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Under the Clear Title Provisions of the Food
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by

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Protecting Security Interests in Equine Collateral Under the Clear Title Provisions of the Food Security Act of 1985

BY RICHARD A. VANCE*

INTRODUCTION

On Christmas Eve, 1986, those equine lenders unaware of the clear title provisions of the Food Security Act of 1985¹ may have given an unintended gift to purchasers of thoroughbreds, standardbreds, Arabians, and other horses in which they held a security interest. December 24, 1986 was the effective date of section 1324 of the Federal Food Security Act of 1985 (FSA).² Entitled "Protection of Purchasers of Farm Products," these so-called clear title provisions preempt portions of the Uniform Commercial Code and impose a federal layer of compliance on all agricultural lenders, whether the collateral for their loan is an acre of soybeans or a million dollar thoroughbred mare in foal to Alydar. The stakes are high: failure to observe the FSA's provisions means that a purchaser of the lender's collateral—even one who is aware of the lender's security interest—purchases free of the lender's security

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¹ Food Security Act of 1985, Pub. Law No. 99-198, § 1324, 99 Stat. 1354 (1985) (codified at 7 U.S.C. § 1631). For convenience, this article will use citations to the United States Code throughout.

² 7 U.S.C. § 1631(j) (1988).

interest, just as if the collateral were the inventory of a nonagricultural seller. In an environment where many debtors engaged in the thoroughbred business are experiencing financial difficulty, the ability to follow collateral sold without the approval of the lender into the hands of third parties can substantially affect the evaluation of equine credit. Unfortunately, the FSA is marred by sloppy draftsmanship and falls far short of its stated goal of facilitating and simplifying purchases and sales of farm products.³

I. THE "FARM PRODUCTS" EXCEPTION

A. Policy and Historical Context

Since its earliest versions, section 9-307(1) of the Uniform Commercial Code (U.C.C.) has afforded special protection to agricultural lenders. This provision draws a distinction between purchasers of farm products and purchasers of other, nonagricultural, inventory. Under both the 1962 official text and the 1972 revisions to the official text, a buyer who purchases goods "in the ordinary course of business" takes free of the security interest in those goods, even though the security interest is perfected.⁴ Because purchasers can only be buyers "in the ordinary course of business" if, among other requirements, they buy "in ordinary course from a person in the business of selling goods of that kind,"⁵ section 9-307(1) applies only to buyers who purchase "inventory". But expressly excepted from the reach of section 9-307(1) is the purchaser of "farm products from a person engaged in farming operations,"⁶ with the result that the security interest in farm products continues regardless of the sale, thus subjecting the farm product purchaser to the risk of paying twice for the farm products—once to the

³ See Mooney, *Introduction to the Uniform Commercial Code Annual Survey: Some Observations on the Past, Present, and Future of the U.C.C.*, 41 BUS. LAW. 1343, 1352 (1985) (The "clear title" provision of the Food Security Act of 1985 is "internally inconsistent, unintelligible and unworkable . . . it is a disaster.").

⁴ UNIFORM COMMERCIAL CODE § 9-307(1) (1987) [hereinafter U.C.C.].

⁵ Section 1-201(9) of the U.C.C. provides in pertinent part:

"Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker.

⁶ U.C.C. § 9-307(1).

seller and once to the lender to remove the lien.⁷ The farm product exception also subjects auctioneers and brokers to serious risks of liability to the lender for the tort of conversion, even though unwittingly.⁸ Cynics have marveled that this rule, carried to its logical extreme, permits secured lenders to follow their collateral from the cattle ranch, through the slaughterhouse, to the supermarket, and onto the consumer's dinner plate, where it might be speared in mid-bite by the fork of an indefatigable repo man.⁹

The policy rationale for the farm products exception in section 9-307 has never been "precisely articulated."¹⁰ Perhaps the explanation lies in the different treatment accorded to farm products under pre-Code law.¹¹ Many lenders used the procedures of the Uniform Trust Receipts Act,¹² which did not reach farm products, to create security interests in inventory. On the other hand, until recently, lenders to farmers relied primarily upon real estate financing to provide collateral for their loans.¹³ When additional financing techniques became necessary, it was the chattel mortgage, which grew out of real estate law, that was developed and refined. Under the chattel mortgage system, unlike the Uniform Trust Receipts Act, mortgagees could follow their security interests in agricultural collateral into the hands of distant purchasers, even where the sale was in the ordinary course of business.¹⁴ The system

⁷ This perceived inequity was cited by Congress as a principal reason for the enactment of § 1631. See H.R. REP. No. 99-271, 99th Cong., 1st Sess. 109, reprinted in 1985 U.S. CODE CONG. & ADM. NEWS 1103, 1213.

⁸ For cases holding an auctioneer liable for the tort of conversion despite a lack of knowledge of a security interest, see *Towe Farms, Inc. v. Central Iowa Prod. Credit Ass'n*, 528 F. Supp. 500 (S.D. Iowa 1981); *Colorado Bank & Trust Co. v. Western Slope Investments, Inc.* 539 P.2d 501 (Colo. Ct. App. 1975); *Ottumwa Prod. Credit Ass'n v. Keoco Auction Co.*, 347 N.W.2d 393 (Iowa 1984). See also Annotation, *Personal liability of auctioneer to owner or mortgagee for conversion*, 96 A.L.R. 2d 208(1964). But see *Jessup v. Cattle Center, Inc.*, 259 Cal. App.2d 434, 66 Cal. Rptr. 361 (Cal. App. 1968); *Top Line Equip. Co. v. National Auction Serv., Inc.*, 649 P.2d 165 (Wash. Ct. App. 1982); *Production Credit Ass'n v. Equity Coop Livestock Sales Ass'n*, 261 N.W.2d 127 (Wisc. 1978) (holding that an auctioneer cannot be held liable for the tort of conversion unless actual or constructive knowledge can be demonstrated).

⁹ See Dolan, *Section 9-307(1): The U.C.C.'s Obstacle to Agricultural Commerce in the Open Market*, 72 Nw. U.L. REV. 706, 711 (1978) (citing *Garden City Prod. Credit Ass'n v. Lannon*, 186 N.W.2d 99, 104 (Newton, J., dissenting)).

¹⁰ G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 26.10 (1965).

¹¹ *Id.* at 26.11; Dolan, *supra* note 9, at 711.

¹² Uniform Trust Receipts Act, 9C Uniform Laws Annotated 220 *et seq.* (1957). See generally Gilmore, *supra* note 10, at ch. 4.

¹³ See Dolan, *supra* note 9.

¹⁴ See Annotation, *Filing of chattel mortgage on crops grown or to be grown as constructive notice*, 77 A.L.R. 572 (1932) (collecting cases).

suffered from inflexibility because of its failure to allow purchasers clear title and its inability to extend to after-acquired property without amendment to the mortgage.¹⁵

While the drafting of the U.C.C. and its revisions provided an appropriate occasion to reconsider the policy reasons for the unique treatment accorded farm products, the exception was retained without reasoned analysis, apparently due to concerns that agricultural states would refuse to accept a change in the prior practice.¹⁶ Two policy reasons have been suggested, perhaps after the fact, to justify the farm products exception of section 9-307(1). The first has its basis in a stereotype of incompetent "grizzled farmer[s] in bib overalls"¹⁷ who need a paternalistic system to protect them from their own ineptitude.¹⁸ Of questionable merit from the outset, given the complexities of today's farming operations and financing, this view has no current justification. Multimillion dollar thoroughbred operations and agribusinesses bear virtually no resemblance to the "yeoman farmer" image underpinning this rationale.

A second justification would provide protection not because of the weakness and incompetence of the farmer, but because of the strength and sophistication of the large agricultural buyers who are, it is argued, better able to protect themselves from the risks of having to pay twice for products.¹⁹ This is an interesting contrast to what can be viewed as the U.C.C.'s general bias toward protecting naive consumers from sophisticated sellers. A more sensible rationale is the theory that sales of farm products resemble bulk sales more closely than retail sales of nonagricultural goods.²⁰ For

¹⁵ Coates, *Farm Secured Transactions Under the UCC*, 23 BUS. LAW. 195, 203 (1967) (In order to keep a security interest in a dairy herd up-to-date "it was necessary to have a new mortgage executed each time a new cow was purchased.").

