



SIMMONS PERRINE MOYER BERGMAN PLC

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The Next Economic Downturn: Are You Prepared?

August 28, 2019

Today's Presenters:



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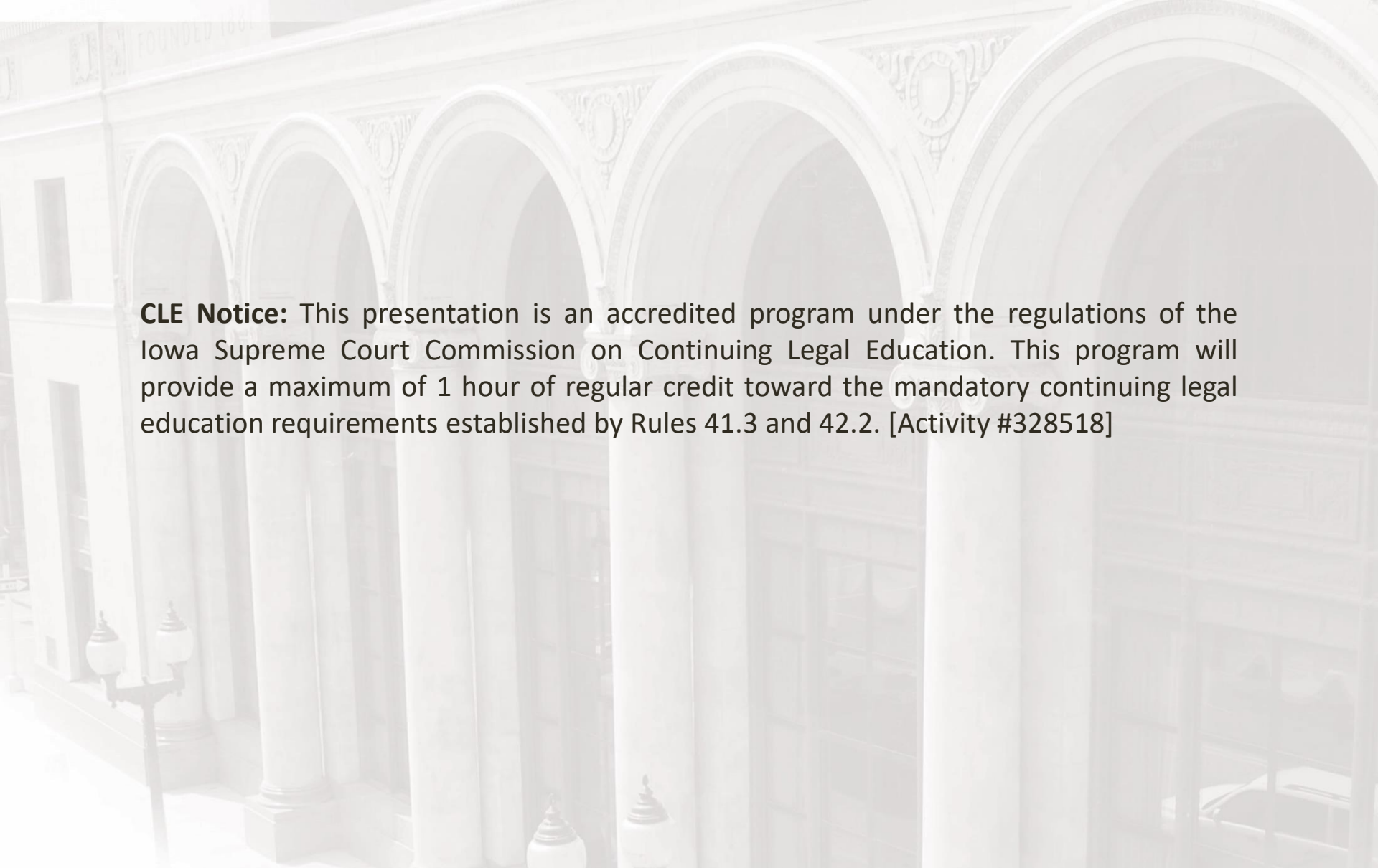
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File Review and Documentation Mistakes

- Borrower's name in the "Debtor's Box" of financing statement is inaccurate and on the loan documents is either inaccurate or inconsistent.
- The type of collateral is not correctly classified under the UCC; thus, the method of perfection might be improper.



