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## An Agricultural Law Research Article

### **A Comparative Study of the Former Owner's Right of First Refusal Upon a Lender's Resale of Foreclosed Agricultural Land: A New Form of State Mortgagor Relief Legislation**

by

Thomas J. Houser

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# A COMPARATIVE STUDY OF THE FORMER OWNER'S RIGHT OF FIRST REFUSAL UPON A LENDER'S RESALE OF FORECLOSED AGRICULTURAL LAND: A NEW FORM OF STATE MORTGAGOR RELIEF LEGISLATION

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## I. INTRODUCTION

The Midwestern farm economy suffered tremendous setbacks in the early 1980s.<sup>1</sup> Farmers were losing their farms at rates rivaled only by those of the Great Depression.<sup>2</sup> Because the family farm is the central form of agricultural

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1. For descriptions of national and midwestern agricultural financial conditions, see *Farm Credit Crisis: Hearing Before the Subcomm. on Conservation, Credit, and Rural Development of the House Comm. on Agriculture*, 99th Cong., 1st Sess. (1985); J. SCHWAB, *THE FARM CREDIT CRISIS IN IOWA* (1985); Harl, *The Architecture of Public Policy: The Crisis in Agriculture*, 34 U. KAN. L. REV. 425 (1986); Melichar, *A Financial Perspective on Agriculture*, 70 Fed. Res. Bull. 1 (1984); see *infra* text accompanying notes 27-34.

2. The 1983 Minnesota legislature declared that:

the number of unemployed persons in this state has reached the highest level since the Depression of the 1930's; that farm commodity prices are below the break-even point for the cost of production; that the number of mortgage loans currently in

production in the Midwest,<sup>3</sup> several state legislatures have taken steps to help farmers cope with the crisis.<sup>4</sup> An increasing number of states have recognized that one way to alleviate the harshness of farm foreclosures is to give the former owner a right of first refusal to repurchase the property when it is sold by the lending institution.<sup>5</sup> Iowa Code section 524.910(2), Minnesota Code section 500.24(6)<sup>6</sup> and Iowa Code section 654.16 are representative of this new trend in mortgagor relief legislation.

Iowa Code section 524.910(2) regulates, in part, the disposition of agricultural real property purchased by a state-chartered bank at a mortgage foreclosure sale.<sup>7</sup> The subsection provides foreclosed farmers a right of first refusal to repurchase their agricultural land.<sup>8</sup> By exercising the right, the farmer is able to repurchase the real estate that was lost in the foreclosure.<sup>9</sup> The Iowa legislature

default due to the unemployment of the principal wage earner has reached critical levels; and that by reason of these conditions and the high rates of interest on mortgage loans, many of the citizens of this state will be unable for extended periods of time, to meet payments of taxes, interest, and principal of mortgages on their properties and are, therefore, threatened with loss of their real property through mortgage foreclosure, contract termination, and judicial sales. The legislature further finds that these conditions have resulted in an emergency of a nature that justifies and validates legislation for the extension of the time prior to foreclosure and execution sales and for other relief.

MINN. STAT. § 583.01 (1986); see *infra* text accompanying notes 27-40.

3. See, e.g., MINN. STAT. § 500.24(1) (1986).

The legislature finds that it is in the interests of the state to encourage and protect the family farm as a basic economic unit, to insure it as the most socially desirable mode of agricultural production, and to enhance and promote the stability and well-being of rural society in Minnesota and the nuclear family.

*Id.*

4. See, e.g., IOWA CODE § 654.15(2) (1987) (extending mortgage foreclosure moratorium providing for stay of up to two years upon governor's declaration of economic emergency); *Id.* § 654.16 (granting former owner of farmland right of first refusal to repurchase farm homestead when nonstate bank member institution sells); MINN. STAT. § 500.24(6) (1986) (granting former owner of foreclosed agricultural real estate a right of first refusal to repurchase or lease property when sold or leased by acquiring institution); NEB. REV. STAT. § 76-1518(2) (1986) (granting 60 day right to cure defaults on new mortgages); N.D. CENT. CODE § 6-09.10-04(2) (1987) (authorizing credit review board to assist farmer in negotiating a settlement that allows the farmer to reside in farm residence and use the farmland to produce agricultural commodities).

5. See, e.g., COLO. REV. STAT. § 13-40-125 (Supp. 1986) (granting qualified farm owner-tenant a first right of refusal to acquire property from owner); IOWA CODE § 524.910(2) (1987) (state bank must offer former owner of agricultural land first right to purchase before selling to a third party); *Id.* § 654.16(2) (former owner of farmland must be given right of first refusal to purchase farm homestead when sold by nonstate bank member institution); MINN. STAT. § 500.24(6) (1986) (state or federal agency and certain corporations must offer agricultural land and homesteads to immediately preceding owner); MONT. CODE ANN. § 25-13-902 (1987) (former owner of foreclosed agricultural real estate has right to match third party offer to lease or purchase that property).

6. The Minnesota legislature amended § 500.24(6) during its 1987 legislative session. See MINN. STAT. § 500.24(6)-(7) (Supp. 1987). The amendment includes many of the procedural elements discussed herein. See *infra* text accompanying notes 126-67. The statute's predecessor, however, better illustrates the need for reform in this area. Therefore, the Note analyzes the 1986 statutory version. See *infra* note 82 (providing the text of this section).

7. IOWA CODE § 524.910(2) (1987).

8. *Id.*

9. See *id.*

was the first to extend such a right to farmers.<sup>10</sup> The Iowa statute, however, was drafted vaguely.<sup>11</sup> Consequently, the broad statutory language raises issues concerning the procedure the state bank must follow to comply with the statute when disposing of the agricultural land.

The 1986 Minnesota legislature gave its farmers a similar right to repurchase farm land or a farm homestead.<sup>12</sup> The Minnesota statute governs a broader range of institutions<sup>13</sup> than does the Iowa statute, and applies to leases as well as sales.<sup>14</sup> In a unique move, the Minnesota legislature provided that lending institutions must make a "good faith" effort to offer the right of first refusal to the former owner.<sup>15</sup> Good faith in this context, however, is defined by the statute and, therefore, is not to be confused with the general concept of good faith.<sup>16</sup> Most importantly, the statute specifies the procedure to be followed in extending the right of first refusal.<sup>17</sup>

Iowa Code section 654.16<sup>18</sup> is the most recent of the statutes considered in this Note. Section 654.16 gives the former mortgagor a right of first refusal to repurchase the farm homestead on the foreclosed agricultural property.<sup>19</sup> Iowa Code section 654.16 is the most comprehensive of the statutes dealing with the procedure the lending institution must follow when disposing of the foreclosed property.<sup>20</sup>

This Note first discusses the circumstances that prompted the recent developments in state mortgagor relief legislation.<sup>21</sup> Next, the Note compares the mortgage relief measures of the Great Depression with those of the early 1980s.<sup>22</sup> The Note then examines three state statutes that provide procedures for lending institutions to follow when disposing of real estate.<sup>23</sup> The Note discusses the

10. Cf. IOWA CODE § 524.910(2) (1987). Subsection (2) was enacted in the 1985 regular session of the Iowa General Assembly. See ch. 252, § 34, 1985 Iowa Acts 524, 539; see also *supra* note 5 (providing dates of subsequent state legislation regarding rights of first refusal).

11. The relevant portion of IOWA CODE § 524.910(2) states, "[b]efore the state bank sells or otherwise disposes of agricultural land held pursuant to this subsection, the state bank shall first offer the prior owner the opportunity to repurchase the agricultural land on the terms the state bank proposes to sell or dispose of the agricultural land." IOWA CODE § 524.910(2) (1987).

12. Section 500.24(6) states that an agency "leasing or selling farm land or a farm homestead, must offer or make a good faith effort to offer land for sale or lease to the immediately preceding former owner . . . ." MINN. STAT. § 500.24(6) (1986).

13. *Id.* (regulating state and federal agencies and corporations other than an authorized farm corporation or a family farm corporation).

14. *Id.* An institution must at least make a "good faith effort to offer the land for sale or lease to the immediately preceding former owner . . . ." *Id.*

15. "An offer delivered by certified mail to the former owner's last known address is a good faith offer." *Id.*

16. Good faith ordinarily is used to describe that state of mind denoting honesty of purpose and freedom from intention to defraud. Generally, it means being faithful to one's duty or obligation. *Efron v. Kalmanovitz*, 249 Cal. App. 187, 192, 57 Cal. Rptr. 248, 251 (1967).

17. See *infra* text accompanying notes 82-99.

18. IOWA CODE § 654.16 (1987).

19. *Id.* § 654.16(2) (the member institution shall first offer the mortgagor the opportunity to repurchase the designated homestead upon proposal to sell).

