The Conundrum Surrounding Crops Liens

With the economy as it is, prices of farm products changing constantly, and farms being foreclosed upon, one would think that the farmers and the lawyers who represent them and their creditors would have plenty of work. It seems that an old issue is once again “cropping” up, however: the priority of crop liens. This article will address the issues with respect to liens on crops, whether crops are real property or personal property, and the effect the UCC has on interpretation of lien priority.

A Security Interest in Property Not Yet Grown

In light of the long growing season, it is commonplace for farmers to finance crops in advance of each planting season through the use of liens against the grown crop. In order to purchase seed, it is essential that farmers grant a security interest in the grown crops in exchange for funding. Banks and lenders are willing to advance funds to purchase seeds and immature crops in exchange for a valid security interest in future crops. Perhaps one reason is that Uniform Commercial Code Article 9, U.C.C. § 9-101, et seq., specifically addresses the issue of crops and lien priority.

Article 9 of the Uniform Commercial Code expressly defines farm products. The definition of farm products includes: “(A) crops grown, growing, or to be grown . . . and . . . (C) supplies used or produced in a farming operation.” U.C.C. § 9-102(a)(34)(A), (C). Thus, the UCC actively considered the change in the “product” as it matures.

These various definitions must be considered in determining the priority of liens with respect to crops during any given point of the growing season. For example, one must consider a seed at time of purchase in a burlap sack; fertilizer at the time it is purchased in order to permit the seed to grow; the fertilizer once it is placed onto the soil and commingled therewith; and the seed placed into the fertilized soil to commence the growing process. At each stage, the priority of liens on the property, the seed, fertilizer, and soil or land may change in classification from real property to personal property and, potentially, back again. In the example above, crops’ seeds certainly can be included within the definition of “crops to be grown.” Likewise, fertilizer, even before it is placed on the ground, is a supply “used or produced in a farming operation.” Thus, both elements fall within the Article 9 definition.

Further, the UCC defines “goods” as “crops grown, growing, or to be grown.” U.C.C. § 9-102(a)(34)(A). Again, both definitions of “farm products” and “goods” apply to seeds that are or may be planted or the seedlings, or both, and ultimately the crops fully grown.
The Security Interest

Like other goods, a bank or financing institution generally requires a security interest prior to granting a loan for crops. The security interest might be tied to real property or personal property. Farmers and their crops, however, present unique lender issues. For example, a farmer could be a tenant on land owned by another. In that case, the security interest will be tied to personal property (the crop or feed), as the real property is owned by another.

In the event that the security interest in farm products is properly perfected under the UCC by the filing of a financing statement with the applicable secretary of state, the holder of the UCC interest has a valid priority interest. Here, the debate begins. At what point in time do seeds and fertilizer become part of real property and when do they retain their unique interest as goods or farm products pursuant to the definitions of the UCC Code? When exactly does fertilizer or seed become “commingled goods” as defined by the UCC? That is, when the security interest is not in the fertilizer as the secured “goods.” The fertilizer comes in bags or barrels such that it is a unique personal property subject to the UCC requirements related to security interests. But consider the lender who has secured and perfected a security interest in the fertilizer itself. The fertilizer is not a crop, but rather is a means in which to assist a crop in growing. In bags or barrels, it is a unique personal property subject to the UCC requirements related to security interests. But consider the lender who has secured and perfected a security interest in the fertilizer itself.

But fertilizer is an item that can be commingled readily with real property, the soil, or the land on which it is placed prior to planting seeds, such that it cannot of its own right be distinguishable from the soil. It will not become “a crop grown, growing, or to be grown,” due to its commingled status with the soil.

Under the UCC, a security interest does not exist in commingled goods. But, a security interest could attach to the crop that grows from the commingled fertilizer and soil. The UCC specifically provides that if a security interest in collateral is perfected before the collateral becomes commingled goods, the security interest in the product resulting from the commingling is perfected. U.C.C. § 9-315. Arguably, one can distinguish between the commingling of the seed with the fertilizer versus the commingling of the fertilizer and the real property soil. Theoretically, this becomes a “chicken and egg” analysis with respect to the fertilizer. Does the security interest in the fertilizer continue to exist because it was perfected before the fertilizer becomes a “commingled good” or does its status change when it becomes a part of the real property to which no security interest can attach? Before placing a lien or using defined goods as security, one must contemplate whether: 1) the security interest attaching to the fertilizer is personal property (because the fertilizer is commingled with the seed), and thus the crops become the secured interest for the fertilizer; or 2) the commingling of the
fertilizer with the soil, prior to the introduction of the seed, creates a commingling with the soil, thereby ultimately eliminating the security interest in personal property as it becomes part of the real property.

**Illinois Case Law**

These issues were addressed by the Illinois Appellate Court Second District in *First State Bank of Maple Park v. DeKalb Bank*, 175 Ill. App. 3d 812 (2d Dist. 1988). In that case, two banks filed liens against certain property, including the crops on that property, and both asserted a priority lien when the borrower defaulted on the notes. *First State Bank of Maple Park*, 175 Ill. App. 3d at 813. The Second District contemplated the UCC in conjunction with Illinois statute, throwing yet another analysis into the “field.” In one instance, DeKalb Bank held a landlord’s lien under a distressed warrant. The plaintiff, First State Bank of Maple Park, held a UCC Article 9 security interest in the same property. *Id.* at 813-14. At issue were two separate statutes. First, Section 9-301 of the Code of Civil Procedure states:

In all cases of distress for rent, the landlord, by himself or herself . . . may seize for rent any personal property of his or her tenant that may be found in the county where such tenant resides, and in no case shall the property of any other person, although the same may be found on the premises, be liable for seizure for rent due from such tenant.