Individual's Legal Name – Alternative A

- **Old rule:** Use the “individual name of the debtor”
 - William, Will, Bill, or Billy?



- **New rule:** Use the individual's name as it appears on an unexpired driver's license issued by the state of residence.
 - Use the old rule when the individual has no license, an expired license, or an out-of-state license.

Determining the exact legal name may not be as easy a task as it initially appears to be

- Mary Beth Hartman – Is Mary Beth the first name or is Beth the middle name?



Seriously Misleading

- A Financing Statement not complying with these rules MAY still be effective, depending on whether it is seriously misleading, and the laws of your state:
 - A filing made that is not in compliance with the Article 9 rules is presumed to be seriously misleading .
 - However, a filing under an improper name may be deemed to not be seriously misleading if such a filing is found when someone performs a search of the filing office records using the correct debtor's name.
 - Please Note: In some states it has been held that failure to comply is seriously misleading, and is not presumed.
 - **Example:** In an Alternative A state, if a filing is made for a debtor using the name "John Doe" and the name appearing on that debtor's driver's license is "John Smith Doe" then the presumption that the filing is seriously misleading might be able to be overcome if a search on the name "John Smith Doe" returns the filing made for "John Doe".
- The ONLY way to ensure a Financing Statement is not seriously misleading is to file it using the proper debtor name as required under Article 9.

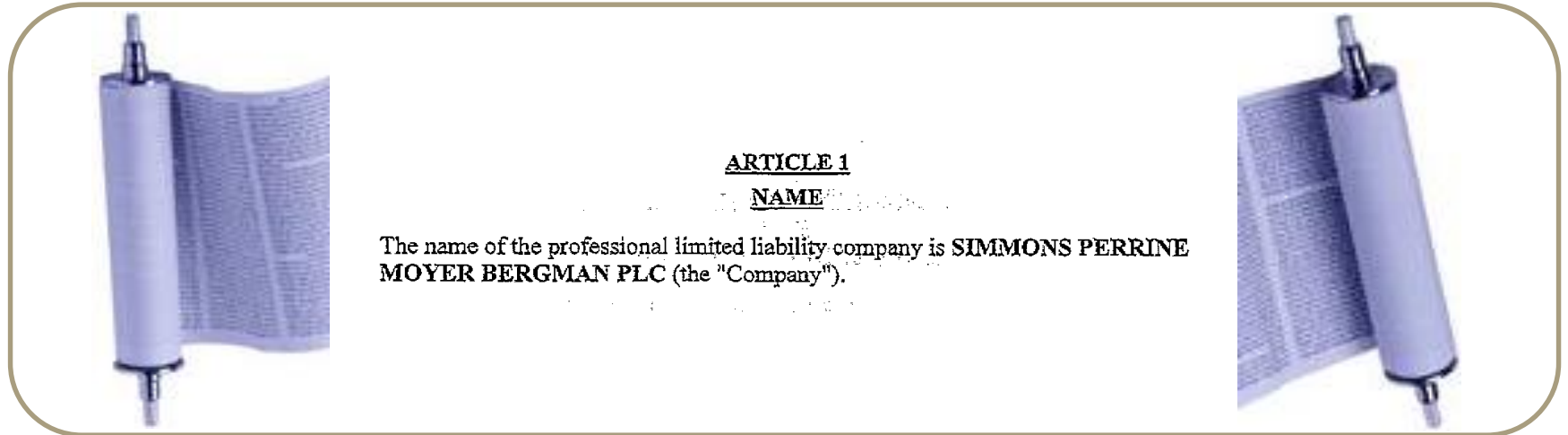
Common Questions Regarding Filing for Individuals

- **Should a secured party file just using the First and Last Name on the Driver's License?**
 - No, the name on the filing should be *exactly as it appears on the driver's license*.
- **What if someone's driver's license is incorrect?**
 - Still file under the incorrect driver's license name. Recommend filing a second filing under the correct name.
- **What if someone has multiple unexpired driver's licenses, in the same state, with different names?**
 - Use the name listed in the most recent unexpired driver's license and consider filing under other names.
- **What if someone has multiple driver's licenses from different states with different names?**
 - Use the driver's license issued in the state of domicile and consider filing under other names.



