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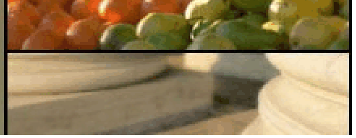

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Relief for Buyers of Farm Products Under the Uniform Commercial Code

by

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RELIEF FOR BUYERS OF FARM PRODUCTS UNDER THE UNIFORM COMMERCIAL CODE

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I. INTRODUCTION

Agricultural financiers have enjoyed a preferred status under the "farm-products exception"[1] of Article 9 of the Uniform Commercial Code (Code). Section 9-307(1) of the Code states:

> A buyer in [the] ordinary course of business . . . *other than a person buying farm products* from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.[2]

Thus, the ordinary purchaser of farm products[3] is afforded less protection than a purchaser of non-farm products. If a farmer defaults on loans secured by his farm products, the unwary buyer of those products may have them or their value repossessed or be sued for conservation by the secured lender.

Few other secured lenders enjoy such protection.[4] The "farm-products exception" can have a far-reaching impact when one considers the fungibility and sheer volume of agricultural products sold in

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1. U.C.C. § 9-307(1) (1978), codified at IDAHO CODE § 28-9-307(1) (1980). Idaho has adopted the Uniform Commercial Code, which is codified at Title 28 of the Idaho Code. Numbered U.C.C. sections have retained their section numbers within Title 28.
2. *Id.* (emphasis added).
3. Farm products are:

> crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool-clip, maple syrup, milk and eggs), and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products, they are neither equipment nor inventory. U.C.C. § 9-109(3) and Official Comment 4 (1978).

4. *See* U.C.C. §§ 9-310, -312 (1983).

the marketplace and the pervasiveness of agricultural financing.[5]

This article will first examine the unique treatment of farm products under the Code and the impact of the farm-products exception on buyers who purchase products in the "ordinary course of business." Next, the discussion will turn to case law, particulary the recent Idaho case of *Western Idaho Production Credit Association v. Simplot Feed Lots, Inc.* (*WIPCA*).[6] This case held that lenders can lose their security interests in farm products if they, through course of dealing or course of performance, expressly or impliedly authorize the disposal of the secured farm products.[7]

II. FARM-PRODUCTS TRANSACTIONS

A. Pre-Code Treatment

Before Idaho adopted the Code and its farm-products exception, a farmer could mortgage crops and livestock under the Chattel Mortgage Act (the Act).[8] The Act defined agricultural products as "all property, goods or chattels, not defined by statute to be real estate."[9] Under the Act, buyers who purchased goods and chattel in the ordinary course of business did so at their peril, for they risked the possibility that an unknown security interest existed in the goods. Lenders could then, as now, repossess the collateral or obtain its value from the subsequent holder of the goods if the debtor defaulted on the loan. "Buyers in the ordinary course of business" are purchasers who, in good faith and without the knowledge that someone else has a security interest in the goods, buy goods from a person who is in the business of selling that kind of goods.[10] When the Uniform Commercial Code was adopted in 1967,[11] section 9-307 was enacted to protect these good-faith purchasers. Good-faith buyers in the ordinary course of business could take the goods free of the security interest.[12] The Code, however, did not extend this protection to purchasers of farm products.[13] Thus, pur-

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5. *See* Clark, *The Agricultural Transaction: Equipment and Crop Financing*, 11 U.C.C. L.J. 15 (1978-79).

6. 106 Idaho 260, 678 P.2d 53 (1984).

7. U.C.C. § 9-306(2) (1978).

8. The Chattel Mortgage Act was codified at IDAHO CODE §§ 45-1101 to -1119. All sections of the Act except § 45-1102 were repealed by 1967 Idaho Sess. Laws, ch. 161, art. 10, § 10-102(2)(a)(iv).

9. IDAHO CODE § 45-1101 (repealed 1967).

10. U.C.C. § 1-201(9) (1978).

11. 1967 Sess. laws, ch. 161 (codified at Title 28, IDAHO CODE).

12. *See* U.C.C. § 9-307 and Official Comment 2 (explaining the interaction between the buyer in the ordinary course of business and the taking free of a security interest).

13. *Id.*

chasers of farm products still face the pre-Code hazard of losing their purchased goods to the original secured creditors.

Idaho's treatment of agricultural lending and farm products under prior law and subsequently adopted in the Code is consistent with contemporary thinking and practice. One commentator has suggested three reasons why the buyers of farm products do not receive the same protection as other good-faith buyers.[14] First, while credit for agricultural financing is no less pressing than it is for other businesses, the demand for agricultural credit developed later than that for the general business community. This later demand is attributed to the slower mechanization of agricultural. Second, lawmakers and courts fostered a paternalistic attitude toward farmers. The pre-Code statutes sought to protect farmers from defaulting sellers who sell the farmers' products to good-faith purchasers. Finally, and most importantly, the traditional collateral for farm loans was not farm products but land. Land was the farmer's most valuable asset and, thus, ample collateral for lending. These historical differences resulted in the disparity between farm and commercial lending.[15]

Industrial mechanization and its resulting increase in production created pressure to find new means of secured lending. Inventory financing relieved the credit pressure and permitted buyers to take free of the lender's encumbrance. "[T]he factor's lien acts and the Uniform Trust Receipts Act, both of which were passed to facilitate secured inventory lenders, . . . did not cover agricultural transactions. Rather, agricultural lenders were forced to resort to the chattel mortgage statutes"[16] which did not protect good faith purchasers. Thus, pre-Code statutes protected farmers if they marketed farm goods themselves, but favored good-faith purchasers of non-agricultural products.[17]

B. Code Treatment

There is evidence that the continued retention of the farm-products exception in section 9-307(1) is due to the lobbying efforts of certain lenders and the federal government. The committee charged with updating Article 9 proposed in 1970 that the farm-products exception be eliminated, but the permanent editorial board deleted this proposal

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14. Dolan, *Section 9-307(1): The U.C.C.'s Obstacle to Agricultural Commerce in the Open Market*, 72 No. U.L. Rev. 706, 710-12 (1978); *see generally* 1 G. Gilmore, Security Interest In Personal Property 83 § 4 (1965).