735 ILCS 5/9-301.

Next, Section 9-316 of the Code of Civil Procedure states: “Every landlord shall have a lien upon crops grown or growing upon the demised premises for the rent thereof . . . and also for the faithful performance of the lease.” 735 ILCS 5/9-316. Early case law suggests that a landlord’s lien on crops, due to its specificity, is separate from the landlord’s lien on other personal property. A lien on crops pursuant to Section 9-316 does not extend to other personal property as set forth in Section 9-301. A crop lien, as explained above, is a paramount lien that arises by operation of statute and does not depend upon the judgment of any court or the employment of any means for its employment. See *Lillard v. Noble*, 159 Ill. 311, 317 (1896). A landlord’s lien on crops attaches from the time of the commencement of their growth. *Watt v. Scofield*, 76 Ill. 261 (1875).

The *Bank of Maple Park* court then expressly addressed the priority of UCC crop liens and statutory crop liens, when it analyzed whether, in view of Section 9-104 of the UCC, U.C.C. § 9-104, conflicts between landlord’s liens and Article 9 security interests are governed by the priority rules of Article 9. The court recognized a “split of authority in Illinois on this question.” *First State Bank of Maple Park*, 175 Ill. App. 3d at 816. The court also cited to *Peterson v. Ziegler*, 39 Ill. App. 3d 379, 385 (5th Dist. 1976), where the Illinois Appellate Court Fifth District stated:

The purpose of section 9-104(b), however, is only to indicate that article nine does not govern the creation of a landlord’s lien or the priorities between competing landlords’ liens. In order for article nine to be the comprehensive statute that it was meant to be on the subject of consensual security interests, article ninie must always supply a rule for determining the priorities between a consensual security interest and any other kind of lien.

*Peterson*, 39 Ill. App. 3d at 385, quoted in *First State Bank of Maple Park*, 175 Ill. App. 3d at 816.

The Second District in *Bank of Maple Park* also recognized that the Illinois Appellate Court Fourth District in *Dwyer v. Cooksville Grain Co.*, 117 Ill. App. 3d 1001 (1983), specifically rejected the holding in *Peterson*, stating that “[t]he language of 9-104(b) and 9-102(2) is crystal clear—no part of article 9, including the priority rules, apply to a landlord’s statutory lien.” *Dwyer*, 117 Ill. App. 3d at 1005, quoted in *First State Bank of Maple Park*, 175 Ill.App.3d at 816-17. The Second District further stated, “Applying non-UCC
principles, generally a lien which is first in time has priority [citation omitted] and is entitled to prior satisfaction out of the property it binds.” *First State Bank of Maple Park*, 175 Ill. App. 3d at 817 (citing *Home Fed. Savs. & Loan Ass'n v. Cook*, 170 Ill. App. 3d 720 (5th Dist. 1988), and 51 Am. Jur. 2d Liens § 52 (1970)).

The *Bank of Maple Park* court, in analyzing the distinction between Section 9-104(b) of the UCC and the statutory landlord’s lien, recognized that the UCC merely governs the applicability of the UCC to landlord liens. It does not, by its language, suggest that, under whatever priority rule is applied in disputes between a landlord’s lien and an Article 9 security interest, distinctions between types of landlord’s liens are to be ignored. Thus, the *Bank of Maple Park* court held that the UCC does not eliminate distinctions between the landlord’s crop lien and the lien under a distress warrant as to other personal property.

**Conclusion**

In a nutshell, liens on crops continue to create quite the conundrum when a priority dispute arises. To best protect oneself or one’s client, one must not only use due diligence at the onset but also consider both the “first in time, first in rights” analysis and any statutes that affect crops whether grown, growing, or to be grown. Then, one should be sure to consider whether the subject of the lien is to be commingled with real property. If so, the final consideration is where the security interest in the collateral was perfected before the collateral becomes commingled goods and where there is a perfected security interest in the product resulting from the commingling.

---

**From the Author**

With some sadness, I offer my final Property Insurance column (hopefully) for your reading enjoyment. After well over 10 years of authoring this column, it is time to allow a new author the privilege of taking over this great endeavor. I will be moving on to other duties on the IDC Board of Directors and look forward to enjoying Catherine Cooke’s perspective as the new author of the Property Insurance column for years to come. Many thanks to all of the editors who over the years who have worked so diligently to ensure that the *IDC Quarterly* remains one of the best legal publications in Illinois.

—Tracy E. Stevenson

**About the Author**

Tracy E. Stevenson is a partner in the Chicago firm of Robbins, Salomon & Patt, Ltd., where she concentrates her practice in medical malpractice defense and insurance defense. She has defended cases on behalf of physicians and hospitals and represented various major insurance companies in claims involving fraud. Ms. Stevenson also represents corporations in litigation matters including TRO’s and shareholder actions. She is licensed in Michigan as well as Illinois and speaks at various seminars around the country.

**About the IDC**

The Illinois Association Defense Trial Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation. For more information on the IDC, visit us on the web at [www.iadtc.org](http://www.iadtc.org).

Statements or expression of opinions in this publication are those of the authors and not necessarily those of the association. *IDC Quarterly*, Volume 23, Number 4. © 2013. Illinois Association of Defense Trial Counsel. All Rights Reserved. Reproduction in whole or in part without permission is prohibited.

Illinois Association of Defense Trial Counsel, PO Box 588, Rochester, IL 62563-0588, 217-498-2649, 800-232-0169, idc@iadtc.org