TO BE PUBLISHED
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

OYENS FEED & SUPPLY, INC., Appellant and Cross-Appellee, vs. PRIMEBANK, Appellee and Cross-Appellant, and CROOKED CREEK CORP., Plaintiff, vs. PRIMEBANK and OYENS FEED & SUPPLY, INC., Defendants.	No. C14-4114-DEO **REPORT AND RECOMMENDATION**

Appellant Oyens Feed & Supply, Inc. (Oyens), and cross-appellant Primebank appeal from a decision and judgment entered by the United States Bankruptcy Court for the Northern District of Iowa[1] on October 21, 2014. On February 19, 2015, the Honorable Donald E. O'Brien, Senior United States District Judge, entered an order (Doc. No. 17) referring these appeals to me for the preparation of a report and recommended disposition pursuant to 28 U.S.C. § 636. For the reasons that follow, it

[1] The Honorable Thad J. Collins, Chief United States Bankruptcy Judge.

is my recommendation that Judge O'Brien enter an order certifying the two legal questions presented by these appeals to the Iowa Supreme Court.

I. PROCEDURAL HISTORY[2]

Crooked Creek Corporation (Debtor) filed for Chapter 12 bankruptcy on August 18, 2009. Debtor is a farmer that conducted farrow-to-finish operations for swine production. Oyens is a feed supplier. Primebank is a traditional lender. They are both creditors of Debtor.

Debtor filed the Adversary Proceeding to determine which lien has priority in hog-sale proceeds. Oyens filed an answer asserting that its lien had priority as a statutory lien under Iowa Code Chapter 570A, which gives priority status to agricultural feed suppliers. Primebank filed a cross-claim asserting that its lien had priority in the hogs.

On Debtor's motion, and pursuant to the bankruptcy court's order, the disputed livestock was sold and the proceeds were deposited in a cash collateral account. Those proceeds are insufficient to satisfy both parties' liens. Under the bankruptcy court's order, the creditors' respective lien claims attached to the proceeds in the same nature and priority as their liens attached to the hogs. Because Debtor needed cash collateral, the parties agreed to allow Debtor to use some of the sale proceeds as cash collateral so long as Debtor left $358,841.10 in the account, which represented the maximum amount necessary to satisfy Oyens' asserted claim. Those proceeds are currently in escrow.

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[2] This procedural overview, along with the facts set forth in Section II of this report and recommendation, are taken from the bankruptcy court's October 21, 2014, decision. *See* Doc. No. 148 in *Oyens Feed & Supply, Inc. v. Primebank (In re Crooked Creek Corp.)*, Adv. Case No. 09-09093S in the United States Bankruptcy Court for the Northern District of Iowa (the Adversary Proceeding).

Primebank moved for partial summary judgment, asserting that Oyens was not entitled to superpriority under Iowa Code § 570A.5(3) because it did not comply with the certified request process described in Iowa Code § 570A.2. Oyens resisted the motion by arguing that §570A.5(3) operates independently of § 570A.2. The bankruptcy court granted Primebank's motion for partial summary judgment. Oyens appealed to this court, which certified the question to the Iowa Supreme Court. On December 30, 2011, the Iowa Supreme Court issued an opinion answering the certified question in Oyens' favor. The Court determined that Primebank's lien was superior insofar as it covered the purchase price of the hogs, but that Oyens had priority on increases in the hogs' value from acquisition price to final sale. *Oyens Feed & Supply Co. v. Primebank*, 808 N.W.2d 186, 194 (Iowa 2011).

The case was then remanded to the bankruptcy court for trial. The bankruptcy court issued its decision and entered its final judgment on October 21, 2014. The court concluded that Oyens has a superpriority claim for $156,367.43 and an unsecured claim for $186,004.35, while Primebank's secured claim is limited to $315,270.19.[3]

II. FACTS

The bankruptcy court found the facts to be as follows:[4]

Debtor is a farrow-to-finish hog operation. Debtor did not purchase any outside swine. Debtor raised replacement gilts rather than purchasing them. Oyens provided Debtor's sole source of hog feed. Oyens also provided Debtor with management

[3] The bankruptcy court amended its decision on November 14, 2014, to clarify that Oyens did not concede (and thus waive) a certain issue. *See* Doc. No. 157-1 in the Adversary Proceeding.

