LIEN ON ME…: USE OF CASH COLLATERAL IN CHAPTER 12, AND SECRET LIENS

I. Cash Collateral and Security Interests

A. Cash Collateral-As they say in the Sound of Music, let's start at the very beginning:[1]

1. Section 363(a) has the definition:

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b) ….

(c) (1)….

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) ….

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any

[1] Statutory material is public material downloaded from the outstanding Cornell Legal Information Institute website. Thanks for the compilations and easy access.

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unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362)….

(p) In any hearing under this section—
(1) the trustee has the burden of proof on the issue of adequate protection; and
(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

A. Adequate Protection-a few key sections

1. Section 362(d)

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
(1) for cause, including the *lack of adequate protection* of an interest in property of such party in interest;
(2) with respect to a stay of an act against property under subsection (a) of this section, if—
(A) the debtor does not have an equity in such property; and
(B) such property is not necessary to an effective reorganization;….[emphasis added]

2. Section 361- 11 U.S. Code § 361. Adequate protection

When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by—
(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;
(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or
(3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

STOP THE PRESSES---THAT'S ALL WRONG: Read 11 U.S.C. §1205

"(a) Section 361 does not apply in a case under this chapter.

(b) In a case under this chapter, when adequate protection is required under section 362 , 363 , or 364 of this title of an interest of an entity in property, such adequate protection may be provided by--

(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of property securing a claim or of an entity's ownership interest in property;

(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of property securing a claim or of an entity's ownership interest in property;

(3) paying to such entity for the use of farmland the reasonable rent customary in the community where the property is located, based upon the rental value, net income, and earning capacity of the property; or

(4) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will adequately protect the value of property securing a claim or of such entity's ownership interest in property. [emphasis added]."

In a sense, the adequate protection provisions of chapter 12 and chapter 12 itself carefully follow the contours of the case of Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935). In that case, the Court held the Frazier-Lemke Act to be unconstitutional. The Court held the Fifth Amendment limited the power of the bankruptcy process; Congress' creation of a moratorium on mortgage foreclosures under various conditions was an unlawful taking.

A general summary of the facts is in the Radford syllabus para. 16:

"16. A bank which ten years previously had made a long-time loan of $10,000, interest at 6%, secured by mortgages on a Kentucky farm then worth presumably twice that sum, was obliged by defaults to foreclose in a state court. The mortgagor refused the bank's offer to take the farm in satisfaction of the debt, and, before a judicial sale was ordered, he took advantage of the Frazier-Lemke Act, meanwhile enacted, and was adjudged a bankrupt. The bank offered to pay into the bankruptcy court for the property over $9,000, which, if accepted, would have been returned to the bank in satisfaction of the debt; but this was refused. The property was appraised at $4,445. Upon the bank's refusing its assent to a "sale" of the property at that price

by the trustee to the bankrupt, upon the terms specified in Paragraph 3 of the Act, the court, proceeding under Paragraph 7, ordered that, for a period of five years, all proceedings to enforce the mortgages be stayed, and that the possession of the property remain in the bankrupt, "under control of the court," subject only to the payment of an annual rental to be fixed by the court. The rental for the first year was fixed at $325, but no other provision was made for taxes, insurance, and administrative charges."

3. Section 364

(c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt—

(1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;

(2) secured by a lien on property of the estate that is not otherwise subject to a lien; or

(3) secured by a junior lien on property of the estate that is subject to a lien.

(d) (1) The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if—

(A) the trustee is unable to obtain such credit otherwise; and

(B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

(2) In any hearing under this subsection, the trustee has the burden of proof on the issue of adequate protection.

(e) The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

4. The Rule related specifically to use of cash collateral—Bkrcy. R. 4001

(d) Agreement Relating to Relief From the Automatic Stay, Prohibiting or Conditioning the Use, Sale, or Lease of Property, Providing Adequate Protection, Use of Cash Collateral, and Obtaining Credit.

(1) Motion; Service.