15. *Id.*

16. Dolan, *supra* note 14, at 711 (footnote omitted).

17. *Id.* at 712.

in its final report.[18] According to Professor Hawkland:

> The chief proponent of the present rule preserving the security interest in farm products is the federal government, and it fought the committee's efforts to make the change. The federal government always has an ace to play in these struggles by threatening to enact its own legislation to give it what it deems desirable. Much farm credit, perhaps the majority of it, is supplied by the federal government, and an alternative threat is to withhold this credit if the climate for lending is unfavorable. The statutes under which these loans are made do not specify whether the law governing them is the U.C.C. or federal common law and the circuits are split on the matter. Under the federal rule, it is clear that the perfected security interest in farm products is preserved against bona fide purchasers, and if the state law carried a different result some, perhaps all, of the circuit courts of appeal might make the federal rule their choice of law. As it is now, this choice of law problem is academic since both the state and federal rule dictate a common result.[19]

A case can be made for retaining the farm-products exception, because its elimination might adversely affect federal loans for agriculture. However, preservation of the farm-products exception to facilitate federal lending has been determined to be unnecessary.[20]

III. THE TRAPS OF THE FARM-PRODUCTS EXCEPTION

The farm-products exception arguably impedes the free flow of farm products in the marketplace by increasing the risk of direct purchases from farmers. Because this Code provision exists, feedlot and elevator operators, commission agents, brokers, and middlemen are at risk when they purchase farm products directly from the farmer who produced them. Buyers fear having to pay not only the farmer, but also his lender, if there is an unsatisfied security interest continuing in the collateral. Buying from the producer can be an expensive

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18. *See* Funk, *The Proposed Revision of Article 9 of the Uniform Commercial Code*, 27 Bus. Law. 321, 325 (1971); Permanent Editorial Board for the Uniform Commercial Code, Final Report 208-209 app. B-9 (1971).

19. Hawkland, *The Proposed Amendment to Article 9 of the U.C.C.—Part One: Financing the Farmer*, 76 Com. L.J. 416, 420 (1971) (footnotes omitted).

20. Federal law, not the Code, governs security rights under FHA loans. United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979), *vacating* United States v. Crittenden, 563 F.2d 678 (5th Cir. 1977); United States v. Giragossiantz, 488 F.2d 358 (9th Cir. 1973); United States v. Matthews, 244 F.2d 626 (9th Cir. 1957).

lesson for a buyer, especially if the producer is insolvent.

A. Distinguishing Between Farm Products and Inventory

The unique treatment afforded farm products is not restricted to section 9-307(1). Farm products are defined as the supplies and the goods produced by a "debtor engaged in raising, fattening, grazing or other farming operations."[21] To be classified as a farm product, the product must not only be the appropriate type of good but must also be in the possession of a debtor engaged in farming operations. Both requirements must be met before goods may be classified as farm products. Although this seems straightforward, the Code does not specify what "crops," "livestock" or "farming operations" are but allows case law to develop these definitions.[22]

A significant problem lies in defining when a farm product becomes "inventory."[23] Products of crops or livestock lose their status as farm products when subjected to a manufacturing operation.[24] Exactly what is meant by a manufacturing operation is not defined in the Code but is left for the courts to define.[25] It may be easy to identify the product of livestock but as Professor Hawkland acknowledges, it is more difficult to determine what constitutes the product of a crop.[26] For example, growing corn

> might be considered a crop, but corn in a crib might be considered a product of a crop. Distinctions like this are harmful to the financier who describes the collateral specifically, rather than by type. . . . [I]f grain loses its identity as a crop when it is harvested, the security agreement and financing statement may fail to pick it up unless the words "products of crops," "corn of the crib," "farm products" or the like have been used in the descriptions.[27]

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21. U.C.C. § 9-109(3) is set out *supra* note 3.

22. U.C.C. § 9-109, Official Comment 4.

23. Inventory is defined as goods for sale, lease or to be furnished under contracts. Inventory also includes raw materials, working process, or materials used in a business. U.C.C. § 9-109(4) and Official Comment 3.

24. *Id.*

25. "At one end of the scale some processes are so closely connected with farming—such as pasteurizing milk or boiling sap to produce maple syrup or maple sugar—that they would not rank as manufacturing. On the other hand an extensive canning operation would be manufacturing." U.C.C. § 9-109, Official Comment 4.

26. Hawkland, *supra* note 19, at 419.

27. *Id.*

The case of *United States v. Hext*[28] illustrates the difficulty of drawing the not-so-obvious line between inventory and farm products. In *Hext*, the Farmers Home Administration (FHA) claimed a security interest in cotton grown by Hext but ginned and sold by his wholly owned corporation. In due course, the buyers presented the negotiable warehouse receipts for the warehoused goods and took delivery of the cotton. Because both Hext and his corporation were insolvent, the FHA sued both the selling agent and the warehouseman for conversion. The Fifth Circuit determined that federal common law should apply but that the FHA's rights should be no different than under the Code.[29] Despite the fact that the gin mill was wholly owned by the farmer, the court held that the buyers of the cotton took free of the FHA's security interest because the cotton had been transferred into the inventory of the gin mill with the FHA's prior knowledge. In contrast, the Texas Court of Appeals, in *Cox v. Bancoklahoma Agri-Service Corp.*,[30] found that cattle did not become inventory simply because the rancher held himself out as a "cattle trader."[31] Courts have narrowly construed the phrase "farming operations" so as to preserve the distinction between inventory and farm products.[32]

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28. 444 F.2d 804 (5th Cir. 1971).

29. *Id.* at 808-11. In 1979 the United States Supreme Court determined that federal law governed the priority of liens stemming from federal lending programs, but a nationwide federal rule was unnecessary. *Kimbell Foods*, 440 U.S. at 726, 728-30. The Court determined that the states' adoption of the U.C.C. afforded a uniform body of law and state law (the Code) would be incorporated as the federal rule of decision. 440 U.S. at 728. Prior to *Kimbell Foods*, the circuit courts were split on the issue. The Third, Sixth, Ninth, and Tenth Circuits held that rights and liabilities to such suits must be determined with reference to federal law. *Id.* at 807-08 n.8, *citing*, Cassidy Comm'n Co. v. United States, 387 F.2d 875 (10th Cir. 1967); United States v. Carson, 372 F.2d 429 (6th Cir. 1967); United States v. Sommerville, 324 F.2d 712 (3rd Cir. 1963), *cert. denied*, 376 U.S. 909 (1964); United States v. Matthews, 244 F.2d 626 (9th Cir. 1957). The Fourth and Eight Circuits had ruled in favor of state law. *Id.* at 808 n.9, *citing*, United States v. Union Livestock Sales Co., 298 F.2d 755 (4th Cir. 1962).

