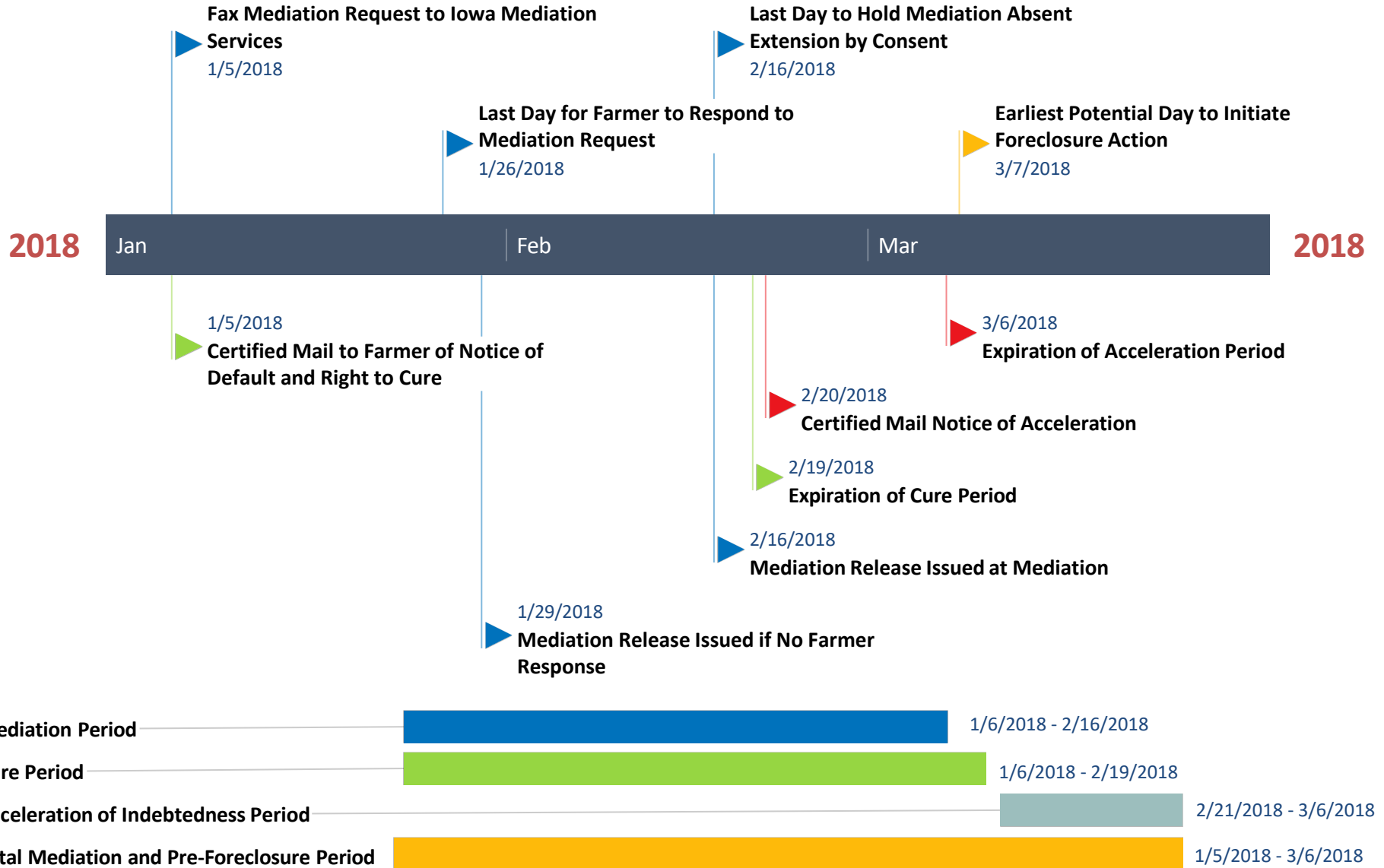
- <http://www.iowamediationservice.com/forms/>

Mediation held within 42 days after request, unless extended by consent. Mediation Notice and 45 day Cure can run concurrently. Can be waived by Court if irreparable harm properly plead.

Mediation participation:

- Attendance and non-negotiable position okay
- “The statute does not give the mediation service the power to compel either creditor or debtor to negotiate. It merely attempts to set up conditions in which the parties might find a solution to their problems short of forfeiture or foreclosure.” *Graham v. Baker*, 447 N.W.2d 397, 401 (Iowa 1989).

Mandatory Mediation Timeline



Ag. Land Foreclosure

When negotiations and voluntary surrender break down.

Foreclosure:

- Appointment of receiver under mortgage(s)
- Lengthy process

Replevin:

- Any problems with identifying collateral
- Locating collateral
- Logistics of repossession
- Willingness to post bond for immediate possession
- Force a Debtor into ill-timed bankruptcy



Deficiency Issues:

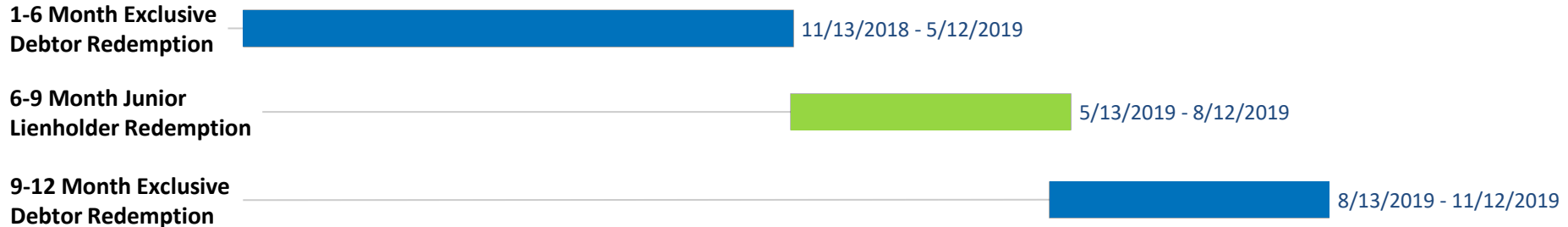
- Attachment – Any concerns about the transfer or destruction of non-pledged & non-exempt assets

