Conflicts Between Secured Creditors and Buyers of Farm Products Collateral Under the U.C.C. *Farmers State Bank v. Farmland Foods, Inc.*

by

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CONFLICTS BETWEEN SECURED CREDITORS AND BUYERS OF FARM PRODUCTS COLLATERAL UNDER THE U.C.C. - *FARMERS STATE BANK v. FARMLAND FOODS, INC.*

INTRODUCTION

For many years, Nebraska agricultural lenders have relied on case law interpreting the section of the Uniform Commercial Code which allowed their security interest to remain in collateral that was sold without authorization.[1] The exception for farm products created by section 9-307(1) of the Nebraska Statutes only applies if the sale of the collateral is not authorized by the creditor.[2] Prior to *Farmers State Bank v. Farmland Foods, Inc.*,[3] Nebraska courts, as well as most other jurisdictions, did not interpret as an *implied* authorization a creditor's non-enforcement of a requirement in its security agreements that a debtor first receive written permission before selling collateral.[4] If the courts had so interpreted, then the creditor's security interest in the collateral would have been severed.

Farmland Foods, has effectively negated this long-standing rule of law in Nebraska.[5] Additionally, the opinion has made a hollow shell of the farm products exception of the Nebraska Uniform Commercial Code.

This Note will review the facts of *Farmland Foods* and the decision of the Nebraska Supreme Court.[6] This Note will explore past Nebraska cases which have shaped the law prior to *Farmland Foods*.[7] This Note will then review the jurisdictions that have settled the issue contrary to *Farmland Foods* and their various rationales.[8] This Note will also examine the federal and state legislation that has dealt with this subject.[9] Finally, this Note will conclude that the decision of the Nebraska Supreme court in *Farmland Foods* ignored Nebraska precedent and other states' reasoning.[10] Without regard to federal and state legislation, the Nebraska Supreme Court has effectively bound the hands of secured lenders.

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1. Farmers State Bank v. Farmland Foods, Inc., 225 Neb. 1, 14, 402 N.W.2d 277, 285 (1987) (Krivosha, C.J., dissenting).
2. NEB. REV. STAT. U.C.C. §§ 9-306(2), 9-307(1) (Reissue 1980).
3. 225 Neb. 1, 402 N.W.2d 277 (1987).
4. *Id.* at 10, 402 N.W.2d at 283 (Krivosha, C.J., dissenting).
5. *Id.* at 10, 402 N.W.2d at 282.
6. *See infra* notes 11-33 and accompanying text.
7. *See infra* notes 34-97 and accompanying text.
8. *See infra* notes 98-155 and accompanying text.
9. *See infra* notes 156-249 and accompanying text.
10. *See infra* notes 250-72 and accompanying text.

FACTS AND HOLDING

David Hopwood obtained financing from Farmers State Bank in the amount of $86,000.00.[11] Hopwood signed a security agreement with the bank pledging as collateral farm assets and hogs.[12] The security agreement contained a provision that Hopwood would not sell or transfer the collateral without first obtaining prior written consent of the bank.[13] Nevertheless, Hopwood had sold hogs on more than 130 occasions without obtaining the bank's consent.[14] The bank never questioned Hopwood about the sales nor required that he obtain such consent.[15]

Hopwood sold and delivered hogs to Farmland ten to fifteen times annually and would take the proceeds to the bank and have them applied to his indebtedness.[16] Occasionally, Hopwood would deposit these proceeds directly into his farm account; later, he would return to the bank and have those proceeds applied to his indebtedness.[17]

Between April 30 and June 17, 1983, six separate sales were made to Farmland totaling $16,612.01 for 155 hogs.[18] The proceeds were deposited directly into Hopwood's farm account and used to pay for feed and other farm operation expenses, rather than being applied to his outstanding loan balance.[19] In July of 1983, the bank discovered these sales and suggested that Hopwood liquidate the collateral and pay off the loan.[20] However, in November, 1983, Hopwood filed for bankruptcy, and Farmers State Bank then attempted to recover the proceeds from the six disputed sales.[21] Accordingly,

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11. *Farmland Foods*, 225 Neb. at 2, 402 N.W.2d at 278.

12. *Id.* Hopwood was involved in a farrow-to-finish hog raising operation where hogs were raised from birth and sold at market when they achieved market weight. *Id.*

13. *Id.* The Security Agreement provided, "DEBTOR [Hopwood] WARRANTS AND COVENANTS: . . . (3) Not to sell, transfer or dispose of the Collateral . . . without the prior written consent of the Secured Party [the Bank]." *Id.*

14. *Id.* at 2-3, 402 N.W.2d at 278.

15. *Id.* at 3, 402 N.W.2d at 278-79. The bank's president testified that it was physically impossible to comply with the prior written consent provision because of the immediate nature of the typical sale of a farmer's collateral. *Id.* at 3, 402 N.W.2d at 279.

16. *Id.* at 3, 402 N.W.2d at 279. Hopwood's custom was to check on Farmland's price and, if agreeable, immediately deliver the hogs to Farmland. *Id.*

17. *Id.* at 3-4, 402 N.W.2d at 279. Hopwood testified that on October 25, November 8, and November 9, 1982, he sold hogs and deposited the proceeds in his farm account. He later returned and applied the money to the loan, but no reprimand was made by the bank. *Id.* at 4, 402 N.W.2d at 279.

18. *Id.* at 4, 402 N.W.2d at 279.

19. *Id.*

20. *Id.* The bank continued to advance funds until such time as the liquidation was complete, with Hopwood operating as before. *Id.*

21. *Id.* at 4, 402 N.W.2d at 279-80.

Farmers State Bank sued Farmland Foods for conversion based on Farmland's purchase of hogs which were subject to the bank's security interest.[22] Farmland countered that the bank had impliedly consented to the sale of hogs and thus had waived the bank's security interest in the collateral.[23]

Farmland Foods was tried before a jury and the issues of Farmland's liability for conversion and Farmers State Bank's waiver of security interest were submitted to the jury for determination.[24] Farmland received a favorable verdict.[25]

On appeal, the Nebraska Supreme Court determined that the central issue was whether the bank, by its conduct over an extended period of time, had consented to the sale of the collateral without its written consent and therefore had waived its security interest.[26] The court held that "[c]onsent . . . may be established by implication arising from a course of conduct as well as expressly, and such consent operates as a waiver of the security interest."[27] The Supreme Court of Nebraska held that evidence presented in the lower court was sufficient to show a relinquishment of the bank's right to the collateral.[28] The relevant Code provision before the court was section 9-306(2) of the Nebraska Uniform Commercial Code.[29] The Supreme Court relied on the "or otherwise" language of the statute in its holding that the bank had waived its right to the collateral and its security interest, not by an express provision in the agreement, but rather by the bank's course of conduct.[30]

Chief Justice Krivosha, in his dissent, stated that there was no

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22. *Id.* at 1-2, 402 N.W.2d at 278.
23. *Id.* at 2, 402 N.W.2d at 278.
24. *Id.*
25. *Id.*
26. *Id.* at 5, 402 N.W.2d at 280.
27. *Id.* (citations omitted). The Nebraska Supreme court also defined "waiver" as a "voluntary and intentional relinquishment . . . of a known existing legal right . . . *or such conduct as warrants an inference of the relinquishment of such right. . . .*" *Id.* (citing Five Points Bank v. Scoular-Bishop Grain Co., 217 Neb. 677, 681, 350 N.W.2d 549, 552 (1984)).
28. *Id.*
29. *Id.* at 6, 402 N.W.2d at 280. Section 9-306(2) provides: "Except where this article 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, and also continues in any identifiable proceeds including collections received by the debtor." NEB. REV. STAT. U.C.C. § 9-306(2) (Reissue 1980).
30. *Id.* at 6-7, 10, 402 N.W.2d at 280-83. The Nebraska Supreme Court stated that it had confronted the "or otherwise" language of section 9-306(2) in State Bank, Palmer v. Scoular-Bishop Grain Co., 217 Neb. 379, 349 N.W.2d 912 (1984) and *Five Points Bank*, where it determined that the waiver question was a factual one. Waiver is based on the bank's prior course of dealing and may occur by an implied agreement. *Id.* at 6, 402 N.W.2d at 280-81.

express or implied waiver sufficient to allow the court to ignore the language of the security agreement.[31] The Chief Justice stated that the majority was confused on the issue of whether there was a waiver of the security interest or merely a waiver of a requirement to obtain permission to sell in writing.[32] The Chief Justice reasoned that the most that can be inferred was that the bank had impliedly consented to the sale of the hogs with a condition that the proceeds were to be delivered to the bank, as in the previous sixty to ninety sales.[33]

BACKGROUND

NEBRASKA LAW

Since 1971, *Garden City Production Credit Association v. Lannan*[34] has represented the law regarding implied waiver in Nebraska.[35] In *Garden City*, the Production Credit Association "PCA" had executed a note and security agreement with Marlin Carter.[36] The PCA had perfected its interest in the collateral, 161 head of cattle, by filing a financing statement.[37] The security agreement prohibited Carter from selling the collateral without first obtaining written consent from the PCA.[38] However, at times Carter had sold collateral without obtaining written consent but had endorsed all checks he received over to the PCA.[39] Carter had never requested written consent nor had the PCA ever rebuked him for having sold the cattle without first obtaining consent.[40]

With the PCA's knowledge of an intended sale, Carter sold the

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31. *Id.* at 11, 402 N.W.2d at 283 (Krivosha, C.J., dissenting).

32. *Id.* at 11-12, 402 N.W.2d at 283 (Krivosha, C.J., dissenting). Justice Krivosha stated that section 9-306(2) provides that a security interest continues in collateral. And to find that a secured creditor had waived that interest was not the law in Nebraska for the past fifteen years, nor the law generally throughout the United States. *Id.* at 10-12, 402 N.W.2d at 283-84.

33. *Id.* at 11-12, 402 N.W.2d at 283-84.

34. 186 Neb. 668, 86 N.W.2d 99 (1971).

35. *Farmland Foods*, 225 Neb. at 10, 402 N.W.2d at 283 (Krivosha, C.J., dissenting). *Cf.* Smith v. Brooks, 154 Neb. 93, 47 N.W.2d 389 (1951). In this pre-U.C.C. case, the Nebraska Supreme Court held that consent to sell cattle conditioned on the receipt of proceeds by the lender did not authorize the sale. The mortgagee did not lose his security interest in the cattle by such consent when the condition was not met. *Smith*, 154 Neb. at 100-01, 47 N.W.2d at 394.

36. *Garden City*, 186 Neb. at 669, 186 N.W.2d at 101.

37. *Id.*

38. *Id.* The agreement provided that the PCA could repossess the cattle in the event of default. *Id.*

39. *Id.* at 670, 186 N.W.2d at 101. The PCA was therefore aware of the sales and thus knew that Carter was selling the collateral without written consent. *Id.* at 671, 186 N.W.2d at 101.

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

secured cattle to Augustin Brothers through a livestock broker.[41] Carter then endorsed a draft he received as payment from Augustin over to the PCA.[42] But the Augustin draft was returned by the PCA's bank as an insufficient funds check.[43] During this time, however, Augustin had resold the cattle to the defendant, Lannan.[44] Subsequently, the PCA made demand for the return of cattle from Lannan.[45] This demand was refused and an action for replevin was commenced.[46]

The Nebraska Supreme Court reasoned that the Uniform Commercial Code had been designed in order to develop suitable standards between lenders and innocent purchasers, promote farm credit financing, and encourage the sale and exchange of collateral.[47] The court did not find any intention on the part of either the PCA or the debtor, express or implied, to waive its security interest in the collateral.[48] The court stated, "Lannan, the purchaser, was bound by the provisions of the Code and must ordinarily take the risk of a failure to make the appropriate investigation contemplated by its provisions."[49]

Additionally, the court stated that Lannan was not entitled to ignore the provisions of the U.C.C. because of a previous course of dealing between the PCA and Carter.[50] Lannan relied on the "or

41. *Id.*

42. *Id.* at 670-71, 186 N.W.2d at 101. Carter intended this money be applied as a credit on his loan account. *Id.*

43. *Id.* at 671, 186 N.W.2d at 101.

44. *Id.* Pursuant to the Nebraska Uniform Commercial Code, the PCA filed a financing statement in Platte County, Nebraska, thereby perfecting its security interest in the cattle. *Id.* The rule of section 9-306(2) gives the secured party the right to follow collateral into the hands of good faith purchasers and to recover by way of an action in replevin or conversion. 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 26.11 (1965). *See* NEB. REV. STAT. U.C.C. § 9-306(2) comment 3 (Reissue 1980). Conversion is "the exercising of unauthorized control over property." North Cent. Kan. Prod. Credit Ass'n v. Washington Sales Co., 223 Kan. 689, —, 577 P.2d 35, 41 (1978). Replevin is a repossession of the actual collateral itself. J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 26-7, at 976 (2d ed. 1972).