(A) Motion. A motion for approval of any of the following shall be accompanied by a copy of the agreement and a proposed form of order:

(i) an agreement to provide adequate protection;

(ii) an agreement to prohibit or condition the use, sale, or lease of property;

(iii) an agreement to modify or terminate the stay provided for in §362;

(iv) an agreement to use cash collateral; or

(v) an agreement between the debtor and an entity that has a lien or interest in property of the estate pursuant to which the entity consents to the creation of a lien senior or equal to the entity's lien or interest in such property.

(B) Contents. The motion shall consist of or (if the motion is more than five pages in length) begin with a concise statement of the relief requested, not to exceed five pages, that lists or summarizes, and sets out the location within the relevant documents of, all material provisions of the agreement. In addition, the concise statement shall briefly list or summarize, and identify the specific location of, each provision in the proposed form of order, agreement, or other document of the type listed in subdivision (c)(1)(B). The motion shall also describe the nature and extent of each such provision.

(C) Service. The motion shall be served on: (1) any committee elected under §705 or appointed under §1102 of the Code, or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under §1102, on the creditors included on the list filed under Rule 1007(d); and (2) on any other entity the court directs.

(2) Objection. Notice of the motion and the time within which objections may be filed and served on the debtor in possession or trustee shall be mailed to the parties on whom service is required by paragraph (1) of this subdivision and to such other entities as

> the court may direct. Unless the court fixes a different time, objections may be filed within 14 days of the mailing of the notice.
>
> (3) Disposition; Hearing. If no objection is filed, the court may enter an order approving or disapproving the agreement without conducting a hearing. If an objection is filed or if the court determines a hearing is appropriate, the court shall hold a hearing on no less than seven days' notice to the objector, the movant, the parties on whom service is required by paragraph (1) of this subdivision and such other entities as the court may direct.
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> (4) Agreement in Settlement of Motion. The court may direct that the procedures prescribed in paragraphs (1), (2), and (3) of this subdivision shall not apply and the agreement may be approved without further notice if the court determines that a motion made pursuant to subdivisions (a), (b), or (c) of this rule was sufficient to afford reasonable notice of the material provisions of the agreement and opportunity for a hearing.

A. Cases: Not too many reported cases in the context of chapter 12-more educational in the sense of why a debtor lost the proposed use of cash collateral in front of the bankruptcy court which an appellate court affirmed.
The same general rules (except as to adequate protection) apply for use of cash collateral as among Chapter 11, 12, and 13 where the "trustee' is the debtor-in-possession.

"Subject to such limitations as the court may prescribe, a debtor in possession shall have all the rights, other than the right to compensation under section 330, and powers, and shall perform all the functions and duties, except the duties specified in paragraphs (3) and (4) of section 1106(a), of a trustee serving in a case under chapter 11, including operating the debtor's farm or commercial fishing operation." Section 1203.

Key summary points/takeaways:

1. Have a real budget and a real plan. If you fudge the budget, you won't get out of the gate because every farm is liened up and the judge is trapped because there is no adequate protection against diminution in value of collateral. The farmer will have no cash to operate and will not be permitted to use what cash comes in. If you overestimate and miss, and lose cash, you are probably facing a failed case
2. Don't scrimp on service—it is a fundamental error that cannot be fixed in hindsight and is one of the few reasons why an appeal might succeed as well as a stay pending appeal.

3. Don't fail to obtain court authority--If the farmer decides to violate this provision on prohibition of cash collateral, the only reason the farmer could touch the cash was as a "trustee." The farmer has a fiduciary duty to creditors. Candidly, that provision may be a little loosely enforced as to paying certain priority expenses, but if the farmer uses cash collateral without court authority, the farmer has converted the cash and is likely to lose either an objection to discharge under section 727 or a complaint to determine dischargeability under section 523. Excuses like "I have to eat" are without statutory basis.
4. Attorney liability and discipline--For an attorney, permitting or tolerating unauthorized use of cash collateral can subject the attorney to loss of fees, and discipline for aiding and abetting fraudulent or unlawful conduct.
5. Don't insult the judge—the Court is present to help the farmer reorganize and will allow use of cash collateral if the facts support it. Recusal motions are rare and even more rarely granted and virtually always the denial is affirmed.