Ag. Land Foreclosure Timeline

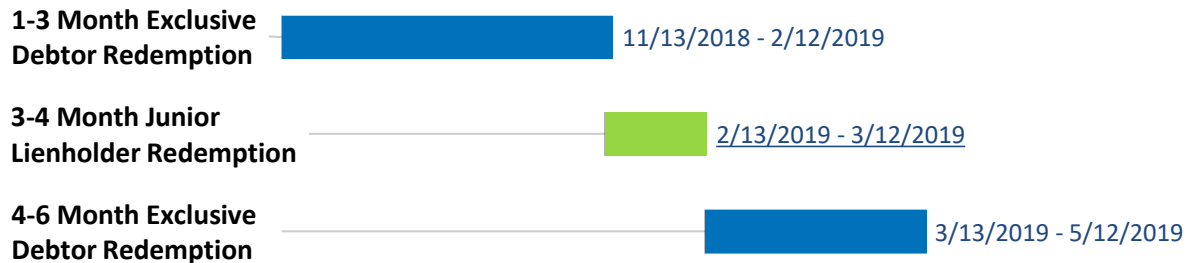


Statutory Redemption Timeline

Standard 12 month Redemption Timeline:



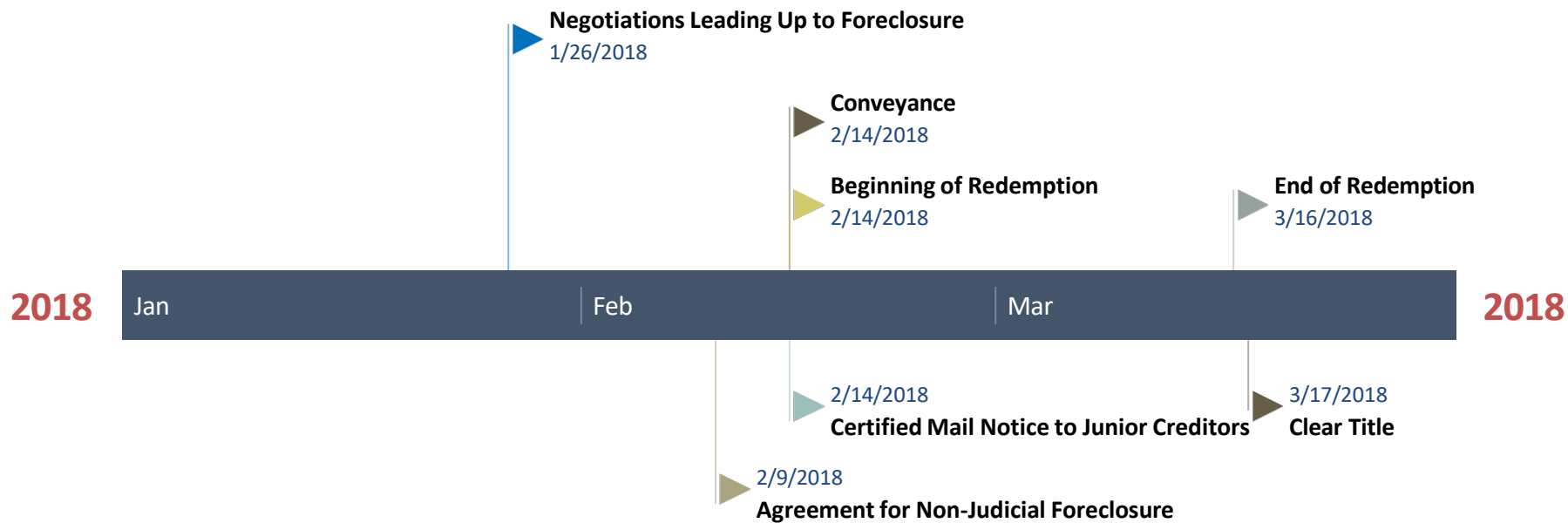
Shortened Redemption: Less than 10 Acres, Waiver of Deficiency, and Mortgage Provides Agreement for Reduction in Redemption:



If a party stays execution, no right to redeem by that party.