In a related issue involving the liability of auctioneers for selling secured livestock and federal preemption under the Packers and Stockyards Act, 7 U.S.C. §§ 181-229 (1982), *see* 1 J. DAVIDSON, AGRICULTURAL LAW § 3.80 (1981); United States v. Kramel, 234 F.2d 577 (8th Cir. 1956). *See* Hawkland, *supra* note 19, at 420.

30. 641 S.W.2d 400 (Tex. Civ. App. 1981).

31. *Id.* at 403.

32. Security Nat'l Bank v. Belleville Livestock Comm'n Co., 619 F.2d 840 (10th Cir. 1979) (held debtor was a cattle feeder and not a cattle dealer or trader); *In re* K. L. Smith Enterprises, Ltd., 2 Bankr. 280 (Bankr. D. Colo. 1980) (held washing, candling, and packing of eggs prior to shipping did not transform eggs into inventory); *In re* Caldwell, Martin Meat Co., 10 U.C.C. Rep. 710 (E.D. Cal. 1970) (held feedlot steers in possession of a debtor engaged in fattening were farm products).

B. The "Created by His Seller" Test

The liability is complicated and the risk to the subsequent buyer is compounded when multiple sales of farm products are involved. A multiple sale involves, for example, a sale of wheat by a farmer to a middleman, and a subsequent sale by the middleman to a miller. Further down the distribution chain, the wheat ends up in the hands of the baker, the grocer, and finally the consumer. For the initial and subsequent purchasers of farm products, section 9-307(1) poses not one but two traps to the final buyer in this example. The first is the farm-products exception which excludes buyers of farm products from the protection that buyers in ordinary course of business receive.[33] The second and more subtle trap is the "security interest created by his seller" test.[34] Section 9-307(1) protects buyers in the ordinary course of business only from security interests "*created by their seller*, but not from those created by previous sellers."[35] Even though "farm products" in the possession of a non-farmer are no longer farm products,[36] a buyer in the ordinary course of business only takes free of his immediate seller's security interest. For example, *A* takes a security interest in goods sold to *B*. *B*, in turn, sells them to *C*, who later sells them to *D*. *D* may take free of a security interest created by *C*, but since *C* did not create a security interest, *A*'s interest continues to *C*'s purchase. Thus, subsequent buyers may not be protected from prior security interests. Remote buyers are always at risk because they rarely buy directly from the seller who created the security interest. Buyers of farm products thus faces two obstacles under section 9-307: first, the farm-products exception, and then the "created by his seller" trap.[37]

Unless the lender waives the security interest or authorizes a sale, the security interest continues down the line of distribution, potentially raising genuine problems for unwary good-faith purchasers.[38] An

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33. U.C.C. § 9-307(1).

34. *Id.*

35. *See* Coates, *Financing the Farmer*, 20 PRAC. LAW No. 7, 45 (1974); *supra* Dolan, note 14, at 713-15 (Dolan characterizes this as the "Surprise" and the "His Seller" trap); R. HENSON, HANDBOOK ON SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE 86 (1973).

36. "When crops or livestock of their products come into the possession of a person not engaged in farming operations they cease to be 'farm products.'" U.C.C. § 9-109(3) & Official Comment 4.

37. The created by his seller trap has been strictly applied. Massey-Ferguson Credit Corp. v. Wells Motor Co., 374 So.2d 319 (Ala. 1979); Nat'l Shawmut Bank v. Jones, 108 N.H. 386, 236 A.2d 484 (1967); Baker Production Credit Ass'n v. Long Creek Meat Co., 266 Or. 643, 513 P.2d 1129 (1973); Martin Bros. Implement Co. v. Diepholz, 109 Ill. App. 3d 282, 440 N.E.2d 320 (1983).

38. *Martin Bros. Implement*, 109 Ill. App. 3d at 282, 440 N.E.2d at 320; Commer-

example of this trap is found in *Baker Production Credit Association v. Long Creek Meat Co.*[39] Deer Creek Cattle Feeders (Deer Creek) was engaged in buying, feeding, fattening, and selling cattle for slaughter. Deer Creek financed its operations through the Baker PCA, which took a security interest in all livestock owned or acquired by Deer Creek, including proceeds from the sale of cattle. Deer Creek sold cattle to Long Creek Meat Company for slaughter, which in turn sold the carcasses to Coast Packing. The Oregon Supreme Court held that the Baker PCA's lien continued to cover the carcasses in the hands of Coast Packing even though the carcasses were inventory and not farm products.[40]

Section 9-315 indicates that a perfected security interest in farm products may continue into not only commingled but also processed or manufactured goods. A security interest continues in processed goods such as "where flour, sugar and eggs are commingled into cake mix or cake."[41] Consequently, even remote purchasers of processed farm products may incur liability by purchasing products subject to an unknown but perfected lien.

C. Resistance to the Farm-Products Exception

Loan agreements typically prohibit or limit the debtor from selling the loan collateral unless the debtor obtains the expressed or written consent of the secured lender.[42] If the debtor makes an unauthorized sale, the person who assumes liability for the loan repayment (assuming the debtor is insolvent) is the subsequent purchaser—the buyer in the ordinary course of business. Frustrated by their exposure to the risks of a security interest created by a *previous* seller, subsequent buyers have challenged the validity of the underlying security interest. The buyers may attempt to show: (1) the lender waived the security interest, or (2) authorized the debtor to sell the farm products. Section 9-306(2) says a "security interest continues in collateral notwithstanding sale, exchange or other disposition thereof, *unless the disposition was authorized by the secured party in the security agreement or oth-*

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cial Equipment Corp. v. Bates, 154 Ga. App. 71, 267 S.E.2d 469 (1980); *Massey-Ferguson Credit*, 374 So. 2d at 319; Exchange Bank of Osceola v. Jarrett, 180 Mont. 33, 588 P.2d 1006 (1979); *Baker Production Credit*, 266 Or. at 643, 513 P.2d at 1129; Security Nat'l Bank v. Goodman, 24 Cal. App. 3d 131, 100 Cal. Rptr. 763 (1972); *Nat'l Shawmut Bank*, 108 N.H. at 386, 236 A.2d at 484.