In re West, Case No. 10-bk-29333, Order dated 6/24/2011 (Bkrcy. D. Md. 2011) (Judge Derby) is an agreed order but has interesting and useful provisions addressing cash collateral"

1. There were specific findings as to the scope and priority of the various liens.
2. The Debtor's counsel became the escrow agent handling all cash collateral instead of the chapter 12 trustee (Ms. Cosby who also was a chapter 13 trustee). . The escrow account had joint signature provisions of the Debtor and the Debtor's counsel.
3. There were specific provisions for living expenses and farm expenses.
4. If there was a dispute between the debtor farmer and her counsel, the Court could appoint a manager or trustee of the escrow to overcome the conflict of interest problem.
5. There were provisions for the farm debtor to submit future budgets subject to the approval the affected lender.

In re Mortellite, 2017 Bankr. LEXIS 4199 (Bankr. D. N.J. 2017). An administrative expense claim only will not constitute adequate protection. Credit: Agricultural Law Digest https://www.agrilawpress.com/2018/01/bankruptcy-use-of-cash-collateral/

Justice v. Valley National Bank, 849 F.2d 1078, 57 USLW 2013, 19 Collier Bankr.Cas.2d 172, 17 Bankr.Ct.Dec. 1198, Bankr. L. Rep. Para. 72,362 (1988).

The facts of Justice involved a farm foreclosed and sold at foreclosure sale after default in South Dakota and a subsequent February, 1987 bankruptcy filing . "On July 7, 1986, the court entered a monetary judgment for Prudential and foreclosed the Justices' rights and interests in the farmland, subject to their statutory rights of possession and redemption. See SDCL Sec.

21-47-13. The court also ordered that the land be sold at public auction. On August 11, 1986, the sheriff sold the farm to Prudential for $315,000 and awarded Prudential the certificate of sale. The Justices retained the right to redeem the property by paying Prudential $315,000 plus interest until August 11, 1987, unless they took steps to extend the redemption period. See SDCL Secs. 21-52-1, -11, -12 (1987)."

"'On April 3, 1987, the Justices brought a motion in bankruptcy court to permit them to use cash collateral, in which Valley National Bank held a security interest, for the purpose of operating their farm during the 1987 crop season. See 11 U.S.C. Sec. 363(c)(2)(B). On April 15, the bankruptcy court dismissed the motion. The court held that under Chapter 12 state law controlled the rights of the parties regarding redemption, and that the Justices had failed to demonstrate that they would be able to redeem the land by August 11, 1987, as required by South Dakota law. As a result the Justices could not show that they would be in possession of the land at the expiration of the redemption period and could not offer "adequate protection" for the cash collateral under 11 U.S.C. Sec. 1205. They therefore failed to qualify for use of the collateral under 11 U.S.C. Sec. 363(e).'" A chapter 12 plan proposed to cure the redemption amount over 20 years.

The Justices appealed to the U.S. District Court from the denial of use of cash collateral. The District Court affirmed the Bankruptcy Court holding "inter alia, that under Chapter 12 state law controls the rights of the parties regarding redemption, barring confirmation of such a plan. Because a foreclosure sale extinguishes the mortgage contract and works a substantial change in the relationship of the parties under state law, we [the Eighth Circuit] hold that the provisions of Chapter 12 relating to the debtor's power to cure defaults and modify the rights of secured creditors are not applicable after a foreclosure sale has been held. We accordingly affirm the order of the district court.

Over a lengthy dissent, a variety of arguments were rejected asserting the allowability of a cure and effective extension of redemption outside the terms of the South Dakota statute.

One short lesson of this case is to honor the maxim of filing early, and certainly before a foreclosure sale.

In re Watford, Watford v. Federal Land Bank of Columbia, 898 F.2d 1525, 22 Collier Bankr.Cas.2d 1286, Bankr. L. Rep. Para. 73,354 (11th Cir. 1990).