Agricultural Foreclosure

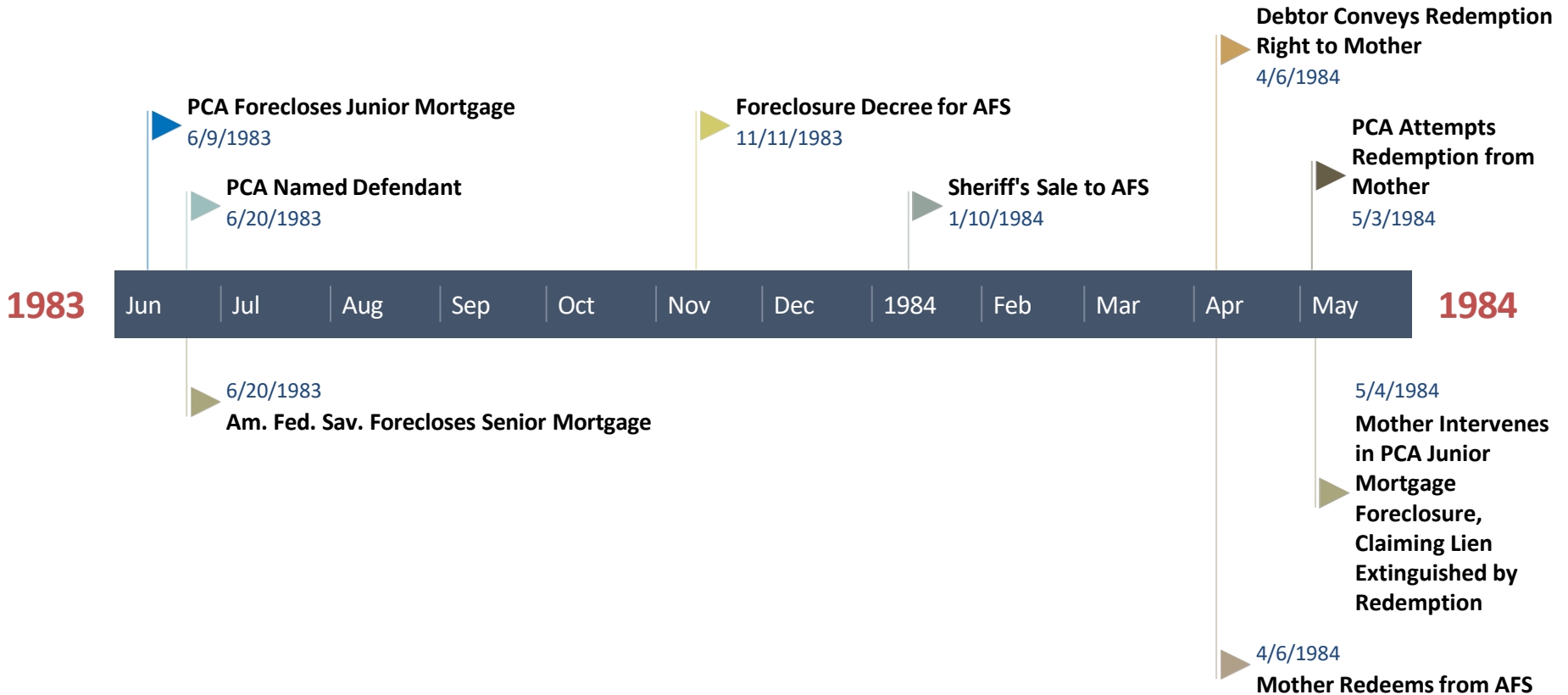
Non-Judicial Voluntary Foreclosure:



Mandatory Terms: (1) Borrower conveys all interest in real estate; (2) Lender waives deficiency; (3) Lender has immediate access to property; and (4) Recording of jointly executed document that states election of non-judicial foreclosure.

Agricultural Foreclosure, cont.

Redemption Case Study: *Farmers Prod. Credit Ass'n v. McFarland*, 374 N.W.2d 654 (Iowa 1985)



Agricultural Foreclosure, cont.

Majority:

- “Although redemption by the mortgagor or assignee during the exclusive period prevents redemption by a junior lienholder, it does not provide the redeemer complete relief from junior liens.”

Dissent:

- “[J]unior lienors have no justifiable expectation that their liens will survive the sale . . . they must take the statutory system of redemption as the legislature has established it, including the risk of redemption by the mortgagor or the mortgagor's assignee during the exclusive period.”

McFarland Takeaways:

- Majority decision may be challenged
- Do not risk losing junior lienholder redemption
- BID AT SHERIFF’S SALE

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, cont.

▪ **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, cont.

- **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, cont.

- **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).

Dragnet Clauses in Bankruptcy: *In re McMahon*, 2018 WL 3014067 (Bankr. N.D. Iowa June 8, 2018)

- **Facts:** Debtor owed over \$2 Million on three business loans, each with a dragnet clause. Debtor's homestead and rental property were specifically identified as collateral for one loan, but not the other two. Bank argued all three notes are cross-collateralized due to the dragnet clauses.
- **Court:** The Court identified *Wells Fargo* as controlling and held the homestead and rental property were collateral under all three notes. The opinion gives the impression the bankruptcy judge would have sided with the dissent absent the existing Court of Appeals precedent.



Liquidation Issues



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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. 2nd 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



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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.

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.