¹⁶ See Uchtmann, Bauer, & Dudek, *The UCC Farm Products Exception—A Time to Change*, 69 MINN. L. REV. 1315 (1985) [hereinafter Uchtmann].

¹⁷ Rasor & Wadley, *The Secured Farm Creditor's Interest in Federal Price Supports: Policies and Priorities*, 73 KY. L.J. 595, 596 (1985-86).

¹⁸ See Miller, *Farm Collateral Under the UCC: "Those Are Some Mighty Tall Silos, Ain't They Fella?"*, 20 S.D.L. REV. 514, 515 (1975) ("The Code approaches farming as an occupation peopled by simple, unsophisticated tillers of the soil who need the mantle of protective legislation to survive."); Dolan, *supra* note 9, at 717-18.

¹⁹ See, e.g., B. Clark, "Memorandum to the American Bankers Association on the UCC Farm Products Rule, the Impact of the Food Security Act on that Rule, and Suggested Amendments for the Federal Act" at 4 (March 17, 1986).

²⁰ See Meyer, *Agricultural Credit and the Uniform Commercial Code: A Need for Change?*, 34 KANSAS L. REV. 469, 484 (1985); Note, *Clear Title: A Buyer's Bonus, A Lender's Loss—Repeal of U.C.C. § 9-307(1) Farm Products Exception by Food Security Act § 1324 [7 U.S.C. § 1631]*, 26 WASHBURN L.J. 71, 78 (1986).

example, farmers will usually sell all their corn to a few buyers, perhaps even to a single buyer, on a seasonal basis. Such a sale may be more similar to a bulk sale of inventory than to the continuous sales of small quantities of inventory.²¹ By definition, bulk sales are not "in the ordinary course of business" and a lender's security interest continues in the collateral.²² While this theory provides a more coherent explanation for the exception, it is still questionable whether current business practices in fact provide adequate support for it. Because many farm products are not usually sold on a seasonal basis, to a few large buyers, or in large quantities, there may be too many exceptions to justify an exception to the general rule. In any event, it is clear that the draftsmen of the U.C.C. did not give the issue the careful consideration it deserved, leaving it to the courts and then to Congress to act.

B. *Confusion in the Courts*

Perhaps because courts have been unable to clearly articulate the policy reasons for the farm products exception, they have struggled with its application in difficult cases. While many courts have strictly applied the seemingly clear provisions of U.C.C. section 9-307(1),²³ others have perceived the rigid application of this section as imposing an inequitable result upon the purchaser of farm products in the ordinary course of business.²⁴ These courts

²¹ See Miller, *supra* note 18, at 537.

²² U.C.C. § 6-102(1)(c) (1987). The Bulk Sales Act does not apply to sales of farm products. U.C.C. § 6-103(1), comment 1.

²³ Pursuant to U.C.C. § 9-307(1), a buyer in ordinary course of business other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by the seller even though the security interest is perfected and even though the buyer knows of its existence. Courts strictly applying the farm products exception include *Security Nat'l Bank v. Belleville Livestock Comm'n Co.*, 619 F.2d 840, 845-46 (10th Cir. 1979); *United States v. Hughes*, 340 F. Supp. 539 (N.D. Miss. 1972); *United States v. Greenwich Mill & Elevator Co.*, 291 F. Supp. 609 (D. Ohio 1968); *North Cent. Kansas Prod. Credit Ass'n v. Washington Sales Co.*, 577 P.2d 35, 41 (Kan. 1978); *Southwest Washington Prod. Credit Ass'n v. Seattle-First Nat'l Bank*, 593 P.2d 167 (Wash. 1979).

²⁴ Smith, *Implied and Conditional Consent in the Sale of Horse Shares or Seasons*, 74 Ky. L.J. 839, 842-43 (1985-86) (a sizeable minority of jurisdictions have found that course of dealing or usage of trade amounts to either a consent or waiver thus cutting off a prior perfected security interest). See, e.g., *Colorado State Bank v. Hoffner*, 701 P.2d 151 (Colo. Ct. App. 1985); *Western Idaho Prod. Credit Ass'n v. Simplot Feed Lots, Inc.*, 678 P.2d 52 (Idaho 1984); *Anon, Inc. v. Farmers Production Credit Ass'n of Scottsburg*, 446 N.E.2d 656 (Ind. App. 1st Dist. 1983); *Peoples Nat'l Bank & Trust v. Excel Corp.*, 695 P.2d 444 (Kan. 1985).

have been receptive to arguments limiting the farm products exception rule of section 9-307(1). The result has been a series of conflicting cases and a lack of predictability in the marketplace for farm products.²⁵

Advocates arguing to limit the scope of section 9-307(1) frequently rely upon U.C.C. section 9-306(2), which provides that "a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor."²⁶

Not all courts have been willing to adopt an expansive interpretation of section 9-306(2), adhering instead to a strict reading of section 9-307(1).²⁷ For example, in *Swift County Bank v. United Farmers Elevators*,²⁸ a secured creditor sued a buyer for the conversion of grain purchased from its borrower. The Minnesota appellate court held that a secured party's failure to object to past unauthorized sales of grain did not operate as a waiver of the secured party's right to insist on strict adherence to the security agreement.²⁹ The court in *Swift* specifically relied on the farm products exception of section 9-307(1) in holding the purchaser liable to the secured party.³⁰

Similarly, in *F.S. Credit Corp. v. Troy Elevator, Inc.*,³¹ the Supreme Court of Iowa held that a prior course of dealing will not operate as a waiver to defeat a secured party's interest in the collateral.³² In *Troy*, the secured party brought a conversion suit against the purchaser of a corn crop subject to the creditor's perfected security interest.³³ Although the security agreements provided that the debtor could not sell the collateral without prior written approval of the creditor, the trial court relied heavily on

²⁵ See generally B. CLARK, *THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* ¶ 8.08 (1988).

²⁶ U.C.C. § 9-306(2) (1987).

²⁷ Interestingly, *Garden City Prod. Credit Ass'n v. Lannan*, 186 N.W.2d 99 (Neb. 1971), often regarded as the leading decision holding that course of dealing between the secured party and debtor does not operate as a waiver, was recently overruled in *Farmers State Bank v. Farmland Foods, Inc.*, 402 N.W.2d 277 (Neb. 1987).

²⁸ 366 N.W.2d 606 (Minn. App. 1985).

²⁹ *Id.* at 609.

³⁰ *Id.*

³¹ 397 N.W.2d 735 (Iowa 1986).

³² *Id.* at 738.

³³ *Id.* at 736.

the prior course of dealing between the debtor and the secured party to find that the creditor's failure to enforce these provisions or to object to the debtor's selling the crops without approval constituted a waiver of the written provision and dismissed the action.³⁴ The Iowa Supreme Court had ruled in other cases that the lender waives its liens against third parties when it authorizes the debtor to dispose of collateral.³⁵ Nevertheless, it reversed the trial court's ruling drawing a distinction from its earlier decisions based on significant language in the security agreement. The operative language provided that "[a]ny waiver by the company of this paragraph or failure to require prior written consent shall in no way operate as a waiver."³⁶ The court found that this additional language operated as a withdrawal of any earlier waiver obtained from the creditor based on its failure to object to the prior sales.³⁷

In contrast is the line of cases receptive to a liberal construction of section 9-306(2).³⁸ These courts have been willing to rely on the "authorized disposition" language of section 9-306(2) to find that a secured party waived or forfeited its security interest in farm products that serve as collateral.³⁹ Permitting the debtor to sell the farm products without specific permission, in contravention of a specific provision of the security agreement, deprives creditors of the benefit of their security interests.

The leading case adopting this interpretation is *Clovis National Bank v. Thomas*,⁴⁰ which involved a secured party's conversion action against a broker for the wrongful sale of cattle subject to the lender's security interest. Although the security agreement required the debtor to obtain the creditor's written consent prior to selling the collateral,⁴¹ the bank had permitted the debtor to sell the cattle from time to time as the debtor chose and relied upon it to turn over the proceeds from the sales to be applied to the indebtedness, declining to exercise its right to require written authority before permitting the debtor to dispose of the cattle. The

³⁴ *Id.*

³⁵ *Id.* at 737. See *Ottumwa*, 347 N.W.2d 393; *Hedrick Sav. Bank v. Myers*, 229 N.W.2d 252 (Iowa 1975); *Lisban Bank & Trust Co. v. Murray*, 206 N.W.2d 96 (Iowa 1973).

