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Avoiding Double Payment: Sec. 1631 Issues in Livestock Transactions


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October 5, 2016



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Presentation Materials Table of Contents


- 7 U.S.C. § 1631 (eff. Dec 23, 1986) – in full
- 9 C.F.R. Part 5, §§ 205.1 to 205.214 – USDA regulations
- List of Cases 1986 to present
 - 55 cases
- Discussion and citations of main issues adjudicated with published opinions



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Section 1631: The Basics

- Congress preempted Uniform Commercial Code farm products rule to prevent double payment by buyers in the ordinary course of business, commission merchants, and selling agents; Section 1631(a)&(b)
- General rule for commission merchants in Section 1631(g): commission merchants not subject to a security interest unless:
 - Within 1 year of sale, direct notice; or
 - Effective Financing Statement in Central Filing System; and
 - Commission merchant ignores the legal notice.
- Secured parties must distinguish between
 - Perfection under the UCC (a UCC-1) and
 - Protection of security interest under Section 1631 by giving the required notice to commission merchants (auctions)
 - EFS and a UCC-1 are separate and distinct legal documents



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USDA Regulations: 9 C.F.R. Part 205

- Grain Inspection, Packers & Stockyards Administration
- USDA regulations not often the focus of the adjudicated cases
- Presentation Materials do not set forth the regulations – only the citation



Who is the Seller?: D/B/A and Fronting

- Fact pattern: Secured party gave notice to auction about John Doe. Auction sells cattle for Brown Eyes Dairy (d/b/a) or for General Manager Joe (fronting). John Doe is the owner of the sold cattle.
- In d/b/a pattern, South Dakota cases rule in favor of commission merchant. List of cases # 04, # 14, and # 32. *But see*, # 53 (an opposing decision from Fifth Circuit).
- In the fronting pattern, Minnesota cases rule in favor of the secured party. List of cases # 13 and # 15.



Substantial Compliance? Strict Compliance?

- Fact Pattern: Secured party gave notice but the notice must be a legally effective notice. Auction defends on basis that some information, specifically required in the statutory language, does not appear on the secured party's notice.
- 8th Circuit decision (2004) adopting strict compliance. List of Cases # 07; *followed by* Illinois cases List of cases # 02 and # 19.
- Kansas decision (1995) adopting substantial compliance, List of cases # 05; *followed by* List of cases # 27 and # 41.
- These two lines of cases are directly in conflict.



Common Law Defenses Survive?

- Fact Pattern: Secured Party has given legally effective notice to the Auction. Auction raises common law defenses of waiver, estoppel, implied consent relying on the interactions of Secured Party and its Borrower.
- Oklahoma decision (1998) and federal Missouri decision (1994) allow common law defenses. List of cases # 23 and #12.
- However, cases tied to Nebraska have not allowed common law defenses. List of cases # 09 and # 57.



Where Livestock Produced?

- Fact Pattern: Bank lends money to Rancher for cow-calf operation in Oklahoma. When calves reach feedlot weight, Rancher moves cattle to Nebraska feedlot. When calves reach market weight, Rancher trucks cattle to auction in South Dakota.
- Where must Bank give legally effective notice to hold Auction liable for the security interest: Oklahoma, Nebraska, South Dakota, or in all three states?
- Statutory language says, Bank must give notice "where [the farm product] located or produced."
- One Colorado decision (2012). List of cases # 33. Court ruled: "Accordingly, we conclude that 'produced in.' as used in this context, means the location where farm products are furnished or made available for commerce."
- Kershen comment: Questionable legal standard, though on the facts of the case the court reached correct result. Implication of the standard is that in Fact Pattern, the South Dakota law applies.



Perfection versus Protection

- If Secured Party has protected under Section 1631, commission merchant is subject to security interest regardless of whether the Secured Party is perfected under the UCC. List of cases # 10 and # 25.
- If Secured Party has perfected under the UCC, Secured Party has gained no protection of the security interest under Section 1631. List of cases # 01.



Buyer in the ordinary course of business

- Definition of this term in Section 1631 specifically omits “good faith” and “without knowledge” -- § 1631(c)(1). *See also*, §§ 1631(d) and 1631(g).
- Secured Party must give a legally effective § 1631 notice and cannot attack commission merchant on “good faith” and “knowledge” grounds.
- List of cases # 08, # 20, and # 40.



