

# JB BANKING LAW TODAY

## LIEN ON ME

### Understanding the Statutory Liens Granted to Agricultural Service Providers at Harvest Time

Harvest time always creates a unique set of challenges for farmers and their lenders. One of the biggest legal challenges for lenders arises from super priority statutory

commodities it hauled that is superior to the bank's lien. If it fails to perfect within that time frame, it still has a lien, but that lien is subordinate to the bank's lien.

**"ANY PAYMENTS TO UNPERFECTED  
STATUTORY LIEN CREDITORS WILL LIKELY  
RESULT IN A DOLLAR-FOR-DOLLAR  
REDUCTION ON THE AMOUNT A BANK  
WILL RECEIVE IN A LIQUIDATION  
SCENARIO"**

liens granted to agricultural service providers who assist with harvest time activities. Today, a bank may have a first priority lien on agricultural commodities, but tomorrow it could be in second, third or even fourth position due to these statutory liens. Grain elevators, harvesters, commodity haulers and similar service providers are all granted super priority liens that may trump a bank's prior, perfected security interest.

At this point, you might be asking – why do you keep using the word "*may*"? do these statutory liens trump the bank's lien or don't they? The answer is it depends on whether the lien was perfected by filing a UCC Financing Statement within the applicable time period. In the case of harvester liens, perfection must occur within 15 days after the last day that the applicable service was provided.

This means, by way of example, that a trucking company would have 15 days after dropping off the commodities at their destination to file a UCC Financing Statement. If it files within that time period, it has a lien on the

As a consequence, over the period of less than one month the bank's commodity collateral can go from having no competing liens, to having a competing lien that is potentially superior to the bank's interest, to having a competing lien that is inferior to the bank's interest. Plus, all of this can occur with absolutely no direct notice to the bank.

If all of that is not confusing enough, the analysis of when the clock starts running for perfection can often be quite ambiguous as well. If services are being continuously provided over a period of time, it is not always clear when the end date might be. Is it the last date any service is provided on any commodities, or are there multiple different end dates depending on when service was provided to specific portions of the commodities? The answer is not always clear and can be very fact specific.

Finally, complexity can be added based on the fact that the good/service provider debt at issue and the applicable commodity need to "match." In other words, even if a company provides harvest related services and even if they file a UCC Financing Statement within applicable timelines, they cannot use the resulting statutory lien to secure payment of a bill from last year, related to last year's harvest. In that case, they would be trying to claim that they have a lien over 2018 commodities for work performed on 2017 commodities – this is not permissible.

While the area of statutory lien priority can be a bit messy, it is important for bankers to realize that it is not some esoteric legal conundrum; there is practical significance to bankers being knowledgeable in this area.

The first situation where it is important to understand the statutory lien priority rules occurs when grain elevators attempt improper offsets. In these situations, the grain elevator sells the commodity, but rather than remitting the full proceeds back to bank and borrower, the elevator deducts any past due invoices it has with respect to that borrower from the commodity proceeds. If the elevator does this (without filing a UCC Financing Statement to perfect their harvester's lien) it would be converting the proceeds of the bank's commodity collateral. In this situation, the bank could legitimately demand that any offset payments be refunded to bank and borrower.

The other practical situation where it is important to understand statutory lien priority comes up when a bank is evaluating whether it will release the proceeds of

commodity sales to pay harvest time service providers. If the bank knows in advance that it will not be renewing loans/advancing additional funds for crop inputs in 2019, then it needs to understand that any payments to *unperfected* statutory lien creditors will likely result in a dollar-for-dollar reduction on the amount it will receive in a liquidation scenario. Payments to *perfected* statutory lien creditors, on the other hand, would not result in such a reduction in collections because the statutory lienholder would have priority over the bank regardless.

Bottom line, in situations where it is likely that a credit will not be renewed for 2019, the bank has to lock down the proceeds from commodity sales and watch them like a hawk. All offsets should be scrutinized and all payment requests by service providers should be closely evaluated. Any missteps in this area can result in drastic reductions in the total amount eventually collected from the borrower in a liquidation scenario.

-Matthew Bialick, Esq.

## MONTHLY SPOTLIGHT

### Johnson | Bialick Firm Overview



- ❖ 3 full time attorneys – Matthew Bialick, Todd Johnson and Scott Johnson.
- ❖ 2 of-counsel attorneys.
- ❖ Practicing in the areas of banking law, agricultural finance, creditors' remedies, business law and general commercial litigation.
- ❖ Over 150 years of combined legal experience.
- ❖ J|B attorneys have published 3 full length novels and have written multiple, professional country music songs.

### Installment 5 of the Johnson | Bialick Agricultural Webinar Series

#### *“Properly Renewing Agricultural Loans in a Troubled Economy”*

This webinar will discuss best practices for renewing agricultural credits in a troubled economy. Rather than being an esoteric or ivory tower analysis of various types of legalistic boilerplate, this webinar will tackle the big, practical problems common in loan renewals and it will provide concrete advice on how to deal with these problems. After listening to this webinar, you will understand the major sources of risk in loan renewals, the associated harm, and how to structure the loan renewals in a manner that mitigates the potential for that harm.

Registration Link: <https://register.gotowebinar.com/register/6260548134795620867>

## THE ENLIGHTENING ROUND

**Q: What should you do when your bank is served with a garnishment summons from an agricultural good/service provider who is owed money by your borrower?**

**A:** First of all, the bank should assess whether its security agreement covers deposit accounts. If it does, then the amount in the borrower's account constitutes the bank's collateral and the bank can respond in its disclosure statement that while there is money in the borrower's account, the bank has a security interest in those funds and therefore the funds are not subject to garnishment.

The bank should also strongly consider defaulting the borrower and commencing liquidation action (subject to farmer lender mediation rights) given that if other service providers have already obtained judgments against the borrower, it is very likely that the operation is no longer viable and further delay could financially harm the bank.

**Q: Does my bank's existing security agreement cover Market Facilitation Program payments or is a separate assignment/agreement necessary?**

**A:** The best practice is to either execute a separate security agreement explicitly covering the MFP payments or else have your borrower execute USDA Form CCC-36 Assignment of Payment. This is important because it is unclear whether a court would find that a general, all assets granting clause in a security agreement covers emergency government payments on a program that was not in existence at the time the security agreement was first executed. While the bank has more protection if the granting clause is exceptionally detailed and specifically says that it covers all government payments, that protection is not absolute since the security agreement was still executed before the MFP payment came into existence.

**Q: Does a CCC-679 Lien Waiver operate as a subordination agreement effective only with respect to the USDA or does it act as a global waiver of the bank's interest in the specified commodity collateral?**

**A:** This is a bit of a sticky issue. There is language in the form which suggests that it is a subordination effective only with respect to the USDA and there is also language which suggests that it is a waiver of the bank's entire interest in the commodity collateral. When dealing with this type of uncertainty, and risk, it is advisable to document around the issue. Rather than simply execute the form and hope that a court eventually sees things your way, the best practice is to take a new security interest in any collateral covered by the CCC-679. I recommend first running a UCC search to see if there are any junior lienholders. If there are none, the bank can simply have the borrower execute a new security agreement and possibly do a new UCC filing. If there are competing security interests, the bank can deal with them through an inter-creditor agreement that specifies the new priority scheme after execution of the CCC-679 and the supplemental security agreement.

