



# SIMMONS PERRINE MOYER BERGMAN PLC

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## Minimizing Risk of Problem Agricultural Loans

Friday, November 16, 2018

# Today's Presenter:



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# Minimizing Risk of Problem Agricultural Loans



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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).



# 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.





# 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>.





# 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

# 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



# 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 <u>one</u> debtor name (1a or 1b) - do not abbreviate or combine names            |  |                            |  |                                  |  |
| 1a. ORGANIZATION'S NAME   |  |                            |  |                                  |  |
| OR  |  | 1b. INDIVIDUAL'S LAST NAME |  | FIRST NAME                       |  |
|   |  | <b>Hartman</b>             |  | <b>Lynn</b>                      |  |
| 1c. MAILING ADDRESS   |  | CITY                       |  | MIDDLE NAME                      |  |
| <b>303 Ashland Ct SE</b>  |  | <b>Cedar Rapids</b>        |  | <b>Wickham</b>                   |  |
| 1d. SEE INSTRUCTIONS  |  | 1e. TYPE OF ORGANIZATION   |  | 1f. JURISDICTION OF ORGANIZATION |  |
|   |  | DEBTOR                     |  | IA                               |  |
|   |  |                            |  | STATE POSTAL CODE COUNTRY        |  |
|   |  |                            |  | IA 52403                         |  |
|   |  |                            |  | 1g. ORGANIZATIONAL ID #, if any  |  |
|   |  |                            |  | <input type="checkbox"/> NONE    |  |
| 2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only <u>one</u> debtor name (2a or 2b) - do not abbreviate or combine names |  |                            |  |                                  |  |
| 2a. ORGANIZATION'S NAME   |  |                            |  |                                  |  |
| OR  |  | 2b. INDIVIDUAL'S LAST NAME |  | FIRST NAME                       |  |
|   |  | <b>Wickham Hartman</b>     |  | <b>Lynn</b>                      |  |
| 2c. MAILING ADDRESS   |  | CITY                       |  | MIDDLE NAME                      |  |
| <b>303 Ashland Ct SE</b>  |  | <b>Cedar Rapids</b>        |  | <b>Wickham</b>                   |  |
| 2d. SEE INSTRUCTIONS  |  | 2e. TYPE OF ORGANIZATION   |  | 2f. JURISDICTION OF ORGANIZATION |  |
|   |  | DEBTOR                     |  | IA                               |  |
|   |  |                            |  | STATE POSTAL CODE COUNTRY        |  |
|   |  |                            |  | IA 52403                         |  |
|   |  |                            |  | 2g. ORGANIZATIONAL ID #, if any  |  |
|   |  |                            |  | <input type="checkbox"/> NONE    |  |
| 3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNOR/SFP) - insert only <u>one</u> secured party name (3a or 3b)                    |  |                            |  |                                  |  |
| 3a. ORGANIZATION'S NAME   |  |                            |  |                                  |  |
| OR  |  | 3b. INDIVIDUAL'S LAST NAME |  | FIRST NAME                       |  |
|   |  |                            |  |                                  |  |
| 3c. MAILING ADDRESS   |  | CITY                       |  | MIDDLE NAME                      |  |
|   |  |                            |  |                                  |  |
|   |  |                            |  | 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. <input type="checkbox"/> This FINANCING STATEMENT is to be filed (for record) (or recorded) in the REAL ESTATE RECORDS. Attach Addendum | 7. Check to REQUEST SEARCH REPORT(S) on Debtor(S) (if applicable) |                     | 8. Check to REQUEST SEARCH REPORT(S) on Debtor(S) (optional) |              | All Debtors | Debtor 1       |
| 8. OPTIONAL FILER REFERENCE DATA   |   |                     |  |              |             |                |

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

# 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.

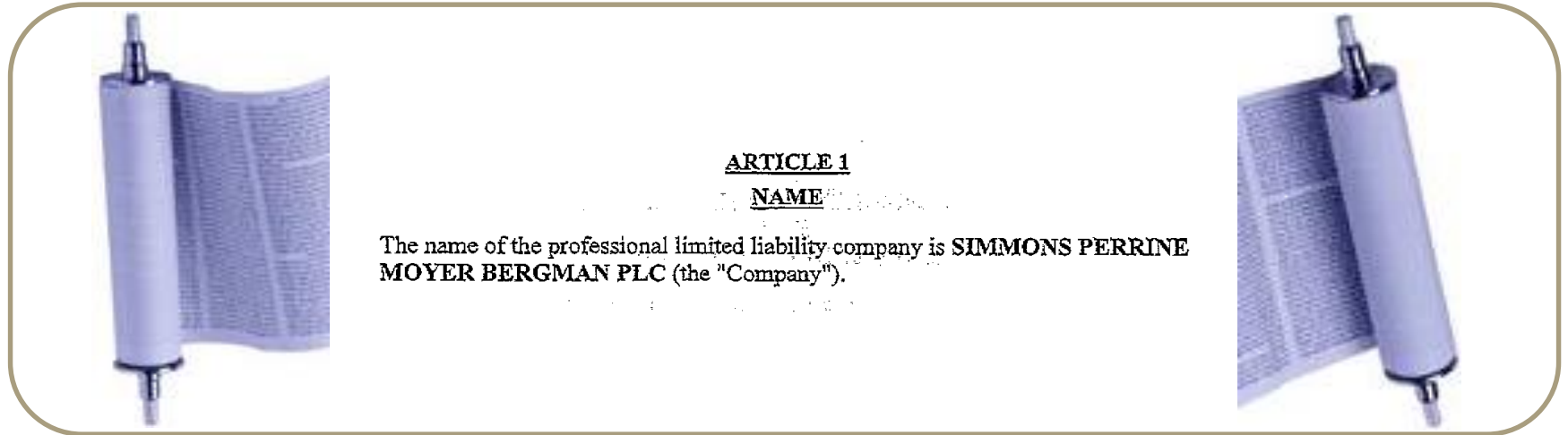
# Common Questions Regarding Filing for Individuals