> "In summary, we hold that the Watfords' stone crabbing business does not fall within the definition of "farming operation." To this extent, we affirm the district court. However, in regard to the Watfords' activities of storing soybeans and planning commercial fish ponds, we conclude that the bankruptcy court and the district court applied an incorrect legal standard in addressing whether or not the Watfords were engaged in a "farming

> operation" at the time of filing their Chapter 12 petition. Thus, we vacate the judgment below in this regard and remand for a determination of whether the Watfords had abandoned all farming operations at the time of the filing, or whether under the totality of the circumstances the Watfords had not abandoned all farming operations, but rather were planning to continue farming operations in the form of commercial fish ponds or otherwise. [f.n. omitted]. Id. at 1529.

The case illustrates the point that the debtor will need to show it is eligible for chapter 12 in order to use cash collateral.

In re Miner, H & C Development Group, Inc. v. Miner, 229 B.R. 561 (B.A.P. 2nd Cir. 1999). This is an unusual case in that a junior creditor, First Vermont, tried to argue that an on-the-record settlement in conjunction with use of cash collateral reducing the senior lienor's claim should be binding and protect First Vermont from having its lien "stripped down" leaving it only with an unsecured claim. The Court held there had been no binding settlement and that New York law did not give First Vermont standing to attempt to enforce the alleged agreement.

In re Osborn, Osborn v.. Durant Bank & Trust Company, 24 F.3d 1199, Bankr. L. Rep. Para. 75,924 (10th Cir. 1994) *reh. den.* June 24, 1994. In this joint debtor case, one of the debtors repeatedly asserted that their homestead claim was related to Oklahoma and not Texas. This was the basis of adequate protection to the Bank. As the case proceeded and things did not go well, the debtor attempted to amend the schedules to now claim a Texas homestead exemption. The bankruptcy court denied the right to amend essentially on the basis of estoppel. The Tenth Circuit held that unless both debtors had estopped themselves, amendments were freely allowed and the case was remanded to allow the amendment.

In re Bennett, 283 B.R. 308 (B.A.P. 10th Cir. 2002). This unusual case arising out of New Mexico involved an effort by the Debtor and Debtor's counsel ("Behle") to disqualify a bankruptcy judge in a chapter 12. The BAP treated the effort as a petition for mandamus and denied the relief requested. Summarizing a lot of verbiage, the essence of what appeared to be a very personally antagonistic view of debtor's counsel toward the bankruptcy judge began with an unrelated case in which the Debtor's counsel felt unfairly treated, and felt that that unfairness was carrying over to the Bennett's chapter 12. Prior to the judge being on the bench, in the prior unrelated case, there was an administrative insolvency. The judge's former law firm (prior to his being appointed to the bench) had succeeded Behle as counsel. Because of the administrative insolvency, the Behle law firm was compelled to disgorge fees and the now-judge had been a witness. Upon assuming the bench, the judge had waived any right to obtain part of the ultimately disgorged Behle fees.

In the chapter 12, upon an application for employment by the Behle firm, the Court approved the employment but reduced the hourly rate somewhat while allowing monthly payment of fees and expenses and allowing a later request for a higher fee amount. The Behle firm filed a Motion to Withdraw as counsel. Later, in the chapter 12 (same counsel), the Debtor had filed a chapter 12 plan but the debtor and counsel did not meet local rule deadlines for the path to confirmation. After a cash collateral hearing, the judge promised a decision which the Judge did not accomplish. An Order to Show Cause on why deadlines were not met was issued, and the process seemed to move forward but apparently the Behle law firm had had enough and filed a Motion to Recuse. The judge denied them motion and the BAP affirmed.

This odd case illustrates the importance of moving forward feasibly in a streamlined manner in a chapter 12. While the debtor's counsel might have had a dispute with the judge that was personally antagonistic, debtor's counsel did not distinguish itself by compliance with court deadlines and the fact the Court delays ruling is hardly grounds for disqualification.