20. See *infra* text accompanying notes 100-19.

21. See *infra* text accompanying notes 27-34.

22. See *infra* text accompanying notes 35-47.

23. See *infra* text accompanying notes 51-119.

procedural methods adopted to guide the extension of the right of first refusal to the former owner.<sup>24</sup> It also analyzes six procedural guides that are crucial to the statutes' success.<sup>25</sup> Finally, the Note proposes a model statute.<sup>26</sup>

## II. BACKGROUND

### A. Circumstances Giving Rise to a Proposal for Reform

In the early 1980s, Midwestern agriculture endured the most wrenching financial problems in a half century.<sup>27</sup> Several factors contributed to the problems: low commodity prices,<sup>28</sup> high real interest rates,<sup>29</sup> declining land values,<sup>30</sup> and adverse weather conditions.<sup>31</sup> The threat of property loss from mortgage foreclosure peaked as a result of the ailing economy, and loan default rates soared.<sup>32</sup> In short, the early 1980s set modern records for farm financial difficulties,<sup>33</sup> surpassed only by the Great Depression.<sup>34</sup>

### B. Depression-Era Actions in Response to Agricultural Problems

The 1930s were fraught with economic, social, and political upheaval.<sup>35</sup> State legislatures throughout the country attempted several different methods to improve

24. See *infra* text accompanying notes 120-67.

25. See *infra* text accompanying notes 125-67.

26. See *infra* text accompanying notes 168-77.

27. Harl, *A Financial Revolution in Agriculture*, 60 N.D.L. REV. 387 (1984). Financial difficulties of farm businesses in the 1980s are exceeded only by the difficulties of the Great Depression. Factors contributing to financial problems include adverse weather conditions, high real rates of interest, and declining land values. *Id.* at 387-88.

28. Kunkel, *The Fox Takes Over the Chicken House: Creditor Interference with Farm Management*, 60 N.D.L. REV. 445, 445 (1984) (attributing Midwestern financial pressure to low commodity prices, high interest rates, and declining land values).

29. Harl, *supra* note 27, at 387-88. "The real rate of interest is the stated rate less the rate of inflation." *Id.* at 388 n.2. The Federal Reserve's decision to wring out inflation by tightening the money supply triggered an increase in real interest rates and declining land values. The result was that lenders became concerned about a substantial portion of their farm borrowers. *Id.* at 388.

30. *Id.*; Kunkel, *supra* note 28, at 445.

31. Harl, *supra* note 27, at 387 (noting that the debt-to-asset ratio for farm firms has been rising; one-quarter or more of the total farm debt is held by farmers with a debt-to-asset ratio of over 70%).

32. Comment, *Bankruptcy: Can It Save the Family Farm?*, 11 WM. MITCHELL L. REV. 1019, 1019 (1985); see *supra* note 2 (noting that the number of mortgage loan defaults due to unemployment of principal wage earner had reached critical levels in 1983).

Declining land values decrease the farmer's equity in the farmland. The resulting loss in purchasing power inhibits the farmer's ability to obtain short-term loans to cover current operating costs. *Economic Realities Demand the Demise of the "Family Farm,"* Minneapolis Star & Trib., Feb. 26, 1985, at 9A, col. 1.

33. Harl, *supra* note 27, at 389. Professor Harl noted:

The agricultural sector is substantially more vulnerable to financial stress than it was a decade ago. In 1971 the total outstanding farm debt in the United States was slightly more than \$54 billion. As recently as 1976, that figure stood at slightly more than \$91 billion. In the next eight years, the figure climbed to \$215 billion. As a percent of total farm assets, farm debt in the United States was at 20.1% in 1983, but a special survey in 1984 placed the figure at 29.5% in Iowa.

*Id.*

34. *Id.* at 387; see *infra* text accompanying notes 35-40.

35. Vogel, *The Law of Hard Times: Debtor and Farmer Relief Actions of the 1933 North Dakota Legislative Session*, 60 N.D.L. REV. 489, 489 (1984).

debtor relief programs,<sup>36</sup> particularly the severe financial problems in the agricultural sector.<sup>37</sup> The Iowa legislature, for example, responded to the state's deteriorating farm economy and the resulting public pressure by enacting a moratorium on farm foreclosures.<sup>38</sup> It also granted continuances for statutory redemption periods.<sup>39</sup> This legislation still exists today.<sup>40</sup>

### C. State Reaction to the Farm Crisis

In recent years, state legislatures have taken great strides to help the farmer. For example, Minnesota enacted the Family Farm Security Program, which is aimed at creditworthy farmers wishing to expand their operations.<sup>41</sup> North Dakota now authorizes subsidies of interest rates paid by farmers on certain real estate loans.<sup>42</sup> Mortgage foreclosure moratoria still recur in many states, directly aiding those farmers threatened with foreclosure action.<sup>43</sup>

Much of the recent legislation, however, operates prospectively to help the farmer who has yet to be foreclosed upon or to file for bankruptcy.<sup>44</sup> The legislation fails to protect a farmer whose land has been foreclosed upon and who was unable to redeem within the statutory period. The 1985 Iowa legislature took the first step to help this group of farmers when it amended Iowa Code section 524.910(2).<sup>45</sup> The amendment provides that state chartered banks must

36. Comment, *Governmental Action on Farm Mortgage Foreclosures*, 1 GEO. WASH. L. REV. 500, 500-01 nn.5-6 (1933).

37. Vogel, *supra* note 35, at 489; Comment, *supra* note 36, at 500-01 nn.5-6.

38. Ch. 110, 1935 Iowa Acts 155-58 (codified after IOWA CODE § 11796, at 1645 (1935)).

39. Bauer, *Judicial Foreclosure and Statutory Redemption: The Soundness of Iowa's Traditional Preference for Protection over Credit*, 71 IOWA L. REV. 1, 46 (1985). For a general discussion of Depression-era mortgage relief legislation in Iowa, see *id.* at 46-48.

40. See IOWE CODE § 654.15(2) (1987). Section 654.15(2) provides:

In all actions for the foreclosure of real estate mortgages, . . . an owner of real estate may apply for a moratorium as provided in this subsection if the governor declares a state of economic emergency. The governor shall state in the declaration the types of real estate eligible for a moratorium continuance, which may include real estate used for farming . . . .

*Id.*

41. MINN. STAT. § 41B.01(2) (Supp. 1987).

42. N.D. CENT. CODE § 6-09.10-05 (1987). This legislation authorizes the Farm Credit Review Board to subsidize interest rates paid by farmers for the purpose of refinancing, redeeming, or purchasing the "home quarter"—a single contiguous tract not to exceed one hundred sixty acres upon which the farm residence and buildings are located. *Id.*; see MINN. STAT. §§ 41B.01(2), .035(1) (1986 & Supp. 1987). Section 41B.01(2) authorizes the Minnesota Rural Finance Administration to issue bonds, the proceeds of which are to help farmers restructure existing debt and to make available additional credit on terms not otherwise available from other credit sources to farmers who own or purchase agricultural properties. *Id.*

43. See, e.g., IOWA CODE § 654.15(2) (1987) (revising § 654.15 to stay mortgage foreclosure proceedings for up to two years upon the governor's declaration of economic emergency; stays not available for mortgages made after governor's declaration); MINN. STAT. § 583.04 (1986) (mortgage foreclosure proceeding may be stayed up to 12 months). *But see id.* § 583.07 (redemption period must be reduced correspondingly by length of moratorium; consequently, unless the moratorium is equal to or greater than the redemption period, the moratorium effects no benefit).

44. See *supra* notes 42-43.

45. Act effective May 31, 1985, ch. 252, § 34, 1985 Iowa Acts 538-39 (amending IOWA CODE § 524.910(2) (1984)).

divest themselves of real foreclosure property within five years after title is vested in the state bank.<sup>46</sup> Furthermore, before the state bank sells agricultural land, it first must offer the prior owner the opportunity to repurchase the agricultural land on the same terms as those under which the bank proposes to sell or dispose of the land.<sup>47</sup> Thus, the foreclosed farmer is given an opportunity beyond the redemption period to repurchase the property and to begin farming his own land again.

#### *D. Iowa's Recent Attempt to Assist the Farmer*

Prior to amendment, subsection 524.910(2) simply stated that real property acquired through certain means must be disposed of by the bank within one year after title vested in the bank.<sup>48</sup> Therefore, in order to dispose of foreclosure property, the bank only had to wait until title vested in the bank. The 1985 amendment to the statute, however, provided for two major changes in the regulation of the disposition of agricultural land. The first alteration lengthened the time that state banks can hold foreclosed agricultural property to a maximum of five years after title to the land vests in the bank.<sup>49</sup> The second addition mandated that the bank first offer the prior owner the opportunity to repurchase the property on terms identical to those which the bank proposes to an interested third party.<sup>50</sup> This Note concentrates on the procedural guidelines of the latter addition. With an increasing number of states extending a right of first refusal to the former owner, the method of offering the right and closing the sale should be refined.