45. *Garden City*, 186 Neb. at 671, 186 N.W.2d at 101.

46. *Id.* at 669-71, 186 N.W.2d at 100-01.

47. *Id.* at 671-72, 186 N.W.2d at 102. *See* NEB. REV. STAT. U.C.C. § 9-306(2).

48. *Id.* at 672-73, 186 N.W.2d at 102. The Nebraska Supreme Court said in addition, considering the purpose of the U.C.C. and the awareness of its drafters of the practical aspects of farm credit financing, that no waiver occurred. *Id.* at 673, 186 N.W.2d at 102.

49. *Id.* The court recognized that the PCA had strictly complied with the U.C.C. Code provisions in perfecting its security interest. *Id. See* NEB. REV. STAT. U.C.C. §§ 9-103(3), 9-401(4).

50. *Garden City*, 186 Neb. at 673-74, 186 N.W.2d at 103. *See* NEB. REV. STAT. U.C.C. §§ 9-307, 1-205.

otherwise" wording of section 9-306(2) of the Nebraska U.C.C.[51] The interpretation which is given to the phrase "or otherwise," when an agreement does not expressly provide consent to a sale of collateral, is that the secured party may otherwise provide consent by his conduct.[52] As indicated by the court, conduct of a previous course of dealing was only relevant as to controversies between the creditor and debtor.[53] Thus, Lannan could not rely on such conduct and be free of the PCA's security interest.[54]

The court applied section 1-205(4) of the Nebraska Uniform Commercial Code and concluded that the express terms of the agreement would control both "course of dealing" and "usage of trade."[55] This section of the U.C.C. resolves conflicts between express contract terms and those terms which may be implied by usage of trade or course of performance.[56] The court said, "[I]n order to establish a waiver . . . 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."[57] Therefore, the court found the PCA's conduct insufficient to establish waiver of its security interest.[58] As a practical matter, the court concluded that it could not be seriously contended that the PCA contemplated waiver of its security interest in the collateral because of the extreme amount of credit extended to the farm industry.[59] The way in which the PCA conducted its business illustrated

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51. *Garden City*, 186 Neb. at 671, 186 N.W.2d at 101-02. *See* NEB. REV. STAT. U.C.C. § 9-306(2).

52. *Garden City*, 186 Neb. at 671, 186 N.W.2d at 101-02.

53. *Id.* at 673, 186 N.W.2d at 103.

54. *Id.*

55. *Id.* at 675-76, 186 N.W.2d at 103-04. Section 1-205 of the Nebraska U.C.C. states:

> (1) 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.
>
> (2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. . . .
>
> . . . .
>
> (4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

NEB. REV. STAT. U.C.C. § 1-205 (Reissue 1980).

56. NEB. REV. STAT. U.C.C. § 1-205 (Reissue 1980).

57. *Garden City*, 186 Neb. at 676, 186 N.W.2d at 104 (citations omitted). *See* Dugan, *Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code*, 46 U. COLO. L. REV. 333, 339 (1975). Other jurisdictions follow "estoppel" reasoning in determining waiver questions. *See infra* note 212 and accompanying text.

58. *Garden City*, 186 Neb. at 676, 186 N.W.2d at 104.

59. *Id.* Judge Newton dissented stating that the farm products exception re-

the ongoing nature of selling farm products and reducing loan balances with the proceeds; there was nothing unusual about the way in which the PCA conducted its business.[60]

Two years after *Garden City*, the Nebraska Supreme Court addressed the waiver issue again in *Farmers State Bank v. Edison Non-Stock Cooperative Association*.[61] A bank had loaned a farmer money to finance the growing of his crops.[62] In conjunction with the loan, the parties executed a security agreement with a provision that the debtor would not sell the collateral without first obtaining prior written consent.[63] The president of the bank knew that the crops would be used to feed livestock and some crops would be sold.[64] The debtor sold seventy-nine loads of grain to the defendant elevator for $20,000.00 but only applied $3,584.48 against his indebtedness at the bank.[65] The issue was whether the knowledge of the bank of the pending sale by the debtor constituted an authorization of such sale, thereby cutting off the bank's security interest.[66]

The Nebraska Supreme Court held that the bank's conduct in failing to enforce the written consent clause was not conduct that showed an equivocal, intelligent and voluntary waiver of a security interest.[67] Therefore, the purchaser was to be charged with constructive notice of the agreement and took subject to the security interest.[68]

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stricted the movement of goods in commerce. Judge Newton said that common law rules of waiver survived the implementation of the U.C.C. and that authority to sell may be derived from the secured party's conduct. *Id.* at 676-78, 186 N.W.2d at 104-05. (Newton, J., dissenting). Furthermore, the Nebraska statutes provide:

> A buyer in ordinary course of business (subsection (9) of section 1-201) *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.

NEB. REV. STAT. U.C.C. § 9-307(1) (emphasis added).

60. *See* supra notes 39-40.

61. 190 Neb. 789, 793, 212 N.W.2d 625, 628 (1973). *See also* Overland Nat'l Bank v. Aurora Coop. Elev. Co., 184 Neb. 843, 172 N.W.2d 786 (1969) (stating that *Clovis* was not controlling and the bank's non-enforcement of a written consent provision was not sufficient evidence of waiver). *But see In re Selden*, 1 U.C.C. Rep. Serv. 2d (Callaghan) 280 (1986) (holding secured party waived its security interest in dairy cows by allowing debtor to sell such collateral at will).

62. *Edison*, 190 Neb. at 790, 212 N.W.2d at 626.

63. *Id.* at 790-91, 212 N.W.2d at 626-27. The agreement provided: "[T]he debtor warrants . . . (3) Not to sell, transfer or dispose of the Collateral . . . without the prior written consent of the Secured Party." *Id.* at 791, 212 N.W.2d at 627.

64. *Id.* at 792, 212 N.W.2d at 627-28. However, the bank did not have actual knowledge of any of the specific sales until after they had been made. *Id.* at 792, 212 N.W.2d at 628.

65. *Id.* at 792, 212 N.W.2d at 627.

66. *Id.* at 793, 212 N.W.2d at 628.

67. *Id.* at 795, 212 N.W.2d at 629.

68. *Id.*

The *Edison* court applied section 1-205(4) of the Nebraska U.C.C. and stated that the express terms of the agreement would control both course of dealing and usage of trade.[69] The court held that because the elevator purchased farm products which were secured by a financing statement, it was bound by the provisions of the U.C.C.[70] Consequently, the elevator took the risk by failing to check the lien records.[71]

Trial courts attempted to apply *Garden City* in a summary fashion, but in 1984, two Nebraska cases indicated a willingness by the Nebraska Supreme court to view the issue of waiver as a question of fact for the jury.[72] In *State Bank, Palmer v. Scoular-Bishop Grain Co.*,[73] the defendant, Scoular-Bishop, bought grain that was secured by a perfected security interest.[74] The security agreement provided that written permission must be obtained from State Bank before selling collateral.[75] The trial court excluded evidence offered by Scoular-Bishop that the bank had knowledge of the sales and that such knowledge constituted a course of dealing and therefore a waiver of the written consent provision.[76] The Nebraska Supreme Court said that waiver cases turned on the weight of the evidence that established such waiver.[77]

The court applied section 1-205 of the Nebraska U.C.C.[78] In light of that section, the court required that "the buyer must prove that the course of dealing was reasonably consistent with the express provisions in the security agreement."[79] The court defined waiver as "a voluntary and intentional relinquishment" of a "known existing legal right."[80] Therefore, the court reiterated the rule that "failure to re-

69. *Id.* The court noted that because an express term in the contract was not consistent with an implied waiver, the express term controlled. *Id. See* NEB. REV. STAT. U.C.C. § 1-205(4).

70. *Edison*, 190 Neb. at 795, 212 N.W.2d at 629.

71. *Id.*

72. *See infra* notes 73-90 and accompanying text.

73. 217 Neb. 379, 349 N.W.2d 912 (1984).

74. *Id.* at 380, 349 N.W.2d at 913.

75. *Id.* Rudolf, the debtor, had made five sales of corn to Scoular-Bishop, deposited the proceeds into his personal account, and made no payments on the debt. *Id.* at 381-82, 349 N.W.2d at 914.

76. *Id.* at 381, 349 N.W.2d at 914. The trial court judge relied on *Garden City* in deciding the evidence was not relevant to show waiver. *Id.*

77. *Id.* at 387, 349 N.W.2d at 917. The court was specifically referring to previous waiver cases, *Garden City* and *Edison*, as well the case at bar. The court stated that *Garden City* resolved the question of waiver based upon the weight of the evidence. The buyer must prove that the course of dealing was consistent with the express terms of the agreement and that the creditor's course of dealing was a voluntary and intentional relinquishment of a legal right. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

buke the seller [was] not [an act] which indicate[d] intention to waive a security interest."[81] The Nebraska Supreme Court adopted the position that mere acquiescence is insufficient to find a waiver of a security interest.[82] The court suggested that when interpreting the "or otherwise" wording of section 9-306 of the U.C.C., it is with "extreme hesitancy" that a court should find an implied agreement.[83] Although the court reasoned that claims of implied waiver should be approached with caution, it held that the denial of the evidence regarding the bank's conduct was an abuse of discretion.[84]

In *Five Points Bank v. Scoular-Bishop Grain Co.*,[85] a similar fact situation arose.[86] The bank received a security interest in a debtor's grain and sued the subsequent purchaser for conversion.[87] The court held that the "or otherwise" language of section 9-306 of the Nebraska U.C.C. must be applied on a case-by-case basis.[88] As in *State Bank, Palmer*, the court again indicated that waiver was a "voluntary and intentional relinquishment or abandonment of a known existing legal right" and "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."[89] The Nebraska Supreme Court concluded, as it had in *State Bank, Palmer*, that an implied waiver should only be found with hesitancy and the standard of proof must be clear and convincing evidence of such an agreement.[90]

Recently, the United States District Court for the District of Nebraska in *Federal Deposit Insurance Corp. v. Neu Cheese Co.*,[91] heard

81. *Id.* at 386, 349 N.W.2d at 916. (quoting *Garden City*, 186 Neb. at 675, 186 N.W.2d at 104 (1971)).

82. *Id.* at 387-88, 349 N.W.2d at 917 (citing Central Cal. Equip. Co. v. Dolk Tractor Co., 78 Cal. App. 3d 855, 862, 144 Cal. Rptr. 367, 371 (1978)). *See infra* note 199 and accompanying text.

83. *State Bank, Palmer*, 217 Neb. at 388, 349 N.W.2d at 917. The Nebraska Supreme Court held that the standard of proof in establishing an implied waiver is "clear and convincing evidence . . . which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Id.*

84. *Id.* at 388-89, 349 N.W.2d at 917-18.

85. 217 Neb. 677, 350 N.W.2d 549 (1984).

86. *Id.* at 678-79, 350 N.W.2d at 550-51.

87. *Id.* at 678, 350 N.W.2d at 550. The debtor was encouraged by the bank's president to acquire his fertilizer by credit and deduct the balance from the sale of grain in the fall (set-off method). This fact was offered by Scoular-Bishop as evidence that the bank had expressly or impliedly acquiesced in this "sale" of grain through the set-off method of obtaining credit. *Id.* at 678-79, 350 N.W.2d at 551.

88. *Id.* at 680, 350 N.W.2d at 551.

89. *Id.* at 681, 350 N.W.2d at 552 (citing Farmers State Bank v. Edison Non-Stock Coop. Ass'n, 190 Neb. 789, 212 N.W.2d 625 (1973)). The *Five Points Bank* court distinguished the facts of its case from that of *Edison* because the bank's president was told of the set-off arrangement against the future grain sales. *Id.* at 681-82, 350 N.W.2d at 552.

90. *Id.* at 682, 350 N.W.2d at 552.