39. 266 Or. at 643, 513 P.2d at 1129.

40. *Id.* at 649, 513 P.2d at 1132.

41. U.C.C. § 9-315, Official Comment 3 (1978).

42. Western Idaho Production Credit Ass'n v. Simplot Feed Lots Inc., 106 Idaho 260, 678 P.2d 52 (1984).

erwise.[43] Thus, lenders must be cautious in their course of performance[44] or course of dealing[45] with debtors, lest either be construed as an implied authorization or waiver for the sale of the collateral. Such authorization or waiver would cause lenders to lose their security interest.

There is much disagreement about whether a course of performance or course of dealing is indeed sufficient to authorize a farmer to sell secured farm products, thereby extinguishing the creditor's security interest. One view holds that authorization or waiver by conduct of the secured party does not extinguish the security interest. The opposite view, adopted in *Clovis National Bank v. Thomas*,[46] holds that it does.

In *Clovis*, the progenitor of waiver-authorization cases, the New Mexico Supreme Court found a bank had waived its security interest by its course of dealing with the debtor.[47] The decision was much criticized by commentators[48] and prompted the state legislature to amend Section 9-306(2) with the following provision: "A security interest in farm products and the proceeds thereof *shall not be considered waived* by the secured party *by any course of dealing* between parties or by any trade usage."[49] In a case of first impression, the Idaho Supreme Court in *Western Idaho Production Credit Association v. Simplot Feed Lots Inc.* (*WIPCA*)[50] adopted section 9-306(2) course-of-performance and course-of-dealing exceptions. Buyers of farm products are not always at risk because of the farm-products exception. The *WIPCA* decision marks an important but reasonable departure from prior Idaho law.

IV. *WIPCA*: DEALING A BLOW TO THE FARM-PRODUCTS EXCEPTION

In *WIPCA*, the court held that a security interest may be lost when there is evidence the lender "authorized" a sale of the collateral through some course of dealing or course of performance. The court relied on Idaho Code section 28-9-306(2),[51] which states that a security

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43. U.C.C. § 9-306(2) (1978) (emphasis added).
44. U.C.C. § 2-208(1) (1978).
45. U.C.C. § 1-205 (1978).
46. 77 N.M. 554, 425 P.2d 726 (1967).
47. *Id.* at 560, 425 P.2d at 730.
48. Hawkland, *supra* note 19; 8 NAT. RESOURCES J. 183 (1968); *see* Dolan, *supra* note 14.
49. N.M. STAT. ANN. § 55-9-306(2) (1978) (emphasis added).
50. 106 Idaho at 260, 678 P.2d at 52.
51. U.C.C. § 9-109, Official Comment 4.

interest "continues in collateral notwithstanding sale . . . *unless the disposition was authorized by the secured party* in the security agreement or otherwise. . . ."[52]

The Production Credit Associataion (PCA) financed the production of the farmers' crops and perfected security interests in them. The security agreements used were form documents containing the usual broilerplate admonishing the debtor "not to sell . . . any collateral without the consent of the Secured party."[53] The PCA knew, however, that the farmers had sold crops for several years without giving WIPCA notice of the sale. "[I]n practice, WIPCA allowed the farmers to sell crops . . . at the discretion of the farmers so long as the gross sales proceeds went to WIPCA."[54] In the transaction in question, the farmers advised WIPCA that they would be selling barley to Martin. Although the WIPCA branch manager had knowledge of the sale, he did not attempt to block the sale or impose restrictions. The PCA contended that its consent to the sale was conditional and that the farmers were obligated to remit all of the sales proceeds.[55] The farmers sold the barley to Martin, who commingled the barley, and Martin sold it again to Simplot Feed Lots. Simplot paid Martin in full and took delivery without knowledge of WIPCA's security interest.[56] Martin defaulted on the payment to the farmers.

The PCA argued in district court and on appeal that it authorized the sale of the barley on condition that the loan be paid in full; that the condition failed; and that it retained its security interest under the farm-products exception of section 9-307(1). In light of WIPCA's conduct with the farmers, the court held that WIPCA clearly authorized the debtors to dispose of the secured collateral without the lender's prior written consent.[57] The court in *WIPCA* found that Idaho Code section 28-9-306(2) provided:

> Except where this chapter otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof *unless the disposition was authorized by the secured party* in the security agreement or otherwise. . . . Thus, when a disposition of collateral is authorized by the secured party, the party purchasing the collateral takes

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52. 106 Idaho at 263, 678 P.2d at 55 (emphasis added).

53. *Id.* at 262, 678 P.2d at 54.

54. *Id.*

55. *Id.*

56. The PCA did not demand payment from Simplot until some ten months after the purchase. *Id.*

57. *Id.* at 263, 678 P.2d at 55 (citing *Clovis*).

> free of the security interest.
> . . . The course of the dealing between WIPCA and the farmers and the policies of WIPCA clearly indicate the authorization to sell crops in which WIPCA held security interests and that WIPCA further authorized this particular sale by the farmers to Martin.[58]

The PCA also argued that it only "conditionally" authorized the sale of barley—the condition being that the PCA receive the proceeds of the sale to Martin. Since the condition failed, WIPCA's security interest was not extinguished under section 9-306(2).[59] The court rejected the conditional-consent argument, finding that section 9-306(2) makes no distinction between conditional authorization and any other form of authorization.[60] The court further found that conditional authorization runs counter to the Code's policy of promoting the exchange of goods. "Even though the secured party conditions consent on receipt of the proceeds, failure of this condition will not prevent that consent from cutting off the security interest under section 9-306(2)."[61]

The holding in *WIPCA* is significant to agricultural lenders and buyers of farm products in the ordinary course of business for several reasons:

A. Both a course of performance and course of dealing are relevant and material in determining whether the secured party expressly or impliedly authorized the sale of secured collateral;
B. The proof required to show an authorization to sell collateral is less stringent than the proof to show a waiver of a security interest.
C. A lender's consent to a sale of farm products conditioned on the receipt of payment does not defeat an authorization to sell collateral under section 9-306(2).