UCC Governs Between Creditors

- Section 1631 only preempts the UCC farm products exception.
- Section 1631 does not preempt the UCC between creditors (e.g. secured parties versus secured parties, secured parties versus lienholders, secured parties versus unsecured parties) regarding issues of perfection and priority.
- List of cases # 03, # 06, # 16, # 17, # 21, # 22, # 26, # 29, and # 48.



Thank you.

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§ 1631. Protection for purchasers of farm products, 7 USCA § 1631

United States Code Annotated
Title 7. Agriculture
Chapter 38. Distribution and Marketing of Agricultural Products (Refs & Annos)
Subchapter I. General Provisions

7 U.S.C.A. § 1631

§ 1631. Protection for purchasers of **farm products**

Currentness

(a) **Congressional findings**

Congress finds that--

(1) certain State laws permit a secured lender to enforce liens against a purchaser of **farm products** even if the purchaser does not know that the sale of the products violates the lender's security interest in the products, lacks any practical method for discovering the existence of the security interest, and has no reasonable means to ensure that the seller uses the sales proceeds to repay the lender;

(2) these laws subject the purchaser of **farm products** to double payment for the products, once at the time of purchase, and again when the seller fails to repay the lender;

(3) the exposure of purchasers of **farm products** to double payment inhibits free competition in the market for **farm products**; and

(4) this exposure constitutes a burden on and an obstruction to interstate commerce in **farm products**.

(b) **Declaration of purpose**

The purpose of this **section** is to remove such burden on and obstruction to interstate commerce in **farm products**.

(c) **Definitions**

For the purposes of this **section**--

(1) The term "buyer in the ordinary course of business" means a person who, in the ordinary course of business, buys **farm products** from a person engaged in farming operations who is in the business of selling **farm products**.

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(2) The term "central filing system" means a system for filing effective financing statements or notice of such financing statements on a statewide basis and which has been certified by the Secretary of the United States Department of Agriculture; the Secretary shall certify such system if the system complies with the requirements of this **section**; specifically under such system--

(A) effective financing statements or notice of such financing statements are filed with the office of the Secretary of State of a State;

(B) the Secretary of State records the date and hour of the filing of such statements;

(C) the Secretary of State compiles all such statements into a master list--

(i) organized according to **farm products**;

(ii) arranged within each such product--

(I) in alphabetical order according to the last name of the individual debtors, or, in the case of debtors doing business other than as individuals, the first word in the name of such debtors; and

(II) in numerical order according to the social security number, or other approved unique identifier, of the individual debtors or, in the case of debtors doing business other than as individuals, the Internal Revenue Service taxpayer identification number, or other approved unique identifier, of such debtors, except that the numerical list containing social security or taxpayer identification numbers may be encrypted for security purposes if the Secretary of State provides a method by which an effective search of the encrypted numbers may be conducted to determine whether the **farm product** at issue is subject to 1 or more liens; and

(III) geographically by county or parish; and

(IV) by crop year;

(iii) containing the information referred to in paragraph (4)(D);

(D) the Secretary of State maintains a list of all buyers of **farm products**, commission merchants, and selling agents who register with the Secretary of State, on a form indicating--

(i) the name and address of each buyer, commission merchant and selling agent;

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(ii) the interest of each buyer, commission merchant, and selling agent in receiving the lists described in subparagraph (E); and

(iii) the **farm products** in which each buyer, commission merchant, and selling agent has an interest;

(E) the Secretary of State distributes regularly as prescribed by the State to each buyer, commission merchant, and selling agent on the list described in subparagraph (D) a copy in written or printed form of those portions of the master list described in subparagraph (C) that cover the **farm products** in which such buyer, commission merchant, or selling agent has registered an interest except that--

(i) the distribution of the portion of the master list may be in electronic, written, or printed form; and

(ii) if social security or taxpayer identification numbers on the master list are encrypted, the Secretary of State may distribute the master list only--

(I) by compact disc or other electronic media that contains--

(aa) the recorded list of debtor names; and

(bb) an encryption program that enables the buyer, commission merchant, and selling agent to enter a social security number for matching against the recorded list of encrypted social security or taxpayer identification numbers; and

(II) on the written request of the buyer, commission merchant, or selling agent, by paper copy of the list to the requestor;

(F) the Secretary of State furnishes to those who are not registered pursuant to (2)(D) of this **section**¹ oral confirmation within 24 hours of any effective financing statement on request followed by written confirmation to any buyer of **farm products** buying from a debtor, or commission merchant or selling agent selling for a seller covered by such statement.

(3) The term "commission merchant" means any person engaged in the business of receiving any **farm product** for sale, on commission, or for or on behalf of another person.