91. No. 85-0-470 (D. Neb. Sept. 30, 1986) *rev'd*, 825 F.2d 1270 (8th Cir. 1987).

an appeal from a decision by the United States Bankruptcy Court for the District of Nebraska.[92] The bankruptcy judge found in favor of the FDIC (representing the secured creditor) and stipulated that the FDIC should recover $63,368.71 from Neu Cheese (the subsequent purchaser).[93] Neu Cheese argued that the bank had waived its security interest in collateral through its course of dealing with the debtor when it allowed the debtor to sell the collateral without first obtaining prior written consent.[94] The district court stated that the bank knew the debtor was selling his milk without written approval since approximately 500 checks had been drawn in payment for the milk.[95] Each time the debtor had deposited the checks in his own farm account.[96] Nevertheless, the court followed prior Nebraska courts' rationale that a creditor's failure to enforce a consent provision does not establish waiver of the security interest.[97]

OTHER JURISDICTIONS

Jurisdictions Finding Waiver of Security Interests

In *Clovis National Bank v. Thomas*,[98] the bank loaned a farmer operating capital and gained a security interest in cattle as collateral.[99] In prior dealings, the farmer had sold cattle to the defendant, a licensed livestock commission house, and applied the proceeds against his indebtedness.[100] Thereafter, on five separate occasions the farmer sold the cattle without first obtaining prior written consent as was stipulated by the security agreement.[101] On these occasions, the farmer did not apply the proceeds toward his

92. *Id.* at 1.

93. *Id.* at 2. Neu Cheese is engaged in the dairy business, buying milk from farmers in order to manufacture cheese. Neu Cheese had purchased milk from Jensen, a bankrupt farmer who owed money to the Bank of Verdigre which was represented by the FDIC because the bank was in receivership. *Id.*

94. *Id.* at 3-4. The security agreement signed by Jensen was properly perfected and contained a provision which prohibited the sale of the collateral without written permission. Jensen, in prior dealings with Neu Cheese, would deposit proceeds into his farm account and then pay off the bank, but never directly applied proceeds to his loan account. *Id.* at 3.

95. *Id.* at 7.

96. *Id.* at 3.

97. *Id.* at 7. The court cited *State Bank, Palmer* and *Five Points Bank* in its determination of the meaning of the "or otherwise" phrase of section 9-306(2) of the Nebraska Revised Statutes. *Id.*

98. 77 N.M. 554, 425 P.2d 726 (1967).

99. *Clovis*, 77 N.M. at —, 425 P.2d at 727. The bank loaned W.D. Bunch $21,500, who, in turn, gave the bank a promissory note and a security interest in his cattle. The agreement provided: "Without the prior written consent of Secured Party, Debtor will not sell, or otherwise dispose of the Collateral." *Id.* at —, 425 P.2d at 728.

100. *Id.* at —, 425 P.2d at 727.

101. *Id.* at —, 425 P.2d at 728. This practice was customary, developed through the parties' prior dealings. *Id.* at —, 425 P.2d at 727.

indebtedness.[102] The bank then sued the defendant-cattle barn in an action for conversion when the loan balance could not be reduced by the farmer.[103] The trial court determined that the bank had acquiesced and consented to the sales and therefore, had waived any security interest it had in the cattle.[104]

The *Clovis* court stated that the bank was aware of its right to require that written consent be given prior to sale.[105] By not enforcing this provision of the agreement, the bank waived its security interest.[106] The bank's intent that the proceeds be applied to the loan did not avoid a finding of waiver.[107]

In *Clovis*, Justice Carmody dissented.[108] Justice Carmody stated that there was no intentional relinquishment of a known right by the conduct of the bank, and thus no waiver.[109] Justice Carmody also stated that at most, the bank may have waived its right to require that written consent be given prior to selling the collateral.[110] In addition, the dissenting Justice said that section 50A-1-205(4) of the New Mexico statutes was controlling and that the express terms of the agreement would control the usage of trade or any course of dealing.[111] He indicated that severe repercussions from the decision would develop in the area of security interests of farm products and

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102. *Id.* at —, 425 P.2d at 727-28.

103. *Id.* at —, 425 P.2d at 728.

104. *Id.* at —, 425 P.2d at 729. *See also* United States v. Central Livestock Ass'n, 349 F. Supp. 1033 (D.N.D. 1972) (stating that it adopted *Clovis* in interpreting section 9-306(2) and implied waiver).

105. *Id.* at —, 425 P.2d at 730.

106. *Id.* at —, 425 P.2d at 730. One commentator has suggested that the *Clovis* court decided the case on the basis of the way the parties had been acting, rather than relying on the provision in the security agreement. T. QUINN, UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST ¶ 9-307[A][11][a] (1978).

107. *Clovis*, 77 N.M. at —, 425 P.2d at 730. Pursuant to U.C.C. section 1-103, which sets forth that specific common law principles not be displaced by adoption of the Code, the New Mexico Supreme Court explained that the common law doctrine of waiver was merely supplemented by the Code. The court stated that, in particular, waiver by implied acquiescence or consent survived the implementation of the Code. Therefore, though a security interest continues in collateral, the common law doctrine of implied waiver can serve to cut off this interest by a creditor's consent to such sales. *Id.* at —, 425 P.2d at 732.

108. *Id.* at —, 425 P.2d at 734 (Carmody, J., dissenting).

109. *Id.* There was, in Justice Carmody's opinion, no evidence that the bank knew of any sales made by the debtor-farmer and therefore could not have consented to them, even impliedly. Intentional relinquishment and waiver needed to be based on knowledge of the facts and this requirement was true of implied consent. *Id.*

110. *Id.*

111. *Id.* at —, 425 P.2d at 736. (Carmody, J., dissenting). The controlling statutory provision states: "(4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable, express terms control both course of dealing and usage of trade. . . ." N.M. STAT. ANN. § 50A-1-205(4). Because there was an express term in the security agreement providing for no sale without

the utilization of the Uniform Commercial Code.[112] The dissent concluded by warning that " 'the door is open' for judicial construction of the Code in a manner not contemplated by the authors or the legislature."[113]

The dissent's reasoning was endorsed by the New Mexico legislature.[114] Shortly after *Clovis* was decided, the legislature amended section 9-306(2) of its U.C.C. to effectively overrule *Clovis*.[115] The New Mexico statutory amendment provides: "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 the parties or by any trade usage."[116] Yet, other jurisdictions have adhered to the *Clovis* reasoning, in spite of New Mexico's legislative reaction.[117]

In *CharterBank Butler v. Central Cooperatives, Inc.*,[118] a Missouri court found that a bank had waived its security interest by following a course of conduct when it permitted the debtor to sell his crops and other security.[119] This implied authorization cut off the bank's security interest.[120] The court cited *Clovis* and stated that a course of dealing whereby the bank had acquiesced in the sale of crops which were covered by a security agreement would render the security interest unenforceable.[121] The Missouri Court of Appeals held that the bank could not preserve its lien by conditioning the payment of the proceeds of the collateral on its indebtedness.[122]

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written consent, implied consent is inconsistent and arguably, is therefore controlled by the express term.

112. *Clovis*, 77 N.M. at —, 425 P.2d at 734 (Carmody, J., dissenting).

113. *Id.* at —, 425 P.2d at 737 (Carmody, J., dissenting).

114. *See infra* notes 115-16 and accompanying text.

115. QUINN, *supra* note 106, at ¶ 9-307[A][11][d]; *North Central Kansas Prod. Credit Ass'n*, 223 Kan. at —, 577 P.2d at 39.

116. *North Central Kansas Prod. Credit Ass'n*, 223 Kan. at —, 577 P.2d at 39 (quoting N.M. STAT. ANN. § 50A-9-306(2) (1975)) (currently cited as N.M. STAT. ANN. § 55-9-306(2) (1978)).

117. *See infra* notes 118-55.

118. 667 S.W.2d 463 (Mo. Ct. App. 1984).

119. *Id.* at 465. The trial court had found the bank had a policy by which they permitted the debtor-farmer to sell crops, cattle and other security. *Id.*

120. *Id.*

121. *Id.* at 466. In *CharterBank Butler*, there was no specific provision in the security agreement prohibiting sale without written consent. In fact, the bank's loan officer testified that its practice was to allow any sale as long as the proceeds were applied to the loan. *Id.* at 464. The *CharterBank Butler* court said that the present facts are virtually identical to *Clovis* with the exception of the type of collateral. *Id.* at 466.

122. *Id.* at 466. *See also* Parkersburg State Bank v. Swift Indep. Packing Co., 41 U.C.C. Rep. Serv. (Callaghan) 248, 250 (8th Cir. 1985) (holding that mere failure by debtor to apply proceeds toward the indebtedness did not offset an implied authorization to sell collateral); Annon, Inc. v. Farmers Prod. Credit Ass'n, 446 N.E.2d 656 (Ind. Ct. App. 1983) (holding that the fact that the lender conditioned the sale on receiving proceeds was irrelevant because if the buyer had called, the lender would have author-

Under the Missouri U.C.C., the bank had given its consent to the sale of the debtor's collateral and had therefore waived its security interest.[123]

A number of Iowa cases have held that a creditor may waive its security interest by its course of conduct.[124] In the leading case, *Lisbon Bank & Trust Co. v. Murray*,[125] a bank loaned money against a debtor's cattle as collateral, and the debtor proceeded to sell a portion of the cattle.[126] He then defaulted wihtout applying the proceeds against his loan.[127] The Iowa Supreme Court stated the issue was whether the bank had authorized the sale of the cattle and noted section 9-306(2) as the relevant U.C.C. provision.[128] The court pointed out that the security agreement did not contain a provision requiring written consent prior to sale, distinguishing the facts of the case from those of *Garden City*, a case cited by the bank in support of its position.[129] The Iowa Supreme Court indicated that though the sale had been conditioned on the debtor directly applying the proceeds to his indebtedness, the bank had effectively waived its security interest.[130]

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ized the sale anyway); First Nat'l Bank & Trust Co. v. Iowa Beef Processors, Inc., 626 F.2d 764 (10th Cir. 1980) (holding that conditioning sale on receipt of proceeds was not a true conditional authorization; therefore, the security interest was cut off).

123. *CharterBank Butler*, 677 S.W.2d at 465. Section 400.9-306(2) of the Missouri statute, provides: "A security interest continues in collateral notwithstanding sale . . . by the debtor unless his action was authorized by the secured party . . . ." *Id.* (quoting MO. REV. STAT. § 400.9-306(2) (1978)).

124. *See, e.g.*, Ottumwa Prod. Credit Ass'n v. Keoco Auction, Co., 347 N.W.2d 393 (Iowa 1984) (holding that order by PCA to liquidate collateral amounted to an *express* waiver of security interest); Hedrick Sav. Bank v. Myers, 229 N.W.2d 252 (Iowa 1975) (finding that bank's conduct of accepting checks from prior sales made without written consent amounted to implied authority to sell); Lisbon Bank & Trust Co. v. Murray, 206 N.W.2d 96 (Iowa 1973) (holding that bank's conduct in allowing debtor to sell livestock purchased with secured loans negated bank's lien in the livestock). *But cf.* FS Credit Corp. v. Troy Elevator, Inc., 397 N.W.2d 735 (Iowa 1986) (holding that prior course of conduct by secured party was not a waiver of a new provision in a new security agreement); Larsen v. Warrington, 348 N.W.2d 637 (Iowa Ct. App. 1984) (holding that debtor's transfer of collateral in partial satisfaction was not within the "course of dealing" authorized by creditor's conduct).

125. 206 N.W.2d 96 (Iowa 1973).

126. *Id.* at 97.

127. *Id.* at 97-98. The bank sought to recover a deficiency of $2,428.80 in an action against the party to whom the debtor had sold the cattle. *Id.* at 97.

128. *Id.* at 97. The Iowa court quoted the pertinent language of U.C.C. section 9-306(2): "Except where this Article otherwise provides, a security interest continues in collateral notwithstanding sale . . . by the debtor unless his action was authorized by the secured party in the security agreement or otherwise." *Id.* (quoting IOWA CODE § 9-306(2)).

129. *Id.* at 98-99. The bank's theory was that it did not authorize the sale and that the security interest continued in the collateral regardless of the sale because it was unauthorized. *Id.* It was significant that there was no written provision in the security agreement. Consequently, the Iowa court was unable to utilize either the *Clovis* or *Garden City* rationale. *See id.*

130. *Id.* at 99. The court did say, however, that if the sale had been conditioned on

The *Lisbon* court also indicated that though the purchaser may have been unaware of the bank's conduct, the waiver of the bank's interest still occurred.[131]

A federal court in Colorado applied a different section of the U.C.C. to resolve the waiver issue.[132] In *Moffat County State Bank v. Producers Livestock Marketing Association*,[133] the United States District Court for the District of Colorado found that although the bank had a security agreement which required written authorization to sell, it had allowed the debtor to sell collateral without receiving such written permission.[134] The rancher-debtor, without the bank's knowledge, sold sixty-eight head of cattle through the defendant's sale barn.[135] The rancher kept the proceeds and did not inform the bank of the sale.[136] The bank learned of the sale and foreclosed on the debtor, after repeated attempts to collect on its loan.[137] Thereafter, the bank sued the sale barn for conversion to cover a deficiency left by the rancher's bankruptcy.[138]

The district court held that the bank's course of performance was relevant to show that a waiver of a security interest had occurred.[139] In addition, the court found the bank's argument that the sale of the collateral was conditioned upon the application of the proceeds to the indebtedness was "without merit."[140]

Regarding the issue of waiver of the security interest, the court stated that the Colorado legislature could solve the problem.[141] Courts will continue to be placed in a position of choosing between two innocent parties and apply difficult and abstract distinctions,

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the *purchaser* making payments directly to the bank, then the lien would not have been cut off. *Id.*

131. *Id.* No reliance by the purchaser upon the bank's conduct was necessary to establish waiver. *Id.*

132. *See infra* notes 133-43 and accompanying text.