³⁶ *F.S. Credit Corp. v. Troy Elevator, Inc.*, 397 N.W.2d 735, 735 (Iowa 1986).

³⁷ *Id.* at 738.

³⁸ See generally *Miller*, *supra* note 18, at 582.

³⁹ See generally Annotation, *What constitutes secured party's authorization to transfer collateral free of lien under UCC section 9-306(2)*, 37 A.L.R. 4th 787 (1985).

⁴⁰ 425 P.2d 726 (N.M. 1967).

⁴¹ *Id.* at 728.

New Mexico Supreme Court found that the bank had acquiesced and impliedly consented to the sale of the cattle, therefore forfeiting its security interest in the cattle. Accordingly, the bank was precluded from recovering on its conversion theory against the defendant who sold the cattle for the debtor.⁴²

Despite the language of section 9-307(1) and the majority of courts, a significant minority of courts have relied on the *Clovis* rationale to find that usage of trade, course of dealing or failure to object to an unauthorized sale is enough to imply consent or waiver by a secured party.⁴³ This split of judicial authority as to whether or not U.C.C. section 9-307(1) should be applied in a rigid fashion or limited by an implied "authorized disposition" resulted in an unpredictable risk to buyers of farm products. Congress found that this risk constituted a burden on interstate commerce in agricultural products.⁴⁴

C. Attempts at Legislative Solutions

Whatever the merits of its underlying rationale, many agricultural lenders continued to believe that the farm products exception furnished added protection essential to the continued availability of farm credit. Recent commentary unanimously criticized the farm products exception, arguing that the balance of risk was already weighted heavily in favor of lenders, and needed to be redistributed to allocate greater protection to the buyers of farm products.⁴⁵ Several states responded to calls for change by limiting the exception to particular types of farm products, or eliminating the exception altogether, while another group of states placed conditions on its effectiveness by requiring lenders to give notice of their liens to auctioneers or by limiting the lender's rights to enforce its lien against the purchaser.

⁴² *Id.* at 730.

⁴³ See generally Smith, *supra* note 24, at 841-46. Smith suggests that Kentucky's position on this issue is unclear. *Id.* at 847; see also *Moffat County State Bank v. Producers Livestock Mktg. Ass'n*, 598 F. Supp. 1562, 1568 (D. Colo. 1984) (bank waived its security interest in cattle by its course of dealing and course of performance between it and the debtor).

⁴⁴ 7 U.S.C. § 1631(a)(4) (1988) (Documenting Congressional finding that the exposure of purchasers of farm products to double payment "constitutes a burden on and an obstruction to interstate commerce in farm products.").

⁴⁵ See, e.g., Uchtmann, *supra* note 16; Gilmore, *supra* note 10, at 26.10; Dolan, *supra* note 9.

As a result of these scattershot reform efforts, the official version of section 9-307(l) remained intact in only thirty-one states.⁴⁶ Kentucky, the center of the thoroughbred breeding business, adopted two nonuniform provisions to modify the farm products exception. Its version of section 9-307 provides that a security interest arising under Article 9 is lost, without recourse against the auctioneer, if a registered breed is sold at auction, unless the secured party sends written notice by registered mail, prior to the time of sale, to the auctioneer, setting forth the name and address of the debtor, the lien, and its amount, and a proper identification of the horse subject to the security interest.⁴⁷ Because over three quarters of the \$283 million spent on thoroughbred yearlings sold at auction in 1988 was spent at auctions held in Kentucky,⁴⁸ careful bankers lending against equine collateral not only perfect their security interests by filing but also obtain from the debtor express authority in the security agreement to notify the Keeneland Association and the Fasig-Tipton Company of the lender's security interest. The lender may then send blanket notices to the auctioneers or review sales catalogues carefully and send "Keeneland notices" when it finds its equine collateral listed for sale.

Other leading thoroughbred states took different approaches. California eliminated the farm products exception altogether⁴⁹ and Florida has retained it in its entirety.⁵⁰ Given the mobile nature of

⁴⁶ See Uchtmann, *supra* note 16, at nn. 3, 4.

⁴⁷ KY. REV. STAT. ANN. 355.9-307(6) (Michie/Bobbs-Merrill 1987) provides: If any registered breed of horse, the racing of which is regulated by KRS Chapter 230, subject to the lien of a security interest is sold at public auction in the ordinary course of business by an organization engaged in the business of selling such horses at public auction, a bona fide purchaser for value of such horse shall take title thereto free and clear of any such lien, and the organization selling such horse shall not be liable to the holder of such lien, unless written notice by registered mail, return receipt requested of such lien and the amount thereof, the name and address of the debtor and proper identification of the horse subject to lien are given to the organization prior to the time of sale.

Other provisions of this statute extend similar protection to purchasers of tobacco at public auction, purchasers of grain or soybeans holding a federal warehouse storage license or a Kentucky grain storage license, and purchasers of livestock at public auction holding a state stockyard license. Whether this provision is preempted by the Food Security Act of 1985 is discussed *infra* at notes 99-100 and accompanying text.

⁴⁸ Of the \$283 million spent on thoroughbred yearlings in 1988, over \$214 million was spent at auctions in Kentucky. Gross sales are actually down from the 1984 high of \$383 million. Bowen, *The Price and the Purse, THE BLOOD-HORSE*, January 7, 1989, Volume CXV, Number 1, at 41, 45.

⁴⁹ CAL. CODE § 9-307(1) (1964).

⁵⁰ FLA. STAT. 679.307(1) (Supp. 1989).

thoroughbreds and the multi-state operations of many breeders, the result has been, at best, a crazy-quilt of inconsistent lien preservation approaches. While section 1631 of the Food Security Act was intended to eliminate, or at least to reduce, this confusion, it now seems clear that it has increased the chaos exponentially.

II. THE CLEAR TITLE PROVISIONS OF THE FOOD SECURITY ACT OF 1985

A. Overview

At first glance, the statutory scheme seems relatively straightforward. Congress initially stated its conclusion that current state law exposed buyers and auctioneers of farm products to a risk of double payment, and that this risk inhibited and obstructed trade in agricultural products.⁵¹ Congress then eliminated the farm products exception:

[N]otwithstanding any other provision of Federal, State, or local law, a buyer who in the ordinary course of business buys a farm product from a seller engaged in farming operations shall take free of a security interest created by the seller, even though the security interest is perfected; and the buyer knows of the existence of such interest.⁵²

A subsequent provision extends the same immunity to auctioneers, commission merchants, and selling agents, thereby barring the innocent conversion liability of the intermediary who sells farm products subject to a lien.⁵³

The FSA does not eliminate the farm products exception entirely, however. In fact, the clear title provisions draw heavily upon prior state experimentation with alternatives to the farm products exception. Two models had emerged among the various approaches. One model, exemplified by the Indiana statute, required the borrower to provide the lender with a list of buyers; it was then incumbent upon the lender to give notice to the prospective buyers to preserve its security interest.⁵⁴ The model developed by Montana, on the other hand, established a central filing system,

⁵¹ 7 U.S.C. § 1631(a) (1988).

⁵² *Id.* at § 1631(d).

⁵³ *Id.* at § 1631(g).

⁵⁴ IND. CODE ANN. § 26-1-9-307(1) (Supp. 1974).

permitting a lender to preserve its security interest by filing an appropriate statement.⁵⁵

Congress did not choose between these different approaches; rather, the FSA essentially incorporates these two experiments, with some changes, leaving the states the ultimate choice between the alternatives. The FSA establishes the "notice to buyer" provisions,⁵⁶ and a state need take no legislative action to adopt this procedure; the choice is made by default. If a state chooses to implement the central filing model, then it must enact a legislative system in conformance with the federal guidelines established by the FSA and its implementing regulations, and submit the program to the Packers and Stockyards Administration for certification.⁵⁷ Compliance with the applicable procedure is the only way a lender may follow its security interest in agricultural collateral into the hands of a purchaser, even one with knowledge of its lien.

