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# Secured Interests in Louisiana Crops: The 2010 Legislative Revision

L. David Cromwell\*

## INTRODUCTION

If the legislator had by design sought to obscure the law governing secured interests in crops and other farm products by scattering it throughout the law books, he would have been at great pains to devise a more fitting statutory scheme than the one that has developed in Louisiana over the last several decades.

Since 1990, Chapter 9 of the Uniform Commercial Code<sup>1</sup> has to an increasing extent governed consensual security interests in crops and other farm products. As revised in 2001, Chapter 9 now also applies to agricultural privileges that arise by operation of law,<sup>2</sup> though the Uniform Commercial Code does not itself create any of these privileges. Rather, agricultural privileges arise under various articles of the Louisiana Civil Code as well as numerous sections of Title 9 of the Louisiana Revised Statutes of 1950. Neither Chapter 9 of the Uniform Commercial Code, the Civil Code, nor Title 9 of the Louisiana Revised Statutes prescribes the means of making security interests and privileges upon agricultural products effective against third persons. Those rules are found in Title 3 of the Louisiana Revised Statutes and, in the case of out-of-state debtors, in the laws of other states. However, until the 2010 legislation that is the focus of this Article, none of these codes or statutes provided the basic rule for ranking competing security interests and privileges in crops. For that rule, it was necessary to consult yet another section of Title 9 of the Louisiana Revised

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1. Louisiana was the last state to adopt Article 9 of the Uniform Commercial Code. See Act No. 528, 1988 La. Acts 1367, amended by Act No. 135, 1989 La. Acts 417 (adopting “Chapter 9 of the Louisiana Commercial Laws,” effective January 1, 1990).

2. “A *privilege* is a right, which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors, even those who have mortgages.” LA. CIV. CODE ANN. art. 3186 (1994). Privilege can be claimed only for those debts for which it is expressly granted by law. *Id.* art. 3185. Chapter 9 of the Louisiana Uniform Commercial Code uses the uniform terminology “agricultural lien” to refer to privileges that fall within the scope of the definition of that term in Louisiana Revised Statutes section 10:9-102(a)(5). Except where specific reference is made to a provision of Chapter 9, this Article will use the civilian term “privilege” rather than “lien.” Where used in this Article, the term “agricultural lien” should be understood to have the technical meaning given to it in Chapter 9.

Statutes, section 9:4521.<sup>3</sup> But, by its terms, the effect of that statute was limited simply to the relative rankings of secured interests that were perfected by a filing under Title 3 of the Louisiana Revised Statutes. To determine the effectiveness of a secured interest that was not so perfected, if indeed an unperfected secured interest could have any effect against third persons at all, it was necessary to return to rules in Title 3, the Uniform Commercial Code, or perhaps even the Civil Code. Finally, none of these statutes, either singly or in combination, gives a complete picture of the rights of the holder of a secured interest in agricultural products against a buyer. To find the answer to that question, it is necessary to consult the federal Food Security Act of 1985, 7 U.S.C. § 1631.

Concerned about the “myriad of ownership, contract and security interest issues that are difficult to sort out if there is not enough money to satisfy the farmers, lenders and grain elevators” following the insolvency of a grain elevator, the Louisiana Legislature adopted Senate Concurrent Resolution No. 122 of 2008, urging the Louisiana State Law Institute (the “Law Institute”) to study “security interest priorities and contract right issues faced by farmers, lenders and grain elevators.”<sup>4</sup> After an exhaustive study, the Law Institute rendered a report to the legislature,<sup>5</sup> concluding that substantial inconsistencies, anomalies, and voids existed in the law governing secured interests in crops.<sup>6</sup> Accordingly, the Law Institute proposed, and the 2010 Louisiana Legislature adopted, legislation designed to address and correct these problems.<sup>7</sup> After a review of the legislative evolution that over the course of time produced Louisiana’s legal regime governing secured interests in crops, this Article will discuss the

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3. Louisiana Revised Statutes section 9:4521 was repealed by Act No. 378 of 2010.

4. S. Con. Res. 122, 2008 Leg., Reg. Sess. (La. 2008), available at <http://www.legis.state.la.us/billdata/streamdocument.asp?did=502554>.

5. See Report in Response to SCR No. 122 of 2008, Secured Interests in Crops (Mar. 12, 2010), which was authored by the author of this Article with the assistance of members of the Security Devices Committee of the Law Institute. This Article draws upon, and to a large extent reproduces, the author’s work embodied in the report. The assistance provided by members of the Committee is gratefully acknowledged.

6. “Farm products,” as defined in the Uniform Commercial Code, includes both harvested and unharvested crops, livestock, and products of crops or livestock. U.C.C. § 9-102(a)(34) (2010). Title 3 of the Louisiana Revised Statutes defines “farm products” also to include standing timber. See LA. REV. STAT. ANN. § 3:3652(8) (Supp. 2011). Though the focus of the Law Institute’s report, as well as the resulting legislation, was on crops, the 2010 legislation nonetheless has some effect on secured interests in other types of farm products. For instance, the changes made to Title 3 affect secured interests in all types of farm products.

7. Act No. 378, 2010 (effective, with limited exceptions, Aug. 15, 2010).

changes made by the 2010 legislation as well as a number of other conflicts not addressed by the legislation.

## I. HISTORICAL DEVELOPMENT

To understand how Louisiana's rules governing secured rights in farm products became scattered about as they are in its statutes, and more importantly to understand how those rights relate to one another, it is necessary to have an appreciation of the historical development of Louisiana agricultural privileges, crop pledges, and security interests.<sup>8</sup>

### A. Agricultural Privileges

In view of the longstanding dependence of the state's economy upon agriculture, it might seem surprising that at the time Louisiana attained statehood in 1812, its law recognized only two privileges on crops: (1) the privilege of the overseer on crops of the current year to secure payment of amounts due him for the current year and the immediately preceding year and (2) the privilege for debts due for the rent of an immovable and the hire of slaves employed in working it.<sup>9</sup> Act 70 of 1843 added a privilege for debts due for necessary supplies, making this privilege expressly subordinate to that of the overseer.

Following the close of the Civil War, Act 195 of 1867 amended article 3184 of the Civil Code of 1825 by substituting a privilege for the wages of farm laborers in place of the previously existing privilege for the hire of slaves.<sup>10</sup> The same act added a

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8. For an early discussion of crop privileges and pledges in Louisiana, see Jack A. Bornemann, *Crop Liens and Privileges in Louisiana*, 14 TUL. L. REV. 444 (1940).

9. DIGEST OF 1808, bk. III, tit. XIX, ch. IV, § I, art. 74. The same provision was carried forward in article 3184 of the Civil Code of 1825, except that the overseer's privilege was expanded to cover also the preceding year's crop.

10. The term "laborer" has been extensively interpreted under the jurisprudence, most recently by the Louisiana Supreme Court in *Bayou Pierre Farms v. Bat Farms Partners, III*, 693 So. 2d 1158 (La. 1997), in which the court, analogizing to its prior ruling under the Louisiana Private Works Act in *Pringle-Associated Mortgage Corp. v. Eanes*, 226 So. 2d 502 (La. 1969), held that the agricultural laborer's privilege protects only the individuals who actually pick cotton rather than the partnership employing them. But see *Tee It Up Golf, Inc. v. Bayou State Construction, LLC*, 30 So. 3d 1159 (La. Ct. App. 3d 2010), which, without citing either *Pringle* or *Bat Farms*, allowed a corporate general contractor in a Private Works Act case to claim the laborer's privileges of its employees. Fortunately, this portion of the court's opinion was only dicta, as the court correctly found that the general contractor's filed statement of privilege was defective because it contained only a municipal address of the property. *Id.* at 1162.

privilege for debts due for money advanced for the purpose of the purchase of necessary supplies and payment of necessary expenses.<sup>11</sup> These new privileges,<sup>12</sup> along with the preexisting privilege in favor of the overseer,<sup>13</sup> were expanded to cover not only the crop itself<sup>13</sup> but also its proceeds.<sup>14</sup> Interestingly, the right to pursue proceeds was not given to the laborer and was not expressly granted to the lessor by the act.<sup>15</sup> All agricultural privileges were ranked concurrently, except that the laborer's privilege was given first priority. The 1867 legislation was retained in the adoption of the Revised Civil Code of 1870,<sup>16</sup> and the privileges that it recognized are the same crop privileges that arise under the Louisiana Civil Code today.<sup>17</sup>

Until recently, the jurisprudence held that agricultural privileges operate upon movables and hence need not be recorded

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11. Substantial jurisprudential gloss exists as to the meaning of the terms "necessary supplies" and "necessary expenses." See HARRIET SPILLER DAGGETT, *LOUISIANA PRIVILEGES AND CHATTEL MORTGAGE* § 110, at 443–53 (1942).

12. The overseer's privilege was limited by Act No. 195 of 1867 to amounts due him for the current year on crops of the current year.

13. Agricultural privileges attach only to the merchantable part of the crop and not to that part needing to be retained on the plantation to keep it going. *Milliken & Farwell v. Roger*, 70 So. 848 (La. 1916); *Citizens Bank v. Wiltz*, 31 La. Ann. 244 (1879).

14. As revised in 2001, Chapter 9 of the Uniform Commercial Code applies to agricultural privileges but does not address the issue of whether agricultural privileges attach to proceeds, instead leaving that determination to other law. However, if the privilege does attach to proceeds, the perfection and ranking rules of revised Chapter 9 apply to the proceeds to the same extent as they apply to the farm products themselves. See LA. REV. STAT. ANN. § 10:9-315 UCC cmt. 9 (2002 & Supp. 2011).

15. *Bat Farms*, 693 So. 2d 1158, notes, but does not reach, the issue of whether the laborer's privilege attaches to proceeds of crops. Professor Daggett suggested that the omission of the reference to proceeds with respect to the laborer's privilege was intentional, because the laborer has pursuit against other movables. See DAGGETT, *supra* note 11, § 111, at 454. Of course, the same could be said of the lessor's privilege, but the courts have given the lessor the right to pursue proceeds of crops, primarily on the basis of article 2705 of the Louisiana Civil Code of 1870 (now article 2707), granting the lessor a privilege on "the fruits produced during the lease of the land." See *Carroll v. Bancker*, 10 So. 187 (La. 1891); *Vento v. Amici*, 159 So. 751 (La. Ct. App. 1st 1935).

16. LA. CIV. CODE ANN. art. 3217 (1994).

17. Special legislation has added additional privileges for debts for water furnished to grow crops and amounts due to threshermen, combinemen, and grain driers. See LA. REV. STAT. ANN. §§ 9:4522–:4523 (2007) (derived from Act. No. 53, 1898 La. Acts 35, and Act No. 53, 1906 La. Acts 86). There was formerly a privilege in Louisiana Revised Statutes section 9:4524 for physicians providing medical services, but the privilege was repealed by Act No. 378 of 2010.

in order to have effect against third persons.<sup>18</sup> With limited exceptions, however, privileges on movables are by their very nature simple preferences unaccompanied by a right of pursuit.<sup>19</sup> The courts were presented some time ago with the issue of whether the fact that most agricultural privileges attach to both the crop and its proceeds, in combination with the rule that agricultural privileges need not be recorded in order to be effective against third persons, causes the privilege to follow the crop into the hands of a third party purchaser. A number of early cases held that agricultural privileges follow crops into the hands of third persons, who are charged with presumptive knowledge of the existence of the privilege.<sup>20</sup> However, in *Loeb v. Collier*, the court severely limited any right of pursuit.<sup>21</sup> According to the court in that case, as long as the agricultural product remains in the hands of the farmer, it is a crop, but when the farmer's vendee parts with ownership, the agricultural product can no longer be considered a crop but instead is merchandise.<sup>22</sup> The court believed that allowing the privilege holder to pursue the crop against third persons *ad*

18. See *Purity Feed Mills Co. v. Moore*, 93 So. 196 (La. 1922); *Weill v. Kent*, 28 So. 295 (La. 1900). Article XIX, section 19 of the 1921 Constitution (which, as an unrepealed section of the Constitution Ancillaries, continues in force as a statute) provides that privileges upon movable property exist without registration except in such cases as are prescribed by law. Until the enactment of legislation creating the central agricultural registry in 1987, there was no provision of law requiring agricultural privileges to be recorded in order to be effective against third persons.

