

Chapter Four

Operating and Equipment Loans, Secured Creditors, and Repossession

I. Introduction

Many farm operating and equipment loans include security agreements. These agreements create what the law calls a security interest in a debtor's property and give the creditor the power to take possession of that property in case of a default. This chapter discusses the creation of security interests, their effect on farm operations, and the rights of creditors to take possession of secured property.

Creditors are interested in gaining a security interest in the debtor's property for two reasons. First, it allows them to take possession of the property if the debtor defaults on the debt without having to seek a judgment lien through the courts, as is required for unsecured debts. Second, if the creditor properly files the right documents, the security interest places the secured creditor ahead of other creditors in getting paid from the proceeds from a sale of the debtor's property.

The security agreements discussed in this chapter are largely covered by Minnesota's version of the Uniform Commercial Code (UCC). In general, the UCC covers debts secured by personal property or fixtures.¹ Personal property generally includes all possessions that are not real estate or buildings. This includes machinery, livestock and stored crops, and crops in the ground. Recently, Minnesota and every other state enacted what is known as Revised Article 9 of the UCC.² Revised Article 9 makes significant changes to the rules and procedures for secured

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- 1 Minn. Stat. § 336.9-109. The UCC covers fixtures but otherwise does not cover real estate except to the extent that contract for deed payment accounts are covered. Minn. Stat. §§ 336.9-109, 336.9-334, 336.9-619; see also Larry M. Wertheim, *Revised Article 9 of the U.C.C. and Minnesota Contract for Deeds*, 28 WM. MITCHELL L. REV. 1483 (2002) available at http://www.wmitchell.edu/current/info/stuorganizations/lawreview/Article_Files/Volume_28/Issue4/05_Wertheim.pdf. Future payments owed to a debtor may serve as collateral and are known as "accounts." Minn. Stat. § 336.9-102(a)(2).
 - 2 2000 Minn. Laws ch. 399 and 2001 Minn. Laws ch. 195. For an overview of farm related issues under Revised Article 9, see Phillip L. Kunkel and Scott T. Larison, *Security Interests in Personal Property*, UNIVERSITY OF MINNESOTA EXTENSION (Jan. 2002) available at <http://www.extension.umn.edu/distribution/businessmanagement/DF7292.html>; Linda J. Rusch, *Farm Financing Under Revised Article 9*, 73 AM. BANKR. L.J. 211 (1999); Drew Kershen & Alvin C. Harrell, *Agricultural Finance—Comparing the Current and Revised Article 9*, 33 UCC L.J. 169 (2000); Roger A. McEowen and Neil E. Harl, *AGRICULTURAL LAW, Secured Transactions*, ch. 3 (2001); and Julian B. McDonnell, *Farm Financing Under Revised Article 9*, ch. 26 in Peter F. Coogan et al., *SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* (2002).

transactions. These changes took effect in Minnesota on July 1, 2001, though creditors may have incorporated provisions into earlier security agreements and financing statements that reflect Revised Article 9 changes.

Debts that use real estate as collateral are discussed in Chapter Three, and debts not secured by any collateral are discussed in Chapter Five.³

Debtor — The person who owes money. This book assumes that the farmer is the debtor.

Creditor — The person to whom the debt is owed.

Collateral — Debtor's property identified in an agreement that is pledged to the creditor if the debtor does not repay the debt.

II. Creating secured debt — loan agreements and promissory notes

Although the combination of documents can vary, debtors usually sign two separate agreements for a secured loan: (1) either a loan agreement or a promissory note, which is a promise to pay the amount of the debt; and (2) a security agreement, which grants a security interest in the debtor's property to the creditor. Since they are legally binding contracts, loan agreements, promissory notes, and security agreements should be read with care, and any confusion or questions should be resolved before signing. For more information, see the box beginning on page 105 entitled "Questions farmers should consider when seeking secured credit."

A. Types of promissory notes

Usually a promissory note will be one of three types: an installment note, an open-ended note, or a demand note.

1. Installment note

An installment note calls for payments of principal and interest that gradually pay off the loan by some set time in the future—usually specified in years or months. Payments under an installment note are usually scheduled at regular intervals.

2. Open-ended note — lines of credit

An open-ended note is used when a loan is in the form of a line of credit. The debtor gets a line of credit of up to a certain amount, and the debtor may use the money as needed for a set period of time.

³ If the security agreement covers both real and personal property, the creditor may use the UCC concerning the personal property or may use real estate law for both. Minn. Stat. § 336.9-604.

3. Demand note

A demand note allows the creditor to demand repayment at any time.

B. Terms in loan documents

Loan agreements and promissory notes are contracts between the debtor and the creditor. They include many important terms setting out the rights and responsibilities of both parties, including repayment of the loan, what qualifies as a default, and what action the creditor can take if there is a default.

1. Repayment terms

The loan agreement or promissory note should set out the length of the loan, how much each payment is, and what dates payments are due.

2. Default

If the debtor defaults on a secured loan, the creditor can take the debtor's collateral. Since the law does not define "default," the security agreement defines what acts—or failures to act—can be considered a default.⁴

3. Rate of interest

The loan agreement or promissory note should state the interest rate to be paid. There are legal limits on the amount of interest creditors can charge.⁵

4. Acceleration

An acceleration clause in a loan agreement or promissory note is a clause that allows the creditor to "accelerate" the payment schedule and claim the whole loan amount as due if specified events occur. Acceleration clauses are usually triggered by a default on the loan. For example, suppose you borrowed \$20,000 with payments scheduled over four years. If you default after the first payment and your loan is accelerated, the creditor can demand the full \$15,000 (plus any interest) immediately, even though you would otherwise only have had to make the next annual payment. A creditor may only accelerate the loan if the agreement includes an acceleration clause.⁶ The secured creditor must accelerate in good faith, meaning that the creditor believes payment on the debt is not likely.⁷

5. Fees and expenses in case of default

Loan documents often say that the creditor can collect from the debtor reasonable attorneys' fees, legal expenses, and costs of collection that result from a default.

4 Minn. Stat. §§ 336.9-601, 336.9-602.

5 For some creditors, if a loan of under \$100,000 is made for an agricultural purpose, the interest may not be more than 4.5 percentage points over the federal discount rate at the time of the loan. Banks and other financial institutions are allowed to charge up to 21.75 percent interest. Appendix A provides a more detailed discussion of interest rate limits.

6 *Sheet Metal Workers Local No. 76 Credit Union v. Hufnagle*, 295 N.W.2d 259 (Minn. 1980).

7 Minn. Stat. § 336.1-208.

6. Inspections

Some agreements allow creditors to inspect the collateral during the term of the loan to ensure that it is still providing adequate security for the debt.

C. Waiving your rights

Many debtor rights are protected automatically by law. It is illegal for a creditor to require a debtor to waive these rights in a contract, loan agreement, or security agreement as a condition of receiving an agricultural loan unless the law specifically makes an exception and allows the debtor to give up those rights.⁸

D. Co-signers and guarantors

A creditor may want someone besides the borrower—such as a family member—to co-sign or guarantee the loan. If someone does so, he or she can be held responsible for the entire loan amount.

III. Creating security interests

A debtor granting a security interest to a creditor will probably be asked to sign a security agreement and an effective financing statement in addition to the loan agreement or promissory note. Security interests may also be created through a statutory lien.

Security interest

A security interest is a legal claim of a creditor allowing the creditor to take possession of the debtor's property or claim proceeds from the sale of the debtor's property if the debtor defaults on the debt. Some security interests are created by law or by order of a court. Most commonly, however, security interests are agreed to by debtors as part of a credit arrangement.

A. Security agreements

A security interest is a legal claim of a creditor allowing the creditor to take possession of the debtor's property or claim proceeds from the sale of the debtor's property if the debtor defaults on the debt. A security agreement is a contract that gives a creditor a security interest in the debtor's property. Although security interests typically are used to provide assurance of repayment for credit issued at the same time that the security agreement is signed, a security agreement may include language giving the creditor an interest in the debtor's property to secure repayment of credit advances made by the creditor in the future or to secure previous credit extensions that are already outstanding when the security agreement is signed.⁹

8 Minn. Stat. § 550.42.

9 Minn. Stat. § 336.9-204.

1. General requirements of security agreements

In general, security agreements must be in writing, must be signed by the debtor, and must include a description of the collateral.¹⁰

2. Describing the property covered by the security agreement

Creditors have often attempted to use a “supergeneric” description of a debtor’s property in security agreements in order to obtain the maximum amount of collateral. This means that they would use a very general description such as “all assets” or “all the debtor’s personal property.”¹¹ Under Revised Article 9, a supergeneric description of collateral is permitted in a financing statement¹² but is not permitted in a security agreement.¹³ To be enforceable, therefore, the security agreement must reasonably identify the collateral at least by category.¹⁴ For instance, a security agreement giving all of the debtor’s equipment as security is valid.¹⁵

Since a statutory change in 1999, Minnesota no longer requires creditors seeking a security interest in crops growing or to be grown to include a legal description of the land on which the crops were planted in the security agreement and financing statement.¹⁶ This change allows creditors to gain an interest in all crops grown by a debtor while a security agreement is in effect simply by indicating in the security agreement and financing statement that “crops grown or to be grown” are collateral for the debt.

Although Minnesota no longer requires that land descriptions be included in security agreements, it is still permissible to include those descriptions in security agreements and financing statements to limit the scope of the creditor’s interest. To protect their interests, farmers who do not intend to give a general interest in all crops to a creditor should consider writing in the security agreement a legal description of the land on which the crops that are given as collateral will be grown or another description that excludes certain farm parcels.¹⁷ Farmers might also consider trying to limit the reach of a

10 Minn. Stat. §§ 336.9-203, 336.1-201(39), (46). Signatures are not needed if the creditor possesses the collateral.

11 Minn. Stat. § 336.9-108(c).

12 Minn. Stat. §§ 336.9-502(b), 336.9-504.

13 Minn. Stat. § 336.9-108(c).

14 Minn. Stat. § 336.9-108.

15 Minn. Stat. § 336.9-108(b)(2).

16 1999 Minn. Laws ch. 105 (codified at Minn. Stat. §§ 336.9-203(b)(3), 336.9-502(b)).

17 For example, Farm Service Agency Form FSA-0440-04A, “Security Agreement (Chattels and Crops)” (June 29, 2001) (hereinafter FSA Security Agreement), uses general language that claims a security interest in all crops growing or to be grown and then states that this collateral includes but is not limited to crops “now planted, to be planted, growing or grown, or harvested on the following described real estate. . . .” Sec. II, Item 1, page 2. Under this language, the real estate description(s) would not limit FSA’s security interest in a specific crop or specifically identify some of the crops in which FSA could claim an interest. To truly limit FSA’s claim on a specific crop or parcel, debtors would need to specifically exclude the land using language such as, “except crops growing or to be grown on farm number XX” or “except crops growing or to be grown on 100 acres located at xxxx.”

creditor's security interest over future crops by using language that specifies certain crop years or an end date, such as "except crops planted after May 1, 200x."