V. ANALYSIS

A. Course of Performance and Course of Dealing

The court's reference to a course of dealing[62] between the farmers

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58. *Id.* (emphasis added and cititions omitted).
59. *Id.*
60. *Id.* at 264, 678 P.2d at 56. See text accompanying *supra* note 43 for § 9-306(2); U.C.C. § 9-306, Official Comment 3.
61. *WIPCA*, 106 Idaho at 264, 678 P.2d at 56 (quoting First Nat'l Bank, Etc. v. Iowa Beef Processors, 626 F.2d 764, 769 (10th Cir. 1980).
62. See text accompanying *supra* note 57.

and WIPCA raises several issues which are resolved under Article 2.[63] Terms of an agreement may be supplied not only by course of dealing, but also by course of performance, which has a different meaning. The principal difference between course of dealing and course of performance is timing:

> A course of dealing is a *sequence of previous conduct* between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.[64]

A course of dealing pertains to events or customs which occur contemporaneous with or prior to a transaction. In contrast, a course of performance is conduct between the parties which occurs subsequent to the agreement.[65] In *WIPCA*, the relevant conduct between the farmers and the PCA occurred after the security agreements had been executed. While course of dealing could be relevant to determine an authorization or waiver, "course of performance" is the more accurate term to categorize the evidence which the court actually considered.[66]

Course of performance, like course of dealing, is material in determining the meaning of an agreement.

> Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.
>
> The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of

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63. Under the Code, conduct itself may be used to prove the existence of a contract. U.C.C. § 2-204. In non-U.C.C. contexts, Idaho has adopted a rule that permits proof on agreement through a "course of conduct."

64. U.C.C. § 1-205(i) (emphasis added).

65. *Id.* at 2-208.

66. Trade usage also focuses on contemporary and past practice, custom, or methods of dealing "which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressed and other conduct." U.C.C. § 1-205. Trade usage should also be relevant in determining either a waiver or authorization to sell. U.C.C. § 1-205, Official Comments 4 and 5.

> performance shall control both course of dealing and usage of trade.[67]

Finally, a course of performance controls over both course of dealing and trade usage[68] as proof that an agreement has been modified.[69]

There is reason to question whether the course of performance, which is a concept found in Article 2, should be applied in Article 9 situations. Article 9 makes no mention of course of performance, course of dealing, or trade usage. Article 9's scope and purpose are to govern the creation of consensual security interests in personal property.[70] Arguably, the language of Article 2 may even suggest its provisions do not apply to secured transactions under Article 9:

> Unless the context otherwise requires, [Article 2] applies to transactions in goods; it *does not apply* to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.[71]

A majority of courts have resorted to evidence of either course of dealing or trade usage in determining whether there was a waiver of a security interest or an authorization to sell.[72] A few courts, however, have refused to consider course of dealing or trade usage in Article 9 situations. These courts refused to find waiver or authorization because

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67. U.C.C. § 2-208(1), (2).

68. *Supra* note 66.

69. U.C.C. § 2-208(3).

70. U.C.C. § 9-101, Official Comment.

71. U.C.C. § 102 (emphasis added). The Court of Appeals in First Security Bank of Idaho v. ABSCO Warehouse, Inc., had the opportunity but failed to address this issue. 104 Idaho 853, 664 P.2d 281 (Idaho Ct. App. 1983). Section 208(1) speaks of course of performance being relevant to determining the agreement in the contract of a "contract for sale."

72. Although the courts spoke of a "course of business" in these cases, it is assumed that this term is synonymous with "course of dealing." Planters Production Credit Ass'n v. Bowles, 256 Ark. 1063, 511 S.W.2d 645 (1974); Halperin v. Tri-State Livestock Credit Corp. (*In re* Ellsworth), 28 Bankr. 13 (Bankr. 9th Cir. 1983), *rev'd*, 722 F.2d 1448 (1984); United States v. Big Z Warehouse, 311 F. Supp. 283 (S.D.Ga. 1970); *ABSCO Warehouse*, 104 Idaho at 853, 664 P.2d at 281; Anon, Inc. v. Farmers Production Credit Ass'n., 446 N.E.2d 656 (Ind. App. 1983); Citizens Savings Bank v. Sac City State Bank, 315 N.W.2d 20 (Iowa 1982); Nat'l Livestock Credit Corp. v. Schultz, 653 P.2d 1243 (Okla. App. 1982); *In re* Mid-Atlantic Piping Products of Charlotte, Inc., 24 Bankr. 314 (Bankr. W.D.N.C. 1982); Benson County Coop. Credit Union v. Central Livestock Ass'n, 300 N.W.2d 236 (N.D. 1980); *In re* Frank Meador Leasing, Inc., 6 Bankr. 910 (Bankr. W.D.Va. 1980).

(1) the contractual provisions of the security agreement required written consent to sell collateral, or (2) Article 2 provisions on course of performance apply only to sales contracts and not secured transactions.[73]

The rationale for applying "course of performance" to Article 9 contests is found within Code section 1-201. As the Oklahoma Court of Appeals explained:

> [t]he definitions in Article One (12A O.S.1981 § 1-201) are automatically made a part of each article in the code and thus a "security agreement" must first be an "agreement" as defined in § 1-201. And, since an agreement is defined by the code as "the bargain of the parties in fact as found in their language or by implication from other circumstances including . . . course of performance as provided in this Act (Section . . . 2-208)," this has to include security agreements. Therefore, a certain *course of performance can result in the waiver of an express term in a security agreement.*[74]

As the court noted above, the broad definition of "agreement" contained in Code section 1-201(3) permits course of performance to define the bargain between the secured party and the debtor.[75]

A number of cases[76] have relied on the definition of "agreement"

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73. Cox v. Bancoklahoma Agri-Service Corp., 641 S.W.2d 400 (Tex. App. 1982); Wabasso State Bank v. Caldwell Packing Co., 308 Minn. 349, 251 N.W.2d 321 (1976); Garden City Prod. Credit Ass'n v. Lannan, 186 Neb. 668, 186 N.W.2d 99 (1971); *In re* Environmental Electronics Systems, Inc., 2 Bankr. 583 (Bankr. N.D.Ga. 1980).

74. Nat'l Livestock Credit Corp. v. Schultz, 653 P.2d at 1247 (footnotes omitted and emphasis added). *See* Westinghouse Credit Corp. v. Shelton, 645 F.2d 869 (10th Cir. 1981) (applying Oklahoma law); *Planters Prod. Credit Ass'n*, 256 Ark. at 1063, 511 S.W.2d at 645; J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 3.3 (1980).