[4] I have omitted some facts that do not appear to be material to the issues raised by these appeals.

services including inventorying and monitoring the hogs and preparing budgets. Although Oyens tracked Debtor's inventory, most of those records have been lost for the relevant periods of time.

Debtor is indebted to both Primebank and Oyens Feed. Debtor owes $342,371.78 to Oyens for unpaid feed: $45,927.22 is for feed delivered from April 27, 2009 to May 28, 2009, and $110,440.21 is for feed delivered from July 14, 2009, to August 14, 2009. Debtor also owes Oyens $16,570.00 for yardage and veterinary services.

Originally, Debtor owed Primebank roughly $1.2 million on two promissory notes. As a result of various transactions and a partial loan write-off, Debtor now owes Primebank $315,270.19.

As noted above, livestock proceeds totaling $358,841.10 remain in an escrow account. Both creditors have perfected their respective liens in the livestock proceeds. Primebank perfected its secured position in 1997 with a standard Article 9 "blanket lien," which includes Debtor's hogs. Primebank properly renewed its interest in 2002 and 2007. Oyens filed financing statements on May 28, 2009, and August 14, 2009, to perfect a lien for Debtor's feed purchases.

III. JURISDICTION

District courts have jurisdiction to hear appeals from "final judgments, orders, and decrees" of bankruptcy courts. 28 U.S.C. § 158(a)(1). Both parties assert, and I concur, that jurisdiction exists under Section 158(a)(1) because the bankruptcy court's October 21, 2014, ruling is a final order that disposed of the entire Adversary Proceeding. Doc. No. 11 at 5; Doc. No. 13 at 4.

IV. THE ISSUES ON APPEAL

Oyens raises the following issue on appeal:

> Whether the Bankruptcy Court erred in determining that, under Iowa Code Chapter 570A [specifically Iowa Code § 570A.4(2)[5]], Oyens Feed was required to file a financing statement every 31 days in order to maintain perfection of its Agricultural Supply Dealer's Lien as to feed supplied within the preceding 31 day period.

Doc. No. 11 at 4. Oyens argues that Section 570A.4(2) does not limit the duration of the lien to 31 days but, instead, limits the retroactive perfection of the lien to 31 days. Thus, it argues that a single financing statement may be filed to perfect the lien as to future deliveries and as to feed delivered up to 31 days before the filing.

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[5] Section 570A.4 states:

> 570A.4 PERFECTING THE LIEN -- FILING REQUIREMENTS.
>
> Except as provided in this section, a financing statement filed to perfect an agricultural supply dealer lien shall be governed by chapter 554, article 9, part 5, in the same manner as any other financing statement.
>
> 1. The lien becomes effective at the time that the farmer purchases the agricultural supply.
>
> 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. The financing statement shall meet the requirements of section 554.9502, subsection 1, and include all applicable information described in section 554.9516. Filing a financing statement as provided in this subsection satisfies all requirements for perfection of an agricultural lien as provided in chapter 554, article 9.

Iowa Code § 570A.4

Primebank raises the following issue on cross-appeal:

> Whether the Bankruptcy Court erred in determining that the definition of acquisition price under Iowa Code § 570A.5(3)[6] is $0 when hogs are born in the facility.