19. *Liquid Carbonic Corp. v. Leger*, 169 So. 170 (La. Ct. App. 1st 1936); see also 2 MARCEL PLANIOL & GEORGES RIPERT, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL*, pt. 2, Nos. 2548, 2618 (La. State Law Inst. trans., 1959) (12th ed. 1939) (Fr.); A.N. Yiannopoulos, *Real Rights in Louisiana and Comparative Law: Part I*, 23 LA. L. REV. 161, 223 (1963). There are, however, limited exceptions to this rule. For instance, despite Planiol's views, federal courts in Louisiana have construed Louisiana Civil Code article 3227 to mean that a vendor's privilege on movables survives an alienation by the original purchaser so long as he remains in possession following the alienation. *In re Tape City*, U.S.A., 677 F.2d 401 (5th Cir. 1982); *In re Trahan*, 283 F. Supp. 620 (W.D. La. 1968), *aff'd*, 402 F.2d 796 (5th Cir. 1968); see also Bessie Margolin, Comment, *Civil Law: Vendor's Privilege*, 4 TUL. L. REV. 239 (1929). Also, the last paragraph of Louisiana Civil Code article 3227, as well as Louisiana Revised Statutes section 9:4541, gives the vendor of agricultural products in any chartered city or town a five-day right of pursuit.

20. See, e.g., *Nat'l Bank of Commerce v. Sullivan*, 41 So. 480 (1906); *Weill v. Kent*, 31 So. 761 (La. 1902); *Weill v. Kent*, 28 So. 295 (La. 1900). However, certain wording of the majority opinion in *Sullivan*, as well as a concurring opinion, suggested that this rule applies only to those who buy directly from the planter. *Sullivan*, 41 So. at 485-86 (majority opinion); *id.* at 487 (Breux, C.J. & Land, J., concurring).

21. 59 So. 816 (La. 1912).

22. *Id.* at 817.

*infinitum* would “practically paralyze our entire commerce.”<sup>23</sup> Thus, the rule evolved that there is a limited right of pursuit against the first purchaser if the purchase of the crop occurred on the farm.<sup>24</sup> However, there was no right of pursuit against subsequent purchasers.<sup>25</sup>

### *B. Crop Pledges*

An important concept central to the notion of privileges is that they arise only by operation of an express provision of law and cannot be granted contractually.<sup>26</sup> Thus, until 1874, a planter was without any practical means of granting lenders or suppliers a consensual secured interest in his growing crop.<sup>27</sup> Act 66 of 1874 for the first time permitted farmers to pledge their growing crops for advances of money and supplies required for the production of the crop, explicitly substituting recordation of the contract of pledge in the mortgage records in place of the requirement of

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23. *Id.*

24. Professor Daggett questioned the holdings of these cases, because the Louisiana Civil Code does not expressly limit the effectiveness of agricultural privileges as it does in the case of the vendor’s privilege or the lessor’s privilege. See DAGGETT, *supra* note 11, § 113, at 467–68. Her reasoning obviously did not proceed from Planiol’s starting proposition that privileges ordinarily carry with them no right of pursuit. If that proposition is used as the starting point, then the *limitation* that she saw upon vendor’s privileges is actually an *expansion* of the right of the vendor beyond the event (alienation from the debtor’s patrimony) that would otherwise extinguish the privilege. Viewed from Planiol’s perspective, the proper criticism of these cases would be that they allow the holder of an agricultural privilege a right of pursuit even against the first purchaser, not that they fail to allow pursuit against subsequent purchasers.

25. The adoption in 2001 of revised Chapter 9 of the Uniform Commercial Code appeared to have undone the longstanding rule that the holder of an agricultural privilege has no right of pursuit beyond the first purchaser. This change was reversed by Act No. 378 of 2010. See discussion *infra* Part II.C.

26. See, e.g., Southport Petroleum Co. of Del. v. Fithian, 13 So. 2d 382 (La. 1943); *In re* Liquidation of Hibernia Bank & Trust Co., 162 So. 644 (La. 1935); State v. Miller, 126 So. 422, 428 (La. 1930); Succession of Rousseau, 23 La. Ann. 1 (1871). For a case involving an extreme, and perhaps misguided, allegiance to this rule, see *Lewis v. Kubena*, 800 So. 2d 68 (La. Ct. App. 4th 2001), in which the court found that the words “I hereby grant a lien against the proceeds of this case” were ineffective to grant the creditor any rights in the proceeds in question because a lien or privilege cannot be created by contract. The quoted language should have been considered sufficient to create a Chapter 9 security interest in the described proceeds.

27. The contract of pledge requires that actual delivery of the thing pledged be made to the pledgee. LA. CIV. CODE ANN. art. 3152 (1994). Antichresis contemplates delivery of an immovable to the creditor so that he might reap its fruits and other revenues. *Id.* art. 3176. Neither is practical in the case of a producer growing its own crop.

delivery of possession otherwise required by the law of pledge.<sup>28</sup> The act made the pledge subordinate to both the laborer's privilege and the lessor's privilege. Under the express wording of the act, the crop pledge did not supersede any privilege that the crop pledgee might otherwise hold under the law but rather conferred additional rights upon the pledgee.

The court in *National Bank of Commerce v. Sullivan* held that a crop pledge could not secure advances made prior to the time the pledge was contracted, even though those advances were used for the current year's crop.<sup>29</sup> This holding was legislatively overruled by Act 93 of 1922, which permitted the pledge to secure advances that had been received, were received concurrently with the pledge, or were thereafter made; however, the pledge could "secure no debt other than for money, goods, and necessary supplies for the production of such crop for the current year."

In Act 89 of 1886, the legislature enacted a comprehensive scheme governing the ranking of agricultural privileges and crop pledges among themselves, displacing the ranking rules of Act 66 of 1874 as well as those provided within article 3217 of the Louisiana Civil Code.<sup>30</sup> The privileges of the laborer, the lessor, and the overseer were ranked in that order ahead of all crop pledges, which were ranked among themselves in the order of recordation. The privileges of the furnishers of supplies and money, and of the physician, were ranked behind all other privileges and all crop pledges.<sup>31</sup>

In the enactment of the Louisiana Revised Statutes of 1950 and the almost immediate amendment made by Act 115 of 1950, the crop pledge law appeared as Louisiana Revised Statutes section 9:4341. The ranking rules that had originated in Act 89 of 1886 were placed in Louisiana Revised Statutes section 9:4521<sup>32</sup> and

28. Act No. 51 of 1890 later provided for the filing of crop pledges in a separate crop pledge book, rather than in the mortgage records. Act No. 114 of 1934 prescribed the recordation of only an abstract of the crop pledge, rather than the crop pledge itself.

29. 41 So. 480 (La. 1906).

30. This act is the precursor of former Louisiana Revised Statutes section 9:4521 (repealed by Act No. 378 of 2010).

31. Act No. 89, 1886 La. Acts 127.

32. Prior to its repeal by Act No. 378 of 2010, former Louisiana Revised Statutes section 9:4521 provided as follows:

As a specific exception to [Louisiana Revised Statutes section] 9:4770, the following statutory privileges and perfected security interests as affecting unharvested crops shall be ranked in the following order of preference, provided that such privileges and security interests have been properly filed and maintained in accordance with the central registry provisions of [Louisiana Revised Statutes section] 3:3651 et seq.: (1) Privilege of the laborer, the thresherman, combineman, grain



slightly modified to yield the following hierarchy, which endured through the late 1980s: Of first priority were the privileges of the laborer, threshermen, combinemen, grain drier, and overseer, apparently ranking concurrently among themselves. Next came the lessor's privilege, followed by crop pledges in order of recordation. Last in the hierarchy were the privileges of the furnisher of the supplies and money, the furnisher of water, and the physician. As discussed above, recordation of only crop pledges was required, and agricultural privileges generally did not have to be recorded to be effective against third persons.

In 1985, perceiving that certain state laws subjected purchasers of farm products to risk of double payment that "inhibits free competition in the market for farm products" and "constitutes a burden on and an obstruction to interstate commerce in farm products," Congress enacted the Food Security Act of 1985 (the "FSA").<sup>33</sup> This statute had the direct effect of prompting the Louisiana Legislature to enact Act 451 of 1987, creating a central agricultural registry. A year later, at the urging of a newly elected governor and secretary of state, and for reasons that were not confined to concerns about farm products, Louisiana became the last state in the nation to adopt Article 9 of the Uniform Commercial Code, a comprehensive treatment of the subject of secured interests in most types of movable property.<sup>34</sup> These three events precipitated a wholesale change in Louisiana's statutory law governing encumbrances upon farm products.

### C. Central Agricultural Registry

In obedience to the implicit command of the federal statute,<sup>35</sup> Act 451 of 1987 enacted Louisiana Revised Statutes sections 3:3651

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drier, and the overseer. (2) Privilege of the lessor. (3) Perfected security interests under Chapter 9 of the Louisiana Commercial Laws in the order of filing, as provided by [Louisiana Revised Statutes section] 3:3651 et seq. (4) Privilege of the furnisher of supplies and of money, of the furnisher of water, and of the physician.

33. Pub. L. No. 99-198, 99 Stat. 1354 (codified at 7 U.S.C. § 1631 (2006 & Supp. 2009)). The central purpose of the FSA was to preempt provisions of the Uniform Commercial Code, Section 9-307(1) in the 1972 version and now Section 9-320(a), which exclude farm products from the rule protecting buyers in the ordinary course of business.

34. Act No. 528, 1988 La. Acts 1367, amended by Acts No. 135, 1989 La. Acts 417. Under the 1989 legislation, the effective date of Louisiana's adoption of a modified version of Article 9 of the Uniform Commercial Code was January 1, 1990.

35. 7 U.S.C. § 1631 provides, with express preemption of any conflicting state law, that a buyer purchasing a farm product in the ordinary course of

et seq., establishing for the first time in Louisiana a central registry of all security devices establishing security interests in farm products. The term “security interest” was defined in the act to mean any interest in farm products securing payment or performance of an obligation, thus encompassing within its scope both agricultural privileges and crop pledges.<sup>36</sup> The act specifically provided that a security device affecting farm products was ineffective against third persons unless the security device and an “effective financing statement” containing certain prescribed information were filed in the central agricultural registry. Thus, the act went beyond what is required by the FSA and protected not only buyers of farm products but also any other third person, including presumably other creditors of the farmer.<sup>37</sup> Crop pledges were no longer to be filed in the crop pledge book of the local parish but rather in the central agricultural registry. Agricultural privileges, which theretofore were not subject to any recordation requirements, were also required to be filed in the central agricultural registry if they were to have effect against third persons.

In each of its next four regular sessions, the Louisiana Legislature made amendments to the central agricultural registry law found in Title 3 of the Louisiana Revised Statutes. Act 323 of 1988 added a simple statement to Louisiana Revised Statutes section 3:3653 to the effect that the law applied to security devices affecting timber. Act 548 of 1989 made a number of technical changes<sup>38</sup> to Title 3 and, at the same time, amended Louisiana

business from a seller engaged in farming operations takes free of the security interest in a state that has not established a central filing system approved by the U.S. Secretary of Agriculture unless the buyer has received from the secured party or seller a written notice of the security interest containing prescribed information. The buyer’s actual notice of the security interest or knowledge that the sale violates a lender’s security agreement is irrelevant.

36. “Farm products,” as originally defined in the statute, covered both crops and livestock and any products of crops or livestock in their unmanufactured state. To constitute a farm product, however, the commodity had to be in the possession of a person engaged in farming operations.

37. It has been held that the reference in Louisiana Revised Statutes section 3:3656(D) (as it existed prior to its revision by Act No. 378 of 2010) to “third parties” was not limited to purchasers of farm products, but included other secured creditors, even though the primary purpose of the provisions of Title 3 of the Louisiana Revised Statutes and 7 U.S.C. § 1631 upon which they are based was to protect purchasers from double payment for farm products. *Howard v. Stokes*, 607 So. 2d 868 (La. Ct. App. 2d 1992).

