

The National Agricultural
Law Center



University of Arkansas
NatAgLaw@uark.edu · (479) 575-7646

An Agricultural Law Research Article

Agricultural Liens Under Revised Article 9

by

Scott J. Burnham

Originally published in MONTANA LAW REVIEW
63 MONT. L. REV. 91 (2002)

www.NationalAgLawCenter.org

ARTICLE

AGRICULTURAL LIENS UNDER REVISED ARTICLE 9

Scott J. Burnham*

I. INTRODUCTION.

Montana has rarely met a Uniform Law it didn't like. Although Montana has now lost its distinction of having enacted more Uniform Laws than any other jurisdiction, it still ranks near the top.¹ Often the first to enact a Uniform Law, Montana has occasionally had few followers. When a Uniform Law is enacted in only a couple of jurisdictions, it fails to produce national uniformity.

Uniform Laws are the product of the National Conference of Commissioners on Uniform State Laws (NCCUSL)² (assisted, in the case of the Uniform Commercial Code (UCC), by the

* Professor of Law, The University of Montana School of Law. I am grateful for the research assistance of Ryan Hyslop, then a student at The University of Montana School of Law, and the comments of David Gray Carlson, Professor of Law at Cardozo School of Law.

1. See UNIFORM LAWS ANNOTATED, DIRECTORY OF UNIFORM ACTS AND CODES: TABLES - INDEX 9-80 (Master ed. 2001)(Table of Jurisdictions Listing Uniform Acts Adopted). Among the other strong finishers are Colorado, New Mexico, North Dakota, Maine, and Minnesota.

2. Additional information may be found at the organization's web site, <<http://www.nccusl.org/nccusl/default.asp>> (last visited Nov. 2, 2001).

American Law Institute),³ an organization created in 1892 to promote uniformity among state laws. Commissioners are chosen from each state and meet annually to review the drafts that have been prepared by a Drafting Committee and reviewed through an extensive process.⁴

Uniform Laws fill a need in a state lacking a professional legislature. The product comes before the legislature ready-made — the drafting has been done, the interest groups have been heard from, the competing policies have been weighed, the effort to construct workable and enactable legislation completed.⁵ As long as the products reflect high quality, legislators can feel comfortable with the brand name. Indeed, the very name “Uniform Law” may inspire confidence; it is reassuring that other jurisdictions are using the product. In fact, even if there are few adopting jurisdictions, the Uniform Law still serves as model legislation for the state.

As with most virtues, however, the strengths of Uniform Laws are also their weaknesses. One of those strengths is, to coin a phrase, uniformity. The greatest achievement of the Uniform Laws process, the Uniform Commercial Code, states its underlying purpose explicitly: “to make uniform the law among the various jurisdictions.”⁶ To promote uniformity, NCCUSL strongly discourages the adopting jurisdiction from enacting variations.⁷ But the enactment of a Uniform Law in a particular jurisdiction often sets off a chain reaction among existing statutes. In the process of replacing or reconciling related statutes, oversights frequently occur, especially in a state with as complex a body of statutes as Montana.⁸ More significantly, the “one size fits all” philosophy of NCCUSL may result in a jurisdiction enacting statutes that do not meet its regional needs.

3. “There is potential tension in the partnership because the partners have somewhat different goals. At the risk of over-simplification, the goal of the ALI is to ‘get it right’ (on the merits) and the goal of NCCUSL is to ‘get it right enough to get it enacted.’ Resolving this tension is not an easy task because of disagreements over what is ‘right’ and how to get there.” Richard E. Speidel, *Revising UCC Article 2: A View from the Trenches*, 52 HASTINGS L.J. 607, 608 (2001).

4. See generally Fred Miller, *The View from Experience*, 52 HASTINGS L.J. 621 (2001).

5. See generally Robert E. Scott, *Symposium on the Revision of Article 9 of the Uniform Commercial Code: The Politics of Article 9*, 80 VA. L. REV. 1783 (1994).

6. U.C.C. § 1-102(2)(c) (2000).

7. See Miller, *supra* note 4, at 622.

8. The 2001 corrections bill for Revised Article 9 runs 100 pages, almost as long as the original 1999 enactment. See S.B. 23, 57th Leg., Reg. Sess. (Mont. 2001).

These strengths and weaknesses may be seen in the Montana enactment of Revised Article 9 of the Uniform Commercial Code in 1999.⁹ The name itself reveals a conflict between the Uniform Law and the enacting jurisdiction. To fit within the structure of the Montana Code Annotated, old Article 9 was codified as Chapter 9 of Title 30. Perhaps in the interest of national uniformity, however, no one calls it by its enacted name, "Chapter 9," and I shall continue the practice of calling the Montana enactment "Article 9."¹⁰ This article does not address the overall effect of that revision.¹¹ Rather, this article explores the adoption of Revised Article 9 in one microcosm — its effect on agricultural lien statutes.

The drafters of Revised Article 9 wrestled with the issue of what to do with agricultural liens. One proposal was to preempt them completely, incorporating agricultural liens within Revised Article 9.¹² The final result represents a compromise, incorporating the liens for some purposes but not for others. Like most compromises, the result is unsatisfactory. It may prove workable in some states, but Montana has a unique set of agricultural lien statutes that do not accommodate themselves to the Code scheme.¹³

This article examines the impact this Uniform Law has on

9. MONT. CODE ANN. §§ 30-9A-101 to -709 (2001)(effective date 07/01/01). Where the distinction is significant, this article refers to the revision as "Revised Article 9" and to the version that has been repealed as "old Article 9."

10. Actually, things are more confused than that. To prevent confusion between the repealed sections of old Article 9 and the newly enacted sections of Revised Article 9 that have the same uniform section number, the Montana Code Commissioner determined that Revised Article 9 would be codified as Chapter 9A. While I shall refer to the sections by their uniform numbers, the reader will look for them in the Montana Code Annotated in Title 30, Chapter 9A.

11. Nevertheless, I cannot resist a prediction. Perhaps unfamiliarity with the revision makes it appear more overwhelming than it is, but to this student familiarity produces not repose but a conviction that the revised statute is in fact overwhelming. Each state fell in line in haste, enacting it because of the call for the greater good of uniformity, but our leisure will provide much opportunity to repent. We will long for the old code, not just because it was familiar, but because it was comprehensible. The principal author of the old Article 9, Grant Gilmore, explained that the accessibility of the Code made secured financing safe for "country bankers." Grant Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605, 620 (1981). The revision makes secured financing accessible to no one.

12. See Keith G. Meyer, *Should the Unique Treatment of Agricultural Liens Continue?*, 24 IND. L. REV. 1315, 1348-56 (1991).