Organization's Legal Name

- **Old rule:** Use the name “indicated on the public record of the debtor’s jurisdiction”
 - & or and; LLC or L.L.C.; Inc. or Incorporated?



- **New rule:** Use an organization’s “public organic record”
 - Choose the formation document most recently filed with the state not the Secretary of State’s database entry



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Determining Name of Registered Organizations

- Registered Organizations include Corporations, Limited Partnerships, and Limited Liability Companies.
- Name to be used is the exact name stated on the “public organic record” most recently filed in the state where the organization is organized.
 - Examples of public organic records: Articles of Incorporation, Certificates of Limited Partnership, Articles of Organization, Amendments or Restatements to such.
- Important to note, the name(s) listed in a certificate of good standing or on the Secretary of State’s website is not sufficient. The organization’s name must match the actual public organic record.
 - **Illustration:** Certificate of good standing and Secretary of State’s website identifies debtor as: “Property Disposals, Inc.” and the Articles of Incorporation states: “Property Disposal, Inc.” (without any other filings)
 - **Filing should use the name of “Property Disposal, Inc.”**
- When filing continuation statements, the name used on such statements must match the “public organic record.”




Organization's Legal Name

- Do not use organization's name listed on the Secretary of State's website database entry:



IOWA SECRETARY OF STATE


Paul D. Pate



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Business Entities Results

 [print](#)


Searched: **Simmons Perrine** Results 1 - 5 of 5

| Business No. | Name | Status | Type |
|------------------------|--|----------|-----------------|
| 177200 | SIMMONS, PERRINE, ALBRIGHT & ELLWOOD, L.L.P. | Inactive | Legal |
| 181871 | SIMMONS, PERRINE, ALBRIGHT & ELLWOOD, P.L.C. | Active | Legal |
| 181871 | SIMMONS PERRINE MOYER BERGMAN PLC | Active | Fictitious name |
| 181871 | SIMMONS PERRINE MOYER BERGMAN PLC | Active | Legal |
| 181871 | SIMMONS PERRINE P.L.C. | Active | Legal |

FEATURED RESOURCES

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- [Am I Registered to Vote in Iowa?](#)
- [Register to Vote](#)
- [Request an Absentee Ballot](#)
- [Track Your Absentee Ballot](#)
- [Business Resources](#)



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Organization's Legal Name

- Do not use organization's name listed on the Secretary of State's Certificate of Existence:

**IOWA SECRETARY OF STATE
MATT SCHULTZ**



CERTIFICATE OF EXISTENCE

Date: 7/23/2013

Name: SIMMONS PERRINE MOYER BERGMAN PLC (489DPL - 181871)

Date of Incorporation: 1/1/1995

Duration: 1/1/2045



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Other Legal Name Situations

- General Partnership
 - List the general partners using the individual and organization rules, as applicable.
- Limited Liability Partnerships
 - Treat general partners of a limited liability partnership as you would general partners in a general partnership.
 - It is advisable when filing against the limited liability partnership itself to rely on the name of the partnership in the “Statement of Qualification” filed on the Secretary of State’s website (or the most recent amendment to such). If informed that the partnership name is different than the name on the Statement of Qualification, then advisable to file under that name as well.

Pledging Assets in a Revocable Trust

- If spouse signed deed to real estate in revocable trust, make certain that spouse waived elective share (many attorneys may likely remove this boilerplate language from deeds).
- If spouse did not sign deed to transfer assets to revocable trust, then have spouse sign mortgage to waive spousal rights and elective share.
- Best practice will be to have spouse sign mortgage in all cases.
- Review Trustee Powers in the Trust
 - Certificate of Trust
 - Abstract of Trust



File Review and Documentation Mistakes

- The collateral description in the financing statement does not match language in the security agreement.
- Financing statements are not amended or timely filed to reflect changes in the name or address of the borrower.
- Exhibits are not attached to: loan agreements, financing statements or mortgages.



File Review and Documentation Mistakes

- Stock powers are filled in and dated (should be left blank except for the signature of the person or the corporation owning the stock; signature guaranty required).
- The certificate of insurance does not reflect the appropriate property coverage, the actual address of the property or the bank as lender's loss payee.