38. Included among the changes were a definition of “security device” specifically encompassing both crop pledges and agricultural privileges and a clarification that filing of effective financing statements alone was sufficient, without inclusion of any written security device, in the case of unwritten

Revised Statutes section 9:4521 to provide that privileges and pledges on crops were ranked in the order of preference given in the statute “provided that notice thereof has been properly filed and maintained in [Louisiana Revised Statutes section] 3:3651, et seq.”<sup>39</sup> Act 123 of 1990, which was adopted after Chapter 9 of the Louisiana Commercial Laws had already become effective, provided for the transfer of the central agricultural registry to the secretary of state.<sup>40</sup> The act also provided, in a fashion similar to Chapter 9, that the proper place to file effective financing statements was with the clerk of court of any parish, who was charged with the responsibility of transmitting the information to the secretary of state for inclusion in the central agricultural registry. Act 539 of 1991, as well as Act 1201 of 1995, made coordinating changes to Title 3 of the Louisiana Revised Statutes that were incidental to other changes being made in Chapter 9, discussed more fully below.

An interesting feature of Louisiana’s central agricultural registry is that unlike the central agricultural filing systems in a number of the other states that have adopted them in response to the FSA, Louisiana’s registry serves the *dual* purpose of not only providing constructive notice to buyers in accordance with the FSA but also serving as the place where Uniform Commercial Code financing statements are filed in order to perfect security interests in farm products against other secured parties, lien creditors, and unsecured creditors of the debtor. In some of the other states that have chosen to create central agricultural filing systems in accordance with the FSA, two filings are needed: (1) an ordinary Uniform Commercial Code financing statement filed with the secretary of state in order to perfect the security interest and (2) an effective financing statement filed in the agricultural registry in order to protect the secured party against buyers.<sup>41</sup> A filing in one place does not obviate the need to file in the other.<sup>42</sup> Louisiana’s

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security devices described in former Louisiana Revised Statutes section 9:4521 (i.e., agricultural privileges).

39. Act No. 548, 1989 La. Acts 1583.

40. Under Chapter 9 of the Louisiana Uniform Commercial Code, the secretary of state also maintains the master index of Uniform Commercial Code filings; however, that index was, and continues to be, separate from the central agricultural registry. *See generally* LA. REV. STAT. ANN. §§ 10:9-519 to -526 (2002 & Supp. 2011).

41. *See, e.g.*, NEB. REV. STAT. §§ 52-1301 to -1322 (West, Westlaw through 101st Leg., 2d Reg. Sess. 2010); OR. REV. STAT. §§ 80.100-.130 (West, Westlaw through ch. 21 of 2011 Reg. Sess.).

42. *See* BARKLEY CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ¶ 8.08[4][c] (Sheshunoff Fin. Servs. Library, retrieved Jan. 23, 2009) (on file with author).

use of a single filing system probably arises from the fact that at the time its central agricultural registry was created in 1987, Louisiana had not yet adopted Article 9 of the Uniform Commercial Code and had no central filing system at all.

#### *D. Chapter 9 of the Louisiana Commercial Laws*

The crop pledge law, which had originated with Act 66 of 1874 and was ultimately codified at Louisiana Revised Statutes section 9:4341, remained through the early 1990s the substantive law governing the creation of consensual security interests in crops.<sup>43</sup> Effective January 1, 1990, Louisiana adopted Article 9 of the Uniform Commercial Code as Chapter 9 of the Louisiana Commercial Laws,<sup>44</sup> a self-contained set of laws providing for the encumbrance of most types of movable property through the granting of a “security interest” that is normally “perfected” (i.e., made effective against most third persons) by the filing of a financing statement with a public filing officer.<sup>45</sup> However, until 1992, Chapter 9 covered security interests in only those crops that had already been harvested, and growing crops were specifically excluded from coverage.<sup>46</sup> Even in the case of harvested crops, perfection was not achieved by filing a financing statement in the normal manner; rather, a filing in accordance with Title 3 of the Louisiana Revised Statutes continued to be required. The same was, of course, also true of security devices affecting unharvested crops, the difference being that the substantive law governing their creation, enforcement, and priority existed wholly outside of Chapter 9.

This dichotomy largely disappeared with the enactment of Act 539 of 1991, which brought growing crops within the ambit of Chapter 9 effective January 1, 1992. The term “goods” was re-

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43. Livestock was encumbered under the Louisiana Chattel Mortgage Law, LA. REV. STAT. ANN. §§ 9:5351–:5366.2 (effectively superseded by Act No. 135 of 1989 and repealed outright by Act No. 128 of 2001).

44. Chapter 9 was first enacted by Act No. 528 of 1988, which was originally to be effective July 1, 1989, but was substantially amended by Act No. 135 of 1989. The 1989 act postponed the effectiveness of the adoption of Chapter 9 until January 1, 1990.

45. One of the innovations of Louisiana’s version of Chapter 9 was its rule allowing filing of financing statements with any clerk of court, who then transmits the contents of the filing to the secretary of state for inclusion in the master Uniform Commercial Code index. Thus, creditors have both the flexibility of filing with any of 64 different clerks, regardless of the location of the debtor or collateral, and the ease of a single search of the index maintained by the secretary of state to identify filings in favor of other creditors.

46. LA. REV. STAT. ANN. §§ 10:9-102(4)(d), -105(h) (each as adopted or amended by Act No. 135 of 1989).

defined in Louisiana Revised Statutes section 10:9-105(1)(h) to include both harvested and unharvested crops. The term “farm products” was redefined in Louisiana Revised Statutes section 10:9-109(3) to include, by both an expansive generic formulation and a specific listing, any type of crop, whether growing or to be grown, and any species of livestock, as well as products of livestock in their unmanufactured state, but expressly excluding standing timber.<sup>47</sup> The definition continued to require that the crops, livestock, or products be in possession of a debtor engaged in farming operations but specifically recognized civil possession as defined in the Louisiana Civil Code to be sufficient.<sup>48</sup> The act continued the statement of Louisiana Revised Statutes section 10:9-302(3) to the effect that the filing of a financing statement under Chapter 9 is neither necessary nor effective to perfect a security interest in property subject to the central agricultural registry law, but that exclusion was expanded to cover harvested and growing crops alike. The act also enacted Louisiana Revised Statutes section 9:4391, recognizing that crops, whether harvested or unharvested, could be the subject of a security interest under Chapter 9. Additionally, the act amended Louisiana Revised Statutes section 9:4521 to provide that privileges and perfected security interests “as affecting unharvested crops” were ranked in the order of preference given in that statute, substituting perfected security interests under Chapter 9 in the hierarchical position previously assigned to crop pledges. Finally, the statute enacted a nonuniform Section 9-509, providing additional default remedies to enforce security interests affecting unharvested crops, livestock, and other farm products.

Thus, effective January 1, 1992, Chapter 9 of the Louisiana Commercial Laws became the substantive law governing the creation and enforcement of security interests affecting crops, whether harvested or unharvested. Filing an effective financing statement in the central agricultural registry under Title 3 of the Louisiana Revised Statutes continued to achieve perfection, and Louisiana Revised Statutes section 9:4521 continued to set forth the ranking of competing privileges and security interests in crops, at least to the extent that the crops were “unharvested.” This was essentially the same statutory arrangement in effect at the time of adoption of the 2010 legislation.<sup>49</sup>

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47. The definition of “farm product” in Louisiana Revised Statutes section 3:3652 was amended in the same act to be virtually identical to the definition inserted in Chapter 9, except for the *inclusion* of standing timber.

48. See LA. CIV. CODE ANN. art. 3431 (2007).

49. Minor technical changes were made to the provisions of Title 3 of the Louisiana Revised Statutes by Act No. 1201 of 1995. Act No. 63 of 2004 removed Title 3’s requirement of the signature of the debtor or secured party on

*E. Revised Chapter 9 of the Louisiana Uniform Commercial Code*

Participating in a nationwide revision of Article 9, Louisiana adopted revised Chapter 9 of the Uniform Commercial Code<sup>50</sup> effective as of the national uniform effective date of July 1, 2001.<sup>51</sup> Unlike the original enactment of Chapter 9 in 1988 and 1989, however, the adoption of revised Chapter 9 was the product of study and adaptation by the Law Institute. The myriad changes to Chapter 9 wrought by the revision are beyond the scope of this Article, which will limit its discussion of the 2001 revision to three major changes of particular significance to crop financing: the change in choice of law rules, the elimination of the requirement of inclusion in the security agreement of a description of the immovable property upon which crops are growing, and the inclusion of agricultural privileges within the coverage of Chapter 9.

According to the perfection rules in effect under the original version of Chapter 9, the issue of perfection of security interests in most types of tangible collateral was governed by the law of the state where the collateral was located.<sup>52</sup> Though couched in terms of a choice of law rule, this provision was tantamount to a filing rule, mandating that filing of a financing statement occur in the state where the collateral was located. As a dramatic departure from this approach, revised Chapter 9 moved toward the ideal of a single filing in one jurisdiction sufficient to perfect a security interest in all collateral nationwide. After the 2001 revision, the general rule is that perfection of most security interests<sup>53</sup> is governed by the law of the state where the debtor is located, and therefore filing a financing statement as a means of perfection is

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an effective financing statement. The approval by the United States Department of Agriculture of the deletion of the signature requirement appears in 71 Fed. Reg. 8563 (Feb. 17, 2006).

50. Act No. 128, 2001 La. Acts 561. For the first time, Louisiana embraced the title "Uniform Commercial Code" in place of "Commercial Laws," which a quarter century earlier had been considered to be a more apt description of a set of laws that were derided as being neither uniform nor worthy of the term "code." See LA. REV. STAT. ANN. § 10:1-101 La. cmt. (2003 & Supp. 2011).

51. For a discussion of Louisiana's variations from the model act, see James A. Stuckey, *Louisiana's Non-Uniform Variations in U.C.C. Chapter 9*, 62 LA. L. REV. 793 (2002).

52. See LA. REV. STAT. ANN. § 10:9-103(1)(b) (2002) (as enacted by Act No. 135 of 1989).

53. The filing and perfection rules discussed in this paragraph of the text apply only to *security interests*. In the case of *agricultural liens*, Chapter 9 provides that issues of perfection are governed by the local law of the jurisdiction where the farm products are located. See discussion *infra*.

also required in that state.<sup>54</sup> There are exceptions to the general rule in the case of such real estate-related collateral as mineral production, fixtures, and timber,<sup>55</sup> but there is notably no exception to the general rule in the case of growing crops. Thus, in the case of a debtor located in another state, the proper place to file to perfect a security interest in crops that the debtor is growing in Louisiana is the state of the debtor's location;<sup>56</sup> a filing in Louisiana would be superfluous and ineffective insofar as the Uniform Commercial Code is concerned.<sup>57</sup> However, even though another state's law governs the issue of *perfection* in cases where the debtor is located in another jurisdiction, the issues of the *effect of perfection* and *priority* of security interests continue to be governed by the law of the jurisdiction in which collateral is located.<sup>58</sup> Thus, if the debtor is located in another state, a filing in that other state will be sufficient to perfect a security interest in crops located in Louisiana, but the priority to be given to security interests, even those perfected under the law of another state, is nonetheless governed by Louisiana's substantive law.

Consistent with the theme of revised Chapter 9 that crop filings are subject to no special choice of law rules, revised Chapter 9 also deleted the requirement that security agreements covering crops contain a description of the immovable property upon which the crops are growing.<sup>59</sup> The explanation given in the commentary for

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54. See LA. REV. STAT. ANN. § 10:9-301(1) (Supp. 2011).

55. *Id.* § 9-301(3)–(4).

56. Chapter 9 provides that an individual debtor is considered to be located at his principal residence. *Id.* § 9-307(b)(1) (2002). Corporate debtors and other “registered organizations” organized under the law of a state, such as a limited partnership or a limited liability company, are considered to be located in that state. *Id.* § 9-307(e). A general partnership, not owing its existence to a filing with any state, is considered to be located at its place of business and, if it has more than one, at its chief executive office. *Id.* § 9-307(b)(2)–(3). The definition of “registered organization” appears in Louisiana Revised Statutes section 10:9-102(a)(70).

57. Where the issue is the enforcement of a security interest against a buyer of farm products produced in a state that has established a central filing system, the FSA still requires the filing of an effective financing statement in the state of production. See 7 U.S.C. § 1631(e)(2) (2006 & Supp. 2009).

