AGRICULTURAL LAW

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1. Iowa Agricultural Law Update.

Nondisclosure and Misrepresentation

1) *DeShaw v. Farmers Savings Bank*, 912 N.W.2d 499 (Iowa 2017).
   a) The jury found that a banker (defendant) and a financially struggling customer (defendant) worked together to defraud the borrower (plaintiff).
   b) Plaintiff was found to be in default by the bank for failure to make payments on a note, was excused because the note was procured by fraudulent misrepresentation and nondisclosure.
   c) The court found substantial evidence supporting the claim of fraudulent misrepresentation, such as: defendant made representations; the banker and bank aided and abetted the defendant; the representation was false at the time it was made; the representation was material; defendant knew the representation was false when he made it; defendant intended to deceive the plaintiff; the plaintiff acted in reliance; and the representation was a proximate cause of plaintiff's damages.
   d) The court also found evidence supporting the fraudulent nondisclosure claim, such as: special circumstances existed giving rise to the duty of disclosure; the banker knew the plaintiff would be signing a mortgage; the banker concealed or failed to disclose that the plaintiff would be signing a mortgage; the undisclosed information was material to the transaction; the banker knowingly failed to make the disclosure; the banker intended to deceive the plaintiff; the plaintiff acted in reliance; and the failure to disclose was a cause of the plaintiff's damage.

*A special thank you to our law clerk, Kaydon Guymon, Drake Law Student, Class of 2019, for his assistance and research in preparing this outline.

e) Court of Appeals affirmed a judgment in favor of a borrower, against his banker, for claims of fraudulent misrepresentation and nondisclosure. The bank was not entitled to foreclosure on a loan.

Partition in Kind Developments

1) *Newhall v. Roll*, 888 N.W.2d 636, 640 (Iowa 2016).
   a) Iowa is "unequivocal in favoring *partition by sale*."
   b) According to Iowa R. Civ. P. § 1.1201(2), a party seeking a partition in kind has the burden to prove it would be both equitable and practicable.
   c) Partition in kind is not appropriate where separate parcels depreciate the aggregate value.
      i) Iowa law does not allow for "owelty," cash payment to make a partition in kind division fairer.
      ii) This economic-based approach assigns little or no value or significance to intangible characteristics, such as family history or emotional attachment
2) *Wihlm v. Campbell*, 906 N.W.2d 185 (Iowa 2018).
   a) Iowa Court of Appeals allowed a partition in kind because of the sister's sentimental attachment to the home place.
   b) Iowa Supreme Court vacated the Court of Appeals and reinstated the district court opinion which held that the sister failed to prove that the partition in kind would be "equitable and practicable" because "the volatile nature of farmland as affected by the crop prices has made a partition in kind merely guesswork when factoring in the nature and qualities of the land."
3) Iowa Code chapter 651
   a) Division I provides definitions.
   b) Division II provides general provisions applicable to all partitions.
      i) § 651.12: the court shall file an initial decree addressing the following matters:
         (1) The shares and interests of the owners in the property must be established.
         (2) One referee is required to be appointed, unless all the owners of the property agree upon a larger number.
         (3) An appraisal is required to be ordered.
         (4) The decree is required to direct the referee to file a report setting forth the referee's recommendations for completing the partition.
      ii) § 651.16: Partition in Kind Procedures
         (1) Subsection (4): referee to file a report detailing the referee's proposed division.
            (a) Authorizes the referee to "recommend owelty payments as part of the referee's recommendation for the partition in kind."
         (2) Subsections (5) & (6) provide for a court hearing on the report of the referee and decree approving the report.
      iii) § 651.18: Partition by Sale Producers
      iv) § 651.23: Attorney Fees Taxed as Costs
         (1) "If the plaintiff is the losing contestant in a contest arising from any partition, any of the plaintiff's attorney fees relating to such contest shall not be taxed as costs."
   c) Division III provides special provisions that apply only in situations where real estate defined as "heirs property," is partitioned.
      i) If all of the cotenants agree to partition by sale, none of the provisions of Division III are applicable to the partition.

ii) § 651.27: special heirs property procedures. Applicable only where "if a cotenant requests a partition in kind in an action to partition heirs property."
iii) § 651.28: requires the court to file an initial decree appointing a referee and ordering an appraisal. Upon receipt of the appraisal, the court is required to hold a hearing and make a determination of the fair market value of the property.
iv) § 651.29: in cases where a cotenant requi9es partition sale, the cotenants that did not seek a sale have the right to buy out the petitioning cotenant at a price that represents the value of the petitioning cotenant's fractional ownership interest.
v) § 651.30 requires the court to make a determination of whether to order partition in kind or partition by sale.
(1) The court is required to order a partition in kind, unless the court determines that partition in kind would result in "great prejudice to the cotenants as a group."
vi) § 651.31: To make this determination of partition in kind, the court gives consideration to all of the numerous factors listed in 651.31(1).
(1) (2): "The court shall weigh the totality of all relevant factors and circumstances and not consider any one factor in subsection 1 to be dispositive."

d) The new law reorganizes and replaces the current Iowa Code chapter 651and integrates provisions from the Iowa Rules of Civil Procedure.
e) The new Iowa Code chapter 651 means that a tenant in common not wanting to sell the family farm will likely not be forced to do so.
f) A buyout or partition in kind will now be favored disposition if another cotenant seeks a partition by sale.

Oral Option to Purchase/Promissory Estoppel

1) *Kunde v. Estate of Bowman*, No. 17-0791 (Iowa Ct. App. Feb. 21, 2018).
a) Farmer claimed that his neighbor granted him an oral option to purchase his farm in the future. The farmer made substantial improvements to the land. Neighbor sold the farm to a third party and the farmer sued, arguing he was entitled to purchase the farm under the verbal option agreement.
b) Jury found the neighbor to breach the option contract and awarded the farmer damages.
c) District Court directed a verdict for the neighbor, asserting the terms of the agreement were indefinite and no consideration was given.
d) On the second appeal, Court of Appeals reversed and remanded the case, stating an option to purchase did *not* have to be included in a written lease agreement.
e) Doctrine of Promissory Estoppel factors: (1) a clear and definite promise; (2) the promise was made with the promisor's clear understanding that the promise was seeking an assurance upon which the promissee could rely and without which he would not act; (3) the promise acted to his substantial detriment in reasonable reliance on the promise; and (4) injustice can be avoided only by enforcement of the promise. See, *Kolkman v. Roth*, 656 N.W.2d 148, 153 (Iowa 2003).
i) The court further explained that promissory estoppel was based upon the existence of a promise made by one party, not upon the existence of an agreement.
f) Dissent argues that the proper analysis for promissory estoppels was a three part-test from McKee v. Isle of Capri Casinos, Inc., 864 N.W.2d 518, 532 (Iowa 2015): (1) a clear an definite oral

agreement; (2) proof that the plaintiff acted to his detriment in reliance thereon; and (3) a finding that the equities entitle the plaintiff to this relief.

i) The evidence supported there was no definite oral agreement, so the dissenting judge asserted that promissory estoppel was not applicable.

2) Case was remanded. Waiting to see if the Iowa Supreme Court will clarify elements of promissory estoppel.

Wind Turbine Authorization on Agricultural Land

1) *Woods v. Fayette Cty. Zoning Bd. of Adjustment*, 913 N.W.2d 275 (Iowa App. 2018).
2) A wind group applied to the Fayette Cty. Bd. of Adjustment for special use permits to construct three wind turbines. The Board denied the application.
3) The county attorney determined from interpretation of the county's zoning ordinance that the wind turbines would qualify as "electrical transmission and regulating facilities" so as to exempt them from the need for a special use permit. The county administrator approved this interpretation and approved the applications. The City of Fairbank appealed the approval and the Board denied the appeal.
4) District court declared the approvals of the applications as "illegal and void," found that a wind turbine was "not an electrical transmission and regulating facility" within the meaning of the zoning ordinance and further directed the wind group to remove the structures.
5) Iowa Court of Appeals affirmed the district court that a wind turbine that produces electricity is not an electrical transmission and regulating facility.

Syngenta Settlement

1) Proposed Settlement Class (approx. 600,000 proposed members): includes any person in the United States that from September 15, 2013 through the date of preliminary approval of the settlement (if granted), owned any interest in corn in the United States priced for sale, if they fall within one of the sub-classes.
   a) Subclass 1: Producers who did not purchase Agrisure Viptera and/or Agrisure Duracade corn seed.
   b) Subclass 2: Producers that purchased Agrisure Viptera and/or Agrisure Duracade corn seed.
   c) Subclass 3: Any grain handling facility owning interest in corn in the US during the Class Period.
   d) Subclass 4: Any Ethanol Production Facility owning interest in corn in the US during the Class Period.
   e) Subclasses 2 – 4: Limited to $72 million of the $1.51 billion.
      i) <u>Filing Claims in Syngenta Settlement May 11</u>
         (1) Preliminary approval for the $1.51 billion Syngenta settlement was granted on April 10, 2018.
         (2) All claims must have been submitted by October 12, 2018.
         (3) Still preliminary because Syngenta had the opportunity to walk away by October 10, 2018.
         (4) Final approval hearing, after which the court would issue its final approval order, was scheduled for November 15, 2018.

Clean Water Act

1) U.S. Court of Appeals for the Fourth and Ninth Circuits held that a discharge that passed from a point source through groundwater to navigable waters could support a Clean Water Act claim.
2) *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018).

a) Plaintiffs alleged that gasoline remained unrecovered and its seepage into tributaries from groundwater adjacent to a pipeline rupture constituted an ongoing CWA violation and that the CWA prohibited the discharge of pollutants from a point source through groundwater that has a direct hydrological connection to navigable waters. Fourth Circuit agreed, analyzing the definition of "discharge of a pollutant" within 33 U.S.C. § 1362(12)(A).
b) Relied upon the holding of *Haw. Wildlife Fund v. Cnty. Of Maui*, 24 F. Supp. 3d 980 (D. Hawaii 2014).
    i) Ruled that an indirect discharge must be "fairly traceable" from the point source to the navigable water.
c) Fourth Circuit stated that it saw "no functional difference between the Ninth Circuit's fairly traceable concept and the direct hydrological connection concept developed by EPA."

3) These court decisions appear to be favoring CWA jurisdiction over point source discharges passing through groundwater into jurisdictional water.

Minority Shareholders Rights in Farm Corporations

1) *Van Horn v. R.H. Van Horn Farms, Inc.*, 2018 WL 3060240 (Iowa App. June 20, 2018).
a) Plaintiff siblings argued that they were oppressed by the actions of the father and brother, who were the operators of the farm.
b) Iowa Court of Appeals relied upon *Baur v. Baur Farms, Inc.*, 832 N.W.2d 663, 668 (Iowa 2013), which defined the applicable standard of proof as follows: "Majority shareholders act oppressively when, having the corporate financial resources to do so, they fail to satisfy the reasonable expectations of a minority shareholder by paying no return on shareholder equity while declining the minority shareholder's repeated offers to sell shares for fair value."
c) The court rejected the validity of the siblings' proof, crediting a CPA who testified that the actions by the father and brother were reasonable.
d) The court ruled that two shareholders of a family farming corporation did not prove their claim of minority shareholder oppression.