File Review and Documentation Mistakes

- The mortgage is not amended if there is a new loan or amendment increasing the amount of the commitment to the borrower. A title report should be ordered to verify mortgage priority.
- The mortgage legal description does not include all the real estate intended to be pledged.



File Review and Documentation Mistakes

- The mortgage form is not notarized or is improperly notarized.
- The loan documents are executed by someone not authorized by the borrowing resolution or partnership agreement.
- Participation certificates do not list all collateral, guaranties and/or security agreements which support the loan facilities.

File Review and Documentation Mistakes

- Only a title search is obtained, not title opinion.
- Failure to address prior liens or superior liens not reflected in the public record (**e.g.**, third-party interests reflected by prior filed financing statements or judgments; landlord liens; mortgagee interests in fixtures; property taxes; IRS tax liens; various agricultural lien priorities; etc.).



File Review and Documentation Mistakes

- Annual review should ensure that the loan documents reflect the terms of the transaction as approved by creditor.
- Annual renewal should include file review, UCC search and correct any mistakes.
- If there are covenant defaults, acknowledge and in exchange for limited waiver take release.
- The loans are not cross-collateralized.

File Review and Documentation Mistakes

- Homestead Waivers
- Iowa Code section 561.22 requires certain notice language when a contract affecting agricultural land of 40 acres or more, or buildings on that land, waives the owner's homestead rights.
- Relevant but not determinative factors:
 - Whether the land is currently being farmed;
 - Whether the property owners are capable of farming the land; and
 - Whether the land is large enough to be an independently profitable farm.
- Iowa State Bank & Trust Co. v. Michel, 683 N.W.2d 95 (Iowa 2004).



File Review and Documentation Mistakes

Homestead Waivers

“I understand that homestead property is in many cases protected from the claims of creditors and exempt from judicial sale; and that by signing this contract, I voluntarily give up my right to this protection for this property with respect to claims based upon this contract.”



File Review and Documentation Mistakes

- Prepayment Penalties
- Iowa Code section 535.9
 - Lenders may not charge penalties for prepayment of certain agricultural loans
 - This prohibition applies to:
 - (1) loans used for the purpose of purchasing real property which is a single-family or two-family dwelling occupied or to be occupied by the borrower
 - (2) loans for the purpose of purchasing agricultural land, payable in five years or less.
 - These can include the refinancing of a contract of sale, the refinancing of a prior loan, and the assumption of a prior loan.
 - The lender can require advance notice of prepayment of not more than thirty days.
 - If a lender is found to have improperly charged prepayment penalties, section 535.9(3) permits the borrower to recover the amount of the penalty, plus attorney's fees and court costs incurred in the recovery.
- Section 535.9 does not create a right to prepayment.
- Prudential Insurance Co. v. Rand & Reed Powers Partnership, 141 F.3d 834 (8th Cir. 1998).

File Review and Documentation Mistakes

- Prepayment Penalties
- Iowa law is not clear regarding the enforceability of prepayment penalties on other loans.
 - Make-whole provisions that calculate the penalty based upon “prevailing market rates in an attempt to calculate [the lender’s] actual loss of earnings resulting from [the borrower’s] prepayment” have been upheld by federal courts. *Great Plains Real Estate Development, L.L.C. v. Union Central Life Insurance Co.*, 536 F.3d 939 (8th Cir. 2008).



Protection Prior to Lending

- **Standard Terms in Commitment Letters**

- The commitment in the letter is subject to:
 - (1) there being no material adverse changes in the business, assets, operations, performance, property, condition of the company and its subsidiaries; (2) the completion of due diligence by the lender; (3) lender not becoming aware of any other information that would impact the decision to lend money to the customer; (4) the execution of the loan agreement before [date], and (5) the other terms and conditions set forth in the term sheet.
- Indemnify and hold harmless clause.
- Choice of law and venue provision and waiver of jury trial.
- Term stating that the choice of law, venue, and jury waiver shall apply even if the definitive financing documentation is never executed.
- Confidentiality clause preventing the disclosure of the terms of the letter to anyone other than directors, officers, agents, attorneys, accountants and advisors who are directly involved in the consideration of this matter and for whom you shall be responsible for any breach by any one of them of this confidentiality undertaking, or as ordered by an administrative or judicial proceeding.
- Required Patriot Act notice.
- Statement that no oral commitment to lend money, extend credit, forebear from the collection of money, etc. is enforceable.
- Request that term sheet be signed and returned.