58. See LA. REV. STAT. ANN. § 10:9-301(2)–(3) (Supp. 2011).

59. Compare *id.* § 9-203(b)(3)(A), with pre-revision Section 9-203(1)(a). Perhaps the only Louisiana reported case to interpret the previous description requirement is *Agricredit Acceptance Co. v. Singleton*, 767 So. 2d 137 (La. Ct. App. 2d 2000), which held a reference in a security agreement to “all crops outlined in Exhibit A attached to UCC-1F” to be sufficient where the filed UCC-1F did in fact contain a proper description of the immovable property. For a discussion of cases in other jurisdictions involving the real estate description requirement under former Article 9, see CLARK, *supra* note 42, ¶ 8.05[1][b].

the deletion was simply that the former rule seemed “unwise.”<sup>60</sup> Like the model revision, revised Chapter 9 no longer requires that either a security agreement or a financing statement contain a description of the immovable property upon which crops are growing. However, the central agricultural registry law continues to require that an effective financing statement include “a reasonable description of the property.”<sup>61</sup> Because a filing in the central agricultural registry is the means of perfecting non-possessory security interests in crops, Louisiana thus still requires a description of the immovable property in financing statements filed to perfect security interests in growing crops.

The third significant change brought about by revised Chapter 9 was the inclusion of most aspects of agricultural liens<sup>62</sup> within the coverage of Chapter 9, except for the law governing creation of the agricultural liens themselves.<sup>63</sup> Specifically, as revised in 2001, Chapter 9 subjected agricultural liens to the following rules:

1. Section 9-302 provides a choice of law rule that the local law of the jurisdiction where farm products are located governs perfection, the effect of perfection or nonperfection, and the priority of an agricultural lien. Thus, in contrast to the choice of law rule applicable to security interests, the law of the state where the crops are grown governs the issue of perfection of agricultural liens in the crops, even if the debtor is located in another state. For this reason, agricultural liens on Louisiana crops are always perfected by a filing in this state, regardless of where the debtor is located.

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60. See LA. REV. STAT. ANN. § 10:9-502 UCC cmt. 4 (Supp. 2011).

61. See *id.* § 3:3654(E)(3)(e). The description may be by “farm name or its general location by section, township, and range, or otherwise, or alternatively, the Farm Service Agency of the United States Department of Agriculture (FSA) farm number.” This is apparently a much less exacting standard than that imposed by Chapter 9 upon descriptions of immovable property in financing statements covering timber, fixtures, and as-extracted collateral. See LA. REV. STAT. ANN. § 10:9-502(b)(3) (2002).

62. The term “agricultural lien” is defined by Louisiana Revised Statutes section 10:9-102(a)(5) to include privileges on farm products that secure payment of an obligation for goods or services furnished in connection with a farming operation or for rent on leased immovable property used by a debtor in connection with its farming operation. To qualify as an agricultural lien, the privilege must be in favor of a person who furnishes goods or services to a debtor or who leased real property used by a debtor, and the privilege must not depend on the person’s possession of the collateral. Thus, it can be readily seen that all the agricultural privileges discussed in this Article qualify as “agricultural liens” within the meaning of the definition used in Chapter 9.

63. The law governing creation of agricultural liens is left to the Louisiana Civil Code and Title 9 of the Louisiana Revised Statutes.



2. Although Sections 9-308(b) and 9-310 appear to subject agricultural liens to the perfection rules of Chapter 9 and the general requirement of filing a financing statement to achieve perfection, Section 9-311(a) largely negates those rules by providing that the filing of a financing statement in the Chapter 9 Uniform Commercial Code records is neither necessary nor effective to perfect an agricultural lien in property subject to the provisions of Title 3 of the Louisiana Revised Statutes. This same rule applies to filings that are made to perfect consensual security interests in crops.

3. As revised in 2001, Section 9-501(a) provided that, if the local law of Louisiana governed perfection, the place in which to file a financing statement to perfect a security interest *or agricultural lien* was the Chapter 9 Uniform Commercial Code records of the clerk of court of any parish. However, the preemptive effect of Title 3 of the Louisiana Revised Statutes made this provision a dead letter for filings involving agricultural liens, regardless of whether the crops in question were located in Louisiana or elsewhere.<sup>64</sup>

4. Sections 9-317 and 9-322 subject agricultural liens to the same general priority rules applicable to security interests, including the rules of Section 9-322(a) that conflicting perfected security interests and agricultural liens rank according to priority in time of filing or perfection and that, in the case of two unperfected security interests or agricultural liens, the first to attach has priority.<sup>65</sup> However, these general rules were tempered by the statement in Section 9-322(f) that they are subject to Louisiana Revised Statutes section 9:4521 with respect to a security interest or agricultural lien affecting unharvested crops.<sup>66</sup>

5. Part 6 of revised Chapter 9 brings agricultural liens within the full panoply of Chapter 9's rules involving remedies and enforcement.

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64. The reference in Section 9-501(a) to agricultural liens was removed by the 2010 legislation. Given that under the choice of law rule of Section 9-302, an agricultural lien affecting the out-of-state crops of a Louisiana producer is filed in the state where the crops are growing, and under Section 9-311(a) agricultural liens affecting Louisiana crops are always filed in the central agricultural registry, the reference to agricultural liens in Section 9-501(a) seemed wholly without meaning and to some extent misleading.

65. LA. REV. STAT. ANN. § 10:9-322(a) (Supp. 2011). Louisiana omits the rule contained in model Section 9-322(g) that a perfected agricultural lien has priority over a conflicting security interest if the statute creating the agricultural lien so provides.

66. The reference to Louisiana Revised Statutes section 9:4521 was removed by the 2010 legislation.

6. A nonuniform provision of Section 9-626(c) provides that the Louisiana Deficiency Judgment Act<sup>67</sup> does not apply to the enforcement of a security interest or agricultural lien governed by revised Chapter 9.

Another interesting feature of the 2001 revision was its inclusion of agricultural liens within the scope of the general rule that a security interest or *agricultural lien* continues in collateral notwithstanding the sale, lease, license, exchange, or other disposition of the collateral.<sup>68</sup> With little fanfare, this revision appeared to abrogate the longstanding jurisprudence that agricultural privileges upon crops do not survive after the immediate buyer has alienated them.<sup>69</sup> Agricultural privileges thus appeared to have been elevated to the status of real rights.<sup>70</sup> As discussed below, this change was reversed by the 2010 legislation.

#### F. Security Interests in Crops of Future Years

A pledge under the crop pledge law could extend only to crops of the current year and then only as security for debts contracted for the production of that crop.<sup>71</sup> When growing crops were added to the coverage of Chapter 9 in 1992,<sup>72</sup> the crop lender was freed from these limitations. The lender's security interest could attach to crops to be produced during all future crop years *ad infinitum*. Moreover, the lender's security interest was no longer limited to funds advanced for the current year's crop, or for that matter to funds advanced for an agricultural purpose, and the secured debt could be wholly unrelated to any farming operation. This obviously exposed a lender desiring to finance a producer's current crop to the possibility that a security interest granted by the producer in favor of another lender who was still owed money on a prior year's crop might have priority even with respect to the current crop. To afford the current year's crop lender some protection against this risk, the model Uniform Commercial Code at the time contained a provision, Section 9-312(2), which in very narrow circumstances gave superpriority to a perfected security interest in farm products for new value given within three months

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67. LA. REV. STAT. ANN. §§ 13:4106--4108.3 (2006).

68. *See id.* § 10:9-315(a) (Supp. 2011) (as enacted by Act No. 128 of 2001).

69. *See* Loeb v. Collier, 59 So. 816 (La. 1912).

70. *See generally* Yiannopoulos, *supra* note 19 (asserting that real rights are ultimately distinguishable from personal rights by the presence of two essential attributes: the right to follow and the right of preference). *See also* LA. CIV. CODE ANN. art. 476 cmt. (b) (2010).

71. *See* Act No. 93, 1922 La. Acts 172.

72. *See* Act No. 539, 1991 La. Acts 1740.

before planting to enable the debtor to produce the farm products.<sup>73</sup> In the legislation adding growing crops to the scope of Louisiana's Chapter 9 in 1992, Louisiana adopted this provision, which had been omitted when it first enacted the Uniform Commercial Code a few years earlier.

Mindful of the limited practical benefit of former Section 9-312(2), the drafters of the 2001 model revision of Article 9 of the Uniform Commercial Code suppressed it, instead providing individual states with optional provisions providing for a "production-money security interest," a concept analogous to the purchase-money security interest.<sup>74</sup> In its work in connection with the adoption of revised Chapter 9 in Louisiana, the Law Institute considered these provisions but, finding little impetus for their adoption in Louisiana and scant acceptance in other states,<sup>75</sup> did not recommend their adoption, and these provisions were not enacted by the Louisiana Legislature.

A consequence of the existing rule under revised Chapter 9 is that once a producer has authenticated a security agreement granting a lender a security interest in all current and future crops, the producer is effectively without the ability to give security to anyone who may lend money or furnish supplies in order to make a crop for a subsequent year, even if the original crop lender is not providing financing for that year's crop. A crop lender financing the current year's crop labors under a misapprehension of the law if it believes that its security interest has superpriority over existing

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73. U.C.C. § 9-312(2) (1972) (currently U.C.C. § 9-312 (2000)). So limited was this superpriority rule in its scope that it was described as "[o]ne of the strangest priority rules in Article 9," with such a limited effect that it was "a real weakling." CLARK, *supra* note 42, ¶ 8.05[2][c].

74. The optional provisions include additional definitions in Section 9-102 as well as model Section 9-103(a) and model Section 9-324(a). See generally Jason Finch, *The Making of Article 9, Section 9-312(2) into Model Provision Section 9-324A: The Production-Money Security Interest: Finally a Sensible "Superpriority" for Crop Finance*, 5 DRAKE J. AGRIC. L. 381 (2000).

75. At the time, no state appeared to have enacted the optional production-money security interest provisions. As of the present writing, states known to the author to have adopted them include only Maine, Mississippi, North Carolina, Vermont, West Virginia, Wisconsin, and Wyoming. Professor Clark notes that supplier trade associations across the country are seeking to improve the position of the crop supplier, either through the adoption of the production-money security interest provisions or through the creation of statutory liens having priority over security interests. He questions whether this legislation might have the effect of making the agricultural lender "much more wary about extending credit, to the ultimate detriment to the farmer." CLARK, *supra* note 42, ¶¶ 8.07[3]-[4].

perfected security interests.<sup>76</sup> Until the 2010 legislation, a person who furnished supplies or money on credit without obtaining and perfecting a security interest was in an even worse position, because the privilege that the law afforded the supplier was by its nature made subordinate under former Louisiana Revised Statutes section 9:4521 to all security interests, even those that are perfected later.<sup>77</sup>

## II. THE 2010 LEGISLATION

### *A. Ranking of Security Interests and Agricultural Privileges Affecting Crops*

Until its repeal by the 2010 legislation, former Louisiana Revised Statutes section 9:4521 was the basic ranking rule for security interests and agricultural privileges affecting crops in Louisiana. The structure of the statute, as well as its essential ranking scheme, had seen little change since the enactment of the 1886 statute in which it found its genesis. However, amendments that had been made over the last two decades for the purpose of accommodating the creation of the central agricultural registry and Louisiana's adoption of Chapter 9 of the Uniform Commercial Code created a number of problems that warranted correction.

Perhaps the most significant deficiency in former Louisiana Revised Statutes section 9:4521 was its failure to keep pace with changes in the law governing the proper place of filing. As

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76. The Arkansas case of *Searcy Farm Supply, LLC v. Merchants & Planters Bank*, 256 S.W.3d 496 (Ark. 2007), illustrates a valiant though unsuccessful attempt by an agricultural supplier to elevate itself from its subordinate position. In that case, a seed supplier who took a security interest in the seeds it was supplying on credit to a farmer attempted to achieve superpriority over a lingering security interest that had been granted in connection with a prior year's crops. Like Louisiana, Arkansas had not adopted the optional production-money security interest provisions. The supplier's argument was that crops of the current year constituted proceeds of its seeds and that it therefore held a purchase-money security interest in both the seeds and the crop with priority over the previously perfected security interest. Finding no case law or statutory authority defining crops to be the identifiable proceeds of seeds, the Arkansas Supreme Court declined to hold that they constitute proceeds and resolved the priority dispute in favor of the prior year's crop lender on the basis of the first-in-time rule of Section 9-322 of the Arkansas Uniform Commercial Code. The same result would obtain under Chapter 9 of the Louisiana Uniform Commercial Code.