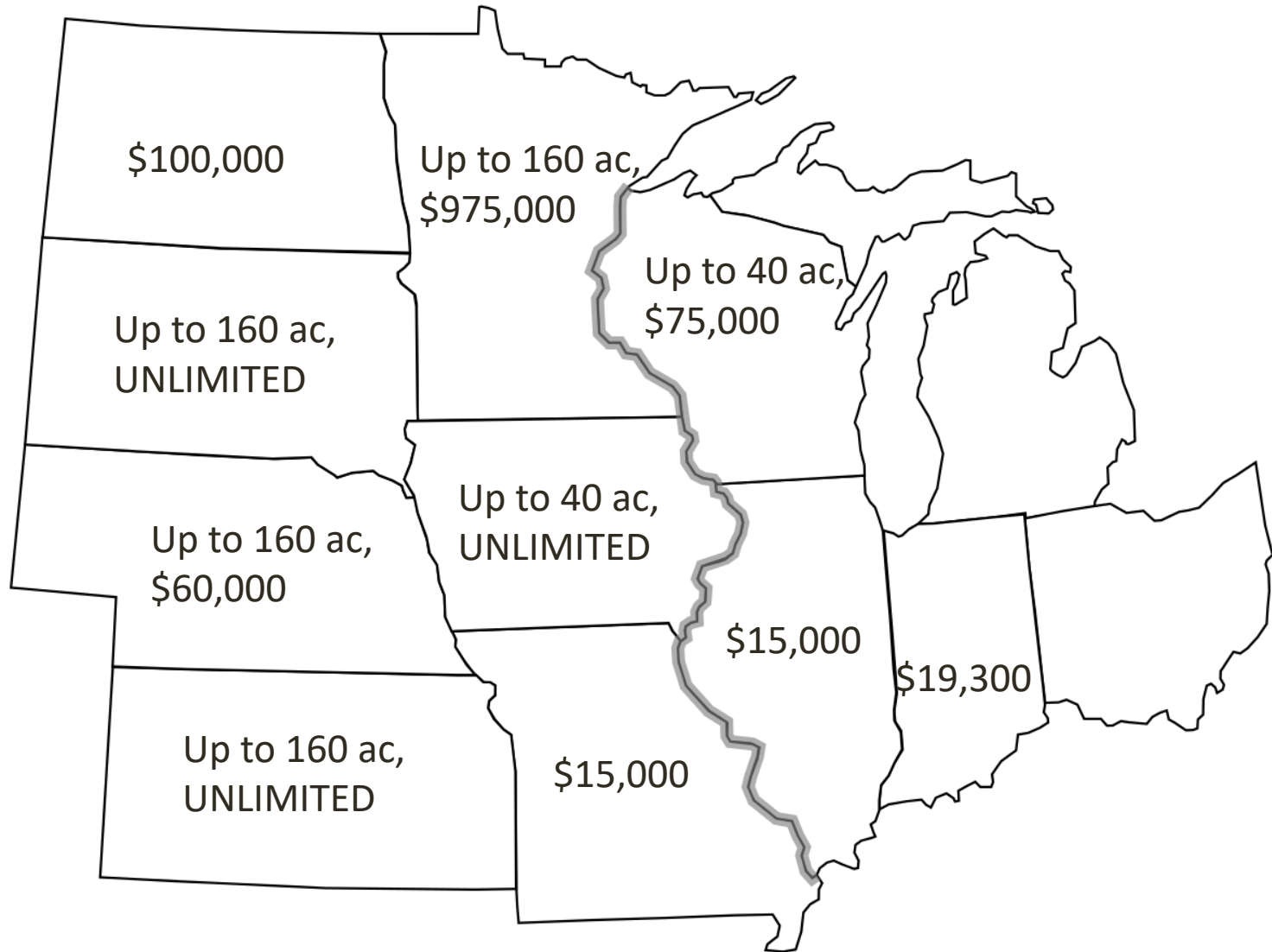
- No later than the time the sheriff's deed is recorded (which must be within one year and 60 days from the date of sheriff's sale), the Grantee of the sheriff's deed must notify the Mortgagor of this right.
- The grantee of the sheriff's deed must give notice to the mortgagor of the terms and price 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.

Deed in Lieu of Foreclosure

Iowa Code § 654.19 permits mortgagors to give a deed in lieu of foreclosure for agricultural land so satisfy all or part of an outstanding debt, so long as the mortgagee agrees.

- Accepting a deed in lieu pursuant to § 654.19 avoids creating a presumption of an **equitable mortgage**.
- Iowa Code § 654.19 also permits—but probably does not require—the mortgagor and mortgagee to agree to give the mortgagor a right of first refusal to the property.
- Iowa law used to require a right of first refusal, but that requirement was removed and the Iowa Supreme Court has indicated § 654.19 does not, by itself, require giving a right of first refusal.

Midwest Farm Homestead Survey



Iowa Farm Homestead

Creative homestead platting – Debtor's choice

Iowa Homestead Liable for:

- Pre-acquisition debts; and
- Debts secured by mortgage

All property subject to execution must be sold first.

Indivisible homestead – each owner entitled to the whole homestead. *In re Gaeta*, No. 99-3810-DH (Bankr. S.D. Iowa, Sept. 28, 2000) (Hill, J.).

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.

Fixture Filings

What is a FIXTURE?

- Merriam-Webster: “An item of movable property so incorporated into real property that it may be regarded as legally a part of it.”
- Black’s Law Dictionary: “Personal property that is attached to land or a building and that is regarded as an irremovable part of the real property, such as a fireplace built into a home.”
- Uniform Commercial Code: “Goods that have become so related to particular real property that an interest in them arises under real property law.”

The PROBLEM:

What do any of these mean?

Fixture Filings, cont.

So, the Courts created a different fixture definition:

Three requirements:

- Annexation
- Adaptation
- Intention

“The intention of the party annexing the improvement is the ‘paramount factor’ in determining whether the improvement is a fixture.” *Young v. Iowa Dep't of Transp.*, 490 N.W.2d 554, 556 (Iowa 1992).

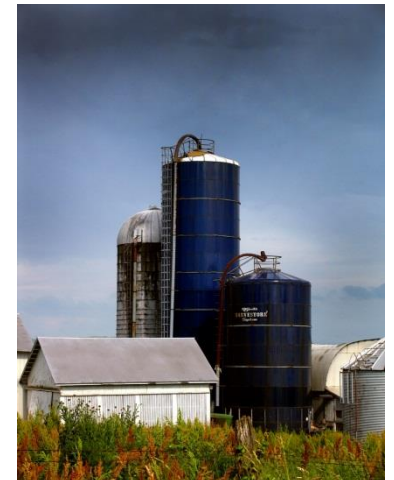
The PROBLEM:

Better, but what does this test mean?

Fixture Filings, cont.