B. Financing statements

A financing statement has two main purposes. First, it serves as public notice that the creditor has a security interest in the debtor's property. Second, if two different creditors ever tried to claim the same piece of the debtor's property, the financing statement helps to settle which one gets the collateral.¹⁸

Usually a financing statement, called a UCC-1, includes the legal names of the debtor and the creditor, the addresses of both parties, a description of the types of collateral, and the debtor's Social Security or Tax ID number.¹⁹ If the property is to become a fixture, the financing statement must include a description of the real estate.²⁰

1. Debtor's signature no longer required on financing statements

Until July 2001, the debtor would have been required to sign the financing statement.²¹ Under Revised Article 9, the debtor's signature is no longer required.²² A primary motivation for this change was to ease the use of electronically filed financing statements.²³ Even though the debtor's signature is not required, the creditor must still have the debtor's authorization to file the financing statement. In general, anyone who files a financing statement without the debtor's authorization may be liable to the debtor for damages.²⁴ Debtors should be aware, however, that under Revised Article 9, this authorization is automatic whenever a debtor signs or agrees to become bound by a security agreement.²⁵ Authorization to file a financing statement may also be included in the language of the security agreement itself, and some creditors may have required debtors to sign security agreements with such language before July 1, 2001.²⁶

2. New filing system for financing statements as of 2001

Under the Minnesota law in effect until July 1, 2001, creditors would file financing statements in different locations, depending on the type of collateral and the debtor's location

18 Priority among creditors is discussed in Minn. Stat. § 336.9-322.

19 Minn. Stat. §§ 336.9-502, 336.9-504. IRS tax numbers are used if the farm is incorporated. Minor errors that are not seriously misleading do not make the financing statement ineffective. Minn. Stat. § 336.9-506; Minn. R. ch. 8280.

20 Minn. Stat. § 336.9-502(b).

21 2000 Minn. Laws ch. 399, Art. 1, § 73 (effective July 1, 2001) (recodifying Minn. Stat. § 336.9-402(1) (2000)).

22 Minn. Stat. § 336.9-502.

23 Rev. § 9-502, Official Comment 3.

24 Minn. Stat. § 336.9-625(b), (e)(3).

25 Minn. Stat. § 336.9-509(b).

26 See, for example, the FSA Security Agreement, which provides that FSA is "authorized to file financing statements describing the collateral, to file amendments to the financing statements and to file continuation statements." FSA Security Agreement, Sec. III.D. By signing the security agreement, therefore, the debtor gives FSA authority to file financing statements, amendments, and continuation statements without the debtor's signature.

and legal status. Under Revised Article 9, financing statements will, with very few exceptions, be filed with the Secretary of State in the state where the debtor's principal residence is located.²⁷ If the debtor is a corporation, limited liability company, or limited partnership, the financing statement is filed in the state where the debtor is registered.²⁸

Minnesota's filing system for financing statements varies from the uniform version of Revised Article 9, which only provides for one central filing office in each state for almost all types of collateral.²⁹ In Minnesota, 79 of the 87 county recorder offices are designated satellite offices of the Secretary of State, and it is possible to file financing statements in those satellite offices as well as directly with the Secretary of State.³⁰ Information from financing statements filed at satellite offices will be automatically added to the Secretary of State's database of financing statements.³¹ Therefore, in Minnesota, a financing statement filed with either the Secretary of State's office or an authorized county satellite office will be effective.³²

3. Changing or correcting financing statements

A creditor may change the information in a financing statement by filing an amendment.³³ If a financing statement or an amendment contains incorrect information or was wrongfully filed, the debtor can file a correction statement that will be kept with the financing statement or amendment.³⁴ The correction statement gives the debtor the opportunity to clarify the record, but the financing statement will remain filed with the Secretary of State's office.³⁵

C. Centralized Filing System — effective financing statements and lien notices

As a part of the 1985 Farm Bill, Congress ordered the creation of a centralized computer filing system for liens on farm products.³⁶ Before this time, grain dealers who purchased grain from farmers often faced claims from farm creditors who had security interests in the grain. Under the federal Centralized Filing System, a secured creditor protects its interest and puts others on

27 Minn. Stat. §§ 336.9-301(1), 336.9-307(b)(1).

28 Minn. Stat. § 336.9-307(e).

29 Minn. Stat. § 336.9-501. The exceptions are minerals, timber, and certain fixtures.

30 Minn. Stat. § 336.9-527.

31 Minn. Stat. § 336.9-528.

32 A complete list of Minnesota's 79 county satellite offices is posted at: <http://www.sos.state.mn.us/uccd/CountyFile.html>.

33 Minn. Stat. § 336.9-512.

34 Minn. Stat. § 336.9-518.

35 Minn. Stat. § 336.9-518(c).

36 7 U.S.C. § 1631; Minn. Stat. §§ 336A.04, subd. 5, 336A.08, 336A.11. For a general overview, see Julian B. McDonnell, *The Food Security Act and Its Relationship With Article 9*, ch. 27, in Peter F. Coogan et al., *SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* (2002). Legislation is expected to be introduced in the 2004 Minnesota legislative session that, if enacted, will amend Minnesota statutes to reflect the changes governing the federal Effective Financing Statement for farm products made by the 2002 Farm Bill. See Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134, § 10604 (May 13, 2002).

notice of its claim by filing an "effective financing statement."³⁷ Persons who hold statutory liens against farmers can do the same by filing a "lien notice."

Farm products, for the purposes of the federal Centralized Filing System, include farm commodities such as corn and soybeans as well as livestock and poultry and unmanufactured crop or animal products, such as milk or eggs.³⁸

Effective financing statements and lien notices must include the names and addresses of the debtor and creditor, a description of the property subject to the security interest or lien, the name of the county in which the property is located, and the amount owed.³⁹ A lien notice must be signed by the lienholder.⁴⁰ An effective financing statement must be signed by the debtor and must include the debtor's Social Security Number.⁴¹

Although the purpose of effective financing statements and lien notices is similar to the purpose of UCC financing statements discussed above, the two forms are different and may not be combined in one document.⁴²

D. Continuation statements

A security interest lasts as long as the debt is unpaid. A financing statement, however, is usually only valid for five years.⁴³ After that, the creditor must file a continuation statement.

An effective financing statement also lasts for five years.⁴⁴ The creditor can extend it by refileing or filing a continuation statement with the Minnesota Secretary of State's Centralized Filing System.⁴⁵

E. Termination statements

A termination statement declares that the creditor's security interest is terminated and the creditor no longer has an interest in the debtor's property. Once the debtor has paid off the debt, the creditor must provide a termination statement.⁴⁶ If the creditor does not produce a termination

37 An effective financing statement must be properly filed to be valid. *Monfort, Inc. v. Kunkel*, 182 B.R. 1007 (Bankr. D. Minn. 1995).

38 Minn. Stat. § 336A.01; 7 U.S.C. § 1631(c)(5). To be a farm product, these goods must be in the farmer's possession.

39 Minn. Stat. § 336A.03, subd. 2(a); 7 U.S.C. § 1631(c)(4)(C). If there is a significant change to the information in an effective financing statement or lien notice, the statement or notice must be amended to reflect the change within three months. Minn. Stat. § 336A.01, subd. 4; 7 U.S.C. § 1631(c)(4)(D).

40 Minn. Stat. § 336A.03, subd. 3.

41 Minn. Stat. §§ 336A.03, subd. 3, 336A.03, subd. 2(a)(4). The signature requirement may be changed during the 2004 Minnesota legislative session to allow electronic filing as authorized by the 2002 Farm Bill. See 7 U.S.C. § 1631(c)(4)(A)-(B). An IRS taxpayer number is used if the farmer is a business entity. 7 U.S.C. § 1631(c)(4)(C)(iii).

42 Minn. Stat. § 336A.03, subd. 2(c).

43 Minn. Stat. § 336.9-515. However, a real estate mortgage that also serves as a financing statement for a fixture on the land is valid until a mortgage release or satisfaction is filed.

44 Minn. Stat. §§ 336A.03, subd. 5(a), 336A.06; 7 U.S.C. § 1631(c)(4)(E). The debtor must sign, authorize, or otherwise authenticate that the debtor was aware of the continuation statement.

45 Minn. Stat. § 336A.06; 7 U.S.C. § 1631(c)(4)(E).

46 Minn. Stat. § 336.9-513.

statement at the time the debt is paid in full, the debtor should write the creditor and ask for one. A copy of the termination statement should be filed everywhere the original financing statement was filed. If the creditor fails to file a termination statement, the creditor is liable for any damages caused to the borrower; under Revised Article 9, the borrower may also recover \$500 from the creditor.⁴⁷ For effective financing statements under the federal system, the creditor must file a termination statement within 30 days after its security interest is terminated.⁴⁸ If the creditor fails to file a termination statement, the creditor is liable for \$100 plus any losses caused to the borrower for the first time there is a failure and \$250 for each subsequent failure to file a termination statement.⁴⁹

IV. Collateral for secured debts

As discussed earlier, a security agreement must identify at least in general terms the items or categories of property in which the debtor is allowing the creditor to take an interest. This property is then referred to as “collateral” for the debt. It is very important for debtors to understand what items of property are considered collateral for secured loans and what limitations they may face in making use of any property that is collateral.

A. Types of collateral

In general, a security agreement can use as collateral the debtor’s personal property, such as crops, livestock, machinery, bank accounts, and other property such as future government program payments.⁵⁰ Other forms of collateral include the following.

1. Proceeds

If the debtor sells or trades collateral, the creditor’s security interest usually continues or follows in the proceeds from the sale or trade.⁵¹ For example, if you sell crops that are serving as collateral for a loan, the creditor still has a security interest in the money you got from the sale. This is true even if the check from the sale does not have the creditor’s name on it.

Use of proceeds in violation of the security agreement is called conversion, which is discussed below. Debtors should be careful to request written permission from secured creditors if they want to use proceeds from the sale or trade of collateral for anything other than paying the secured debt.

47 Minn. Stat. § 336.9-625(b), (e)(4).

48 Minn. Stat. § 336A.07.

49 Minn. Stat. § 336A.07, subd. 4.

50 Minn. Stat. § 336.9-109.

51 Minn. Stat. § 336.9-315. The debtor and creditor may agree otherwise. Proceeds are considered whatever is received upon “sale, lease, license, exchange, or other disposition” of collateral. Minn. Stat. § 336.9-315(a)(1).

2. After-acquired property

The security agreement may include an “after-acquired property” clause.⁵² This gives the creditor a security interest in property acquired by the debtor after the security agreement was signed. For example, if your security agreement gives your creditor a security interest in all farm equipment that you currently own “or will acquire” in the future, that means a tractor you buy the next year will also serve as collateral for the debt secured by that agreement.

3. Security in crops

If a security agreement includes crops as collateral, the creditor’s security interest may carry over to future crops.⁵³ For example, if a secured creditor from last year’s crop was not paid in full, that creditor may have a legal claim to this year’s crop or other future crops even if the creditor provided no financing for those later crops.

4. Deposit accounts

Since 2001, creditors have been allowed to take a debtor’s “deposit accounts” as original collateral for non-consumer debts.⁵⁴ To know what this change means, it is important to understand two terms: “deposit accounts” and “consumer transactions.” Deposit accounts include checking, savings, and similar accounts and certain certificates of deposit that are held at banks and other financial institutions.⁵⁵

Deposit account

Deposit accounts are checking, savings, and similar accounts and certain certificates of deposit maintained with a bank or other financial institution.

Consumer transactions involve personal, family, or household debts and property. Farmers’ credit arrangements may qualify as consumer transactions or non-consumer transactions, depending on the primary purpose of the debt and the type of collateral.