Doc. No. 13 at 4. Primebank argues that even though the Debtor's hogs were born at the Debtor's facility, the Debtor incurred certain costs associated with gaining possession

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[6] Section 570A.5 states:

> 570A.5 PRIORITY OF LIEN.
>
> Except as provided in this section, an agricultural supply dealer lien that is effective or perfected as provided in section 570A.4 shall be subject to the rules of priority as provided in section 554.9322. For an agricultural supply dealer lien that is perfected under section 570A.4, all of the following shall apply:
>
> 1. The lien shall have priority over a lien or security interest that applies subsequent to the time that the agricultural supply dealer lien is perfected.
>
> 2. 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 lien is perfected. However, a landlord's lien that is perfected pursuant to section 570.1 shall have priority over a conflicting agricultural supply dealer 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 lien as provided in section 571.3A.
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> 3. A lien in livestock feed shall have 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.

and ownership of those hogs. Primebank contends the bankruptcy court erred in holding that the "acquisition price" is zero under these circumstances.

V. DISCUSSION

Both issues raised by these appeals present questions of statutory construction that have not been addressed by the Iowa Supreme Court. While this case has already been certified to the Iowa Supreme Court once, to answer a different question, I raised the possibility of certifying the current issues during a status conference with counsel on April 6, 2015. After consulting with their respective clients, counsel advised my chambers that (a) Oyens supports certification and (b) Primebank does not oppose it. Thus, I find that it is appropriate to consider whether certification is, in fact, appropriate.

The procedure for certifying a question to the Iowa Supreme Court is outlined in Local Rule 83 and Iowa Code § 684A.1. Local Rule 83 states:

> When a question of state law may be determinative of a cause pending in this court and it appears there may be no controlling precedent in the decisions of the appellate courts of the state, any party may file a motion to certify the question to the highest appellate court of the state. The court may, on such motion or on its own motion, certify the question to the appropriate state court.

Section 684A.1 states:

> The supreme court may answer questions of law certified to it by the supreme court of the United States, a court of appeals of the United States, a United States district court or the highest appellate court or the intermediate appellate court of another state, when requested by the certifying court, if there are involved in a proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the appellate courts of this state.

This court has identified seven factors to evaluate in deciding whether to certify a question of law to the applicable state court: (1) the extent to which the legal issue under consideration has been left unsettled by the state courts; (2) the availability of legal resources which would aid the court in coming to a conclusion on the legal issue; (3) the court's familiarity with the pertinent state law; (4) the time demands on the court's docket and the docket of the state supreme court; (5) the frequency that the legal issue in question is likely to recur; (6) the age of the current litigation and the possible prejudice to the litigants which may result from certification; and (7) whether there is any split of authority among those jurisdictions that have considered the issues presented in similar or analogous circumstances. *Lieberkneckt v. Bridgestone/Firestone, Inc.*, 980 F. Supp. 300, 310-11 (N.D. Iowa 1997).

Regarding the first factor — the extent to which the legal issue under consideration has been left unsettled by the state courts — it appears that there are no Iowa state court decisions that address the statutory construction issues present here. The construction of Iowa Code § 570A.4(2) has been addressed in several bankruptcy court rulings,[7] but not by any Iowa state court. Meanwhile, Iowa Code § 570A.5(3) was addressed in the Iowa Supreme Court's prior decision on certification in this case, but the "acquisition price" issue now raised by Primebank was not considered. *See Oyens Feed & Supply, Inc.*, 808 N.W.2d at 189-95. Neither party has referred me to any Iowa state court decisions, at any level, addressing the questions posed by these appeals. I find that the first certification factor weighs in favor of certification.

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[7] *See Schley v. Peoples Bank (In re Schley),* 509 B.R. 901 (Bankr. N.D. Iowa 2014); *Farmers Coop Co. v. Ernst & Young, Inc. (In re Big Sky Farmers Inc.),* 512 B.R. 212 (Bankr. N.D. Iowa 2014)*; Wells Fargo Bank v. Tama Benton Coop. (In re Shulista),* 451 B.R. 867 (Bankr. N.D. Iowa 2011).

As for the second factor – the availability of legal resources which would aid the court in coming to a conclusion on the legal issue – this court has been unable to locate legal resources that are useful in predicting how the Iowa Supreme Court would rule on the issues presented. The second factor weighs in favor of certification.