13. The variety of agricultural liens in different jurisdictions may be surveyed in Steven C. Turner et al., *Agricultural Liens and the U.C.C.: A Report on Present Status and Proposals for Change*, 44 OKLA. L. REV. 9 (1991).

these native agricultural liens and urges reform of the Montana agricultural lien laws. Revision of Article 9 did not cause agricultural liens to become problematic. The accretion of changes over time has made them untidy, but Revised Article 9 puts that untidiness in stark relief.¹⁴ The process of reform should not only eliminate existing conflicts, but result in an improvement in the law. I caution, however, that I am not always sure of the direction that reform should take. One strength of the academic ivory tower is that I can survey the problem with dispassion; the concomitant weakness is that I lack the experience in the field, as it were, to fashion a solution that will prove workable in practice. For, in the process of reform, we must always remember another laudable purpose of the Uniform Commercial Code: "to permit the continued expansion of commercial practices through custom, usage and agreement of the parties."¹⁵ My role is not to dictate the particular solution to each problem, but to outline the problem and present the competing considerations. I am hopeful that others will then take up this cause and give us, at least in this area, a body of law that will serve the final underlying purpose of the UCC: "to simplify, clarify and modernize the law governing commercial transactions."¹⁶

Part II of this article clarifies the Revised Article 9 definition of Agricultural Liens. The article then examines the claims various creditors may have to the same collateral. Part III reviews the attachment process and Part IV the perfection process. Part V reviews the conflict between the secured party and a buyer of farm products, indicating the conflicts between Article 9 and the federal Food Security Act.¹⁷ Part VI then explores the Montana agricultural lien statutes, indicating conflicts among those statutes and conflicts between those statutes and Revised Article 9. Part VII lays out a proposal for addressing the conflicts noted throughout the article.

II. AGRICULTURAL LIENS UNDER REVISED ARTICLE 9.

Although we may think of the term "agricultural lien" as describing any lien on farm products, in fact the term is a term

14. See Donald W. Baker, *Some Thoughts on Agricultural Liens Under the New U.C.C. Article 9*, 51 ALA. L. REV. 1417 (2000).

15. U.C.C. § 1-102(2)(b) (2000).

16. § 1-102(2)(a).

17. 7 U.S.C. § 1631 (2001).

of art. It is, however, a term that means different things in different statutes, having one meaning under Revised Article 9, another meaning under Montana Code Annotated Title 71, and another under other statutes. While old Article 9 did not apply to statutory liens,¹⁸ Revised Article 9 expressly applies to agricultural liens. Section 9-109(a)(2)(1)(b) provides that "this article applies to . . . an agricultural lien."¹⁹ The change is more limited than that section suggests, however, for not *all* of Revised Article 9 applies to agricultural liens and the applicable provisions apply only to agricultural liens as defined in the statute. The definition provides:

"Agricultural lien" means an interest, *other than a security interest*, in farm products:

(A) which secures payment or performance of an obligation for:

- (i) goods or services furnished in connection with a debtor's farming operation; or
- (ii) rent on real property leased by a debtor in connection with its farming operation;

(B) which is created by statute in favor of a person that:

- (i) in the ordinary course of its business furnished goods or services to a debtor in connection with a debtor's farming operation; or
- (ii) leased real property to a debtor in connection with the debtor's farming operation; and

(C) whose effectiveness does not depend on the person's possession of the personal property.²⁰

Under this scheme, an agricultural lien is not a "security interest," which is defined as "an interest in personal property or fixtures which secures payment or performance of an obligation."²¹ Therefore, although Revised Article 9 applies to agricultural liens, only those parts of Revised Article 9 that expressly refer to agricultural liens, rather than those that refer only to security interests, are applicable to agricultural liens. There are, in fact, few sections that expressly apply to agricultural liens. On the other hand, a "secured party" is defined to include both "a person in whose favor a security

18. U.C.C. § 9-104(c) (1998) (repealed 2001). The historical background leading to the exclusion of agricultural liens from old Article 9 is explored in Baker, *supra* note 14.

19. U.C.C. § 9-109(a)(2) (2000).

20. § 9-102(a)(5) (emphasis added).

21. § 1-201(37).

interest is created" and "a person that holds an agricultural lien."²² Therefore, when Revised Article 9 refers to a "secured party," it refers to both a person holding a security interest and a person holding an agricultural lien.

According to the Revised Article 9 definition, the principal difference between a security interest and an agricultural lien is that a security interest is a consensual lien, arising only by contract between the creditor and the debtor, while an agricultural lien is a creature of statute, arising when the creditor satisfies the statutory requirements, irrespective of the consent of the debtor. Furthermore, the definition limits agricultural liens to the statutes that do not make the lien dependent on possession. The statute determines the scope of the lien and may determine its priority.²³

Although the definition of agricultural liens includes statutes that give a landlord a lien in connection with a lease of farm property, there are no such statutes in Montana. In Montana, therefore, a Revised Article 9 agricultural lien is a statute that gives a non-possessory interest in farm products which secures payment or performance of an obligation in favor of a person that in the ordinary course of its business furnished goods or services to a debtor in connection with a debtor's farming operation.²⁴ Because lien law, both within and without Article 9, is largely a matter of determining 1) whether a lien becomes effective, 2) the scope of the lien,²⁵ and 3) its priority among the various claimants to the debtor's property, we will approach the issue of the relationship between agricultural liens and Revised Article 9 by looking at the various competing claimants to the farm products of a debtor.

22. § 9-102(a)(72).

23. See Part VI.B., *infra*. If the statute does not provide a priority, the Article 9 default rule of first to file or perfect governs. § 9-322(a)(1), (3).

24. Although the definitions of farm products (§ 9-102(a)(34)) and farming operation (§ 9-102(a)(35)) have changed somewhat, the changes have no effect on the agricultural liens. Compare § 9-109(3) (repealed 2001).

25. The scope of the lien is not relevant to our inquiry. Nevertheless, the lienor must carefully study the statute to determine the scope of the lien. For example, the property to which the lien attaches varies. The Seed or Grain Lien attaches to the crops produced from the seed, and seed or grain threshed from those crops. The Threshers' Lien attaches to crops threshed by the lienor's machine. The Hail Insurance Lien attaches to crops grown on the insured land and seed and grain threshed from those crops. The Spraying or Dusting Lien attaches only to the grain or crops dusted. The Farm Laborers' Lien, however, applies to all crops grown raised or harvested by the farmer (except for feed sufficient to maintain certain animals for three months!). But the laborer claiming under the Farm Laborers' Lien would apparently have a claim only to the crop, and not to the grain threshed from that crop, for the statute is so limited.