52 Minn. Stat. § 336.9-204.

53 Minn. Stat. §§ 336.9-203(b)(3), 336.9-502(b); see also Susan A. Schneider, *Statutory Agricultural Liens Under Revised Article 9 of the Uniform Commercial Code*, NATIONAL AGLAW CENTER PUBLICATIONS (Mar. 2002) at 5, available at <http://www.nationalaglawcenter.org/publications/articles/schneider.pdf>.

54 Minn. Stat. § 336.9-109(d)(13).

55 Minn. Stat. § 336.9-102(a)(29).

For example, if a farmer purchases a lawnmower on credit primarily for use around the family home, this would be a consumer transaction. The same lawnmower purchased on credit but primarily for use in the farming operation would be a non-consumer transaction.⁵⁶

Consumer transaction

Consumer transactions are transactions in which: (1) the debt is taken primarily for personal, family, or household purposes; and (2) the collateral is primarily for personal, family, or household use.

A creditor's ability to take deposit accounts as original collateral in non-consumer transactions means that, in case of default, a farmer's creditors can seek payment from sources that in the past were partially protected from creditors. For example, Revised Article 9 provides that if a farmer signs a security agreement in exchange for credit to purchase a tractor and the security agreement includes as collateral both the tractor and the farmer's savings account, upon default the creditor may first attempt to take the funds in the farmer's savings account before going through the hassle of taking possession of the tractor and reselling it in order to satisfy the debt.

a. Listing checking and savings accounts in security agreements

If a creditor wants to use deposit accounts as security for repayment of a debt, the security agreement must clearly state that deposit accounts are included as collateral.⁵⁷ This will most likely be done in the section of the security agreement that lists or defines collateral for the debt.⁵⁸ Although it is possible to name (by type or account number) specific deposit accounts that are being given as security, standard security agreements will likely just state the general category of "deposit

56 Minn. Stat. § 336.9-102(a)(24). The comments to Revised Article 9 clarify that a credit arrangement secured by more than one type of collateral will be considered a consumer transaction if at least some of the collateral is for household use. See Rev. § 9-102, Official Comment 7.

57 Rev. § 9-109, Official Comment 16; see also, for example, FSA Security Agreement, Sec. II, Item 4, p. 5.

58 Steven O. Weise, *Materials on Revised Article 9* (July 2002), available at <http://www.hewm.com/news/articles/ucc.pdf>.

accounts" and will not specify individual accounts.⁵⁹ Using this general language means that funds held in any deposit accounts owned or acquired by the debtor would be available to the creditor as original collateral for the debt. One possible way for farmers to limit creditors' access to their deposit accounts would be to separate their household accounts from their business/farming accounts and to make sure that the security agreement only lists the business/farming deposit accounts and does not use the general category of "deposit accounts" without limitation.⁶⁰ This will almost certainly require making changes to the standard security agreement provided by the creditor.

b. Security interest gives creditors quicker and easier access to debtor's deposit accounts

It is important to remember that using deposit accounts as original collateral for a loan is not the only way that creditors can gain the right to funds in a debtor's accounts. Therefore, listing specific accounts or even removing deposit accounts from the types of collateral given in a security agreement will not provide absolute protection for the farmer's accounts. As was true under the old Article 9 provisions, creditors can generally claim funds in deposit accounts that are not listed as collateral if the funds are proceeds from the sale of security property (discussed earlier) or if state law otherwise gives the creditor a claim against the account.⁶¹ What is special about the new rule under Revised Article 9 is that creditors can have much easier access to a debtor's deposit accounts and generally need not get a court order to access the funds held in a debtor's accounts.

c. Creditors seeking to access debtor's deposit account under a security agreement must "control" the account

Even though the new rule makes it easier for creditors to access a debtor's accounts, there are still some requirements that must be met beyond signing the security agreement if a creditor is to gain access to the funds in the account. Most impor-

59 See, for example, FSA Security Agreement, Sec. II, Item 4, p. 5 (collateral to be listed in the security agreement includes "[a]ll accounts, *deposit accounts*, goods, supplies, supporting obligations, investment property, certificates of title, payment intangibles, and general intangibles, including, but not limited to the following. . . .") (emphasis added). Although the "including, but not limited to" language in FSA's security agreement appears to clearly state that any specific listing of collateral would not limit FSA's interest in other accounts and rights, the instructions to FSA personnel that accompany the security agreement tell those personnel that the agreement will cover "only those accounts, contract rights and general intangibles which are listed by FSA. If security interest [sic] is to be taken on milk assignments, FSA deficiency payments, etc., and [sic] appropriate detailed description will be inserted." FSA Procedure Notice, Issue No. 119, Forms Manual Insert (FMI) page 2 (July 10, 2001). This conflict between FSA's interpretation of the agreement language for its personnel and the arguably clear language of the agreement itself is likely to cause problems for debtors. In order to ensure that a specific deposit account or other property is *not* given as security under this language, debtors should insist that the agreement explicitly state an exclusion under Item 4, such as "except account number ##### at Community Bank."

60 Bruce A. Markell, *From Property to Contract and Back: An Examination of Deposit Accounts and Revised Article 9*, 74 CHI.-KENT. L. REV. 963, 978 (1999).

61 Minn. Stat. § 336.9-315.

tantly, to have access to funds in a deposit account that is covered by a security agreement, the creditor must also have “control” over the deposit account.⁶² Control has a special meaning for this purpose. There are three ways that a creditor can take control of a debtor’s account.

(1) Creditor is the bank where the deposit account is located

First, if the creditor is the bank where the deposit account is located, that creditor will have automatic control of the account.⁶³

(2) Creditor’s name is on the deposit account

Second, a creditor will be considered to have control of a debtor’s account if the creditor’s name is also on the account.⁶⁴

(3) Creditor, debtor, and bank have entered into a “control agreement”

The third way that a creditor can take control of a debtor’s account, and probably the most common way that this will occur, is for the debtor, the creditor, and the bank to enter into a “control agreement.”⁶⁵ A control agreement is a document that authorizes a bank to follow a secured creditor’s instructions concerning a debtor’s account funds without further approval from the debtor.⁶⁶ The control agreement may also restrict when or if the debtor can access any funds from the deposit account without the secured creditor’s prior written consent. This could mean the debtor’s assets are essentially frozen subject to the instructions of the secured creditor. For example, if a control agreement restricts the debtor’s ability to draw funds from the account, any request for payments from the account made by the debtor, such as an automatic payment withdrawal or a check written on the account, may be denied or dishonored by the bank. If this happens, not only will the debtor be unable to make payments, but he or she may also be responsible for charges such as insufficient funds fees.

The bank where the deposit account is located cannot be required to enter a control agreement, even if the debtor as account holder requests it.⁶⁷ Debtors, too, are not required by state law to sign a control agreement, though in practice the security agreements farmers sign may require cooperation with respect to obtaining control in the deposit accounts, including requiring them to sign control agreements.⁶⁸ For example, the Farm Service Agency’s (FSA)

62 Minn. Stat. § 336.9-314.

63 Minn. Stat. § 336.9-104(a)(1).

64 Minn. Stat. § 336.9-104(a)(3).

65 Minn. Stat. § 336.9-104(a)(2).

66 Minn. Stat. § 336.9-104(a)(2).

67 Minn. Stat. § 336.9-342.

68 Steven O. Weise, *Materials on Revised Article 9* (July 2002), footnote 33, at 7-8, available at <http://www.hewm.com/news/articles/ucc.pdf>.

Revised Article 9 Security Agreement states that by signing the agreement, the farmer/debtor:

agrees to execute any further documents, including additional security instruments on such real and personal property as [FSA] may require, and to take any further actions reasonably requested by [FSA] to evidence or perfect the security interest granted herein or to effectuate the rights granted to [FSA] herein.⁶⁹

Farmers who fail to follow FSA's instructions under the agreement, including executing documents that FSA needs to perfect its rights, will be considered in default.⁷⁰

A control agreement might require the bank to agree not to sign any other control agreements regarding the debtor's same deposit accounts.⁷¹ If this requirement is included and the bank signs the control agreement, the deposit accounts covered by the agreement would likely not be available as collateral for any other secured creditor, even if the debtor signs multiple security agreements that all include the debtor's deposit accounts as collateral.

Regardless of what provisions are included in the control agreements, farmers should be extremely careful to understand the documents they sign. Control agreements could result in being unable to access one's checking and savings accounts without a creditor's prior written consent, causing bank fee charges, credit rating concerns, and perhaps even greater problems.

B. Restrictions on collateral

Many security agreements restrict what debtors can do with the collateral. For example, the debtor may be prevented by the agreement from selling the property, terminating a current lease, or allowing a lien to attach to the property.

1. Restrictions on selling

Loan documents often say that the debtor must get the creditor's permission before selling collateral. Although creditors do not always enforce this requirement, to avoid future problems, debtors should get written permission for a sale in advance whenever it is required by the loan agreement. Even if the debtor has sold collateral without the se-

⁶⁹ FSA Security Agreement, Sec. III.H.

⁷⁰ FSA Security Agreement, Sec. IV.B.

⁷¹ A model control agreement drafted by Edwin O. Smith (a member of the Revised Article 9 Drafting Committee) requires the bank to "represent and warrant to Lender (the secured creditor) that you have not entered, and you covenant with Lender that you will not enter, into any agreement with any other person by which you are obligated to comply with instructions from such other person as to the disposition of funds from the Deposit Account or other dealings with any of the Deposit Account Collateral."

cured creditor's consent in the past and the secured creditor did not object, this does not necessarily mean that the debtor can continue to do so in the future without penalty.⁷²

Oral permission to sell collateral—even if the loan agreement requires written permission—should be legally binding on the creditor.⁷³ To be safe, however, when a debtor gets oral permission to sell collateral, it is wise to follow up with a short letter to the creditor confirming the conversation.

2. Reporting requirements

The security agreement may require that the debtor provide the creditor with a list of potential buyers for the collateral. Federal law requires the debtor to follow through on this promise by providing the creditor with the names of potential buyers.⁷⁴

If the debtor wants to sell the collateral to someone not on the list, the debtor must either notify the creditor in writing at least seven days before the sale and name the new buyers or pay the creditor the proceeds from the sale within ten days after the sale.⁷⁵

C. Conversion

A debtor selling collateral, making changes to collateral, or using proceeds from the sale of collateral in violation of the security agreement may be accused of conversion.⁷⁶ Both civil and criminal penalties can follow. The key to avoiding conversion is knowing what is required by the security agreement and following those requirements exactly.

D. Two-party checks

When selling farm products, a debtor might be paid with a two-party check made out to both the debtor and the creditor. The debtor then cannot use the proceeds without the creditor's consent. This is intended to ensure that the debtor will use the proceeds for payment on the debt to the creditor. Sometimes it is possible to reach an agreement with the creditor to use part of the proceeds for other expenses—such as a mortgage payment or taxes. If so, the debtor should get a written agreement that explains how the proceeds will be used.

The Farm Service Agency (FSA)—must agree to allow debtors to sell certain types of collateral and use the proceeds for essential family living and farm operating expenses if the loan has not been accelerated.⁷⁷

72 *Wabasso State Bank v. Caldwell Packing Co.*, 251 N.W.2d 321 (Minn. 1976).

73 *Citizens Nat'l Bank of Madelia v. Mankato Implement, Inc.*, 441 N.W.2d 483 (Minn. 1989).

74 7 U.S.C. § 1631(h).

75 7 U.S.C. § 1631(h). Debtors failing to satisfy this requirement can be fined \$5,000 or 15 percent of the value of the property sold, whichever is greater.