B. *Scope of the F.S.A.*

At the outset, it is important to understand what the clear title provision is not. It is not a uniform perfection and priority statute.⁵⁸ Equine and other agricultural lenders must still look to applicable state law for the rules governing the creation, perfection, and priority of security interests. While some states have attempted to integrate the FSA filing requirements into existing U.C.C. filing systems,⁵⁹ there is no necessity that they do so, and other states may adopt freestanding FSA filing procedures, with the result that lenders will have to make filings in each system.

This observation, while perhaps self-evident, is important because the drafters of the Food Security Act have chosen to use several terms confusingly similar to terms employed by the U.C.C. such as "effective financing statement," "farm products," and "central filing system".⁶⁰ Yet these terms have statutory definitions that are different from the definitions given by the U.C.C.

⁵⁵ MONT. CODE ANN. 81-8-307(1) (1983) (amended in 1986 in response to FSA). See generally Van Hooser, *Farm Products: Recent Legislative Changes to 9-307*, 29 S.D.L. REV. 346 (1984) (discussing state legislation limiting the liability of commission merchants and purchasers of encumbered farm products).

⁵⁶ 7 U.S.C. § 1631(e).

⁵⁷ 7 U.S.C. § 1631(c)(2) (1988).

⁵⁸ See H.R. REP. No. 271, 99th Cong., 1st Sess. 110, reprinted in 1985 U.S. CODE CONG. AND ADMIN. NEWS 1103, 1214.

⁵⁹ See, e.g., IDAHO CODE § 28-9-407 (Supp. 1989).

⁶⁰ Oddly, although the statute carefully defines the phrase "buyer in the ordinary

Of particular importance is the definition of farm products, because it affects the entire scope of the clear title provision. Under the U.C.C., farm products are defined as "crops or livestock used or produced in farming operations or if they are products of crops or livestock . . . and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products, they are neither equipment nor inventory."⁶¹ The Code does not define farming operations, but the official commentary suggests that raising livestock clearly constitutes farming operations.⁶² The FSA defines "farm product" to mean "an agricultural commodity . . . or a species of livestock such as cattle, hogs, sheep, horses, or poultry used or produced in farming operations . . . that is in the possession of a person engaged in farming operations."⁶³ Like the U.C.C., section 1631 offers no definition of "farming operations".

The special problems in attempting to classify equine collateral under the U.C.C. arise from the fact that horses—whether thoroughbreds, standardbreds, quarterhorses, Appaloosas, Arabians, or other breeds—often find their way from the farm to the auction block and on to the race track and show ring, and are frequently owned by persons who are not engaged in what is commonly thought of as farming. Equine lenders and their counsel attempting to classify equine collateral under the U.C.C. must often consider categories other than farm products, including "inventory", "equipment," or "general intangibles".⁶⁴ The issue of proper classification is not only important for perfection purposes but is also crucial for determining whether the farm products exception of section 9-307(1) even applies to the transaction.

In the simplest case, a thoroughbred broodmare, retired from racing and owned by a commercial breeder, is clearly a farm product. A Kentucky court has held that the same analysis applies to stallion shares, at least to the extent that the stallion shares are

course of business", this term is not used in the operative provisions of the statute. Sanford, *The Reborn Farm Products Exception Under the Food Security Act of 1985*, 20 U.C.C. L.J. 3, 11 (1987).

⁶¹ U.C.C. § 9-109(3) (1987).

⁶² *Id.* at comment 4.

⁶³ 7 U.S.C. § 1631(c)(5) (1988).

⁶⁴ See Lester, *Secured Transactions in Thoroughbred and Standardbred Horses: A Transactional Approach*, 70 Ky. L.J. 1065 (1981-82).

held by a commercial breeder.⁶⁵ The same court also suggested in dicta that a stallion season (the right to breed a mare to a stallion in a single year) would be classified a general intangible.⁶⁶ Another reported case held that a quarterhorse stallion acquired with the intention of syndicating the stallion and selling the resultant fractional interests was neither a farm product nor "equipment used in farming operations".⁶⁷ Finally, yet another court classified a thoroughbred racehorse as equipment, finding that its owner was engaged in the business of racing, not the business of farming.⁶⁸

The clear title provisions of the Farm Security Act do nothing to clarify the classification process; it appears that the same case-by-case factual analysis required under the Code will need to be undertaken under the clear title provisions. Both the cases and analyses developed under the U.C.C. should be persuasive in determining the reach of the definitions.⁶⁹ And, since the clear title provisions are intended to alter the result reached by the farm products exception in section 9-307(1) of the U.C.C., if that exception does not apply to the security interest because of the classification of the collateral, there would appear to be no valid policy reason for the clear title provision to reach the transaction either. Consequently, racehorses classified as equipment, and stallion seasons classified as general intangibles should not be reached by the FSA.

C. *Approaches to Compliance—Non-Central Filing System States*

At least for the immediate future, lenders in Kentucky and most states active in the equine business will have no choice but to rely on the notice provisions of the clear title section to preserve

⁶⁵ *North Ridge Farms, Inc. v. Trimble*, 37 U.C.C. Rep. Serv. 1280 (Ky. App. 1983), *aff'd*, 700 S.W.2d 396 (1985). The opinion of the court of appeals in this case is, pursuant to Ky.R.Civ.P. 76.28(4)(a), (c), a "Not To Be Published" opinion that "shall not be cited or used as authority in any other case in any court of (Kentucky)." See also *In re Blankenship-Cooper, Inc.*, 43 B.R. 231 (Bankr. N.D. Tex. 1984) (unsevered breeding rights in a quarter horse stallion are goods under the U.C.C.).

⁶⁶ *North Ridge Farms*, 37 U.C.C. Rep. Serv. at 1291.

⁶⁷ See *In re Butcher*, 43 B.R. 513 (Bankr. E.D. Tenn. 1984) (quarter horses).

⁶⁸ See *In re Bob Schwermer & Assocs, Inc.*, 27 B.R. 304 (Bankr. N.D. Ill. 1983) (standardbred horses were properly classified as equipment). Cf. *In re Rex Group, Inc.*, 80 B.R. 774 (Bankr. E.D. Va. 1987) (grand prix jumping horses were properly classified as equipment).

⁶⁹ See 9 C.F.R. 205.211(a) (1989).

their security interests upon sale.⁷⁰ This section contemplates that agricultural borrowers will disclose to their lenders the prospective buyers of their farm products. The lender then must send notice of its security interest to each buyer; if it fails to do so, then the security interest is cut off by operation of section 1631(d). Certainly, this system places a substantial burden of notification on the lender that was not present under section 9-307(1). Moreover, the conflicting and internally inconsistent directives of the statute make compliance a difficult process.

1. *The Security Agreement*

The cornerstone of protection in non-central filing jurisdictions is the security agreement between the lender and its debtor.⁷¹ Section 1631(h) provides that security agreements may require debtors to furnish the list of potential buyers or commission merchants to whom or through whom they intend to sell.⁷² Security agreements may also contain covenants that prohibit debtors from selling "off-list", i.e., to buyers who are not listed. Moreover, if the security agreement does contain such a provision, debtors are liable for a fine in the greater of five thousand dollars or fifteen percent of the "value or benefit received" if they sell to or through someone not on the list, unless they notified the secured party of the identity of the seller or commission agent at least seven days prior to the sale or they account to the secured party for the proceeds of the sale within ten days following the sale.⁷³

Subsection (h)(1) does not specify any particular form that the debtor's listing must take. Still, because it will serve as the basis

⁷⁰ Although there are legislative proposals to implement a central U.C.C. filing system in Kentucky that will be presented to the 1990 General Assembly, it is unlikely that a central filing system complying with Food Security Act standards will be proposed in the near future. Telephone interview with Brooks Senn, General Counsel, Kentucky Bankers Association (October 30, 1989). The notice provisions are here considered first, because their impact on Kentucky transactions is immediate. In some ways, though, it may help to consider the central filing system provisions first, because the notice provisions were clearly engrafted on the filing system statute, presumably in legislative compromise, and an understanding of the latter explains the evolution of the former.

⁷¹ Section 1631 applies to all sales made after the effective date of its provisions, regardless of when the security interest arose. Careful lenders should amend existing security agreements so they can notify potential purchasers and so that they can be afforded the *in terrorem* protection of the fine.

⁷² 7 U.S.C. § 1631(h) (1987).