133. 40 U.C.C. Rep. Serv. (Callaghan) 314 (D. Colo. 1984).

134. *Id.* at 316-18. The agreement provided for default by the cattle rancher if the cattle secured by a note were sold without obtaining permission. *Id.* at 316.

135. *Id.* at 317.

136. *Id.* After deducting commissions and other sale expenses, the net proceeds were $20,313.00. *Id.*

137. *Id.*

138. *Id.* at 315-17.

139. *Id.* at 324. The court applied the Colorado version of U.C.C. section 2-208(3) and stated that "a 'course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.' " *Id.* at 324 (quoting COLO. REV. STAT. § 4-2-208(3)). The agreement provided for no sale without written consent, but the bank's subsequent performance waived this provision. *Id.* at 324.

140. *Id.* The court said that the defendant-sale barn had paid the debtor-rancher. It was the debtor who failed to follow the condition, not the defendant; therefore, conditioning payment was not binding upon the defendant. *Id.* at 324-25.

141. *Id.* at 329.

such as a failure to rebuke, until the legislature acts.[142] The court reviewed several midwestern states' approaches to the problem and indicated that the conflict could be resolved by the state administering a central filing system which protects both the secured party and the buyer of farm products without unduly burdening either party.[143]

In an Arkansas case, *Planters Production Credit Association v. Bowles*,[144] a creditor (PCA) held a security interest in a cotton crop.[145] The PCA's regular policy was to allow its debtors to sell their collateral at will and apply the proceeds afterward.[146] After encountering financial difficulties, the debtor-farmer sold his cotton crop and did not apply the full amount of proceeds against his debt.[147] The lower court held that the PCA was not entitled to a judgment against various defendant purchasers on the grounds that it had waived its security interest by conduct in which it allowed debtors to dispose of collateral at will.[148]

On appeal, the Arkansas Supreme Court held that a secured creditor could waive its interest in the collateral by its course of dealing.[149] The PCA's conduct constituted an "or otherwise" authorization under the state's U.C.C. section 9-306(2).[150] The *Bowles* court cited *Clovis* and *Lisbon* and indicated that the facts of the case at bar were similar; waiver had occurred by the creditor's course of conduct.[151]

In a fashion similar to New Mexico, the Arkansas legislature amended section 9-306(2) of its U.C.C. to legislatively overturn the *Bowles* opinion.[152] The amendment added the following sentence to section 9-306(2):

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142. *Id.* The court discussed *Clovis* and *Garden City* as the two leading cases representing the different positions relative to the waiver issue. *Id.* at 326. The court discussed the various schemes available by which secured parties could notify potential purchasers of farm products of their security interests. *Id.* at 328-29.

143. *Id.* at 328-29 (citation omitted). In Ohio, a farm products buyer takes free of a security interest unless the secured party can get from the debtor a list of all potential buyers of his collateral and notify each of them as to its interest. If such a system is followed, the security interest then continues in the collateral after sale and the buyer takes subject to any prior liens. *Id.* at 328-29.

144. 256 Ark. 1063, 511 S.W.2d 645 (1974).

145. *Id.* at —, 511 S.W.2d at 645.

146. *Id.* at —, 511 S.W.2d at 649.

147. *Id.* at —, 511 S.W.2d at 646.

148. *Id.* at —, 511 S.W.2d at 646-47.

149. *Id.* at —, 511 S.W.2d at 647.

150. *Id. See* ARK. STAT. ANN. § 85-9-306(2) (Cum. Supp. 1985).

151. *Bowles*, 256 Ark. at —, 511 S.W.2d at 649-50. The Arkansas court mentioned that *Clovis* had been legislatively overruled in New Mexico. *Id.* at 649. Interestingly, this comment by the Arkansas court was a forecast of what was to occur in Arkansas after *Bowles* was decided. *See infra* note 152.

152. *See infra* note 149 and accompanying text.

> A security interest in farm products shall not be considered waived nor shall authority to sell, exchange, or otherwise dispose of farm products be implied or otherwise result from any course in dealing between the parties or by any trade usage.[153]

Although the courts of some states have construed the conduct of a farm products lender as constituting a waiver of its security interest, the leading cases drawing this conclusion have been legislatively overruled.[154] Other jurisdictions have circumvented the need for legislative action through judicial analyses finding no waiver.[155]

Jurisdictions Finding No Waiver of Security Interest

Numerous jurisdictions have concluded, for various reasons, that a lender does not waive its security interest in collateral by failing to enforce the written consent provision of a security agreement.[156] These reasons include: (1) if there had been a consent to sell, it was conditioned on the receipt of the proceeds being applied to the loan;[157] (2) implied authorization to sell collateral was prevented by section 1-205 of the U.C.C. when the security agreement specifically required written authority;[158] (3) waiver of an express term requires reliance by the subsequent buyer on the secured party's conduct and lacking such reliance, there is no waiver;[159] and (4) when the secured creditor does not enforce a prior written consent provision, that conduct does not constitute waiver of a perfected security interest.[160]

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153. ARK. STAT. ANN. § 85-9-306(2) (Cum. Supp. 1985). The Arkansas legislature commented on the amendment. It said that the emergency amendment to section 9-306(2) was caused by confusion resulting from *Bowles* and was to clarify the effect that course of dealing has on a lender's security interest. *Id.* § 85-9-306(2) comment.

154. *See supra* notes 98-116, 144-53 and accompanying text.

155. *See infra* notes 156-249 and accompanying text.

156. *See infra* notes 157-249 and accompanying text.

157. *See North Central Kansas*, 223 Kan. at —, 577 P.2d at 38. *See also* In re Ellsworth, 722 F.2d 1448, 1451 (9th Cir. 1984) (holding where creditor did not receive the proceeds, security interest was not released); Matteson v. Harper, 66 Or. App. 31, —, 672 P.2d 1219, 1221 (1983) (holding that consent to sell was conditioned on receiving a certain dollar amount and to sell for less was a violation of the condition which made the sale unauthorized).

158. *See* Wabasso State Bank v. Caldwell Packing Co., 308 Minn. 349, —, 251 N.W.2d 321, 325 (1976); *See also* Vermillion County Prod. Credit Ass'n v. Izzard, 111 Ill. App. 2d 190, —, 249 N.E.2d 352, 355 (1969) (holding that a course of dealing will not override section 1-205 or an established rule of law).

159. *See* Fisher v. First Nat'l Bank, 584 S.W.2d 515, 519 (Tex. Civ. App. 1979). *See also* Cox v. Bancoklahoma Agri-Service Corp., 641 S.W.2d 400, 404 (Tex. App. 1982) (holding that a waiver is not created if the creditor's conduct does not mislead the subsequent buyer); Aberdeen Prod. Credit Ass'n v. Redfield Livestock Auction, Inc., 379 N.W.2d 829, 832 (S.D. 1985) (holding that the lack of knowledge by a subsequent buyer of a creditor and debtor's course of dealing prevents waiver).

160. *See* Central Cal. Equip. Co. v. Dolk Tractor Co., 78 Cal. App. 3d 855, 862, 144 Cal. Rptr. 367, 371 (1978); First Tenn. Prod. Credit Ass'n v. Gold Kist, Inc., 653 S.W.2d

In *Wabasso State Bank v. Caldwell Packing Co.*,[161] a bank had a security interest in a debtor's cattle.[162] The security agreement contained a provision that the debtor would not sell the collateral without first obtaining written consent from the bank.[163] During approximately a six month period, the farmer sold cattle worth $11,315.59 to the defendant without obtaining permission from the bank.[164]

An action for conversion against the packing company ensued when the farmer became bankrupt and had not appied proceeds from the sales to the defendant to the outstanding loan.[165] The Minnesota Supreme Court stated that Article 9 of the U.C.C. set forth a recording system which allowed a creditor, by filing a financing statement, to establish and depend upon a secured position.[166] The court determined that the packing company was in a better position to protect its interests because it had constructive notice of the bank's security interest.[167] In addition, the court found no detrimental reliance on the part of the packing company since it could not have known of the bank's conduct prior to the sale.[168]

The *Wabasso* court relied on *Garden City*.[169] In so doing, the court held that under the Minnesota version of section 1-205(4), "neither course of dealing nor usage of trade can be used to contradict the express terms of an agreement."[170] The court stated that

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418, 421 (Tenn. Ct. App. 1983). *See also* Security Nat'l Bank v. Belleville Livestock Comm'n Co., 619 F.2d 840, 846 (10th Cir. 1979) (holding that creditor's acceptance of proceeds of authorized sales did not constitute waiver).

161. 308 Minn. 349, 251 N.W.2d 321 (1976).

162. *Id.* at —, 251 N.W.2d at 322. The farmer was engaged in a feeder cattle operation and obtained financing from the plaintiff for the purchase of cattle. *Id.* at —, 251 N.W.2d at 322.

163. *Id.* at —, 251 N.W.2d at 322.

164. *Id.* at —, 251 N.W.2d at 322. The cattle were sold to two separate defendants, Caldwell Packing Co. and Robel Beef Packers, Inc. *Id.* at —, 251 N.W.2d at 322.

165. *Id.* at —, 251 N.W.2d at 322.

166. *Id.* at —, 251 N.W.2d at 323-24.

167. *Id.* at —, 251 N.W.2d at 324. The court stated that with a telephone call, the packing company could have checked the U.C.C. records and determined whether the bank had authorized the sale. *Id.* at —, 251 N.W.2d at 324. *See also* Commercial Credit Corp. v. Blau, 393 S.W.2d 558, 566 (Mo. 1965) (stating that the defendant could have protected himself by inspecting the mortgage which was of record).

168. *Wabasso*, 308 Minn. at —, 251 N.W.2d at 324. The Minnesota Supreme Court hinted that reliance on such conduct which might constitute waiver would be necessary to create a waiver as to a subsequent purchaser. The purchaser must have relied upon the bank's conduct and must have acted according to the impression that the debtor had authority to sell. *Id.* at —, 251 N.W.2d at 324.

169. *Id.* at —, 251 N.W.2d at 324.

170. *Id.* at —, 251 N.W.2d at 325 (citing MINN. STAT. § 336.1-205(4) (1966)). *But see* NEB. REV. STAT. U.C.C. § 2-208 (Reissue 1980). The statute provides:

> (1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportu-

since the security agreement required prior written authorization, a course of dealing or conduct could not establish that authorization.[171]

The Minnesota Supreme Court indicated that the only jurisdiction finding an implied authorization when applying section 1-205(4) was Iowa in *Lisbon*.[172] The *Wabasso* court said that since *Lisbon* did not factually include an express written prohibition against sale without authorization, section 1-205 was inappliable.[173] Thus, *Lisbon* and subsequent Iowa cases were distinguishable.[174]

The *Wabasso* court summarized its position by stating that it did not intend to confuse and complicate a carefully drafted body of law such as the U.C.C. by imposing a judicial interpretation which was not warranted.[175] The Minnesota Supreme Court emphasized, "Article 9 of the Code is an attempt to bring simplicity and certainty to the law of secured transactions through a system of written agreements and recorded notice."[176]

North Central Kansas Production Credit Association v. Washington Sales Co.,[177] also involved security interests in subsequently-sold collateral.[178] In *North Central Kansas*, the creditor (PCA) had a perfected security interest in cows, milk, and crops of a dairy farmer.[179] The PCA, in its prior dealings with its debtor-farmer, did not rebuke him when it learned of sales made of wheat and milk which occurred without obtaining consent.[180] The agreement contained a provision

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nity 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.

Id. But cf. Farmland Foods, 225 Neb. at 7-8, 402 N.W.2d at 281-82. In contrast to the provisions of section 1-205, the Nebraska Supreme Court applied section 2-208 and distinguished course of performance from course of dealing; course of dealing reflects pre-agreement conduct, while course of performance involves post-agreement conduct. *Id.*

171. *Wabasso*, 308 Minn. at —, 251 N.W.2d at 325.