76 A hog farmer who had converted sales proceeds that were subject to a security interest was subject to an action for conversion by the creditor. *Meadowland Farmers Coop. v. Behrendt*, C2-00-1753 (Minn. Ct. App. June 5, 2001) (unpublished).

77 7 C.F.R. § 1962.17. (2003). Farmers will be required to update their Farm and Home Plan with FSA to reflect the sale of the collateral and the use of the proceeds.

E. Debtor efforts to minimize creditor's claims

Sometimes it is tempting for debtors to maximize the farm output that does not fall under a security interest since those proceeds can be used as the debtor chooses. For example, if your creditor's security interest covers only crops grown on certain property, crops you grow on other land might not be covered under your security agreement. Similarly, if you cash-rent land listed on your security agreement, that rent might not be covered by the agreement and you might be free to use that rent as you choose.

These and other similar strategies are often tried to free up funds from security interests. In many cases, these strategies can be perfectly legal. Debtors should keep several things in mind, however.

1. Read the security agreement closely

The security agreement may prohibit some of these strategies. If so, pursuing them might be a default on the debt. For example, many security agreements do not let the debtor rent the land listed in the agreement. As always, it is important to read written agreements closely.

2. Keep unsecured property separate

Care should be taken to keep collateral separate from the debtor's property in which creditors do not have any security interest. For example, if part of the crop from your farm serves as collateral and part of it does not, you should keep the crops and the proceeds separate. Otherwise the creditor might try to claim all of the crop and crop proceeds.

3. Concealing collateral can be a crime

Debtors who—with the intent to defraud a creditor—conceal, remove, or transfer property they know serves as collateral can face stiff criminal penalties.⁷⁸

V. Default and repossession

If the debtor defaults on a secured loan, the creditor may have the right to take possession of the collateral. This section discusses that process.

A. Default

There is no special legal definition of default.⁷⁹ Instead, debtors are in default when they violate the terms and conditions of their loan agreement, promissory note, or security agreement.⁸⁰ If the debtor does something the creditor does not like, therefore, it is probably not a default unless the loan agreement, promissory note, or security agreement specifically prohibit that

⁷⁸ Minn. Stat. § 609.62.

⁷⁹ Revised Article 9 contained only minor changes to the default provisions for secured credit. For an analysis of the new default rules, see Donald J. Rapson, *Default and Enforcement of Security Interests Under Revised Article 9*, 74 CHL-KENT. L. REV. 893 (1999).

⁸⁰ Minn. Stat. §§ 336.9-601, 336.9-602.

Questions farmers should consider when seeking secured credit

The most important questions farmers need to ask themselves when seeking secured credit are: (1) “Have I *read* the documents I am signing?” and (2) “Do I *understand* them?” It is critical to ask questions if you do not understand what particular language in an agreement means. These documents do more than provide access to credit; they establish legal rights and obligations between the creditor and the farmer/debtor.

Next, ask yourself exactly what *collateral* the creditor is taking for the loan. Creditors often attempt to take as much collateral as they can, listing broad categories of property in a security agreement. The collateral listed in the creditor’s printed security agreement might include property that you intend to use as collateral for a separate loan or that is unrelated to the transaction. The bottom line is to understand that the creditor will have a claim to any property listed as collateral in the security agreement, including property that fits under broad categories of collateral. Try to make sure that the security agreement includes no more collateral than is necessary to obtain the loan. For example, if vehicles are listed as collateral, you may want to only include vehicles that you specifically designate on the security agreement.

If possible, you may want to consult with an attorney experienced in agricultural credit law when considering the following questions:

After-acquired property

1. Does the security agreement include language such as “property now owned *or hereafter acquired*” when listing types of collateral? This means that the creditor will have a claim on any future purchases of property of the type listed.
2. Will the creditor make the loan if the “or hereafter acquired” language is struck?
3. If the creditor insists on having after-acquired property as collateral, can the types of property interests or property covered by the “or hereafter acquired” language be limited? For example, can the after-acquired property language cover just equipment or machinery but not any other property?
4. If the after-acquired property language cannot be stricken or limited, are you willing to give the creditor a claim on property interests or property that you acquire between the time the loan is made and when the loan is paid in full?

Deposit accounts

1. Does the security agreement list “deposit accounts” as a category of collateral for the loan? This means checking and savings accounts and some certificates of deposit (CDs).
2. Will the creditor make the loan if deposit accounts are not given as collateral?
3. If the creditor insists on having deposit accounts as collateral, can the accounts covered by the security agreement be limited? For example, can the security agreement list only specific, farm-related accounts as collateral and specifically exclude others, such as “except account #99999 at local Bank” or “except all deposit accounts at local Bank”?

4. If the deposit accounts category cannot be stricken or limited, are you willing to give the creditor a claim on and possible control over all checking and savings accounts in your name until the loan is paid in full?
5. Does the security agreement include language requiring you to sign a control agreement with the creditor and the bank where your accounts are located? For example, language such as, "Debtor agrees to execute any further documents reasonably requested by the creditor to perfect its security interest."

Accounts

1. Does the security agreement list "accounts" as a category of collateral for the loan? This can mean the right to receive contract-for-deed payments, government farm program payments, disaster assistance payments, payments under some crop or livestock production contracts, and other types of income.
2. Will the creditor make the loan if your accounts are not given as collateral?
3. If the creditor insists on having accounts as collateral, can the accounts covered by the security agreement be limited? For example, can the security agreement list only specific types of government farm program payments as collateral and specifically exclude others, such as "including only Conservation Reserve Program payments" or "except Loan Deficiency Payments"?
4. If the accounts category cannot be stricken or limited, are you willing to give the creditor a claim on possibly all your contract-for-deed, production contract, and government payments until the loan is paid in full?

Crops

1. Does the security agreement use language such as "to be planted" or "to be grown," indicating that future crops will be taken as collateral for the loan? Does the security agreement use general language covering all of your crops?
2. Will the creditor make the loan if the language covering future crops is struck? Will the creditor make the loan if only certain crops are covered, using land descriptions to identify particular parcels?
3. If the creditor insists on having future crops as collateral, can the security interest in future crops be limited, either by parcel, by crop year, or both? For example, can the security agreement include language such as "except crops growing or to be grown on [give land description here]" or "including only crops planted before July 1, 2005"?
4. If the language indicating future crops cannot be stricken or limited, are you willing to give the creditor a claim on all crops that you grow until the loan is paid in full? If the language covering all current crops cannot be limited, are you willing to give the creditor a security interest in all of your crops on all property?

CAUTION: Watch for "*including, but not limited to*" language before any list of collateral in a security agreement. This language means that any specified list of collateral would be considered examples, but the agreement would cover the entire category of collateral given. If you think a specific list is the *only* collateral you are giving, be sure that the agreement really says this.

action.⁸¹ Default is most commonly caused by failure to make loan payments, but any violation of the loan agreement, promissory note, or security agreement could create a default.

B. Debtor rights and creditor options after default

Before taking any action on the debt, the creditor may be required to serve the debtor with a farmer-lender mediation notice.⁸² See Chapter Seven for a detailed discussion of the mediation process. Farm Credit Services (FCS) borrowers are also entitled to receive a notice of debt restructuring before a collection action begins.⁸³ And FSA borrowers should receive a notice of debt restructuring rights.⁸⁴

When debtors default on their security agreements, creditors have several different options.

1. Do nothing or work out an agreement

A creditor can wait long past the time of default before trying to collect. For example, if the collateral is growing crops, the creditor might hold off until the crops are harvested before trying to enforce the debt.

The creditor also may consider an arrangement with other creditors to extend or rearrange payments. Some creditors may be especially willing to try this if they will get more under a modified agreement than they would get if the debtor filed a bankruptcy petition.

2. Sue for the amount owed

The creditor may attempt to collect by filing a lawsuit for the amount owed.⁸⁵ Creditors are more likely to try this tactic if seizing and selling the collateral will not bring enough proceeds to cover the debt and the debtor has other assets available that could be targeted in a court action for a judgment lien. Such lawsuits are discussed in Chapter Five.

3. Accelerate the debt

Sometimes the secured creditor accelerates a loan in default. As discussed earlier, for a creditor to have this power, the loan agreement, promissory note, or security agreement must include an acceleration clause, and the creditors must accelerate in good faith, meaning that the creditor believes payment on the debt is not likely.⁸⁶

4. Take possession of the collateral

Unless the security agreement says otherwise, a creditor may take possession of the collateral if there is a default.⁸⁷ In some cases, the creditor may take the collateral without

81 Minn. Stat. § 336.9-601. Creditors are able to demand that debtors follow security agreements strictly. *Brown v. Weeres Indus., Inc.*, 375 N.W.2d 64 (Minn. Ct. App. 1985).

82 Minn. Stat. § 336.9-601(h)-(i).

83 Minn. Stat. § 336.9-601(h)-(i).

84 7 C.F.R. pt. 1951, Exhibit A to subp. S. (2003).

85 Minn. Stat. § 336.9-601(a)(1).

86 Minn. Stat. § 336.1-208; *Sheet Metal Workers Local No. 76 v. Hufnagle*, 295 N.W.2d 259 (Minn. 1980).

87 Minn. Stat. § 336.9-609.

getting permission from a court. Creditors may not seize just any of the debtor's property; it must be the identified collateral for the loan. Debtors have other rights, which are discussed below.

C. How creditors take possession of collateral

There are three basic ways for creditors to repossess collateral: voluntary liquidation, creditor self-help repossession, and court-ordered repossession.

1. Voluntary liquidation

The creditor may want to make an agreement in which the debtor voluntarily turns the property over to the creditor. It can be difficult for a debtor to decide whether it makes sense to turn property over voluntarily. Although every farmer's situation will be different, some of the following factors might be worth considering.

a. Is sale of the collateral inevitable?

Voluntary liquidation may be sensible if the debtor agrees that he or she owes the full amount and concludes that the liquidation of the collateral is inevitable. If there is a chance to avoid the sale of the collateral altogether, the situation may be different.

b. Voluntary liquidation may be cheaper

The creditor's costs of taking possession of collateral—including storage, sales preparation, labor, trucking, repairs, advertising, auctioneering, clerking, and legal expenses—are added to the debt. A debtor might choose to voluntarily give up the collateral in order to avoid being charged these costs.

c. Liquidation may create another default

A liquidation—whether voluntary or not—could put the debtor in default with another creditor who also has a security interest in that property.

d. Will the whole debt be forgiven?

If the collateral's value does not cover the entire amount owed, the creditor could seize the property and still continue legal action against the debtor on the remaining debt. Creditors are sometimes willing to negotiate this point. In return for a voluntary liquidation of collateral, the creditor may forgive the remaining debt. Debtors should be sure to get any agreement like this in writing.

e. Bankruptcy is an option — and a negotiating point

Minnesota farmers in bankruptcy can often protect several thousand dollars worth of farm machinery from a creditor and possibly still continue to farm.⁸⁸ This can encourage the creditor to negotiate good terms with the debtor in exchange for a voluntary liquidation of collateral. The possibility of a bankruptcy can work both

88 11 U.S.C. § 522(d)(1)-(6); Minn. Stat. § 550.37, subds. 4a(a), 5.

ways, however. A creditor fearing bankruptcy might try to take the property all the more quickly. Bankruptcy is discussed in more detail in Chapter Eight.