A. Let's talk preferences:

Recall the burden of proof of the validity of a lien rests on the secured party. If the debtor has a clear-cut claim to a preference, the Court can take that into account t in determining the adequate protection necessary. Filing an early complaint to void a clearly avoidable preference may

B. Secured creditors and lienors:
   1. Don't jump the gun if you have a preference problem such as a late or defective filing, or an improvement of position problem.
   2. Losing can be winning: If you can establish your lien, and prove your equity or value, the farmer may be permitted to use cash collateral, but those findings can come to haunt the farmer when it comes time to confirming a plan.
   3. Losing can be winning: If the secured party is tied of endless broken promises, the bankruptcy court is the last and only refuge for the farmer; if the farmer proposes an unrealistic budget, and the objection of the secured party is overruled, failing to meet that budget is liable to result in modification of the automatic stay, conversion of the case, or dismissal.
   4. Losing can be winning: Bankruptcy Courts are busy places especially when there is a farm crisis—The judges inevitably have to allocate resources, and spending time on a case that is not moving to reorganization with reasonable alacrity takes time from cases that can be a success. Make your case the one moving to success. As a secured creditor; make the records as to why this case is doomed.
   5. As a lawyer, insist on a current search and all of he secured party's communications and agreements. You can't solve the problem of the secret liens I will talk about

next, but it is embarrassing and potentially subject to discipline if you fail to read the agreements and determine if there is perfection with proper perfection.

A. Know the basic perfection rules
   1. What was the old rule on description and perfection in a financing statement?
   2. What is the rule subsequent to 2002 in every state?
   3. Secret answers on next page

4. Secret answers:

A. Old rule—1. Financing Statement --must describe collateral items by type in financing statement.

2. Security agreement could say "all assets"

B. New rule— Financing statement:

" § 9-504. INDICATION OF COLLATERAL.

A financing statement sufficiently indicates the collateral that it covers if the financing statement provides:

(1) a description of the collateral pursuant to Section 9-108; or

(2) an indication that the financing statement covers all assets or all personal property."

Security agreement:

"§ 9-203. ATTACHMENT AND ENFORCEABILITY OF SECURITY INTEREST; PROCEEDS; SUPPORTING OBLIGATIONS; FORMAL REQUISITES.

(a) [Attachment.]

A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

(b) [Enforceability.]

Except as otherwise provided in subsections (c) through (i), a security interest is enforceable against the debtor and third parties with respect to the collateral only if :

(1) value has been given;

(2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and

(3) one of the following conditions is met:

(A) the debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;

(B) the collateral is not a certificated security and is in the possession of the secured party under Section 9-313 pursuant to the debtor's security agreement;

(c) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under Section 8-301 pursuant to the debtor's security agreement; or

(d) the collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, and the secured party has control under Section 9-104, 9-105, 9-106, or 9-107 pursuant to the debtor's security agreement.

And just what is an adequate description:

"§ 9-108. SUFFICIENCY OF DESCRIPTION.

(a) [Sufficiency of description.]

Except as otherwise provided in subsections (c), (d), and (e), a description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.

(b) [Examples of reasonable identification.]

Except as otherwise provided in subsection (d), a description of collateral reasonably identifies the collateral if it identifies the collateral by:

(1) specific listing;

(2) category;

(3) except as otherwise provided in subsection (e), a type of collateral defined in [the Uniform Commercial Code];

(4) quantity;

(5) computational or allocational formula or procedure; or

(6) except as otherwise provided in subsection (c), any other method, if the identity of the collateral is objectively determinable.

(c) [Supergeneric description not sufficient.]

A description of collateral as "all the debtor's assets" or "all the debtor's personal property" or using words of similar import does not reasonably identify the collateral.

(d) [Investment property.]

Except as otherwise provided in subsection (e), a description of a security entitlement, securities account, or commodity account is sufficient if it describes:

(1) the collateral by those terms or as investment property; or

(2) the underlying financial asset or commodity contract.

(e) [When description by type insufficient.]