### III. VARIATIONS ON A BASIC IDEA

#### *A. Iowa Code Section 524.910(2): The Basic Idea*

On its face, Iowa Code section 524.910(2) appears to achieve successfully its goal of assisting the foreclosed farmer to repurchase agricultural land after the statutory redemption period has lapsed.<sup>51</sup> The lack of statutory procedural guidelines, however, severely hampers a state bank's efforts to comply with the statute. Thus, the statute's goal is frustrated. For example, the amendment makes

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46. Prior to amendment, Section 524.910(2) required a state bank to divest itself of real property acquired to satisfy a debt within one year after title vested in the bank. IOWA CODE § 524.910(2) (1985). The legislature also changed the value at which the land must be reported on the bank's books. See Act effective May 31, 1985, ch. 252, § 34, 1985 Iowa Acts 539.

47. IOWA CODE § 524.910(2) (1987). The relevant portion of the statute states, "[b]efore the state bank sells or otherwise disposes of agricultural land held pursuant to this subsection, the state bank shall first offer the prior owner the opportunity to repurchase the agricultural land on the terms the state bank proposes to sell or dispose of the agricultural land." *Id.*

48. IOWA CODE § 524.910(2) (1985).

49. IOWA CODE § 524.910(2) (1987). One possible reason for the extended holding period may be that falling land values reduced the collateral value of farm property and caused potential investors to be reluctant to invest in farmland. Harl, *supra* note 27, at 388-89.

50. IOWA CODE § 524.910(2) (1987); see *supra* note 47 (providing the relevant text of this section).

51. See *supra* text accompanying notes 47-49. The foreclosed farmer is given an opportunity beyond the redemption period to repurchase the property and to once again farm his own land.

no mention of how the bank is to notify properly the former owner of the existence of the right of first refusal.<sup>52</sup> Nor does it state how long the offer to repurchase must remain open.<sup>53</sup> Moreover, the statute fails to address whether the former owner's right of first refusal is assignable.<sup>54</sup> These procedural gaps must be eliminated in order to achieve the statute's goal.

The expiration of the right of first refusal, for example, could be critical where a bank has an outstanding offer that is contingent solely upon the expiration of the right of first refusal.<sup>55</sup> Under such circumstances, if the bank is unable to ascertain the expiration date of the right and it has an outstanding offer subject only to the cessation of that right, then the bank will be uncertain regarding the occurrence of the contingency. The bank may be liable to the former owner for breach of contract if the bank sells the land to a third party unaware of the mortgagor's continued ability to exercise the right.<sup>56</sup>

The Iowa legislature took a commendable stand in assisting the foreclosed farmer to reenter the agricultural business. By failing to set forth procedural guidelines, however, the legislature neglected to address both the concerns of the state banks and the extent to which a farmer can exercise his right.<sup>57</sup> Given the foreclosure rates of the early 1980s, and the requirement that state banks divest themselves within five years after title vests in the bank,<sup>58</sup> state banks increasingly will become subject to Iowa Code section 524.910(2).

A recent case<sup>59</sup> that addresses a state bank's attempt to comply with amended section 524.910(2) in the sale of agricultural land is *Whistler v. Decatur County State Bank*.<sup>60</sup> In this action,<sup>61</sup> Whistler contracted with the Decatur County State Bank (Bank) to purchase certain agricultural land.<sup>62</sup> The Bank held title to the

52. See *infra* text accompanying notes 125-33.

53. See *infra* text accompanying notes 142-52.

54. See *infra* text accompanying notes 160-63.

55. See *infra* text accompanying notes 59-79.

56. A condition is an event, not certain to occur, which must occur before performance under a contract becomes due. RESTATEMENT (SECOND) OF CONTRACTS § 224 (1981). In the illustration, the condition of timely exercise of the right does occur. Therefore, the bank is bound contractually to sell the property to the mortgagor. A breach occurs if the bank sells the land to the third party. Such a situation may occur if the bank and mortgagor measure the expiration of the right from different points in time (e.g., date mailed versus date received).

57. The lack of procedural guidelines creates a "chilling" effect for state banks when they must dispose of property pursuant to section 524.910(2). Bank officers undoubtedly proceed with trepidation when deciding these issues on their own or upon advice of counsel.

58. IOWA CODE § 524.910(2) (1987).

59. The author of this Note was involved directly with the research and preparation of arguments in *Whistler v. Decatur County State Bank*, No. CE 2112, slip op. at 1 (Iowa Dist. Ct. for Decatur County Sept. 9, 1987).

60. *Id.*

61. *Whistler*, slip op. at 1. The opinion states:

Rule 105 of the Iowa Rules of Civil Procedure authorizes [a] court to determine points of law raised in pleadings which go to any material part of the case. In making this determination, the court may consider uncontroverted pleadings and undisputed facts. (citing *Matter of Estate of Thompson*, 346 N.W.2d 5, 7 (Iowa 1984); *Woodburn v. Northwestern Bell Tel. Co.*, 275 N.W.2d 403, 406 (Iowa 1979)).

*Id.*

62. Defendant's Memorandum Brief in Support of Proposition that the Right of First Refusal is Assignable at 1, *Whistler v. Decatur County State Bank* (Iowa Dist. Ct. for Decatur County Sept. 9, 1987) (No. CE 2112).



land after foreclosing on the previous owner, Verda Jackson, who failed to exercise her redemption right.<sup>63</sup> The written purchase agreement between Whistler and the Bank was conditioned on the previous owner's failure to exercise her right of first refusal pursuant to Iowa Code section 524.910(2).<sup>64</sup> The Bank notified Jackson, by certified mail, of her right to repurchase and allowed her fourteen days to exercise this right.<sup>65</sup> Jackson did not receive the letter.<sup>66</sup> The Bank informed Jackson's attorney of Whistler's offer on the thirteenth day.<sup>67</sup> On the morning of the fifteenth day, Jackson and her attorney called the Bank to exercise the right of first refusal.<sup>68</sup> Two days later, Jackson assigned her right to repurchase the real estate to Steven Niemand, who in turn purchased the land.<sup>69</sup> Niemand then sold the land to Jackson's son on contract.<sup>70</sup> The Bank sold the property to Niemand even though the right of first refusal offered to Jackson had expired.<sup>71</sup>

The issue before the court was whether Jackson's right of first refusal was assignable under section 524.910(2).<sup>72</sup> Whistler argued that the right was not assignable because the legislature made an analogous right in Iowa House File 599<sup>73</sup> expressly nonassignable.<sup>74</sup> The court held that the "right to repurchase afforded under section 524.910(2) is a preemptive right which is assignable under Iowa law."<sup>75</sup> The court further concluded that the preemptive right became an option when the bank elected to sell.<sup>76</sup> Under Iowa law, an option is a property right vested in the legal holder thereof.<sup>77</sup> This option is a right that the courts will protect.<sup>78</sup> Generally, Iowa law allows options to be assigned absent any words of limitation prohibiting the assignment.<sup>79</sup>

63. Brief for Adjudication of Point of Law, Exhibit A, Whistler v. Decatur County State Bank (Iowa Dist. Ct. for Decatur County Sept. 9, 1987) (No. CE 2112).

64. *Id.*

65. Defendant's Memorandum Brief in Support of Proposition that the Right of First Refusal is Assignable at 2, Whistler v. Decatur County State Bank (Iowa Dist. Ct. for Decatur County Sept. 9, 1987) (No. CE 2112).

66. *Id.* at 1-2.

67. *Id.* at 2.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* The Bank allowed Jackson 14 days to exercise her right of first refusal. She notified the Bank of her intent to exercise the right on the 15th day. If the Bank's determination of the 14 day time period were valid, then Jackson's right should have expired. Unsure of what to do, the Bank decided to sell the land to the previous owner. It considered this action to be more consistent with the legislative intent. *Id.*

72. Whistler v. Decatur County State Bank, No. CE 2112, slip op. at 1 (Iowa Dist. Ct. for Decatur County Sept. 9, 1987).

73. The relevant portion of Iowa House File 599 is codified at Iowa CODE § 654.16 (Supp. 1987). Section 654.16 extends to the former owner of agricultural land a right of first refusal to repurchase the homestead on that land. *Id.* The right is expressly nonassignable. *Id.* § 654.16(5); see *infra* text accompanying notes 100-19.

74. Plaintiff's Brief for Adjudication of Point of Law at 4, Whistler v. Decatur County State Bank (Iowa Dist. Ct. for Decatur County Sept. 9, 1987) (No. CE 2112).