⁷³ It has been suggested that the security agreement contain a prominent notice of the possible fine for selling "off-list" to obtain the maximum *in terrorem* effect. Reiley, *State Law Responses to the Federal Food Security Act*, 20 U.C.C. L.J. 260, 278-79 n.35 (1988).

for the notice to potential buyers and commission merchants, the listing should contain the addresses of persons to be notified. Since the notice becomes stale and ineffective if a year or more has elapsed between the time the buyer receives the notice and the actual sale,⁷⁴ the security agreement provision should also contain a requirement that the debtor update the listing on an annual basis, timed so as to insure that the notices can be forwarded and received on a timely basis. Unfortunately, the statute is silent as to whether the debtor's failure to update the listing is equivalent to not having provided an accurate list in the first place. Arguably, a debtor who fails to provide updates to the list of potential buyers or commission merchants, despite a contractual obligation to do so, may be subject to the fines set forth in subsection (h)(3).

2. *Formal Requisites of the Notice to Potential Buyers and Commission Merchants*

Once the list of potential buyers and commission merchants is obtained from the borrower, lenders must send notice of their security interests to those on the list. The statute requires that the notice be in writing,⁷⁵ contain the name and address of the secured party,⁷⁶ the name and address of the debtor,⁷⁷ and the social security or taxpayer identification number of the debtor.⁷⁸ In addition, the notice must describe the farm products involved, including "the amount of such products if applicable, crop year, county or parish, and a reasonable description of the property."⁷⁹ The listing should be organized according to farm product.⁸⁰ Finally, the notice should describe any payment obligations imposed upon the buyer by the secured party as conditions for waiver or release of the security interest.⁸¹ For example, a secured party might agree to release a security interest to a buyer who makes payment by drawing a check jointly to debtor and secured party.

⁷⁴ 7 U.S.C. § 1631(e)(1)(A) (1987).

⁷⁵ 7 U.S.C. § 1631(e)(1)(A) (1985). It appears that the contents of the notice were taken from the statutory section prescribing the contents of the effective financing statement. The drafting errors make more sense in light of this assumption.

⁷⁶ *Id.* at § 1631(e)(1)(A)(ii)(I).

⁷⁷ *Id.* at § 1631(e)(1)(A)(ii)(II).

⁷⁸ *Id.* at § 1631(e)(1)(A)(ii)(III).

⁷⁹ *Id.* at § 1631(e)(1)(A)(ii)(IV).

⁸⁰ *Id.* at § 1631(e)(1)(A).

⁸¹ *Id.* at § 1631(e)(1)(A)(v). This phrase lacks a verb, again illustrating the sloppy draftsmanship that characterizes this legislation.

This section illustrates the poor draftsmanship that blemishes the entire statute. The notice requirements appear to have been imported wholesale from the section of the statute setting forth the requirements of the effective financing statement (EFS), the disclosure document constituting the basis of the central filing system. While making sense on a superficial level, because the EFS should constitute adequate notice to buyers of the lender's security interest, certain elements do not fit in the notice system and create wholly unnecessary interpretive problems. For example, the statutory requirement that the notice be an "original or reproduced copy thereof"⁸² is a non sequitur. Written notice to the buyer of the lender's security interest is the purpose of the provision. There is no operative document that must be signed by any party. The provision also states, curiously, that the notice of the security interest will lapse upon "expiration of the statement".⁸³ In a non-central filing state, there will be no EFS to lapse. It cannot refer to the U.C.C. lien filing because there is no suggestion anywhere else in the statute that "statement" means U.C.C. financing statement. The statute states that the amount of the farm products must be included "where applicable", but does not describe when it is applicable.⁸⁴

The statute gives no guidance as to what constitutes a reasonable description of the property.⁸⁵ Under the central filing alternative, it appears that only the county is required.⁸⁶ Under the U.C.C., it is clear that a "reasonable description of the property" sufficient for perfection of a security interest in growing crops requires a description of the property where the collateral is located, and something more definite than the county, such as a street address.⁸⁷ In contrast, the FSA requires only the "county or parish", but does not specify whether it is the county of the debtor's residence, principal place of business, or the county where the goods are located. Presumably, the proper listing is the county

⁸² *Id.* at § 1631(e)(1)(A)(i).

⁸³ *Id.* at § 1631(e)(1)(A)(iv).

⁸⁴ *Id.* at § 1631(e)(1)(A)(ii)(IV). The regulations provide that the amount is necessary only if the collateral is less than all of a particular type of product. 9 C.F.R. 205.207(b) (1989). But these regulations have no application, other than by analogy, in a direct notification system. See Meyer, *UCC Issues: Another Look at Section 1324*, 8 JOURNAL OF AGRICULTURAL TAXATION AND LAW 153, 156 (1986).

⁸⁵ 7 U.S.C. § 1631(e)(1)(A)(ii)(IV) (1985).

⁸⁶ *Id.* at § 1631(c)(2)(C)(ii)(III).

⁸⁷ U.C.C. § 9-110. *Chanute Prod. Credit Ass'n v. Weir Grain and Supply*, 499 P.2d 517 (Kan. 1972). See generally 8 R. Anderson, *Uniform Commercial Code* § 9-110:19 (1985).

where the farm products are located, both in light of the localized nature of filing against farm products under the U.C.C. and the definition of an "effective financing statement" under subsection (c)(4)(D)(iv) requiring that the effective financing statement include the "county or parish in which the property is located."⁸⁸

Secured lenders, conditioned by years of completing financing statements to meet the formal requisites of the U.C.C., may be tempted to construe the notice requirements of subsection (e)(1)(A) as identical to those of the Code.⁸⁹ Neither the statute itself nor the legislative history suggest that this would be appropriate. It is certainly conceivable that descriptions and other technical requirements that are acceptable for one filing system would not be effective under the other. Although the U.C.C. clearly requires only "the mailing address of the debtor" and "an address of the secured party from which information concerning the security interest may be obtained",⁹⁰ the FSA does not elaborate on its address requirement. In appropriate circumstances, the careful lender might consider providing both a mailing address and a street address for the secured party and the debtor, or the address of the debtor's principal place of business and the address where the collateral is located.

Finally, the statute gives no guidance as to how to state the "crop year" of livestock or multi-harvest crops.⁹¹ The notice provisions require a description of the farm products that includes the crop year. Presumably, crop year in the context of equine collateral must mean the year the horse was foaled and the reasonable description, following established equine lending practice, should include sex, color, sire and dam, and Jockey Club Certificate or other registration number.

It appears that in the late nights before the 1985 Christmas recess, the drafters agreed to a compromise proposal incorporating two separate ideas, but failed to proofread the hybrid statute to determine whether nonsensical applications would result, thus spawning a brood of interpretive conundrums for the lending world to ponder over the coming years. This conjecture gains further

⁸⁸ 7 U.S.C. § 1631(c)(4)(D)(iv) (1985).

⁸⁹ Compare *id.* at § 1631(e)(1)(A) with U.C.C. § 9-402.

⁹⁰ U.C.C. § 9-402.

⁹¹ See Meyer, *supra* note 84, at 156-57. Again, although the regulations clearly state that crop year means foal year in central filing states, they shed uncertain light on the interpretation of the statute in a direct notification state.

credence in light of the requirement that any amendment to notice be "similarly signed"⁹² (there being no requirement that the notice initially be signed by anyone), and by the requirement that the debtor's social security number or tax identification number be included, requirements that make sense in a central filing system but seem to have no function in a direct notice system.

3. *Receipt of the Notice*

Unlike many statutes that focus on the sending of notice as the basis for the parties' rights and obligations, the clear title section requires that, in order for there to be effective notice to potential buyers and commission merchants, it must be "received" by the buyer.⁹³ In an uncharacteristic accommodation to state law, subsection (f) provides that "what constitutes receipt . . . shall be determined by the law of the State in which the buyer resides."⁹⁴ This section does little to bring uniformity to this area: in the equine industry, characterized by potential purchasers not only from many states but from many nations, the secured lender will be required to seek counsel on a variety of state and national laws before it can be comfortable that the notice has been received.

In addition, once the appropriate jurisdiction is identified, lender's counsel will be forced to look for the most analogous local law to apply. Section 1-201(26) of the U.C.C. provides that "a person receives a notice or notification when (a) it comes to his attention; or (b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications."⁹⁵ Other statutes assume receipt if the required method of sending the notice, such as by registered or certified mail, is met.⁹⁶

4. *Amendment and Lapse*

The statute requires that the notice be amended in writing within three months to reflect any material changes. As noted

⁹² 7 U.S.C. § 1631(e)(1)(A)(iii) (1985).