Intentional Interference with an Inheritance

1) *In the Matter of the Estate of Erickson*, No. 17-0430 (Iowa Ct. App. July 18, 2018).
a) Testator executed two wills, one in 2010, dividing estate equally among her three children, and, one in 2011 leaving most of her estate (including all of her farmland) to one of her sons. Shortly after, the other two children petitioned for the appointment of a guardian and conservator. In response, the son who was the main beneficiary of the 2011 will, had a codicil drafted that would reimburse him "at the rate of $1,500 per hour" if anyone contested the will. The testator signed the codicil two days before the guardianship hearing. Medical evidence showed that the testator had "moderate to severe" Alzheimer's.
b) To prevail on a claim of intentional interference with an inheritance, a party need show "fraud, duress, or other tortuous means intentionally used by the alleged wrongdoer in depriving another from receiving from a third person an inheritance or gift."
c) Iowa Court of Appeals affirmed the trial court judgment declaring a testator's 2011 will invalid on the grounds of lack of testamentary capacity and undue influence and finding her son liable for

intentional tortuous interference with a bequest.

Agricultural Seed Suppliers

1) *Jamison v. Coddington*, No. 17-674 (Iowa Ct. App. Aug. 15, 2018).
   a) Defendant landowner entered into an agreement with a third-party farmer to "custom farm" the land the defendant owned. The farmer bought seed and chemical supplies through the Plaintiff seed and chemical company. Plaintiff claimed to have had an oral agreement with the defendant and the defendant failed to pay for the goods and services.
   b) First Issue: whether the defendant had told the plaintiff to send him an invoice for the crop inputs. Court found this irrelevant because the Statute of Frauds applied because the alleged contract exceeded $500 per Iowa Code § 554.2105(1).
   c) Second Issue: whether a partnership or agency agreement existed between the defendant landowner and third-party farmer. Court found there to be no evidence to support a finding that a partnership or agency existed to impute the liability to the defendant landowner.
   d) Iowa Court of Appeals affirmed a summary judgment in favor of a landlord, finding that a seed supplier couldn't recover where the customer was a custom farmer.
   e) This case demonstrates the necessity of a written agreement over an oral contract. Courts will not enforce an oral agreement if it would violate the Statute of Frauds. It also alerts input suppliers to the need to understand who their customers are and to protect their interests by perfecting an agricultural supply dealer lien.

Piercing the Corporate Veil

1) *Woodruff Construction, LLC v. Clark*, No. 17-1422 (Iowa Ct. App. Aug. 15, 2018).
   a) Defendant was the sole owner and director of an Iowa corporation. The plaintiff obtained a $410,067 judgment against the defendant for breach of contract. The plaintiff filed a new action seeking to pierce the corporate veil to recover personally from the defendant after not being able to collect on the judgment.
   b) Iowa law governing piercing a corporate veil: where a corporation is "a mere shell, serving no legitimate business purpose and used primarily as an intermediary to perpetrate fraud or promote injustice, the corporate veil may be pierced." Factors include:
      i) The corporation is undercapitalized;
      ii) It lacks separate books;
      iii) Its finances are not kept separate from individual finances, or individual obligations are paid by the corporation;
      iv) The corporation is used to promote fraud or illegality;
      v) Corporate formalities are not followed; and
      vi) The corporation is a mere sham.
   c) Defendant didn't consider the business or its finances to be a separate entity from himself or his other business, and, as such, the court ruled the corporate veil should be pierced.
   d) Corporate protections are only available to businesses that follow the laws establishing the protection. To protect owners from liability, they must keep business and personal finances separate.

Grain Leg Nuisance Abatement

1) *Carroll Airport Commission v. Danner*, No. 17-1458 (Iowa Ct. App. Sept. 12, 2018).
   a) Carroll County farmer built a grain leg in 2013 after receiving permission under the county zoning agricultural exemption and the farmer complied with FAA requirements.
   b) District court found the tower to be a nuisance and the safety measures the farmer took were inapplicable.
   c) Iowa Code § 329.1(2) provides that any structure that exceeds federal obstruction standards and obstructs the space required for the flight, landing, or take-off of a plane is considered to be an "airport hazard." § 329.2 provides that "airport hazards" are a public nuisance that must be removed.
   d) The court found that while there is conflict preemption in a federal statute, the state law merely imposes a stricter requirement than the federal statute and the removal of the grain tower from the airport's protected airspace would comply with the federal goal of aviation safety.
   e) The cost of removing the grain leg will cost around $350,000. Additionally, the judge ordered a $200 fine for every day the structure remained standing. The farmer is appealing to the Iowa Supreme Court.

For a complete listing and summaries of agricultural related court decisions and other agricultural law resources in Iowa, see the Iowa State University Center for Agricultural Law and Taxation website: http://www.calt.iastate.edu/

Legislative Update

1) Installing Cattle Guards (SF 449) – Signed by Gov. 04/17/2018
   a) Allows a landowner to install a cattle guard on a street or highway if the street or highway is a dead end, partially or completely located in a floodplain, serves no residence, and exits to a secondary road.
   b) The landowner installing the cattle guard must own the property on both sides of the street.
   c) The guard can be built if flooding impairs the landowner's ability to use fence to keep cattle in.
   d) All conditions must be met before the guard can be installed.
   e) The guard must be installed at the landowner's expense and must be at least 66 feet from the secondary road.
   f) If the landowner does install the cattle guard, they will not be required to install or maintain a fence and shall not be liable for injury or liability for placement of the cattle guard.
   g) If the cattle guard is in place pursuant to this bill, the landowner will no longer be liable under Chapter 169C for cattle straying onto the street and will not be subject to the habitual trespass provisions in Chapter 169C.

2) Water Quality (SF 512)
   a) The bill relates to water quality by modifying an existing wastewater treatment program, establishing new water quality programs, providing for transfers and approps related to water quality, creating a water service excise tax and related sales tax exemption, and providing for other changes properly related to water quality.
   b) Establishes an edge-of-field infrastructure program and an in-field infrastructure program for agriculture water quality, with funding on a cost-share basis. Requires the programs to be

administered in accordance with the Iowa Nutrient Reduction Strategy. Requires the Soil & Water Division to enter into agreements with landowners for projects. Allows 4% of the funding to be used for administrative purposes by the Soil & Water Division. Establishes reporting requirements and confidentiality.

c) **Wastewater fund**: Allows drinking water programs, including protection programs for water, to qualify for the IFA wastewater treatment program. Strikes a requirement that the communities qualify as disadvantaged. Makes additional management systems eligible. Adds annual reporting requirements and creates a program review committee.

d) **Urban Water**: Creates a Water Quality Urban Infrastructure program. Allows demonstration program on decreasing erosion and storm-water reduction. Makes financing on a cost-share basis.

e) **Tax:** Exempts metered water sales to residential customers from the sales tax and establishes a 6% excise tax. Adds a sunset date for the tax. Transfers the funds from July 2018-August 2019 at 1/6 of the revenues to the water quality financial assistance fund and 1/6 to water quality infrastructure fund. Transfers the funds after that date through the 2029 repeal at 1/2 the revenues to the water quality infrastructure fund. Appropriates money from the water quality assistance fund (40% for IFA for wastewater/drinking water assistance; 45% IFA water quality financing program; 15% to Soil & Water Division for urban infrastructure projects). Transfer $15 million in wagering tax revenues now going to Vision Iowa to the Water Quality fund after 2020.

f) **Other**: Includes findings on the Iowa nutrient reduction strategy. Deems that agricultural storm water or irrigation return flows are not point sources. Adds intent language on the reduction of nutrients in surface waters.

3) Critical Infrastructure Sabotage (SF 2235) – Signed by Gov. 04/17/2018

a) Makes the sabotage of critical infrastructure a Class B felony and punishable by no more than 25 years and a fine of no less than $85,000 but no more than $100,000. Defines such infrastructure to include various utilities, infrastructure for oil and gas, electricity, water, telecommunications, broadband and other related services.

4) Governor's Tax Bill (SF 2417) – Signed by Gov. 05/30/2018

a) Makes the Governor's proposed individual income tax cuts and phases in a reduction of tax rates and an increase in bracket amounts for tax year 2019. The bill reduces the tax rate in each bracket, reduces the brackets to 8 from 9, and increases the taxable income amount in the top bracket to $150,000 or more. Amounts will be indexed for inflation and increased each year beginning in tax year 2020. The bill includes triggers to be hit for activation, indexing and an end to federal deductibility. The bill also strikes the Alternative Minimum Tax and increases standard deductions

b) Coupling and Section 179: The bill also includes provisions on coupling with federal taxes, including provisions for partial coupling in regard to Section 179 expensing. (Under current law, for Iowa tax purposes, the maximum deduction for Section 179 per tax year is $25,000 and the maximum deduction is incrementally reduced when a taxpayer's eligible property placed in service during the tax year exceeds $200,000.) The bill couples for Iowa individual income tax purposes with the changes made in the federal tax bill beginning in 2019, but limits the maximum deduction to $100,000 and sets the investment limitation at $400,000.

c) The bill does decouple for Iowa individual income tax purposes from the federal additional first-year depreciation allowance (bonus depreciation).

d) 529: Allows K-12 expenses to be paid through a 529. Allows tax-free transfers to an ABLE plan.

e) Sales tax: Imposes the sales tax on digital books and other related products. And information services. Makes other changes to sales tax exemptions. Makes changes related to determining nexus for the sales tax.

f) Effective dates: The bill includes different effective dates for various provisions, with most being effective as of January 2019.

5) Fence Viewing (HF 2340) – Signed by Gov. 04/04/2018

a) Proposes to amend Iowa Code Ch. 359A which governs the construction and maintenance of partition fences.
b) Conflicts of Interest: The bill provides for a fence viewer who has a conflict of interest involving a fence dispute must disclose the possible conflict of interest to the parties and other fence viewers.
c) Requires the fence viewer to be disqualified voluntarily or by a vote of the other trustees for an actual conflict of interest and replaced.
d) Requires the county supervisors to appoint a substitute viewer for a township trustee viewer who is disqualified.
e) Also allows the board of supervisors to enact ordinances providing for circumstances which would create a conflict of interest.
f) However, the fence viewer may participate if the parties are notified of the conflict and sign a waiver. Unfeasibility:
g) The bill allows fence viewers to determine that building a fence is not feasible based upon a site evaluation and a determination of characteristics of the land.
h) If there is no suitable area available, the trustees must assist the parties in reaching an agreement or if that fails to take account of the land's characteristics.
i) The order shall require the fence be erected at a feasible location that is closest to the adjoining party's property boundary.

6) Water Quality (HF 2440) – Signed by Gov. 05/05/2018

a) Makes changes to SF512 by eliminating provisions requiring drainage districts to utilize installation of edge of field infrastructure.
b) As it relates to the wastewater treatment financial assistance program, the bill provides that the priority for grants for installation and upgrade of drinking water should be given to communities employing technologies to address Iowa's nutrient reduction strategy and to those communities whose drinking water facilities and systems use surface waters that are on the impaired waters list of the state.
c) Allows a specified industry to participate in the water quality financing program.
d) Defines a specified industry as an entity engaged in an industry which is or will be required by the nutrient reduction strategy to collect data on the source, concentration and mass of total nitrogen or phosphorus in its effluent or an entity implementing technology or operational improvements to reduce nutrients in its discharge.
e) Amends the agriculture infrastructure programs created in SF512 by defining surface waters to include those on the state's impaired waters list that are used as a drinking water supply.
f) Current law appropriates moneys from the ag management account of the groundwater protection fund to ISU Science and Technology for collection and use of data.
g) This bill requires that any remaining money be used to finance related education and outreach programs.