172. *Id.* at —, 251 N.W.2d at 325.

173. *Id.* at —, 251 N.W.2d at 325.

174. *Id.* at —, 251 N.W.2d at 325.

175. *Id.* at —, 251 N.W.2d at 325.

176. *Id.* at —, 251 N.W.2d at 325. The Minnesota Supreme Court said that the issue of whether the bank impliedly authorized the sale and therefore cut off its security interest was settled in favor of the secured party by section 336.9-1-205 of the Minnesota Code. *Id.* at —, 251 N.W.2d at 325.

177. 223 Kan. 689, 577 P.2d 35 (1978).

178. *Id.* at —, 577 P.2d at 35. On facts similar to *North Central Kansas*, the Illinois Court of Appeals in *Vermilion* indicated that the Illinois legislature amended section 9-306(2) of its U.C.C. to impose criminal penalties on debtors who dispose of collateral and fail to pay the secured party. In light of this amendment, the *Vermilion* court held a course of dealing would not constitute a waiver. *Vermilion*, 111 Ill. App. 2d at —, 249 N.E.2d at 355.

179. *North Central Kansas*, 223 Kan. at —, 577 P.2d at 36-37.

180. *Id.* at —, 577 P.2d at 37. The distinction between prior dealings and those at issue was that the prior dealings involved sales of crops. The plaintiff PCA sought to

that the debtor would not sell the collateral without first obtaining written consent.[181] During a two week period in March, 1973, the farmer sold thirty-five head of cattle through the defendant, Washington Sales Co.[182] The PCA then brought an action for conversion to enforce its security interest in the cattle.[183]

The trial court found that the PCA had not waived its security interest by consenting to sales in return for the proceeds.[184] The lower court held that attaching conditions to consent was not prevented by the U.C.C.[185] On appeal, the Kansas Supreme Court applied U.C.C. sections 1-205(4), 9-306(2), and 9-307.[186]

In applying the U.C.C., the Kansas Supreme Court held that the Code did not prevent a creditor from attaching conditions to its consent to the sale of collateral.[187] If a creditor attaches a condition to the sale, and that condition is not met, then any sale is unauthorized and the security interest continues in the collateral.[188] The court reasoned that a purchaser could protect himself by ascertaining whether any security interest existed and whether any conditions existed relevant to the sale of the collateral.[189]

While recognizing that there was a division of authority regarding the issue of implied consent and waiver of security interests, the *North Central Kansas* court noted that most commentators discussing this subject follow *Garden City*.[190] The Kansas Supreme Court examined both *Garden City* and *Clovis*.[191] The Kansas court stated that the *Clovis* decision was no longer applicable in New Mexico because the legislature had amended its version of U.C.C. § 9-306(2).[192] The Kansas Supreme Court opined that the *Clovis* rationale failed to fol-

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recover proceeds from the sale of *cattle*, not crops. However, cattle were also covered in the security agreement. *Id.* at —, 577 P.2d at 37.

181. *Id.* at —, 577 P.2d at 36. The agreement also stated that permission was granted "*providing that payment for the same* [collateral] *is made jointly to the Debtor and the Secured Party.*" *Id.* at —, 577 P.2d at 36.

182. *Id.* at —, 577 P.2d at 36-37.

183. *Id.* at —, 577 P.2d at 37.

184. *Id.* at —, 577 P.2d at 37.

185. *Id.* at —, 577 P.2d at 37. The trial court said that as long as checks received for sales made of wheat and milk sold in prior dealings were turned over to the PCA, it had no grounds for objection. *Id.* at —, 577 P.2d at 38.

186. *Id.* at —, 577 P.2d at 38. The U.C.C. is enacted under Title 84 of the Kansas Statutes. KAN. STAT. ANN. §§ 84-1-101 to 1-102 (1983).

187. *North Central Kansas*, 223 Kan. at —, 577 P.2d at 39.

188. *Id.* at —, 577 P.2d at 38 (citing Baker Prod. Credit Ass'n v. Long Creek Meat Co., 266 Or. 643, 513 P.2d 1129 (1973)).

189. *Id.* at —, 577 P.2d at 38-39 (citing *Baker*, 266 Or. 643, 513 P.2d 1129).

190. *Id.* at —, 577 P.2d at 39.

191. *Id.* at —, 577 P.2d at 39-41. The Kansas Supreme Court indicated that *Garden City* and *Clovis* were the two leading cases representing the two divergent points of view regarding the issue of waiver. *Id.* at —, 577 P.2d at 39.

192. *Id.* at —, 577 P.2d at 39. *See supra* notes 114-16 and accompanying text.

low the intent of the framers of the Uniform Commercial Code.[193] In addition, the court found the *Clovis* position would constrict the granting of credit to the capital intensive agricultural industry.[194] Thus, the Kansas court chose to follow *Garden City*.[195]

In *North Central Kansas*, the Kansas Supreme Court defined waiver as a voluntary and intentional relinquishment of a known right and indicated that the bank's failure to enforce a written consent provision in the security agreement was not a "waiver as that term is generally understood in contract law."[196] The court held that the PCA's action could not be construed as an intentional renouncement of its interest in the collateral.[197] The court said that the waiver doctrine was an equitable one and because the defendant had constructive notice of the security interest and failed to check the filings, the waiver doctrine should not be invoked.[198]

In California, *Central California Equipment Co. v. Dolk Tractor Co.*,[199] involved the sale of a combine to Progressive Farms.[200] The security agreement contained a prohibition against a sale without obtaining written consent.[201] However, Progressive encountered financial problems and it sold the combine to another party, who in turn

193. *North Central Kansas*, 223 Kan. at —, 577 P.2d at 41. *Cf.* United States v. Greenwich Mill & Elevator Co., 291 F. Supp. 609, 614 (N.D. Ohio 1968) (stating that *Clovis* goes too far in its continuation of the waiver doctrine and commenting that the code must allow the creditor and debtor to make plans regarding the sale of collateral without invoking the waiver doctrine).

194. *North Central Kansas*, 223 Kan. at —, 577 P.2d at 41.

195. *Id.* at —, 577 P.2d at 41. The court therefore found no waiver of the PCA's security interest and no consent to the sales made by its debtor. *Id.* at —, 577 P.2d at 41.

196. *Id.* at —, 577 P.2d at 41. The court said, "[w]aiver generally implies 'that a party has voluntarily and intentionally renounced or given up a known right, or has caused or done some positive act . . . which is inconsistent with the contractual right.' " *Id.* at —, 577 P.2d at 41 (quoting United American State Bank & Trust Co. v. Wild West Chrysler Plymouth, 221 Kan. 523, 526, 561 P.2d 792, 795 (1977) (quoting Proctor Trust Co. v. Neihart, 130 Kan. 698, 705, 288 P. 574, 578 (1930))).

197. *North Central Kansas*, 223 Kan. at —, 577 P.2d at 41.

198. *Id.* at —, 577 P.2d at 41. Even though the buyer had constructive notice, the Kansas Supreme Court did ultimately find for the defendant sale barn and against the PCA on the basis that the PCA had "expressly" authorized the sale. Testimony from the PCA's president demonstrated that the PCA did expressly consent to the sale to the sale barn by the debtor-farmer and the conversion action failed. *Id.* at —, 577 P.2d at 41-42.

199. 78 Cal. App. 3d 855, 144 Cal. Rptr. 367 (1978).

200. *Id.* at 858, 144 Cal. Rptr. at 368. A combine is a self-mechanized corn harvesting machine often costing in excess of $100,000.00. Interview with Robert R. Siffring, Nebraska farmer and Executive Editor of Creighton Law Review, in Omaha, Nebraska (July 2, 1987). Plaintiff Central was an equipment company who assigned a note given by Progressive, but with recourse. *Dolk Tractor*, 78 Cal. App. at 858, 144 Cal. Rptr. at 368. Therefore, Central ultimately had the obligation of collecting when Progressive sold the combine and defaulted. *Id.*

201. *Id.* at 858, 144 Cal. Rptr. at 368.

sold it to the defendant, Dolk Tractor.[202] Central filed suit to recover the machine or, in the alternative, its value.[203] The issue before the California Court of Appeals was whether the sale of the combine had been authorized, thus cutting off Central's security interest.[204] The California court indicated little support for the *Clovis* reasoning because that opinion had received negative commentaries and had resulted in an immediate legislative overruling.[205] Instead, the court determined that the purpose of Article 9 was to develop "a comprehensive scheme for the regulation of security interests."[206] Where an agreement expressly prohibited the sale of collateral without written consent, any consent must be in writing in order for the court to find the requested authorization which would permit a sale and thereby sever the security interest.[207] The court stated, that "mere acquiescence is insufficient."[208] The *Central California Equipment* court concluded that if an implied agreement were to be found, it should only be found with "extreme hesitancy."[209] At the trial level, the court had found no authorization and waiver of security interest by the lender.[210] The California Court of Appeals agreed, based upon the evidence.[211]

A number of Texas courts have noted that for conduct to amount to a waiver, there must be reliance by the purchaser on that conduct exhibited by the secured party and its debtor.[212] In *Fisher v. First National Bank of Memphis*,[213] Roden, the farmer-debtor, borrowed $350,000 from the First National Bank and gave a security interest to

202. *Id.* at 858-59, 144 Cal. Rptr. at 368-69.

203. *Id.* at 859, 144 Cal. Rptr. at 369.

204. *Id.* at 860, 144 Cal. Rptr. at 369. The court identified this issue as one of first impression in California. *Id.*

205. *Id.* at 860, 144 Cal. Rptr. at 369-70. The court cited numerous law review articles which discussed *Clovis*. *Id.* (citing Comment, *Agriculture Finance Under the U.C.C.*, 12 ARIZ. L. REV. 391 (1970); Comment, *Uniform Commercial Code-Secured Transactions Implied Consent to Sell*, 17 DE PAUL L. REV. 447 (1968); Comment, *Sales-Waiver of a Security Interest Under the Uniform Commercial Code*, 20 BAYLOR L. REV. 136 (1968)).

206. *Dolk Tractor*, 78 Cal. App. at 862, 144 Cal. Rptr. at 370.

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

208. *Id.*

209. *Id.* The court interpreted the "or otherwise" wording of section 9-306(2) to permit an implied agreement but that should be limited to circumstances which involve a prior course of dealing. *Id.* The court was referring to implied waiver when it discussed implied agreements. *Id.*

210. *Id.* at 863, 144 Cal. Rptr. at 371.

211. *Id.*

212. *Fisher v. First Nat'l Bank*, 584 S.W.2d 515, 519-20 (Tex. Civ. App. 1979); Cox v. Bancoklahoma Agri-Service Corp., 641 S.W.2d 400, 404 (Tex. App. 1982). *See also* Poteau State Bank v. Denwalt, 597 P.2d 756 (Okla. 1979) (indicating that if a party detrimentally relies on conduct of another, a contract term may be modified by such conduct).

213. 584 S.W.2d 515 (Tex. Civ. App. 1979).

the bank in his cattle.[214] The security agreement dictated that Roden not sell the collateral without first obtaining prior written consent from the bank.[215] However, without such prior consent and without submitting the proceeds, Roden sold 158 head of cattle to the defendant Fisher.[216]

The Texas Court of Civil Appeals cited *Wabasso* and stated that its reasoning followed Texas legislative policy.[217] In addition, the court announced that *Clovis* would not be followed in the Texas jurisdiction.[218]

The *Fisher* court went on to define waiver as an "intentional release, relinquishment, or surrender of a known right."[219] The court, quoting previous Texas precedent,[220] stated that in order to establish a waiver, there must be a clear and decisive act by the lender that amounts to an estoppel on the part of the subsequent buyer.[221] Therefore, because the subsequent purchaser had not been misled by the bank's conduct, no waiver of a security interest developed.[222]

Tennessee courts have addressed this issue in *First Tennessee Production Credit Association v. Gold Kist, Inc.*[223] The creditor (PCA) had a secured interest in a debtor's soybean crop.[224] A provision in the security agreement prohibited the sale of the crop without the PCA's written consent.[225] Subsequently, Gold Kist contracted for the soybean crop from the debtor but failed to ask if it was encum-

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214. *Id.* at 517.

215. *Id.* at 518. The agreement provided that Roden would not "sell, lease, or otherwise transfer the collateral without the Bank's consent." *Id.*

216. *Id.* at 517.