75. " 'Agreement' means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (sections 1-105 and 2-208)." U.C.C. § 1-201(3) and Official Comment 3.

76. Shelton v. Erwin, 472 F.2d 1118 (8th Cir. 1973); *In re* Delta Molded Products, Inc., 416 F. Supp. 938 (N.D. Ala. 1976), *aff'd*, 571 F.2d 957 (5th Cir. 1978); Barney v. Rigby Loan & Inv. Co., 344 F. Supp. 694 (D. Idaho 1972); 550 Les Mouches Fashions, Ltd. v. Hope, 24 Bankr. 509 (Bankr. S.D.N.Y. 1982); Hite v. Prod. Credit Ass'n, 4 Bankr. 547 (Bankr. N.D. Ohio 1980); Williams v. First Nat'l Bank & Trust Co., 482 P.2d 595 (Okla. 1971); Little v. Orange County, 31 N.C. App. 495, 229 S.E.2d 823 (1976); Cain v. Country Club Delicatessen of Saybrook, 25 Conn. Supp. 327, 203 A.2d 441 (1964); Caslowitz v. Ocean State Video Group, Inc., 32 U.C.C. REP. SERV. 969 (CALLAGHAN) (R.I. Superior Ct. 1981); *see* Idaho Bank & Trust Co. v. Cargill, Inc., 105 Idaho 83, 665 P.2d 1093 (Idaho Ct. App. 1983).

to determine the existence or scope of a "security agreement."[77] If section 1-203(3) is used in determining the scope or existence of a security interest, then the section should be relevant in determining whether a course of dealing or course of performance constitutes a waiver of a security interest or an authorization to sell collateral under section 9-306(2). Common sense dictates that an authorization or waiver can be proven by events, actions, or conduct that occurred or transpired before or after the agreement in question was made.

B. Elements of Proof of an Authorization to Sell

In analyzing the elements of proof necessary to show an authorization to sell collateral under section 9-306, there are three related but separate issues. First, in the prior section the discussion focused on whether evidence of a course of dealing or course of performance or trade usage can be admitted to prove the debtor has waived or modified a term in a security agreement which prohibits the sale of the collateral. Next, the inquiry shifts to whether common law principles of waiver (actual knowledge of a relinquishment of a known right) are necessary to prove either a waiver or an authorization to sell. Finally, there is the important issue of the burden of proof. Must the elements of waiver or authorization to sell be proved by a preponderance of evidence or by some higher standard?

Proof of an authorization to sell, like its waiver counterpart, is a question of fact.[78] Proof of common law waiver requires evidence of an intentional relinquishment of a known right.[79] In contrast, the Code does not require that the lender have actual knowledge of an abandonment of a right. To show waiver or authorization to sell, a lender has notice under the Code when:

(a) he has actual knowledge of the waiver or authorization; or

(b) he has received a notice or notification of the waiver or authorization; or

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77. " 'Security Agreement' means an agreement which creates or provides for a security interest." U.C.C. § 9-105(1) (1978).

78. Security Nat'l Bank v. Belleville Livestock Comm'n Co., 619 F.2d 840 (10th Cir. 1979); Wesbart & Co. v. First Nat'l Bank of Daehart, 568 F.2d 391 (5th Cir. 1978); Platte Valley Bank of Brighton v. B & J Constr., 606 P.2d 455 (Colo. 1980); Benson County Coop. Credit Union v. Central Livestock Ass'n, 300 N.W.2d 236 (N.D. 1980); Lisbon Bank and Trust Co. v. Murray, 206 N.W.2d 96 (Iowa 1973). The court in *WIPCA*, failed to discuss definitively either the elements or the burden of proof necessary to prove an authorization, although the opinion taken as a whole supports the analysis in this section.

79. Scott v. Castle, 104 Idaho 719, 662 P.2d 1163 (Idaho Ct. App. 1983); Brand S Corp. v. King, 102 Idaho 731, 639 P.2d 429 (1981).

(c) from all the facts and circumstances known to him at the time in question, he has reason to know that the waiver or authorixation exists.[80]

Consequently, proving notice of course of dealing, course of performance, or trade usage requires that the party against whom notice is claimed only has "reason to know that it exists."[81] Thus, it is easier to prove notice for an authorization to sell under the Code than it is to prove waiver under common law. Common law waiver requires "actual knowledge," while the Code only requires simple "notice."

Garden City Production Credit Association v. Lannan[82] illustrates how difficult it is to prove waiver of a security interest under common law. In *Garden City*, the debtors at various times sold cattle subject to a security interest from their ranch without first obtaining written consent as was required in the security agreement.[83] The debtors usually remitted the sales proceeds to the Garden City PCA but were never given any warning or reprimand. Consistent with this course of dealing, the debtors informed the PCA of a sale of the cattle and remitted the buyer's check. A few weeks later the check was dishonored but, in the meantime, the buyer had sold the cattle to an innocent third-party purchaser.[84]

The Nebraska Supreme Court acknowledged that a course of dealing between the parties may alter an agreement. However, the court found the course of dealing between PCA and the debtors was not relevant in the innocent third party's challenge to the security interest.[85] In rejecting the evidence of the course of dealing, the court emphasized the traditional knowledge elements of waiver:

> Our decision herein is in harmony with the general rule that in order to establish a waiver of legal right there must be a clear, unequivocal and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his part. [A] waiver [is] characterized as a "voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intention that such right shall be surrendered and such person forever deprived of its benefits."

80. U.C.C. § 1-201(25) (1978).

81. *Id.* The Idaho Court of Appeals in *ABSCO*, adopted the "notice" standard rather than require "actual knowledge" as proof of a course of dealing. 104 Idaho at 856, 664 P.2d at 284.

82. 186 Neb. 668, 186 N.W.2d 99 (1971).

83. *Id.* at 670, 186 N.W.2d at 101.

84. *Id.*

85. *Id.* at 674, 186 N.W.2d at 103.