III. SECURED PARTY V. DEBTOR.

A creditor such as a bank may take a security interest in farm products. Under old Article 9, a creditor acquired a security interest in collateral of a debtor by having the debtor, in return for value given, grant the interest in a signed writing that describes the collateral.²⁶ This simple requirement for attachment is largely unchanged by Revised Article 9, except that the Code now requires an "authenticated record" rather than a signed writing, to accommodate electronic commerce.²⁷ Revised Article 9 also more clearly specifies what constitutes a sufficient description of the collateral, allowing for example, "a type of collateral defined in the UCC," but not a supergeneric description, such as "all the debtor's personal property."²⁸

For example, in consideration of a loan of \$100,000, in an authenticated record, farmer Ingmar Swenson grants First Bank a security interest in Swenson's farm products. This transaction is effective to give First Bank a security interest in Swenson's collateral, farm products as defined in § 9-102(a)(34). Once its security interest has attached to the collateral, First Bank can of course foreclose on the property in the event of default.²⁹ The security interest also attaches to the proceeds of the collateral, such as cash from the sale of a crop.³⁰

IV. SECURED PARTY V. OTHER SECURED PARTIES AND THE BANKRUPTCY TRUSTEE.

Although attachment is sufficient to give the secured creditor rights as against the debtor, a prudent creditor will perfect its security interest by filing in order to gain priority over other secured creditors and to defeat the trustee in bankruptcy in case the debtor declares bankruptcy. The creditor does so under Revised Article 9 by filing a financing statement containing the required information with the appropriate filing office. While the filing rules have substantially changed, the contents of the financing statement have not, although it is not easy to discern the required contents from the Code. Section 9-502, "Contents of a Financing Statement," provides:

26. U.C.C. § 9-203 (1998) (repealed 2001).

27. U.C.C. § 9-203 (2000). Mercifully, even the section number is unchanged.

28. § 9-108.

29. § 9-601(a)(1).

30. § 9-315(a)(2).

(a) A filing statement, to be sufficient, must:

- 1) provide the name of the debtor;
- 2) provide the name of the secured party or a representative of the secured party; and
- 3) indicate the collateral covered by the financing statement.³¹

This is not the end of it, however. Section 9-516 provides that "Filing does not occur with respect to a record that a filing office refuses to accept because" certain enumerated information is lacking.³² In other words, Revised Article 9 doesn't affirmatively require that creditors include the § 9-516 information in the financing statement, but if they don't, the filing office may reject it. This information includes the mailing address of the secured party and the debtor, and an indication of whether the debtor is an individual or an organization. If the debtor is an organization, the information includes the type of organization, jurisdiction of organization, and organizational identification number for the debtor if any.³³

Figuring out where to file, however, is problematic, for Revised Article 9 substantially changed the choice of law rules. Section 9-301 provides that "while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral."³⁴ Section 9-307 provides that an individual is located at the individual's principal residence, but a registered organization is located in the state under which it is organized.³⁵ Therefore, if the Montana ranch where the collateral is located is owned by an individual residing in Montana, Montana is the appropriate jurisdiction for filing; if the debtor is a California corporation, California is the appropriate jurisdiction for filing; and if the debtor is a Colorado LLP, Colorado is the appropriate jurisdiction for filing.

Once the creditor has found the relevant jurisdiction in which to file, in Montana and most jurisdictions, except for filings with respect to standing timber, minerals, and fixture

31. § 9-502(a)(1)-(3).

32. § 9-516(b).

33. U.C.C. § 9-516(b)(5)(A)-(C) (2000). The Montana standard form financing statement also asks for the social security number of taxpayer ID number, but this information is not required by the Code.

34. § 9-301(1).

35. § 9-307(b).

filings, the place of filing is the office of the Secretary of State.³⁶ Filing is done under the name of the debtor.³⁷ An error in the financing statement, such as an error in stating the name of the debtor, is not fatal to an effective filing if the filing office's standard search logic would find it.³⁸ In Montana, under the search logic adopted by the Secretary of State, the search logic will find only the exact name of the debtor.³⁹ Secured parties

36. MONT. CODE ANN. § 30-9A-501 (2001); U.C.C. § 9-501 (Official Comment 2) (2001). Although not relevant to the present discussion, it might be noted that the major change is that when the collateral is consumer goods, the financing statement is filed with the Secretary of State, not with the county.

37. U.C.C. § 9-502 (2000).

38. § 9-516.

39. Defining Search Criteria for Uniform Commercial Code Certified Searches, MONT. ADMIN. R. 44.6.201 (2001), provides:

(1) The secretary of state provides information regarding centrally filed uniform commercial code records from requests to office staff and via the secretary of state website. These searches are certified for their accuracy.

(2) Searches provided by the secretary of state are "exact name" searches. Only the precise name requested, with very little variation, is searched and certified.

(3) The basic standards for searching individual and entity names are that:

(a) there is no limit to the number of matches that are returned in response to a search request;

(b) no distinction is made between upper and lower case letters;

(c) punctuation marks and accents are disregarded; and

(d) spaces in any field are disregarded.

(4) Basic standards for searching individual names include:

(a) exact match of surnames and exact match of first names; and

(b) middle names become an initial or blank space.

(5) Basic standards for searching business names include:

(a) an exact match of the name requested;

(b) "the" at the beginning of a name is disregarded;

(c) words and abbreviations that indicate the existence or nature of an entity are disregarded. These include:

(i) association;

(ii) assn;

(iii) business trust;

(iv) chartered;

(v) chtd;

(vi) co;

(vii) company;

(viii) co-op;

(ix) cooperative;

(x) corp;

(xi) corporations;

(xii) credit union;

(xiii) cu;

(xiv) fcu;

(xv) federal credit union;

must file in the exact legal name of the debtor; anything else is not an effective filing and the security interest will be unperfected.

-
- (xvi)federal savings bank;
 - (xvii)fsb;
 - (xviii)gp;
 - (xix)general partnership;
 - (xx)inc;
 - (xxi)incorporated;
 - (xxii)joint stock company;
 - (xxiii)joint venture;
 - (xxiv)jsc;
 - (xxv)jv;
 - (xxvi)lc;
 - (xxvii)limited;
 - (xxviii) limited company;
 - (xxix)limited liability company;
 - (xxx)limited liability limited partnership;
 - (xxxi)limited partnership;
 - (xxxii)llc;
 - (xxxiii) llp;
 - (xxxiv) llp;
 - (xxxv)lp;
 - (xxxvi) ltd;
 - (xxxvii) ltd co;
 - (xxxviii) na;
 - (xxxix) national association;
 - (xl)pa;
 - (xli)partnership;
 - (xlii)pc;
 - (xlili)plc;
 - (xliv)pllc;
 - (xlv)professional association;
 - (xlvi)professional corporation;
 - (xlvii)professional limited company;
 - (xlviii)professional limited liability company;
 - (xlix)registered limited liability partnership;
 - (l)rlp;
 - (li)sa;
 - (lii)savings association; and
 - (liii)trust.

(6) A search of the secretary of state's database will not result in accurate findings if:

- (a) first or last names are misspelled;
- (b) non-universal identifiers are in the name and not included in the search request, such as "a Montana corporation" or "a general partnership";
- (c) nicknames or shortened versions of names, i.e., if the debtor's first name is filed as "Robert," the search will not result in finding "Bob"; or
- (d) plurals are used in the search but not in original filing.