(4) The term "effective financing statement" means a statement that--

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(A) is an original or reproduced copy of the statement, or, in the case of a State which (under the applicable State law provisions of the Uniform Commercial Code) allows the electronic filing of financing statements without the signature of the debtor, is an electronically reproduced copy of the statement;

(B) other than in the case of an electronically reproduced copy of the statement, is signed, authorized, or otherwise authenticated by the debtor, and filed with the Secretary of State of a State by the secured party;

(C) contains,

(i) the name and address of the secured party;

(ii) the name and address of the person indebted to the secured party;

(iii) the social security number, or other approved unique identifier, of the debtor or, in the case of a debtor doing business other than as an individual, the Internal Revenue Service taxpayer identification number, or other approved unique identifier, of such debtor; and

(iv) a description of the **farm products** subject to the security interest created by the debtor, including the amount of such products where applicable, and the name of each county or parish in which the **farm products** are produced or located;

(D) must be amended in writing, within 3 months, similarly signed, authorized, or otherwise authenticated by the debtor and filed, to reflect material changes;

(E) remains effective for a period of 5 years from the date of filing, subject to extensions for additional periods of 5 years each by refiling or filing a continuation statement within 6 months before the expiration of the initial 5 year period;

(F) lapses on either the expiration of the effective period of the statement or the filing of a notice signed, authorized, or otherwise authenticated by the secured party that the statement has lapsed, whichever occurs first;

(G) is accompanied by the requisite filing fee set by the Secretary of State; and

(H) substantially complies with the requirements of this subparagraph even though it contains minor errors that are not seriously misleading.

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(5)² The term “**farm product**” means an agricultural commodity such as wheat, corn, soybeans, or a species of livestock such as cattle, hogs, sheep, horses, or poultry used or produced in farming operations, or a product of such crop or livestock in its unmanufactured state (such as ginned cotton, wool-clip, maple syrup, milk, and eggs), that is in the possession of a person engaged in farming operations.

(6) The term “knows” or “knowledge” means actual knowledge.

(7) The term “security interest” means an interest in **farm products** that secures payment or performance of an obligation.

(8) The term “selling agent” means any person, other than a commission merchant, who is engaged in the business of negotiating the sale and purchase of any **farm product** on behalf of a person engaged in farming operations.

(9) The term “State” means each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

(10) The term “person” means any individual, partnership, corporation, trust, or any other business entity.

(11) The term “Secretary of State” means the Secretary of State or the designee of the State.

(5)³ The term “approved unique identifier” means a number, combination of numbers and letters, or other identifier selected by the Secretary of State using a selection system or method approved by the Secretary of Agriculture.

(d) Purchases free of security interest

Except as provided in subsection (e) of this **section** and notwithstanding any other provision of Federal, State, or local law, a buyer who in the ordinary course of business buys a **farm product** from a seller engaged in farming operations shall take free of a security interest created by the seller, even though the security interest is perfected; and the buyer knows of the existence of such interest.

(e) Purchases subject to security interest

A buyer of **farm products** takes subject to a security interest created by the seller if--

(1)(A) within 1 year before the sale of the **farm products**, the buyer has received from the secured party or the seller written notice of the security interest organized according to **farm products** that--

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(i) is an original or reproduced copy thereof;

(ii) contains,

(I) the name and address of the secured party;

(II) the name and address of the person indebted to the secured party;

(III) the social security number, or other approved unique identifier, of the debtor or, in the case of a debtor doing business other than as an individual, the Internal Revenue Service taxpayer identification number, or other approved unique identifier, of such debtor; and

(IV) a description of the **farm products** subject to the security interest created by the debtor, including the amount of such products where applicable, crop year, and the name of each county or parish in which the **farm products** are produced or located;

(iii) must be amended in writing, within 3 months, similarly signed, authorized, or otherwise authenticated and transmitted, to reflect material changes;

(iv) will lapse on either the expiration period of the statement or the transmission of a notice signed, authorized, or otherwise authenticated by the secured party that the statement has lapsed, whichever occurs first; and

(v) contains any payment obligations imposed on the buyer by the secured party as conditions for waiver or release of the security interest; and

(B) the buyer has failed to perform the payment obligations, or

(2) in the case of a **farm product** produced in a State that has established a central filing system--

(A) the buyer has failed to register with the Secretary of State of such State prior to the purchase of **farm products**; and

(B) the secured party has filed an effective financing statement or notice that covers the **farm products** being sold; or

(3) in the case of a **farm product** produced in a State that has established a central filing system, the buyer--

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(A) receives from the Secretary of State of such State written notice as provided in subsection (c)(2)(E) or (c)(2)(F) that specifies both the seller and the **farm product** being sold by such seller as being subject to an effective financing statement or notice; and

(B) does not secure a waiver or release of the security interest specified in such effective financing statement or notice from the secured party by performing any payment obligation or otherwise.