> [T]he record reveals that the secured agreements here between P.C.A. and Carter were periodically reexecuted and contained a prohibition against resale without written authorization. The record shows that P.C.A. was engaged in a business involving some $60,000,000 or $70,000,000. We feel it cannot seriously be contended that P.C.A., by the methods by which it carried out its business and dealt with its debtors during the continuing contemplated process of sales of collateral farm products, intended to waive its security interest in the collateral against third party purchasers.[86]

The Nebraska Supreme Court chose to ignore both the Code's notice provisions and section 9-306(2), which speak of an "authorized" disposition rather than waiver. There was, in fact, actual knowledge of the intended sale.[87] The court's reliance on common law waiver principles in deciding a section 9-306(2) authorization question demonstrates how a waiver analysis increases an innocent third party's burden of proof. By insisting on this common law waiver analysis, the court chose to apply the more restrictive test. It would have been simpler to prove an authorization to sell under section 9-306(2).

This decision also illustrates the confusion which courts experience when applying common law to Code issues. The Code represents the law designed to govern commercial transaction. Unless displaced by the Code, common law principles serve to supplement Code provisions.[88] Thus, common law waiver principles which require actual knowledge contradict the Code's notice provisions and must give way to the Code.

Course of dealing, course of performance, and trade usage are questions of fact which must be proved by a preponderance of the evidence. Some courts have embraced a stricter standard of proof. For example, in *Central California Equipment Co. v. Dolk Tractor Co.*,[89] the California Court of Appeals held:

> [W]hen a security agreement expressly prohibits the disposition of collateral without the written consent of the secured party, in order for a court to find an authorization permitting disposition free of the security interest within the meaning of section [9-306(2)], there must either be actual prior or subsequent consent in writing by the secured creditor manifesting a

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86. *Id.* at 676, 186 N.W.2d at 104 (citation omitted).
87. *Id.* at 670, 186 N.W.2d at 101.
88. U.C.C. §§ 1-102, -103 (1978).
89. 78 Cal. App. 3d 855, 144 Cal. Rptr. 367 (1978).

> purpose to authorize the disposition free of the security interest. Mere acquiesence is insufficient. While we interpret "or otherwise" in section [9-306(2)] to permit an implied agreement, we believe that such an implied agreement should be found with extreme hesitancy and should generally be limited to the situation of a prior course of dealing with the debtor permitting disposition. The issue is a question of fact, but the trial court should carefully consider the written prohibition against disposition found in the security agreement as an important factor in the factual determination and should determine the matter in favor of the written prohibition unless such conclusion is unreasonable under the circumstances.[90]

While the court in *Central California* applied a strict standard of proof, it left more issues unanswered by saying implied agreements should be found only with "extreme hesitancy." Similarly, the Nebraska Supreme Court in two cases said a strict standard must be met to prove the lender authorized a sale of collateral.[91] In concurring with *Central California*, the Nebraska Supreme Court stated:

> We concur with California's statement of caution, and we hold that in these cases the standard of proof is by clear and convincing evidence, being that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.[92]

It would indeed be rare, if not impossible, for a debtor to prove the lender waived the security interest under common law principles. The proof is stacked against the debtor because security agreements typically contain a provision requiring the lender's consent prior to any sale of the collateral. If the debtor sells without obtaining such consent, the secured party will point to the prior-consent clause of the security agreement for protection. The debtor's only means of defeating the prior-consent clause is to show that a course of dealing, course of performance, or trade usage led the debtor to believe a sale was authorized. This later showing is the exception to the rule that the contract will control.[93]

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90. *Id.* at 862, 144 Cal. Rptr. at 371.

91. State Bank, Palmer, Nebraska v. Scoular-Bishop Grain Co., 217 Neb. 379, 349 N.W.2d 912 (1984); Five Points Banks v. Scoular-Bishop Grain Co., 217 Neb. 677, 350 N.W.2d 549 (1984).

92. *State Bank*, 217 Neb. at 388, 349 N.W.2d at 917.

93. In Riverside Development Co. v. Ritchie, the court reiterated that waiver was a question of intent and that the intent must clearly appear but that the intent may be proved by conduct which the court identified as equitable estoppel. 103 Idaho 515, 650

Besides the statutory requirement, there is a sound policy reason to apply the Code in this context. By letting the debtor use evidence of the parties' course of dealing, course of performance, and trade usage to prove the lender authorized the sale of secured collateral, the parties are made responsible for their actions. Adherence to a course of dealing or performance also promotes reasonable commercial expectations. The Code fosters the policy of making persons responsible for their actions or conduct through the concepts of course of dealing, course of performance, and trade usage. These three concepts recognize commercially reasonable conduct, and it would be unfortunate to abandon them in order to perpetuate a narrow exception for agricultural lenders when other creditors do not share the same advantage. Finally, the Code makes clear that common law principles supplement the provisions of the Code. The best indication of the law on this point is a recent Idaho Court of Appeals case, *Palmer v. Idaho Peterbilt, Inc.*[94] In this case, the court applied the Code in its analysis of alleged waiver of a contractual term by a course of performance between the parties. The court held that general principles of law only supplement the Code when they do not conflict with it.[95] As to the waiver issue, the court concluded that a course of performance "is relevant to a show of waiver or modification."[96]

C. Conditional Consent

A debtor's claim that the sale of secured collateral was authorized is usually countered by the lender's assertion that the authorization was conditional upon the lender receiving the sale proceeds. Western Idaho PCA used this argument against Simplot Feed. Western contended that Simplot, an innocent third-party purchaser, was nevertheless liable in conversion for the value of the barley which it had re-

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P.2d 657 (1982); Idaho Bank of Commerce v. Chastain, 88 Idaho 146, 383 P.2d 849 (1963). The difficulty, however, lies with the definition and application of equitable estoppel with prior holdings of the court stating that waiver will not be presumed or implied by conduct or actions, unless the conduct mislead the aggrieved party into honest belief such waiver was intended or consent to. Grover v. Idaho Public Utilities Comm'n, 83 Idaho 351, 364 P.2d 167 (1961). There is some doubt whether a third-party purchaser could claim such a reliance without prior knowledge of the secured party's conduct. Consequently, there could be an anomaly where the most innocent third party without any knowledge is potentially liable while the most knowledgeable third-party purchaser is not culpable.

94. 102 Idaho 800, 641 P.2d 340 (Idaho Ct. App. 1982).

95. *Id.* at 802, 641 P.2d at 342.