Example. If the Montana financing statement used the individual name "Ingemar Swenson" instead of the legal name "Ingmar Swenson," the financing statement would not be effective.

Example. If the Montana financing statement used the corporate name "Ingmar Swenson Natural Food, Inc.," instead of the legal name "Ingmar Swenson Natural Foods, Inc.," the financing statement would not be effective.

Although the appropriate jurisdiction for filing may have changed on July 1, 2001, a filing made in the correct place under old Article 9 remains effective for its duration.⁴⁰ Searchers must therefore look for filings in the appropriate place under both old Article 9 and Revised Article 9. We will now look at how a perfected security interest fares against other claimants.

V. SECURED PARTY V. BUYER.

Assume First Bank has a security interest, properly perfected under Revised Article 9, in Ingmar Swenson's farm products and Swenson sells his wheat crop to General Mills. Does First Bank's security interest remain attached to the crop in the hands of General Mills? With any other kind of collateral, the answer would be found in § 9-320 and the answer would be yes. But with respect to farm products, this particular Article 9 issue has been preempted by federal law and the answer is now found in the Food Security Act of 1985 (FSA).⁴¹ Under the federal scheme in a state with central filing such as Montana, the secured party prevails over the buyer, but only if the secured party has filed an effective financing statement.

The rub is that the requirements for an effective financing statement under the FSA and the requirements for a financing statement under Revised Article 9 differ.⁴² The significant

40. See U.C.C. § 9-705(c) (2000), codified in Montana as MONT. CODE ANN. § 30-9A-705(3) (2001). (See also U.C.C. § 9-403 (1998) (repealed 2001), which was replaced by U.C.C. § 9-515 (2000).)

41. 7 U.S.C. § 1631 (2001).

42. The Food Security Act of 1985, 7 U.S.C. § 1631(c)(4), provides:

(4) The term "effective financing statement" means a statement that—

(A) is an original or reproduced copy of the statement, or, in the case of a State which (under the applicable State law provisions of the Uniform Commercial Code) allows the electronic filing of financing statements without the signature of the debtor, is an electronically reproduced copy of the statement;

differences are that the FSA requires the signatures of the secured party and the debtor, a social security number or Tax ID number, a description of the farm products, and a description of the property where the collateral is located, while Revised Article 9 requires none of this information. On the other hand, Revised Article 9 requires for organizational debtors, the type of organization, the jurisdiction of organization, and an organizational identification number, while the FSA does not.

A prudent creditor perfecting an interest in farm products will include in the financing statement not only information that will satisfy Revised Article 9 to give the creditor priority over other creditors, but also the information that will satisfy the Food Security Act to give the creditor priority over buyers of the collateral. While reform that would reconcile these conflicting requirements would be desirable, it is unlikely that change will be forthcoming at the federal level. Montana has made the FSA requirements easier to satisfy by prompting the filer to include all the relevant information on the financing statement.⁴³

VI. SECURED PARTY V. AGRICULTURAL LIENOR.

A. Agricultural Liens that must be filed under Title 71.

As we saw earlier, "agricultural lien" has a particular

(B) other than in the case of an electronically reproduced copy of the statement, is signed and filed with the Secretary of State of a State by the secured party;

(C) other than in the case of an electronically reproduced copy of the statement, is signed by the debtor;

(D) 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; and a reasonable description of the property, including [the] county or parish in which the property is located[.]

43. See State of Montana Uniform Commercial Code Financing Statement - Form REVFS-1 at http://sos.state.mt.us/css/BSB/Filing_Forms.asp (last visited Dec. 2, 2001). Form REVFS-1 requests a specific collateral description and signatures to comply with "Farm Bill" requirements. Presumably, by "Farm Bill," the Secretary of State means the Food Security Act. The form does not indicate that the Social Security number or Tax ID number of the debtor are also required by the Food Security Act but not by Revised Article 9.

meaning under Revised Article 9. In Montana, the following statutes (the "Title 71 liens") clearly qualify as agricultural liens for this purpose: Farm Laborers' Liens,⁴⁴ Seed or Grain Liens,⁴⁵ Hail Insurance Liens,⁴⁶ Threshers' Liens,⁴⁷ and Spraying or Dusting Liens.⁴⁸ These liens all give the party who provided goods and services to the farmer on credit a lien on certain of the farmer's property. The lien may therefore conflict with the lien acquired by a secured party under Revised Article 9. To determine the applicable rules to resolve that conflict, we must first find the jurisdiction whose law is relevant to the transaction. We saw that the choice of law rules with respect to a security interest looked to the location of the debtor. The choice of law rules with respect to an agricultural lien, however, look to the location of the farm product. Section 9-302 provides:

While farm products are located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of an agricultural lien on the farm products.⁴⁹

So, if First Bank takes a security interest in the crops raised on a Montana ranch owned by a California corporation, and Seedco secures an agricultural lien on the same crop, California law provides the rules for perfection and priority of the security interest, but Montana law provides the rules for perfection and priority of the agricultural lien.

Assuming we are dealing with Montana farm products, let us look in detail at one of these statutes to determine how the lien is obtained, the property it attaches to, and its priority as to other liens. The seed or grain lien provides:

71-3-701. Lien for seed or grain. Any person, company, association, or corporation who furnishes to another seed to be sown or planted or funds or means with which to purchase seed to be sown or planted or to be used in the production or cultivation of a crop or crops on the lands owned or contracted to be purchased, used, leased, occupied, or rented by him or held under government entry, upon filing the statement provided for in 71-3-703, has a

44. MONT. CODE ANN. §§ 71-3-401 to -408 (2001).

45. §§ 71-3-701 to -705.

46. §§ 71-3-711 to -713.

47. §§ 71-3-801 to -810.

48. §§ 71-3-901 to -909.

49. U.C.C. § 9-302 (2000).

lien not exceeding the purchase price of the seed or grain furnished upon the crop produced from the seed or grain furnished, or any part thereof, and upon the seed or grain threshed from the crop to secure the payment of the amount or the value of the seed or grain furnished or the funds or means advanced to purchase the seed or grain.⁵⁰

This lien seems straightforward. The lienor furnishes seed or the money to purchase the seed which is used to plant a crop and obtains a lien in the amount of the price of the seed or grain⁵¹ and the lien attaches to the crop itself and the seed or grain threshed from the crop. The lien obtains a priority over other liens, including security interests.⁵² The wrinkle is in the language which provides that the lienor obtains the lien "upon filing the statement provided for in 71-3-703." That section provides:

71-3-703. How to obtain lien. Any person, company, association, or corporation who is entitled to a lien under 71-3-701 shall, within 90 days after the seed or grain is furnished or the funds, means, or money advanced for the seed or grain, file in the office of the secretary of state a statement of agricultural lien as provided in 71-3-125. Unless the person entitled to a lien files the lien statement within the time required, he is considered to have waived the right to a lien.⁵³

The lien is not obtained – does not attach – unless the lienor makes a lien filing in the Secretary of State's office within 90 days after the grain is furnished. To one schooled in security interests, filing as a condition precedent to effectiveness makes no sense. Security interests attach between the secured party and the debtor when the lien is granted. The purpose of a filing system is public notice. Why should the lien creditor be required to give public notice to make the lien good against the debtor? Furthermore, why should the lienor have 90 days to file the notice? It seems to me there is a difference between extending credit and getting stiffed. If the purpose of the lien statute is to give the unpaid seller an opportunity to recover payment, then

50. MONT. CODE ANN. § 71-3-701 (2001).

51. The carelessness with which the statute is drafted is indicated by the fact that the lien is obtained by providing "seed," but attaches in the amount paid for "seed or grain."