75. Whistler v. Decatur County State Bank, No. CE 2112, slip op. at 4 (Iowa Dist. Ct. for Decatur County Sept. 9, 1987).

76. *Id.*

77. Tuecke v. Tuecke, 257 Iowa 199, 203-04, 131 N.W.2d 794, 796 (1964).

78. *Id.*

79. Dahl v. Zabriskie, 249 Iowa 584, 586, 88 N.W.2d 66, 67 (1958); 6 AM. JUR. 2D *Assignments* § 20 (1975).

*Whistler* addressed one of the uncertainties that state banks face when transacting business subject to section 524.910(2). The only assistance banks have in interpreting section 524.910(2) is a rule of statutory construction specifying that the duration of a right, if not expressly prescribed in the statute, is a reasonable time.<sup>80</sup> The reasonableness of the length of the bank's offer to sell to the former owner depends on the facts of each case. Consequently, the rule is of little value to the offering bank.<sup>81</sup> The procedural omissions in Iowa Code section 524.910(2) illustrate the need to refine this type of statute.

#### B. Minnesota Code Section 500.24(6): Policing Procedure with Good Faith

Promulgated in the 1986 legislative session,<sup>82</sup> Minnesota Code section 500.24(6) provides a method for assisting the former owner of farm land or a farm homestead to repurchase the property.<sup>83</sup> This subsection requires an agency,<sup>84</sup> when disposing of agricultural property, to offer to sell or lease the land to the immediately preceding former owner.<sup>85</sup> The legislature intended to enhance the stability and well-being of rural Minnesota by promoting the family farm as the desired method of agricultural production.<sup>86</sup>

80. *Trailmobile Co. v. Whirls*, 331 U.S. 40, 54-55 (1946) (noting that when time is not prescribed expressly by statute for the duration of a right conferred thereby, it is implied that the right will endure for a reasonable time).

81. See *infra* text accompanying notes 142-52.

82. MINN. STAT. § 500.24(6) (1986). Section 500.24(6) states:

Disposal of land. A state or federal agency or a corporation, other than a family farm corporation or an authorized farm corporation, when leasing or selling farm land or a farm homestead, must offer or make a good faith effort to offer land for sale or lease to the immediately preceding former owner at a price no higher than the highest price offered by a third party that is acceptable to the seller or lessor. An offer to lease to the former owner is required only on the first occasion on which the property is leased. An offer to sell to the former owner is required only on the first occasion on which the property is sold. An offer delivered by certified mail to the former owner's last known address is a good faith offer. This subdivision does not apply to a sale or lease that occurs after the seller or lessor has held the property for five years.

The former owner must exercise the right to lease farm land within ten days after receiving an offer to lease under this subdivision. The former owner must exercise the right to buy farm land within 60 days after receiving an offer to buy under this subdivision. This subdivision does not apply if the former owner is a bankruptcy estate.

*Id.* The original statute allowed the former owner 30 days to act upon an offer to lease, and 90 days to act upon an offer to purchase. See ch. 398, art. 20, 1986 Minn. Laws 475. The legislature amended these time periods to 10 and 60 days, respectively, during the First Special Session of 1986. See ch 2, art. 2, § 13, 1986 Minn. Laws 1282 (1st Spec. Sess.).

83. MINN. STAT. § 500.24(6) (1986).

84. *Id.* Subsection 6 applies to a "state or federal agency or a corporation, other than a family farm corporation or an authorized farm corporation . . . ." *Id.*

85. *Id.*

86. *Id.* § 500.24(1). Section 500.24(1) states:

The legislature finds that it is in the interests of the state to encourage and protect the family farm as a basic economic unit, to insure it as the most socially desirable mode of agricultural production, and to enhance and promote the stability and well-being of rural society in Minnesota and the nuclear family.

Located in the part of the Minnesota Code regulating corporate use of agricultural land,<sup>87</sup> Minnesota section 500.24(6) has a much broader application than its Iowa counterpart<sup>88</sup> in that section 500.24(6) regulates certain corporations as well as state and federal agencies.<sup>89</sup> It also provides for the sale of farm homesteads and the lease of farm land or homesteads.<sup>90</sup> However, the statute applies only to the first occasion on which the property is leased or sold.<sup>91</sup> The right to repurchase is not perpetuated by selling the property to a third party.<sup>92</sup>

Perhaps the most unique element of the Minnesota statute is that a lending institution must make a "good faith" effort to offer the land for sale or lease to the former owner.<sup>93</sup> This requirement, however, is diminished because the legislature chose to define "good faith" as an offer delivered by certified mail to the former owner's last known address.<sup>94</sup> Consequently, the former owner does not receive the extra protection that may have been afforded by the general good faith concept. However, the benefit of this limited definition is that the lending institution may rest assured that it has discharged its legal obligation by notifying the former owner in accordance with the stated procedure. No further steps need be taken in order to dispose of the agricultural property.

Section 500.24(6) also specifies the length of time that the offer is to remain open. Under the statute, an offer to lease shall be exercised within ten days after the former owner receives the offer,<sup>95</sup> whereas an offer to repurchase the farmland remains open sixty days after receipt of the offer.<sup>96</sup> One shortcoming in Minnesota section 500.24(6) concerns the beginning point from which the offering institution measures the length of the outstanding offer. The statute states that the offeree must accept the offer within a specified time after its receipt.<sup>97</sup> A potential problem arises where, as in *Whistler*,<sup>98</sup> the offering institution has an offer outstanding to a third party subject to the former owner's acceptance. Since the actual receipt of the offer by the former owner often cannot be ascertained, the expiration date cannot be determined accurately. It can be

87. MINN. STAT. Ch. 500 (1986) (Estates in Real Property).

88. IOWA CODE § 524.910(2) (1987).

89. MINN. STAT. § 500.24(6) (1986). Section 500.24(6) regulates a "state or federal agency or a corporation, other than a family farm corporation or an authorized farm corporation, when leasing or selling farm land or a farm homestead . . . ." *Id.*

90. *Id.*

91. *Id.* Section 500.24(6) states "[a]n offer to lease to the former owner is required only on the first occasion on which the property is leased. An offer to sell to the former owner is required only on the first occasion on which the property is sold." *Id.*

92. *Id.* Section 500.24(6), however, does not address whether the right of first refusal is revived if the lending institution offers to sell the property to a third party at a lower price or on more favorable terms than the offer made to the former owner.

93. *Id.* (offering institution must make a good faith effort to offer land for sale or lease to the former owner).

94. *Id.*

95. *Id.* Section 500.24(6) states "[t]he former owner must exercise the right to lease farm land within ten days after receiving an offer to lease under this subdivision." *Id.*

96. *Id.* Section 500.24(6) states, "[t]he former owner must exercise the right to buy farm land within 60 days after receiving an offer to buy under this subdivision." *Id.*

97. *Id.*

98. *Whistler v. Decatur County State Bank*, No. CE 2112, slip op. at 1 (Iowa Dist. Ct. for Decatur County Sept. 9, 1987); see *supra* text accompanying notes 59-79.

estimated only within a few days.<sup>99</sup> Consequently, the outstanding offer to the third party in the example cannot be acted on with any certainty.

C. *Iowa Code Section 654.16: A More Structured Approach*

The Iowa legislature recently passed Code section 654.16 during its 1987 session.<sup>100</sup> Generally, the legislation governs mortgage foreclosures of agricultural homesteads.<sup>101</sup> Besides regulating the acquisition and redemption of farm homesteads, however, section 654.16 also controls the sale of homesteads by

99. It is not clear how this problem should be rectified. One possible solution is to measure the length of time that the mortgagor has to match the third party offer from the postmark date and allow for the float in the mail. See *infra* text accompanying notes 134-41.

100. IOWA CODE § 654.16 (1987). The relevant portion of § 654.16 states:

If the member institution which has purchased the designated homestead at a foreclosure sale is not a state bank as defined in section 524.103, the following shall apply:

1. At the time the sheriff's deed is issued, the institution shall notify the mortgagor of the mortgagor's right of first refusal. A copy of this unnumbered paragraph and subsections 1 through 5 and titled "*Notice of Right of First Refusal*" is sufficient notice.

2. If within one year after a sheriff's deed is issued to the institution, the institution proposes to sell or otherwise dispose of the designated homestead, in a transaction other than a public auction, the institution shall first offer the mortgagor the opportunity to repurchase the designated homestead on the same terms the institution proposes to sell or dispose of the designated homestead. If the institution seeks to sell or otherwise dispose of the designated homestead by public auction within one year after a sheriff's deed is issued to the institution, the mortgagor must be given sixty days' notice of all of the following:

- a. The date, time, place, and procedures of the auction sale.
- b. Any minimum terms or limitations imposed upon the auction.