2. Wind Energy Agreements.

Similar to manure easements/application agreements, wind energy agreements allow the use of land for a limited purpose while the landowner retains the use of the land for farming. Sometimes called leases, wind energy agreements present both contract issues and land use issues. A landowner enters into an agreement to allow the construction and operation of a wind powered generator on their land for payment.

As with any agreement, both parties must consider their own rights but also understand that the agreement must work for both parties, or there won't be a workable deal.

In addition to general contract, lease and easement issues, some of the major issues landowners should consider are:

a. Negotiation as a group. Unlike many contractual arrangements, wind energy agreements depend upon a minimum level of interest and participation by landowners in a geographic area. Thus, if landowners in that area negotiate payment and other contractual terms as a group, their negotiating power is greatly increased.

b. Legal fees. Landowners may be able to negotiate for payment of their legal fees by the developer for reviewing and negotiating the terms of the agreement. Of course, the attorney in this situation must be mindful of the ethical implications.

c. The length of the agreement. Some early agreements were for very long periods of time, some approaching perpetual. Other agreements are for 10 to 30 year periods. Obviously, landowners need to be very careful in entering long term agreements unless they have reasonable rights of termination and/or payment escalator provisions. In addition to the length of the agreement, any rights of extension of the term by either party unilaterally must be carefully evaluated. .

d. If the feasibility of wind energy in an area is not known, a developer may ask for an option for access to the property to investigate the feasibility of constructing wind turbines. This may be a separate agreement or included in the lease/agreement itself. The terms of this option are critical so that the landowner is not tied up in the option and prevented from exploring an agreement with another company if the holder of the option does not proceed.

e. Is the agreement contingent upon the developer obtaining a minimum number of acres in the area? If so, landowners may want a clause limiting the amount of time the developer has to obtain the minimum number of acres.

f. Do the access easements for underground cables, etc. continue even if no wind turbines are placed on the land? Most landowners don't want the disruption to their land and crops if unless they get the economic benefit of wind turbines.

g. The form and methods of payment vary from fixed rate (per turbine, per acre of land used, or per acre of land subject to the agreement) to a combination of fixed payments and variable payments based on the production of wind energy. Some agreements also include payments for lineal feet of cable that is on the landowner's property. If so, make sure the agreement is clear as to whether the payment is for each individual cable or if it is the same per foot no matter how many cable are in the same trench. Remember, relatively small changes in the terms of variable payments based on production can result in large differences in the amount of payment over the life of the agreement.

h. Landowners should consider a "most favored nation" clause that provides that the developer must offer any more favorable terms to the landowner that may be subsequently offered to other landowners in the project area. Also, landowners may want to request a first right of refusal clause if a competing developer offers an agreement with better terms to landowners in the project area.

i. For long term agreements, landowners should strongly consider a term for increasing the payment at various stages in the term of the agreement. Examples include a "reopener" clause, a CPI adjustment clause, or escalator clauses based on revenue from the turbines. Any time period to determine a payment adjustment clause should begin when the agreement begins, not a later date such as when energy is begun to be produced.

j. One of the major issues is the location of the wind turbines and how much land will be used by the developer for each turbine. Agreements often give complete control over these matters to the developer. While this is understandable from a wind energy production standpoint, landowners either need some control over the location and the amount of land, or a method of being compensated according to the type and amount of land being used by the developer. The agreement should specify the type of equipment that will be installed, the exact location of the equipment, and the amount of land that will be used. Points of ingress and egress should be clearly agreed to before signing the agreement. Some agreements give the landowner authority to approve the final site plan for location of turbines and other equipment and allow the agreement to terminate if the landowner rejects the developer's site plan.

k. Does the agreement restrict a landowner's use of the property to certain uses, such as agricultural and therefore prohibit construction of residences, etc.? Most agreements prohibit the landowner from obstructing the operation of the turbines. While this is understandable from the developer's perspective, landowners must carefully evaluate how this may affect the future use of their property for agricultural and other uses. These non-obstruction covenants in an agreement make knowing where the turbines will be located very important to the landowner.

l. Compensatory payments to landowner. Payment for crop damage, tile line damage, fence repair or replacement, or other damage to the land during exploration, construction and any future activities on the property. The developer must be required to replace all topsoil on land disturbed during construction but which can be farmed after construction. A clause should be included that covers how the loss of any federal farm program payments will be handled.

m. What rights does either party, particularly the developer, have to terminate the agreement? Landowners should consider a clause allowing them to terminate the agreement if no turbines are built within a reasonable amount of time. If the agreement includes a force majeure clause in favor of the developer, landowners should negotiate for the clause to not apply to the developer's non-monetary obligations and require the developer to continue to pay any minimum payments under the agreement.

n. Is the landowner prohibited from entering into agreements with other companies on other parcels of land? Some agreements expressly allow landowners to have their own turbines for personal energy needs.

o. Does the agreement address the filing of mechanics liens?

p. Have mortgage holders, contract vendors, or other lien holders been made aware of and consented to the agreement? Does the developer require nondisturbance agreements?

q. Does the agreement require the developer to remove all equipment and return all land to a farmable condition upon termination of the agreement? Some agreements only require the developer to remove below ground concrete or other construction materials to a certain depth and not all of the concrete, etc.

r. The agreement should require the developer to post a bond or any other type of financial assurance that will be available to the landowner for returning the land to a farmable condition upon termination of the agreement. Many developers want to delay the posting of this bond until later in the term of the agreement. Landowners should negotiate for posting of this bond as early in the agreement as possible, preferably no later than the tenth year of a long term agreement. The landowner should also address priorities to that bond payment vs. secured lenders.

s. Does the agreement address potential liabilities of each party for actions such as nuisance lawsuits?

t. Can either party, particularly the developer, assign the agreement? If so, landowners should be careful of and/or be aware of potential assignment to a developer's affiliated entities that may not be as financially sound as the developer. Landowners need to consider how the agreement will be affected by any transfer of their land.

u. Does county zoning or other county regulation apply to the wind turbines?
v. Many agreements require that the terms be kept confidential. Landowners may want to negotiate to have such clauses removed, or at least made less restrictive. Landowners must be aware of the requirements of the confidentiality clauses to avoid violation.
w. Who is liable for property taxes on the wind energy equipment and improvements?
x. Who is responsible for insurance, both property casualty and liability?

References on this topic include:
a. Professor Neil Hamilton, Drake University Ag Law Center. Professor Hamilton is a leading resource on this topic. His information includes his outline entitled "Roping the Wind: Legal Issues in Wind Energy Development in Iowa", Oct. 17, 2008, Iowa State Bar Association 2008 Environmental & Natural Resources Law Seminar and materials from a Drake Ag Law Center and ISBA Ag Law Section seminar on Nov. 13, 2008 entitled "Wind Rights Legal Forum: Improving Wind Agreements to Protect Landowners."
b. "Negotiating Wind Energy Property Agreements", Farmers Legal Action Group, http://www.flaginc.org/topics/pubs/arts/WindPropertyAgrmnts2007.pdf
c. Professor Roger McEowen, Iowa State University, Center for Agricultural Taxation and Law, "Wind Energy Production: Legal Issues and Related Concerns for Landowners", http://www.calt.iastate.edu/pubs/WindEnergyProduction.pdf
d. Shannon L. Farrell, Oklahoma State University Department of Ag Economics, "Aren't Lawyers Supposed to be Windy Anyway?, The Technical and Ethical Challenges for Lawyers in Wind Energy Issues", outline presented to the American Agricultural Law Association Annual Symposium on Oct. 21, 2011, Austin, Texas (this outline contains an extensive list of references on wind energy agreements).
e. H. Alan Carmichael, Wetsel & Carmichael, LLP, Sweetwater, Texas, and Shannon L. Farrell, Oklahoma State University Department of Ag Economics, "Wind Energy Leasing: Representing Landowner Interests", outline presented to the American Agricultural Law Association Annual Symposium on Oct. 21, 2011, Austin, Texas.

3. Honomichl et. al. v. Valley View Swine, LLC and JBS Live Pork, LLC.

A. Statutory Nuisance Defenses.

i. Constitutionality of Iowa's Ag Area Law – Iowa Code section 352.11.
Bormann v. Board of Supervisors of Kossuth County, 584 N.W.2d 309 (Iowa 1998). The Iowa Supreme Court ruled that Iowa's Agricultural Area Law nuisance defense (Iowa Code section 352.11(1)(a)) was a per se taking of neighbors' private property. In its analysis, the court first found that the property interest involved was an easement. *Id.* at 315-316. "This is because the immunity allows the applicants to do acts on their own land which, were it not for the easement, would constitute a nuisance." *Id.* at 315. The court concluded: "In enacting section 352.11(1)(a), the legislature has exceeded its authority. It has exceeded its authority by authorizing the use of property in such a way as to infringe on the rights of others by allowing the creation of a nuisance without the payment of just compensation." *Id.* at 321.

The court ruled "When all the varnish is removed, the challenged statutory scheme amounts to a commandeering of valuable property rights without compensating the

owners, and sacrificing those rights for the economic advantage of a few. In short, it appropriates valuable private property interests and awards them to strangers.. . . [W]e are convinced our responsibility is clear because the challenged scheme is plainly -- we think flagrantly -- unconstitutional." *Id* at 322.

ii. Constitutionality of Iowa's Animal Feeding Operations Nuisance Defense – Iowa Code section 657.11.

(1) *Gacke v. Pork Xtra, LLP*, 684 N.W.2d 168 (Iowa 2004).

Iowa's most recent right-to-farm law was adopted in 1995 and amended in 1998 and applies to both open feedlots and confinement operations. To qualify for the nuisance defense, the alleged nuisance cannot arise out of a failure of the livestock operation to comply with federal or state law. In addition, to defeat the defense the plaintiff must prove the animal feeding operation unreasonably and for substantial periods of time interferes with the person's comfortable use and enjoyment of the person's life or property and failed to use existing prudent generally accepted management practices reasonable for the operation. Iowa Code section 657.11(2)(b). This nuisance defense applies regardless of the established date or expansion of the operation, i.e., the livestock operation does not have to be "first in time." Activities involved with livestock production are covered by the defense, including the treatment, disposal, transportation, and application of manure. Iowa Code section 657.11(4).