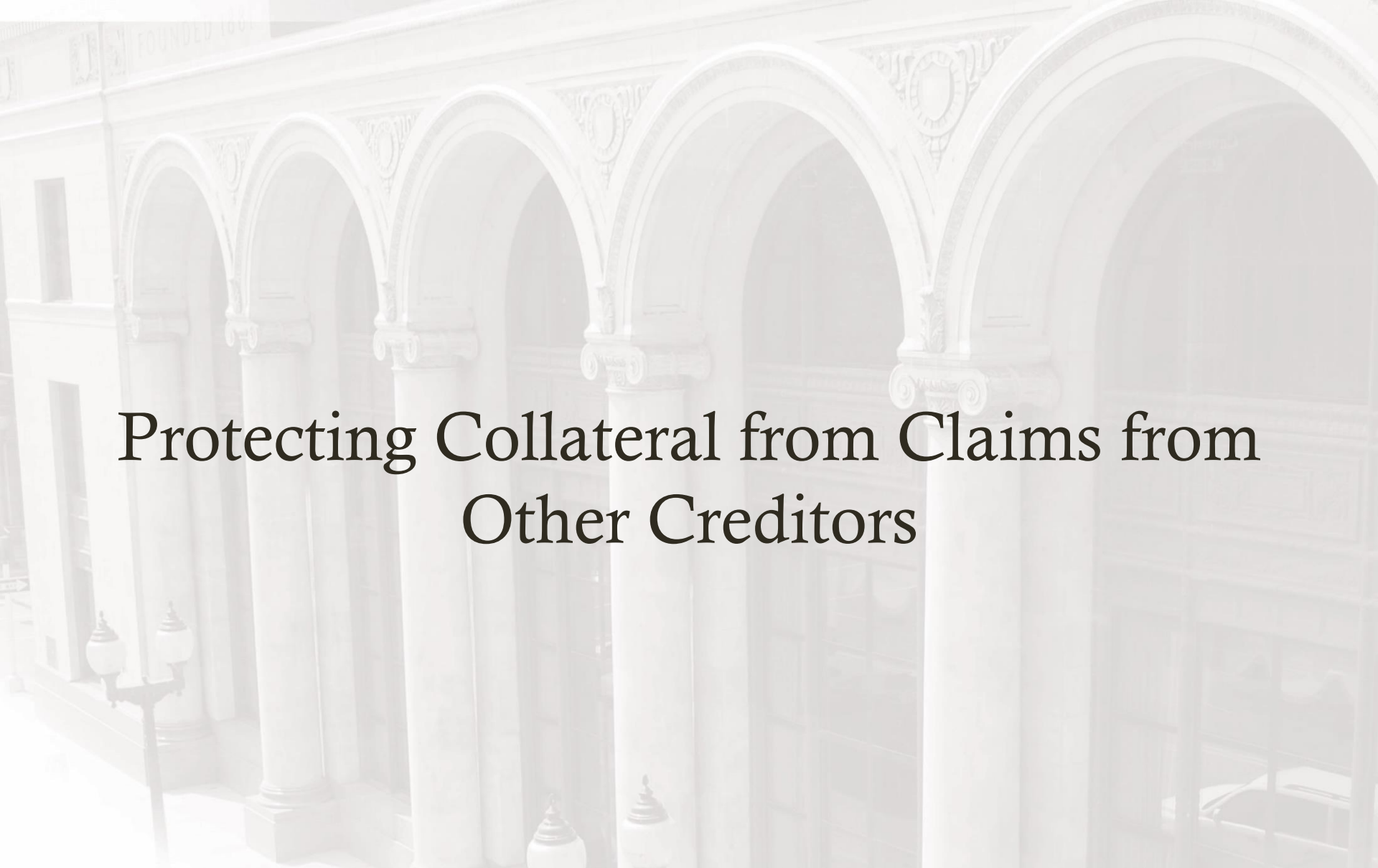


Protection Prior to Lending

- **The following tips apply to loan commitments:**
 - Loan commitments should contain an expiration date to be extended only in writing;
 - The commitment letter should provide that any waivers of terms must be made in writing;
 - The lead lender should not agree to waive terms or conditions without expressed authority from other loan participants;
 - The lender should assure itself if the loan commitment includes all essential terms and conditions which should be set forth clearly and unambiguously;
 - All loan documents should contain well-drafted merger clauses and the liability to repay on time should be absolute and state in no uncertain terms.