96. *Id.*

ceived and paid for.[97] The Idaho Supreme Court rejected WIPCA's claim of conditional consent. The court found that section 9-306(2) permits the third-party purchaser to take free of a security interest "whenever the disposition was authorized."[98] The section makes no distinction between "conditional authorization" and any other kind of authorization. The court concluded that conditional consent will not prevent a third party from taking free of the security interest when the sale was authorized by the secured lender.[99]

Despite the holding in *WIPCA*, the concept of conditional consent has been successfully claimed by lenders in other cases.[100] The rationale for allowing a claim of conditional consent is simply that it is not precluded by the Code and therefore is enforceable against even a subsequent good-faith purchaser. An example of this reasoning is found in *Baker Production Credit Association*,[101] in which the Oregon Supreme Court stated:

> If the consent or authorization to sell is unconditional . . . then clearly the purchaser takes free of the security interest. We have found no cases decided under the Code which deal with conditional consents. There is nothing in the Code, however, to prevent a secured party from attaching conditions or limitations to its consent to sales of collateral by a debtor. If such conditions are imposed, then a sale by the debtor in violation of those conditions is an authorized sale and the security interest, under [9-306(2)], continues in the collateral.
>
> The purchaser, of course, can protect himself by ascertaining whether a security interest exists and by requiring that he be furnished with proof of the secured party's consent. In this way he can learn whether there are any conditions attached to the consent which would prevent him from taking free of the security interest.[102]

The inherent problem with conditional consent to the sale of secured collateral is that in most cases an innocent third party may not know of the security interest in the first place or may not be able to

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97. 106 Idaho at 263, 678 P.2d at 55.

98. *Id.* at 264, 678 P.2d at 56.

99. *Id.*, *citing* First Nat'l Bank & Trust Co. v. Iowa Beef Processors, Inc., 626 F.2d 764, 769 (10th Cir. 1980).

100. Lisbon Bank and Trust Co. v. Murray, 206 N.W.2d 96 (Iowa 1973); Baker Prod. Credit Assoc. v. Longcreek Meat Co., 226 Or. 643, 513 P.2d 1129 (1973); Garden City Prod. Credit Assoc., 186 Neb. at 668, 186 N.W.2d at 99.

101. 226 Or. at 643, 513 P.2d at 1129.

102. *Id.* at 654, 513 P.2d at 1134.

determine whether conditional consent exists. Because of the fungibility of agricultural products (with the exception of branded livestock) it would be impossible for someone down the chain of distribution to determine the origin, ownership, or lien status of farm products.

The first case to squarely address the problems inherent in conditional consent was *First National Bank & Trust Company v. Iowa Beef Processors, Inc.*[103] The debtors had standing consent to sell cattle to Iowa Beef, provided the proceeds from the sale were promptly remitted to the bank. The testimony of the bank's vice president illustrates the casual manner in which the bank permitted cattle sales conditioned, of course, upon prompt remission of the proceeds. When asked if the debtor had the bank's consent to sell the secured cattle, the vice president stated: "I guess [the debtor] has the implied consent from the bank to release those cattle, so long as they . . . got me the check for the proceeds within seven days."[104] Although the bank's security agreement prohibited the sale of the cattle without the bank's prior-consent, another vice president acknowledged that this prior-consent requirement had never been enforced.[105] Similar statements were also made by WIPCA's district manager. The PCA knew that the farmers had sold crops without prior consent but took no action to enforce its security interest.[106]

In *Iowa Beef* the court found that the Code puts a greater burden on the buyer of farm products to check for liens on collateral. Iowa Beef did not check to determine whether a security interest was involved. The court determined, however, that Iowa Beef's failure to do so was irrelevant because the bank gave the debtors actual authority to sell, and it was unnecessary to communicate that authority to the purchaser.[107] The circuit court noted that even if Iowa Beef had checked, the bank would have informed Iowa Beef that it had agreed to the sale of the cattle and that the proceeds could be remitted directly to the seller. The court also pointed out that, at the time of the sale, Iowa Beef could not have known that its seller would not remit the proceeds to the bank.

> Consent to sell in the debtor's own name "provided" the seller remits by its own check to the bank is not a true conditional sales authorization. In essence, such a condition makes the buyer an insurer of acts beyond its control. The bank has

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103. 626 F.2d at 764.
104. *Id.* at 767.
105. *Id.*
106. *WIPCA*, 106 Idaho at 262, 678 P.2d at 54.
107. 626 F.2d at 768.

made performance of the debtor's duty to remit proceeds to the bank a condition of releasing from liability a third party acting in good faith. IBP could not ascertain in advance whether this condition would be met, as it could if a condition precedent was involved; nor did IBP have any control over the performance of the condition, as long as it paid Wheatheart. A secured party has an interest in protecting its security by conditioning its consent, but it can place conditions that would afford it protection without great unfairness to the good faith purchaser.

We conclude that the policy of the Uniform Commercial Code to promote ready exchange in the marketplace, *see Riverside Nat'l Bank v. Law*, 564 P.2d 240, 243 (Okl. 1977), outweighs the secured party's interest in the collateral under these circumstances. Therefore, we hold that even though the secured party conditions consent on receipt of the proceeds, failure of this condition will not prevent that consent from cutting off the security interest under section 9-306(2).[108]

VI. CONCLUSION

The farm-products exception discriminates not only against buyers but against secured lenders as well. The public policy rationale for the exception was to protect the interest of the federal government in farm loans. The Code, however, is conspicuously silent and provides no rationale for making farm products more deserving for protection under the Code than other types of collateral. The agricultural lender's preference over other lenders is without a reasonable commercial basis.

The answer to critics of the waiver-authorization rule is that agricultural lenders must adopt effective collateral screening and monitoring procedures. As the United States Supreme Court noted in *Kimbell Foods*, the federal agencies have developed rigorous standards for loans and are "fully capable of establishing terms that will secure repayment."[109] Lenders should avoid practices that may be construed as authorizing the disposition of secured collateral. On the other hand, direct buyers of farm products should not prematurely celebrate. The lender in *WIPCA* lost its security interest to a subsequent buyer in the ordinary course of business. The standards for the waiver-authorization of a security interest in farm products are arguably the same, but this issue will perhaps be decided at a later date.

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108. *Id.* at 769.
109. 440 U.S. at 736 (footnote omitted); *id.* at 732-36.