The Iowa Supreme Court first noted that for purposes of constitutional analysis, section 657.11 is not distinguishable from the Ag Area Law nuisance defense. *Id.* at 172-173. The Court ruled that the exception to the nuisance defense in the Ag Area law for negligent operations is analogous to the exception in section 657.11 for failure to use "existing prudent generally accepted management practices reasonable for the operation." *Id.* The Court ruled that based on *Bormann's* interpretation of the Ag Area Law, "the reasonable-and-prudent-management-practices exception" in the AFO nuisance defense does not prevent it from being an unconstitutional taking. *Id.*

Although the Court stated it was not "retreating" from its decision in *Bormann,* it did rule that section 657.11 is a taking only as to any reduction in property value of a neighbor's residence. *Id.* 174-175. The nuisance defense can apply to all other non-property value type damages (loss of personal use and enjoyment, mental distress, punitive damages, etc.). *Id.*

The Court then ruled that section 657.11 is unconstitutional in this case because it violates the Inalienable Rights Clause of the Iowa Constitution (All men are, by nature, free and equal, and have certain inalienable rights — among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.). *Id. at 175-179.* The Court ruled that this constitutional provision is not absolute and is subject to "reasonable regulation by the state." *Id.* While the Court noted the

public purpose of section 657.11 in protecting livestock producers from defending nuisance lawsuits, it ruled that in this case section 657.11 was unduly oppressive and outweighed the public purpose of the law. *Id.* at 178-179. The Court noted: "Unlike a property owner who comes to a nuisance, these landowners lived on and invested in their property long before Pork Xtra constructed its confinement facilities." *Id.* at 179. The Court also ruled that the law did not provide any benefit to the Gackes other than the public benefit. *Id.* at 178-179. The Court ruled that the nuisance defense could not be relied on in this case, but expressed no opinion "as to whether the statute might be constitutionally applied under other circumstances." *Id.* at 179.

(2) *McIlrath v. Prestage Farms of Iowa,* 889 N.W.2d 700 (Iowa Ct. App. Nov. 23, 2016). See the discussion of district court decisions below for the background facts of this case. On appeal, the court affirmed the district court's ruling finding section 657.11 unconstitutional under the holding of *Gacke.* The court agreed with the district court that the facts in this case were substantially similar to the facts of *Gacke* so that section 657.11(2) was unconstitutional as applied to this case. McIlrath received no benefit from section 657.11. Further, McIlrath lived on and made substantial improvements to her property long before Prestage Farms constructed the hog confinement.

In addition, the court rejected Prestage Farms' claims for a new trial based on irregularity and misconduct at trial. Specifically, the court found:

(a) Prestage Farms failed to preserve error regarding McIlrath counsel's statements in closing appealing to the passions and prejudices of the jury when it did not object nor file a motion for mistrial.

(b) McIlrath counsel's attempted questioning of Prestage Farms' witness about an email that was ruled inadmissible in a ruling on a motion in limine was not grounds for a new trial because Prestage Farms' counsel at trial asked only for relief that the trial go forward without reference to the inadmissible email.

(c) McIlrath counsel's questioning of one of McIlrath's neighbor witnesses about mediation was not grounds for a new trial based on settlement efforts since there was only a brief mention of mediation and McIlrath's counsel moved on to a new subject as directed by the trial judge.

(d) McIlrath counsel's questioning of Prestage Farms' general manager about the Iowa Code definition of nuisance was not grounds for a new trial. Upon objection by Prestage Farms' counsel, the trial court sustained the objection and, out of the presence of the jury, admonished McIlrath's counsel that what he was doing was improper and borderline unethical. Prestage Farms counsel did not request a mistrial and the appeals court rejected Prestage Farms' request on appeal for a new trial because it did not move for a mistrial and because the trial judge had instructed the jury that the court is responsible for instructing as to Iowa law.

(e) McIlrath counsel's questioning of Prestage Farms' general manager about his position that McIlrath should sell her home or attempt to sell her home was not grounds for a new trial. After the trial court sustained Prestage Farms' objection because this was the basis for a motion for summary judgement but mitigation of damages had not been raised in the case, McIlrath's counsel terminated the cross examination of the witness. The appeals court denied the motion for new trial because the termination of the cross examination was the relief requested by Prestage Farms at trial.

Finally, the appeals court rejected Prestage Farms' claims that the verdict was not supported by sufficient evidence in the record or was contrary to law and that the damages were excessive. The Defendant's application for further review was denied by the Iowa Supreme Court.

(3) *Honomichl et. al. v. Valley View Swine, LLC and JBS Live Pork, LLC,* 914 N.W.2d 223 (Iowa 2018). On June 22, 2018 the Iowa Supreme Court ruled that in nuisance cases against animal feeding operations trial judges must rule on the constitutionality of Iowa Code section 657.11 for each individual plaintiff. In this interlocutory appeal the trial court in this case had ruled that the nuisance defense was unconstitutional as to all of the plaintiffs. The Supreme Court ruled:

> "We now reverse the district court ruling granting the plaintiffs' motion for partial summary judgment. Specifically, the district court found that section 657.11(2), as applied to the plaintiffs in this case, violated article I, section 1. However, the district court did so without making specific findings of fact relative to any plaintiff. Without this fact-based analysis, we are unable to resolve this issue on this record. We therefore reverse and remand the case to the district court for further proceedings consistent with this opinion." *Id.* at 227.

In this interlocutory appeal the Iowa Association for Justice filed an amicus curiae brief and participated in oral argument in support of the plaintiffs and the Iowa Pork Producers Association and the Iowa Farm Bureau Federation filed an amicus curiae brief and participated in oral argument in support of the defendants.

The Iowa Supreme Court ruled that each plaintiff must prove the nuisance defense is unconstitutional. To do that, each plaintiff must prove three factors established in *Gacke.* Each plaintiff must prove, either in a pre-trial hearing or at trial, that they:

- "Received no particular benefit from the nuisance immunity granted to their neighbors other than that inuring to the public in general";
- "Sustained significant hardship"; and
- "Resided on their property long before any animal operation was commenced" and that they "spent considerable sums of money in

improvements to their property prior to construction of the defendant's facilities." *Id.* at 235.

The Court recognized that Iowa law governing confinement feeding operations had changed since *Gacke*, stating:

> "The legal landscape governing CAFOs has changed since we decided Gacke. In Gacke, the plaintiffs lived approximately 1300 feet, or one-quarter mile, away from the CAFOs. 684 N.W.2d at 171. The necessary separation distance for the same size facility today exceeds that, as the minimum distance between the CAFOs and adjacent landowners at issue is 1875 feet. See Iowa Code § 459.202(b) (2016). And here, the separation distance from both Site 1 and Site 2 to the nearest home in this case almost doubles the statutorily required separation distance between the CAFOs and the closest plaintiffs—the Honomichls—who live approximately .67 miles or 3537 feet from the closest CAFO. Under the current regulatory framework, the Honomichls have the power to prevent the construction of a CAFO on 253.55 acres of land surrounding their property—much of which they do not own but are given a certain amount of power over due to the regulatory scheme governing separation distances. See id.
>
> Moreover, the legislature has since enacted more requirements governing the construction of CAFOs including a manure management plan. See id. § 459.303. Alongside these requirements, the legislature has established a master matrix that the Iowa DNR must adopt "to provide a comprehensive assessment mechanism in order to produce a statistically verifiable basis for determining whether to approve or disapprove an application for the construction" or expansion of a CAFO. Id. § 459.305. Likewise, the Iowa DNR has established standards for formed manure storage to contain the manure and its corresponding odor. Iowa Admin. Code r. 567—65.15(14)." *Id.* at 236-237.
>
> The Court, however, refused to overrule the *Gacke* decision stating:
>
> "Despite these significant statutory and regulatory changes, the analytical framework set forth by the *Gacke* factors, even with its limitations, are still compatible with present conditions. Changes in the regulatory scheme limiting CAFOs would appear to benefit the adjacent landowners, at least in theory. But the fighting issue remains whether section 657.11(2), as applied to the particular facts of the instant case, is constitutional." *Id.* at 237.

Two concurring justices agreed that the trial judge failed to properly apply the three factor constitutionality test to each plaintiff, but would have went further

than the other five justices and would eliminate the *Gacke* three factor test. *Id.* at 239. The two concurring justices emphasized:

- " . . . a decade after Gacke, we unanimously held that the deferential rational-basis test is to be applied for challenges under the inalienable rights clause. City of Sioux City v. Jacobsma, 862 N.W.2d 335, 352 (Iowa 2015). In my view, this is the test that should be applied on remand to adjudicate the constitutional challenge to section 657.11(2). In the last century, Gacke is the only Iowa case sustaining a constitutional challenge under the inalienable rights clause. See Todd E. Pettys, The Iowa State Constitution 67–68 (2d ed. 2018) (acknowledging that "[b]ecause the standard of review under Section 1 is highly deferential to government actors, it is far easier to find cases in which Iowa courts have rejected inalienable-rights claims"). Jacobsma restores the proper deference to the policy choices of the elected branches."
- "The legal landscape has changed since 2004. . . . And the legislature and Iowa Department of Natural Resources (IDNR) have imposed more stringent regulations on the construction and operation of CAFOs. . . . The CAFO loses its statutory defense if it fails to comply with these more stringent state law requirements or those imposed by federal law."
- "*Gacke* was wrongly decided. CAFOs may be controversial, but it is not our court's role to second-guess policy choices of the elected branches of government."
- "All other states have passed such right-to-farm laws, and no other state supreme court has held them even partially unconstitutional. To the contrary, other courts have uniformly rejected constitutional challenges to these statutes. *Gacke* stands alone." *Id.* at 239.

4. Recent Ag Nuisance Jury Verdicts and Upcoming Iowa Ag Nuisance Trials.

i. Illinois

- *Marsh et. al. v. Sandstone North, et. al.*, May 24, 2016, Scott County, Illinois
  - 15,000-head swine finisher (on 2 farms ¼ mile apart)
  - Jury verdict – no nuisance
  - 10 plaintiffs living in five residences from .1 to 1.6 miles away

ii. Mississippi

- *King v. Peco Foods, Inc.*, March 15, 2017, Monroe County, U.S. District Ct., No. District
  - poultry, broiler
  - Jury verdict – no nuisance or negligence
  - 55 plaintiffs

iii. Minnesota

- *Winter et. al. v. Gourley Premium Pork, LLC et. al.* December 15, 2017, Todd County, Minnesota
  - 3,200-head sow farm

- Jury verdict – no nuisance
- 6 plaintiffs living in four residences from ¼ to ½ miles away

iv. In three recent court cases in U.S. District Court in North Carolina, juries returned verdicts against Smithfield Foods finding their contract hog operations a nuisance and awarding a total of $97.88 million in compensatory and punitive damages.

- *McKiver v. Murphy-Brown, LLC*, Bladen County
  - 15,000-head swine finisher
  - Nuisance jury verdict on April 26, 2018
  - 10 plaintiffs, each awarded $75,000 compensatory damages and $5 million punitive damages
  - Punitive damages capped by N.C. statute at $250,000 each
  - Total judgment: $3.25 million
- *McGowan v. Murphy-Brown, LLC*, Duplin County
  - 4,740-head swine finisher (on 2 farms)
  - Nuisance jury verdict on June 29, 2018
  - 2 plaintiffs, each awarded $65,000 compensatory damages and $12.5 million punitive damages
  - Punitive damages capped by N.C. statute at $250,000 each
  - Total judgment: $630,000
- *Jacobs v. Murphy-Brown, LLC*, Pender County
  - 5,646-head swine finisher (on 2 farms)
  - Nuisance jury verdict on August 3, 2018
  - 6 plaintiffs, awarded compensatory damages of $5 million to each of 2 plaintiffs, $4 million to one plaintiff, $3 million to each of 2 plaintiffs, and $3.5 million to one plaintiff and $75 million punitive damages.
  - Punitive damages capped by N.C. statute at $15 million to each of 2 plaintiffs, $12 million to one plaintiff, $9 million to each of 2 plaintiffs, and $10.5 million to one plaintiff
  - Total judgment: $94 million

Smithfield is appealing the verdicts. It has also been reported that Smithfield is removing its pigs from the three farms that suffered the jury verdicts. Twenty three more nuisance cases are scheduled against Smithfield in North Carolina in the coming months with the next case rescheduled for November and December, 2018.