The third factor – the court's familiarity with the pertinent state law – also weighs in favor of certification. Iowa Code chapter 570A establishes an agricultural supply dealer lien, describes the method for perfecting the lien and addresses the manner in which the lien fits within Iowa's statutory secured-transactions framework. Numerous references to Article 9 of Iowa's Uniform Commercial Code are included within Sections 570A.4 and 570A.5. Moreover, both parties address the interrelationship between chapter 570A and Article 9. While it would be inaccurate to state that this court has no familiarity with this area of Iowa law, the Iowa Supreme Court is in a far better position to address the issues of Iowa law presented by these appeals. The third factor weighs in favor of certification.

The fourth factor – the time demands on this court's docket and the docket of the state supreme court – is presumably neutral. I have no information suggesting that the Iowa Supreme Court's docket is any less demanding than this court's docket. The fifth factor – the frequency that the legal issue in question is likely to recur – weighs in favor of certification. This is especially true with regard to the interpretation of Section 570A.4(2). As noted above, the question of whether a financing statement must be filed every 31 days to maintain perfection of an agricultural supply dealer's lien has arisen repeatedly in bankruptcy court. While the "acquisition price" issue Primebank raises with regard to Section 570A.5(3) does not appear to have been litigated as frequently, it is likely to arise in any proceeding that involves a farrow-to-finish production operation.

As for the sixth factor – the age of the current litigation and the possible prejudice

to the litigants which may result from certification – the parties do not oppose certification. This, alone, negates any concerns as to potential prejudice. Moreover, it is not apparent that certification would cause a delay in the ultimate adjudication of these appeals. If I address the merits, one or both parties can (and surely will) appeal my report and recommendation to Judge O'Brien by filing objections. Resolving those objections will likely consume significant time. And, of course, once Judge O'Brien issues a final ruling, the parties will have the right to appeal that ruling to the Eighth Circuit Court of Appeals.

By contrast, if the questions presented are certified and the Iowa Supreme Court agrees to answer them, the answers will almost-certainly be dispositive of both appeals. I have no information to suggest that the certification process would take significantly more, or less, time than a final ruling by this court followed by an appeal to the Eighth Circuit. Because no party is claiming prejudice, and because certification would cause no obvious delay, I find that the sixth factor weighs in favor of certification.[8]

On balance, I find that the pertinent factors weigh heavily in favor of certification. Accordingly, pursuant to Local Rule 83 and Iowa Code § 684A.1, I recommend that Judge O'Brien enter an order certifying the following questions of Iowa law to the Iowa Supreme Court:

First Question of Law for Certification

> Pursuant to Iowa Code Section 570A.4(2), is an agricultural supply dealer required to file a new financing statement every thirty-one (31) days in

[8] The seventh factor – whether there is a split of authority from other jurisdictions – does not appear to be applicable to the questions presented by these appeals. Neither party has cited cases interpreting analogous state statutes. I consider this factor to be neutral.

order to maintain perfection of its agricultural supply dealer's lien as to feed supplied within the preceding thirty-one (31) day period?

Second Question of Law for Certification

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

VI. CONCLUSION AND RECOMMENDATION

For the reasons set forth herein, I RESPECTFULLY RECOMMEND the entry of an order certifying the two questions of law set forth above to the Iowa Supreme Court pursuant to Local Rule 83 and Iowa Code § 684A.1.

Objections to this Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b) must be filed within fourteen (14) days of the service of a copy of this Report and Recommendation. Objections must specify the parts of the Report and Recommendation to which objections are made, as well as the parts of the record forming the basis for the objections. *See* Fed. R. Civ. P. 72. Failure to object waives the right to de novo review by the district court of any portion of the Report and Recommendation as well as the right to appeal from the findings of fact contained therein. *United States v. Wise*, 588 F.3d 531, 537 n.5 (8th Cir. 2009).

IT IS SO ORDERED.

DATED this 5th day of May, 2015.

LEONARD T. STRAND
UNITED STATES MAGISTRATE JUDGE