217. *Id.* at 519. The court said that in light of the enactment of U.C.C. section 1-205 by the Texas legislature, the *Wabasso* reasoning is most appropriate regarding the issue of waiver by implied consent. *Id.*

218. *Id.* The court stated the primary reasons for this policy were that *Clovis* was decided "notwithstanding § 50A-1-205(4), N.M.S.A.1953 which provided: '(4) The express terms of an agreement . . . control both course of dealing and usage of trade . . . .' and that the New Mexico legislature set aside the *Clovis* decision by specific amendment to its Code." *Id.* at 518-19 (quoting N.M. STAT. ANN. § 50A-1-205(4) (1953)).

219. *Id.* at 519.

220. *Nixon Constr. Co. v. Downs*, 441 S.W.2d 284, 286 (Tex. Civ. App. 1969).

221. *Fisher*, 584 S.W.2d at 519.

222. *Id.* at 520. The court said, "In essence, conduct which misleads no one does not constitute a waiver." The facts did not indicate that Fisher had been prejudicially misled into believing that the bank had intended to waive its security interest in the 158 head of cattle purchased. The proof did not show that Fisher had any knowledge of the relationship between Roden and the bank. *Id.* at 520.

223. 653 S.W.2d 418 (Tenn. Ct. App. 1983).

224. *Id.* at 419. The PCA had advanced funds to finance the production of a farmer's crop. *Id.*

225. *Id.* at 420. The agreement stated: "Debtor . . . will not further encumber, conceal, remove, sell or otherwise dispose of the same [crops] without the written consent of the Lender." However, in the four years the PCA had financed the debtor, it had never enforced this provision. *Id.*

bered in any way.[226]

The Tennessee court noted that Gold Kist was charged with constructive notice of the PCA's perfected security interest.[227] In addition, the *Gold Kist* court held that it was not reasonable to find that the PCA had authorized the debtor's past sales when it was only presented with a "*fait accompli*."[228]

In addition, the court stated that by interpreting U.C.C. section 1-205(4) of the Tennessee Code,[229] express terms of an agreement will control when inconsistent with a party's course of dealing.[230] The Tennessee court relied extensively on *Wabasso*, *Garden City*, and *North Central Kansas* in substantiating its decision.[231] The court also recognized that the purchaser acted at its own risk when it failed to make more than a minimal investigation of the security interest which was filed by the creditor in the state's notice filing system.[232]

The Washington Supreme Court addressed the waiver issue in *Southwest Washington Production Credit Association v. Seattle-First National Bank*.[233] The creditor (PCA) had a security interest in crops and a provision in the agreement which prohibited encumbrances or sale of the collateral without first obtaining written consent.[234] The court found that although the PCA had not authorized the sale in the agreement itself, it had "otherwise" authorized the sale.[235] However, the court found that the PCA had conditioned the consent on repayment of the proceeds to the PCA when a sale oc-

226. *Id.*

227. *Id.* The PCA had perfected its security interest by filing a financing statement. *Id.*

228. *Id.* at 421. "Fait accompli" is defined as a "[f]act or deed accomplished, presumably irreversible." BLACK'S LAW DICTIONARY 538 (5th ed. 1979). The court said it was not reasonable to find that the PCA had "authorized" the sale. In past dealings, the debtor had first made the sale and then made the PCA aware of that fact when he submitted the proceeds. *Gold Kist*, 653 S.W.2d at 421.

229. TENN. CODE ANN. § 47-1-205(4) (1979).

230. *Gold Kist*, 653 S.W.2d at 421.

231. *Id.* at 421-22. The court said, "Easily the names of the parties in the case subjudice could be substituted in most details for the names of those in *North Central [Kansas]*." *Id.* at 422.

232. *Id.* at 422. The court stated that the buyer must carry a "heavy burden" to overcome the perfected security interest of a valid financing statement duly registered with the state. *Id.*

233. 92 Wash. 2d 30, 593 P.2d 167 (1979).

234. *Id.* at —, 593 P.2d at 168. For ten years, the PCA had made short-term one-year demand loans to farmers to cover operating expenses for the growing of crops. The security agreement was a standard form and one provision provided that farmer-debtors would "not permit any of the Collateral to be encumbered . . . sold, or removed . . . without first having obtained the written consent of the Secured Party." This provision had never been enforced in prior years or in the current circumstances of this case. *Id.* at —, 593 P.2d at 168.

235. *Id.* at —, 593 P.2d at 169.

curred.[236] The court concluded that the debtor had violated the condition, which made the sale an unauthorized one.[237] Therefore, the security interest continued in the collateral.[238]

Similarly, the rule in Oregon holds that non-enforcement of a written consent provision in a security agreement does not constitute waiver.[239] In *Baker Production Credit Association v. Long Creek Meat Co.*,[240] a PCA had a secured interest in the cattle of a debtor which had been sold to the defendant, a meat packing company.[241] The PCA was aware that the debtor was selling cattle to the defendant but did not object to those sales.[242] The trial court found that the creditor's consent to the sale of the collateral by the debtor was conditioned upon receipt of the proceeds when the cattle were sold, and this finding was confirmed by the Oregon Supreme Court.[243] Checks made payable for the cattle would be honored as always; there was no reason for the PCA to object to this past conduct.[244] The Oregon Supreme Court was unconvinced by the *Clovis* rationale and indicated that the New Mexico legislature amended section 9-306 of its U.C.C. to negate *Clovis*.[245] The *Long Creek* court held that the PCA did condition its consent on receipt of the proceeds of the sale of the

236. *Id.* at —, 593 P.2d at 169. Citing *Edison*, the court noted that the U.C.C. does not prevent a party from attaching a condition to its consent. *Id.* at —, 593 P.2d at 169.

237. *Id.* at —, 593 P.2d at 169.

238. *Id.* at —, 593 P.2d at 169. Since the U.C.C. does not prevent a secured party from attaching conditions to consent, the court concluded that the PCA did not "or otherwise" authorize the sale which would have had the effect of waiving the security interest. *Id.* at —, 593 P.2d at 169.

239. Baker Prod. Credit Ass'n v. Long Creek Meat Co., 266 Or. 643, —, 513 P.2d 1129, 1133-35 (1973). *See also In re* Coast Trading Co., 31 Bankr. 670, 672 (D. Or. 1983) (holding that secured creditor did not waive its interest in collateral when it permitted debtor to sell wheat without obtaining prior written consent); Matteson v. Harper, 66 Or. App. 31, —, 672 P.2d 1219, 1221 (1983) (holding that auctioneer's acceptance of an amount less than stipulated violated an imposed condition and thus the sale was unauthorized).

240. 266 Or. 643, 513 P.2d 1129 (1973).

241. *Id.* at —, 513 P.2d at 1131. The PCA financed a cattle-feeder for the business of buying and fattening cattle for slaughter. The PCA had filed and perfected security agreements that prohibited the sale of cattle without consent. The custom was for the defendant meat company to mail drafts payable to the PCA at the time the cattle left the debtor's feed lot for delivery to defendant's place of business. However, due to financial problems, $88,343.96 of Long Creek's drafts were dishonored by its bank. *Id.* at —, 513 P.2d at 1131.

242. *Id.* at —, 513 P.2d at 1133. It was customary for the debtor to sell without obtaining the consent of the PCA. *Id.* at —, 513 P.2d at 1131.

243. *Id.* at —, 513 P.2d at 1133.

244. *Id.* at —, 513 P.2d at 1133. As long as the condition of its consent was being met, there was no reason for the PCA to rebuke its debtor. *Id.* at —, 513 P.2d at 1133.

245. *Id.* at —, 513 P.2d at 1133-34. The Oregon court also noted that the majority in *Clovis* ignored the U.C.C. section 1-205(4) regarding the control of usage of trade and course of dealing by express terms of an agreement. *Id.* at —, 513 P.2d at 1134.

collateral.[246] When the draft was dishonored, the sale became an unauthorized one, and therefore, the security interest continued in the collateral.[247]

On balance, the *Clovis* opinion and other decisions following its rationale have been substantially eradicated by legislative action as well as repudiated by the criticisms of other jurisdictions.[248] Additionally, actions by Congress and the Nebraska legislature illustrate the need to protect the farm products exception.[249]

In 1985, Congress enacted The Food Security Act which effectively eliminated the farm products exception of the U.C.C. section 9-307.[250] The federal legislation remedied situations where a purchaser of farm products could be held to pay twice for the same product because the security interest remained in farm products, unlike all other types of collateral sold.[251] One commentator has suggested that the Food Security Act represents a "milestone" in the conflict between agricultural lenders and buyers' groups.[252] Congress provided in the Act that state laws which permitted a secured lender to enforce a security interest against a subsequent purchaser of farm products would be invalidated because buyers of farm products seldom have means of discovering the existence of a security interest.[253] Congress stated that the purpose of this legislation was to remove what had become a burden on interstate commerce and a situation which inhibited free competition in the market for farm products.[254]

However, the Act did provide that a buyer will take subject to a security interest if within one year of the sale, the secured party gives the buyer written notice of its security interest.[255] The secured

246. *Id.* at —, 513 P.2d at 1134.

247. *Id.*

248. *See supra* notes 98-247 and accompanying text.

249. *See infra* notes 250-72 and accompanying text.

250. *Food Security Act of 1985*, 7 U.S.C. § 1631 (Supp. III 1985). The pertinent provision of the Act provides:

> Purchases free of security interest except as provided in subsection (e) of this section and notwithstanding any other provision of Federal, State or local law, a buyer who in the ordinary course of business buys a farm product from a seller engaged in farming operations shall take free of a security interest created by the seller, even though the security interest is perfected; and the buyer knows of the existence of such interest.

7 U.S.C. § 1631(9)(d) (Supp. III 1985).

251. 7 U.S.C. § 1631 (Supp. III 1985). This potential result is explained in the following language: "[T]hese laws subject the purchaser of farm products to double payment for the products, once at the time of purchase, and again when the seller fails to repay the lender." *Id.* § 1631(a)(2).

252. Sanford, *The Reborn Farm Products Exception Under the Food Security Act of 1985*, 20 U.C.C. L.J. 3, 28 (1987).

253. 7 U.S.C. § 1631(1)(1).

254. *Id.* § 1631(a)(3), (4).

255. *Id.* § 1631(e)(1)(A). The applicable language provides:

party can also retain its security interest if the state has developed a central filing system, the buyer had registered with the state, and the secured party had filed a financing statement.[256] Ten states have so far adopted central filing systems and have received certification from the Secretary of State for this use.[257]

Congress intended that this section repeal the farm products exception of the U.C.C. and allocate accordingly the loss that results when a borrower defaults on a farm products loan.[258] The Act is the "necessary step forward" in making the U.C.C. work.[259]

As a result of the federal mandate to protect buyers of farm products, Nebraska has extensively amended its Uniform Commer-

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A buyer of farm products takes subject to a security interest created by the seller if — (1)(A)within 1 year before the sale of the farm products, the buyer has received from the secured party or the seller written notice of the security interest organized according to farm products that —

(i) is an original or reproduced copy thereof;

(ii) contains,

(I) the name and address of the secured party;

(II) the name and address of the person indebted to the secured party;

(III) the social security number of the debtor or, in the case of a debtor doing business other than as an individual, the Internal Revenue Service taxpayer identification number of such debtor;

(IV) a description of the farm products subject to the security interest created by the debtor, including the amount of such products where applicable, crop year, county or parish, and a reasonable description of the property; and

(iii) must be amended in writing, within 3 months, similarly signed and transmitted, to reflect material changes;

(iv) will lapse on either the expiration period of the statement or the transmission of a notice signed by the secured party that the statement has lapsed, whichever occurs first; and

(v) any payment obligations imposed on the buyer by the secured party as conditions for waiver or release of the security interest.

Id. (footnote omitted).

256. *Id.* § 1631 (e)(2)(A), (B). The following wording states these requirements:

[I]n the case of a farm product produced in a State that has established a central filing system —

(A) the buyer has failed to register with the Secretary of State of such State prior to the purchase of farm products; and

(B) the secured party has filed an effective financing statement or notice that covers the farm products being sold.

Id.

257. Sanford, 20 U.C.C. L.J. at 26. The ten states are Arkansas, Idaho, Louisiana, Maine, Mississippi, Montana, Nebraska, North Dakota, Oregon, and Utah. The central filing system is advantageous in that the financing statement need be filed only once every five years; direct notice systems must be sent every year. *Id.* at 19, 26.