52. MONT. CODE ANN. § 71-3-702 (2001). Priorities are discussed in greater detail in section VI.B., *infra*.

53. § 71-3-703.

the extended period might make sense. But if the purpose of the statute is to protect a creditor who is entering a credit transaction, there is no reason the creditor could not take the steps at the time credit is extended. Here, it appears that the seed or grain lienor is extending credit, for the intention seems to be to allow the farmer to receive the seed at the beginning of the cultivation cycle and pay for it at the end of the cycle, a period that, in the absence of judicious application of Miracle-Gro, will probably exceed 90 days.

If I have correctly discerned the purpose of the seed lien, then it closely resembles the purpose of the superpriority given under Article 9 to a creditor who enables the debtor to obtain additional financing when the debtor's collateral is already encumbered by an existing security interest containing an after-acquired property clause. For example, if First Bank has a security interest in debtor's inventory, Second Bank may finance the purchase of additional inventory and obtain a superpriority. Similarly, the Farmer who has given a security interest in her crop to First Bank is able to secure the means to plant a new crop from Seedco by giving Seedco a Seed or Grain Lien. Old Article 9 contained a limited superpriority in crops in § 9-312(2).⁵⁴ This provision was not carried over in the body of Revised Article 9, but a similar provision was placed in an appendix for states to consider.⁵⁵ The optional provision was not enacted in Montana.⁵⁶

One difference between Article 9 superpriority statutes and Title 71 liens is that the security interest given a superpriority is a purchase money security interest, attaching only to the additional collateral provided by the new creditor. The Title 71 lienor, on the other hand, provides no additional collateral, so the lien attaches to the same collateral claimed by the secured party, somewhat diminishing the collateral available to the secured party. For example, Second Bank's superpriority in inventory attaches only to the inventory provided by Second Bank, while Seedco's Seed or Grain Lien attaches to the same crop as First Bank's security interest. The policy question seems to be whether Seedco should be allowed to provide the farmer the means to cultivate another crop at some risk to First Bank, which has first priority in the crop. Under existing law,

54. U.C.C. § 9-312(2) (1998) (repealed 2001).

55. U.C.C. § 9-324A (2000), "Priority of Production-Money Security Interests and Agricultural Liens."

56. See S.B. 153, 56th Leg., Reg. Sess. (Mont. 1999).

the fact that such liens have been enacted and given priority indicates the question has been answered in the affirmative, but review might question that policy.

If the policies favor the creation of such a lien, it would make sense to fashion it like a purchase money security interest with a superpriority.⁵⁷ If the lien was modeled after the purchase money security interest in inventory⁵⁸ or livestock,⁵⁹ the lienor would have a lien good against the debtor without filing, but would have a priority over secured creditors only if it filed and gave notice to creditors with conflicting liens at the time the credit was extended. Such a scheme would bring the lien within the sphere of Revised Article 9.

Whatever else is done with the Title 71 liens, it is most important that the filing process be reformed, for enactment of Revised Article 9 has made it unclear what steps the lienor must take to file. The drafters of Revised Article 9 intended that agricultural liens would be perfected by filing in the same manner as security interests. Recall that § 9-302 provides that "local law" governs perfection. However, with the enactment of Revised Article 9, there are now two local laws governing perfection in Montana. Revised Article 9 provides one scheme. Under it, § 9-308(b) provides that "an agricultural lien is perfected if it has become effective and all of the requirements for perfection in Section 9-310 have been satisfied."⁶⁰ Section 9-310(a) provides that "a financing statement must be filed to perfect all security interests and agricultural liens."⁶¹ At first blush it may appear that an agricultural lien may be perfected by an Article 9 filing.

Section 9-308(b), however, provides that "an agricultural lien is perfected if it has *become effective*" and it has been properly filed,⁶² and the Title 71 liens all provide that they are not effective unless the statement required by § 71-3-125 is filed.⁶³ The § 71-3-125 statement contains requirements that

57. See U.C.C. § 9-324 (2000), "Priority of Purchase-Money Security Interests."

58. § 9-324(b).

59. § 9-324(d).

60. § 9-308(b).

61. § 9-310(a).

62. § 9-308(b) (emphasis added).

63. MONT. CODE ANN. § 71-3-125 (2001) provides in pertinent part:

(2) A statement of an agricultural lien is sufficient if it:

(a) gives the names and addresses of the debtor and lienor;
(b) describes the type of lien and its statutory authority;
(c) describes the collateral;

differ from the requirements of the Revised Article 9 financing statement. The § 71-3-125 statement must be signed by the lienor, must describe the service or product furnished, must state the county in which the farm products are located, and must state particulars with respect to each type of lien, while the Revised Article 9 financing statement contains no such requirements.

Because the filing requirements of Title 71 and Revised Article 9 are inconsistent, it is not clear which prevails. This issue will come to a head when an agricultural lienor files a financing statement pursuant to the requirements of Revised Article 9 and a creditor with a security interest in the crop will claim the lien is not effective because the lienor did not provide the information required by § 71-3-125. The authorities suggest that if there are two filing systems, then the legislature, knowing of the older system, must have intended the newer one to prevail.⁶⁴ Under this view, because Revised Article 9 is newer, it supplants § 71-3-125.⁶⁵ The argument might make sense as between two competing filing systems for purposes of perfection. But the agricultural lien statutes prescribe filing for the lien to become effective, in other words, for it to attach. There must be attachment before there is perfection. Because

(d) contains the notation by the secretary of state of the date of filing and filing number;

(e) is signed by the lienor;

(f) describes the service or product furnished. If the collateral is farm products, the statement must state the county in which the farm products are located, designated by type of farm product.