77. The 2010 legislation eliminated the rule always relegating to last position the privilege of the furnisher of supplies or money, even behind later perfected security interests. See discussion *infra* notes 104–05 and accompanying text.

discussed above, the general choice of law rule under revised Chapter 9 is that perfection of security interests is governed by the law of the state of location of the debtor, rather than the state of location of the collateral. There is no exception to this rule in the case of growing crops. Thus, if a debtor is located in another state, a filing in the proper filing office within that state is both necessary and sufficient to achieve perfection of security interests in Louisiana crops.<sup>78</sup> However, with respect to crops growing in Louisiana, the *effect of perfection* and *priority* are governed by Louisiana law.<sup>79</sup> Curiously, however, Louisiana's priority rule embodied in former Louisiana Revised Statutes section 9:4521 seemed to deny these perfected security interests any priority, even though they were properly perfected in accordance with the law of the state chosen by Louisiana's conflicts rule to govern the issue of perfection.<sup>80</sup> Denying ranking to a properly perfected security interest could certainly never have been intended by the 2001 revision, for such a rule would be completely at odds with the uniform approach of the model Uniform Commercial Code, which has self-contained priority rules within Article 9 that neither discriminate against a security interest perfected solely in accordance with the law of the chosen state nor require parallel perfection in the state of location.

Not only was the law prior to the 2010 legislation unclear on the ranking of *filed* security interests and agricultural privileges affecting crops, it was even more confused on the issue of the priority of *unfiled* security interests and agricultural privileges against each other and unsecured creditors. By its terms, former Louisiana Revised Statutes section 9:4521 applied only to ranking disputes between those creditors who had perfected their security interests and agricultural privileges by making a filing in the central agricultural registry under Title 3 of the Louisiana Revised Statutes. The statute was wholly silent with respect to the priority of unperfected security interests or agricultural privileges, if they

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78. The FSA *does* require a filing in the state in which crops are produced in order for security interests to be effective against buyers. 7 U.S.C. § 1631(e)(2)(B) (2006). However, that statute does not purport to regulate conflicting security interests or agricultural privileges.

79. LA. REV. STAT. ANN. § 10:9-301(3)(C) (Supp. 2011).

80. Under the law as it existed prior to the 2010 legislation, the reverse problem was potentially presented when the first secured party to make a filing covering the Louisiana crops of an out-of-state debtor filed only in Louisiana and not in the state of the debtor's location. It would have been anomalous indeed for such a secured party who neglected to make a filing in the state whose law governs the issue of perfection to be given priority over a later-filing secured party who properly filed in the debtor's state of location. This factual pattern does not appear to have ever arisen in a reported case.

had any priority at all. Prior to the adoption of revised Chapter 9 of 2001, the priority contest among holders of unfiled agricultural privileges would have been governed by the Louisiana Civil Code, and in the case of a contest, for example, between a laborer and others, the laborer would have won under the last paragraph of Louisiana Civil Code article 3217. With the adoption of revised Chapter 9, however, Louisiana Revised Statutes section 10:9-322(a) applied to security interests and agricultural liens alike a first-in-time priority rule that, under paragraph (f)(5) of Section 9-322, yielded only to the ranking rule of former Louisiana Revised Statutes section 9:4521. Thus, if that statute were inapplicable, as would certainly have appeared to be the case in a contest between two unfiled claimants, the priority dispute would seem to have been governed by Section 9-322(a), rather than by the Louisiana Civil Code. This would lead to the result that an unfiled laborer's privilege would usually have been subordinate to an unfiled lessor's privilege because a lease almost always predates the rendition of services. The unfiled laborer's privilege would also have been subordinate to a previously arising but unfiled privilege in favor of a furnisher of supplies, such as a supplier who provides fertilizer for a cotton crop that is later picked by the laborer.

What seems anomalous about these results is that, in a contest between the laborer and the lessor, the laborer would have won if both had filed. However, if neither had filed and if Section 9-322(a) governed, the lessor would have won because the lease almost always antedates work by a laborer on a crop planted on leased land. Similarly, if neither the laborer nor the furnisher of supplies had filed, the laborer would have lost if it turned out that the supplier's privilege arose first. These results seemed to obtain even though all the competing claimants had Civil Code privileges, and under the Louisiana Civil Code, the laborer is always given priority.<sup>81</sup>

Before the enactment of the 2010 legislation, a further complication was that despite appearances, it was arguable that the ranking rules of neither the Louisiana Civil Code nor Chapter 9 applied, because Title 3 of the Louisiana Revised Statutes

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81. Admittedly, any issue surrounding the effectiveness and priority of unperfected security interests and agricultural privileges was in all likelihood more of academic than practical concern because the issue was avoided altogether if any of the competing claimants took the simple step of filing an effective financing statement in the central agricultural registry. This is a step that the secured lender or privileged creditor apparently could take at any time before the priority issue was decided because the time of filing under former Louisiana Revised Statutes section 9:4521 was irrelevant, except to rank filed security interests among themselves.

contained a provision, Louisiana Revised Statutes section 3:3656(D),<sup>82</sup> that categorically stated that all unfiled secured interests were wholly ineffective against third persons.<sup>83</sup> After 2001, however, it was no longer clear that this provision of Title 3 was absolute. A quite convincing argument could be made that the adoption of the priority rules of revised Chapter 9, which expressly purport to rank *unperfected* security interests and agricultural liens affecting farm products, was later legislation that impliedly repealed the absolute bar to effectiveness that Title 3 of the Louisiana Revised Statutes appeared to provide.

Another anomaly in former Louisiana Revised Statutes section 9:4521 was its statement that the ranking rules it provided applied to “unharvested crops.” From its original enactment in 1886 through the 1991 legislation placing unharvested crops within the ambit of Chapter 9,<sup>84</sup> former Louisiana Revised Statutes section 9:4521 and its precursors ranked competing interests in “crops” without any express differentiation between those that were growing and those that had been harvested. The word “crops” continued to be used in the statute even after the creation of the central agricultural registry and the original adoption of Chapter 9, which initially applied only to harvested crops. When growing crops were added to the scope of Chapter 9 by the 1991 legislation, former Louisiana Revised Statutes section 9:4521 was changed to apply to “unharvested crops,” perhaps upon the assumption that the ranking rules within Chapter 9 itself would apply to harvested crops.

If the ranking rules provided by former Louisiana Revised Statutes section 9:4521 were limited in their applicability to unharvested crops, a number of anomalies would result. First, the

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82. Until its revision in 2010, Louisiana Revised Statutes section 3:3656(D) provided that “[o]nly effective financing statements and other statements, which are filed with the filing officer for inclusion in the central registry, as provided in this Chapter shall be effective against third parties.” Act No. 123, sec. 1, § 3656(D), 1990 La. Acts 413, 417. Curiously, the wording of the statute literally deprived the unfiled financing statement, rather than the underlying security interest, of effectiveness against third parties. Prior to the enactment of Act No. 123 of 1990, this provision, then contained in paragraph B of Louisiana Revised Statutes section 3:3656, more precisely provided that “[o]nly security interests as to which effective financing statements and written security devices are filed with the central registry, as provided in this Chapter, shall be effective against third parties.” Act No. 548, § 3656(B), 1989 La. Acts 1584, 1586. In addition to limiting the class of protected third parties to buyers in the ordinary course of business, the 2010 legislation also corrected this obvious error.

83. The courts have construed “third parties” to include other secured parties, and not simply buyers of farm products. See discussion *supra* note 37.

84. Act No. 539, 1991 La. Acts 1749.

lessor who had properly perfected a lessor's privilege would, by virtue of the nature of this privilege, have priority over all Chapter 9 security interests so long as the crop was left growing in the field; however, at the very moment of harvest, the ranking rules of former Louisiana Revised Statutes section 9:4521 would have ceased to have applicability, with the presumptive result that the general ranking rules of Chapter 9 would apply, i.e., priority according to time of filing or perfection. Thus, if the lessor happened to have filed its financing statement after a crop lender, it would suddenly lose its priority by the mere act of harvesting. Even more anomalous would be the treatment of the privileges belonging to the thresherman, combineman, and grain drier, for those privileges by their very nature do not even arise until the crop is in the process of being harvested and processed, and it would be curious indeed for the very labor that those privilege holders exerted in harvesting and processing the crop to cause them to lose the first priority position that former Louisiana Revised Statutes section 9:4521 purported to give them so long as the crops were unharvested.

Fortunately, no court appears to have limited the operation of the ranking rules of former Louisiana Revised Statutes section 9:4521 to unharvested crops, and those recent cases that construed the statute applied it, apparently without objection, to conflicts over proceeds of crops that had not only been harvested but even sold.<sup>85</sup> Nonetheless, former Louisiana Revised Statutes section 9:4521 was certainly deceptive to the extent that its wording suggested that its applicability was limited to unharvested crops. For over 100 years, the statute applied to "crops," and neither the creation of the central agricultural registry nor the adoption of Chapter 9 compelled a limitation of the ranking rules of the statute only to unharvested crops.<sup>86</sup>

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85. Though *Deposit Guaranty National Bank v. Central Louisiana Grain Co-Op, Inc.*, 737 So. 2d 167 (La. Ct. App. 3d 1999), did not expressly address the issue of what is meant by "unharvested" crops in former Louisiana Revised Statutes section 9:4521, it applied the statute to a dispute in which a secured party holding a security interest in a crop contended that a grain elevator improperly disbursed proceeds of the crop to a harvester, thus implicitly assuming that the priority statute would continue to have effect even after the crops had been harvested, stored in a grain elevator, and disposed of by the elevator. See also *Bayou Pierre Farms v. Bat Farms Partners, III*, 693 So. 2d 1158 (La. 1997); *Meyhoeffer v. Wallace*, 792 So. 2d 851 (La. Ct. App. 2d 2001).

86. Another possible explanation for the limitation of the statute to "unharvested" crops might have been a desire to avoid the application of the statute to security interests that first attach after the crops have been harvested and placed in the hands of a purchaser. However, as mentioned above, the courts



Yet another problem with former Louisiana Revised Statutes section 9:4521 was its proviso that “such privileges and security interests have been properly filed and maintained in accordance with the central registry provisions of [Louisiana Revised Statutes section] 3:3651 et seq.” Lawyers accustomed to associating a heightened status with perfected security interests no doubt with scant hesitation interpreted this proviso to mean that each of the competing security interests and agricultural privileges had to have been properly filed under Title 3 of the Louisiana Revised Statutes if the holder of the security interest or privilege was to be entitled to the priority available under the ranking statute. Indeed, that is the interpretation that the courts placed upon the statute, even if that was not precisely what it provided.<sup>87</sup> However, as literally written, the proviso seemed to be a condition to the applicability of the ranking statute itself.<sup>88</sup>

Each of the problems outlined above was addressed in the 2010 revision, which repealed former Louisiana Revised Statutes section 9:4521 and replaced it with a comprehensive crop ranking rule—applicable to harvested and unharvested crops alike—that was enacted as a non-uniform paragraph (g) of Section 9-322 of Chapter 9:<sup>89</sup>

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have long held that at that point, the products in question, though originating on the farm, can no longer be considered a crop at all but instead are merchandise. *Loeb v. Collier*, 59 So. 816 (La. 1912). Similar limitations on the meaning of the term “farm products” can be inferred from the definitions of that term in Louisiana Revised Statutes section 10:9-102(a)(34) (requiring that the debtor be engaged in a farming operation) and Louisiana Revised Statutes section 3:3652(8) (requiring that the product be in the civil or corporeal possession of a person engaged in farming operations).