Upcoming ag nuisance lawsuit trials in Iowa:

- Louisa Co. – swine finishing — jury trial scheduled 12/ 4/18
- Buchanan Co. – cattle feedlot — jury trial scheduled 1/9/19
- Henry Co. – swine finishing — jury trial scheduled 1/29/19
- Poweshiek Co. – swine finishing — jury trial scheduled 2/5/19
- Jefferson Co. – swine finishing — jury trial scheduled 6/18/19
- Des Moines Co. – swine finishing — jury trial scheduled 6/25/19
- Wright Co. – poultry egg laying — jury trial scheduled 10/21/19
- Wapello Co. – swine finishing — jury trial not yet scheduled
- U.S. District Court - swine finishing in Davis County — jury trial not yet scheduled
- Iowa Co. – swine finishing — jury trial not yet scheduled

5. Agreements for Construction of Livestock Operations, Including Manure Easement/Agreement Terms and Litigation.

As discussed below, crop farmers' interest in manure for fertilizer, but a reluctance to engage in livestock production themselves, has led many crop farmers to seek out manure from livestock producers. Livestock producers without a land base often are interested in purchasing or otherwise securing access to a parcel of land to construct a livestock operation and provide the manure to the crop farmer selling or otherwise providing access to the parcel of land. The legal agreements required in such a transaction may include (of course, depending on the facts of each transaction, not all of these agreements are required in all transactions):

1. Land deed or long term ground lease/building severance agreement and footprint lease
    a. Both may include rights of first refusal for the seller or grantor of the ground lease
        i. See *West Lakes Properties, L.C. v. Greenspon Property Management, Inc*. 2017 WL 4317297 (Iowa Ct. App. Sep. 27, 2017)(Court ruled that a right-of-first refusal was void and unenforceable because a verified claim under Iowa Code §614.17A was not filed within 10 years of the original filing of the right-of-first refusal notice).
2. Manure easement/agreement
3. Non-disturbance agreement with mortgage holders on land where livestock operation is located and land where manure will be applied.
4. Building/feedyard lease or contract feeding agreement if the owner of the building/feedyard will not be feeding their own livestock
    a. Landlord's or contract feeding lien. (see next section of this outline)
5. Regulatory requirements.
    a. Iowa DNR:
        i. Manure management plan
        ii. Construction design statement or engineering requirements
        iii. Construction permit, including master matrix
        iv. Compliance with separation distances, or waivers of separation distance requirements from residence owners, business owners, and certain public use areas

a. *Jongma v. Grand Pork, Inc*., 776 N.W.2d 886 (Iowa App. 2009). Court ruled that a reservation to the rights to all manure in the warranty deeds was not effective because the deed was only signed by the Jongmas. The court gave no analysis nor cited any authority for this ruling. Apparently the court found that the reservation to all manure was not an easement, restrictive covenant or any other type of right that can be reserved in a deed. (For a contrary analysis, which was not cited or analyzed by the court, see *Mikesh v. Peters*,282 N.W.2d 215, 217-18). Regarding the manure easements, the court ruled that the easements clearly stated that Major Pork was not obligated to apply any manure to the Jongma's property and had full rights to determine the amount of manure to be applied.

b. *Lubbers v. MDM Pork, Inc.*, No. 15-0675, 2016 (Iowa Ct. App. Feb. 24, 2016). Lubbers sold off a parcel of his 80 acres to MDM Pork for MDM to build a hog barn. The parties signed a Real Estate Purchase Agreement that provided Buyer would "provide the necessary manure easement". The Agreement included the standard integration clause. The parties closed the real estate sale but did not sign a written manure agreement. Instead, the Lubbers received the manure from the barn at no cost by oral agreement. MDM later sold the hog barn and parcel and included in the sale contract a clause: "Buyer understands for the remainder of 2012 Paul Lubbers is entitled to the manure in the hog facility located on the property and buyer agrees to provide Paul Lubbers

reasonable access to retrieve the manure." Buyer allowed Lubbers to have the manure in 2012 at no cost, but not in 2013 or after.

Lubbers filed suit alleging breach of the original Real Estate Purchase Agreement with MDM, breach of the oral agreement, and fraudulent misrepresentation. The district court ultimately granted MDM summary judgment on all claims citing the integration clause in the purchase agreement. The Court of Appeals ruled that although the purchase contract contained an integration clause, given the ambiguity in the contract, evidence of the oral agreement should have been allowed. The Court stated:

> "However, the parol-evidence rule "does not come into play until by interpretation the meaning of the writing is ascertained, and, as an aid to interpretation, extrinsic evidence is admissible which sheds light on the situation of the parties, antecedent negotiations, attendant circumstances, and the objects the parties were striving to attain." Hamilton v. Wosepka, 154 N.W.2d 164, 168 (Iowa 1967). The parol evidence rule should not be invoked to prevent a litigant the chance to prove a writing does not, in fact, represent what the parties understood to be their agreement. First Interstate Equip. Leasing of Iowa, Inc. v. Fielder, 449 N.W.2d 100, 103 (Iowa Ct. App. 1989).
>
> Although the Real Estate Purchase Agreement contained an integration clause, given ambiguity in that agreement, the Trust should not be barred from introducing evidence concerning the oral agreement for the purpose of demonstrating the Real Estate Purchase Agreement was representative of the parties' agreement. Based on the parties' past conduct (MDM allowing the manure to be removed for years at no cost), evidence of other agreements not included in the purchase agreement (attorney fees and surveyor fees), MDM's representatives' claimed lack of knowledge on why Paul was allowed to remove manure for years at no cost, and the ambiguous manure easement language in the purchase agreement, we believe material questions of fact exist regarding the oral agreement between the parties. We find MDM's motion for summary judgment on the alleged oral contract was improperly granted."

This case was set for jury trial in Sioux County District Court on Dec. 14, 2016 and was settled and dismissed with prejudice on Dec. 19, 2016.

c. *Thompson v. JTTR Enviro, LLC*, No. 16-1610 (Iowa Ct. App. July 19, 2017). Thompson purchased cropland from Langel, JTTR's predecessor in interest, who constructed a hog operation and Thompson and Langel entered into a manure agreement that ran with the land and gave Thompson the right to manure from the hog operation to cover the cropland he bought from Langel. JTTR bought the hog operation and converted it to a finishing operation. JTTR provided Thompson with enough manure for 73 acres arguing that Thompson was to utilize a corn-soybean rotation that meant he was only entitled to enough manure to cover the one-half of the 146 acres every year that were planted to corn. Thompson sued for the value of all of the manure and the trial court ruled in favor of Thompson. On appeal, the appeals court:

   a. Rejected JTTR's argument that the manure agreement as an easement only imposed a burden on Thompson, but not on JTTR. The court ruled that this agreement was a "written contract that contains the terms agreed to by the parties" and that the "terms of the agreement explicitly impose a burden upon JTTR as the successor of the Langels and reflect the parties' intent to impose such a burden."
   b. Rejected JTTR's argument that because finishing manure is "more nutrient rich than manure from a farrowing barn" it was subject to a greater burden to supply manure as required by the original manure agreement. The court ruled that the manure agreement

applied to manure and was not specific only to farrowing manure as opposed to finishing manure.

c. Rejected JTTR's argument that under the manure agreement Thompson was only entitled to enough manure for one-half of the 146 acres because he was to utilize a corn-soybean rotation instead of corn-on-corn rotation which required manure on all 146 acres. The court based its ruling in part on the credibility of the witnesses at trial but found more compelling the express language of the manure agreement noting there was "no reference to fertilizing taking place every other year or that fertilizing would occur on only half of the property each year."

d. Reduced Thompson's damages the district court awarded for lost fertilizer value on acres on which planted soybeans because no manure was applied to those acres.

e. Upheld the district court awarding damages for the lost crop nutrient value of the manure based on expert testimony of commercial fertilizer nutrient value.

f. Awarded attorney fees based on a clause in the manure agreement.

6. Iowa Statutory Agricultural Liens.

a. State Statutory Ag Liens Under Article 9. Article 9, as revised and effective July 1, 2001, applies to agricultural liens. Iowa Code §554.9109(1)(b).

b. Iowa Statutory Liens Qualifying as Agricultural Liens:

i. Landlord's Lien, Iowa Code Chapter 570.
ii. Agricultural Supply Dealer's Lien, Chapter 570A.
iii. Harvester's Lien, Chapter 571.
iv. Custom Cattle Feedlot Lien, Chapter 579A.
v. Commodity Production Contract Lien, Chapter 579B.
vi. Lien for Services of Animals, Chapter 580. (owner, keeper or artificial inseminator has prior lien on progeny of a stallion, bull, or jack)
vii. Veterinarian's Lien, Chapter 581.

c. Filing Required to Perfect Ag Liens. Iowa Code §554.9310 provides:
(1) "A financing statement must be filed to perfect all . . . agricultural liens."
(3) "If a secured party assigns a perfected security interest or agricultural lien, a filing under this Article is not required to continue the perfected status of the security interest against creditors of and transferees from the original debtor."

d. Maintaining a Perfection of an Ag Lien When the Collateral is Moved to Another State. Iowa Code §554.9302 provides: "While farm products are located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of an agricultural lien on the farm products."

Note: This section provides a different choice of law for ag liens than for security interests under Iowa Code §554.9301 (general rule is that perfection and priority of security interests are governed by the law of the jurisdiction where the debtor is located.)

If agricultural lien collateral leaves the state, the agricultural lien must be perfected in the state where the collateral is moved. If the lien is not perfected in that state, the lien loses its priority during the time the collateral is in that state. See Iowa Code section 554.9302 ("While farm products are located in a jurisdiction, the local law of that jurisdiction governs perfection,

the effect of perfection or nonperfection, and the priority of an agricultural lien on the farm products.") Also see UCC 9-316, Official Comment 7, Example 10.

e. Continuation of Perfection of Ag Lien Upon Sale and Attachment to Proceeds. Iowa Code §554.9315: "Except as otherwise provided in this Article and in section 554.2403, subsection 2:
a. a security interest or agricultural lien continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof unless the secured party authorized the disposition free of the security interest or agricultural lien; and
b. a security interest attaches to any identifiable proceeds of collateral."

Note: Reading Art. 9 literally, an agricultural lien does not attach to proceeds by the provisions of Art. 9. Any attachment to proceeds by an agricultural lien must arise from the lien statute itself. See 9-322 Official Comment 12. In addition, courts have ruled that an ag lien can attach to proceeds due to the underlying policy of the lien statute and because comment 9 to 554.9315 states that Article 9 does not determine whether a lien extends to proceeds of farm products subject to an ag lien. See In Re Schley discussed below.