Example Fixtures:

- LP Tanks
- Silos
- Grain Bins
- Chemical Tanks
- Irrigation Equipment
- Grain Dryers
- Hoop Buildings



Example Non-Fixtures:

- LP Tanks
- Silos
- Grain Bins
- Chemical Tanks
- Irrigation Equipment
- Grain Dryers
- Hoop Buildings



Fixture Filings, cont.

Any doubts?

- Treat goods as both fixtures AND personal property.
- Ordinary building materials cannot become fixtures
 - Security interests do not continue once incorporated into real estate
 - Mechanic's lien laws

UCC contemplates three types of filings on a fixture:

- Standard UCC-1 Financing Statement – a filing on fixtures
- A “fixture filing”
- Mortgage effective as a financing statement

Type of filing impacts priority.

Fixture Filings, cont.

“Fixture Filing”

- Special defined term in the UCC
- “A financing statement covering goods that are or are to become fixtures and satisfying Section 9-502(a) & (b).”
- Only effective for fixtures

Ordinary Requirements – 9-502(a): name of debtor and secured party, description of collateral.

Extra Requirements – 9-502(b):

- Indicates fixture coverage
- Indicates filed in county recorders office
- Legal description of real property
- Name of record owner (if Debtor does not have interest)

Fixture Filings, cont.

UCC FINANCING STATEMENT ADDENDUM

FOLLOW INSTRUCTIONS

9. NAME OF FIRST DEBTOR: Same as line 1a or 1b on Financing Statement If line 1b was left blank because Individual Debtor name did not fit, check here:

9a. ORGANIZATION'S NAME

OR

9b. INDIVIDUAL'S SURNAME

FIRST PERSONAL NAME

ADDITIONAL NAME(S)/INITIAL(S)

SUFFIX

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

10. DEBTOR'S NAME: Provide (10a or 10b) only one additional Debtor name or Debtor name that did not fit in line 1b or 2b of the Financing Statement (Form UCC1) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name) and enter the mailing address in line 10c

10a. ORGANIZATION'S NAME

OR

10b. INDIVIDUAL'S SURNAME

INDIVIDUAL'S FIRST PERSONAL NAME

INDIVIDUAL'S ADDITIONAL NAME(S)/INITIAL(S)

SUFFIX

10c. MAILING ADDRESS

CITY

STATE

POSTAL CODE

COUNTRY

11. ADDITIONAL SECURED PARTY'S NAME *or* ASSIGNOR SECURED PARTY'S NAME: Provide only one name (11a or 11b)

11a. ORGANIZATION'S NAME

OR

11b. INDIVIDUAL'S SURNAME

FIRST PERSONAL NAME

ADDITIONAL NAME(S)/INITIAL(S)

SUFFIX

11c. MAILING ADDRESS

CITY

STATE

POSTAL CODE

COUNTRY

Fixture Filings, cont.

12. ADDITIONAL SPACE FOR ITEM 4 (Collateral):

13. This FINANCING STATEMENT is to be filed [for record] (or recorded) in the REAL ESTATE RECORDS (if applicable)

14. This FINANCING STATEMENT:

covers timber to be cut covers as-extracted collateral Is filed as a fixture filing

15. Name and address of a RECORD OWNER of real estate described in Item 16 (if Debtor does not have a record interest):

16. Description of real estate:

Insert Legal Description:
NW1/4 of the SE1/4 . . .

17. MISCELLANEOUS:

FILING OFFICE COPY — UCC FINANCING STATEMENT ADDENDUM (Form UCC1Ad) (Rev. 04/20/11) International Association of Commercial Administrators (IACA)

Fixture Filings, cont.

Mortgage effective as a financing statement fixture filing.

Mortgage must satisfy 9-502(c):

- Describe goods covered;
- The goods are or will become fixtures related to the described real estate;
- Satisfies ordinary financing statement requirements; and
- Mortgage is recorded.

Fixture Filing. From the date of its recording, this Mortgage shall be effective as a financing statement filed as a fixture filing with respect to the Personal Property and for this purpose, the name and address of the debtor is the name and address of Grantor as set forth on the first page of this Mortgage and the name and address of the secured party is the name and address of Lender as set forth on the first page of this Mortgage.

Assignments – comply with local real property laws

Amendments – no guidance in UCC

Fixture Filings, cont.

UCC choice of law:

- For security interests perfected by fixture filing, the law of the state where the fixture is located governs perfection and priority.

Filing Location:

- For filing on fixtures: location of Debtor
- For “fixture filings” and mortgages: location of goods/fixtures

Fixture Filings, cont.

Example: Northern Iowa farmer owns farm land in Worth County, IA, and Freeborn County, MN. Bank finances construction of Sukup bins and dryer facility in Freeborn County. Security agreement describes the bins and dryer and their attachment as fixtures.

Choices:

IA SOS Office	Worth County Recorder
MN SOS Office	Freeborn County Recorder

Decision:

UCC-1 Financing Statement & Fixture Filing Addendum	IA SOS Office
UCC-1 Financing Statement & Fixture Filing Addendum	Freeborn County Recorder

Fixture Filings - Priority

General Rules: First in time, and mortgage trumping

- Priority of security interests rank from the earliest of filing or perfection
- Real estate laws: priority of interests in real estate in order of recording
- Interest in fixtures created under real property law holds priority over UCC security interest in fixtures.