(g) states the price or wage agreed upon or, if the price or wage was not agreed upon, the reasonable value of the service or product furnished;

(h) states the amount remaining unpaid;

(i) states the terms and period of employment if it is a farm laborer's lien filed pursuant to part 4 of this chapter;

(j) describes the land upon which seed or grain was or will be sown, planted, or used if it is a lien for seed or grain filed pursuant to part 7 of this chapter;

(k) describes the land upon which the grain or crops were grown and the place the grain or crops are presently stored if it is a thresher's lien filed pursuant to part 8 of this chapter;

(l) describes the land upon which the service was performed if it is a lien for spraying or dusting filed pursuant to part 9 of this chapter; and

(m) states the starting date of insurance coverage if it is a lien filed pursuant to part 7 of this chapter.

64. See *Ross v. City of Great Falls*, 1998 MT 276, 291 Mont. 377, 967 P.2d 1103.

65. See Linda Rusch, *Farm Financing Under Revised Article 9*, 73 AM. BANKR. L. J. 211, 236 n.170 (1999), which states, "If the statute creating the lien has different perfection requirements, presumably Revised Article 9 will override those requirements."

the Title 71 lien does not even arise until it is filed under § 71-3-125, filing of the Title 71 liens serves a different purpose than filing of security interests, which is required only for purposes of perfection. This distinction persuades me that filing under Revised Article 9 is not sufficient to perfect a Title 71 agricultural lien, and that the secured party would prevail in this dispute.⁶⁶

The same conflict arises with respect to contests between the lienor and a buyer. According to Revised Article 9, the agricultural lien continues in collateral notwithstanding sale as long as it is perfected.⁶⁷ This protection is provided in Title 71, but again, only if the § 71-3-125 statement is filed. Section 71-3-125(1) provides:

Unless a statement of an agricultural lien has been filed in the office of the secretary of state as provided in this chapter, a buyer who, in ordinary course of business as defined in 30-1-201(9), buys a farm product takes it free of any lien created by this chapter even though the lien is otherwise perfected.⁶⁸

For example, if the lienor claiming a Seed or Grain lien filed pursuant to Revised Article 9 and the farmer sold the crop to General Mills, General Mills would claim that the filing was not effective because § 71-3-125 was not complied with. The lienor's rights as against the buyer are also significant in bankruptcy, for under the Bankruptcy Code, the trustee may avoid a statutory lien that "is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists."⁶⁹ If the lien were filed under Article 9 but not under Title 71, the trustee could avoid it.

The solution to this problem is for the legislature to repeal the filing requirements of Title 71, thereby making Revised

66. See *Great Falls Farm Machinery Co. v. Rocky Mountain Elevator Co.*, 94 Mont. 188, 22 P.2d 303 (1933), which supports this view (holding that a thresher was not entitled to a Thresher's Lien if he did not file within the statutory period). The court held that the lienor lost his right to a lien when he failed to file. The court cited with approval a series of Idaho cases, explaining that "[i]f the filing is made within the statutory period, then the lien relates back in such a way as to give full force and potency to it from the beginning, but if the filing is not made, the inchoate right never ripens into an actual lien." *Id.* at 195, 22 P.2d at 305.

67. See U.C.C. § 9-315(a)(1) (2000).

68. MONT. CODE ANN. § 71-3-125(1) (2001).

69. 11 U.S.C. § 545(2) (2001).

Article 9 filing the means to perfect agricultural liens. Although the purpose of filing is to give notice to other creditors, it may not be easy for a creditor to find the filed agricultural lien. Recall that under Revised Article 9, the place for perfecting a security interest is the location of the debtor, which may not be Montana in the case of a registered organization.⁷⁰ The Title 71 liens, however, are filed with the Montana Secretary of State. This practice would not change even if the perfection scheme was governed by Revised Article 9, for agricultural liens follow the location of the farm products, not the location of the debtor.⁷¹ Thus in the case of a Colorado partnership that owns a ranch in Montana, a searcher looking for liens in Colorado would not find agricultural liens filed in Montana under either the Title 71 scheme or the Revised Article 9 scheme. The burden of finding the relevant filings could be placed on the secured party, but because the agricultural liens are usually filed after the security interest has been filed, the secured party would be required to search continuously. The better solution might again be found in the superpriority statutes, which require both filing and direct notice to existing creditors in order to achieve the superpriority.⁷²

Even under Revised Article 9, the perfected agricultural lienor has no claim to proceeds (unless the proceeds are also farm products). Section 9-315(a)(2) gives such a right only to a secured party.⁷³ For example, if Seedco had a Seed or Grain Lien in a farmer's crop, and the farmer sold the crop to General Mills, the lienor would have no right to the cash received by the farmer. Revised Article 9 leaves the right to proceeds up to the local lien laws and the Title 71 lien laws grant lienors only very limited rights to proceeds. For example, § 71-3-701 provides that the Seed or Grain Lien applies to the crop produced and to "the seed or grain threshed from the crop."⁷⁴ Another policy question to be determined is whether the agricultural liens should extend to proceeds. Continuing the analogy to Article 9 superpriorities, the purchase money security interests attach to proceeds.⁷⁵

70. See U.C.C. § 9-301(1) (2000).

71. § 9-302.

72. § 9-324(c), (e).

73. § 9-315(a)(2).

74. MONT. CODE ANN. § 71-3-701 (2001). See U.C.C. § 9-302 cmt. 2 (2000).

75. The purchase money security interest generally attaches to all proceeds, except that the superpriority in inventory attaches only to cash proceeds. See U.C.C. § 9-324(b)

We have so far scrutinized the Seed or Grain Lien. The other liens, the Hail Insurance Lien, Threshers' Lien, Farm Laborers' Lien, and Spraying or Dusting Lien, all serve the same purpose of allowing the farmer to complete the crop cycle on credit. If they serve the same purpose, they should be treated similarly, and given a superpriority if the proper filing and notice is complied with. A possible exception is the Farm Laborer's lien, which provides:

71-3-401. Who may have lien—priority. (1) Any person who performs services for another in the capacity of a farm or ranch laborer has a lien on all crops of every kind grown, raised, or harvested by the person for whom the services were performed during that time as security for the payment of any wages due or owing to such persons for services so performed.⁷⁶

This statute is essentially a wage protection statute, allowing the laborer a lien to recover for services rendered. All employees, including farm laborers, have the protection of modern wage statutes in the event of nonpayment of wages.⁷⁷ It is questionable whether this lien serves any purpose if there is an alternative available. Before arriving at any conclusion on that question, it would be helpful to know whether the statute has in fact any proven utility and whether the Department of Labor could effectuate the same purpose under existing wage protection statutes.

B. Priority of Title 71 agricultural liens.

Assuming the agricultural liens are effectively created, Revised Article 9 provides the priority rules. Although the general rule is that conflicting security interests and agricultural liens rank according to priority in time of filing,⁷⁸ an exception recognizes that the statute that creates the agricultural lien may provide a different priority.⁷⁹ Most of the Title 71 lien statutes contain such a priority rule that 1) ranks them ahead of security interests, and 2) ranks them among each other. These rules are badly written and contradictory. For example, the Seed or Grain Lien has "priority over all other

(2000).