A description only by type of collateral defined in [the Uniform Commercial Code] is an insufficient description of:

(1) a commercial tort claim; or

(2) in a consumer transaction, consumer goods, a security entitlement, a securities account, or a commodity account." [emphasis added]

II. Statutory liens—section 545

1. [11 U.S.C.] Section 545. Statutory liens.

The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien—

(1) first becomes effective against the debtor—

(A) when a case under this title concerning the debtor is commenced;

(B) when an insolvency proceeding other than under this title concerning the debtor is commenced;

(C) when a custodian is appointed or authorized to take or takes possession;

(D) when the debtor becomes insolvent;

(E) when the debtor's financial condition fails to meet a specified standard; or

(F) at the time of an execution against property of the debtor levied at the instance of an entity other than the holder of such statutory lien;

(2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists, except in any case in which a purchaser is a purchaser described in section 6323 of the Internal Revenue Code of 1986, or in any other similar provision of State or local law;

(3) is for rent; or

(4) is a lien of distress for rent.

While the section starts out in the affirmative as to what the trustee may avoid, a closer reading reveals it is not so easy.

The UCC must be considered:

9-308. WHEN SECURITY INTEREST OR AGRICULTURAL LIEN IS PERFECTED; CONTINUITY OF PERFECTION.

(a) [Perfection of security interest.]

Except as otherwise provided in this section and Section 9-309, a security interest is perfected if it has attached and all of the applicable requirements for perfection in Sections 9-310 through 9-316 have been satisfied. A security interest is perfected when it attaches if the applicable requirements are satisfied before the security interest attaches.

(b) [Perfection of agricultural lien.]

An agricultural lien is perfected if it has become effective and all of the applicable requirements for perfection in Section 9-310 have been satisfied. An agricultural lien is perfected when it becomes effective if the applicable requirements are satisfied before the agricultural lien becomes effective.

§ 9-310. WHEN FILING REQUIRED TO PERFECT SECURITY INTEREST OR AGRICULTURAL LIEN; SECURITY INTERESTS AND AGRICULTURAL LIENS TO WHICH FILING PROVISIONS DO NOT APPLY.

(a) [General rule: perfection by filing.]

Except as otherwise provided in subsection (b) and Section 9-312(b), a financing statement must be filed to perfect all security interests and agricultural liens.

(b) [Exceptions: filing not necessary.]

The filing of a financing statement is not necessary to perfect a security interest:

(1) that is perfected under Section 9-308(d), (e), (f), or (g);

(2) that is perfected under Section 9-309 when it attaches;

(3) in property subject to a statute, regulation, or treaty described in Section 9-311(a);

(4) in goods in possession of a bailee which is perfected under Section 9-312(d)(1) or (2);

(5) in certificated securities, documents, goods, or instruments which is perfected without filing or possession under Section 9-312(e), (f), or (g);

(6) in collateral in the secured party's possession under Section 9-313;

(7) in a certificated security which is perfected by delivery of the security certificate to the secured party under Section 9-313;

(8) in deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights which is perfected by control under Section 9-314;

(9) in proceeds which is perfected under Section 9-315; or

(10) that is perfected under Section 9-316.

(c) [Assignment of perfected security interest.]

If a secured party assigns a perfected security interest or agricultural lien, a filing under this article is not required to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

§ 9-311. PERFECTION OF SECURITY INTERESTS IN PROPERTY SUBJECT TO CERTAIN STATUTES, REGULATIONS, AND TREATIES.

(a) [Security interest subject to other law.]

Except as otherwise provided in subsection (d), the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to:

(1) a statute, regulation, or treaty of the United States whose requirements for a security interest's obtaining priority over the rights of a lien creditor with respect to the property preempt Section 9-310(a);

(2) [list any statute covering automobiles, trailers, mobile homes, boats, farm tractors, or the like, which provides for a security interest to be indicated on a certificate of title as a condition or result of perfection, and any non-Uniform Commercial Code central filing statute]; or

(3) a statute of another jurisdiction which provides for a security interest to be indicated on a certificate of title as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the property.