Protection Prior to Lending

- Letters of interest
 - These should clearly state that they are not a contract to lend and do not impose any form of binding commitment on the bank.
 - Not recommended.
 - Some clients may request letters of interest as proof of the ability to raise money.



Protecting Collateral from Claims from Other Creditors



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Protecting Collateral from Claims from Other Creditors

- MidWestOne Bank v. Heartland Co-op
 - MidWestOne loaned debtors funds for their farming expenses over four years and obtained a security interest in the debtors farm products, including crops and proceeds, which MidWestOne perfected.
 - The debtors delivered their grain to Heartland Co-op for drying and storage prior to sale. MidWestOne sent Heartland its Notices to Buyer of Security Interest in Farm Products
 - The Notices informed Heartland: “All proceeds are to be paid jointly to Debtor and Secured Party. All proceeds are to be delivered or mailed to Debtor.”
 - Heartland sold the grain and withheld \$79,895.68 of the proceeds to cover drying and storage expenses.



Protecting Collateral from Claims from Other Creditors

- Pertinent Iowa Law:

- Iowa Code section 554.1201(2)(i) – “*Buyer in the ordinary course of business*” does not include a person that acquires goods . . . in total or partial satisfaction of a money debt.

- Issue:

- Whether Heartland applied the grain sales proceeds to an antecedent debt or gave new value.



Protecting Collateral from Claims from Other Creditors

- Holding:
 - Heartland did not provide new value, but instead applied the grain sales proceeds to an antecedent debt.
 - Therefore, Heartland was not a buyer in the ordinary course of business.



Protecting Collateral from Claims from Other Creditors

- Schley v. Peoples Bank (In re Schley)
 - Background Facts:
 - Debtors in Chapter 7 case ran a feeder-to-finish farming operation.
 - Bank held a perfected security interest in Debtors' livestock proceeds.
 - Feed supply company held a superpriority agricultural supply dealer lien in the same proceeds.
 - Debtors sold about half of the pigs for which the Company supplied feed, and the proceeds were insufficient to satisfy both creditors' liens.
- Issue – Whether the Company had a superpriority lien for the price of all the feed it supplied (\$43,314.54), OR the Company's superpriority lien was limited to the cost of the feed that was consumed by the pigs that were sold and generated the proceeds at issue (\$21,224.14 – 49% of the cost of the feed, because 49% of the pigs were sold).



Protecting Collateral from Claims from Other Creditors

- Pertinent Iowa Law:

- Iowa Code section 570A.3:

- An agricultural supply dealer who provides an agricultural supply to a farmer shall have an agricultural lien as provided in section 554.9102. The agricultural supply dealer is a secured party and the farmer is a debtor for purposes of chapter 554, article 9. The amount of the lien shall be the amount owed to the agricultural supply dealer for the retail cost of the agricultural supply, including labor provided. . . .



Protecting Collateral from Claims from Other Creditors

- Holding:

- The Company had superpriority lien on the proceeds of the livestock covering the entire cost of the feed supplied, not merely a pro rata of the cost based on the feed consumed by the pigs sold.
- Only the Company's argument comported with the language of the statute – that “[t]he **amount of the lien** shall be the **amount owed** to the agricultural supply dealer for the retail cost of the agricultural supply, including labor provided.”



Protecting Collateral from Claims from Other Creditors

- An ag supply dealer's financing statement only perfects its lien on supply sold within the preceding 31 days.
 - Iowa Code section 570A.4(2):
 - In order to perfect the lien, the agricultural supply dealer must file a financing statement in the office of the secretary of state as provided in section 554.9308 **within thirty-one days** after the date that the farmer purchases the agricultural supply. . . .
- Oyens Feed & Supply, Inc. v. PrimeBank



Protect Against Fraud & Debtor Mismanagement



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Annual In-Person Inspection

- Prior to Inspection:
 - Pull and review UCC lien search.
 - Review annual financial statement and tax returns.
 - Consider obtaining detailed inventory and equipment listing.