87. The appellate courts have held that even though the statutes creating agricultural privileges do not themselves require recordation in order for the privileges to be effective against third parties, the provisions of Title 3 of the Louisiana Revised Statutes expressly do require filing, and in the absence of filing, the holder of the agricultural privilege will not enjoy the priority that would otherwise be given by former Louisiana Revised Statutes section 9:4521. *See Deposit Guar. Nat’l Bank v. Cent. La. Grain Co-Op, Inc.*, 737 So. 2d 167 (La. Ct. App. 3d 1999); *Howard v. Stokes*, 607 So. 2d 868 (La. Ct. App. 2d 1992).

88. *See Bat Farms*, 693 So. 2d at 1162 (Traylor, J., dissenting).

89. The model version of Section 9-322(g) provides that a perfected agricultural lien has priority over conflicting security interests if the statute creating the agricultural lien so provides. The enactment of the model paragraph, with a few changes to the Louisiana Civil Code and Title 9 of the Louisiana Revised Statutes, might have been accomplished in such a manner as to yield the same substantive results as the nonuniform Section 9-322(g) that was adopted by Act No. 378 of 2010. However, that approach would have relinquished one clear advantage that former Louisiana Revised Statutes section 9:4521 afforded:

(g) Priority of agricultural liens and security interests affecting crops. Agricultural liens and security interests affecting crops and their proceeds rank according to the following order of priority:

- (1) Agricultural liens in favor of agricultural laborers, with equal rank among themselves.
- (2) Perfected agricultural liens securing payment of rent due to a person that has leased real property on which the crops are growing or from which they were produced.
- (3) Other perfected agricultural liens and perfected security interests, with priority among themselves as provided in the other provisions of this Section and Part.
- (4) Unperfected agricultural liens securing payment of rent due to a person that has leased real property on which the crops are growing or from which they were produced.
- (5) Other unperfected agricultural liens and unperfected security interests, with priority among themselves in the order in which they become effective or attach.<sup>90</sup>

It is immediately apparent that the basic ranking scheme is largely unchanged, though there are some substantive changes that will be discussed below. Of first priority are the privileges of agricultural laborers, followed by the lessor whose privilege upon the crop has been perfected.<sup>91</sup> In third place are all other perfected security interests and agricultural liens, ranked against each other according to ordinary Chapter 9 priority rules. Behind all of these perfected interests come all unperfected interests, with the proviso that the lessor who has an unperfected privilege still has priority over all other unperfected interests.

The placement of the new ranking rule within Chapter 9, rather than in Title 9 of the Louisiana Revised Statutes, is significant for

its familiar, schematic-like form that set forth in a single place the priority rules applicable to crops. The approach of the model version also creates a substantial risk of “vicious circles,” which would occur if the inferior of two agricultural privileges were given priority over security interests by the law establishing the inferior privilege, without such priority being mentioned in the statute establishing the other privilege. For a general discussion of vicious circles in Louisiana law, see Joseph Dainow, *Vicious Circles in the Louisiana Law of Privileges*, 25 LA. L. REV. 1 (1964).

90. LA. REV. STAT. ANN. § 10:9-322(g) (Supp. 2011).

91. As was the rule under former Louisiana Revised Statutes section 9:4521, the *time* of perfection of the lessor’s privilege is immaterial, for regardless of when perfected, it has priority by its nature over all conflicting secured interests other than privileges of agricultural laborers. See LA. REV. STAT. ANN. § 10:9-322(g) 2010 comments (Supp. 2011).

a number of reasons. First, on a national level, Article 9 is intended to state self-contained rules ranking security interests in all farm products,<sup>92</sup> and the placement of the ranking rule within Chapter 9 should ease the task of the out-of-state lender or practitioner who seeks to find Louisiana's rules. Secondly, the placement of the ranking rule within Chapter 9 had the immediate drafting advantage of incorporating Chapter 9's definitions of terms, so that the new ranking rule was able to use such well-defined terms as "perfected," "unperfected," "security interest," and "agricultural lien."<sup>93</sup> Even more importantly, the use of the term "perfected" imports the choice of law rules of Chapter 9 embedded within that term. Thus, in cases where Chapter 9 provides that the issue of perfection is governed by the law of another state (as when the debtor is an out-of-state resident or a registered organization organized under the laws of another state), a security interest perfected by a filing in that state is a "perfected" security interest entitled to the priority that Section 9-322(g) specifies.

There were also compelling substantive reasons for placing the crop ranking rule within Chapter 9. Unlike former Louisiana Revised Statutes section 9:4521, Chapter 9 itself does not treat crops as a special type of collateral as to which filing is the only possible means of perfection. Nor does Chapter 9 presuppose that the universe of possible claimants is limited to those who have made filings in the central agricultural registry. Amounts due to a producer from the sale of its crop, while constituting proceeds of the crop, also constitute accounts, and Chapter 9 has a rule to rank security interests in the two types of collateral against one another.<sup>94</sup> Also, the possible means of perfecting security interests in harvested crops is not limited to filing; they can be perfected by possession of the crops themselves or by negotiation of a negotiable warehouse receipt representing the stored crops.<sup>95</sup> These

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92. See LA. REV. STAT. ANN. § 10:9-322 UCC cmt. 12 (2002 & Supp. 2011). As this comment to the model act reflects, the general ranking rule of model Section 9-322 is subject to an exception if the statute creating an agricultural lien gives it priority over a conflicting security interest. See discussion *supra* note 65.

93. Leaving the ranking rule within Title 9 of the Louisiana Revised Statutes while at the same time attempting to achieve all the necessary corrective measures would have presented a difficult task, for even the basic terms commonly used in Chapter 9 parlance are undefined in Title 9, such as "security interest" (which incidentally has a different and larger meaning with reference to farm products in Title 3 of the Louisiana Revised Statutes), "perfected," and "proceeds."

94. See LA. REV. STAT. ANN. § 10:9-322(a)-(b) (2002 & Supp. 2011), along with Example 5 in UCC Comment 6 thereto.

95. See *id.* §§ 9-312 to -313 (Supp. 2011).

possible means of perfection, though not contemplated by former Louisiana Revised Statutes section 9:4521, are taken into account in the existing priority rules of Chapter 9. Because the 2010 legislation places the crop-ranking rule within Chapter 9, the new rule will be supplemented by, and read in accordance with, all complementary priority rules found within Chapter 9.

The new ranking provision also makes clear that unperfected security interests and agricultural liens affecting crops have a specified ranking against each other and unsecured creditors, though not a very favorable one. This is achieved not only by inclusion of the last two clauses of Section 9-322(g) but also by amendments to Louisiana Revised Statutes section 3:3656(D), which quite unnecessarily had provided that a secured interest in farm products that was not filed in the registry was ineffective against *any* third party.<sup>96</sup> This was much more than is required by the FSA, which has been consistently interpreted to protect only buyers of farm products in the ordinary course of business and not to preempt state laws relating to the creation, perfection, or priority of security interests, or to reorder the normal priorities of liens in farm products.<sup>97</sup> Under Chapter 9, as well as Article 9 of the Uniform Commercial Code in effect in other states, unperfected security interests in other types of collateral can be effective among themselves and against general creditors even in the absence of a filing. The 2010 legislation eliminated the tension that had existed between these provisions of Chapter 9 and the seemingly absolute bar to effectiveness of unfiled interests against third parties provided by Title 3 of the Louisiana Revised Statutes. The protection against an unfiled interest that Louisiana Revised Statutes section 3:3656 previously afforded to *all* third parties is now limited to buyers in the ordinary course of business,<sup>98</sup> leaving to the general provisions of Chapter 9 the effectiveness that an

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96. *Id.* § 3:3656(D).

97. *See, e.g.*, *Consol. Nutrition, L.C. v. IBP, Inc.*, 669 N.W.2d 126, 131 n.7 (S.D. 2003) (“The Congressional record clearly established that the FSA was not intended to preempt state laws on the creation, perfection, and priority of security interests between competing lenders.”); *Food Servs. of Am. v. Royal Heights, Inc.*, 850 P.2d 585, 588 (Wash. Ct. App. 1993) (citing H.R. REP. NO. 271, 99th Cong., pt. 1, at 110 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1103, 1214); *see also* 9 C.F.R. § 205.202 (2010).

98. The definition of the term “buyer in the ordinary course of business” in Title 3 of the Louisiana Revised Statutes is virtually identical to that found in the FSA.

unfiled or unperfected security interest in farm products might have against other creditors.<sup>99</sup>

In addition to addressing the inconsistencies and anomalies that had existed under the former ranking rules, the 2010 legislation makes two substantive changes in the ranking scheme by granting automatic perfection to agricultural laborers and removing the statutory inferiority of the privilege of the furnisher of supplies or money. As a matter of policy, the legislation provides that all agricultural liens in favor of agricultural laborers<sup>100</sup> are automatically perfected and outrank all other security interests and agricultural liens, without the necessity of any filing.<sup>101</sup> As the 2010 revision comments to Section 9-309 observe, agricultural laborer's privileges are usually small in amount and in any event attach only to the current year's crop. Many agricultural laborers, lacking the commercial sophistication of lessors and lenders, may unwittingly lose the privileged position the law affords them out of ignorance of the necessity or means of filing, or even out of the inability to afford the filing fee. However, there was an even more compelling reason why it did not make sense to require an agricultural laborer to file: Under the law prior to the 2010 revision, no lender could rely on the *absence* of a filing in favor of an agricultural laborer anyway, for a filing that an agricultural laborer made at any time, even after a Chapter 9 security interest had been perfected in favor of another creditor, still afforded him priority over the security interest. The 2010 legislation preserves the priority of the agricultural laborer's privilege<sup>102</sup> but removes the requirement of a filing for him to enjoy that priority.<sup>103</sup>

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99. The change that the 2010 legislation made to Louisiana Revised Statutes section 3:3656(D) affects all farm products, including standing timber, and not simply crops.

100. The 2010 legislation enacts a nonuniform definition of "agricultural laborer" in Louisiana Revised Statutes section 10:9-102(d)(1): "an individual holding an agricultural lien securing payment of wages due him for labor he performed as a worker, thresherman, combineman, grain drier or overseer." The use of the word "individual" (which is used elsewhere in Chapter 9, e.g., Louisiana Revised Statutes section 10:9-102(a)(24), to denote a natural person) was intentional, for only a natural person is entitled to claim a laborer's privilege, as the courts have held. See *Bayou Pierre Farms v. Bat Farms Partners, III*, 639 So. 2d 1158, 1162 (La. 1997). The *Bat Farms* opinion twice placed the word "wages" in italics, and that word was also used in the new definition to signal that no change in the law was intended as to the scope of persons entitled to the priority of the agricultural laborer's privilege or the debts secured thereby.

101. LA. REV. STAT. ANN. § 10:9-309(13) (Supp. 2011).

102. As Comment 3 of the 2010 comments to Louisiana Revised Statutes section 10:9-309 indicates, the automatic perfection of the agricultural laborer's privilege applies to proceeds only insofar as the law creating the privilege provides that it attaches to proceeds. With the exception of the privilege held by

The other substantive change made to the ranking scheme by the 2010 legislation is that the privilege of the furnisher of supplies or money<sup>104</sup> now takes ranking based upon when a filing to perfect it occurs, rather than being relegated by its nature to a position behind all security interests, even those perfected later. The previous rule was a vestige of the ranking rule that applied under the crop pledge law; however, that law limited the scope of crop pledges to crops of the current year and to loans that were made for the production of that crop. This limitation has never applied to Chapter 9 security interests in crops. Moreover, prior to the 2010 revision, no lender desiring to take a security interest in a producer's crop could have cavalierly disregarded a previous filing made by a creditor holding a furnisher's privilege anyway, for the lender could not know with certainty that the creditor making the previous filing did not also hold a security interest in addition to his codal privilege.<sup>105</sup>

#### *B. Substance and Scope of Agricultural Privileges*

The 2010 legislation creates no new agricultural privileges, nor does it expand or contract the scope of any existing privilege. It does, however, suppress one: the physician's privilege on crops that arose under former Louisiana Revised Statutes section 9:4524.<sup>106</sup> This privilege, which originated with Act 129 of 1880 and which was given a ranking in former Louisiana Revised Statutes section 9:4521, was almost certainly the most useless of all privileges in view of its limitation to only \$15 per year.