2. Self-help repossession

If there is a default, a secured creditor may simply take possession of the collateral.⁸⁹ There are significant limits on this power of “self-help repossession.”⁹⁰

a. Creditor may not “breach the peace”

In a self-help repossession, creditors may not breach the peace.⁹¹ A breach of the peace is not defined in the statute. Minnesota courts, however, tend to be quite strict with creditors in this regard.⁹² Creditors taking possession of collateral in a public place or from a driveway probably will not be considered to have breached the peace.⁹³ To the extent that a creditor uses physical force, makes threats, trespasses, breaks locks, or enters buildings, however, the action begins to look more like a breach of the peace.⁹⁴

If the debtor tells the creditor not to take the property, the creditor must give up self-help repossession.⁹⁵ For example, if you send a creditor a letter—by certified mail, return receipt requested—saying that the creditor does not have permission to self-help repossession, this might prevent the creditor from taking possession, at least for the time being. A copy of the letter should be kept in your records. If the security agreement grants the creditor self-help repossession rights, the letter is sufficient to revoke this consent.⁹⁶

b. Creditor must give notice of strict enforcement if it accepted late payments in the past

If a creditor falls into a pattern of accepting late payments from the debtor, the creditor cannot suddenly take possession of collateral upon default without letting the debtor know that the security agreement will now be enforced strictly.⁹⁷

3. Court-ordered assistance — replevin and claim and delivery

If creditors do not use self-help repossession, they may instead seek a court order allowing them to take possession of the collateral. To do so, creditors file a special kind of law-

89 Minn. Stat. § 336.9-609(a).

90 *Steichen v. First Bank Grand*, 372 N.W.2d 768 (Minn. Ct. App. 1985).

91 Minn. Stat. § 336.9-609(b)(2). Parties are not allowed to alter by contractual agreement the creditor’s duty to not breach the peace. Minn. Stat. § 336.9-603(b).

92 *Bloomquist v. First Nat’l Bank of Elk River*, 378 N.W.2d 81 (Minn. Ct. App. 1985).

93 *James v. Ford Motor Credit Co.*, 842 F. Supp. 1202, 1208 (D. Minn. 1994).

94 *Clarín v. Norwest Bank*, No. 97-2003 (D. Minn. March 8, 1999) (unpublished); *Akerlund v. TCF Nat’l Bank*, No. 99-1537 (D. Minn. June 11, 2001) (unpublished).

95 *James v. Ford Motor Credit Co.*, 842 F. Supp. 1202 (D. Minn. 1994); *Bloomquist v. First Nat’l Bank of Elk River*, 378 N.W.2d 81 (Minn. Ct. App. 1985).

96 *Bloomquist v. First Nat’l Bank of Elk River*, 378 N.W.2d 81 (Minn. Ct. App. 1985).

97 *Cobb v. Midwest Recovery Bureau Co.*, 295 N.W.2d 232 (Minn. 1980); *Robinson v. Mack Trucks, Inc.*, 426 N.W.2d 220 (Minn. Ct. App. 1988).

suit that does not involve a full trial.⁹⁸ Two steps are involved. First, in a replevin action, the creditor gets the court to agree that the creditor probably has the right to the collateral. Second, in a claim and delivery action, the court gives the creditor permission to take the property.⁹⁹

a. Summons and complaint

Creditors start the lawsuit by delivering a summons and complaint to the debtor and by filing the complaint with the court.¹⁰⁰ The debtor has 20 days from the day the summons is received to file an answer with the court.¹⁰¹ Although debtors are allowed to represent themselves in a replevin action, to be most effective, debtors probably need the help of a lawyer to determine how best to answer the complaint.

To get a court order for possession of collateral, the creditor asks the court for permission to take the property.¹⁰² In some circumstances, a court will issue an order without any notice to the debtor. Usually, however, courts do not issue an order until after the debtor has received notice and a hearing has been held.¹⁰³

b. Creditor notice

In the vast majority of replevin actions, the debtor receives a notice explaining what the creditor is trying to do, and the court then holds a hearing that the debtor may attend.¹⁰⁴

If a hearing is to be held, the creditor will serve the debtor with notice of the date, time, and place of the court's hearing and will include with it legal papers explaining why the creditor thinks it should be able to take the property.¹⁰⁵

c. The hearing

The replevin hearing will not be a full trial. Instead, both sides briefly argue their points, and the court will make a decision based mainly on whether the creditor would be likely to win the case in a full trial.¹⁰⁶ Unless the debtor has a very strong argument—for example, that the security agreement is not legally valid, or that the debtor is not really in default—courts tend to find that the creditor would be likely to win in a full trial and award the creditor the right to take the property immediately.

98 The lawsuit probably will be filed in either district or county court, although it could be in conciliation court or federal court. Minn. Stat. §§ 487.15, 487.23, subd. 8.

99 Minn. Stat. § 565.23.

100 Minn. Stat. § 565.23, subds. 1, 2.

101 Minn. R. Civ. P. 12.01.

102 Minn. Stat. §§ 565.23, 565.24.

103 Minn. Stat. § 565.23, subd. 3.

104 Minn. Stat. § 565.23, subd. 2.

105 Minn. Stat. § 565.23, subd. 2.

106 Minn. Stat. § 565.23, subd. 3.

In a few cases, even if the court is convinced that the creditor would probably win in a full trial, the court lets the debtor keep the property, at least temporarily.¹⁰⁷ If this happens, the court might order the debtor to make a partial payment into escrow or post a bond.¹⁰⁸

Usually, if debtors want to keep the property until a full trial is held to resolve the issue, they must post a large bond.¹⁰⁹ A narrow exception allows some debtors to keep or get back the property for up to six months without a bond if they depend on the property to make a living.¹¹⁰

d. Replevin actions without prior notice

In certain situations, it is possible for a court to allow a creditor to take the collateral prior to a replevin hearing.¹¹¹ A court will only allow pre-hearing seizure of collateral if the creditor can show the court that: (1) the creditor is likely to be awarded possession at the hearing; (2) the creditor cannot contact the debtor or the creditor has reason to fear that if the debtor knew about the hearing, the debtor would wrongfully keep the creditor from taking the property; and (3) the creditor will suffer irreparable harm if it cannot take the property before the hearing.¹¹² As long as the creditor can find the debtor with reasonable effort, a court will only allow pre-hearing seizure of collateral when the court believes the debtor is about to destroy, hide, or secretly sell the property or act in a similarly fraudulent way.¹¹³ The Minnesota Supreme Court has held that a creditor may only seek pre-hearing seizure of collateral if the creditor has first commenced an action against the debtor for recovery of the debt.¹¹⁴ The Supreme Court of the United States has also warned that replevin actions without prior notice can violate the debtor's constitutional right to due process.¹¹⁵

107 Minn. Stat. § 565.23, subd. 3. Debtors can keep the property, at least temporarily, if they can show that: (1) they have a reasonable defense to the creditor's claims that needs to be sorted out in a full lawsuit; (2) even if the creditor posts a bond to protect the value of the property, this will not be enough to protect the debtor; and (3) the harm suffered by the debtor if the property is taken would be substantially worse than the harm suffered by the creditor if the property is not taken.

108 Minn. Stat. § 565.23, subd. 4.

109 Minn. Stat. §§ 565.23, subd. 5, 565.25, subd. 2; *Westbrook State Bank v. Aetna Casualty & Surety Co.*, 437 N.W.2d 738 (Minn. Ct. App. 1989).

110 Minn. Stat. §§ 565.25, 565.251, 565.23, subd. 4; *Bio-Line, Inc. v. Wilfey*, 366 N.W.2d 662 (Minn. Ct. App. 1985). To keep the property under this exception, debtors must be unable to make required payments because of unforeseen economic circumstances beyond their control, must insure the property, and must make periodic payments to the creditor. Otherwise, the bond will be either 1.25 times the fair market value of the property or 1.5 times the value of the creditor's claim, whichever is less.

111 Minn. Stat. § 565.24, subd. 2.

112 Minn. Stat. § 565.24, subd. 2.

113 Minn. Stat. § 565.24, subd. 2.

114 *First Nat'l Bank of Deerwood v. Gregg*, 556 N.W.2d 214 (Minn. 1996). That is, the court held that Minn. Stat. § 565.24, subd. 2, allows for claim and delivery prior to notice and hearing of the *motion* for claim and delivery, but it does not allow claim and delivery prior to notice and hearing of the underlying action.

115 *Fuentes v. Shevin*, 407 U.S. 67 (1972).

e. If the creditor wins possession at the hearing

If the court decides that the creditor should get possession of the property, the court will order the sheriff to seize the property and give it to the creditor and may order the debtor to turn over the property or reveal where the property is located.¹¹⁶ The court's order will state specifically what property may be taken by the sheriff.¹¹⁷ Any other property taken must be returned right away. The court may give the sheriff the power to break into a building to get the property.¹¹⁸

VI. After repossession — what happens to the property

Once creditors get possession of collateral, they either dispose of it and apply the proceeds to the amount the debtor owes, or they keep it to satisfy all or part of the debt.¹¹⁹ If the collateral is sold and the proceeds do not cover the debt, the creditor may try to get a deficiency judgment from the debtor.¹²⁰ If the debtor keeps the property, a partial deficiency judgment may be allowed if certain procedures are followed.¹²¹

A. Creditor sells the property

In many cases, creditors sell collateral taken after default.¹²² If so, the creditor must protect and preserve the property before the sale and must sell it in a commercially reasonable way.¹²³

1. Auction — public sale

Many creditors selling collateral do so in an auction. The bidding must be open to anyone.¹²⁴ This includes the creditor.

2. Private sale

The creditor may sell the property privately, without competitive bidding, but must still make a reasonable effort to get the highest price.¹²⁵ Creditors may buy the property

116 Minn. Stat. §§ 565.25, 565.26.

117 Minn. Stat. § 565.26, subd. 1(a).

118 Minn. Stat. § 565.26, subd. 2.

119 Minn. Stat. §§ 336.9-610, 336.9-620, 336.9-621, 336.9-624.

120 Minn. Stat. §§ 336.9-608, 325G.22.

121 Minn. Stat. §§ 336.9-620, 336.9-621.

122 Minn. Stat. §§ 336.9-207, 336.9-601, 336.9-610, 336.9-611, 336.9-615.

123 Minn. Stat. § 336.9-610(b).

124 Minn. Stat. §§ 336.9-610(c)(1), 336.9-613(1)(E). According to the Revised Article 9 Official Comments, "a 'public disposition' is one at which the price is determined after the public has had a meaningful opportunity for competitive bidding." Rev. § 9-610, Official Comment 7.

125 Minn. Stat. § 336.9-610(c)(2).

themselves if the collateral is customarily sold in a recognized market or is subject to widely distributed price quotations.¹²⁶

3. Notice to the debtor and other secured creditors

The creditor generally must send the debtor and any secured creditor that has a financing statement on file a notice explaining the time and place of any auction.¹²⁷ If the creditor uses a private sale, the notice must include the date after which the property will be sold.¹²⁸ For non-consumer transactions, notice must be sent ten calendar days or more before the sale so the debtor can pay the debt, find a friendly buyer, or bid on the property.¹²⁹

4. Commercially reasonable sales

A sale or lease of the collateral—whether through an auction or a private sale—must be commercially reasonable in every aspect, including the method, manner, time, place, and terms of the sale.¹³⁰

a. Burden of proof is on the creditor

It is up to the creditor to prove, if challenged, that the sale was done in accordance with Minnesota law, thereby creating a presumption that the sale was commercially reasonable.¹³¹ If the creditor fails to do this—for example, because it did not give proper notice to the debtor—a court will assume that the sale would have brought at least as much as the debtor owes.¹³² If the creditor fails to overcome this assumption in court, the creditor loses the chance for a deficiency judgment and may owe the debtor damages.¹³³

126 Minn. Stat. § 336.9-610(c)(2). A “recognized market” is defined in the Revised Article 9 Official Comments as “one in which the items sold are fungible and prices are not subject to individual negotiation. For example, the New York Stock Exchange is a recognized market. A market in which prices are individually negotiated or the items are not fungible is not a recognized market, even if the items are the subject of widely disseminated price guides or are disposed of through dealer auctions.” Rev. § 9-610, Official Comment 9.