***Know your borrower, your assets and
your borrower's other creditors.***



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Protect Against Fraud & Debtor Mismanagement

- Fraudulent Transfers
- The Security National Bank of Sioux City v. Western Slopes Farms Partnership et al. (In re Western Slopes Farms Partnership), Bankr. No. 17-00699, Adv. No. 17-09047, 2018 WL 4348048 (Bankr. N.D. Iowa Sept. 10, 2018).
 - Lender made loans to Debtor and other entities, all operating as a single farming operation.
 - Debtor defaulted. Lender brought replevin action. State court found that collateral held by all entities was fully encumbered.
 - One entity transferred equipment to Debtor for no consideration.
 - Debtor, holding nearly all assets, filed for bankruptcy. Lender sought to void transfer under Iowa's Voidable Transfers Act, Iowa Code section 684.
 - Held: Section 684 applies to the "transfer" of an "asset," which excludes "[p]roperty to the extent it is encumbered by a valid lien." Transfer could not be voided.



Protect Against Fraud & Debtor Mismanagement

- Transferred property
- Security National Bank of Sioux City v. Welte, 924 N.W.2d 877 (Table) (Iowa Ct. App. 2018).
 - Rand made loans to Welte to finance Welte's farming operation; Rand obtained and perfected a security interest in Welte's farm-related property.
 - Welte transferred two tractors subject to Rand's security interest to Welte's son for ¼ of their fair market value.
 - Rand passed away and his personal representative brought an action for replevin.



Protect Against Fraud & Debtor Mismanagement,

- Court found that the two tractors were subject to Rand's security interest.
 - The course of dealing between the lender and borrower did not permit a "benevolent sale" free and clear of security interest.
- First State Bank, which loaned the money with which Son purchased the tractors, asserted its purchase money security interest was superior to Rand's interest.
 - Court: Rand's interest is superior. FSB had opportunity to investigate the ownership and value of the tractors, and should have discovered Rand's perfected security interest. Rand's interest survived the transfer from Welte to Son, and therefore had priority over FSB's security interest.



Protect Against Fraud & Debtor Mismanagement

- Family Farm Relief Act of 2019
- Signed into law by President Trump on August 23, 2019
- Proposed by Senator Grassley on March 27, 2019
- This bill would amend the definition of “family farmer” in Title 11 by raising the limit of the farmer’s aggregate debts to \$10,000,000, from its current level of \$4,411,400. *See* 11 U.S.C. § 101.
- Amends “family farmer” Chapter 12 eligibility:
 - The individual or husband and wife must be engaged in a farming operation.
 - The total debts (secured and unsecured) of the operation must not exceed ~~\$4,153,150~~ \$10,000,000.
 - If a family farmer, at least 50%, of the total debts that are fixed in amount (exclusive of debt for the debtor's home) must be related to the farming operation.
 - More than 50% of the gross income of the individual or the husband and wife for the preceding tax year, or for each of the 2nd and 3rd prior tax years, must have come from the farming operation.



Protect Against Fraud & Debtor Mismanagement

- Advantages to debtors of Chapter 12
 - Less expensive than Chapter 11.
 - No committee of unsecured creditors.
 - Easier to sell “farmland or farm equipment” free and clear of liens.
 - Tax arising from “the sale . . . of any property used in the debtor’s farming operation” is treated as an unsecured liability and may be discharged in bankruptcy.
 - Unsecured creditors may only be paid out of a debtor’s disposable income, which excludes amounts necessary for “operation of the debtor’s business” and “maintenance and support” of the debtor & dependents.
 - Creditors do not vote on confirmation of the plan, but may file objections—however, plan may be confirmed over their objections.
 - Generally faster than Chapter 11.
- Expansion of Chapter 12 eligibility increases the bargaining power of newly-eligible debtors, even if they do not ultimately file for bankruptcy.