- **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


# 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**  
*Paul D. Pate*



Home Business Services Search Databases Online Filing Elections Notaries Nonprofits Youth

Home » Search Databases » Business Entities » Results

## Business Entities Results

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           |

**FEATURED RESOURCES**

QUICK LINKS ONLINE SERVICES SEARCH

- Find Your Precinct/Polling Place
- Am I Registered to Vote in Iowa?
- Register to Vote
- Request an Absentee Ballot
- Track Your Absentee Ballot
- Business Resources



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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.



# 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

# 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.



# 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 /<br>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<br>(Livestock or Raw Milk) | 45 days after first arrival unless continuing /<br>180 days after first arrival if continuing |
| Commodity Production Contract Lien<br>(Crops)                 | 45 days after crop is planted.  |
| Veterinarian's Lien   | 60 days after treatment of livestock  |
| Lien for Services of Animals                                  | N/A   |





*Oyens Feed & Supply v. PrimeBank*



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# Perfecting Agricultural Supply Dealer Loans

## The Iowa Supreme Court Case

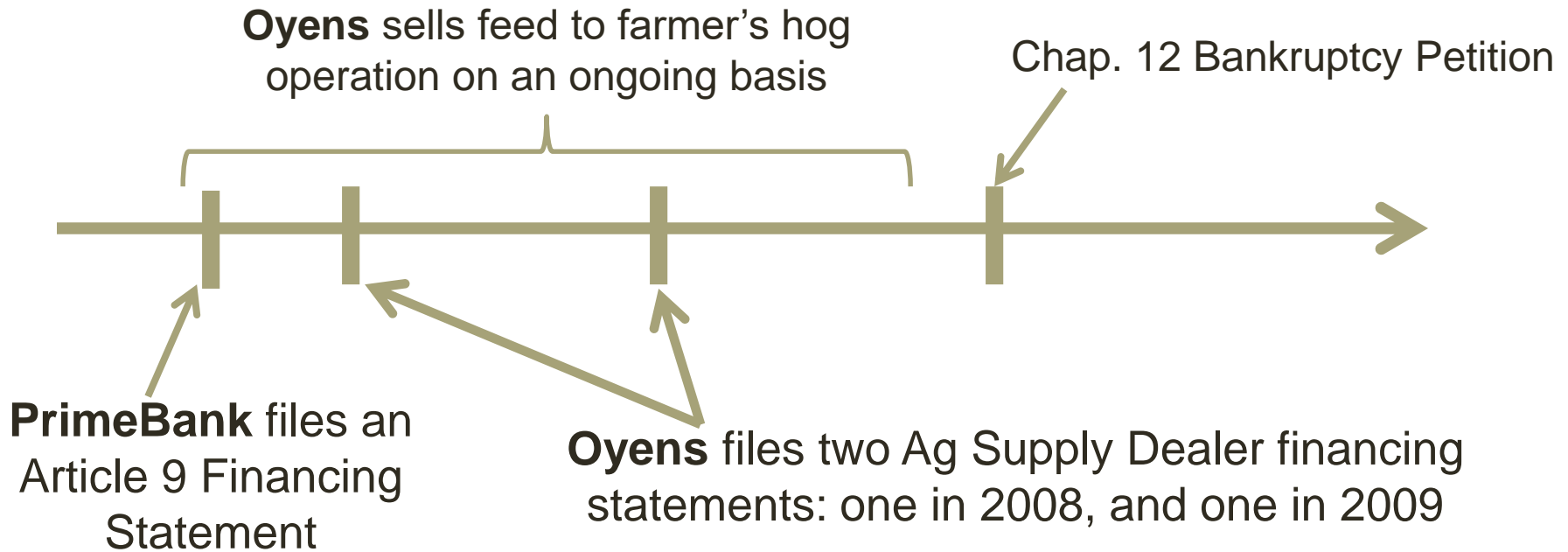
- **Oyens** sold feed to a farmer over several years, and the farmer eventually went into bankruptcy.
- Dispute was whether **Oyens** or **PrimeBank** had priority in the proceeds of selling the farmer's hogs.

## 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.



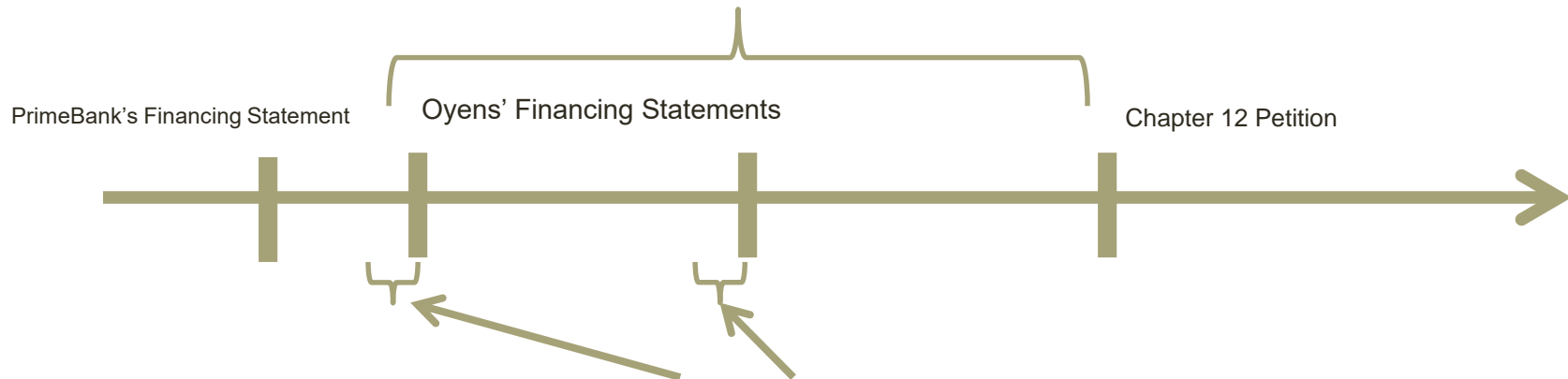
# Timeline in *Oyens*



# 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.



# 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).



# 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.

# 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



# 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



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# 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.

