

Ag Lending, Workouts, and Remedies

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- Overview of asset-based lending
 - Creation of a Security Interest or Lien – a security interest secures the performance of an obligation and is generally created and enforceable upon the following condition: (a) value has been given, (b) the debtor has rights in the collateral or the power to transfer rights in the collateral, and (c) with respect to the type of collateral, the debtor has authenticated a security interest that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned. ORS Chapter 79 Secured Transactions at 79.0203 or UCC § 9203. Once created, a security interest is effective according to its terms between the parties, against purchasers of the collateral, and against creditors. UCC § 9201.
 - Perfection - Only an attached security interest can become a perfected security interest (§ 9308). A financing statement must contain (UCC § 9502): (1) the name of the debtor, (2) the name of the secured party (or its representative), and (3) reference to the collateral. The financing statement (UCC § 9310) must either sufficiently describe the collateral (UCC § 9108) *or* indicate that the financing statement “covers all assets or all personal property” (UCC § 9504). In general, the UCC financing statement is filed with the Secretary of State where the debtor is organized (UCC §§ 9310(a) and 9307).
 - Debt – Lending relationships are based on outstanding debt. Make sure debt instruments are proper and consistent.
- Core distribution models – (1) borrower owns product and sells/transfers into the market through agency, consignment, or sales model OR (2) others own products and borrower participates in the market for them – e.g., licensor owns plants and IP while receiving royalties.
- Special rules and laws that apply to ag deals (commercial gap-fillers, federal protections, secret liens, etc.)
 - UCC - comprehensive set of laws governing all commercial transactions involving goods in the US. Not federal law, but uniformly adopted state law. Provisions include (1) implied warranties for goods, (2) creating, perfecting, maintaining, and enforcing security interests, (3) default rules for competing claims/interests (e.g., crop lender vs. landlord), and (4) enforcing remedies.
 - PACA - Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499a et seq - federal statutory trust designed to protect unpaid suppliers of certain perishable agricultural commodities.

- Silent/secret liens - various state statutes (including adopted UCC provisions) provide silent/secret liens or trusts.
 - Examples include: (1) Ag chemical and seed lien, (2) Ag laborer's lien, (3) warehousemen's lien, (4) cold storage lien, (5) dairy cattle liens, (6) carrier's lien, and (7) Ag producers rights against processors.
 - Some liens require perfection through filing and many liens are lost if claimant voluntarily delivers or unjustifiably refuses to deliver goods.
- FSA – Federal law, the Food Security Act of 1985, which preempts/replaces UCC 9320 (preserving security interests in farm products) and allows a buyer in the ordinary course of business purchasing a farm product from a seller engaged in farming operations to take the product free and clear of a security interest, *even if the interest is perfected and the buyer knows of its existence*. In these instances, a creditor's security interest will only follow the farm product purchased if the creditor sufficiently puts the buyer "on notice" of its interest in the farm product. About 34 states (including CA, DE, NY, and TX) require "direct notice" while 16 states (including CO, ID, OR, and UT) operate a "central filing system."
- Packers and Stockyards Act – Applies to persons engaged in the business of marketing livestock, meat, and poultry in interstate or foreign commerce, packers, swine contractors, stockyard owners, market agencies, dealers, and live poultry dealers. Requires all livestock a packer purchases in cash sales and all inventories, receivables or proceeds from meat, etc. be held by such packer in trust for the benefit of all unpaid cash sellers of such livestock until full payment has been received by such unpaid sellers.
- FSMA - FDA's Food Safety Modernization Act requires specific actions be taken at various points to *prevent* foodborne illnesses, including water assessments, food traceability, and foreign supplier verification programs for food importers.
- Borrower reps and warranties addressing core legal landscape and distribution models:
 - UCC - make sure the borrower (1) owns the plants, (2) provides detailed budgets for all phases of production and distribution, (3) has food safety and recall measures in place, (4) has sourced sufficient water and other production needs (fertilizer, chemicals, etc.), (5) properly identifies and maintains collateral (including crop location), (6) details distribution method(s), parties, and contracts, (7) provides landlord waivers or estoppel certificates, (8) has notice and cure rights for key licenses, services, and supplies, (9) robust indemnity provisions, (10) insurance, etc.
 - PACA - A secured lender dealing with a PACA trustee can avoid exchanging credit for an illusory lien on trust assets and being responsible to PACA claimants by both:

- confirming the proposed collateral is *not* trust property – i.e.,
 - (i) obtain appropriate waivers, (ii) confirm seller’s payment terms exceed 30 days, (iii) confirm no PACA trust and no PACA trust funds were used when buying the collateral or (iv) after buying the collateral, all suppliers and PACA claimants were paid in full (terminating the trust); and
 - making a sufficiently reasonable inquiry into the borrower’s financial position when extending credit (e.g., borrower’s financial statements, A/R and A/P reports and ledgers, borrowing base certificates, etc.)
- Silent/secret liens - review financials and ask about potential lien/trust beneficiaries, including by category. Pull filing reports (UCC, labor commissioner, etc.)
- FSA - identify any bulk sales or large purchasers of product, search central filing systems (where applicable), and request all UCC or FSA notices.
- Packers and Stockyards Act – (i) obtain appropriate contract waivers, (ii) confirm no trust rights, including the seller’s failure to comply with trust requirements (e.g., give proper notice within 30 days from the last day in which the packer was to make prompt payment or within 15 business days “after the seller has received notice the payment instrument promptly presented for payment has been dishonored”), (iii) confirm all suppliers/sellers entitled to trust protections are paid in full, and (iv) sufficient due diligence into borrower’s financials/operations.
- FSMA - review applicable FSMA rules for borrower’s operations, conduct due diligence, and add appropriate reps.
- Intercreditor and subordination agreements/issues.
 - Distribution issues to be addressed so collateral is effectively liquidated without increased rejections/spoilage.
 - A junior lender (Produce Pay) could not jump ahead of a working capital bank using a PACA trust. *See Produce Pay, Inc. v. Spiech Farms, LLC (In re Spiech Farms, LLC)*, 840 Fed.Appx. 861 (6th Cir. 2021).
 - California law requires all parties to act reasonably in mitigating losses, especially when food is involved. *See, e.g., Henrici v. South Feather Land & Water Co.* (1918) 177 Cal. 442, 449-450 (“the plaintiff could not hold the defendant responsible for the ruin caused by his own act in allowing his trees and vines to go without water for four years, when, as he well knew, he might, at slight cost, have secured the water and reduced his damage to almost nominal proportions”).

- Enforcement strategy, issues, and remedies
 - Enforcement leverage often determined by the parties' relative ability to quickly obtain and sell perishable commodities.
 - Dispute resolution provisions - quick escalations and arbitration required.
 - Foreclose on crops and proceeds – by letter! Provide UCC §§ 9406 and 9607 notices of security interests and liens with demands for accounting and payments. The letter goes to all marketers and distributors of borrower's crops with a copy to the borrower. (If necessary, find warehouses and follow trucks.)
 - Lawsuits over interpleader, conversion, unjust enrichment, tortious interference, etc. Consider indemnity agreements with friendly third parties.
 - Forbearance agreements – great time to confirm obligations, cut off defenses, and obtain additional collateral or add guaranties in exchange for forbearance.
 - TROs and preliminary injunctions
 - Consider CROs or appointment of a receiver or trustee *without* (1) notice, (2) regard to the adequacy of the security for the obligations, and (3) regard to the solvency of the borrower, any guarantor, or any other person liable for any of the obligations.
- Receivers
 - Receivership law in Oregon is codified at Oregon Revised Statutes Chapter 37 – Oregon Receivership Code (“ORC”). Oregon Rules of Civil Procedure 80 (“ORCP”) – Receivers (although ORS 37.040 states that the provisions of the ORC control over conflicting provisions of state law, including ORCP 80).
 - ORS 37.030 defines a receivership as “the process by which a court appoints a person to take charge of property during the pendency of an action or upon a judgment or order entered therein and to manage or dispose of the property as the court may direct.”
 - When can a court appoint a receiver, what property is covered/excluded, and who can be a receiver?
 - The powers, duties, and limitations of a receiver.
 - Special ag considerations within receiverships.

Questions?