127 Minn. Stat. §§ 336.9-611, 336.9-613; *Chemlease Worldwide, Inc. v. Brace, Inc.*, 338 N.W.2d 428 (Minn. 1983). Debtors signing a default statement waiving this right will not get a notice. Minn. Stat. § 336.9-624(a). There may be no notice if the property is perishable, may lose value quickly, or is customarily sold on a recognized market. Minn. Stat. § 336.9-611(d).

128 Minn. Stat. §§ 336.9-611, 336.9-613.

129 Minn. Stat. §§ 336.9-612(b), 336.9-627.

130 Minn. Stat. § 336.9-610(b). The right to a commercially reasonable sale may not be waived by the debtor. Minn. Stat. § 336.9-602(7). Under Revised Article 9, parties may determine by agreement how the commercially reasonable standards are to be measured, and this agreement will be upheld if the standards are not manifestly unreasonable. Minn. Stat. § 336.9-603(a).

131 *Chemlease Worldwide, Inc. v. Brace*, 338 N.W.2d 428 (Minn. 1983); *Ford Motor Credit Co. v. Hertzberg*, 511 N.W.2d 25 (Minn. Ct. App. 1994); *Karlstad State Bank v. Fritsche*, 374 N.W.2d 177 (Minn. Ct. App. 1985).

132 *Chemlease Worldwide, Inc. v. Brace*, 338 N.W.2d 428 (Minn. 1983).

133 Minn. Stat. §§ 336.9-625, 336.9-627; *Total Equip. Leasing v. LaRue Inv. Corp.*, 357 N.W.2d 347 (Minn. Ct. App. 1984). The debtor’s right to damages may not be waived. Minn. Stat. § 336.9-602(13). Somewhat different rules apply for consumer goods.

b. Low price does not always make the sale unreasonable

The fact that the collateral could have brought a better price with a different sale method, or with a sale at a different time, does not necessarily mean that the sale is commercially unreasonable.¹³⁴

c. If there is a recognized market for the property

If a recognized market exists for the collateral—for example, corn has a recognized market—and the creditor sells the property in the usual manner in that market or sells the property somewhere else for the same price that the property would have brought in that market, the price aspect of the sale is commercially reasonable.¹³⁵

d. If there is no recognized market for the property

If there is not a recognized market for the collateral, the creditor must sell the property using the reasonable commercial practices that dealers of that type of property use.¹³⁶

5. Proceeds from the sale of the property — surplus and deficiency

Proceeds from the sale of the property go first to the reasonable expenses of taking possession of the property and selling or leasing it.¹³⁷ This may include reasonable attorneys' fees and legal expenses if they are provided for in the security agreement.¹³⁸ The rest of the proceeds go to pay the debt owed to the creditor who took the property, and then, upon a written demand by other creditors, any excess is paid to other creditors who had a security interest in the property.¹³⁹ The debtor gets any remaining money.¹⁴⁰

If the proceeds do not cover the amount the debtor owes the creditor, the creditor may try to get the balance from the debtor through a deficiency judgment.¹⁴¹ To get a deficiency, the creditor has the burden of proof to show that the sale of the collateral was commercially reasonable.¹⁴²

134 Minn. Stat. § 336.9-627(a); *Fedders Corp. v. Taylor*, 473 F. Supp. 961 (D. Minn. 1979); *Citizen's Nat'l Bank of Willmar v. Taylor*, 368 N.W.2d 913 (Minn. 1985).

135 Minn. Stat. § 336.9-627(b).

136 Minn. Stat. § 336.9-627(b)(3); *Piper Acceptance Corp. v. Yarbrough*, 702 F.2d 733 (8th Cir. 1983). The Supreme Court of North Dakota concluded that there is not a recognized market for either livestock or farm machinery. *State Bank of Tomner v. Hausen*, 302 N.W.2d 760 (N.D. 1981).

137 Minn. Stat. §§ 336.9-608, 336.9-615.

138 Minn. Stat. § 336.9-615(a)(1).

139 Minn. Stat. § 336.9-615(a)(3).

140 The right to a surplus may not be waived. Minn. Stat. § 336.9-608(a).

141 Minn. Stat. § 336.9-608; *Fedders Corp. v. Taylor*, 473 F. Supp. 961 (D. Minn. 1979).

142 Minn. Stat. §§ 336.9-608(a)(3), 336.9-627.

B. Creditor decides to keep the property

A creditor sometimes decides to keep collateral in satisfaction of all or part of the debt.¹⁴³ Prior to doing so, the creditor must send a notice to the debtor explaining this decision.¹⁴⁴ Additional notices must be sent to guarantors who are liable for any of the debtor's debt and any other secured creditor who has filed a financing statement.¹⁴⁵ The debtor may object—and force the creditor to dispose of the property—by sending a written notice to the creditor within 20 calendar days after the creditor mailed the debtor's notice.¹⁴⁶ Guarantors and other secured parties also must object within 20 calendar days after the creditor mailed a notice to those parties.¹⁴⁷ Creditors receiving a debtor's objection must then dispose of the property using commercially reasonable means, as described above.¹⁴⁸ If the debtor does not object, the creditor can keep the property.

Under Revised Article 9, secured creditors keeping collateral may seek a deficiency judgment against the debtor if the debtor receives from the creditor a written proposal that the creditor will accept the collateral in partial satisfaction of the debt, and then the debtor consents to the proposed partial satisfaction.¹⁴⁹ Guarantors and other secured creditors who have filed financing statements must also consent to the creditor keeping the collateral as partial satisfaction of the debt.¹⁵⁰

VII. Debtor redemption rights

Debtors have the right to get their property back from a secured creditor by redemption up until the time when the creditor disposes of the property, has contracted to dispose of it, or has gained the right to keep the property by sending the debtor the proper notice described above.¹⁵¹ Debtor redemption rights may only be waived in writing and may not be waived until after the default.¹⁵²

143 Minn. Stat. §§ 336.9-620, 336.9-622. Revised Article 9 allows for partial satisfaction of the debt, while prior Minnesota law provided that the creditor could propose to keep the collateral only for full satisfaction of the debt. Debtor rights related to a creditor keeping collateral in satisfaction of the debt may not be waived. Minn. Stat. § 336.9-602(10). Different rules apply if the property is a consumer good. See Minn. Stat. §§ 336.9-620(g), 325G.21, 325G.22.

144 Minn. Stat. §§ 336.9-620, 336.9-102(66). A proposal to a debtor need not take any particular form, as long as it sets out the terms under which the secured party is willing to accept collateral in satisfaction of the debt. Rev. § 9-620, Official Comment 4.

145 Minn. Stat. § 336.9-621(a).

146 Minn. Stat. § 336.9-620(c)(2)(C).

147 Minn. Stat. § 336.9-620(d)(1). Other parties who were not entitled to receive notification must object within 20 days after the last notification was sent to guarantors and other secured parties or if notification was not sent before the debtor consents to the acceptance. Minn. Stat. § 336.9-620(d)(2); Rev. § 9-620, Official Comment 8.

148 Minn. Stat. §§ 336.9-620, 336.9-610, 336.9-627.

149 Minn. Stat. § 336.9-620(c).

150 Minn. Stat. § 336.9-621(b).

151 Minn. Stat. § 336.9-623.

152 Minn. Stat. § 336.9-624(c).

To redeem property, debtors pay the creditor: (1) the amount owed on the debt; (2) the creditor's expenses for seizing and storing the collateral; and (3) if the security agreement provides for them, the creditor's attorneys' fees and legal expenses.¹⁵³

VIII. Getting new credit

Once much of a farmer's property serves as collateral, it can be harder to get operating credit.¹⁵⁴ The key in the mind of potential creditors is priority. Unsecured creditors know that under the UCC priority rules, a secured creditor will generally be paid first if the debtor defaults. This section discusses some ways that debtors can help new creditors jump ahead in the line of priority. Three possible methods are to: (1) seek a subordination from a present creditor, (2) use the UCC priority rules that favor some new creditors, or (3) use statutory liens—such as landlords' liens—that can automatically place a new creditor in a high priority. There are advantages, disadvantages, and technical rules about using these devices. The following discussion explains some of the basics.

Getting new credit

In order to get new credit, farmers with existing security agreements may try using:

1. Subordination agreements.
2. UCC creditor priority rules.
 - a. Purchase-money security interests.
 - b. Purchase-money security interests for livestock purchases.
 - c. Standard UCC security interests.
3. Statutory liens.

A. Subordination agreements

In a subordination agreement, a current creditor voluntarily allows another creditor to move ahead in priority. Since subordination agreements are voluntary, debtors often need to convince creditors that it is in the best interests of everyone involved to grant the subordination. For example, a bank with a first priority claim on a crop might be willing to subordinate its interest to an input supplier, especially if the new loan amount is relatively small and the input is essential to getting the crop in. Subordination agreements should always be in writing. If the creditor is FSA, in many cases the debtor will be entitled to a subordination if certain conditions are met.¹⁵⁵

153 Minn. Stat. § 336.9-623(b)(2).

154 The Minnesota Attorney General's Office has a publication entitled *The Credit Handbook*, which discusses how to use credit. The handbook is available by calling the Minnesota Attorney General's Office at 1-800-657-3787 or on the Internet at <http://www.ag.state.mn.us/consumer/finance/CreditHnbk/>.

155 7 C.F.R. § 1965.12 (2003); 7 C.F.R. § 1962.30. (2003).

B. UCC creditor priority rules

The UCC creditor priority rules that cause problems for debtors seeking new credit can themselves be useful for debtors seeking new credit. Usually, priority among creditors is based on timing: the first creditor to gain a security interest in the collateral and to properly file the documents gets first priority in the collateral.¹⁵⁶ UCC rules can sometimes be used to move creditors up the priority list and help get farmers new credit. These include: purchase-money security interests, agricultural input liens, and standard security agreements.

1. Purchase-money security interests

A purchase-money credit arrangement exists when a creditor loans a debtor money to purchase personal property and that personal property is used as collateral for repayment of the loan.¹⁵⁷ A security interest held by a purchase-money creditor is a purchase-money interest, which gives the creditor first priority in the acquired personal property, even if other creditors have already filed valid financing statements giving them an interest in the debtor's property.¹⁵⁸ For example, even if a bank has a valid security agreement that claims all of your machinery as collateral, including machinery acquired in the future, if the machinery dealer sells you a new tractor on credit, the dealer can usually get the top priority claim in that particular tractor.