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:

|                      |                              |
|----------------------|------------------------------|
| <b>IA SOS Office</b> | <b>Worth County Recorder</b> |
| MN SOS Office        | Freeborn County Recorder     |

Decision:

|  |                          |
|--|--------------------------|
| <b>UCC-1 Financing Statement &amp; Fixture Filing Addendum</b> | <b>IA SOS Office</b>     |
| 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

# Landlord/Tenant Concerns

Documents to Consider Changing if Borrower is Tenant

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



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

Consider Using if Borrower is Landlord

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



# Third Parties with Contractual Claims

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



# How Can I Protect My Bank's Interest?

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



# Commodity Accounts

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





# Grain Companies

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



# Forward Contracts

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

# Marketing and Other Production Contracts

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

# Federal Farm Security Act of 1985

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

# 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
  - *Ipsa 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).



*Liquidation Issues*



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# 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/>

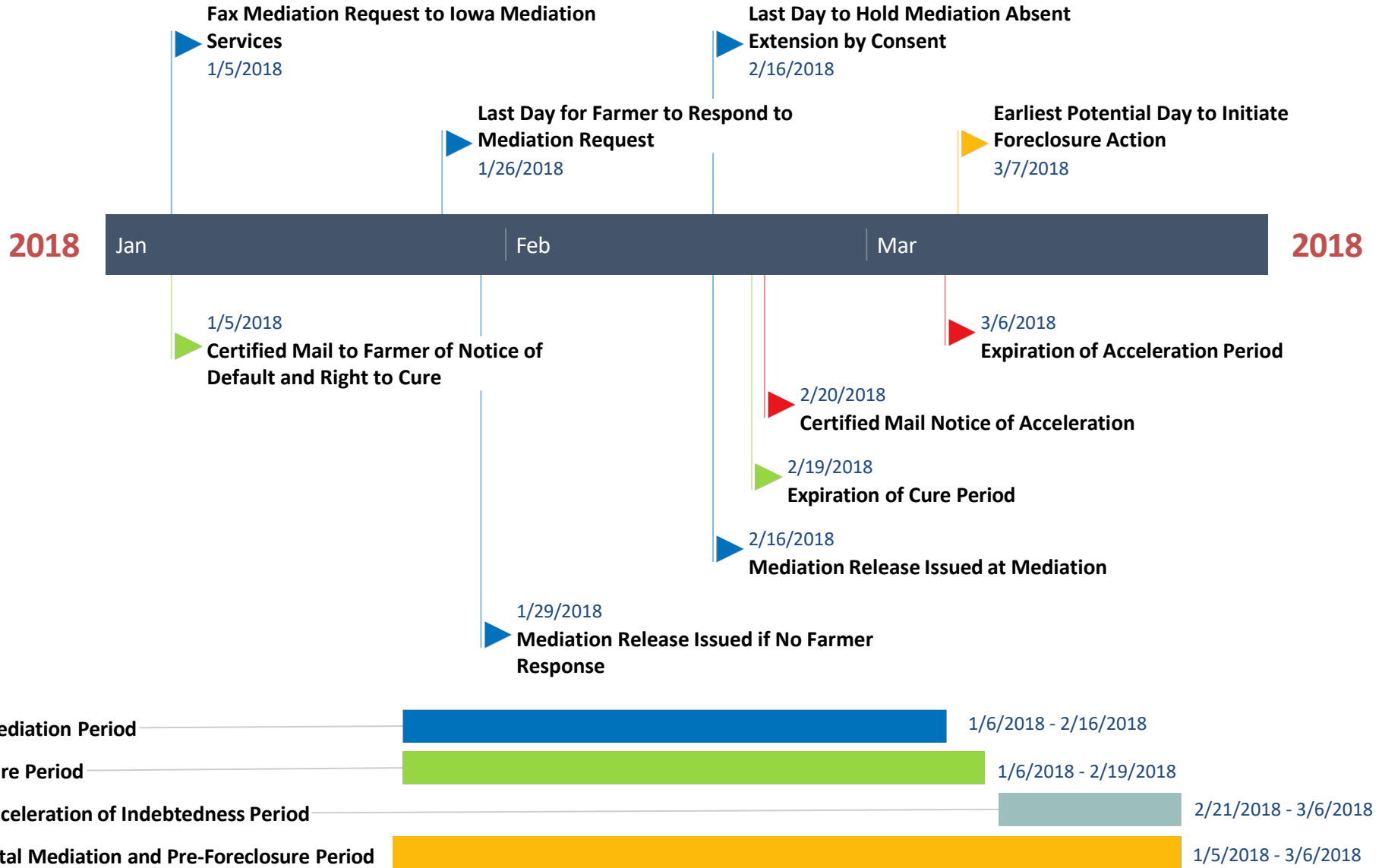
Mediation held within 42 days after request, unless extended by consent. Mediation Notice and 45 day Cure can run concurrently. Can be waived by Court if irreparable harm properly plead.