3. The institution is not required to offer the mortgagor financing for the purchase of the homestead.

4. The mortgagor has ten business days after being given notice of the terms of the proposed sale or disposition, other than a public auction, in which to exercise the right to repurchase the homestead by submitting a binding offer to the institution on the same terms as the proposed sale or other disposition, with closing to occur within thirty days after the offer unless otherwise agreed by the institution. After the expiration of either the period for offer or the period for closing, without submission of an offer or a closing occurring, the institution may sell or otherwise dispose of the designated homestead to any other person on the terms upon which it was offered to the mortgagor.

5. Notice of the mortgagor's right of first refusal, a proposed sale, auction, or other disposition, or the submission of a binding offer by the mortgagor, is considered given on the date the notice or offer is personally served on the other party or on the date the notice or offer is mailed to the other party's last known address by registered or certified mail, return receipt requested. The right of first refusal provided in this section is not assignable, but may be exercised by the mortgagor's successor in interest, receiver, personal representative, executor, or heir only in case of bankruptcy, receivership, or death of the mortgagor.

*Id.*

101. *Id.* The homestead is designated by the mortgagor as the contiguous portion of the foreclosed real estate that contains the mortgagor's residence. The homestead must be as compact as practical and must not exceed 40 acres. *Id.*

Section 654.16 provides a two year fair market value redemption period for homestead property purchased at a foreclosure sale by nonmember institutions. A one year fair market value redemption period is provided for homesteads purchased by member institutions. *Id.*

member institutions.<sup>102</sup> Because state banks may qualify as member institutions, they are subject to the one year fair market value redemption period provided in section 654.16.<sup>103</sup> However, state banks are not subject to the right of first refusal.<sup>104</sup>

Similar to Minnesota Code section 500.24(6),<sup>105</sup> Iowa Code section 654.16 is much more explicit than Iowa Code section 524.910(2) regarding the procedure which the lending institution must follow when disposing of the foreclosed property. The homestead mortgagor, for example, must be notified of the existence of the right of first refusal upon the issuance of the sheriff's deed<sup>106</sup> to the acquiring institution.<sup>107</sup> The crux of section 654.16 is that the institution first must offer the mortgagor the opportunity to repurchase the homestead if the institution proposes to sell it within one year after acquiring the sheriff's deed.<sup>108</sup> The institution must offer the mortgagor the opportunity to repurchase the homestead on the same terms that would be offered to a third party.<sup>109</sup> However, the terms may differ with regard to financing because section 654.16 does not require the institution to finance the former owner's purchase.<sup>110</sup>

Identical to Minnesota section 500.24(6),<sup>111</sup> Iowa Code section 654.16(5) allows the notice of the right of first refusal to be mailed to the mortgagor.<sup>112</sup> If the mail is used, the institution must request a return receipt so that it will know if the mortgagor did not receive the notice.<sup>113</sup> Under the Iowa statute, notice is considered given on the date it is mailed to the mortgagor's last known

102. *Id.* § 654.16(5) (defining member institution as "any lending institution that is a member of the federal deposit insurance corporation, the federal savings and loan insurance corporation, the national credit union administration, or an affiliate of such institution").

103. *Id.* § 654.16. Section 654.16 states "[t]he mortgagor may redeem the designated homestead from a member institution . . . by tendering the fair market value of the designated homestead within one year from the date of the foreclosure sale, pursuant to the procedures set forth in chapter 628." *Id.*

104. *Id.* Subsections 654.16(1)-(4) only apply if the member institution which has purchased the designated homestead is not a state bank as defined in section 524.103. *Id.* State banks are subject to a five year right of first refusal pursuant to IOWA CODE § 524.910(2) (1987); see *supra* text accompanying notes 51-58.

105. See *supra* text accompanying notes 82-99.

106. IOWA CODE § 626.98 (1987) states:

If the debtor or the debtor's assignee fails to redeem, the sheriff then in office must, at the end of the period for redemption provided by law for the particular action, execute a deed to the person who is entitled to the certificate as hereinbefore provided, or to that person's assignee. If the person entitled is dead, the deed shall be made to the person's heirs.

*Id.*

107. IOWA CODE § 654.16(1) (1987). Thus the mortgagor receives notice of the right of first refusal shortly after the redemption period has run.

108. *Id.* § 654.16(2).

109. *Id.* However, if the institution intends to sell the homestead at public auction, the mortgagor must be given 60 days notice of "[t]he date, time, place, and procedures of the auction sale [and] any minimum terms or limitations imposed on the auction." *Id.*

110. *Id.* § 654.16(3).

111. See *supra* text accompanying notes 93-99.

112. IOWA CODE § 654.16(5) (1987). Subsection (5) allows notice to be served personally or to be mailed to the mortgagor's last known address. If mailed, the notice must be sent by registered or certified mail, return receipt requested. *Id.*

113. *Id.*

address.<sup>114</sup> Establishing notice as of the date of mailing eliminates the potential problem of Minnesota section 500.24(6) that the institution will not know with certainty when the offer was received.<sup>115</sup>

Perhaps the most unique feature of section 654.16 is its bifurcation of the length of time given to the former owner to exercise the right of first refusal.<sup>116</sup> Subsection (4) allows the mortgagor ten business days to exercise the right by submitting a binding purchase offer to the bank conforming to the terms of the proposed sale.<sup>117</sup> The mortgagor then has an additional thirty days after the offer is submitted to close the sale.<sup>118</sup> If either period expires without timely action by the mortgagor, the institution is free to sell or dispose of the homestead to any other person on the same terms.<sup>119</sup>

#### IV. ANALYSIS AND A PROPOSAL

##### A. Comparison of State Procedures

The scope of Iowa Code section 524.910(2) is much narrower than that of its Minnesota counterpart, but is in line with Iowa Code section 654.16. The similarities and differences among the three are several and noteworthy. First, the goal of each is to help the family farmer cope with the aftermath of the Midwestern agricultural depression.<sup>120</sup> Minnesota section 500.24(6) and Iowa section 654.16, however, go beyond Iowa section 524.910(2) by providing the institutions with unequivocal procedural guidelines that ultimately will minimize controversy.<sup>121</sup> Section 524.910(2) would be more effective if similar procedural guides were provided.

Although the three statutes have the same goal, the approach of each differs significantly. Whereas each section recognizes that the former owner must be notified of the right of first refusal,<sup>122</sup> the method and timing of the notification needs improvement. For example, notification may be improved simply by providing for service of the notice by certified mail.<sup>123</sup> More importantly, however, the length of time that the offeree has to accept the offer or to exercise the right must be stated expressly in the statute.<sup>124</sup> The following analysis will consider the procedural guides that are crucial to the proper functioning of a right of first refusal.

114. *Id.*

115. *See supra* text accompanying notes 80-81.

116. IOWA CODE § 654.16(4) (1987).

117. *Id.*

118. *Id.* (closing must occur within thirty days after the offer unless otherwise agreed upon).

119. *Id.* Subsection (4) states: "After the expiration of either the period for offer or the period for closing, without submission of an offer or a closing occurring, the institution may sell or otherwise dispose of the designated homestead to any other person on the terms upon which it was offered to the mortgagor." *Id.*

120. *See id.* § 654.16 (extending redemption period and granting right of first refusal); MINN. STAT. § 500.24(1) (1986) (stating that the purpose is to encourage and protect the family farm and to promote the stability and well-being of rural society in Minnesota).

121. *See supra* text accompanying notes 82-119.

122. *See* IOWA CODE § 524.910(2) (1987); *id.* § 654.16(1); MINN. STAT. § 500.24(6) (1986).

123. *See* IOWA CODE § 654.16(5) (1987); MINN. STAT. § 500.24(6) (1986).

124. *See* IOWA CODE § 654.16(4) (1987); MINN. STAT. § 500.24(6) (1986).

### 1. Notification of the Right of First Refusal

Notifying the former owner of the right of first refusal is vital if the former owner is to mount a serious attempt to repurchase the agricultural property. Iowa section 654.16 mandates that the former mortgagor be notified of the right when the sheriff's deed is issued to the bank.<sup>125</sup> Minnesota section 500.24(6) and Iowa section 524.910(2), on the other hand, imply that the notification requirement is satisfied when the bank extends a binding offer to the former owner.<sup>126</sup>

Notice is essential to the exercise of a preemptive right.<sup>127</sup> The length of time between the notification and the expiration of the right of first refusal often determines the mortgagor's ability to exercise that right. For example, a state bank may offer to sell a four hundred acre plot of agricultural land to a third party subject only to the offer to the former owner. If the governing statute gives the former owner only ten days to accept the offer, the former owner most likely will have a difficult time obtaining the money or financing to purchase the land.<sup>128</sup> The legislature must provide the former owner a reasonable amount of time after notification to raise the funds necessary to purchase the farmland.<sup>129</sup>

### 2. Method of Notification

Notification necessarily implies that the mortgagor will receive the notice. The procedure which the bank must follow to ensure receipt varies depending on the factual circumstances.<sup>130</sup> Iowa Code section 524.910(2) does not provide a method by which the state bank can notify or extend an offer to the former mortgagor. Both Iowa section 654.16 and Minnesota section 500.24(6), however, state that an offer sent by certified mail to the former owner's last known address will suffice for the bank to comply with the statute.<sup>131</sup>

Notification by certified mail allows for a speedy, convenient, and accurate method of informing the former owner of the right of first refusal. It alleviates many of the potential problems incumbent in personal service.<sup>132</sup> Notwithstanding

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125. IOWA CODE § 654.16(1) (1987). Subsection (1) states "[a]t the time the sheriff's deed is issued, the institution shall notify the mortgagor of the mortgagor's right of first refusal." *Id.* This provision notifies the former owner of the right at the end of the redemption period. The institution must notify the mortgagor a second time when it actually intends to sell the land. *Id.* § 654.16(2).