Note: Because of the requirements in the two previous sections, one commentator has stated: "In light of the limit on proceeds, and the different filing rules, it might be wise for a creditor relying on an agricultural lien to also get a consensual security agreement. There is no prohibition to having two bites at the apple. Even without a security agreement, if the statute creating the agricultural lien contains an enforcement mechanism, the creditor should be able to enforce its statutory lien under either Part 6 of Article 9 or the statutory mechanism." The Law of Secured Transactions Under the Uniform Commercial Code, Barkley Clark, paragraph 8.09, p. 8-121.

f. Federal Food Security Act and Written Notice – Not Applicable to Ag Liens. Iowa Code §554.9320, Buyer of Goods, provides: "Buyer in ordinary course of business. Except as otherwise provided in subsection 5, 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 buyer's seller, even if the security interest is perfected and the buyer knows of its existence."
7 U.S.C. §1631 provides that a buyer who in the ordinary course of business who buys a farm product from a seller engaged in farming operations takes 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 unless, in states such as Iowa, the seller has provided direct written notice of the security interest to the buyer.
Iowa Code §554.9102(4) provides: "For purposes of the Federal Food Security Act, 7 U.S.C. § 1631, written notice shall be considered to be received by the person to whom it was delivered if the notice is delivered in hand to the person, or mailed by certified or registered mail with the proper postage and properly addressed to the person to whom it was sent. The refusal of a person to whom a notice is so mailed to accept delivery of the notice shall be considered receipt."
Note: Compliance with direct notice provisions of Iowa and Federal law to preserve an agricultural lien in proceeds should not be required because the Federal Food Security Act refers to security interests (security interest is defined as an interest in farm products that secures payment or performance of an obligation) and because the Food Security Act has been interpreted to apply to consensual liens, but not nonconsensual liens. See 7 U.S.C. section 1631(e)(refers to security interests created by the seller) and Farm Financing Under Revised Article 9, Linda J. Rusch, American Bankruptcy Law Journal, Vol. 73, p. 211, 245-246 (1999).

However, from a practical perspective, in certain situations a producer may want to voluntarily notify a buyer of farm products of the producer's ag lien.

g. Termination. Within 20 days after a secured party receives an authenticated demand from a debtor, the secured party shall cause the secured party of record for a financing statement to send to the debtor a termination statement for the financing statement or file the termination statement in the filing office if there is no obligation secured by the collateral remaining. Iowa Code §554.9513.

h. Priority of Ag Liens. Iowa Code §554.9322(7) provides that a perfected agricultural lien on collateral has priority over a conflicting security interest in or agricultural lien on the same collateral if the statute creating the agricultural lien gives priority.

The following chart shows the priority of perfected Iowa Ag Liens in addition to the priority over later perfected UCC security interests and UCC liens:

Iowa Code Chapter	Lien	Priority as provided in statute
570	Landlord's Lien	Any prior security interest and prior perfected lien, except Harvester's Lien, Mechanic's Lien, Custom Cattle Feedlot Lien, Commodity Production Contract Lien, or Veterinarian's Lien. IC 570.1(2)
570A	Ag Supply Dealer's Lien	Feed: Any prior perfected lien or security interest to the extent of the difference in the acquisition price of the livestock and the fair market value of the livestock at the time the lien attaches or the sale price of the livestock, whichever is greater IC 570A.5(3) Other ag supplies: Equal priority to prior perfected lien (except LL's lien or Harvester's lien) and security interest if certified notice sent IC 570A.5(2)
571	Harvester's Lien	Any prior perfected security interest or Landlord's lien IC 571.3A(2)
579A	Custom Cattle Feedlot Lien	Any prior perfected security interest or lien other than a perfected Vet's lien or Emergency care of livestock lien IC 579A.2(5)
579B	Commodity Production Contract Lien	Any prior perfected security interest or lien other than a perfected Vet's lien or Emergency care of livestock lien IC 579B.4(4)
581	Veterinarian's Lien	Any prior perfected security interest or lien except Emergency care of livestock lien IC 581.2(2)
717	Emergency Care of Livestock	Any prior perfected security interest or lien IC 717.4(5)

i. Landlord's Lien, Iowa Code Chapter 570.

(1) A landlord has a lien for the rent on crops grown on the premises, and on any other personal property of the tenant which has been used or kept on the leased premises which is not exempt from execution. Iowa Code §570.1(1).

(2) Iowa Code §570.1, expressly provides that a landlord's lien on farm products has priority over conflicting perfected Article 9 security interests, including those perfected before the landlord's lien was created, if the landlord's lien is perfected by filing a financing statement with the Iowa Secretary of State when the tenant takes possession of leased premises or within 20 days after the tenant takes possession. Iowa Code §570.1(2).

(3) Section 570.1(3) requires that a financing statement "include a statement that it is filed for the purpose of perfecting a landlord's lien." A financing statement perfecting a Landlord's Lien is effective until a termination statement is filed.

(4) The lien continues for one year after the rent is due or six months after the end of the lease, whichever is earlier. Iowa Code §570.2.

(5) The lien may be enforced as follows:

1. Under Iowa Code §570.5, "by the commencement of an action, within the period above prescribed, for the rent alone, in which action the landlord shall be entitled to a writ of attachment, upon filing with the clerk a verified petition, stating that the action is commenced to recover rent accrued within one year previous thereto

upon premises described in the petition; and the procedure thereunder shall be the same, as nearly as may be, as in other cases of attachment, except no bond shall be required."

2. Under the general Art. 9 provisions for enforcement of an agricultural lien as provided in chapter 554, article 9, part 6.

Note:

a. Iowa farm lease law requires that the termination date for farm tenancies be March 1 in the year that the lease terminates. Iowa Code §562.5. Thus, because most farm leases begin on March 1 and a tenant takes possession on that date, a financing statement perfecting a landlord's lien on farm products would have to be perfected by March 20 in the year which the lease begins. Under 570.1, a landlord's lien can be perfected prior to the date of the tenant's possession. It would appear that the landlord's lien would become effective at the time the debtor (tenant) takes possession, normally when the lease begins. Iowa Code §554.9509(1)(a) provides that a financing statement may be filed to perfect an agricultural lien that has not become effective only if the debtor (tenant) has authorized the filing in an authenticated record. Thus, a landlord may file a financing statement prior to the beginning of the lease only if the tenant has so authorized in the lease or in a separate authenticated record.

b. Landlord lien filings do not lapse after five years. However, as a precaution to avoid disputes, landlords may want to file a continuation statement for UCC-1's that remain in effect and have been on file five years.

c. Under Iowa farm lease law, a farm lease for a term of years continues past the contractual term under the same terms and conditions on a year-to-year basis unless it is terminated before September 1 of the final year of the contractual term. Iowa Code §562.6 and Pollock v. Pollock, 72 N.W.2d 483, 485 (Iowa 1955). The question is whether a landlord under a lease that continues pursuant to 562.6 must perfect a landlord's lien by filing every year. In addition, even if a new lease is entered into between the same landlord and tenant for the same land, must a financing statement be filed to perfect a landlord's lien under the new lease?
While Chapter 570.1 and Article 9 do not expressly answer this question, the safest course of action is to file each year within twenty days after the lease term begins.

d. A properly perfected landlord's lien has priority over a conflicting security interest or lien, including a prior perfected security interest ("super priority") and other ag liens except a properly perfected Harvester's Lien, Mechanic's Lien, Custom Cattle Feedlot Lien, Commodity Production Contract Lien, or Veterinarian's Lien.

e. Although Iowa Code §570.1 does not expressly provide that the lien attaches to proceeds, the Iowa Supreme Court has ruled (before Rev. Art. 9 was adopted) that the lien created by Iowa Code section 570.1 extends to proceeds of crops grown on leased premises and has priority over a prior perfected security interest. Meyer v. Hawkeye Bank & Trust Co., 423 N.W.2d 186, 188-189 (Iowa 1988) and Perkins v. Farmers Trust and Savings Bank, 421 N.W.2d 533, 534-535 (Iowa 1988).

f. Under Art. 9, a landlord may file a financing statement to perfect a security interest in crops or livestock granted in a lease. (This may be done because Bankruptcy Code section 545 may be interpreted to allow a bankruptcy trustee to avoid a landlord's lien.) This financing statement perfects a security interest and not an ag lien. Such a perfected security interest does not have the priority granted by the landlord's lien.

j. Custom Cattle Feedlot Lien, Chapter 579A.

(1) A custom cattle feedlot operator has a nonpossessory lien on cattle and identifiable cash

proceeds for the amount of the cost for the care and feeding of the cattle. Iowa Code §579A.2(2).

(2) The lien is effective when the cattle arrive at the feedlot and continues for one year after the cattle leave the feedlot. Iowa Code §579A.2(3)(b).

(3) The lien is perfected by filing a financing statement with the Secretary of State within 20 days of the arrival of the cattle at the feedlot.

(4) The lien may be enforced under Iowa Code §579A.3 as follows:
"While the cattle are located at the custom cattle feedlot, the custom cattle feedlot operator may enforce a lien created in section 579A.2 in the manner provided for the enforcement of an agricultural lien as provided in chapter 554, article 9, part 6. After the cattle have left the custom cattle feedlot, the custom cattle feedlot operator may enforce the lien by commencing an action at law for the amount of the lien against either of the following:
1. The holder of the identifiable cash proceeds from the sale of the cattle.
2. The processor who has purchased the cattle within three days after the cattle have left the custom cattle feedlot."

(5) With the exception of a perfected Veterinarian's Lien, a perfected Custom Cattle Feedlot lien has priority over other statutory liens and Art. 9 security interests, regardless of when they are perfected. Iowa Code §579A.2(5)(a).

(6) Waivers of rights provided by the chapter are void. Iowa Code §579A.4.

(7) A custom cattle feedlot operator may file and enforce a lien under 579A or 579B, but not both. Iowa Code §579A.5.
Note: Unlike a financing statement perfecting a Landlord's Lien, an express statement that a Feedlot Lien is being perfected is <u>not</u> required.
Note: Some Iowa custom cattle feeders provide financing to the owners of the cattle placed in their feedlots for the purchase price of the cattle. This loan is then repaid upon sale of the cattle. These custom cattle feeders must be advised that neither the Custom Cattle Feedlot Lien nor the Commodity Production Contract Lien provides a lien for financing of the cattle. To obtain a priority security interest in the cattle for the amount financed, the cattle feeders must follow other procedures such as obtaining a purchase money security interest in livestock under Iowa Code 554.9324(4) or obtaining a subordination agreement from prior perfected secured parties.

k. <u>Commodity Production Contract Lien, Chapter 579B</u>.

(1) A producer feeding another person's cattle, sheep or swine (poultry are not included) or raising another person's crop on the producer's farm (crops are defined to include "a plant used for food, animal feed, fiber, or oil . . ." Note that crops used for other purposes such as seed or pharmaceuticals are not included) has a nonpossessory lien on the livestock or crop and cash proceeds for the amount of the services provided. Iowa Code §579B.2 and .3.

(2) If the livestock or crop is sold by the contractor, the lien shall be on cash proceeds from the sale. Cash held by the contractor shall be deemed to be cash proceeds from the sale regardless of whether it is identifiable cash proceeds. Iowa Code §579B.3.

(3) If the livestock is slaughtered or the crop is processed by the contractor, the lien shall be on any property of the contractor that may be subject to a security interest as provided in section 554.9109. Iowa Code §579B.3.

(4) The lien is effective when the livestock arrive at the farm or when the crop is planted and continues for one year after the livestock or crop leave the control of the producer. Iowa Code §579B.4.

(5) The lien is perfected by filing a financing statement with the Secretary of State within 45

days of the arrival of the livestock or planting of the crop.

(6) In addition, if there is "continuous arrival" of livestock at the animal feeding operation (monthly or more frequent as provided by contract), the lien may be perfected by filing within 180 days after the livestock's arrival.