Exceptions:

- PMSI & Fixture Filing within 20 days of fixture status
- Fixture Filing first in time & priority in chain of title
- Security interest perfected and readily removable goods
- Security interest perfected prior to judicial lien
- Consent given by mortgagee, regardless of security interest perfection

Fixture Filings - Priority

Fixture Issues to Spot:

- UCC Financing Statements for
 - Grain bins
 - Grain dryers
 - Chemical or LP tanks
 - Buildings
- Fixture Filing on collateral described in financing statement, and date of Fixture Filing.
- Sufficiency of legal description in Fixture Filing
- Attempted “lease” transaction of fixture
 - True lease or secured transaction?
 - UCC Financing Statement for “leased” property, often a building or tank
 - Commonly lack Fixture Filing due to insufficient information on legal description

Marshaling Assets

Marshaling:

- Creditors having common debtor(s) – Common Debtor
- Common collateral, and “extra” collateral, owned by the common debtor(s) – Common Fund
- No prejudice to marshaled creditor in first seeking satisfaction out of “extra” collateral – No Prejudice

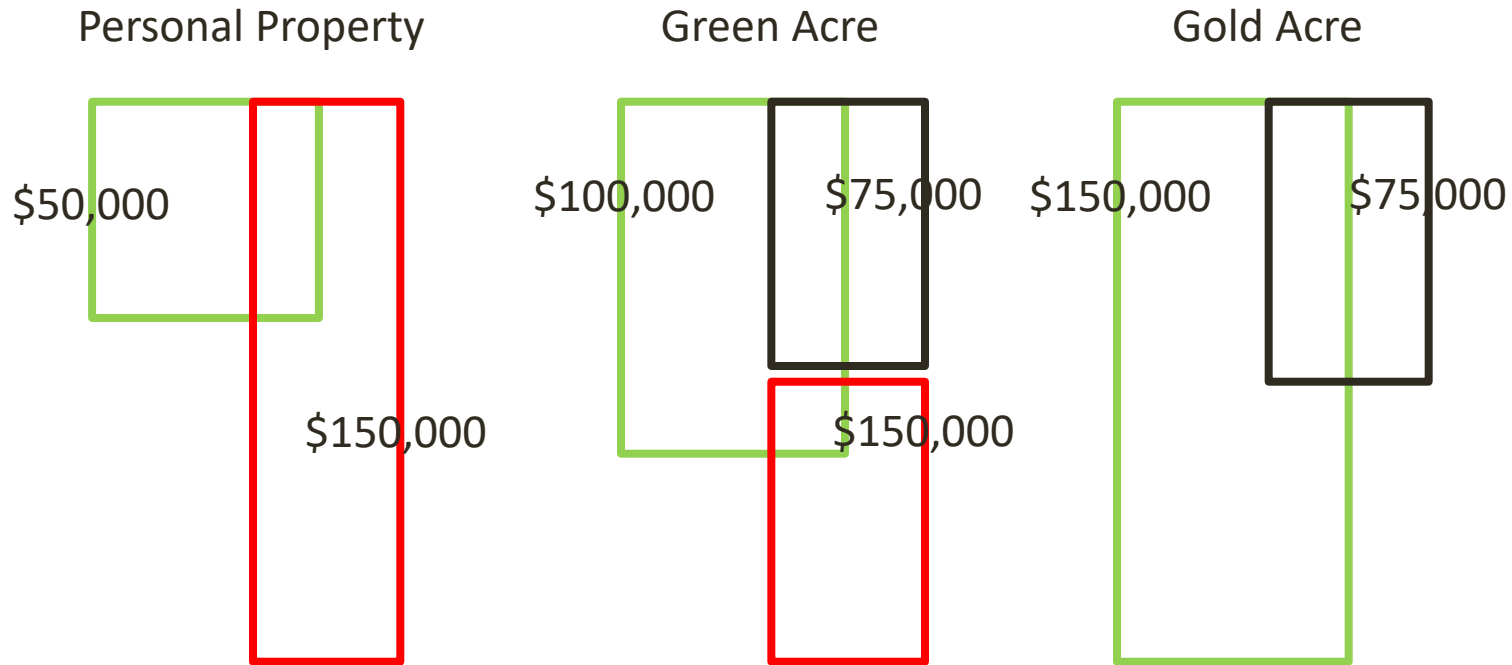
The purpose of marshaling “is to prevent the arbitrary action of a senior lienor from destroying the rights of a junior lienor or a creditor having less security. It deals with the rights of all who have an interest in the property involved and is applied only when it can be equitably fashioned as to all of the parties.” *In re Oxford Dev., Ltd.*, 67 F.3d 683, 686–87 (8th Cir. 1995).