(f) Law governing “receipt”

What constitutes receipt, as used in this **section**, shall be determined by the law of the State in which the buyer resides.

(g) Commission merchants or selling agents: sales free of or subject to security interest; law governing “receipt”

(1) Except as provided in paragraph (2) and notwithstanding any other provision of Federal, State, or local law, a commission merchant or selling agent who sells, in the ordinary course of business, a **farm product** for others, shall not be subject to a security interest created by the seller in such **farm product** even though the security interest is perfected and even though the commission merchant or selling agent knows of the existence of such interest.

(2) A commission merchant or selling agent who sells a **farm product** for others shall be subject to a security interest created by the seller in such **farm product** if--

(A) within 1 year before the sale of such **farm product** the commission merchant or selling agent has received from the secured party or the seller written notice of the security interest; organized according to **farm products**, that--

(i) is an original or reproduced copy thereof;

(ii) contains,

(I) the name and address of the secured party;

(II) the name and address of the person indebted to the secured party;

(III) the social security number, or other approved unique identifier, of the debtor or, in the case of a debtor doing business other than as an individual, the Internal Revenue Service taxpayer identification number, or other approved unique identifier, of such debtor; and

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(IV) a description of the **farm products** subject to the security interest created by the debtor, including the amount of such products, where applicable, crop year, and the name of each county or parish in which the **farm products** are produced or located;

(iii) must be amended in writing, within 3 months, similarly signed, authorized, or otherwise authenticated and transmitted, to reflect material changes;

(iv) will lapse on either the expiration period of the statement or the transmission of a notice signed, authorized, or otherwise authenticated by the secured party that the statement has lapsed, whichever occurs first; and

(v) contains any payment obligations imposed on the commission merchant or selling agent by the secured party as conditions for waiver or release of the security interest; and

(B) the commission merchant or selling agent has failed to perform the payment obligations;

(C) in the case of a **farm product** produced in a State that has established a central filing system--

(i) the commission merchant or selling agent has failed to register with the Secretary of State of such State prior to the purchase of **farm products**; and

(ii) the secured party has filed an effective financing statement or notice that covers the **farm products** being sold; or

(D) in the case of a **farm product** produced in a State that has established a central filing system, the commission merchant or selling agent--

(i) receives from the Secretary of State of such State written notice as provided in subsection (c)(2)(E) or (c)(2)(F) of this **section** that specifies both the seller and the **farm products** being sold by such seller as being subject to an effective financing statement or notice; and

(ii) does not secure a waiver or release of the security interest specified in such effective financing statement or notice from the secured party by performing any payment obligation or otherwise.

(3) What constitutes receipt, as used in this **section**, shall be determined by the law of the State in which the buyer resides.

(h) **Security agreements; identity lists; notice of identity or accounting for proceeds; violations**

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- (1) A security agreement in which a person engaged in farming operations creates a security interest in a **farm product** may require the person to furnish to the secured party a list of the buyers, commission merchants, and selling agents to or through whom the person engaged in farming operations may sell such **farm product**.
- (2) If a security agreement contains a provision described in paragraph (1) and such person engaged in farming operations sells the **farm product** collateral to a buyer or through a commission merchant or selling agent not included on such list, the person engaged in farming operations shall be subject to paragraph (3) unless the person--
- (A) has notified the secured party in writing of the identity of the buyer, commission merchant, or selling agent at least 7 days prior to such sale; or
- (B) has accounted to the secured party for the proceeds of such sale not later than 10 days after such sale.
- (3) A person violating paragraph (2) shall be fined \$5,000 or 15 per centum of the value or benefit received for such **farm product** described in the security agreement, whichever is greater.

(i) **Regulations**

The Secretary of Agriculture shall prescribe regulations not later than 90 days after December 23, 1985, to aid States in the implementation and management of a central filing system.

(j) **Effective date**

This **section** shall become effective 12 months after December 23, 1985.

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03 - Food Services of America v Royal Heights Inc.pdf	112KB	Adobe Acrobat Document	5/4/2016 1:56 PM	
04 - Fin-Ag Inc v Cimpl's Inc.pdf	148KB	Adobe Acrobat Document	5/4/2016 1:56 PM	
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