Revised Article 9 includes language that is intended to preserve the priority status of purchase-money security interests for non-consumer transactions even if the debt is refinanced or cross-collateralized.¹⁵⁹ In case of refinancing, however, the priority status only applies to the amount that is carried over from the original purchase-money arrangement.¹⁶⁰ The comments to Revised Article 9 provide an example of this involving a \$10,000 loan secured by a purchase-money security interest. Imagine that the original creditor agrees to refinance the loan and advance the debtor an additional \$2,000 secured by the same collateral. In this situation, the creditor will keep its purchase-money priority status, but only up to \$10,000—the amount of its original purchase-money interest.¹⁶¹ The clearer language under Revised Article 9 establishing priority for purchase-money security interests that survives refinancing may mean that creditors will be more willing to provide purchase-money credit.

2. Purchase money security interests for livestock purchases

Revised Article 9 creates a new priority rule for purchase-money security interests in livestock that is similar to the general purchase-money priority rule described above.¹⁶² A creditor's security interest in livestock will be considered a purchase-money security

156 Minn. Stat. § 336.9-322.

157 Minn. Stat. § 336.9-103. For an overview of recent changes in purchase money security interests, see Keith G. Meyer, *A Primer on Purchase Money Security Interests Under Revised Article 9 of the Uniform Commercial Code*, 50 KAN. L. REV. 143 (Nov. 2001).

158 Minn. Stat. § 336.9-324(a).

159 Minn. Stat. § 336.9-103(f).

160 Minn. Stat. § 336.9-103(e).

161 Rev. § 9-103, Official Comment 7(a).

162 Minn. Stat. § 336.9-324(d).

interest when: (1) the creditor provides financing for the livestock purchase and files a financing statement identifying the livestock as collateral before the debtor receives possession of the livestock, (2) the creditor sends written notice of its interest to the debtor's other creditors who claim an interest in the livestock, (3) the notice is received by the other creditors within six months before the debtor receives possession of the livestock, and (4) the notice states that the creditor sending the notice expects to acquire a purchase-money security interest in the debtor's livestock and then describes the livestock.¹⁶³

If the creditor satisfies these requirements, its purchase-money security interest in livestock will have priority over any other security interests in the same livestock and also over any security interests in proceeds from the livestock.¹⁶⁴ By providing for purchase-money security interests in livestock, Revised Article 9 gives creditors who finance livestock purchases priority over all other secured creditors who claim an interest in the livestock. If the debtor defaults on the debt, the purchase-money creditor should be the first to be paid.¹⁶⁵

3. Creditors can take a standard UCC security interest

Unsecured creditors can usually take a standard UCC security interest in the debtor's crops or other property.¹⁶⁶ That turns them into secured creditors. Creditors need to get a security agreement signed and file the proper papers. The advantage for the creditor is that it gives the creditor a higher priority than all unsecured creditors and later secured creditors. This strategy most likely makes sense if a fairly large sum of money will be owed—for example, rental payments to a landlord.

C. Statutory liens

Statutory liens can help farmers get credit because they allow the farmer to give a high priority to creditors who could not otherwise get a high priority. Sometimes this higher priority can convince someone to provide services, inputs, or rental land even though many of the farmer's assets and future crops are tied up as collateral. Examples of statutory liens in Minnesota include landlords' liens, mechanics' liens, and emergency veterinarians' liens.

1. Introduction

In general, statutory liens give the creditor a higher priority in two ways. First, the lien places the creditor ahead of any other unsecured creditors. Second, the lien puts the creditor ahead of secured creditors who have not yet legally finalized—the legal term is “perfected”—their claim on the debtor's property. The statutory lien, in other words, turns an unsecured creditor into a secured creditor. Some statutory liens, such as the landlord's lien, put the new creditor ahead of other already secured creditors as well.¹⁶⁷

163 Minn. Stat. § 9-324(d), (e).

164 Minn. Stat. §§ 336.9-315, 336.9-324(d), 336.9-327. The interest in proceeds would still lose out to a perfected interest in the debtor's deposit accounts.

165 Rev. § 9-324, Official Comment 10.

166 Minn. Stat. § 336.9-102(a)(72)-(73).

167 Minn. Stat. §§ 336.9-322(g), 336.9-317(a), 514.964, subd. 7, 514.966, subd. 8.

a. Possible disadvantages to statutory liens

Although the statutory liens discussed here can help farmers, they also carry some possible disadvantages. First, statutory liens create security interests, and, as the above sections in this chapter explain, creditors with security interests have several possible remedies if the debtor defaults, which are not available to unsecured creditors.¹⁶⁸ Second, it may be the case that other agreements the farmer has signed—possibly including mortgages, contracts for deed, and other security agreements—will go into default if certain statutory liens are filed against the farmer. As always, it is important to read all agreements closely.

b. Filing lien statements or financing statements

Statutory liens are automatic. After a time, however, each expires unless the creditor files a lien statement or, for those liens covered by Revised Article 9, a financing statement.¹⁶⁹ Creditors should therefore make sure to file within the time provided. The requirements for what must be included in a lien statement or financing statement vary somewhat, so farmers who are also creditors—for example landlords—will likely want to get some legal advice about what exactly to include in the statement and where to file. In general, lien statements and financing statements are valid even if they contain some minor mistakes.¹⁷⁰ Creditors should also file lien notices in the Centralized Filing System.¹⁷¹

2. Agricultural liens and Revised Article 9

Certain agricultural liens—such as landlord’s liens, agricultural input liens, breeders’ liens, and emergency veterinarians’ liens—are covered by Revised Article 9.¹⁷² This means these agricultural lienholders must file a financing statement to ensure the lien’s priority against other creditors.¹⁷³ Minnesota had already required persons with agricultural lien claims to file lien statements in order to gain priority against the farmer’s other

168 Minn. Stat. §§ 514.964, subd. 9, 514.966, subd. 10. For certain agricultural liens, the enforcement rules of Revised Article 9 apply.

169 Minn. Stat. §§ 336.9-310(a), 514.964, subd. 5, 514.966, subd. 6.

170 Minn. Stat. §§ 336.9-506, 514.08, subd. 1(1), 514.74; *Bierlein v. Gagnon*, 96 N.W.2d 573 (Minn. 1959); *Standard Lumber Co. v. Alasker*, 289 N.W. 827 (Minn. 1940); *S.H. Bowman Lumber Co. v. Pierso*, 180 N.W. 106 (Minn. 1920). Most liens should be filed according to Minn. Stat. § 336.9-501. Mechanics’ liens should usually be filed with the county recorder where the real estate is located. If the property is registered (sometimes known as Torrens property), filing should be with the registrar of titles. Minn. Stat. §§ 514.08, subd. 1, 514.12, subd. 1; *David Thomas Companies v. Voss*, 517 N.W.2d 341 (Minn. Ct. App. 1994).

171 Minn. Stat. §§ 336A.03, 336A.04, 336A.05.

172 Minn. Stat. §§ 336.9-102(a)(5), 336.9-109(a)(2).

173 Minn. Stat. § 336.9-310(a).

creditors. However, the inclusion of agricultural liens within Revised Article 9 will bring changes in the rules governing those liens.¹⁷⁴ Minnesota's state-specific agricultural lien statutes will still control what types of agricultural liens can be obtained and which agricultural liens will have special priority, but Revised Article 9 will generally control the lien filing requirements.¹⁷⁵ For example, to have priority over secured creditors and other lienholders, a landlord in Minnesota must now file a UCC-1 financing statement in the Secretary of State's Centralized Filing System.¹⁷⁶

The inclusion of agricultural liens under Revised Article 9 may create two possible areas of confusion that can affect creditors' willingness to extend credit to farmers. The first area of uncertainty may arise if there are inconsistencies between Revised Article 9 and the state agricultural lien statutes establishing lien priority and filing requirements. If these inconsistencies exist, creditors may feel uncertain how to ensure their priority interest in farm collateral and may be less willing to extend credit. Such inconsistencies in Minnesota law were addressed by legislation enacted during the 2001 session intended to provide a more simplified and consolidated agricultural lien priority structure and requiring agricultural lienholders to comply with Revised Article 9 filing, enforcement, and transition procedures.¹⁷⁷

The second area of uncertainty may arise if input providers or landlords do not know how to comply with Revised Article 9's filing or enforcement rules. These creditors may be unwilling to continue to use a lien as assurance of repayment. For example, input providers or landlords who do not change their practices to reflect the requirements of Revised Article 9 may mistakenly think that their lien priority is secure even though they have not met the filing requirements, may not understand how to protect their interests against other creditors, or may fail to provide a termination statement when the farmer makes full payment for the service or input.

Farmers who want to ensure that their lienholders continue to have priority claims to their collateral may want to consider alerting their landlords and farm input providers that their ability to obtain payment priority may be altered because of Revised Article 9. This can be a difficult topic to raise, especially when the farmer is a relative or neighbor

174 For an overview of agricultural liens and Revised Article 9 issues, see, generally, Susan A. Schneider, *Statutory Agricultural Liens Under Revised Article 9 of the Uniform Commercial Code*, NATIONAL AGLAW CENTER (Mar. 2002), available at <http://www.nationalaglawcenter.org/publications/articles/schneider.pdf>; Donald W. Baker, *Some Thoughts on Agricultural Liens Under the New U.C.C. Article 9*, 51 ALA. L. REV. 1417 (2000); Scott J. Burnham, *Agricultural Liens Under Revised Article 9*, 63 MONT. L. REV. 91 (2002); Jo. M. Pasqualucci, *Revised Article 9 in South Dakota With Emphasis on Newly Included Agricultural Liens*, 46 S.D. L. REV. 449 (2000); and John Mark Stephens, *Boon or Boondoggle? Proposed Article 9 Revisions Incorporate Statutory Agricultural Liens for Better, Not Worse*, 30 TEX. TECH. L. REV. 1199 (1999).

175 Minn. Stat. §§ 336.9-322, 336.9-334.

176 Minn. Stat. §§ 514.964, subd. 5, 514.966, subd. 6.

177 2001 Minn. Laws ch. 57 (H.F. 285) (codified at Minn. Stat. §§ 514.963, 514.964, 514.965, 514.966). Phillip L. Kunkel and Scott T. Larison, *Agricultural Liens in Minnesota*, UNIVERSITY OF MINNESOTA EXTENSION (Oct. 2001) available at <http://www.extension.umn.edu/distribution/businessmanagement/DF7682.html>.

of the landlord or input provider. If financial problems arise, however, and the farmer cannot pay all incurred debts, these same relatives and neighbors face being near the end of the line to receive payments instead of near the top if they do not comply with new filing requirements. Lienholders can fix this potential problem through the simple filing of a financing statement in the designated government office.

3. Landlord's lien

Among the most important statutory liens for farmers is the landlord's lien. By properly filing such a lien, the landlord can take a top priority claim over secured creditors in crops grown on rented land.¹⁷⁸ The lien is for the amount of unpaid rent.¹⁷⁹ The lien covers crops produced on the leased land during the crop year as well as their products and proceeds.¹⁸⁰ The landlord must file a financing statement within 30 days after the crops begin growing.¹⁸¹

Landlords can also take a standard UCC security interest in crops as collateral for rental payments.¹⁸² Although there can be advantages for the landlord in filing a standard UCC financing statement, the statutory landlord's lien usually gives the landlord a higher priority.¹⁸³ Some landlords will want to do both.