(7) With the exception of a perfected Veterinarian's Lien, a perfected Commodity Production Contract Lien has priority over other statutory liens and Art. 9 security interests, regardless of when they are perfected. Iowa Code §579B.3.

(8) The lien may be enforced under Iowa Code §579B.5 as follows:
"Before a commodity leaves the authority of the contract producer as provided in section 579B.3, the contract producer may enforce a lien created in that section in the manner provided for the enforcement of an agricultural lien as provided in chapter 554, article 9, part 6. After the commodity is no longer under the authority of the contract producer, the contract producer may enforce the lien in the manner provided in chapter 554, article 9, part 6."

(9) Waivers of rights provided by the chapter are void. Iowa Code §579B.6.

(10) A custom cattle feedlot operator may file and enforce a lien under 579A or 579B, but not both. Iowa Code §579B.7.
Note: Neither 579A or 579B allow for perfecting the lien before the lien becomes effective, even though Art. 9 (§554.9509(1)(a)) would permit this if the debtor (owner of the cattle or commodity) had authorized the filing in an authenticated record.
Note: Because a custom cattle feedlot operator may file and enforce a lien under 579A or 579B, a feedlot operator who misses the 20 day perfection period in 579A could utilize the 45 day perfection period (or 180 days if there is continuous arrival) in 579B.
Note: Unlike a financing statement perfecting a Landlord's Lien, an express statement that a Commodity Production Contract Lien is being perfected is <u>not</u> required.

l. <u>Agricultural Supply Dealer's Lien, Chapter 570A</u>. The Ag Supply Dealer's lien creation, perfection and priority provisions are:

(1) An agricultural supply dealer who provides an agricultural supply to a farmer shall have an agricultural lien. Iowa Code 570A.3

(2) The amount of the lien is the amount owed to the agricultural supply dealer for the retail cost of the agricultural supply, including labor provided. The lien applies to crops or livestock.

(3) The lien is perfected by filing a financing statement with the Iowa Secretary of State within 31 days after the ag supply is purchased. Iowa Code 570A.4.

(4) For livestock feed, the lien has priority over an earlier perfected lien or security interest to the extent of the difference between the acquisition price of the livestock and the fair market value of the livestock at the time the lien attaches or the sale price of the livestock, whichever is greater. Iowa Code 570A.5(3).

(5) For all other ag supplies, the lien has the following priority:
"<u>Except as provided in section 570A.2, subsection 3, the lien shall have equal priority to a lien or security interest which is perfected prior to the time that the agricultural supply dealer's lien is perfected</u>. However, a landlord's lien that is perfected pursuant to section 570.1 shall have priority over a conflicting agricultural supply dealer's lien as provided in section 570.1, and a harvester's lien that is perfected pursuant to section 571.3 shall have priority over a conflicting agricultural supply dealer's lien as provided in section 571.3A. 3." Iowa Code 570A.5(2).

The exception referenced at the beginning of 570A.5(2) is:

"570A.2 Financial institution memorandum to agricultural supply dealers.
1. Upon the receipt of a certified request of an agricultural supply dealer, prior to or upon a sale on a credit basis of an agricultural supply to a farmer, a financial institution which has either a security interest in collateral owned by the farmer or an outstanding loan to the farmer for an agricultural purpose shall issue within four business days a memorandum which states whether or not the farmer has a sufficient net worth or line of credit to assure payment of the purchase price on the terms of the sale. The certified request submitted by the agricultural supply dealer shall state the amount of the purchase and the terms of sale and shall be accompanied by a waiver of confidentiality signed by the farmer, and a fifteen dollar fee. The waiver of confidentiality and the certified request may be combined and submitted as one document. If the financial institution states in its memorandum that the farmer has a sufficient net worth or line of credit to assure payment of the purchase price, the memorandum is an irrevocable and unconditional letter of credit to the benefit of the agricultural supply dealer for a period of thirty days following the date on which the final payment is due for the amount of the purchase price which remains unpaid. If the financial institution does not state in its memorandum that the farmer has a sufficient net worth or line of credit to assure payment of the purchase price, the financial institution shall transmit the relevant financial history which it holds on the person. This financial history shall remain confidential between the financial institution, the agricultural supply dealer, and the farmer.
2. If within four business days of receipt of a certified request a financial institution fails to issue a memorandum upon the request of an agricultural supply dealer and the request from the agricultural supply dealer was proper under subsection 1, or if the memorandum from the financial institution is incomplete, or if the memorandum from the financial institution states that the farmer does not have a sufficient net worth or line of credit to assure payment of the purchase price, the agricultural supply dealer may decide to make the sale and secure the lien provided in section 570A.3.
3. Upon an action to enforce a lien secured under section 570A.3 against the interest of a financial institution secured to the same collateral as that of the lien, it shall be an affirmative defense to a financial institution and complete proof of the superior priority of the financial institution's lien that the financial institution either did not receive a certified request and a waiver signed by the farmer, or received the request and a waiver signed by the farmer and provided the full and complete relevant financial history which it held on the farmer making the purchase from the agricultural supply dealer on which the lien is based and that financial history reasonably indicated that the farmer did not have a sufficient net worth or line of credit to assure payment of the purchase price."

Cases:

a. *Oyens Feed & Supply, Inc. v. Primebank,* 808 N.W.2d 186 (Iowa 2011) The disagreement among the various Iowa and federal courts on the correct interpretation of Iowa's feed lien law has been settled by the Iowa Supreme Court. In this case of major importance to feed suppliers and lenders as well as livestock producers, the Supreme Court ruled on Dec. 30, 2011, that that the feed lien is superior to the secured lender's security interest even though a certified notice of the feed lien is not sent to the lender.

Background – Iowa's feed lien law and conflicting court decisions. The Oyens case was referred to the Iowa Supreme Court by the federal district court for the Northern District of Iowa for a definitive ruling on the priority of the liens.

This referral was necessary because Iowa and federal courts have issued conflicting rulings on the priority of feed supplier liens vs. a lender's security interest in a producer's livestock.

To briefly recap the problem, Iowa Code Chapter 570A provides a lien to businesses that sell ag supplies such as fertilizer, pesticides, seed, feed or petroleum products used for an ag purpose. This lien must be filed with the Iowa Secretary of State within 31 days after the farmer purchases the ag supply. The dispute centers on §570A.2 which provides that the supplier is to send a certified letter to the farmer's lender. The lender must then respond whether the farmer has sufficient finances to assure payment of the ag supply and provide a full and complete relevant financial history. This section states that a supplier who sells an ag supply and files an ag supply lien will lose to the lender's lien if the lender either did not receive the certified letter or received the letter and responded, along with the necessary financial history, that the farmer did not have sufficient finances to cover the price of the ag supply. If the lender responded that the farmer had sufficient finances, the ag supplier and the lender have equal priority under their liens. However, §570A.5(3) states that for feed, the ag supplier will have priority (not just equal priority) in livestock sales proceeds for the difference between the livestock's purchase price and the greater of the value of the livestock when the feed was sold or the livestock's sales price (this difference was labeled as "new value" created by the feed supplier). This section does not specifically refer to the section of the law requiring a certified notice be sent to the lender. Because of this omission, the analysis is that for a lien for feed, unlike a lien for other ag supplies, the supplier is not required to send a certified letter to the lender.

In all of the court decisions, the feed suppliers properly filed their liens with the Iowa Secretary of State but did not send a certified notice to the bank. The judges then had to determine who had priority: the banks because they did not receive the certified notice or the feed supplier because the section of the law on feed liens does not specifically refer to the certified notice requirement.

Iowa Supreme Court Settles the Conflict. With this background, the Iowa Supreme Court first noted that Iowa legislature intended to give feed suppliers more protection than sellers of seed, chemicals, and petroleum because the legislature in writing the feed lien portion of the law did not specifically reference the certified letter requirement as was done for the lien for seed, chemicals and petroleum. The Supreme Court ruled that if the certified letter sections of the law were intended to apply to feed liens, the legislature "would have expressly said so as it did" for the other ag supply liens. The Court went on to note that the certified letter requirement was in a more general section of Chapter 570A (§570A.2) and the section specific to feed liens (§570A.5(3)) did not contain the certified letter requirement. The Court relied on the time-honored principle that when there is a conflict between specific and general statutes, the specific controls over the general.

The Court summed up its decision with the following analysis:

> "It makes sense the legislature would give superpriority status to livestock feed suppliers limited to the new value created, without requiring compliance with the certified request procedure. Livestock feed is often supplied on an ongoing basis, and it would be impractical and cumbersome to require serial certified requests with ever changing dollar amounts and recurring fees. Livestock feed is grown and sold by farmers.

> The legislature presumably sought to encourage a fluid feed market without burdening cooperatives and farmers with the certified request process. By contrast, sales of crop seed, herbicides, and fertilizer are more often bulk transactions by large vendors for whom the certified request process is less cumbersome.
>
> Importantly, the superpriority provision only allows feed suppliers to trump perfected secured lenders to the extent the acquisition value of the livestock is exceeded by the livestock's value at the time the lien attaches or its ultimate sale price. Accordingly, the secured lender generally retains its secured position up to the livestock's acquisition price. The feed supplier's superpriority corresponds to the livestock's increase in value that typically results from consuming feed. The legislature reasonably could conclude the feed supplier who made the credit sale, not the secured lender, should be entitled to superpriority in this new value. This interpretation furthers the legislature's goal to encourage feed sales to livestock producers already burdened with bank debt."

Subsequent proceedings: Iowa Supreme Court Answers Certified Questions. On May 27, 2016, the Iowa Supreme Court responded to two certified questions which arose from the federal district court case of *Oyens Feed & Supply Inc. v. Primebank, 2015 U.S. Dist. LEXIS 58482 (N.D. Iowa May 5, 2015).* This dispute arose through the hog producer's Ch. 12 bankruptcy. See *In re Crooked Creek Corp.,* No. 09-02352S, 2014 Bankr. LEXIS 4456 (Bankr. N.D. Iowa Oct. 21, 2014). After the hog producer filed for bankruptcy, the hogs were sold, but the sale did not general enough money to satisfy the competing liens asserted by Oyens Feed & Supply and Primebank.

Certified Question Number One: Pursuant to Iowa Code §570A.4(2), is an agricultural supply dealer required to file a new financing statement every thirty-one (31) days in order to maintain perfection of its agricultural supply dealer's lien as to feed supplied within the preceding thirty-one (31) day period?

The Iowa Supreme Court held that, yes, an ag supply dealer in feed must file a new financing statement every 31 days to maintain perfection of its lien as to the feed sold within the preceding 31-day period. The Court concluded that §570A.4 is ambiguous and proceeded to apply rules of statutory construction to resolve the ambiguity. Iowa Code §570A.4 expressly incorporates Iowa Code §554.9308. The court further concluded that the language of §570A.4 conflicts with the language of §554.9308 and "within thirty-one days after" creates a rule that is specific to ag supply dealer liens and that modifies the general agricultural lien rule. The court also looked to the legislative history of Ch. 570A and concluded that Ch. 570A was a "compromise between the interests of ag supply dealers and financial institutions and the requirement of filing every 31 days is "fairly… considered as a reasonable exchange for the super-priority status the filing helps to acquire."

Certified Question Number Two: Pursuant to Iowa Code §570A.5(3), is the "acquisition price" zero when the livestock are born in the farmer's facility?