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the overseer, present law does not appear to extend the agricultural laborer's privilege to proceeds of the crop. See discussion *supra* notes 14–15 and accompanying text.

103. Although filing is no longer necessary for an agricultural laborer to enjoy priority over other creditors, the laborer is still required to file in order to have protection against buyers in the ordinary course of business: in the absence of a filing in favor of the laborer, both Louisiana Revised Statutes section 3:3656(D) (as revised in 2010) and the FSA allow a buyer in the ordinary course of business to take free of the laborer's privilege.

104. These privileges arise under Louisiana Civil Code article 3217(1).

105. The 2010 legislation does not change the rule of the Louisiana Civil Code that the supplier's privilege secures only amounts due to the supplier for the current year and attaches only to crops of the current year and their proceeds. See LA. CIV. CODE ANN. art. 3217(1) (1994).

106. Louisiana Revised Statutes section 9:4524 has apparently never been cited in any reported case.

*C. Agricultural Privileges as Real Rights*

As mentioned above, one of the major changes to Article 9 of the Uniform Commercial Code brought about in the 2001 national revision was the inclusion of agricultural liens within its scope. In furtherance of that expansion, model Section 9-315(a)(1) of the 2001 revision provided that not just a security interest but also an agricultural lien continues in collateral notwithstanding the sale or other disposition of the collateral. The Official Revision Comments to the model statute give no explanation as to why it was necessary to expand the continuation rule to cover agricultural liens as well as security interests. Though Louisiana had well-developed jurisprudence limiting the ability of a privileged creditor to follow crops in the hands of third persons,<sup>107</sup> it adopted this provision in the wholesale revision of Chapter 9 in 2001, thereby apparently removing those limits altogether and, at the same time, giving agricultural privileges the status of real rights contrary to fundamental doctrine about the nature of privileges on movables. This change was reversed by the 2010 legislation.

As a general rule in Louisiana, privileges bearing upon movables are mere rights of preference that do not carry with them any right of pursuit.<sup>108</sup> It is likely that Louisiana's adoption in 2001 of the uniform revision of Section 9-315(a)(1) was made without consideration of the conflict that would exist between a provision giving unlimited pursuit and the conceptual notions of privileges. There is certainly no need for national uniformity on a policy permitting a privileged creditor to enforce a privilege after the crop has left the hands of the producer, and if there were any uniform policy interest on this issue, it would seem to be one of limitation, not expansion. As the 2010 comments to the section state, the removal of references to agricultural liens in Section 9-315(a)(1) is intended to restore longstanding Louisiana law limiting the enforcement of agricultural privileges on crops after they have been sold. As the comments also point out, the inclusion of agricultural liens within the rule of Section 9-315(a) was of questionable value anyway, because both Louisiana Revised Statutes section 3:3656(D) and the FSA limit the ability of unfiled interests to survive a sale to a buyer. However, under Section 9-315(a) prior to the 2010 revision, if the holder of an agricultural lien did make a filing, the holder could in theory follow its privilege even into the hands of the ultimate consumer who buys groceries for his table.

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107. See *Loeb v. Collier*, 59 So. 816 (La. 1912).

108. See discussion *supra* note 19 and accompanying text.

*D. Technical Corrections and Coordinating Changes to Chapter 9 of the Uniform Commercial Code and Titles 3 and 9 of the Louisiana Revised Statutes*

Three technical corrections to Title 3 of the Louisiana Revised Statutes were included in the 2010 legislation. First, Louisiana Revised Statutes section 3:3653, which sets forth the scope of the Title 3 provisions, was simplified and corrected to remove a technical inaccuracy. Despite what the provision previously stated, the Title 3 provisions in question apply to all security devices affecting farm products, not merely those for which an effective financing statement has been filed. Moreover, with definitional changes that had been made in prior years, standing timber is a type of farm product, rather than a coequal classification of collateral, as the provision incorrectly suggested. Secondly, Louisiana Revised Statutes section 3:3652 was updated to remove an out-of-date reference to the recorder of mortgages of Orleans Parish as well as a reference to former Louisiana Revised Statutes section 9:4521. Finally, Louisiana Revised Statutes section 3:3656(D) was amended to clarify the obvious intention that it is the underlying security device, rather than the effective financing statement itself, that is ineffective against buyers if no effective financing statement has been filed.

Technical corrections were also made to the intrastate filing rules of Section 9-501(a) of Chapter 9, which had contained a number of inaccuracies that warranted correction. In view of Sections 9-311(a)(2) and 9-302, the ordinary Uniform Commercial Code records are never an appropriate place to make a filing covering agricultural liens; thus, the reference to agricultural liens in the introductory paragraph of Section 9-501(a) was removed.<sup>109</sup> The outdated reference to the recorder of mortgages of Orleans Parish was omitted. Paragraph (2) of the statute, specifying the proper filing officer for filings made in “all other cases” was clearly misplaced, because it logically should appear after paragraph (3), which concerns vessel filings with the Department of Wildlife and Fisheries. The necessary correction was accomplished by repealing paragraph (2) and moving its substance, with corrections, to paragraph (4).<sup>110</sup> Finally, the inclusion of the reference to standing timber in the amplification of what “all other

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109. See discussion *supra* note 64.

110. The reason that section 5 of Act No. 378 of 2010 delayed the effective date of the changes to Louisiana Revised Statutes section 10:9-501 is that previously enacted amendments to paragraph (3) of the section, concerning vessel motor filings, were not scheduled to go into effect until January 1, 2011.



cases” might include was inappropriate, in view of the provision of Section 9-311(a)(2) that the filing of a Chapter 9 financing statement is neither necessary nor effective to perfect a security interest in collateral, such as timber, for which a filing must be made in the central agricultural registry.<sup>111</sup>

### III. OFFSET RIGHTS OF CROP BUYERS

Ironically, the 2010 legislation does nothing to address a problem that was one of the motivating forces behind the Louisiana Legislature’s adoption of Senate Concurrent Resolution No. 122 of 2008: the tension between the competing rights of a crop lender and a buyer of crops who seeks to offset “cover” damages the buyer sustains when the producer fails to deliver the quantity of crops promised under a forward booking contract.

In view of its provisions that a security interest continues in collateral notwithstanding its sale<sup>112</sup> and that a person buying farm products from a person engaged in farming operations takes subject to a previously perfected security interest,<sup>113</sup> the Uniform Commercial Code itself would appear to provide that a warehouse or other person buying a producer’s crop acquires subject to a previously perfected security interest. However, the continued effectiveness of a secured party’s security interest in crops after the sale to the buyer is an issue preempted by the federal FSA, which provides that a perfected security interest continues against a buyer in the ordinary course if the secured party gives a notice to the buyer that contains any payment obligations imposed on the buyer by the secured party as conditions for release of the security interest and the buyer fails to perform the payment obligations. Thus, if the buyer complies with its “payment obligations,” it is able to extinguish the perfected security interest.

Unfortunately, it is not always clear what is included within the term “payment obligations,” a term not defined in the FSA. Sometimes the buyer purchases under a forward booking contract

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111. The 2010 legislation also made slight revisions to Louisiana Revised Statutes section 9:4770, which was originally enacted at the time of Louisiana’s adoption of Chapter 9 in order to avoid doubt as to the priority of Chapter 9 security interests against privileges, particularly the vendor’s privilege and lessor’s privilege. In addition to making purely stylistic changes and grammatical corrections, the 2010 legislation removed the cross-reference to former Louisiana Revised Statutes section 9:4521, substituting instead a reference to the new ranking rule in Louisiana Revised Statutes section 10:9-322(g).

112. LA. REV. STAT. ANN. § 10:9-315 (Supp. 2011).

113. Compare *id.* § 9-317(b), with *id.* § 9-320(a) (2002).

by which the producer promises, at the beginning of the crop season when expectations of a bountiful crop may be high, to deliver a specified quantity of crops. A usual term of the contract is that the producer agrees to an offset<sup>114</sup> against the proceeds of the crop in the event the producer delivers less than the specified quantity, and the buyer is thus forced to “cover” by obtaining the amount of the deficiency elsewhere in the market at a higher price.<sup>115</sup> In these cases, a question arises as to whether the buyer has the right to offset these “cover” damages against the proceeds otherwise payable to the secured party.<sup>116</sup>

This legal issue is a thorny one, requiring application of a number of statutes, none of which appears to answer the question directly. Insofar as the crop lender is claiming the producer’s rights under the contract as collateral, Section 9-404(a) of the Uniform Commercial Code applies and subjects the rights of the crop lender to a right of offset belonging to the buyer if the right of offset arises out of the same contract. However, the crop lender almost invariably holds a security interest not just in the producer’s rights under the booking contract for the sale of the crop but also in the crop itself. By its own terms, Section 9-404(a) does not seem to temper the lender’s claim of a security interest in the crop.<sup>117</sup> Those provisions of the Uniform Commercial Code that do address the issue of whether a lender’s perfected security interest in crops themselves survives a disposition of the crops by a person engaged in farming operations seem, in isolation, to favor the perfected lender’s position; however, as pointed out above, those provisions are to a large extent preempted by the FSA.

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114. The term used in the Louisiana Civil Code for what is commonly referred to as offset, or set-off, is “compensation.” See LA. CIV. CODE ANN. art. 1893 (2008). Louisiana’s version of Section 9-403(b) of the Uniform Commercial Code contains a nonuniform insertion of the words “compensation” and “set-off” in clause (4).

115. Since 1995, “cover” damages have been specifically allowed to a buyer under Louisiana Civil Code article 2609 when the seller fails to render the performance required by a contract of sale of movables.

116. It is important to realize that the crop lender potentially has two different types of collateral. First, the lender will almost always have a security interest in the crop itself, perfected by the filing of an effective financing statement in the central agricultural registry. The lender may also have a security interest in the producer’s rights under the forward booking contract, either as original collateral (if the collateral description contained in the lender’s security agreement is broad enough to cover it) or as proceeds of the crop.

117. By its terms, Section 9-404(a) applies to “account debtors,” not buyers of goods.

No Louisiana appellate court appears yet to have considered the offset issue,<sup>118</sup> though courts in other states have done so, issuing irreconcilable decisions.<sup>119</sup> In one of the early decisions, a bankruptcy court focused simply on the concept of “identifiable proceeds” under the Uniform Commercial Code, finding that the net amount remaining after the buyer had exercised a right of recoupment was all that constituted identifiable proceeds.<sup>120</sup> Thus, the court permitted the buyer to offset to the prejudice of the secured party cover damages resulting from an underdelivery of the crop. A number of other cases<sup>121</sup> have been resolved in favor of

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118. Louisiana courts have, however, addressed the issue of the rights of a crop lender holding a perfected security interest against a buyer who fails to remit net proceeds to the crop lender, finding that under those circumstances, the crop lender has a state law claim against the buyer for conversion. See, for example, *Deposit Guaranty National Bank v. Central Louisiana Grain Co-Op, Inc.*, 737 So. 2d 167 (La. Ct. App. 3d 1999), which held that a grain elevator converted collateral subject to a perfected security interest in favor of a crop lender when it disbursed proceeds from the disposition of the crop to a harvester whose privilege did not have priority over the bank’s perfected security interest. See also *United States v. Weems*, 680 F.2d 26 (5th Cir. 1982).

119. At least one state, Nebraska, has sought to balance the competing policy concerns legislatively by the adoption of a nonuniform paragraph (f) in Section 9-320: “No buyer shall be allowed to take advantage of and apply the right of offset to defeat a priority established by any lien or security interest.” NEB. REV. STAT. U.C.C. § 9-320 (West, Westlaw through 101st Leg., 2d Reg. Sess. 2010). As a policy choice, this provision appears always to favor the secured party, or even a mere lien claimant, over the rights of the buyer. Notably, this nonuniform paragraph is not limited by its terms to buyers of farm products and might have consequences far beyond the area of crop financing.

120. *In re McDonald*, 224 B.R. 862 (Bankr. S.D. Ga. 1998). The court felt it unnecessary to decide whether, under the FSA, the buyer bought the crop subject to the secured party’s security interest because, even if it did, the secured party was still entitled only to the identifiable proceeds from the sale of its collateral. *Id.* at 868.