⁹³ 7 U.S.C. § 1631(e)(1)(A).

⁹⁴ 7 U.S.C. § 1631(f) (1985).

⁹⁵ U.C.C. § 1-201(26).

⁹⁶ See, e.g., KY. REV. STAT. ANN. § 355.9-307(6) (Michie/Bobbs-Merrill 1987). One commentator has suggested using this loophole as means to establish privately-owned multi-state filing systems—by legislatively defining "receipt" of the notice by the buyer as filing by the seller in the approved system. Kottman, *A Response to the Federal Food Security Act*, 21 U.C.C. L.J. 263 (1989); see also Sanford, *supra* note 60, at 22-23.

above, the statute imposes the curious requirement that the amendment be "similarly signed and transmitted".⁹⁷ Subsection (e)(1)(A)(iv) also provides that the notice will lapse upon notice from the secured party that it has lapsed or upon the "expiration period of the statement".⁹⁸

5. Preemption

Insofar as the FSA conflicts with state law, the FSA clearly preempts.⁹⁹ But where there is no conflict, state law continues to apply. Because it is not clear whether compliance with the federal requirements is alone sufficient, or whether the lender must also comply with state law, it appears that lenders must meet the requirements of both state and federal law for maximum protection. For example, in the context of a thoroughbred loan, the lender should ensure that its notice to the auctioneer complies with both the requirements of the FSA and those of Ky. Rev. Stat. Ann. (K.R.S.A.) section 355.9-307(6).¹⁰⁰ In addition, it is unclear whether federal law will be deemed to preempt Kentucky's non-uniform K.R.S.A. section 355.9-319, which requires that a secured party having a lien against livestock first pursue its debtor to judgment or dismissal with prejudice prior to foreclosing its lien.

6. The Benefits of Compliance

If proper notice has been given to the buyer or commission merchant, the lender's security interest continues if "the buyer (or the commission merchant) has failed to perform the payment obligations."¹⁰¹ Thus, the statute does provide some level of protection against sales of collateral. But if the buyer does not receive such notice, he obtains clear title. In the event that the buyer does not receive notice, even because of the debtor's failure to furnish the secured party with the required information, the buyer still

⁹⁷ 7 U.S.C. § 1631(e)(1)(A)(iii) (1985).

⁹⁸ *Id.* at § 1631(e)(1)(A)(iv).

⁹⁹ U.S. CONST. art. VI, § 2 (supremacy clause).

¹⁰⁰ KY. REV. STAT. ANN. § 355.9-307(6) (Michie/Bobbs-Merrill 1987)—requires written notice by certified mail, return receipt requested, of the lien, unless written notice by certified mail, return receipt requested, of such lien and the amount thereof, the name and address of the debtor and proper identification of the horse subject to lien are given to the organization prior to the time of the sale.

¹⁰¹ 7 U.S.C. § 1631(e)(1)(B).

obtains clear title, and the secured party has no recourse against the collateral. The statutory protection is far less than complete.

D. *Approaches to Compliance—Central Filing System States*

The FSA permits the states to opt for an alternative to the notice provisions of section 1631(e)(1). Rather than force cautious lenders to comply with the time consuming and burdensome notice provisions, states may establish a qualified central filing system to furnish information regarding liens on agricultural products. This alternative requires secured lenders to file effective financing statements in the central filing system. Buyers must also register to receive periodic listings of farm product liens.

The FSA places the burden of establishing the new central filing system squarely on the states. The statute and the implementing regulations promulgated by the Packers and Stockyards Administration of the Department of Agriculture¹⁰² merely lay out the minimum requirements for the system, and require that the administration certify the system before it goes into operation.

1. *Establishing the Central Filing System*

The central filing system envisioned by the Food Security Act requires lenders who desire to protect their security interest in agricultural collateral to file an effective financing statement with an appropriate state office. Notice filing has always been a basic tenet of the U.C.C. filing system. Filing in compliance with the FSA is similar, but there are important differences. The system operator must prepare and sort the information by county, by farm product, by social security number, by crop year, by federal tax I.D. number, and by name.¹⁰³ The system operator must make the data available to persons requesting it within twenty-four hours.¹⁰⁴ By requiring that the system operator sort the data according to these criteria, Congress hoped to facilitate the search process required of prospective buyers.

In addition to the inquiry procedure, the system operator must prepare "regular" listings of liens, again sorted by product, on agricultural products and distribute them to regular buyers who

¹⁰² 9 C.F.R. § 205.206(c) (1989).

¹⁰³ 7 U.S.C. § 1631(c)(2)(C) (1985).

¹⁰⁴ *Id.* at § 1631(c)(2)(F).

have registered for this purpose.¹⁰⁵ Whether computerization will enable state offices to meet these onerous sorting and listing requirements efficiently remains to be seen.

2. *Listing the Farm Products*

The Packers and Stockyards Administration has promulgated regulations defining different groups of farm products.¹⁰⁶ A state may establish a filing system for all farm products, or limit the system to certain products.¹⁰⁷ However, there can be no miscellaneous categories.¹⁰⁸ Unfortunately, some of the groupings are less than helpful. The approved livestock grouping, which includes certain specified animals, lists pigs, sheep and cattle alongside thoroughbred breeding stock, hardly facilitating the search process for equine lenders.¹⁰⁹ It does appear that states may be permitted to develop more useful groupings, providing that they meet the minimum standards prescribed.¹¹⁰

3. *Preparing the Effective Financing Statements*

The concept of the effective financing statement is similar to that of the familiar UCC-1 financing statement, but the differences pose traps for the unwary. Some states have already designed new forms to provide the necessary EFS information. In most instances, it probably will be necessary for lenders to prepare separate documents and forms to meet a totally separate set of filing requirements.¹¹¹ Again, the FSA does not preempt state rules, including filing requirements, concerning creation and perfection of security interests.

The EFS must set forth the address of the debtor and the secured party, and the signature of each.¹¹² Under U.C.C. case law, a mailing address is sufficient, although some filing officers persist in refusing to accept UCC-1's with post office boxes as

¹⁰⁵ *Id.* at § 1631(c)(2)(E).

¹⁰⁶ 9 C.F.R. § 205.206 (1989).

¹⁰⁷ *Id.* at § 205.206(c).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at § 205.206(a).

¹¹⁰ *Id.* See *supra* note 102 and accompanying text.

¹¹¹ Notwithstanding the author's opinion, one commentator has suggested a combined form for U.C.C. and FSA filings. Sanford, *supra* note 60, at Appendix C. Mississippi has adopted a combined form.

¹¹² 7 U.S.C. § 1631(c)(4)(D) (1985).

addresses, or with out of state addresses. Presumably, the notice function of the FSA filing system is based on the same theory, and a mailing address should be sufficient for the EFS. Nevertheless, the statute does not clarify which address is required, and the lender may wish to include the street address of the principal place of business. The implementing regulations state that the case law of the U.C.C. is relevant in interpreting the scope of section 9-307(1), and particularly what constitutes a person engaged in farming operations, but are silent as to its relevance to other issues.¹¹³

Unlike the UCC-1 requirements, the EFS must contain the social security number, or the federal tax I.D. number of the debtor, to facilitate the searching of information relative to particular debtors.¹¹⁴ Many states are beginning to require these numbers on UCC-1's, too, so this difference is becoming less important.

The EFS must list the farm products subject to security interest by name,¹¹⁵ and must provide sufficient information for the searcher to determine which products are subject to a security interest and which are not.¹¹⁶ This is significantly more precise than the U.C.C. requirement, where it is sufficient merely to put the searcher on notice, and impose a duty of additional inquiry. In addition, a general description of the category of collateral, such as farm products would be sufficient under the U.C.C., but not under the FSA.¹¹⁷

The EFS must specify the county or parish where the products are located, and must also give a reasonable description of the land.¹¹⁸ Although additional information may be required on the EFS, in the discretion of the state, it does not appear that states have availed themselves of this opportunity. In addition, while it appears that an EFS may list multiple products on a single statement, and that a single EFS may list products held in different counties, the administration has refused to confirm that this is so, stating that such matters lie within the discretion of the state's system operator.¹¹⁹

¹¹³ 9 C.F.R. § 205.211(a) (1989).