Marshaling Assets - Available

Total Assets: \$300,000 – pledged by father/son borrowers

Red Bank: Owed \$150,000 – Chattels and Single Mortgage

Black Bank: Owed \$75,000 – Two Mortgages, priority

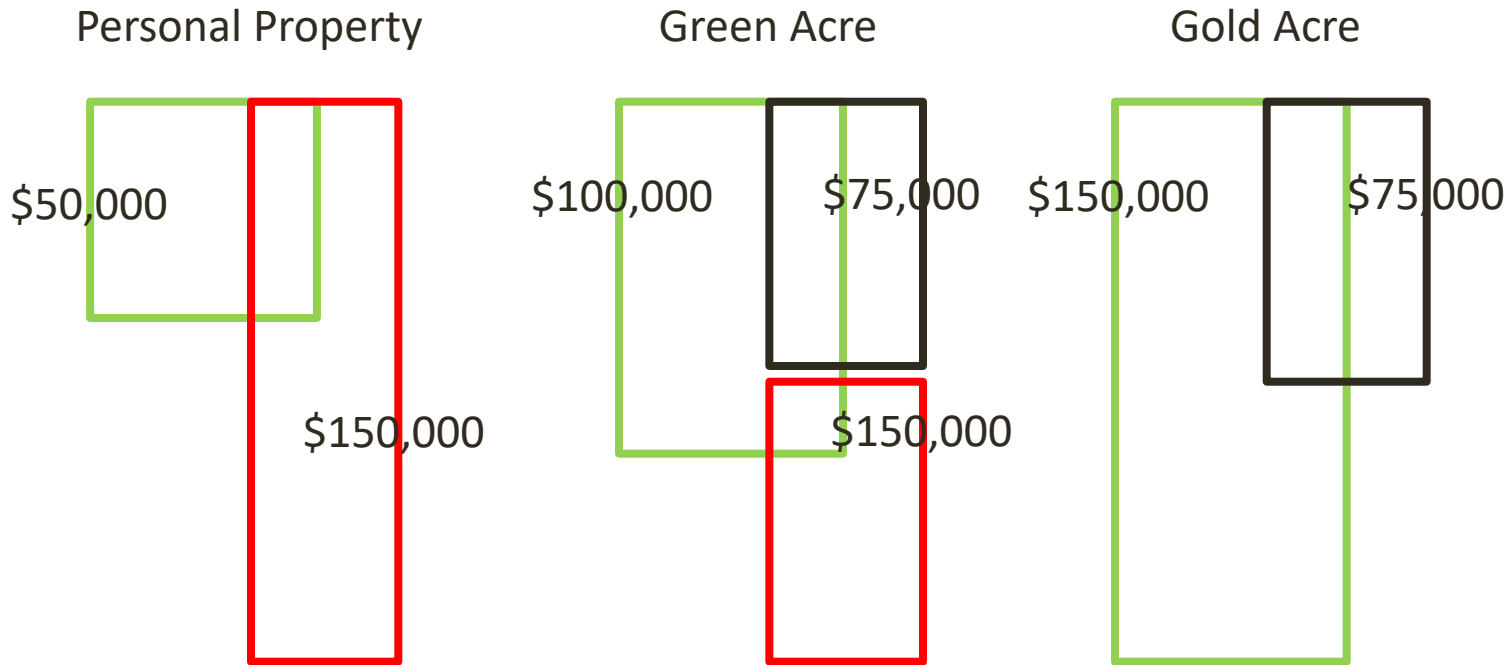


Marshaling Assets - Unavailable

Total Assets: \$300,000 – son borrower, father owns Gold Acre

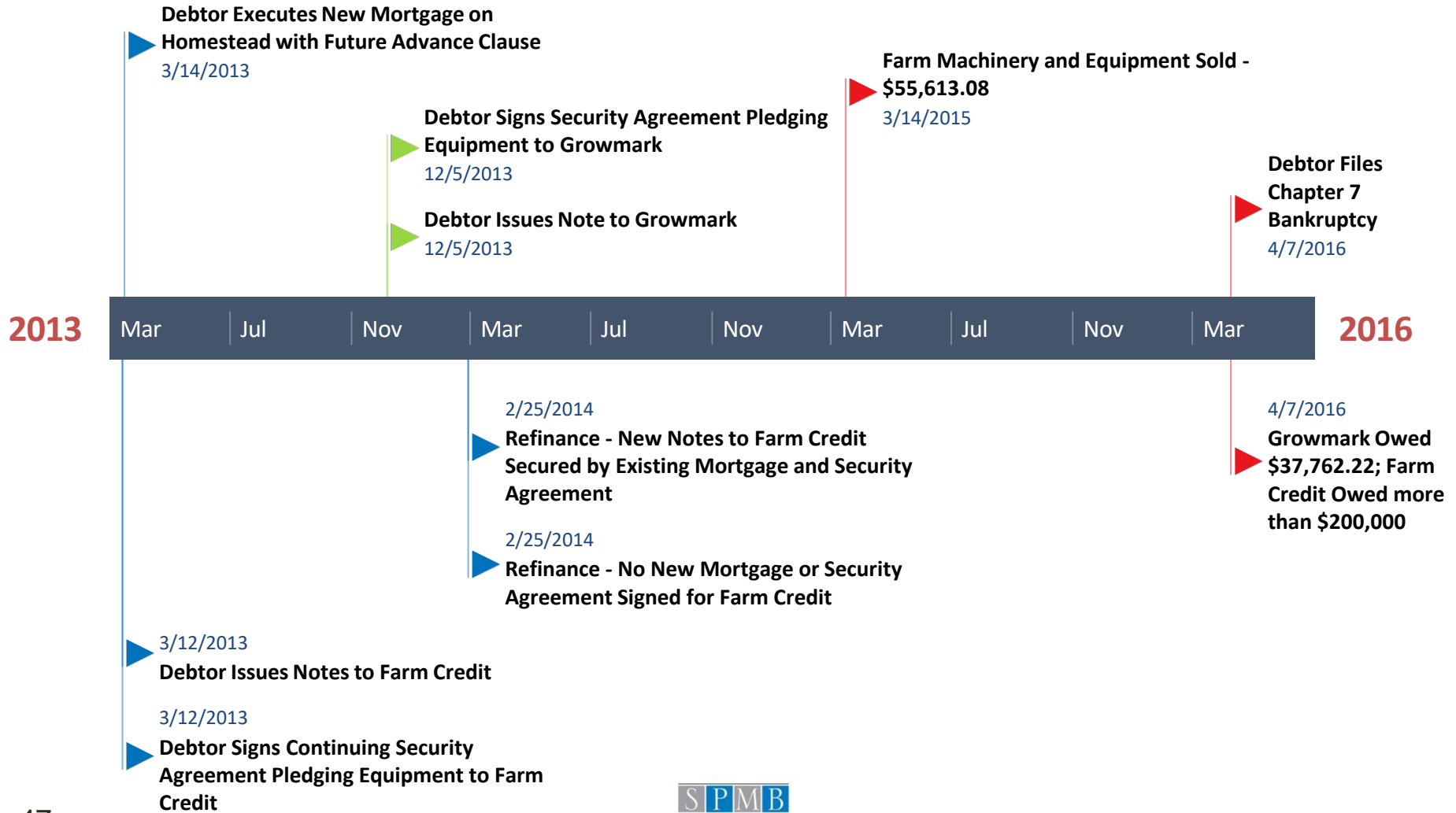
Red Bank: Owed \$150,000 – Chattels and Single Mortgage