76. MONT. CODE ANN. § 71-3-401 (2001).

77. See § 39-3-204.

78. U.C.C. § 9-322(a)(1) (2000).

79. § 9-322(g).

liens and encumbrances”⁸⁰ while the Threshers’ Lien has “priority over any mortgage, encumbrance or other lien”⁸¹ It is doubtful that the addition of “mortgage” to the latter list is meaningful. Meanwhile, the Farm Laborers’ Lien has “priority over all liens, chattel mortgages and encumbrances”⁸² It does not appear significant that “mortgage” became “chattel mortgages.” The Hail Insurance Lien, however, does not state a priority. Section 71-3-711 states that it is “subject to any seed lien,”⁸³ suggesting that the intent was to make it inferior to that lien but superior to all others. It appears, therefore, that the legislative intent was to give all of these liens priority over security interests, and the following priority among themselves:

1. Seed or Grain Lien (§ 71-3-702)
2. Hail Insurance Lien (§ 71-3-711)
3. Threshers’ Lien (§ 71-3-804)
4. Farm Laborers’ Lien (§ 71-3-401(2))
5. Spraying or Dusting Lien (§ 71-3-904)

It seems a clear policy to give these liens priority over security interests, but if there is any logic to the priority scheme among the Title 71 liens, I cannot discern it. The task for reform would involve determining some basis for priority and clearly stating the priority. If no policy basis can be agreed upon, the liens could be given priority according to the default rule, the order of filing. Alternatively, there could be no priority, with each lien equal to the others and, in the event of insufficient collateral to satisfy all of them, apportionment pro-rata.⁸⁴

A table summarizing these aspects of Title 71 liens is attached at the conclusion of this article as an Appendix, Agricultural Liens Filed Under MCA § 71-3-125.

C. Other agricultural liens.

In reciting the priorities among the Title 71 liens, I neglected to mention that the Spraying or Dusting Lien states that it does not have priority over the lien for warehouse

80. MONT. CODE ANN. § 71-3-702 (2001).

81. § 71-3-804.

82. § 71-3-401(2).

83. § 71-3-711.

84. This is the scheme now with pipeline repair liens. See § 71-3-1007.

services.⁸⁵ This aberrant provision, which was probably overlooked during earlier revisions, nevertheless serves as a reminder that Montana has enacted agricultural liens other than the Title 71 liens.

The Agisters' Lien, as evidenced by its name, is an ancient relic. It is not clear whether the Agisters' Lien is an agricultural lien as defined in Revised Article 9. Section 71-3-1201(1) provides:

If there is an express or implied contract for keeping, feeding, herding, pasturing, or ranching stock, a ranchman, farmer, agister, herder, hotelkeeper, livery, or stablekeeper to whom any horses, mules, cattle, sheep, hogs, or other stock are entrusted has a lien upon the stock for the amount due for keeping, feeding, herding, pasturing, or ranching the stock and may retain possession of the stock until the sum due is paid.⁸⁶

The statute provides that the lienor *may* retain possession of the livestock he or she has kept, fed, herded, pastured, or ranched. If the *may* in the statute means the lienor may retain possession in order to secure a lien, then the *may* means *must* and the lien is dependent on possession, which would disqualify it from being an agricultural lien as defined in Revised Article 9. If the *may* is permissive, meaning the lienor secures a lien whether there is possession or not, then it is a Revised Article 9 agricultural lien. It might be noted that in the Mechanic's Lien that follows in the next subsection, the legislature expressly stated that "the lien is dependent on possession."⁸⁷ This change in language indicates that the legislature was capable of using language requiring possession when it meant to create a possessory lien, thereby suggesting that the word "may" in the prior statute was intended to make possession permissive.⁸⁸ Nevertheless, the

85. See § 71-3-904.

86. MONT. CODE ANN. § 71-3-1201(1) (2001).

87. § 71-3-1201(2) provides:

(2) Every person who, while lawfully in possession of an article of personal property, renders any service to the owner or lawful claimant of the article by labor or skill employed for the making, repairing, protection, improvement, safekeeping, carriage, towing, or storage of the article or tows or stores the article as directed under authority of law has a special lien on it. The lien is dependent on possession and is for the compensation, if any, that is due to the person from the owner or lawful claimant for the service and for material, if any, furnished in connection with the service. If the service is towing or storage, the lien is for the reasonable cost of the towing or storage.

88. The "Golden Rule of Drafting" states, "Never change your language unless you wish to change your meaning, and always change your language if you wish to change

author believes the legislative intent was to make the lien dependent on possession. This statute is in need of clarification.⁸⁹

According to § 71-3-1202, this lien does not need to be filed with the Secretary of State to attach, but it loses priority to a perfected Article 9 secured party or "other party with a recorded lien"⁹⁰ if the lienor does not give notice to that party directly.⁹¹ If this requirement were not onerous enough, the agister must send the notice within 30 days of when the agister *received* the property, long before the debt is unpaid. An agister would have to be especially untrusting soul to have an effective lien.

If the Agisters' Lien is a Revised Article 9 agricultural lien, not requiring possession, then the statute is in conflict with Revised Article 9, which requires the lienor to file a financing statement with the Secretary of State in order to obtain priority over other agricultural lienors and secured parties rather than notifying them directly.⁹² Moreover, the section contains its own rules for foreclosure on the lien. One of the sound reasons for bringing agricultural liens within the scope of Revised Article 9 is to apply the same foreclosure rules. If the Agisters' Lien is dependent on possession, then it needs to be modernized and harmonized with the Mechanic's Lien that follows it.

Section 71-3-601 provides for a Loggers' Lien that may be obtained either by the person who did the logging or by the person who allowed the logging on his or her land.⁹³ Like the other Title 71 liens, it is not effective unless filed, in this case within 30 days after the services have been performed. This lien has yet another filing scheme, with filing in the county in which the logs were cut. While this scheme was at one time consistent with Article 9, under Revised Article 9, security interests in extracted timber are no longer filed in the county, but with the

your meaning." SCOTT J. BURNHAM, *DRAFTING CONTRACTS* § 15.4.5 (2d ed. 1993).

89. In *Vose v. Whitney*, 7 Mont. 385, 16 P. 846 (1888), the issue was whether the plaintiff alleged facts that satisfied the elements of the statute when he received the cattle from a deputy sheriff who did not own them. The court held that plaintiff stated a claim, and in presenting the facts, noted that the plaintiff had possession of the cattle. More recently, in *Daniels-Sheridan Federal Credit Union v. Bellanger*, 2001 MT 235, ¶ 16, 307 Mont. 22, 36 P.3d 397, the court held the claimant under an agisters' lien "lacked both possessory and contractual bases for a valid agister's lien."

90. I'm not sure who that could be, as the liens filed under § 71-3-125 do not encumber livestock. Perhaps another creditor claiming an Agisters' Lien.