126. IOWA CODE § 524.910(2) (1987); MINN. STAT. § 500.24(6) (1986).

127. *Atchison v. City of Engelwood*, 193 Colo. 367, 375, 568 P.2d 13, 19 (1977). The court stated that "[u]nless the holder of a preemptive right is given notice and an opportunity to exercise his right, he is under no duty to act." *Id.*

128. If the prevailing market rate is \$1000 per acre, the former owner will have to raise \$400,000 in this 10 day period.

129. See *infra* text accompanying notes 142-52; see also, MINN. STAT. § 500.24(6) (1986) (requiring the former owner to exercise right of first refusal within 60 days after receiving an offer to buy).

130. Contrast the small town banker who knows that the former mortgagor lives on the edge of town with a metropolitan banker trying to locate a former owner who has moved out of the state. In the small town scenario, personal service may be appropriate, whereas in the other scenario, the metropolitan bank may give notice by certified mail to the former owner's last known address.

131. IOWA CODE § 654.16(5) (1987); MINN. STAT. § 500.24(6) (1986).

132. See generally J. COUND, J. FRIEDENTHAL, & A. MILLER, CIVIL PROCEDURE, 158-63 (3d ed. 1980) (illustrating the potential problems that accompany personal service).

these virtues, Iowa section 654.16(5) provides that notification may be served personally as well as delivered through the mail.<sup>133</sup>

### 3. When is the Offer Considered Made?

Guidelines stating the date on which the offer is considered made is imperative.<sup>134</sup> This requirement is necessary to inform all parties of the termination date of the offer to the former mortgagor. This date becomes especially important when an offer to sell is extended to a third party subject only to the timely exercise of the former owner's right to repurchase.<sup>135</sup> If the bank is unsure when the offer expires, it cannot ascertain when acceptance was timely.

Section 524.910(2) does not provide for a method to measure the length of time that the mortgagor has to match an outstanding offer.<sup>136</sup> While the approach taken by the Minnesota legislature in section 500.24(6) is an improvement over Iowa section 524.910(2), it is not definitive. Because section 500.24(6) uses the date that the former owner receives the offer, the lending institution can only estimate the mortgagor's date of receipt by allowing for the delay in the mail.<sup>137</sup>

Iowa Code section 654.16(5) employs the most predictable approach by considering the offer to be made on the date it is mailed.<sup>138</sup> From the lending institution's perspective, this approach leaves nothing to chance. Furthermore, it places the burden on the debtor to keep the lender apprised of the debtor's current address.<sup>139</sup>

This approach also improves the odds of actual notice to the former owner. For example, the notice must be mailed via certified or registered mail,<sup>140</sup> two of the most reliable mailing methods. Moreover, the legislature could require the lending institution to indicate the mailing date on the notice to inform the former owner of the date from which it will measure the length of the offer. For these reasons, considering notice to be given on the date the notice is mailed is beneficial to both the lending institution and the former owner.<sup>141</sup>

133. IOWA CODE § 654.16(5) (1987).

134. *See, e.g., id.* (considering notice to be given on the date of personal service or on the date notice is mailed to mortgagor's last known address).

135. *See supra* text accompanying notes 59-79.

136. IOWA CODE § 524.910(2) (1987) states merely that "the state bank shall first offer the prior owner the opportunity to repurchase the agricultural land on the terms [it] proposes to sell . . ." *Id.*

137. *See supra* text accompanying notes 97-99.

138. IOWA CODE § 654.16(5) (1987) (stating that notice of the right of first refusal is considered given on the date the notice is personally served or on the date the notice is mailed to the former mortgagor's last known address by registered or certified mail).

139. *See id.* § 537.1201(4) (placing burden on debtor to inform creditor of current address).

140. *Id.* § 654.16(5).

141. Legislatures also might consider requiring the lending institution to have the post office stamp the postmark on the notice or require the lending institution to swear to an affidavit of mailing. These suggestions will ensure that both parties measure the offer's expiration from the same date. *See, e.g., MINN. STAT. § 500.24(6)(i)* (Supp. 1987) (affidavit of mailing is prima facie evidence that the offer to the former owner has expired).



#### 4. Length of Time the Mortgagor Has to Exercise the Right

The length of time extended to the offeree to exercise the right to repurchase is a function of several legislative concerns: the amount of financing required, the amount of land being sold, and the difficulty of transacting business when the former owner has left the state. These concerns must be balanced against the additional burden placed on the marketability of the land held by the bank.<sup>142</sup> For example, a bank regulated by Minnesota section 500.24(6) may have a two month wait before the former owner notifies the bank that the right of first refusal will be exercised.<sup>143</sup> Although the sixty day period is a generous amount of time for the mortgagor to exercise the right and close the sale, it may be unreasonably long because it shrouds the sale to a third party in uncertainty.

Iowa Code section 654.16(4), on the other hand, gives the mortgagor over forty days to exercise and close the sale, yet the lending institution will know within ten business days whether the right is going to be exercised.<sup>144</sup> Because the former owner is notified of the existence of the right when the institution first acquires title, the mortgagor is apt to be more prepared to decide whether he will exercise the right within the ten day period provided in Iowa section 654.16(4). The bifurcation of the acceptance periods satisfies the needs of both the lending institution and the former mortgagor.<sup>145</sup>

A final consideration on the subject of the former owner's exercise of the right concerns the characterization of the parties' actions. The legislature ought to clarify whether the lending institution is offering to sell the property to the former owner, or whether the former owner is offering to purchase the property. Iowa law best illustrates the inconsistency. Iowa Code section 524.910(2) states that the state bank shall "first offer" the mortgagor the opportunity to repurchase the land.<sup>146</sup> Iowa Code section 654.16, on the other hand, provides that the

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142. The longer the mortgagor has to accept, the more patient the third party purchaser must be. A purchaser buys agricultural property in anticipation of the growing season. If the bank's sale of the farmland is delayed by a lengthy acceptance time, the buyer may lose the opportunity to cultivate the land.

143. See MINN. STAT. § 500.24(6) (1986) (granting previous owner 60 days to exercise right of first refusal).

144. IOWA CODE § 654.16(4) (1987).

145. The bifurcation of the exercise and closing periods was included recently in amendments to the Farm Credit Act of 1971. See Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 108, 101 Stat. 1568, 1572 (1988) (amending § 4.36 of Farm Credit Act of 1971, codified at 12 U.S.C. § 2219a). Section 4.36(a) grants the previous owner of agricultural land acquired through a loan foreclosure a right of first refusal to repurchase or lease property. *Id.* § 4.36(a). After the acquiring institution notifies the previous owner of its intent to sell or lease, the previous owner has fifteen days to exercise the right by submitting an offer to purchase the property. *Id.* § 4.36(b)(1)-(2). An institution receiving an offer to purchase at the appraised value then must accept the offer within 30 days of the receipt of the offer. *Id.* § 4.36(b)(3). The closing of the sale follows the acceptance of the offer. *Id.*

Contrary to IOWA CODE § 654.16(4) (1987), the Farm Credit Act amendment does not address the amount of time that the previous owner has to close the sale. Nor does it address the consequences that would result should the previous owner exercise the right by submitting an offer to purchase but fail to close the sale.

146. IOWA CODE § 524.910(2) (1987). "[T]he state bank shall *first offer* the prior owner the opportunity to repurchase the agricultural land . . ." *Id.* (emphasis added). See also MINN. STAT. § 500.24(6) (1986). "A state or federal agency . . . *must offer* or make a good faith effort to offer land for sale or lease to the immediately preceding former owner . . ." *Id.* (emphasis added). "The former owner must exercise the right to buy farm land within 60 days after *receiving an offer* to buy under this subdivision." *Id.* (emphasis added).

mortgagor exercises the right to repurchase by submitting a "binding offer" to the institution.<sup>147</sup>

The distinction would come into play only if the former owner were to make an offer to purchase the land for less than the asking price or on different terms. Such an offer might be construed to be a counteroffer, thereby extinguishing the opportunity to exercise the right of first refusal.<sup>148</sup> On the other hand, it may simply be construed as bargaining for more favorable terms.<sup>149</sup> For example, suppose the former owner has ten days to exercise the right of first refusal. On the fifth day, the former owner offers to buy the land at a lower price than the lending institution first proposed. May the bank treat this action as a counteroffer and sell the land to a third party on day six? Or is the former owner merely bargaining for a better price? If it is considered to be bargaining, then the former owner has the remaining five days to exercise the right of first refusal.