258. United States v. Progressive Farmers Mktg. Agency, 788 F.2d 1327, 1331 (8th Cir. 1986).

259. Sanford, 20 U.C.C. L.J. at 6. In addition, the author suggested that if the Act does not eliminate the conflicting results achieved under section 9-306(2) (the "or otherwise" language), it did not accomplish its presumed goal. *Id.* at 10.

cial Code.[260] The Nebraska legislature enacted legislation that became effective June 5, 1985, to resolve the conflict between secured creditors and subsequent buyers of farm products.[261] The Nebraska U.C.C. section representing the farm products exception states: "A buyer in 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 or her seller even though the security interest is perfected."[262] Under this legislation, a purchaser of farm products can be protected by requesting from the seller a written statement identifying outstanding lienholders or stating that none exist.[263]

Beginning September 1, 1988, persons buying farm products in Nebraska may rely upon a computer index system and can check this index for any relevant security interests.[264]

Subsequent legislation has been enacted relative to the computer indexing system.[265] Legislative Bill 1 (L.B. 1) was introduced and approved to more specifically outline the process of providing notice through the computer indexing system.[266] These lists would reflect

260. *See infra* notes 261-72 and accompanying text.

261. NEB. REV. STAT. § 9-307(4), (5), (6), (7) (Supp. 1986).

262. NEB. REV. STAT. § 9-307(1) (Supp. 1986) (emphasis added).

263. *Id.* § 9-307(4). This provision regarding notice reads:

> A buyer who purchases farm products or a person who sells farm products for another for a fee or commission may require that the seller, under the penalties prescribed declare and identify in writing the first security interest holder or first lienholder, as the case may be, with regard to the farm products being sold. If such buyer acts in good faith and without actual knowledge that such disclosure is other than accurate and if such seller is then tendered the total purchase price by means of a check payable to such seller and, if one be named, the named first security interest holder or first lienholder, as the case may be, and if the named first security interest holder or first lienholder authorizes the negotiation of such check, the buyer of such farm products so purchased shall take free of any security interest or lien.

Id. The section also provides that the seller is under a penalty of Class I misdemeanor for lying. *Id.* A Class I misdemeanor carries a maximum penalty of not more than one year imprisonment or a $1000 fine or both. NEB. REV. STAT. § 28-106 (Reissue 1985).

264. NEB. REV. STAT. §§ 9-307(6), 415 (Supp. 1986). Section 9-307(6) provides:

> Commencing September 1, 1988, a person buying farm products from a person engaged in farming operations shall be subject to a security interest created by his or her seller only when such security interest is indicated on the computer index established pursuant to section 9-415 at the beginning of the business day on which the purchase was completed. The beginning of the business day shall be 8:00 a.m. central daylight time. A business day shall be any day Monday through Friday when state offices are not closed pursuant to an official state holiday. If the purchase is on any day other than a business day as defined in this subsection, then for purposes of this subsection the immediately preceding business day shall be considered the business day on which the purchase was completed.

Id. § 9-307(6).

265. L.B. 1, 89th Leg., 3d Special Sess., §§ 1-23, (to be codified at NEB. REV. STAT. U.C.C. §§ 9-307, 411, 415, 420).

266. L.B. 1 at § 1.

statutory liens and act as notice of existing security interests to subscribers.[267] Pursuant to this legislation, the Secretary of State is to compile all security interests filed in a master list in alphabetical order according to the last name of the debtor, including the name and address of the debtor, the name and address of the lender, the dollar amount of the lien and the nature of the lien.[268] This list is then to be made available to any persons registering for and subscribing to such lists.[269] The master list will be distributed on a quarterly basis and updated by a continuation statement filed by the lender within six months of the automatic expiration if his filing.[270]

The Nebraska statutes were amended by L.B. 1.[271] Now buyers of farm products are to be subject to a security interest that is filed according to the precepts of L.B. 1, and a buyer will take free of any security interests only if that interest is unfiled.[272]

ANALYSIS

The majority of jurisdictions have refused to find that a secured creditor waived its security interest based only upon previous conduct which impliedly allowed the debtor to sell his collateral.[273] Many of these jurisdictions, because of the practical realities of farm credit financing, do not find that a lender waives a security interest when a written provision requiring prior written consent for sale of the collateral is not enforced.[274] These jurisdictions have established the continuation of the creditor's security interest through a variety of theories.[275] Some jurisdictions simply find that a creditor's conduct of not enforcing a written provision regarding prior written consent does not constitute waiver.[276] The Nebraska Supreme Court, how-

267. *Id.*

268. *Id.* §§ 7(4), 12(3), 12(4).

269. *Id.* § 12(5). The annual registration fee is $30.00. In addition, subscribers must pay $25.00 for lists on microfiche, or $100.00 if provided on paper. *Id.*

270. *Id.* §§ 12(6), 14. The financing statement reflecting a lender's security interest remains effective for five years from the date of filing and automatically expires unless a continuation statement is filed. *Id.* § 7(6).

271. *See supra* note 265 and accompanying text.

272. *See supra* notes 264-70 and accompanying text.

273. Nickles, *A Localized Treatise On Secured Transactions — Part II: Creating Security Interests*, 34 ARK. L. REV. 559, 661 (1981).

274. *See supra* notes 157-239 and accompanying text. The *Garden City* court indicated that such realities involve a (1) typical farm or ranch operation needing credit to run its operations; (2) the movement of chattel property to market; and (3) problems of a simultaneous sale and payment. The Nebraska Supreme Court, in *Garden City*, also stated that it assumed that the U.C.C. section 9-306(2) was drafted with an awareness of these realities. *Garden City*, 186 Neb. at 672-73, 186 N.W.2d at 102.

275. *See supra* notes 161-247 and accompanying text.

276. *See supra* notes 161-98 and accompanying text. *See also* In re Ellsworth, 722 F.2d 1448, 1451 (9th Cir. 1987) (holding that creditor's security interest in cattle re-

ever, held in *Farmland Foods* that the bank, by its long course of conduct, had consented to the sales in question and had waived its security interest.[277]

This holding is contrary to long established precedent in Nebraska.[278] Additionally, the opinion stands opposite many other jurisdictions that had relied on *Garden City* as the appropriate analysis of the waiver issue.[279] As Chief Justice Krivosha wrote in his *Farmland Foods* dissent, "[t]he real difficulty with the majority opinion is that we are not writing on a clean slate. The law as declared by this court in [*Garden City*] has been the law of this jurisdiction for more than 15 years."[280]

Other jurisdictions have applied U.C.C. section 1-205 when an implied waiver is raised as a defense by the purchaser.[281] Section 1-205(4) provides that an express term of a security agreement controls both course of dealing and usage of trade when either will be inconsistent with the express term.[282] These cases hold that the express term in the contract prohibits waiver because of the existence of such term in the security agreement, making it clear that the debtor must obtain prior written consent before selling the collateral.[283] However, the court in *Farmland Foods* held section 1-205 of the Nebraska Revised Statutes did not apply.[284] The court further held that section 2-208 of the U.C.C. controlled and the conduct exhibited by the bank was *course of performance*, rather than *course of dealing*.[285]

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mained despite the sale of the cattle and previous conduct by Livestock Credit Corporation allowing sale without giving written consent); Security Nat'l Bank v. Belleville Livestock Comm'n, Co., 619 F.2d 840, 845 (10th Cir. 1980) (following *North Central Kansas* in holding that bank's custom of accepting proceeds from prior unauthorized sales did not constitute a waiver of its security interest).

277. *See supra* note 30 and accompanying text. The bank's conduct was its practice of allowing Hopwood to sell collateral without first obtaining consent. However, in these prior sales, Hopwood would apply the proceeds directly against his debt. There was testimony that on prior occasions when Hopwood deposited the proceeds in his farm account, the bank representative informed him that this action was a violation of the agreement. *Farmland Foods*, 225 Neb. at 3-7, 402 N.W.2d at 279-81.

278. *See supra* notes 34-97 and accompanying text.

279. *See supra* notes 161-98 and accompanying text.

280. *Farmland Foods*, 225 Neb. at 13-14, 402 N.W.2d at 285 (Krivosha, C.J., dissenting).

281. *See supra* notes 161-98, 213-32 and accompanying text.

282. *See supra* note 55.

283. *See supra* notes 161-98, 213-32 and accompanying text.

284. *Farmland Foods*, 225 Neb. at 7-8, 402 N.W.2d at 281-82. The court stated that *course of dealing* only involved conduct *before* the agreement was signed; *course of performance* (conduct after the agreement was executed) was the term most descriptive of the type of conduct involved. *Id.* at 8, 402 N.W.2d at 281.

285. *Id.* at 8-9, 402 N.W.2d at 281-82. U.C.C. section 2-208 of the Nebraska Revised Statutes provides:

> (1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportu-

Accordingly, the *Farmland Foods* court applied section 2-208.[286] The Nebraska Supreme Court failed to recognize, however, that course of performance is a sales term and not associated with security agreements.[287] Additionally, under subsection (1), the Nebraska U.C.C. provides, "(1) Where the contract for *sale* involves repeated occasions;" the reference to the word "*sale*" indicates the area of application for this Code provision.[288] Also, the section describing the scope of Article 2 provides:

> Unless the context otherwise requires, this article 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 security transaction nor does this article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.[289]

Numerous jurisdictions have held that although a creditor has waived the requirement of written consent prior to sale, it has nevertheless *conditioned* such consent on the receipt of the proceeds of such sale.[290] Their rationale was that past behavior exhibited by the creditor is merely acquiescence when the debtor duly applies the proceeds against his indebtedness.[291] There was no reason to rebuke or chastise the debtor since the money was being applied to the loan.[292] In *Farmland Foods*, Hopwood routinely turned over to the bank the

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nity 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.

(2) 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 performance shall control both course of dealing and usage of trade (section 1-205).

(3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

NEB. REV. STAT. U.C.C. § 2-208 (Reissue 1980). Course of performance involves *post-agreement* events which are repeated occasions for performance by either party with knowledge of those performances and opportunity for the other party to object to such performances. Dugan, 46 U. COLO. L. REV. at 340.

286. *Farmland Foods*, 225 Neb. at 8, 402 N.W.2d at 281.

287. "Course of performance" is a term used in Article 2 of the Nebraska Uniform Commercial Code NEB. REV. STAT. §§ 2-101-2-725 (Reissue 1980). Article 2 does not apply to security agreements, but rather, to contracts for the sale of goods. *Id.* § 2-102. *See also Aberdeen*, 379 N.W.2d at 831-32 (holding that "course of performance" argument was without merit because such term should be solely associated with sales).

288. NEB. REV. STAT. U.C.C. § 2-208(1) (Reissue 1980) (emphasis added).

289. NEB. REV. STAT. U.C.C. § 2-102 (Reissue 1980).

290. *See supra* notes 157, 177-98 and accompanying text.

291. *See supra* notes 157, 187-89 and accompanying text.

292. *See supra* note 188 and accompanying text.

proceeds of the sale of his hogs.[293] In addition, the bank did not know of the six sales in question until after the fact, and when it did so, it took action by ordering the liquidation of the collateral.[294] There was also evidence that in the prior dealings, when the bank learned of sales in which Hopwood did not directly apply the proceeds against the loan, the bank gave notice to Hopwood that such conduct was a violation of the agreement.[295] Therefore, if the bank consented to anything, it consented to the sale with the condition that upon the sale of any secured collateral, proceeds would be directly applied toward any outstanding debts.[296] This action by the bank was not consent to conduct whereby the debtor would sell collateral and merely deposit the proceeds in his checking account.

At least one jurisdiction has found that in order for a creditor's conduct to constitute a waiver, the subsequent buyer must rely on that conduct.[297] Applying this rationale to *Farmland Foods*, the defendant would be required to have knowledge of and rely on the conduct evidenced by the bank and its dealings with Hopwood. Farmland must have been aware that generally all farmers are financed by banks and that the banks normally require that written consent be obtained prior to sale.[298]

Another interpretation of the conduct exhibited by the creditor is, that if there was waiver, then only the requirement to give prior written consent was waived.[299] It was not a waiver of the entire security interest.[300] If the bank intentionally waived anything, it was solely the requirement that Hopwood first obtain permission, and not its entire security interest in the collateral.[301] In addition, the secur-

293. *See supra* note 16 and accompanying text.

294. *See supra* note 20 and accompanying text.

295. *Farmland Foods*, 225 Neb. at 11, 402 N.W.2d at 283 (Krivosha, C.J., dissenting). The majority noted this testimony by the bank. However, it further noted Hopwwod's lapse of memory concerning the bank's rebuke. *Id.* at 4, 402 N.W.2d at 279.

296. *Id.* at 11-12, 402 N.W.2d at 283-84 (Krivosha, C.J., dissenting).

297. *See supra* notes 213-22 and accompanying text.

298. *Garden City*, 186 Neb. at 669, 186 N.W.2d at 101; *Nickles*, 34 ARK. L. REV. at 110.

