

Negotiating an Ag Lending Intercreditor Agreement
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I. Financing of Agricultural Operations

- a. Many single agricultural operations are financed by multiple lenders who have interests in different collateral but, both intentionally and unintentionally, obtain security interests in the same collateral.
- b. Term Financing usually includes
 - i. Long term non-revolving loans (5-15 year tenor or longer)
 - ii. Secured by fixed assets such as real property and improvements, fixtures, and attachments located thereon ("**Term Collateral**").
- c. Operating Financing usually includes,
 - i. Short term revolving loans (1-2 year tenor)
 - ii. Secured by non-fixed assets such as personal property in the form of accounts, inventory, equipment, and farm products ("**Operating Collateral**").
 - iii. The legal status of certain collateral is frequently disputed, such as whether certain equipment is movable personal property or attached fixtures.

II. Common Cross-Collateralization

- a. Financing of crop operations usually results in competing liens on irrigation equipment such as pumps, circle irrigation equipment, hand and wheel lines, irrigation controls, and telemetry equipment.
- b. Financing of most crop and livestock operations usually results in competing liens on storage, handling, and processing equipment (applies to most all farm products such as crops, milk, eggs, poultry, and livestock, for example).
- c. Financing of permanent plantings, such as vineyards, orchards, and groves, requires differentiation of the plantings, which are real estate, and the crops growing on the plantings, such as grapes, apples, and nuts, which are personal property.

III. Issues

- a. Term Lender requires senior lien on Term Collateral that provides for the foreclosure and sale of the Term Collateral free and clear of competing liens.
- b. Operating Lender requires senior lien on Operating Collateral that provides for foreclosure and sale of the Operating Collateral free and clear of competing liens.
- c. Operating Lender's senior lien is not sufficient for Operating Lender to realize on its liens. Value of Operating Lender's senior lien is dependent on the marketability of the Operating Collateral. Marketability usually requires time and care so that the Operating Collateral may be grown, harvested, processed, and stored pending sale. Operating Lender must have right to access and use the Term Collateral in order to grow, maintain, harvest, store, process, market, and sell Operating Collateral in accordance with the applicable production cycle, subject to certain provisions such as no waste, etc.

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- d. Term Lender's senior lien may not be sufficient for Term Lender to realize on its liens. Value of Term Lender's senior lien is dependent to the marketability of the Term Collateral. Marketability may require certain Operating Collateral to use and operate of Term Collateral Value (such as irrigation equipment in the case of farms; milk processing equipment in the case of dairies; and controlled atmosphere storage facilities in the case of certain fruit operations). Term Lender must have the right to foreclose on and transfer such Operating Collateral together with the foreclosure on and transfer of the Term Collateral.
- e. Absent an intercreditor agreement, each lender could foreclose on and sell assets that devalue or prevent the realization on the other lender's collateral.

IV. Common Structure of Intercreditor Agreement

- a. Should address the following: (i) describe each lender's collateral (both specific and general); (ii) provide priorities with respect to payments from all collateral (whether joint or separate collateral); (iii) provide for access and use rights specifically authorizing operating lender to cultivate, harvest, store, and process permanent plantings, crops, and livestock; (iv) provide certain payment and priority carveouts relating to specific collateral in which opposing lender has absolutely no security interest, lien, or other claim; (v) authorize, following notice, real estate lender to sell operating lender collateral, free of such lender's security interest, if the operating lender does not exercise its rights and remedies with respect to thereto.
- b. Governs the lenders' respective priorities in specifically identified assets in which both lenders have liens, regardless of the priority of the lenders' liens independent of the intercreditor agreement.
- c. Establishes a license, enforceable post-foreclosure of the Term Collateral, authorizing Operating Lender and its agents and representatives to access and use the Term Collateral in order to grow, maintain, harvest, store, process, market, and sell Operating Collateral on certain terms and conditions for a fixed period of time (usually tied to the customary production and sale cycle of the applicable Operating Collateral) (the "**License**"). License includes certain insurance, indemnity, and payment terms. License only applies to Operating Collateral that is "growing" as of the time of foreclosure of the liens on the Term Collateral.
- d. Expires on payment in full of either lender's loans, subject however, in the case of the Term Lender, to the Operating Lender's License.

V. Default and Enforcement

- a. Following a default of the liens establishing either or both of the Term Collateral and Operating Collateral, intercreditor agreement provides for certain notice and establishes certain cure rights.
- b. Foreclosure on Term Lender Collateral triggers right of Operating Lender to exercise the License.
- c. Transferee of Term Collateral takes property subject to the License, provided that the License has been exercised and has not expired.
- d. Intercreditor agreements can be the basis for cross defaults on the operating and real estate lenders' loans (both operating and real estate loans). Such cross defaults can create

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troublesome issues for the lenders, especially the defaults arise immediately prior to crop planting and also while the crops are growing.

VI. Special Issues

- a. Permanent plantings (such as orchard trees and grape vines) may create limitations on the possession, use, marketing, and sale of certain crops and plant material by third parties, including lenders and foreclosure transferees.
- b. Third parties (such as certain plant and fruit developers) may have exclusive ownership and control of plant material and crops, which plants and crops may be grown and handled only by certain persons under a growing agreement. In such cases, lenders can have no lien on the plants and crops and, instead, may secure their loans only by assignments of the payment rights under the growing agreement.
- c. Intellectual property rights may create limitations on the possession, use, marketing, and sale of certain crops that are labeled and/or marketed under a license, marketing, or other intellectual property or contractual agreement.
- d. Some lenders may request that the other common lender release its interest in specific collateral under the intercreditor and file a UCC-3 amending the lender's original security interest. This practice should be avoided since competing liens and security interest change as lenders are paid off or restructure loans. The intercreditor agreement should be the exclusive basis for addressing cross collateral payment and priority issues, not the liens and security interests themselves.
- e. It is also crucial for the operating lender to maintain its continuing security interest in crops, especially when special filings are required such as Effective Financing Statements (EFS) and Idaho Farm Products filings (UCC-1F). Idaho law has generated significant perfection issues due to the complexity and ambiguity of their rules and forms governing farm products. Vigilance is required to obtain and maintain perfection.
- f. Special care is warranted with respect to the oversight, management, and application of collateral proceeds and surplus proceeds.