¹¹⁴ 7 U.S.C. § 1631(c)(4)(D)(iii) (1985).

¹¹⁵ *Id.* at § 1631(c)(4)(D)(iv).

¹¹⁶ 9 C.F.R. §§ 205.207(e), (f) (1989).

¹¹⁷ 7 U.S.C. § 1631(c)(4)(D)(iv) (1985).

¹¹⁸ *Id.*

¹¹⁹ 9 C.F.R. § 205.103(c) (1989).

4. *Buyers*

A buyer of agricultural products may request an oral confirmation with respect to a particular seller or particular farm products, and the state is required to give such confirmation within twenty-four hours.¹²⁰ In addition, a qualified system must provide a registration procedure whereby a buyer of agricultural products can receive periodic listings of security interests.¹²¹ This listing must be available and sorted by social security or I.D. number, by farm products, by crop year, by county, and alphabetically. The listings must be available in paper form, although the state may honor requests from registrants to make the information available in another form, such as microfiche or computer disk. Already some system operators have received complaints from buyers about the incredible volume of paper created by this procedure.

5. *Effect of Filing*

The agricultural lender has increased protection in a state that has established a central filing system. For example, buyers of farm products take subject to security interests where lenders properly file an EFS and the buyer has failed to register with the system operator.¹²² Buyers also take subject to the security interest if they have registered with the secretary of state and have received the listing that specifies that the seller and the farm products are subject to an EFS, if they do not secure a waiver of the security interest.¹²³

But uncertainties cloud the picture for the lenders seeking assurance that their security interest will be preserved. First, as noted above in the context of notice, the statute specifically provides that what constitutes receipt of notice will be determined by state law. Second, a time lag problem exists. The statute mandates "regular" distribution of the information, but does not say how often.¹²⁴ The frequency of distribution is left to the states. But if the distribution is made on a quarterly basis, for example, and the buyer has not received a regular listing naming a new lien at the time of his or her purchase, the buyer appears to take free of the security interest,

¹²⁰ 7 U.S.C. § 1631(c)(2)(F) (1985).

¹²¹ *Id.* at § 1631(c)(2)(E).

¹²² *Id.* at § 1631(e)(2).

¹²³ *Id.* at § 1631(e)(3).

¹²⁴ *Id.* at § 1631(c)(2)(E).

regardless of whether the lender properly filed an EFS.¹²⁵ Even if the listings are circulated weekly, the time lag could be as long as ten days. There is no requirement that a registered buyer update or confirm the information specified on the most recent notice received from the secretary of state.

Unfortunately for buyers of farm products, a state's adoption of central filing does not preclude the use of the notice system.¹²⁶ In some states, grain buyers have already raised an outcry against the blizzard of paper created by the notice requirement. It would be a mistake to think that central filing completely solves this problem. The notice system will remain an available alternative, and a buyer of farm products will have to examine both the listing provided by the system operator and any notice received directly.

III. THE STATES RESPOND TO FSA

Seventeen states have implemented central filing systems in compliance with the Food Security Act:¹²⁷ Alabama, Idaho, Louisiana, Maine, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Vermont, West Virginia, and Wyoming.¹²⁸ One other, Colorado, applied for certification from the Packers and Stockyards Administration in early 1989, but has not yet implemented the system.¹²⁹ Although Arkansas was one of the first states to receive certification in 1986, it discontinued its central filing system in 1989.¹³⁰ Significantly, none of the states presently using the central filing system is a major factor in the thoroughbred industry. Thus, lenders seeking to preserve their lien on equine collateral will for the most part look to the direct notification system for protection.

Most of these states adopted separate EFS systems. Idaho adopted a combined system; a single filing will be effective both for U.C.C. perfection and FSA notification.¹³¹ This approach has been much criticized because of the differing technical requirements

¹²⁵ 9 C.F.R. § 205.208(c) (1989); see also Fry, *Buying Farm Products: The 1985 Farm Bill Changes the Rules of the Game*, 91 *COMM. L.J.* 433 (1986).

¹²⁶ 7 U.S.C. § 1631(e)(2) (1985).

¹²⁷ Telephone Interview with John Casey, Packers and Stockyards Administration (November 1, 1989).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ IDAHO CODE §§ 28-9-307(1), 28-9-401A.

of the two systems.¹³² Mississippi created a new two part U.C.C. form 1-F to be used for farm products filings. The familiar U.C.C. required information to be set forth in part A while FSA required information to be set forth in part B.

Although the FSA requires that the system operator distribute listings of farm products subject to a lien on a regular basis, neither the statute nor the regulations specifies the required frequency. Among the certified systems, frequency varied from biweekly to quarterly;¹³³ monthly is the basis most commonly chosen.¹³⁴

Nearly all states established systems that are capable of tracking all farm product categories identified by the Packers and Stockyards Administration (PSA). Maine will initially use PSA groupings but plans to add new categories. Uniquely, Louisiana has a separate category for "alligators".¹³⁵

None of the more important agricultural states, such as Iowa, Kansas, California, Texas, and Florida have adopted an FSA central filing system. There have been several reasons suggested for this lack of interest: substantial costs for implementation and computerization of a central system; difficulty and complexity of the system; and opposition from growers.¹³⁶ In California, bankers apparently question whether the benefits of the ability to preserve the lien outweigh the costs of implementing the system.¹³⁷ In Kentucky, there has simply been no groundswell of support among the lending community.¹³⁸ Rather than seeking adoption of an FSA central filing system, lenders in Kentucky are more interested in pressing for change from the anachronistic local U.C.C. filing system to local filing with central U.C.C. indexing.¹³⁹ Some states responded to the clear title provisions of the Food Security Act by modifying, or creating, direct notification provisions. Iowa, which had a nonuniform notification procedure prior to the FSA, modified its rules. In response to FSA's specific deference to state law

¹³² Sanford, *supra* note 60, at 25; Clark, *supra* note 19, at 45. Note that a dual system has the effect of making FSA compliance mandatory, a result that seems at odds with congressional intent.

¹³³ Reiley, *supra* note 73, at 267, 269.

¹³⁴ See, e.g., North Dakota, Maine.

¹³⁵ Reiley, *supra* note 73, at 269.

¹³⁶ *Id.* at 271.

¹³⁷ *Id.* at 272.

¹³⁸ Telephone Interview with Brooks Senn, General Counsel, Kentucky Bankers Association (October 30, 1989).

¹³⁹ This alternative possibly will be introduced, with the support of the Kentucky Bankers Association, at the 1990 General Assembly. *Id.*

definitions of receipt, Iowa adopted a rule stating that written notice sent by registered mail, with proper address and postage, was receipt for the purposes of FSA. In addition, the refusal of a person to accept delivery of such notice is considered to be receipt.¹⁴⁰

Many lenders avoid the problems addressed by FSA by requiring that buyers issue checks drawn jointly to borrower and lender. Some states have formalized this procedure. North Dakota, a central filing system state, specifically requires buyers of crops or livestock to issue drafts for payment jointly to the person engaged in farming operations and the secured parties whose names appear on the listing published by the secretary of state.¹⁴¹

One of the criticisms of the direct notification is the potential blizzard of paper caused by a multiplicity of notices. Interestingly, Iowa dealt with this by creating civil penalties to be assessed against lenders that send superfluous notice to buyers that were not listed or otherwise identified by the debtor.¹⁴² Lenders accustomed to making "belt-and-suspenders" U.C.C. filings must be more careful in sending unnecessary lien notifications in Iowa.

IV. STRATEGY FOR COMPLIANCE WITH THE FSA

Will the FSA change the practices of equine lenders? The answer is yes, although the changes have proved less drastic than first feared.¹⁴³ Under prior Kentucky law, a lender's security interest in thoroughbred horses sold at private sale survived the sale of the horses to a third party.¹⁴⁴ After enactment of the FSA, a security interest survives a private sale only if the buyer receives a notice from the secured party complying with FSA prior to sale.¹⁴⁵ Under prior Kentucky law, a lien in thoroughbred collateral survived a sale at auction only if the secured party sent a notice to the auctioneer pursuant to state law.¹⁴⁶ Under the FSA, the lien does not survive the auction sale unless the buyer receives notice con-

¹⁴⁰ IOWA CODE § 554.9307 (1967 & Supp. 1989).