4. Harvester's lien

A person who owns or is hired to operate machinery used in harvesting crops gets a lien against the harvested crops for the value of the service provided.¹⁸⁴ To preserve the lien, the creditor must file a financing statement within 15 calendar days of finishing the work.¹⁸⁵ The lien has priority over other liens, except a perfected crop input lien for the reasonable cost of the seed from that crop and a perfected landlord's lien in the same crop.¹⁸⁶ If more than one harvester's lien exists, the conflicting harvester's liens rank equally in proportion to the value of the service provided.¹⁸⁷

178 Minn. Stat. §§ 514.964, subd. 7(a), 336.9-334(i).

179 Minn. Stat. § 514.964, subd. 1.

180 Minn. Stat. § 514.964, subd. 4.

181 Minn. Stat. § 514.964, subd. 5(b). The financing statement should be filed in the same manner as a UCC security interest is filed.

182 The landlord should file a standard security agreement, financing statement, and an effective financing statement, which should include a description of the land and the crop years. Minn. Stat. §§ 336.9-203, 336.9-502, 336.9-504.

183 Unlike a statutory lien, the UCC security interest may be filed at any time and can claim other property as collateral.

184 Minn. Stat. § 514.964, subd. 2. This can include harvesting, grain drying, baling, and other tasks. Minn. Stat. § 514.964, subd. 2(a).

185 Minn. Stat. § 514.964, subd. 5(c).

186 Minn. Stat. § 514.964, subd. 7(b).

187 Minn. Stat. § 514.964, subd. 7(c).

5. Crop production input lien

Suppliers of crop production inputs get a lien against the crops they helped produce.¹⁸⁸ Crop inputs include not only seed and fertilizers but also fuel and customized labor. The amount of the lien is the unpaid retail cost of the crop production input provided.¹⁸⁹ To preserve the lien, suppliers must file a financing statement within six months after the last input was furnished.¹⁹⁰ A crop production input lien puts the creditor above other unsecured creditors and in some cases may move the creditor ahead of already secured creditors.¹⁹¹

6. Veterinarian's lien

A veterinarian who provides emergency services gets a lien on the animals for the value of the services provided.¹⁹² To preserve the lien, the veterinarian must file a financing statement within 180 calendar days after the service was provided.¹⁹³ Upon filing, the veterinarian will have a perfected veterinarian's lien that will have priority over all secured creditors' and agricultural lienholders' claims in the same animals.¹⁹⁴ If more than one veterinarian's lien is filed, priority is determined by the order of filing.¹⁹⁵

7. Feeder's lien

A person who stores, cares for, or contributes to the keeping, feeding, pasturing, or other care of animals at the request of the animals' owner has a lien upon the livestock for the

188 Minn. Stat. § 514.964, subd. 3. Crop production inputs are defined broadly. Minn. Stat. § 514.963, subd. 5. Crop production inputs include agricultural chemicals, seeds, petroleum products, the custom application of agricultural chemicals and planting of seeds, and labor used in preparing the land for planting, cultivating, growing, producing, harvesting, drying, and storing crops or crop products.

189 Minn. Stat. § 514.964, subd. 3(a).

190 Minn. Stat. § 514.964, subd. 5(d).

191 Minn. Stat. § 514.964, subd. 3. Suppliers have the option of sending to the other secured creditors a lien notification statement explaining that the supplier has a crop input lien. The other creditors may either let the supplier keep the lien or instead promise to pay the supplier directly. Creditors ignoring the notice lose priority to the supplier. Minn. Stat. § 514.964, subd. 3(f). In *Tracy State Bank v. Tracy-Garvin Coop.*, 573 N.W.2d 393 (Minn. Ct. App. 1998), a creditor with a prior perfected security interest in farmer's property that failed to respond to a grain cooperative's lien notification statement regarding an agricultural production input lien (now a crop production lien) lost priority for the amount of the lien listed in the letter.

192 Minn. Stat. § 514.966, subd. 1. "Emergency veterinary services" include surgical procedures; administering vaccines, antisera, antibiotics, and other veterinary services that protect human health; preventing the spread of animal disease; or preserving animals' health. Minn. Stat. 514.965, subd. 4.

193 Minn. Stat. § 514.966, subd. 6(a)-(b).

194 Minn. Stat. § 514.966, subd. 8(a). The emergency veterinarian's lien does not alter veterinarians' rights of detainer, lien, and sale of animals under Minn. Stat. §§ 514.18 to 514.22. Minn. Stat. § 514.94.

195 Minn. Stat. § 514.966, subd. 8(b).

value of the storage, care or contribution, and any legal charges against the animals.¹⁹⁶ To preserve the lien, the owner must file a financing statement within 60 calendar days after the last date that feeding services were provided.¹⁹⁷ A feeder's lien will have priority over secured creditors' and agricultural lienholders' claims in the same animals except a perfected veterinarian's lien.¹⁹⁸ If more than one feeder's lien is filed, priority is determined by the order of filing.¹⁹⁹

8. Breeder's lien

The owner of livestock used for breeding services or any provider of materials used in artificial insemination has a lien upon the livestock bred and any resulting offspring for the value of the services provided.²⁰⁰ To preserve the lien, the owner must file a financing statement within six months after the last date that breeding services were provided.²⁰¹ A breeder's lien will have priority over secured creditors' and agricultural lienholders' claims in the same animals except a perfected veterinarian's lien and a perfected feeder's lien in the same animals and their products and proceeds.²⁰²

9. Livestock production input lien

Suppliers of livestock production inputs get a lien against the livestock they helped produce.²⁰³ Livestock inputs include feed and labor used in raising the animals.²⁰⁴ The amount of the lien is the unpaid retail cost of the inputs provided.²⁰⁵ To preserve the lien, suppliers must file financing statements within six months after the last input was furnished.²⁰⁶ A livestock production input lien puts the creditor above other unsecured creditors and later secured creditors and in some cases may move the creditor ahead of already secured creditors.²⁰⁷

196 Minn. Stat. § 514.966, subd. 4. The livestock shoeing lien is now incorporated into the feeder's lien. Minn. Stat. § 514.966, subd. 4(a). If the feeding of livestock is done under contract, the person may also get an agricultural producer's lien which gives a lien for the contract price of the agricultural commodity. Minn. Stat. § 514.945. Agricultural producers' liens are not covered by Revised Article 9, though Revised Article 9 enforcement rules are used. Minn. Stat. § 514.945, subd. 6.

197 Minn. Stat. § 514.966, subd. 6(e).

198 Minn. Stat. § 514.966, subd. 8(c).

199 Minn. Stat. § 514.966, subd. 8(d).

200 Minn. Stat. § 514.966, subd. 2.

201 Minn. Stat. § 514.966, subd. 6(c).

202 Minn. Stat. § 514.966, subd. 7(e).

203 Minn. Stat. § 514.966, subd. 3.

204 Minn. Stat. § 514.965, subd. 8.

205 Minn. Stat. § 514.966, subd. 3(a).

206 Minn. Stat. § 514.966, subd. 6(d).

207 Minn. Stat. § 514.966, subd. 3. Suppliers have the option of sending the secured creditors a lien notification statement explaining that the supplier has a livestock input lien. The other creditors may either let the supplier keep the lien or instead promise to pay the supplier directly. Creditors ignoring the notice lose priority to the supplier. Minn. Stat. § 514.966, subd. 3(f). In *Underwood Grain Co. v. Harthun*, 563 N.W.2d 278 (Minn. Ct. App. 1997), a creditor with a prior perfected security interest in cattle retained priority over the grain company's agricultural production lien (now a livestock production lien) after the creditor refused to issue a letter of commitment.

10. Mechanics' liens — real estate

Mechanics' liens are designed to ensure that laborers and others who work to improve real estate are paid. Anyone contributing to the improvement of real estate by providing labor, materials, or machinery for building, repairing, or removing buildings, fences, ditches, and wells, for example, gets a mechanic's lien.²⁰⁸ The lien is for the reasonable value of the work done and of the skill, material, and machinery furnished.²⁰⁹ Unlike other statutory liens, a mechanic's lien is a lien against real estate, not personal property (such as equipment).²¹⁰ If the lien is not paid, therefore, it follows the real estate and may make the property difficult to sell. Those claiming a mechanic's lien must file a lien statement against the real estate within 120 days of finishing the work or providing the materials.²¹¹

The mechanic's lien gives the creditor priority over unsecured creditors and in general ahead of secured creditors whose mortgage or other documents are filed after the mechanic's lien creditor began working on the property.²¹²

11. General possessory lien — mechanic's lien for personal property

Creditors who care for, store, repair, make, or haul personal property have an automatic lien on that property for the price or value of the work or material.²¹³ This includes, for example, repair work on machinery. Creditors who have possession of the property may generally keep it until payment is made and, after 90 days of nonpayment, may sell the property to pay the debt.²¹⁴ Creditors losing possession of the property may preserve the lien by filing a lien statement within 60 calendar days of losing possession.²¹⁵

12. Lien for rental value of farm machinery during farmer-lender mediation

A creditor with a security interest in seasonal use machinery may have a special statutory lien if the farmer defaults on the debt and the debt is mediated in farmer-lender

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- 208 Minn. Stat. §§ 514.01 to 514.17; 31 DUNNELL MINN. DIGEST, *Mechanics' Liens* (4th ed. 1996). An "improvement" includes a permanent addition to or betterment of the property that enhances its value and involves spending of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs. *Kloster-Madsen, Inc. v. Tafi's, Inc.*, 226 N.W.2d 603 (Minn. 1975).
- 209 Minn. Stat. § 514.01.
- 210 Minn. Stat. § 514.03, subd. 3.
- 211 Mechanics' liens should usually be filed with the county recorder where the real estate is located. If the property is registered (sometimes known as Torrens property), filing should be with the registrar of titles. Minn. Stat. §§ 514.08, subd. 1, 514.12, subd. 1; *David Thomas Companies v. Voss*, 517 N.W.2d 341 (Minn. Ct. App. 1994). A person who fails to follow the pre-lien notice statutory requirements will not have a valid mechanic's lien. *Niewind v. Carlson*, 628 N.W.2d 649 (Minn. Ct. App. 2001).
- 212 Minn. Stat. § 514.05, subd. 1.
- 213 Minn. Stat. §§ 514.18 to 514.22.
- 214 Minn. Stat. § 514.20. As long as possessory lien creditors possess the property, they have priority over secured creditors. Minn. Stat. § 336.9-333.
- 215 Minn. Stat. § 514.18, subd. 2. This part of the lien does not apply to motor vehicles. Minn. Stat. § 514.18, subd. 4.

mediation.²¹⁶ The lien is for either the total payments needed to bring the debt current until the end of mediation or the reasonable rental value of the machinery that is used for field operation during the mediation, whichever is less.²¹⁷ The lien is on the crops the farmer produced in the calendar year of the mediation.²¹⁸

13. Other statutory liens

Many of the other less well known statutory agricultural liens were incorporated into the consolidated agricultural lien statutes, including the interests of people who shoe animals and the lien for the service of male animals.²¹⁹ Other statutory liens protect the interests of people who work with logs or timber.²²⁰

216 Minn. Stat. § 514.661. The default must be on a purchase money loan or contract. Seasonal use machinery, for the purpose of this lien, means machinery, equipment, or implements used only for planting, row crop cultivating, or harvesting. It does not include tractors, tillage equipment, or utility implements used for general farm purposes.

217 Minn. Stat. § 514.661, subd. 2(a).

218 Minn. Stat. § 514.661, subd. 2(b).

219 2001 Minn. Laws ch. 57 (H.F. 285) (repealing Minn. Stat. §§ 514.23, 514.26, 514.62).

220 Minn. Stat. §§ 514.40 to 514.58.

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