299. *Farmland Foods*, 225 Neb. at 11-12, 402 N.W.2d at 283-84. (Krivosha, C.J., dissenting); *Clovis*, 77 N.M. at —, 425 P.2d at 734 (Carmody, J., dissenting).

300. *Farmland Foods*, 225 Neb. at 11-12, 402 N.W.2d at 283-84 (Krivosha, C.J., dissenting).

301. *Id.* This argument is illustrated by the dissent in *Clovis*. Judge Carmody said that given the absence of evidence of the PCA waiving any intentional right to the collateral, "the violation of the right to written consent is the only possible subject for waiver." *Clovis*, 77 N.M. at —, 425 P.2d at 736 (Carmody, J., dissenting). While this reasoning is technically accurate, it ignores the interplay between the U.C.C. sections 9-306(2) and 9-307(1). Section 9-307(1) allows the farm products lender's security interest to remain attached to the collateral, subsequent to a sale of that collateral. If the sale is not expressly authorized, section 9-306(2) contemplates an implied authorization by its "or otherwise" language. Therefore, if a waiver exists relative to even the writ-

ity agreement contained an express "no waiver" provision.[302] The contract stipulated that no conduct by the parties could create a waiver of any other provision in the agreement.[303] Yet, the Nebraska Supreme Court chose to ignore this argument in its analysis of the case.

The cases which have interpreted these provisions as preventing a waiver reflect an awareness of the purpose behind the U.C.C. sections relevant to this issue.[304] The provisions of the U.C.C. do not provide for a broad interpretation of what constitutes "waiver" under the "or otherwise" language of section 9-306(2).[305] Jurisdictions that have found no waiver follow the drafters' intent, which is evidenced by the farm products exception of the U.C.C. section 9-307(1).[306]

For almost fifteen years, parties to security agreements in Nebraska have structured their relationships around Article 9 of the U.C.C.[307] In addition, creditors' and debtors' perceptions of waiver were colored by the decisions in *Garden City*, *Edison*, *State Bank*, *Palmer*, and *Five Points Bank*.[308] These cases illustrate the nature of farm credit lending.[309] A creditor relies upon collateral to secure its loan and must state in its agreement that the debtor must obtain permission before selling his collateral in order to take advantage of section 9-307(1) and its farm products exception.[310] From a practical point of view, however, the prior written consent provision is unenforceable.[311] The realities of farm collateral transactions do not lend themselves to obtaining written consent prior to sale.[312]

Farmland Foods changes the law in Nebraska by interpreting a creditor's inability to enforce a written consent provision in its secur-

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ten consent provision only, it also implies that the sale is authorized and the security interest is thus cut off.

302. Brief of Appellant at 11, Farmers State Bank v. Farmland Foods, Inc., 225 Neb. 1, 402 N.W.2d 277 (1987).

303. *Id.*

304. *See infra* notes 305-06 and accompanying text.

305. *See* Nickels, 34 ARK. L. REV. at 113. One author suggests that courts should be cautious in applying common law waiver rules to transactions covered by Article Nine of the U.C.C. He suggests that the rationale behind the establishment of farm products exception of 9-307(1) is sound and courts should not abrogate the provision with expanded waiver concepts. *Id.*

306. *See supra* notes 57-60.

307. *Farmland Foods*, 225 Neb. at 14, 402 N.W.2d at 285 (Krivosha, C.J., dissenting).

308. *Id. See supra* notes 35-90 and accompanying text.

309. *See supra* notes 35-90 and accompanying text.

310. *See supra* notes 35-90 and accompanying text. In order for a security interest to continue in farm products collateral under 9-307(1), the creditor must not have *authorized* the sale as defined under section 9-306(2). NEB. REV. STAT. U.C.C. §§ 9-306, 307 (Reissue 1980). Hence, the prior written consent provisions in security agreements are necessary to prevent an unwanted implied authorization.

311. *Farmland Foods*, 225 Neb. at 18, 402 N.W.2d at 287 (Krivosha, C.J., dissenting).

312. *Id.*

ity agreement as a waiver of its entire interest in the secured collateral.[313] The decision creates a no-win situation for creditors. They *must* have a written consent provision in their agreements to take advantage of the farm products exception, but, realistically, they cannot enforce such a provision. Therefore, the majority in *Farmland Foods* effectively negates the benefits of section 9-307 and nullifies the design of the Nebraska legislature.

In the 1985 Federal Food and Drug Act, Congress identified the problem of potential double jeopardy of purchasers when they bought farm products.[314] Therefore, Congress enacted an amendment to Article 7 to provide for the discontinuation of the U.C.C.'s farm products exception.[315] This federal amendment required the adoption of a central filing system by state legislatures in order to facilitate access by purchasers to creditors' security interest filings.[316] In this manner, Congress has shifted the burden from the buyer, who previously had to search U.C.C. records, to the secured creditor, who must now affirmatively notify the buyer.[317]

Nebraska adopted a central filing system under which a creditor has the obligation to identify himself, the debtor, and the collateral in order to perfect his security interest as against subsequent purchasers.[318] In addition, the Nebraska legislature adopted a system in which (until such time as the central filing becomes effective) buyers can fully protect themselves by requesting in writing from the debtor-seller a written list of any secured creditors in the collateral.[319] The statute further makes it a Class I misdemeanor if the debtor-seller does not disclose such security interests.[320] As a result, the purchaser of farm products can take free of any security interest.[321]

The Nebraska legislature and the United States Congress have addressed the problem of the subsequent purchaser and his potential

313. *See supra* note 28 and accompanying text.

314. *See supra* notes 250-51 and accompanying text.

315. *See supra* note 255.

316. *See supra* note 247. The amendment also indicated that notice given by creditors to purchasers of their interest in certain collateral would satisfy the necessary requirements and allow the interest to continue notwithstanding sale. *See supra* note 255.

317. B. CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ¶ 8.4[3][H] (Cum. Supp. 1987).

318. L.B. 1, 89th Leg., 3d Special Sess. §§ 7(4), 12(3), 12(4). This fact was alluded to by Chief Justice Krivosha in his dissent in *Farmland Foods*. Chief Justice Krivosha said, "I am not unmindful that the 1985 legislature has amended Neb. U.C.C. § 9-307 (Cum. Supp. 1986)." *Farmland Foods*, 225 Neb. at 19, 402 N.W.2d at 287 (Krivosha, C.J., dissenting).

319. NEB. REV. STAT. U.C.C. § 9-307(4). *See supra* note 255.

320. *See supra* note 263.

321. *See supra* note 263.

double jeopardy.[322] It seems illogical to judicially modify the Uniform Commercial Code by injecting a broad interpretation of what constitutes a waiver on the part of the creditor. In so doing, the Nebraska Supreme Court has effectively eliminated the primary mechanism through which a creditor can perfect its security interest under the farm products exception of the Nebraska Code. In order to take advantage of the farm products exception, the creditor must include within his security agreement a written prohibition against the sale of the collateral.[323] However, most parties recognize that it is not an enforceable provision given the practical realities of farm lending circumstances and the method in which farmers sell their collateral.[324]

This secured creditor-subsequent purchaser conflict is the primary reason for the balance achieved by amendments to the Nebraska U.C.C. as proposed by the various industry representatives.[325] These amendments struck a very delicate balance between the interests of the secured party and the purchaser of farm products. The *Farmland Foods* decision destroys this balance by creating a situation where creditors cannot benefit from their security interests in collateral.[326] In the normal course of doing business with farmers, it is not practical to enforce the written prohibition-against-sale clause because of the number of occasions, the time of day and the speed necessarily involved when a typical farmer sells his products.[327]

Farmland Foods, therefore, defeats the purpose of the central filing system as adopted by the Nebraska legislature under U.C.C. section 9-307.[328] Under *Farmland Foods*, if a purchaser of farm products chooses to ignore the clear mandate of the Code and not attempt to ascertain the existence of any previously secured interest, he will be rewarded by taking free of that interest. The only requirement is that the lender not enforce a prior written consent clause in the security agreement, an event that most surely will occur. The *Farmland Foods* decision would then dictate that the security interest be cut off, even though the creditor had complied with all provisions of

322. *See supra* notes 250-72 and accompanying text.

323. *See supra* notes 35-90 and accompanying text.

324. *Farmland Foods, Inc.*, 225 Neb. at 17-18, 402 N.W.2d at 287. (Krivosha, C.J., dissenting).

325. Hearings on L.B. 117 before the Banking, Commerce and Insurance Comm. Neb. Unicameral, 88th Leg., 1st Sess. 1 (Jan. 31, 1983). Banking and credit institutions represented one faction, while grain processors, cattle dealers and farm products brokers represented the other. *Id.* at 6-41.

326. *See* Uchtmann, Bauer & Dudek, *The U.C.C. Farm-Products Exception — A Time to Change*, 69 MINN. L. REV. 1315, 1317-20 (1985). Creditors create security interests in farm products with the expectation of being able to follow collateral subsequent to a sale by their debtors. *Id.*

327. *See supra* notes 47-60.

328. *See supra* notes 261-72 and accompanying text.

the central filing amendment.[329] The result achieved in *Farmland Foods* cannot be reconciled with the intent of the legislature as evidenced by their effort to retain the farm products exception.[330]

Two jurisdictions have determined the issue of waiver in a fashion similar to *Farmland*.[331] Their opinions have subsequently been overturned by amendments to their respective states' statutes.[332] Occurring almost immediately after the courts' decisions, these amendments reflected desire by the states' legislatures to retain the farm products exception in spite of a judicially expanded view of waiver.[333] For many years, Nebraska has viewed the issue of the waiver of a security interest through the application of the *Garden City* rationale.[334] Throughout this period, the Nebraska legislature had not amended the Nebraska U.C.C. to force creditors to relinquish this right.[335]

Furthermore, the legislature sought to retain the farm products exception by amending the Nebraska Revised Statutes to follow the intent of the United States Congress as evidenced by federal legislation.[336] The Nebraska legislature has established a long term and workable solution to the problem of secured party-subsequent buyer conflicts. The U.C.C. and the central filing systems provide a framework by which both the creditor and the purchaser of farm products can effectively protect their respective interests. This situation is vastly preferable over one where a court has to pick from among two or more innocent parties who will suffer the indiscretion of the debtor.[337]

CONCLUSION

The federal government repealed the farm products exception as it existed in most statutes. States were left with the choice of either abandoning the exception or preserving it by enacting central filing legislation which would give notice of prior secured interests to subsequent purchasers of farm products. Nebraska choose to retain the

329. *See supra* notes 11-30 and accompanying text.

330. *See supra* note 260.

331. *Clovis*, 77 N.M. 554, 425 P.2d 726; *Bowles*, 256 Ark. 1063, 511 S.W.2d 645.

332. *See supra* notes 115-16, 152-53 and accompanying text.

333. *North Central Kansas*, 223 Kan. at —, 577 P.2d at 39.

334. *Farmland Foods*, 225 Neb. at 10, 13-14, 402 N.W.2d at 283-85. (Krivosha, C.J., dissenting).

335. *Id.* at 14, 402 N.W.2d at 285. (Krivosha, C.J., dissenting). The Chief Justice drew a parallel between the *Clovis* case being legislatively overruled and the *lack* of such an amendment in Nebraska under the *Garden City* case and its progeny. *Id.*

336. *See supra* notes 264-71 and accompanying text.

337. *See supra* notes 264-71 and accompanying text.

exception and provide purchasers and creditors alike with a system that would protect their interests.

However, the Nebraska Supreme Court in *Farmland Foods* has adopted an expanded view of creditor conduct which may constitute a waiver of its security interest. In so doing, the court has virtually eliminated the value that central filing of security interests produces for creditors, debtors and purchasers. Even if a creditor follows exactly the dictates of the filing system, its validly perfected and centrally filed interest is worthless if a prior written consent provision is not enforced. In practice, these clauses are not adhered to, thus creating the catalyst for continued litigation in an area that is better left to the exactitudes of statutes.

In response to the uncertainty of their security, lenders will be forced to more strictly evaluate their farm debtors. This scrutiny translates into higher rates and fewer loans to the farm industry at a time when need for affordable credit is at its peak.[338] Thus, the Supreme Court decision in *Farmland Foods* serves to constrict the flow of credit in Nebraska.

The Nebraska legislature has amended the state's U.C.C. Article 9 to provide for computerized central filing to address the overall problem of secured party-buyer transactions dealing in farm products. The legislature now must further amend section 9-306(2), as have Arkansas and New Mexico, to redefine the waiver issue in Nebraska.

Douglas S. Wilson — '89

338. Telephone interview with Gary Dolan, Attorney for Farmers State Bank (June 1, 1987).