91. See § 71-3-1202.

92. See U.C.C. § 9-322(a) (2000).

93. See MONT. CODE ANN. § 71-3-601 (2001).

Secretary of State where the debtor is located.⁹⁴ The lien has priority over all other liens.⁹⁵ Reform of this lien should provide secured parties be given notice of this lien, either through filing with the Secretary of State or through both filing and direct notice.

The Warehouseman's Lien⁹⁶ coordinates with Revised Article 9 because it appears in Article 7 of the Uniform Commercial Code, which deals with Warehouse Receipts, Bills of Lading, and other Documents of Title. The statute gives the warehouseman a lien for services against the goods covered by the warehouse receipt. Because it is dependent on possession, it is not a Revised Article 9 agricultural lien. The warehouseman does not need to do anything to perfect it except retain possession. The lien is what old Article 9 called "a lien arising by operation of law"⁹⁷ and Revised Article 9 calls a "possessory lien."⁹⁸ As such it has priority over a perfected security interest.

Finally, § 81-8-301 provides that "a livestock market to which livestock is shipped may not be held liable to any secured party for the proceeds of livestock sold through the livestock market by the debtor unless notice of the security agreement is filed" with the Department of Livestock.⁹⁹ This provision alerts the creditor with a security interest in livestock to file not only with the Secretary of State, but also with the Department of Livestock. The contents of the required notice differ from the contents of a Revised Article 9 financing statement.¹⁰⁰ To simplify this process, perhaps the Montana financing statement could designate that a security interest in "livestock" is being claimed. The Secretary of State could then transmit these financing statements to the Department of Agriculture to satisfy the statutory requirement, saving the creditor the necessity of double filing.

VII. CONCLUSION: INQUIRIES AND PROPOSALS.

Decades ago, Grant Gilmore, the principal drafter of the original Article 9, wrote, "It is too much to hope that states

94. See U.C.C. § 9-501, cmt. 3 (2000).

95. See MONT. CODE ANN. § 71-3-602 (2001).

96. See § 30-7-209.

97. U.C.C. § 9-310 (1998) (repealed 2001).

98. U.C.C. § 9-333 (2000).

99. MONT. CODE ANN. § 81-8-301 (2001).

100. See § 81-8-302.

which enacted the Code will concurrently review and revise the local collection of lien statutes."¹⁰¹ He was sadly correct. The enactment of Revised Article 9 now raises a similar hope that the Montana agricultural liens will be brought into harmony with the Revised Article 9 scheme.

One of the strengths of old Article 9, perhaps its principal strength, is that it took disparate devices for securing interests in personal property and united them into one device – the security interest. Revised Article 9 incorporates additional forms of collateral, but provides exceptions to the general rules for most of them. Creditors can now take a security interest in bank deposits, tort claims, health insurance receivables, and so forth, but the rules for each form of collateral differ, exceptions compounding on exceptions. Secured financing now begins to resemble the situation prior to adoption of the old Article 9, except that the different financing devices are now collected under the same roof. Agricultural liens suffer from the same fate, all the more so because the governing rules are found outside of Article 9 as well as in exceptions within Article 9.

I believe a desirable direction of reform is simplification that brings agricultural liens into the mainstream of Article 9 security interests and creates fewer exceptions to standard practices. As between revising Article 9 and revising other statutes, the latter should always be considered first, given the policy of keeping Uniform Laws uniform among the states.

In the short run, the Secretary of State has used his power to promulgate filing forms under Article 9¹⁰² and under § 71-3-125¹⁰³ to assure that a creditor claiming an agricultural lien provides all information necessary to file an effective statement under either of those statutes or under the Food Security Act.¹⁰⁴ In this way, no secured party or agricultural lienor would be prejudiced by guessing wrong as to how to file under Revised Article 9.

One initial inquiry is whether the agricultural liens serve any significant commercial purpose. Are the transaction costs in obtaining and foreclosing on them so out of proportion to the amounts of money involved that they make little economic sense? The Farm Laborers' Lien might be addressed by the wage protection statutes and the others abolished if they have

101. 2 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 887 (1965).

102. U.C.C. § 9-401 to -407 (2000).

103. MONT. CODE ANN. § 71-3-125 (2001).

104. 7 U.S.C. § 1631 (2001).

little utility.¹⁰⁵ If retained, the liens should be rewritten for clarity, to determine what products they attach to and whether they attach to proceeds.

The purpose of the filing requirement for agricultural liens should be explored. Is filing necessary for attachment? If filing for notice is considered desirable, filing under § 71-3-125 should be replaced with perfection under Article 9. The purpose of the time provisions within which the lienor must file should also be explored. If the purpose of the liens is to facilitate the extension of credit, then short time periods are sensible, but if the purpose of the liens is to facilitate the recovery of unpaid bills, then longer time periods make more sense. One proposal would be to model the liens on the Article 9 superpriority statutes, requiring the lienor to file and to give notice in order to obtain first priority.

The statutes should also be rewritten to state clear and consistent priorities among themselves. They should be silent on remedies, deferring to the Revised Article 9 scheme for creditors' remedies on default.¹⁰⁶

If the agricultural liens are brought within Article 9, one aspect of Title 71 that might be retained is the attorney fees provision, which allows the court to award "money paid and attorney fees incurred for filing and recording the lien and reasonable attorney fees in the district and supreme courts."¹⁰⁷ Without this provision, the transaction costs of pursuing an agricultural lien would not be economical. It might be argued that because Article 9 does not award attorney fees to secured creditors, agricultural lienors should not be given this right either. However, because most secured creditors include such a

105. Tana Gormely, Filing Specialist for the Montana Secretary of State, informs me that as of June 5, 2001, there were on file 183 Seed and Grain Liens, 15 Farm Laborer Liens, 1 Hail Insurance Lien, 11 Threshers Liens, and 190 Spraying and Dusting Liens. These liens are not necessarily active. Other than the Hail Insurance Lien, which lapses on March 1 of the succeeding year, and the Farm Laborers' Lien, which has no provision for termination, the others must be terminated by the creditor. Prior to the enactment of statutes enacted with Revised Article 9, there were no incentives for termination. See §§ 71-3-704, -713, -808 and -908. --

106. U.C.C. § 9-102(a)(72)(B) (2000) defines "Secured party" to include "a person that holds an agricultural lien." Thus the provisions that give rights to a secured party on default give the same rights to an agricultural lienor. For example, § 9-606 provides:

Time of Default for Agricultural Lien. For purposes of this part, a default occurs in connection with an agricultural lien at the time the secured party becomes entitled to enforce the lien in accordance with the statute under which it was created.

107. MONT. CODE ANN. § 71-3-124 (2001).

provision in the security agreement, this statute can be viewed as giving the same right to those whose liens arise by operation of law rather than by contract.

These modest reforms would go a long way to improving the muddled state of agricultural liens in Montana.