¹⁴¹ N.D. CODE § 41-09-28(11) (Supp. 1989).

¹⁴² IOWA CODE § 554.9307(1) (1967 & Supp. 1989).

¹⁴³ Of course, the FSA affects only transactions where the equine collateral is classified as farm products, and does not reach situations where the collateral is properly classified as equipment, inventory, or general intangibles. See *supra* notes 106-10 and accompanying text.

¹⁴⁴ KY. REV. STAT. ANN. § 355.9-307(6) (Michie/Bobbs-Merrill 1987).

¹⁴⁵ 7 U.S.C. § 1631(e) (1985).

¹⁴⁶ KY. REV. STAT. ANN. 355.9-307(4) (Michie/Bobbs-Merrill 1987).

forming to the federal statute.¹⁴⁷ Nevertheless, commission merchants or selling agents are "subject to the security interest" if they receive notice from the secured party prior to sale.¹⁴⁸ Presumably, this means that state law conversion remedies against the selling agent are preserved if such notification is made.

At least one regulatory agency has indicated that it considers compliance with the FSA to be important from a safety and soundness standpoint. Shortly before the effective date of the FSA, the Comptroller of the Currency, who is charged with the supervision of national banks, issued a banking circular stating that, for bank examination purposes, agricultural loans will be considered to be secured only if the bank has perfected a security interest according to applicable state law *and* has made reasonable efforts to comply with the notification requirements specified by the FSA.¹⁴⁹ It is difficult to estimate the level of zeal with which the regulators will enforce this pronouncement and it appears that neither the Kentucky banking department nor other federal supervisory agencies have followed the Comptroller.¹⁵⁰

Obviously, since the FSA does not preempt applicable state law affecting the creation and perfection of security interests, lenders must continue to obtain written security agreements, and to file appropriate financing statements under the U.C.C. in order to create and perfect their security interests in equine collateral.¹⁵¹ Because Kentucky is not a central filing state, lenders should also include in the security agreement provisions mandated by the FSA: requiring the borrower to submit a list of potential buyers and auctioneers of equine collateral; authorizing the lender to notify such buyers and auctioneers of the lender's security interests; and informing the borrower that sale of encumbered collateral "off-list" can subject the seller to substantial fines.¹⁵² In order to preserve its security interest against buyers of equine collateral, the lender must send the notifications, in the form mandated by the FSA, to the buyers identified by the debtor.¹⁵³ These notices must be sent at least on an annual basis¹⁵⁴ and must be updated within

¹⁴⁷ 7 U.S.C. § 1631(e) (1985).

¹⁴⁸ *Id.* at § 1631(g).

¹⁴⁹ Banking Circular 221, Federal Banking Law Reports (CCH) Para. 51,113B (December 22, 1986).

¹⁵⁰ See Clark, *supra* note 19, at 26-27.

¹⁵¹ *Id.* at 25; see also *supra* note 99 and accompanying text.

¹⁵² 7 U.S.C. § 1631(h) (1985). See *supra* notes 106-10 and accompanying text.

¹⁵³ 7 U.S.C. § 1631(h) (1985).

¹⁵⁴ *Id.* at § 1631(e)(1)(A).

three months of any material change in the required information.¹⁵⁵ Of course, the equine lender should continue to monitor all auction catalogues and either notify all potential auctioneers of its security interest at the time the security interest is created, or at the time it determines that its collateral has been listed for sale. These notices should comply with the provisions of the Kentucky U.C.C.¹⁵⁶ as well as the FSA.

One current lending practice continues to provide practical protection for lenders. Equine lenders commonly request a written assignment of the Jockey Club certificates relating to thoroughbred collateral, and take physical possession of the certificates. The legal significance of this procedure is unclear; one court has held that Jockey Club certificates constitute property separate from the horses themselves.¹⁵⁷ Certainly, the certificates are not documents of title, for the actions legally significant for transfer of ownership might be the drop of the auction hammer, or the execution of a bill of sale, rather than the acquisition of the certificate.¹⁵⁸ Nevertheless, possession of the certificates provides practical protection because experienced thoroughbred buyers will not consummate a purchase of a horse without the Jockey Club papers.¹⁵⁹ Auctioneers will not permit horses to be listed for auction without the certificates.¹⁶⁰ Foals cannot be registered without the papers of its sire and dam. Finally, racing stewards will not permit a horse to be entered in a thoroughbred race unless the Jockey Club Certificate is in the steward's office.¹⁶¹

By requiring an assignment of the Jockey Club certificate, a lender can condition its delivery of this essential certificate to facilitate an auction sale on the auctioneer's agreement to pay sale proceeds directly to the lender. This practice effectively protects the lender from an unauthorized sale or racing of the animal,¹⁶²

¹⁵⁵ *Id.* at § 1631(e)(1)(A)(iii).

¹⁵⁶ KY. REV. STAT. ANN. § 355.9-307(6) (Michie/Bobbs-Merrill 1987).

¹⁵⁷ *Lee v. Cox*, 18 U.C.C. Rep. Serv. 807 (M.D.Tenn. 1976). It has been observed that while this case may have reached an equitable result on the facts, it created an unworkable rule of law. Lester, *supra* note 64, at 1069-70.

¹⁵⁸ *Simpkins v. Ritter*, 204 N.W.2d 873 (Neb. 1973); Miller, *America Singing: The Role of Custom and Usage in the Thoroughbred Horse Business*, 74 Ky. L.J. 781, 820-22 (1985-86). *But see Baram v. Faruglia*, 606 F.2d 42, 43, 46 (3d Cir. 1979).

¹⁵⁹ Lester, *supra* note 64, at 1068.

¹⁶⁰ See, e.g., Consignment Contract of Fasig-Tipton Kentucky, Inc. ¶ 7.

¹⁶¹ The Jockey Club Rule of Racing 73 (1982).

¹⁶² Although racing is usually the reason a horseman is in the business, the risk to the animal, which may be insured against in some circumstances, is an important consideration in its collateral value in the eyes of a lender.

and provides recourse against the auctioneer if it breaches its agreement. A lender may also advise the Jockey Club of its security interest in the horse and its possession of the registration certificate, requesting that no duplicates be issued without the lender's consent. Similarly, in private transactions, the lender can condition its consent to the sale of thoroughbred collateral upon delivery of sale proceeds. These procedures can help provide the maximum protection remaining available to lenders under the FSA.

CONCLUSION

Given the consistent scholarly criticism of the farm products rule and the variety of steps taken by the states to limit or modify its impact, it is not surprising that Congress attempted to inject needed uniformity into transactions involving agricultural products. Unfortunately, the clear title provisions of the Farm Security Act of 1985 fail to provide the elusive uniformity, much less the needed certainty and simplicity. The different systems adopted by different states, the possible integration of FSA filing into U.C.C. filing schemes, and the massive amounts of paper generated by the detailed notice and sorting requirements promise to create vast confusion. The problem is exacerbated by what can only be characterized as sloppy draftsmanship. It is most unfortunate that the problem was not addressed by the more expert draftsmen of the Permanent Editorial Board of the U.C.C.

Meanwhile, cautious secured lenders must take what steps they can to disseminate notice to possible buyers, or, in states that have adopted FSA filing, to file appropriate EFS statements. It is a detailed process demanding careful attention to protect the secured position of the lender. But even if the clear title provision of the FSA eases the burdens on auctioneers and purchasers of fungible farm products, it does no favor to the equine industry. There, the value of each animal, the fact that each animal is registered and possesses a numbered registration certificate that can be held by the lender, thereby putting potential purchasers on notice of the lender's security interest, and the relatively small number of potential purchasers have combined to create a system that worked well without federal intervention.¹⁶³ Rather, the FSA imposes additional

¹⁶³ The Jockey Club and others have urged the adoption of a national filing system for the perfection of security interests in thoroughbreds, somewhat analogous to the Federal Aviation Administration filing system for aircraft. Telephone Interview between Robert S. Handmaker and John Kiett, counsel for The Jockey Club (June 22, 1987); 49 U.S.C. § 1403 (1958).

burdens on both lender and borrower with no countervailing benefit. The probable result will be increased risks and increased costs of administering the loan—risks and costs that will ultimately be borne by the equine borrower.