##### 5. *Terms Surrounding Former Owner's Opportunity to Exercise the Right of First Refusal*

The inherent conflict in granting a right of first refusal is that the former owner wants a longer time to exercise the right whereas the lending institution wants to remove the cloud that hangs over the sale of the farmland, represented by the right of first refusal. Iowa section 654.16 allows the lender to control the right by requiring it to offer the former owner the opportunity to repurchase the property when the lender proposes to sell.<sup>150</sup> Minnesota section 500.24(6), however, does not allow either party to control the right, because the lender is required to offer the land to the former owner when it has received an offer from a third party.<sup>151</sup> The latter approach is more successful in furthering the statutory goal of helping mortgagors repurchase their foreclosed property.

147. IOWA CODE § 654.16(4) (1987). "The mortgagor has ten business days . . . in which to exercise the right to repurchase the homestead by submitting a *binding offer* to the institution on the same terms as the proposed sale . . ." *Id.* (emphasis added); see also Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 108, 101 Stat. 1568, 1572 (1988) (amending § 4.36 of the Farm Credit Act of 1971, codified at 12 U.S.C. § 2219a) (stating that previous owner must submit an offer to purchase the property).

148. 1 A. CORBIN, CORBIN ON CONTRACTS §§ 89-90 (1963). Corbin defines a counteroffer as:

a communication that expresses an acceptance of a previous offer on certain conditions or with specified variations empowers the original offeror to consummate the contract by an expression of his assent to the new conditions and variations. That is exactly what a counter offer does . . . . [A counter offer] terminate[s] the power of acceptance of the previous offer.

In addition to its effect in creating a power of acceptance, a counter offer ordinarily terminates the power to accept the previously made offer to which it is a "counter," or reply, in the negotiation.

*Id.*

149. Corbin distinguishes inquiries, requests, and suggestions from counteroffers because they "do not turn an otherwise absolute acceptance into a conditional one, so too they do not constitute counter offers." *Id.* § 93. A mere request for information regarding the possibility of lower prices similarly does not create a power of acceptance in the original offeror. Because such a request does not affect the power to accept the original offer, no counteroffer is created. *Id.*

150. IOWA CODE § 654.16(2) (1987).

151. MINN. STAT. § 500.24(6) (1986).

The Iowa approach of extending the right when the lender proposes to sell may frustrate the goal easily. For example, if the lender proposed to sell the property the day after the redemption period expired, the extra ten days to exercise the right of first refusal would not be of much help to the former owner. Suppose further that the lender sells the land eleven months later. Under Iowa section 654.16(2), the right of first refusal is valid for one year after the redemption period expires.<sup>152</sup> Had the right been triggered by the lender's offer to sell to a third party, as in Minnesota section 500.24(6), the former owner would have had the additional eleven months to acquire the funds to repurchase the farmland.

### 6. Terms of the Sale

The terms of sale can be as influential on the mortgagor's decision to repurchase the property as the existence of the right of first refusal. For example, Iowa section 524.910(2) only grants the right of first refusal. There are no guidelines to ensure that the offer extended to the former owner is reasonable. Three terms that largely have gone unnoticed in the legislation are fair market value, financing, and assignability of the right.

First, the method which the lending institution uses to value the property before offering it to the mortgagor should be provided in the statute. Under Iowa section 654.16, the lender may sell the farmland at the price it chooses.<sup>153</sup> Minnesota section 500.24(6), on the other hand, states that the price shall be no higher than the highest price offered by a third party that is acceptable to the lender.<sup>154</sup> Although both procedures are acceptable, the Minnesota provision is preferable.

The Minnesota section is more helpful to the former owner because it requires the lender to have received an offer from a third party before it can force the former owner to decide whether to exercise the right of first refusal.<sup>155</sup> Not only does this give the former owner the benefit of the time it takes the lender to obtain a purchaser,<sup>156</sup> but it also sets a price that is fair to all parties. For example, if the lender can sell the property at an agreeable price, it should be indifferent regarding the identity of the actual purchaser, so long as it receives fair value. The former owner also is benefitted because the final selling price probably will be lower than the lender's proposed price. According to Iowa section 654.16(4), however, if the lender offers to sell the homestead to a third party on terms different from those offered to the former owner, the lender first must offer the former owner the opportunity to repurchase the homestead on the new terms.<sup>157</sup>

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152. IOWA CODE § 654.16(2) (1987) (requiring member institution to offer mortgagor right of first refusal if member institution proposes to sell within one year after sheriff's deed is issued to institution).

153. *Id.* Subsection (2) only provides that "the institution shall first offer the mortgagor the opportunity to repurchase the designated homestead on the same terms the institution proposes to sell or dispose of the designated homestead." *Id.*

154. MINN. STAT. § 500.24(6) (1986).

155. *Id.*

156. See *supra* text accompanying notes 150-52.

157. IOWA CODE § 654.16(4) (1987).

Second, Iowa Code section 654.16(3) expressly states that the lending institution is not required to offer the mortgagor financing for the purchase of the homestead.<sup>158</sup> This provision embodies the notion that a bank should not be required to finance the sale of property to a customer upon whom it already has foreclosed. Neither Minnesota section 500.24(6) nor Iowa section 524.910(2) address the issue of financing.<sup>159</sup>

Third, in order to prevent abusive assignments, Iowa section 654.16(5) unequivocally states that the right of first refusal is not assignable.<sup>160</sup> There are circumstances, however, when the right should be assignable.<sup>161</sup> For example, the former owner should be able to assign the right to family members. Such an assignment furthers the goal of helping the "family farmer" get back into farming<sup>162</sup> by allowing the farmer to assign the right to parents, siblings, spouses, or children. Furthermore, straw conveyances might be permitted where the former owner conveys the right to a third party who immediately reconveys it to the former owner in a bona fide attempt to help the former owner repurchase the property.<sup>163</sup>

Finally, it should be noted that the possibility of the right of first refusal being offered to the former owner depends on the lender's decision to sell and the length of the right's existence. Property held pursuant to Iowa section 524.910(2) must be sold within five years after title vests in the bank.<sup>164</sup> The right of first refusal also exists for the entire five year holding period, so the former owner is assured of the opportunity to exercise the right. Iowa section 654.16, however, only grants a one year right of first refusal.<sup>165</sup> Therefore, if the lender holds the property for two years before proposing to sell, the former owner has no right of first refusal. Finally, property held pursuant to Minnesota section 500.24(6) must be sold within ten years of acquiring title to the property.<sup>166</sup>

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158. *Id.* § 654.16(3).

159. *Id.* § 524.910(2); MINN. STAT. § 500.24(6) (1986).

160. IOWA CODE § 654.16(5) (1987). Subsection (5) states: "The right of first refusal provided in this section is not assignable, but may be exercised by the mortgagor's successor in interest, receiver, personal representative, executor, or heir only in case of bankruptcy, receivership, or death of the mortgagor." *Id.*

161. *See id.*

162. *See supra* note 3 (Minnesota legislature encourages the protection of the family farm and promotes the stability of rural Minnesota society).

163. The form of the assignment in *Whistler* basically was a straw conveyance. The *Whistler* court stated that preemptive rights are assignable under Iowa law. *Whistler v. Decatur County State Bank*, No. CE 2112, slip op. at 4 (Iowa Dist. Ct. for Decatur County Sept. 9, 1987); *see supra* text accompanying notes 59-79.

164. IOWA CODE § 524.910(2) (1987). Real property held pursuant to § 524.910(2) must be sold by the bank within five years after title vests in the bank. *Id.* Before agricultural property is sold, the bank first must offer the former owner the right to repurchase the agricultural land. *Id.*

165. IOWA CODE § 654.16 (1987). The first year that property is held by a member institution pursuant to § 654.16 it is subject to a one year fair market value redemption period. *Id.* If the member institution proposes to sell the property within one year after the sheriff's deed is issued to the lender, then the former owner has a right of first refusal to repurchase the homestead. *Id.* § 654.16(2). Consequently, the lender may deny the former owner the opportunity to exercise the right by holding the property for a two year period.

166. MINN. STAT. § 500.24(3)(i) (1986) (regulating the acquisition of agricultural land by corporations in the collection of debts, whether by mortgage or otherwise, and requiring that such land be disposed of within 10 years after acquiring title).