(b) [Compliance with other law.]

Compliance with the requirements of a statute, regulation, or treaty described in subsection (a) for obtaining priority over the rights of a lien creditor is equivalent to the filing of a financing statement under this article. Except as otherwise provided in subsection (d) and Sections 9-313 and 9-316(d) and (e) for goods covered by a certificate of title, a security interest in property subject to a statute, regulation, or treaty described in subsection (a) may be perfected only by compliance with those requirements, and a security interest so perfected remains perfected notwithstanding a change in the use or transfer of possession of the collateral.

(c) [Duration and renewal of perfection.]

Except as otherwise provided in subsection (d) and Section 9-316(d) and (e), duration and renewal of perfection of a security interest perfected by compliance with the requirements prescribed by a statute, regulation, or treaty described in subsection (a) are governed by the statute, regulation, or treaty. In other respects, the security interest is subject to this article."

"§ 9-333. PRIORITY OF CERTAIN LIENS ARISING BY OPERATION OF LAW.

(a) ["Possessory lien."]

In this section, "possessory lien" means an interest, other than a security interest or an agricultural lien:

(1) which secures payment or performance of an obligation for services or materials furnished with respect to goods by a person in the ordinary course of the person's business;

(2) which is created by statute or rule of law in favor of the person; and

(3) whose effectiveness depends on the person's possession of the goods.

(b) [Priority of possessory lien.]

A possessory lien on goods has priority over a security interest in the goods unless the lien is created by a statute that expressly provides otherwise."

§ 9-322. PRIORITIES AMONG CONFLICTING SECURITY INTERESTS IN AND AGRICULTURAL LIENS ON SAME COLLATERAL.

(a) [General priority rules.]

Except as otherwise provided in this section, priority among conflicting security interests and agricultural liens in the same collateral is determined according to the following rules:

(1) Conflicting perfected security interests and agricultural liens rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest or agricultural lien is first perfected, if there is no period thereafter when there is neither filing nor perfection.

(2) A perfected security interest or agricultural lien has priority over a conflicting unperfected security interest or agricultural lien.

(3) The first security interest or agricultural lien to attach or become effective has priority if conflicting security interests and agricultural liens are unperfected.

(b) [Time of perfection: proceeds and supporting obligations.]

For the purposes of subsection (a)(1):

(1) the time of filing or perfection as to a security interest in collateral is also the time of filing or perfection as to a security interest in proceeds; and

(2) the time of filing or perfection as to a security interest in collateral supported by a supporting obligation is also the time of filing or perfection as to a security interest in the supporting obligation.

(c) [Special priority rules: proceeds and supporting obligations.]

Except as otherwise provided in subsection (f), a security interest in collateral which qualifies for priority over a conflicting security interest under Section 9-327, 9-328, 9-329, 9-330, or 9-331 also has priority over a conflicting security interest in:

(1) any supporting obligation for the collateral; and

(2) proceeds of the collateral if:
(A) the security interest in proceeds is perfected;

(B) the proceeds are cash proceeds or of the same type as the collateral; and

(C) in the case of proceeds that are proceeds of proceeds, all intervening proceeds are cash proceeds, proceeds of the same type as the collateral, or an account relating to the collateral.

(d) [First-to-file priority rule for certain collateral.]

Subject to subsection (e) and except as otherwise provided in subsection (f), if a security interest in chattel paper, deposit accounts, negotiable documents, instruments, investment property, or

letter-of-credit rights is perfected by a method other than filing, conflicting perfected security interests in proceeds of the collateral rank according to priority in time of filing.

(e) [Applicability of subsection (d).]

Subsection (d) applies only if the proceeds of the collateral are not cash proceeds, chattel paper, negotiable documents, instruments, investment property, or letter-of-credit rights.

(f) [Limitations on subsections (a) through (e).]