Black Bank: Owed \$75,000 – Two Mortgages, priority



Marshaling Assets

Marshaling Case Study: *Schantz v. Farm Credit & Growmark, Inc.*,
No. 16-09016 (Bankr. N.D. Iowa Aug. 7, 2017).



Marshaling Assets, cont.

Key Arguments in *Schantz*

Debtors & Farm Credit:

- Cannot marshal onto an exempt Iowa Homestead due to exhaustion requirement.
- The 2014 refinance contract included the new 2014 notes, and existing security agreement and mortgage.

Growmark:

- Marshaling is not a “judicial sale.”
- The Farm Credit mortgage and security agreement are separate contracts – to exhaustion required.

Marshaling Assets, cont.

Court Ruling – Schantzes and Farm Credit Win:

- Contract issue: “While there were multiple documents prepared to support Farm Credit’s loan and security agreements – two promissory notes and separate mortgage and personal property security documents – they were treated by both Farm Credit and Debtors as being part of the same transaction and contract.”
- Judicial Sale issue: “The term ‘judicial sale’ as used in [Iowa Homestead law] was intended to encompass any judicially compelled disposition of the homestead, whether denominated a ‘sale’ or not.”
- Equity issue: “marshaling should not be applied when its effect is to defeat a state exemption—particularly an Iowa homestead exemption.”

We will respond to your questions individually via email following today's presentation.

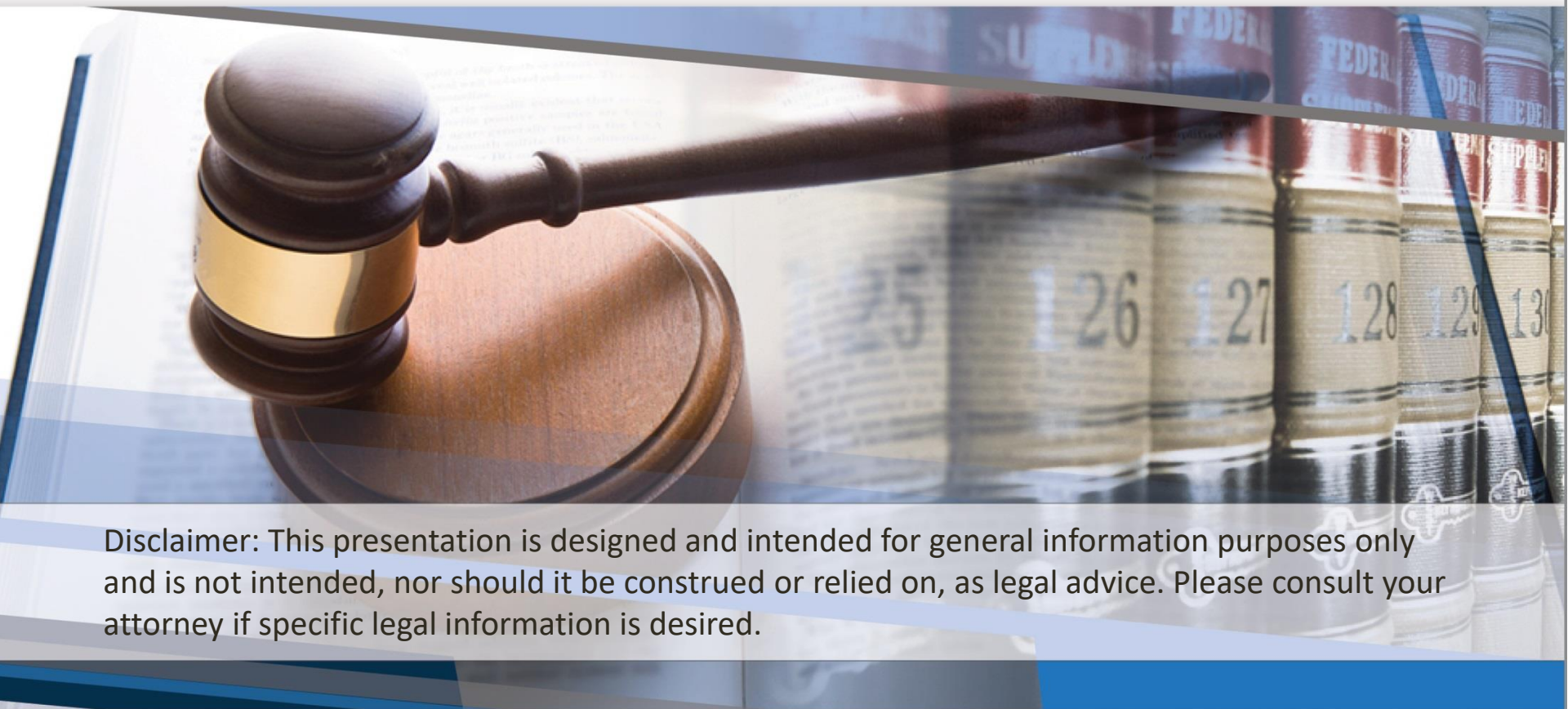
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