The right of first refusal, however, lasts for five years.<sup>167</sup> Consequently, the institution must hold the property longer than five years to prevent the former owner from exercising the right of first refusal. State legislatures should consider the duration of the right of first refusal when drafting legislation.

### *B. A Proposal*

The three statutes discussed above illustrate three very different approaches to the goal of helping farmers repurchase foreclosed agricultural real estate. No one statute, however, addresses all of the problems discussed above. The following proposed statute presents an approach that guides the lending institution in extending the right of first refusal.

(1) **General Rule:** Agricultural real estate acquired by a lending institution as the result of loan foreclosures or in satisfaction of debts previously contracted shall be subject to the right of first refusal of the former owner to repurchase the property, as provided in this section.

(2) When the sheriff's deed is issued to the lending institution, the lending institution shall notify the former owner of the right of first refusal. A copy of this section titled "Notice of Right of First Refusal" is sufficient notice.

(3) If within five years after the sheriff's deed is issued to the lending institution, the lending institution

- (a) makes a good faith offer to sell, or
- (b) receives an good faith offer to purchase, or
- (c) at the time the lending institution otherwise proposes to dispose of the farmland, in a transaction other than a public auction, the institution shall first offer the former owner the opportunity to repurchase the farmland on the same terms offered to or by the third party that are acceptable to the seller. If the lending institution proposes to sell the farmland by public auction within five years after the acquisition of the farmland, the former mortgagor must be given forty days notice of all of the following:
  - (i) The date, time, place and procedures of the auction sale.
  - (ii) Any minimum terms or limitations imposed upon the auction.

(4) Notification is considered given on the date that the notice is served personally on the former owner or on the date the notice is mailed to the former owner's last known address by certified mail.

(5) The former owner has ten business days after being given notice of the terms of the proposed sale or disposition, other than a public auction, in which to exercise the right to repurchase the farmland by submitting a binding offer to the institution on the same terms as the proposed sale or other disposition, with closing to occur within

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167. MINN. STAT. § 500.24(6) (1986). "This subdivision does not apply to a sale or lease that occurs after the seller or lessor has held the property for five years." *Id.*

thirty days after the date of the offer unless otherwise agreed by the institution. After the expiration of either the period for offer or the period for closing, in the absence of submission of an offer or occurrence of a closing, the institution may sell or otherwise dispose of the designated homestead to any other person on the terms upon which it was offered to the mortgagor. Should the lending institution subsequently offer to sell or receive an offer to purchase the property on materially different terms, the institution shall give the former owner the first right to repurchase the property on the new terms.

(6) The lending institution is not required to offer the former mortgagor financing for the purchase of the farmland. The right of first refusal provided in this section is assignable only to the former owner's parents, spouse, sibling, or child, but may be exercised by the former owner's successor in interest, receiver, personal representative, executor, or heir in case of bankruptcy, receivership, or death.

(7) As used in this section, lending institution means any lending institution that is a member of the federal deposit insurance corporation, the federal savings and loan insurance corporation, the national credit union administration, or an affiliate of such institution.

This proposed model statute accomplishes the same objectives as those sought by the Iowa and Minnesota legislatures in the current statutory versions.<sup>168</sup> The proposal is desirable because it alleviates the potential procedural problems that a lending institution may encounter in complying with one of the current statutes.<sup>169</sup> Moreover, the model statute provides for uniform extension of the right of first refusal, allows for a better understanding of the circumstances surrounding the right, and efficiently achieves the legislature's policy goals.

Subsection (1) separates the existence of the prior owner's right of first refusal from the ensuing procedural guidelines. The right, therefore, is more noticeable. This minor alteration will better alert the former owner of the right's existence when the lending institution notifies the former owner by sending a copy of this section pursuant to subsection (2).

Subsection (2) provides that the former owner must be notified of the right's existence when the lending institution acquires title to the property. After the bank has elected to sell the property, subsection (4) delineates the method the institution must use when notifying the former owner of the right. Consistent with Minnesota section 500.24(6), the model statute proposes that the institution notify the former owner when it makes a good faith offer to sell the property or receives a good faith offer to purchase from a third party. Iowa section 654.16(2) calls for notification of the right when the institution proposes to sell or dispose of the property.<sup>170</sup> The difference between the two approaches surfaces when the bank first proposes to sell but is unable to find a buyer for eighteen months. Under the Iowa section, significant changes affecting the sale may occur during this gap: economic conditions may change or the former owner may be

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168. See *supra* text accompanying notes 51-56.

169. See *supra* text accompanying notes 125-67.

170. IOWA CODE § 654.16(2) (1987).

in a better position to purchase the property. By waiting to extend the right to the former owner until the bank has an offer from a third party, the former owner is given the benefit of the delayed sale. Additionally, all offers made or received by the lending institution must be made in good faith to prevent overreaching.

Subsection (4) also allows notice to be served personally or mailed by certified mail. These steps allow the former owner increased opportunity to receive the notice. Moreover, the lending institution benefits from this approach because it is more flexible and does not require strict compliance with one method of notification. Furthermore, because notice is considered to be given on the date of mailing, the lending institution can file an affidavit of mailing<sup>171</sup> with the county recorder's office in the county in which the property is located. Thus, the problem of determining the date of notice, as found in *Whistler*,<sup>172</sup> is avoided.

Subsection (5) adopts a bifurcated acceptance provision similar to that in Iowa section 654.16(4).<sup>173</sup> Rather than tie up the bank's ability to sell the property for a period of sixty days,<sup>174</sup> the acceptance provision in subsection (5) notifies the bank within ten business days of the former owner's intention to exercise the right or to let it lapse. This time frame is fair to the former owner yet it does not prolong the bank's uncertainty for an unreasonable period of time. After offering to purchase the farmland, the thirty day period to close the sale allows the former owner the time needed to raise the financing to purchase the land.

Following the lead of the Minnesota statute, subsection (3) proposes that the terms of the bank's offer shall be the same terms offered to or by the third party that are acceptable to the seller. This provision protects the former owner from a bank's potential overreaching by pricing the property unreasonably beyond the means of the former owner. Thus, a ceiling equal to the price offered to the third party is imposed on the price the bank may offer. Also, the bank is not required to provide any financing for the sale to the former owner. This provision of subsection (6) places the bank in control of the sale negotiations and draws a clear, distinct line regarding financing. The bank still may choose to finance the sale to the former owner; however, it should not be required to do so. The thirty day closing period allows the former owner ample opportunity to seek financing from a different lending institution.

Finally, subsection (6) provides that the prior owner's right of first refusal is subject to limited assignability. Most importantly, however, the right may be assigned to family members without risk of creditor liens being executed.<sup>175</sup> The addition of this subsection eliminates the problem incurred in *Whistler*.<sup>176</sup> Limited

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171. See, e.g., MINN. STAT. § 500.24(6)(i) (Supp. 1987) (stating that an affidavit of mailing is prima facie evidence that an offer to sell or lease farmland has terminated).

172. *Whistler v. Decatur County State Bank*, No. CE 2112, slip op. at 1 (Iowa Dist. Ct. for Decatur County Sept. 9, 1987); see *supra* text accompanying notes 59-79.

173. IOWA CODE § 654.16(4) (1987).

174. See, e.g., MINN. STAT. § 500.24(6) (1986).

175. See *supra* text accompanying notes 160-63.

176. *Whistler v. Decatur County State Bank*, No. CE 2112, slip op. at 1 (Iowa Dist. Ct. for Decatur County Sept. 9, 1987); see *supra* text accompanying notes 59-79.

assignability relieves the bank of extensive procedural obstacles when the bank merely wants to dispose of the land.<sup>177</sup>

#### V. CONCLUSION

The economic crisis of the early 1980s left many farmers without land to farm. With high real rates of interest and declining land values, default rates soared. In a bold move, the Iowa legislature enacted a statutory provision to help the farmer repurchase his agricultural property and get back into farming. Unfortunately the provision was drafted vaguely and created many more problems than it solved. These deficiencies became apparent in the decision of *Whistler v. Decatur County State Bank*.<sup>178</sup> Notification, method of notification, determination of when an offer is considered extended, and the length that the offeree has to accept the offer are all issues that should be addressed by states enacting or revising similar statutes.

Minnesota Code section 500.24(6) and Iowa Code section 654.16 are similar statutory provisions enacted after Iowa Code section 524.910(2). Both provide valuable guidance in addressing the above concerns. Using these sections as a guide, this Note proposes a model statute which will streamline institutional compliance with the legislative intent. Moreover, compliance efforts will become more efficient and less apprehensive. Consequently the farmer will be better served.

*Thomas J. Houser\**

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177. If the right is made assignable, then the bank also must verify the true owner of the right when selling the property to ensure compliance with the statute.

178. See *supra* text accompanying notes 59-79.

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