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



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# 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

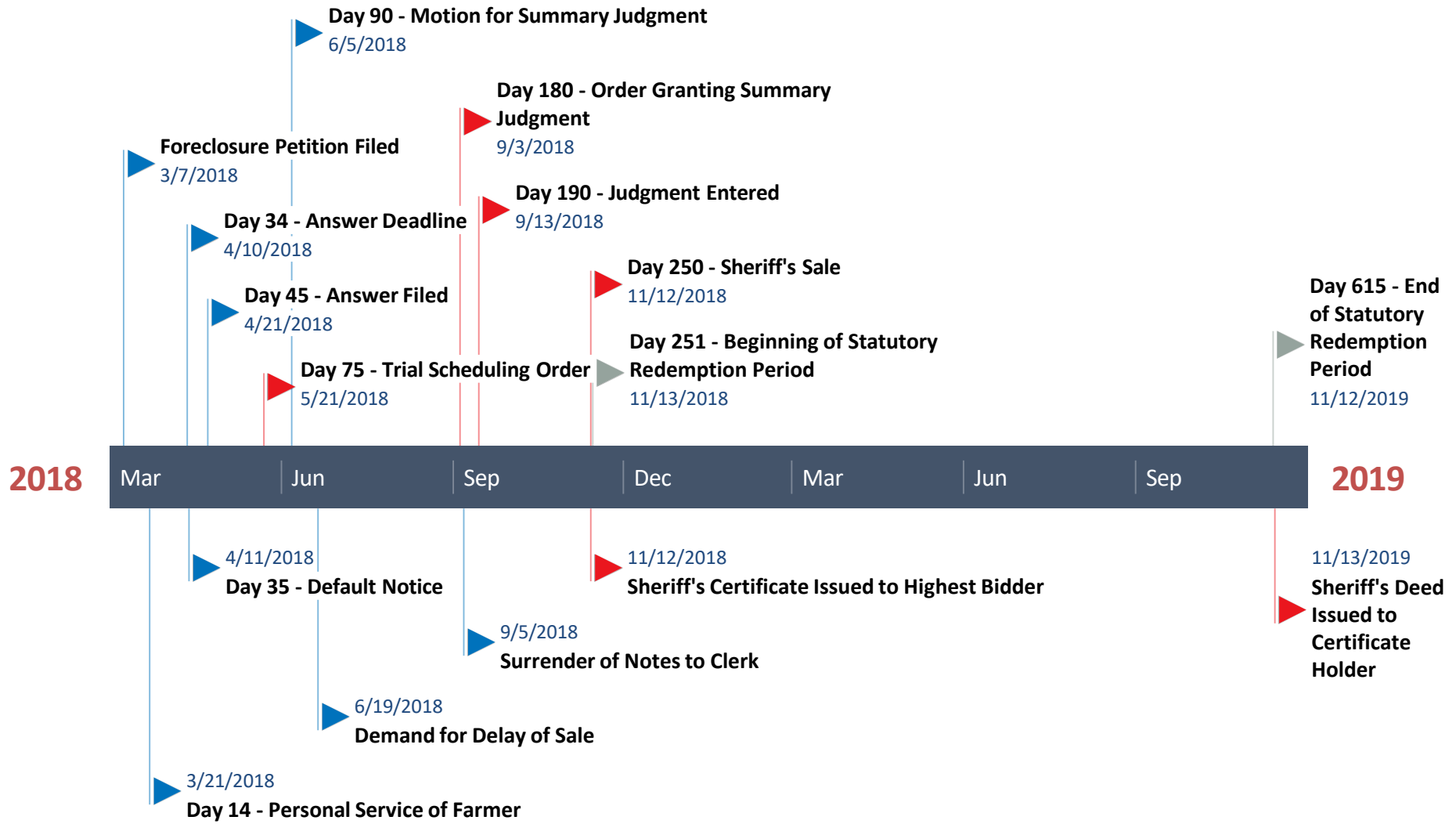


Deficiency Issues:

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

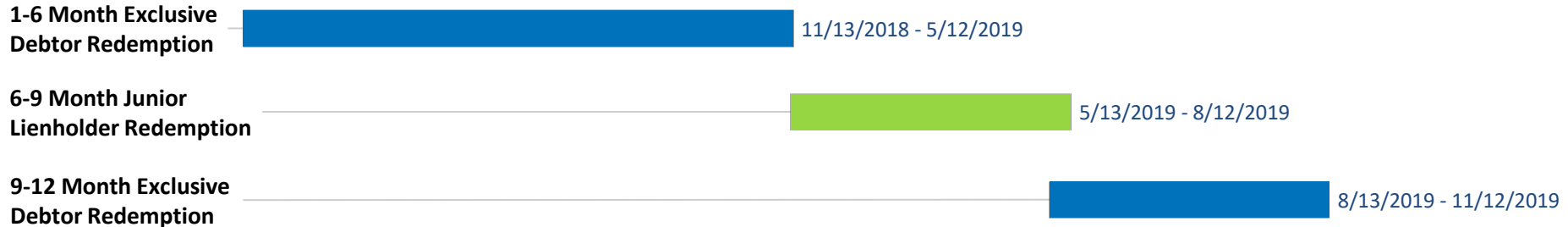


# Ag. Land Foreclosure Timeline

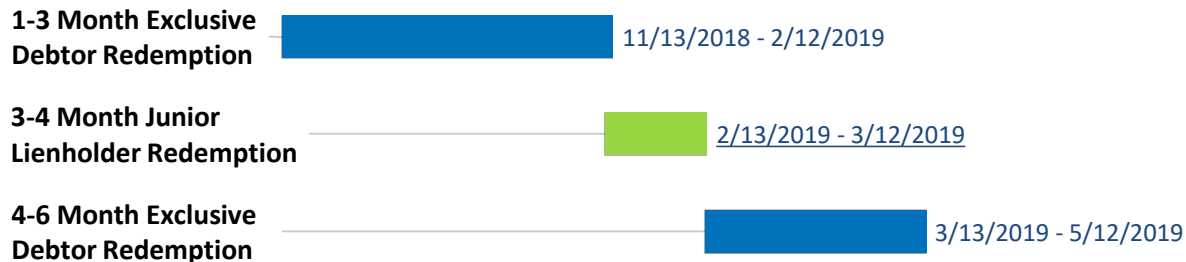


# Statutory Redemption Timeline

## Standard 12 month Redemption Timeline:



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

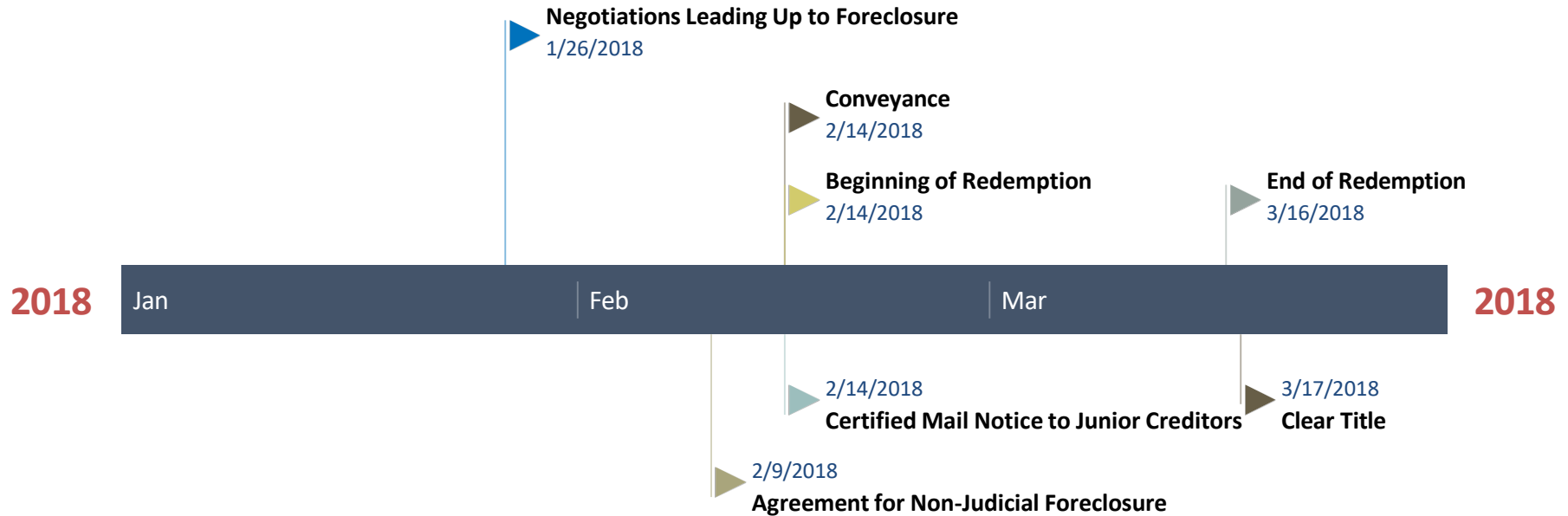


If a party stays execution, no right to redeem by that party.



# Agricultural Foreclosure

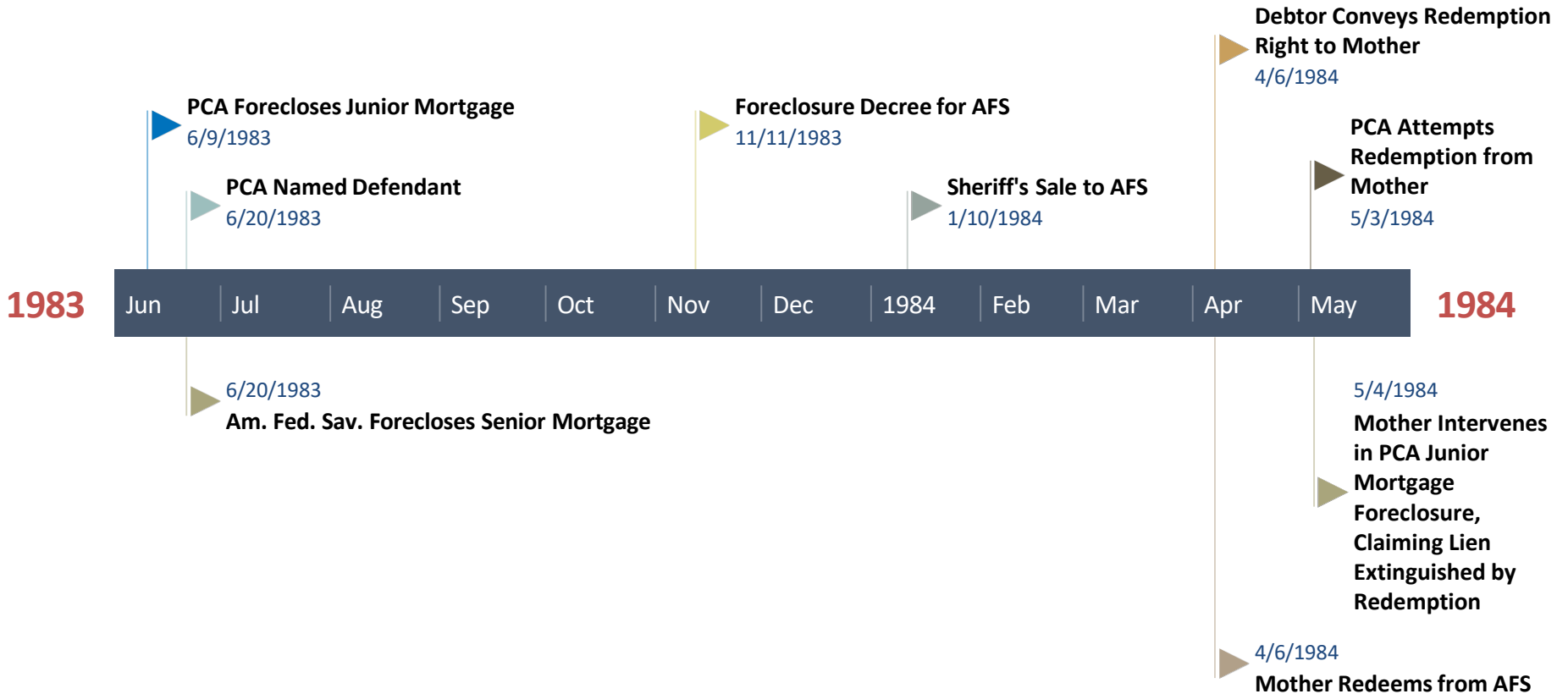
## Non-Judicial Voluntary Foreclosure:



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



# Cure/Demand

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

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



# Prerequisites to Appointment of Receiver

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

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



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

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





# Foreclosure Sale



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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.



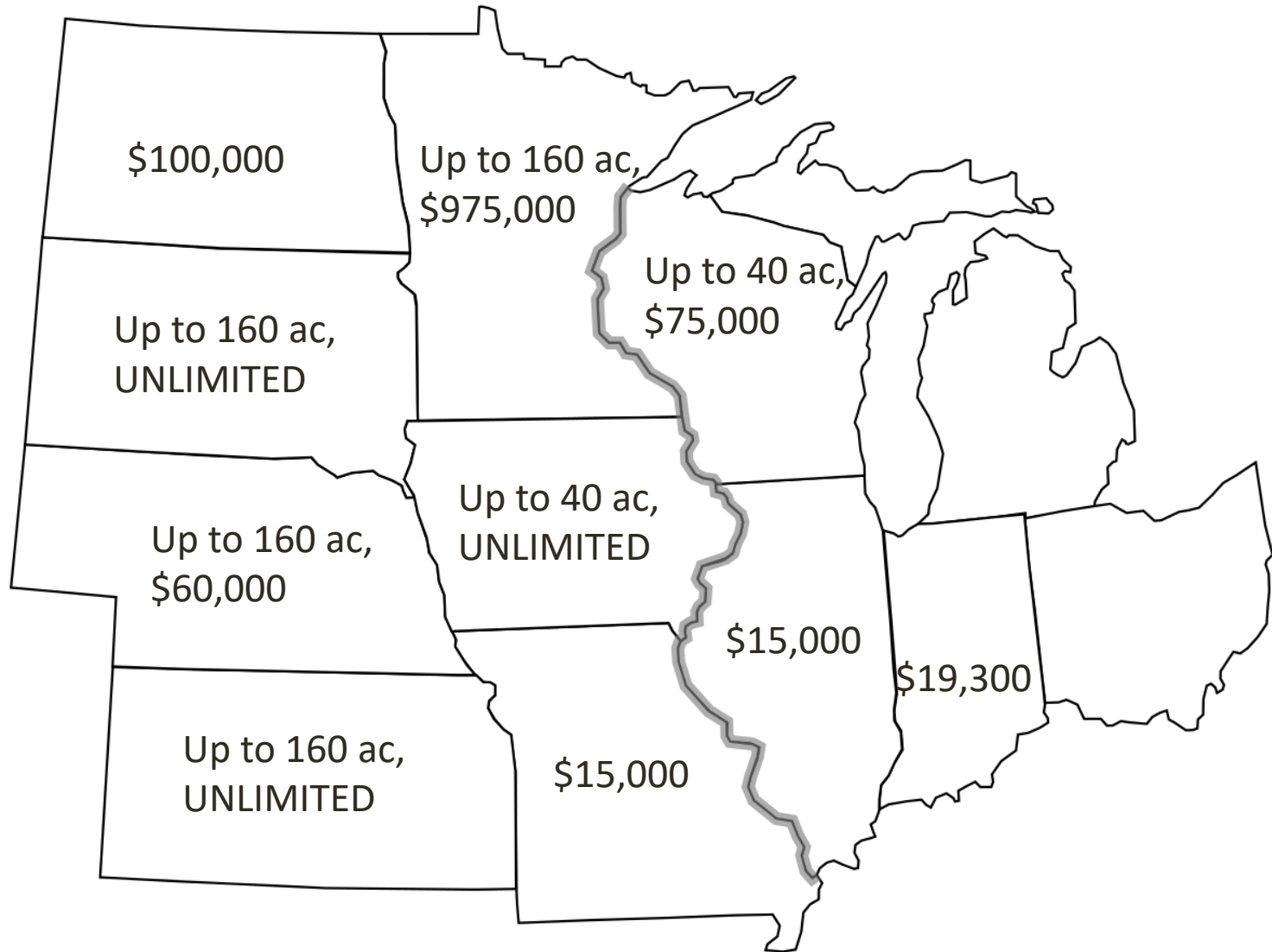
# Deed in Lieu of Foreclosure

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



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# 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.