Protect Against Fraud & Debtor Mismanagement

- Chapter 12 plan confirmation
- In re Fuelling, 601 B.R. 665, Bankr. No. 18-00644 (Bankr. N.D. Iowa May 1, 2019).
 - Debtors proposed a plan in which they would start a cattle operation using fully-encumbered crop proceeds.
 - Creditor/primary lender objected to the plan.

Protect Against Fraud & Debtor Mismanagement

- Court denied confirmation of the plan, holding:
 - The proposed substitute lien in livestock did not satisfy the lien-retention confirmation standards for secured claims.
 - The proposed plan impermissibly sought to use rents derived from grain bins and equipment covered by primary lender's blanket lien to make payments to other creditors.
 - The plan was not feasible because debtors did not show they would be able to make the balloon payments at the end of the plan.
 - Proposed interest rate of 4.88% was equitable and satisfied bankruptcy code.
 - Crop sale proceeds were not necessary to an effective reorganization.





Protect Against Claims and Counterclaims



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Bankruptcy Issues

■ Equitable Subordination

- Section 510(c) of the Bankruptcy Code provides that the bankruptcy court may “under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim (or equity interest) to all or part of another allowed claim (or equity interest).”
- If a Bank is found to be engaged in fraud or other grossly inequitable conduct that results in harm to the Borrower or third parties it could have its claim equitably subordinated to the claims of other creditors. *Bergquist v. First National Bank (In re American Lumber Co.)*, 5 B.R. 470 (D. Minn. 1980).
- Generally the Courts look to whether the Bank acts in the role of an insider or controls the Borrower and its further inequitable conduct injures other creditors.

■ Preference Claim

- A lender can be held liable under section 547 of the Bankruptcy Code if it receives payment from a borrower within 90 days of a bankruptcy filing (or a year if it is deemed to be an insider). The definition of preference and the defenses to preference payments are in section 547 of the Bankruptcy Code.



Bankruptcy Issues

- Fraudulent Conveyances
 - Banks can be held to be liable under sections 544 and 548 of the Bankruptcy Code or under state Fraudulent Transfer law.
 - Claims for fraudulent conveyance can arise when a leveraged buyout fails, because the shareholders were paid before the company's creditors.



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Workout Litigation Liabilities

- **Withholding Taxes**
 - A lender may be liable for its customer's withholding taxes where the Bank has advanced funds to a customer for the payment of wages and there is no allowance for the payment of withholding taxes.
 - A bank can be held liable for unpaid withholding taxes if it is found to be a responsible person – i.e., a bank that is in control of a borrower.
- **Securities Law Violations**
 - A lender can be held liable for securities law violations if it is found to be in control of the daily affairs of the borrower under section 20(a) of the Exchange Act.
- **Hot Goods**
 - The Department of Labor can use a “hot goods injunction” to prevent goods produced in violation of the FLSA (e.g., child labor or minimum wage A lender may be found violations) from entering the marketplace.
- **WARN ACT – Worker Adjustment and Retraining Notification Act of 1988**
 - responsible for payment of wages under the WARN Act where it asserted sufficient control over a borrower's ability to pay debts. *Adams v. Erwin Weller*, 87 F.3d 269 (8th Cir. 1996).



Waiver of Jury Trials and Release Provisions

- These agreements are generally found to be enforceable.
 - Make sure they are prominently placed in any agreement.
 - Ask borrower to initial that they read and understand the waiver.
 - These are a good way to limit the cost of resolving a dispute between borrower and lender.



High Loss Industries

- Quiznos
- Pizza Hut
- Ice Cream / Yogurt Shops
- Hair Salons
- Hotels / Motels
- Most restaurants (focus on well-known franchises)
- Bars / Pubs
- Golf courses, theme parks, recreational venues
- Landscape / Snow removal (Iowa only)
- Boat, motorcycle, recreational vehicle sales / Dealers

High Loss Industries

- Tanning salons
- “Soft retail” stores (i.e. clothing, housewares, etc.)
- Cell phone stores
- Audio / Video stores
- Flower shops
- Jewelry stores
- Craft breweries
- Tax preparation services
- Laundry shops
- Over-the-road trucking companies

High Loss Industries

- Gun stores
- Photography / Photo shops
- Fitness centers



Questions?



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