The Iowa Supreme Court held that, yes, the acquisition price for animals raised in a farrow to finish operation is zero. Thus, an ag supply dealer of feed in Iowa is entitled to super-priority position against other creditors to the full extent

of the value of the feed purchased – as long as they file financing statements every 31 days.

The end result, after the Iowa Supreme Court's answers to the certified questions above, means that while the bank has a secured claim, it will collect after the feed dealer collects on its super-priority claim. See *Oyens Feed & Supply, Inc. v. Primebank,* 879 N.W.2d 853 (Iowa Sup. Ct., May 27, 2016).

b. *In Re Coastal Plains Pork, LLC, First National Bank of Omaha v. Farmers Co-Operative Society and Cooperative Elevator Association, No.09-08367-8-RDD, 2012 Bankr. LEXIS 5784 (Bankr. E.D. N.C. Dec. 17, 2012)*. In this adversary proceeding the court considered cross motions for summary judgment on the issue of the extent of the feed supplier's lien relative to the secured lender's security interest. The Court found genuine issues of material fact as to the extent of the feed supplier's liens for feed provided. The Court noted:

> "The only interpretation this Court can draw from §570A.5(3) and the *Oyens* opinion is that the Iowa Supreme Court intended the lien to encompass the benefit received by the hogs from the livestock feed eaten and not paid for. It is not clear to this Court that the formula in the statute accomplishes what Oyens states is the purpose, to wit: superpriority is intended to correspond to the livestock's increase in value that typically results from consuming the feed.[13]" Footnote 13 provides: "The legislature's formula only works in the simplest of examples. For instance, acquired hogs are purchased at a set purchase price from a third party and are only fed feed that is unpaid for until the hogs are sold. If the hogs are also fed feed that is paid for during the period, the formula does not work to accomplish the purpose set forth by the Iowa Supreme Court. The computation problem is exacerbated if hogs ingest feed from another supplier during this period of time from acquisition to ultimate sale. It is not clear from the affidavits whether Coastal Plains purchased and paid for the other feed from other suppliers during this time period. If so, it would seem the statute should provide for some percentage allocation of increased value based on feed supplied by different feed suppliers."

In addition, the Court ruled that under Chapter 570A the feed dealer's feed lien also covered charges for labor and delivery, including fuel charges. The Court found genuine issues of material fact existed as to whether the feed dealer's lien extended to interest charges.

c. *In re Schley, 509 B.R. 901 (Bankr. N.D. Iowa Apr. 18, 2014).* The debtors ran a feeding-to-finish pig operation. A bank and Cooperative Credit Company had perfected security interests in the debtor's livestock and after acquired property. A defendant feed supplier provided feed for many of the debtors' hogs and had a perfected Chapter 570A lien as to some of the feed it supplied. Before the debtors filed for Chapter 12 bankruptcy protection, they sold hogs, and the proceeds were placed into escrow pending resolution of the competing security interests and Chapter 570A feed lien. The security interest holders argued that the 570A feed lien did not extend to proceeds under the express terms of Chapter 570A and the Iowa UCC. The court ruled that applying the 570A lien only to the hogs themselves and not proceeds would not make sense in that it would provide little

protection to the feed supplier and would discourage them from working with troubled farmers. *Id. at 913.* The court also noted that comment 9 to 554.9315 stated that Article 9 does not determine whether a lien extends to proceeds of farm products subject to an ag lien. The court also referenced the 2011 Minnesota district court ruling on motion for summary judgment in *United Prairie Bank v. Galva Holstein Ag, LLC,* that attachment is implied by 570A.4(3) in that this section refers to "the sale price of the livestock" to determine the amount or extent of the lien and the collateral must be converted to proceeds to determine the extent of the lien. *Id. at 914.*

d. *In re Big Sky Farms, 512 B.R. 212 (Bankr. N.D. Iowa Apr. 18, 2014).* In this case also involving contract finishing hogs and competing security interests and 570A liens, the court ruled that the super priority status of the 570A lien applies only to feed purchased within the 31 days preceding filing of financing statements as expressly set out in Chapter 570A. *Id. at 212 – 221.* The court also addressed the question is whether under 570A the feed dealer is required to apply payments made by the farmer during each 31 day lien period to feed purchased during those lien periods or if the dealer was correct in applying all payments to the oldest feed purchases, even though those purchases were unperfected by any feed lien. The court noted that neither 570A nor any other Iowa statute addresses the issue. The court ruled there since there was no explicit agreement between the parties as to how apply payments for feed on this open account, under Iowa common law the default rule is apply payments on open account to the oldest items first. *Id. at 221 – 223.* On this issue the court did not reference the *United Prairie Bank v. Galva Holstein Ag, LLC* case, but in that case on appeal the court ruled the same stating "[g]enerally, absent an agreement on the application of proceeds on an open account, the law applies payments as they are received to cancel the first-incurred debt." *United Prairie Bank v. Galva Holstein Ag, LLC, et. al., pp. 8-10 (Minn. Ct. App. 2013 WL 6223416)(unpublished opinion).*

e. *Schley v. Peoples Bank (In re Schley),* 565 B.R. 655, 2017 Bankr. LEXIS 115 (Bankr. N.D. Iowa Jan. 13, 2017). The court ruled that the Iowa Code Chapter 570A Ag Supply Dealers Lien for feed applied to all feed that the feed supplier provided and attached to the full value of livestock that consumed the feed. The secured lender had argued that the feed supplier had a lien pro rata on each head of hogs for the amount of feed the hog consumed.

Note: It is now settled law that Iowa's feed lien under Chapter 570A does not require a feed supplier to send a certified notice to a lender with a security interest in the livestock (the certified notice requirement remains for all other ag liens (seed, fertilizer, chemicals, and petroleum products)). The Iowa feed supplier's lien is superior to a lender's security interest if the feed supplier files a UCC-1 with the Iowa Secretary of State within 31 days after the feed is purchased. In other words, each UCC-1 covers the previous 31 days of feed purchases and if feed is purchased beyond a 31 day period, another UCC-1 must be filed for the feed supplier to have priority for those feed purchases.

Note: To address the priority of the 570A lien clarified by the Oyens, Schley, and Big Sky decisions, lenders may consider the following steps:

1) Loan conditions or covenants with livestock producer:

2) Producer required to list all feed suppliers
3) Require notice, subordination or waiver of feed lien by producer's feed suppliers
4) Require producer to provide monthly feed bills to lender
5) Lender adjust borrowing base based on any unpaid feed bills

Note: Beyond the priority issue, there are other issues the practitioner representing a feed dealer or lender should be aware of:
1) Tracing of proceeds
2) Application of payments for feed on open account. One question is the treatment of cash payments for feed by a lender to a feed dealer holding a lien, after the dealer has demanded cash payments for feed due to a delinquent open account balance. This issue was addressed in United Prairie Bank v. Galva Holstein Ag, LLC, et. al., pp. 11-13 (Minn. Ct. App. 2013 WL 6223416)(unpublished opinion) The court found that the feed dealer had not agreed that the bank would have priority over its feed lien for money paid to the feed dealer for feed after the dealer demanded cash payment for feed. The court ruled that the district court was correct in that the feed dealer only preserved its lien as to feed supplied during the perfected periods and for which it was not paid. In addition, the court noted that this approach is consistent with the policy of feed suppliers and banks sharing the risk of continuing to feed livestock to market and with Chapter 570A's goal as interpreted in Oyens of "encouraging feed sales to livestock producer already burdened with bank debt."

m. Veterinarian's Lien, Chapter 581.

(1) A veterinarian has a lien "for the actual and reasonable value of treating livestock, including the cost of any product used and the actual and reasonable value of any professional service rendered by the veterinarian." Iowa Code §581.2A.
(2) The lien is effective when the veterinarian treats the livestock. Iowa Code §581.3(1).
(3) The lien is perfected by filing a financing statement with the Secretary of State within 60 days after the day the veterinarian treats the livestock. Iowa Code §581.3(2).
(4) A timely perfected lien has priority over conflicting security interests or liens, regardless of when the security interest or lien is perfected. Iowa Code §581.2(2).
(5) The lien may be enforced in the manner provided for ag liens in chapter 554, article 9, part 6." Iowa Code §571.4.
Note: Unlike a financing statement perfecting a Landlord's Lien, an express statement that a Veterinarian's Lien is being perfected is not required.

n. Enforcement.
1. Provisions of each lien statute and Iowa Code section 554.9601 - 9624 (Art. 9,part 6)
2. Practical issues with enforcement:
   a. Proper & timely perfection of the lien by filing UCC-1
   b. Default - negotiation with debtor (& other secured creditors)
   c. Notification to buyer of farm product subject to ag lien
      i. Voluntary, not required, but helpful in enforcement
   d. Sale of collateral to create proceeds – proceeds placed in escrow pending resolution of priority of competing security interests
   e. Negotiation and/or litigation to determine priority

7. Federal Packers and Stockyards Administration - Livestock and Poultry Production and Marketing Contracts.

1) Public Law 110-246, 122 Stat. 2119, (2008 Farm Bill, effective June 18, 2008) §§11005 -11006, 7 USC §§197a, 197b, 197c.
   a. Swine & Poultry Production Contracts - Grower Right to Cancel, 7 USC 197a
      i. The later of 3 business days or any date stated in the contract
      ii. Contract must clearly disclose the right, the method and the deadline for cancelling
   b. Swine & Poultry Production Contracts – Disclosure of Additional Capital Investments, 7 USC 197a
      i. Disclosure statement on first page – additional large capital investments may be required
      Note: GIPSA has stated that if the contract does not require additional large capital investments, this disclosure may state that additional large capital investments will not be required.
   c. Swine & Poultry Marketing & Production Contracts - Choice of Law and Venue, 7 USC 197b
      i. Legal forum located in the Federal judicial district in which the principal part of the production takes place
      ii. Contract may specify which state law applies, unless prohibited by state law
   d. All Livestock & Poultry Contracts – Arbitration, 7 USC 197c
      i. Any contract requiring arbitration must contain a provision allowing producer, before entering the contract, to decline to be bound by the arbitration provision
      ii. Contact must conspicuously disclose the producer's right to decline.

Note: Mandatory federal requirements for clauses that must be in swine grower contracts between contract growers and pork producers have been in effect since June 18, 2008 and the U.S.D.A. Grain Inspection , Packers and Stockyards Administration (GIPSA) is levying fines on producers who are not following this law. Some producers may mistakenly believe, perhaps because Packers and Stockyards Administration is involved, that these contracting requirements only apply to marketing contracts with packers. However, that is not the case and all producers who have production contracts with contract growers should carefully review those contracts and the law to ensure compliance with the following federal contracting requirements.

Producers who do not have the required contract disclosures in place when the PSA investigation begins but who amend their contracts to comply with federal law have nonetheless been fined by GIPSA. From information publicly available, these penalties appear start at $1,500 and increase from there depending on the number of contracts involved. Not only are some producers unaware of the requirement to have the contract disclosures in their contracts, producers who amend their contracts to include the required disclosures are surprised when they are later notified by GIPSA that they are being penalized. Much of the surprise comes from the fact that the contract growers have not contacted GIPSA with complaints about the contract and in fact readily sign the amendments and do not take the opportunity to cancel the contract. Producers who do not have the required contract disclosures in place when the PSA investigation begins and who do not amend their contracts after the investigation face court action by GIPSA.