# 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).

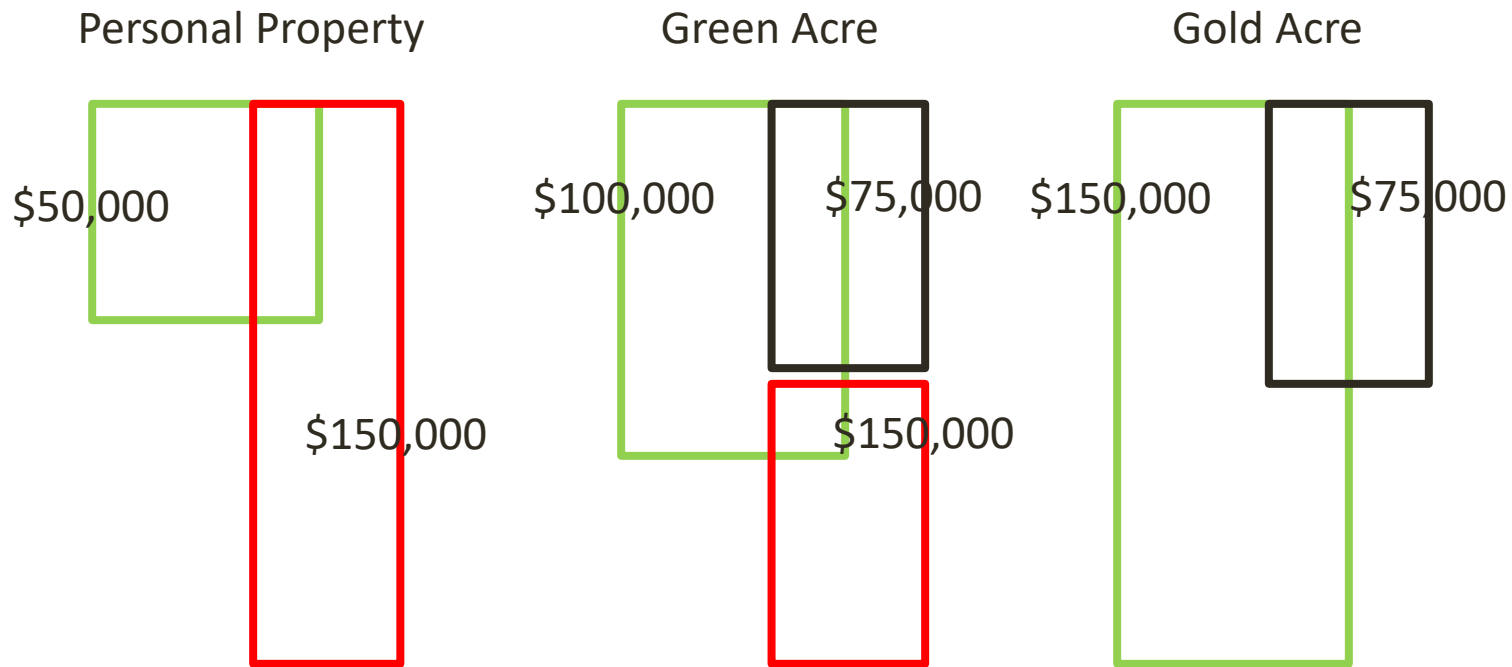


# Marshaling Assets - Available

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

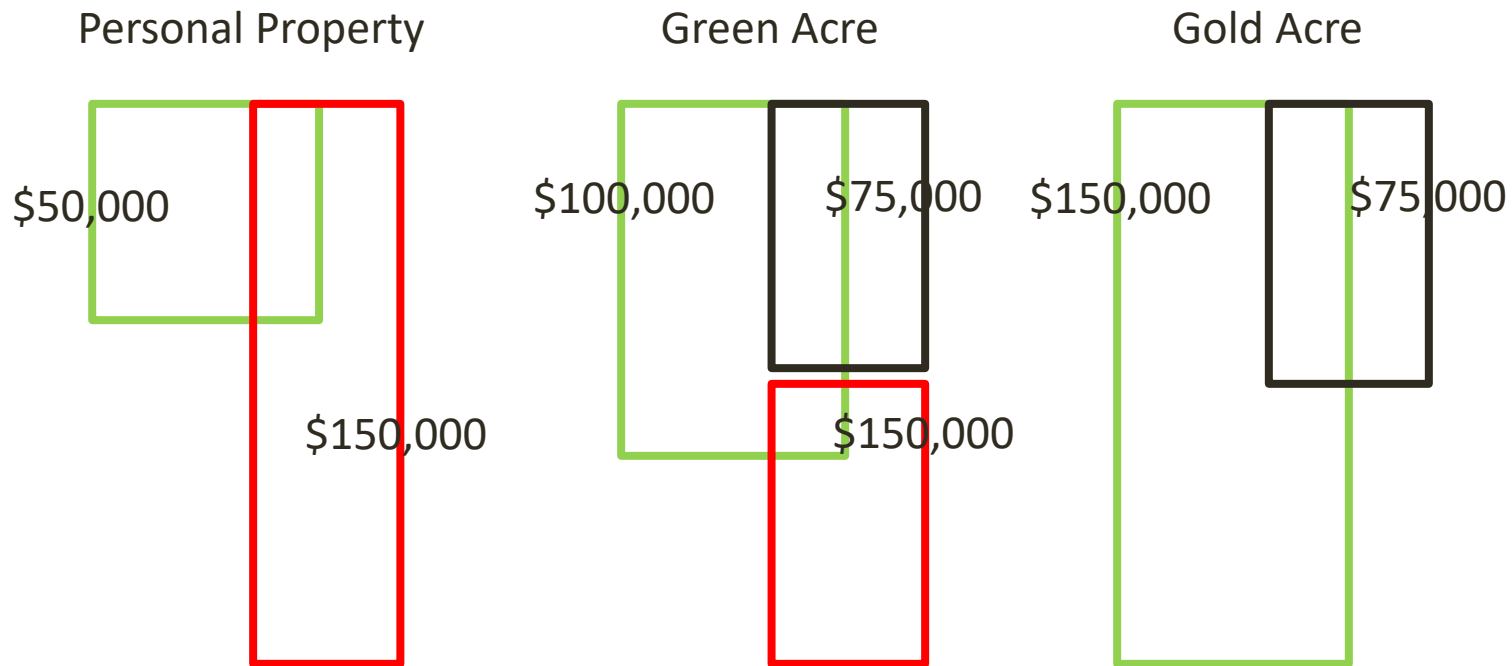


# Marshaling Assets - Unavailable

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

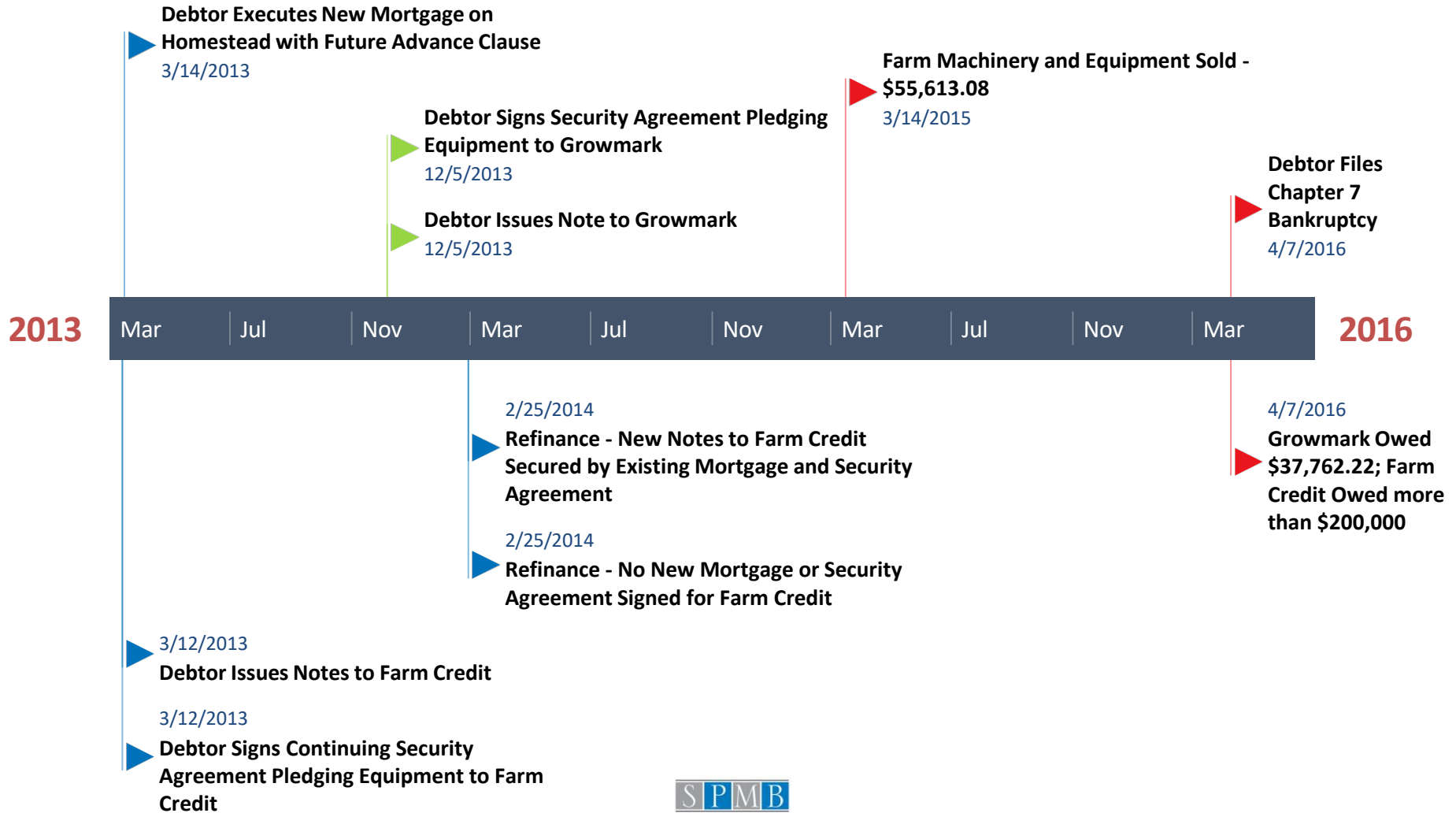
Red Bank: Owed \$150,000 – Chattels and Single Mortgage

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.”

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- Minimizing Risks of Problematic Ag Loans, September 13, 2018
- Iowa Agriculture Mortgage Foreclosure and Related Issue, July 24, 2018
- Automatic Stay Violations and Chapter 12 Update, June 19, 2018
- ACC Fall Symposium: Ethical Issues Facing In-House Counsel, October 6, 2017
- USLAW Network Banking and Financial Services In-House Counsel Forum: Ethics Panel, October 4, 2017
- Iowa Agriculture Mortgage Foreclosure and Related Issues, August 10, 2017
- Commercial Lending Case Law Update and Changes to the Military Lending Act, December 6, 2016
- Minimizing Risk on Problematic Ag Loans, October 11, 2016
- Banking Mergers & Acquisitions, June 22, 2016





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



# Questions?



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