

corn had been moved to a neighboring state. The federal PACA law did not apply because corn is not a protected “perishable” product.

**A variety of state statutory liens.** State laws are replete with many kinds of statutory liens on personal property. Some require that the lienholder have and retain possession of the collateral. Others require that the lienholder file with a state or local office a notice of its interest in the collateral — the rough equivalent of filing a financing statement. Many give the lienholder priority over secured parties, even those with prior perfected security interests.

Article 9 says nothing about the creation and little about the priority of statutory liens. Its only significant provision is UCC § 9-333, which gives priority to certain *possessory* statutory liens. The priority of nonpossessory statutory liens is left to other law. When the lienholder and the debtor are both located in the same state, the law of that state will, in all likelihood, govern the lien’s priority. But what if the parties are located in different states? Specifically, if the statutory lienor acquires a lien pursuant to the law where the lienor is located, but the debtor is located in a different state, which state’s law governs the priority of the statutory lien? Put another way, can statutory lienors safely rely on the state statutes to protect them if the debtor is located in a different state and litigation or a bankruptcy proceeding will occur in that other state? A recent and very thoughtful decision, *In re Symons Frozen Foods Inc.*, 2010 WL 1416139 (Bankr. W.D. Wash. 2010), indicates not.

**The corn case.** Symons Frozen Foods, located in Washington state, purchases, packages, and distributes agricultural products. In 2008, it purchased corn from Hale Farms, an Oregon enterprise, with payment due in three installments after delivery. Symons paid the first installment but failed to pay the balance of the purchase price, approximately \$150,000. Symons eventually filed for bankruptcy protection and continued to operate its business as debtor-in-possession. Hale Farms sought payment of the debt, claiming under Oregon law a first-priority statutory lien on: (i) the corn sold; (ii) all the inventory of Symons; and (iii) the proceeds from the sale of all agricultural products.

Hale Farms had in fact timely filed in Oregon the notice required to obtain a first-priority statutory lien under Oregon law. Hale Farms had not, however, filed in Washington the notice required to obtain a similar lien under Washington law.

**Seller’s Oregon lien ineffective when the corn moves across the state line.** The court began its priority analysis by noting that neither the Oregon statutory lien nor its Washington counterpart qualifies as an “agricultural lien” under either state’s Article 9. An agricultural lien is a statutory lien that arises in favor of someone who provides

## PERFECTING STATUTORY LIENS IN INTERSTATE TRANSACTIONS

In our prior story, we reported on a recent Fourth Circuit decision holding that unpaid sellers of perishable agricultural commodities trumped secured lenders of the buyer, based on a federal statutory “trust” (PACA). Unpaid sellers of agricultural products may also rely on a variety of statutory lien statutes. In a recent decision from Washington, the bankruptcy court held that the unpaid seller of corn could not rely on such a statute because the

goods or services to a debtor engaged in farming operations. *See* UCC § 9-102(a)(5). In other words, it is something that provides protection to a creditor of a producer of agricultural products. In this case, the creditor was the producer of agricultural products and the debtor was its customer. Because the statutory lien was not an agricultural lien, the choice-of-law rule in § 9-302 was inapplicable.

**Conflict of laws.** The court then turned to traditional conflict-of-laws analysis. Hale Farms argued that there was no conflict between the Oregon and Washington statutes that granted first-priority liens to agricultural producers because the two statutes operated independently. But the court disagreed. It noted, among other things, that if Washington law applied, Hale Farms would have no lien at all because it had not complied with Washington law. In other words, the Oregon statute requires filing in Oregon and notification to people who had filed financing statements in Oregon, whereas the Washington statute requires filing in Washington. The court also noted that each state had a legitimate but different interest in the litigation: Oregon in protecting its agricultural producers and Washington in establishing the priority of liens against a Washington debtor's assets (and presumably in the integrity and utility of its filing system).

Looking to Section 251 of the Restatement (Second) of Conflicts of Laws, the court concluded that the law of the state with the more significant relationship to the parties, the collateral, and the lien was the one whose law should govern. While comment (e) indicates that the location of the collateral at the time the lien attaches should normally have the greatest weight, it goes on to note that this general rule does not apply if the parties understand that the goods will be kept there only temporarily. Applying these principles, the court concluded that Washington had the more significant relationship to the parties and the produce. Although Hale Farms' lien attached in Oregon, the parties understood that the goods would remain there only briefly and then be moved to Washington.

Looking to Section 6 of the Restatement, the court also considered the relevant policies of the states and the needs of the interstate system. These too pointed to the application of Washington law. Each state's statute creates a secret lien at first, but then requires a filing in the office in which UCC financing statements are filed. While Article 9 does not apply to these liens, each state's adoption of revised Article 9 expressed its desire for a centralized filing system that alerts searchers to the presence of liens. Applying Washington law limits the possibility that there might be statutory liens arising out of the law of any number of states and provides greater guidance and certainty for searchers.

**The decision hits the target.** The Washington court was absolutely correct. After all, it is far easier for the agricultural

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producer (or any seller) to know who its customer is and to comply with the law of the one jurisdiction in which its customer is located than for searchers to check for filings in all the jurisdictions in which a prospective debtor's many suppliers are located. In addition, the principle in comment (e) to Restatement § 251 — that the jurisdiction where the collateral is located generally has the most significant interest — was based on the choice-of-law rules under old Article 9. However, those choice-of-law rules have changed. Revised Article 9 generally looks to the law to the location of the debtor. Accordingly, the principle is no longer consistent with the law of any state.

The implications of the court's decision are important for creditors who rely on statutory liens. Statutory liens are great in *intrastate* transactions where there is unlikely to be a choice-of-law issue. In *interstate* transactions, reliance on statutory liens is problematic.

A similar lesson emerged from a pair of decisions in the SemCrude bankruptcy last year. *See In re SemCrude*, L.P., 407 B.R. 82 (Bankr. D. Del. 2009); 407 B.R. 112 (Bankr. D. Del. 2009). In those cases, creditors that relied on nonuniform amendments to Article 9 that granted an automatically perfected purchase-money security interest to producers of oil and natural gas found themselves unperfected when the court ruled that the governing law came from the state where the debtor was located, not from either of the states that had enacted these nonuniform rules. While the decision in those cases was controlled by UCC § 9-301, whereas the decision in *Symon Frozen Foods* was not, each court's analysis was correct.

The lesson of all these decisions is clear. A creditor — whether a lender, seller, or service provider — dealing with a debtor located in a different jurisdiction, should think twice before relying on a statute enacted in the creditor's jurisdiction. In short, a creditor must know not merely who, but where, the debtor is.

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