Subsections (a) through (e) are subject to:

(1) subsection (g) and the other provisions of this part;

(2) Section 4-210 with respect to a security interest of a collecting bank;

(3) Section 5-118 with respect to a security interest of an issuer or nominated person; and

(4) Section 9-110 with respect to a security interest arising under Article 2 or 2A.

(g) [Priority under agricultural lien statute.]

A perfected agricultural lien on collateral has priority over a conflicting security interest in or agricultural lien on the same collateral if the statute creating the agricultural lien so provides.

2. So, what are some examples of these unusual liens mostly found in the agriculture context:

SEE, APPENDIX-Some sample state statutory agriculture liens-Maryland, California, Virginia

3. An example of the strength of these liens:

The nut case:

An Illinois Bankruptcy Court construing California law, In re S.N.A. Nut Co. 197 B.R. 642, 652 (Bkrcy. N.D. Illinois 1996) has held that a California processor could assert a Producer's Lien as to products it may grow.

That Court cited California Food and Agricultural Code § 3; In re TH Richards Processing Co., 910 F2d. 639643 fn. 3 (9th Cir. 1990); and a similar case to the "nut case" In re Loretto Winery Limited, 898 F2d. 715, 720-21 (9th Cir. 1990).

The nut case involved the Debtor S.N.A. Nut Company and an entity which sold large disputed amounts of nuts to the Debtor named the Tulare Nut Company. The Debtor filed an adversary proceeding to disallow any lien and the Defendant Tulare Nut Company moved for summary judgment.

The essence of the case was as follows:

> "Under § 55631 of the California Producer's Lien Statute,
>
> 'every producer of any farm product that sells any product which is grown by him to any processor under contract, express or implied, in addition to all other rights and remedies which are provided for by law, has a lien upon such product and upon all processed or manufactured forms of such farm product for his labor, care, and expense in growing and harvesting such product.'
>
> Cal.Food & Agric.Code § 55631 (West 1986 & Supp.1996).

The producer's lien is subject to no formal perfection requirements such as recording or filing. It attaches to every purchased product and processed form of such product in the possession of the processor, regardless of segregation. Cal.Food & Agric.Code § 55634. The lien is extinguished upon relinquishment of possession by the processor. Cal.Food & Agric.Code § 55634.

> Under § 545(2) of the Code, the Trustee may avoid any statutory lien which,
>
> 'is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists.'
>
> 11 U.S.C. § 545(2).

The Court concluded that Tulare's alleged producer's lien cannot be avoided since there could not be a hypothetical bona-fide purchaser as to the producer's walnuts at the commencement of the case. The lien would follow the product. The Court granted Tulare's Motion for Summary Judgment as to Count I of the Complaint and upheld the lien.

How a California producer's lien fares in light to amendments to Article 9 is beyond the scope of the presentation. Facially, some perfection would be wise prior to a debtor's bankruptcy, and then the statutory lien is protected from avoidance by section 545 of title 11. . The issue turns on the interplay of the California producer's lien and UCC section 9-310 and its various exceptions as in force in California.

And overlaying all of this is 7 U.S.C. section 1631 which imposes a federal scheme over agricultural products and deals with security interests (no agricultural liens), and protection of buyers. Again, this is beyond the scope of this presentation.

4. And then there are the non-lien liens:

A. Suppose the farmer did not pay his workers---

Citicorp Industrial Corp. v. Brock , 483 U.S. 27 (1987).

In this case, wages had not been properly paid pursuant to the Fair Labor Standards Act to workers who manufactured goods. Under the so-called "hot cargo" provisions of the FLSA, workers were entitled to enjoin the movement of the goods in interstate commerce. Effectively, the Bank had to pay off the worker claims.

Neither the farmer nor his secured creditor may not ship his/her goods in interstate commerce absent payment of wages. Accordingly, the Bank can't resort to its collateral without those wages being paid.

B. And then there are the tax liens:

Maryland has a personal property tax lien—it is a superpriority lien that follows the goods or collateral until paid.

Outside of a bankruptcy setting, the IRS has a statutory lien subject to certain narrow exceptions pursuant to 26 U.S.C. §6301 et seq.