121. See *Me. Farmers Exch., Inc. v. Farm Credit of Me.*, 789 A.2d 85 (Me. 2002). Agreeing that the majority had correctly applied Section 9-318 (now Section 9-404(a)), the concurring opinion in *Maine Farmers Exchange* nonetheless recognized that a separate issue existed as to whether the buyer took the crop free of the lender’s security interest. *Id.* at 92 (Saufley, C.J. & Dana, J., concurring). The concurring opinion observed that a crop lender who has not received the full proceeds of the sale of collateral typically has two potential claims against a buyer. One sounds in contract to the extent that the buyer has not paid the full price for the collateral, in which event the secured party may sue the buyer to collect the balance due on the account, subject to the buyer’s defenses under Section 9-318 (now Section 9-404(a)). The other potential claim is independent and involves the security interest in the goods themselves. *Id.* Even though the farm products rule that applies under the Uniform Commercial Code would permit a security interest in farm products to survive their disposition, the concurring judges felt that the secured party still could not prevail because the farm products rule has been preempted by the FSA, and the

the buyer on the basis of a straightforward application of Section 9-404(a) or its statutory predecessor.<sup>122</sup> On the other hand, at least one court has found in favor of the secured party on this issue, holding categorically that “a buyer of farm products in the ordinary course of business is not entitled to use setoffs it has against the seller to diminish the secured party’s interest in the farm products.”<sup>123</sup>

Interestingly, even in those cases in which the buyer prevailed, it was not on account of federal preemption under the FSA, though that issue was sometimes considered. The reason for this is that the courts have held that in enacting the FSA, Congress was interested only in eliminating double payment liability for a buyer in the ordinary course of farm products and did not intend to preempt state laws relating to the creation, perfection, or priority of security interests, or to reorder the normal priorities of liens in farm products.<sup>124</sup> Thus, even though a buyer might be entitled to “buyer in the ordinary course” protection under the FSA in its capacity as a buyer of farm products, it is not entitled to that protection to the extent that the buyer acts as creditor and exercises a right of offset.<sup>125</sup> For this reason, when a buyer applies the proceeds from

secured party failed to persuade the lower court of the applicability of any exceptions to the rule under the FSA that a buyer in the ordinary course of business takes free of a security interest created by his seller. *Id.* at 94. According to the concurring opinion, the secured party should have urged that the buyer was not a buyer in the ordinary course of business within the meaning of the FSA because a buyer’s exercise of a right of offset does not constitute the giving of “new value.” *Id.* at 95.

*See also* *Consol. Nutrition, L.C. v. IBP, Inc.*, 669 N.W.2d 126 (S.D. 2003). After rejecting a contention that the FSA protected the buyer, the court found that state law, specifically Section 9-318 of the Uniform Commercial Code (now Section 9-404(a)), nonetheless required a finding in favor of the buyer because the buyer’s claims arose out of the same contract. *Id.* at 131–34. According to the court, the fact that the creditor had a perfected security interest in the farm products themselves made no difference because the creditor’s secured status comes into play only after it is shown that the assignor (the producer) is entitled to payment of funds. *Id.* at 134.

122. The predecessor provision in the model Uniform Commercial Code that existed prior to 2001 was Section 9-318(1).

123. *AG Servs. of Am., Inc. v. DeBruce Grain, Inc.*, 19 P.3d 188, 191 (Kan. Ct. App. 2001). In finding for the secured party, the court rejected the buyer’s contention that upon sale of the crop, the secured party was relegated to the status of the assignee of an account and was therefore subject under Section 9-318(1) (now Section 9-404(a)) to the account obligor’s defenses arising out of the contract giving rise to the account.

124. *See* discussion *supra* note 97 and accompanying text.

125. *See, e.g., Consol. Nutrition*, 669 N.W.2d at 130–31. Although the court in *Consolidated Nutrition* found that the buyer took the farm products in

farm products to an antecedent obligation owed to the buyer or exercises a right of offset, there is no federal preemption, and the buyer remains exposed to the possibility of a state law claim for conversion if what it does is not authorized by state law.

Professor Barkley Clark's treatise addresses the issue of whether a crop lender can claim that its security interest in a crop is not extinguished if the buyer nets out obligations of the producer from the amounts otherwise payable to the lender.<sup>126</sup> He reasons that the "payment obligation," not being defined in the FSA, must be defined under state law and, under state law, consists of only the balance remaining after the offset.<sup>127</sup> His analysis, based on the Uniform Commercial Code's definition of "proceeds" ("whatever is received upon disposition of the original collateral"),<sup>128</sup> is that the proceeds are only the net amount because that is all that is received by the lender. When the buyer remits the net amount remaining after the offset, it complies with its payment obligations, and the lender's security interest is thereby extinguished under the FSA. Professor Clark argues that this furthers the purpose of the FSA by eliminating the risk of double payment that might otherwise be visited upon the buyer who, because it has to purchase other crops in the open market following the producer's breach, "would be subjected to precisely the type of double jeopardy that the FSA was intended to avoid."<sup>129</sup> According to Professor Clark's analysis, the secured party should be in no better position than if it had to suffer an offset because its borrower had delivered defective crops.<sup>130</sup>

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question (hogs) free of the lender's security interest under the FSA, it held that the FSA did not apply to the priority dispute over the proceeds that the buyer had applied to a deficiency balance owed by the hog producer under its hog procurement contract with the buyer. Thus, even though the buyer was entitled to "buyer in the ordinary course" protection under the FSA in its capacity as a buyer of hogs, it was not entitled to that protection to the extent that it acted as creditor and set off the sale proceeds to satisfy the hog producer's preexisting debt under the contract. *Id.* The buyer nonetheless prevailed under state law. See discussion *supra* note 121. See also *Fin-AG, Inc. v. Pipestone Livestock Auction Market, Inc.*, 754 N.W.2d 29, 41 (S.D. 2008), in which the buyer's offset claim was for an antecedent debt that apparently did not arise out of the same contract under which the farm products (cattle) were sold. Following its prior holding in *Consolidated Nutrition*, the court found that the FSA provided no protection to the buyer, which was therefore liable under state law for conversion of the proceeds from the sale of the cattle. *Id.*

126. See CLARK, *supra* note 42, ¶ 8.05[2][f].

127. *Id.* ¶ 8.05[2][f][iii].

128. U.C.C. § 9-102(a)(64) (2010).

129. CLARK, *supra* note 42, ¶ 8.05[2][f][iv].

130. *Id.*

Competing policy considerations exist as well. The crop lender, who usually provides most or all of the financing necessary to produce the crop, has a legitimate interest in seeing that the proceeds of the crop that the lender has financed are applied to the satisfaction of the debt. Without the financing the lender provides, the crop would never have been planted or produced in the first place. When weather or other circumstances result in a diminished harvest, the lender is already injured by the fact that there is not as much crop to harvest and sell; the lender's injury is compounded when the proceeds from that reduced crop are even further decreased by cover damages claimed by the buyer on account of the producer's underdelivery of the contracted quantities. On the other hand, as Professor Clark observes,<sup>131</sup> crop buyers can make compelling policy arguments in their favor. Without the buyer, the crop is essentially worthless except to the extent that it might be used or consumed on the farm itself. Undeniably, the buyer suffers damages when the producer does not deliver the promised quantity of crop, for the buyer is forced into the market to make up the deficiency at perhaps a much greater price.

As mentioned above, Act 378 of 2010 did not purport to resolve this issue,<sup>132</sup> though another act of the same session did address the underlying problem, if only in a quite oblique fashion. Act 860 of 2010 enacts Louisiana Revised Statutes section

131. *See id.* ¶ 8.08[4][a].

132. The Law Institute's report in response to Senate Concurrent Resolution No. 122 of 2008 did suggest, without recommendation, that if the legislature felt as a matter of policy that the offset rights of a buyer are too expansive under the Uniform Commercial Code, it might consider adoption of a non-uniform provision to the effect that

[a] person buying crops from a person engaged in farming operations may not assert against a secured party holding a security interest in the crops perfected at the time of their delivery to the buyer a defense or claim arising from the sale or delivery of the same type of crop of a different year or from the sale or delivery of a different type of crop or other farm product of any year, even if the defense or claim arises from the same contract.

Report in Response to SCR No. 122 of 2008, *supra* note 5.

Section 9-404(a) of Chapter 9 permits a buyer to assert against a secured party any right of offset arising out of the same contract, even if the offset relates to different crops grown on the same or different farms and even to different crop years. If the suggested provision had been enacted, it would have limited the buyer's ability to assert against the secured party a claim or defense, such as a claim for cover damages, to those claims or defenses that arise with respect to the crop in question for the same crop year. The legislature chose not to adopt this suggested limitation, likely out of a desire to avoid enacting a nonuniform limitation that would place Louisiana producers at a competitive disadvantage in finding buyers for their farm products.

3:3419.1, allowing crop lenders and grain dealers to communicate freely with each other concerning a producer with whom they have “a mutual business relationship,” including sharing information as to the amount of agricultural commodities that the producer has contracted to deliver and his loan balances.<sup>133</sup> The utility of the statute is likely to be quite limited, however, in view of a provision added by amendment during the legislative process to limit the statute’s reach to periods when there exists a declared disaster in the parish in which the farm products are being produced.<sup>134</sup>

#### IV. OTHER CONFLICTING INTERESTS

##### *A. Ranking of Privileges and Security Interests Against Mortgages*

Louisiana Civil Code article 3217 provides that the privileges the article creates on a crop “shall not be divested by any prior mortgage, whether conventional, legal or judicial, or by any seizure or sale of the land while the crop is on it.” Because agricultural privileges historically did not have to be recorded anywhere to be effective against third persons, this rule appeared to apply even though the privilege was not of record in the mortgage records. However, in *Bank of America v. Fortier*,<sup>135</sup> the court held that this article must be read in light of Louisiana Civil Code articles 3273 and 3274, as well as Article 123 of the 1868 Constitution then in effect.<sup>136</sup> At the time of the case, Louisiana Civil Code article 3274 required privileges on immovables to be recorded on the day the contract was made in order to be entitled to priority over existing mortgages.<sup>137</sup> The court held that Louisiana Civil Code article 3274 thus unambiguously required the holder of a crop privilege to record his privilege within the delay provided by that article in order to outrank a preexisting mortgage.<sup>138</sup> Professor Daggett asserts that this decision can be justified only on

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133. The act also amended the financial privacy statute to add a specific exclusion for disclosures made under Louisiana Revised Statutes section 3:3419.1. See LA. REV. STAT. ANN. § 6:333(F)(17) (Supp. 2011) (exempting banks that make agricultural loans and that communicate information, either orally or in writing, in accordance with Louisiana Revised Statutes section 3:3419.1).

134. LA. REV. STAT. ANN. § 3:3419.1(D) (Supp. 2011).

135. 27 La. Ann. 243 (1875).

136. *Id.* at 245–46.

137. The required period of recordation under Louisiana Civil Code article 3274 is presently seven days, except that 15 days is allowed if registry is required in a parish other than that in which the act is passed.

138. *Fortier*, 27 La. Ann. at 246.

the basis that a standing crop is an immovable<sup>139</sup> and that the decision is irreconcilable with Louisiana Civil Code article 3217, specifically those decisions holding that, for purposes of that article, a standing crop is classified as a movable.<sup>140</sup> The concept that a growing crop is a movable by anticipation when encumbered with security rights of third persons now appears in Louisiana Civil Code article 474. If the crop is indeed a movable, then it would seem that no filing need be made for the privilege to be assertable against the mortgagee. If not, then an obvious question arises as to where the filing must be made: Louisiana Civil Code article 3274, which would be the article requiring the filing in the first place, seems to contemplate only a filing in the local mortgage records. However, since 1987, the law has required that filings with respect to agricultural privileges, as well as those related to crop pledges and later security interests, be filed in the central agricultural registry.<sup>141</sup> It would be a rare privileged creditor indeed who took the additional step of making a filing in the local mortgage records for the specific purpose of priming real estate mortgages.

Chapter 9 of the Louisiana Uniform Commercial Code now supplies a somewhat different rule to govern the analogous issue of the ranking of a *security interest* in crops against a real estate mortgage. Under Louisiana Revised Statutes section 10:9-334(i), a security interest in crops (but not an agricultural lien) ranks ahead of mortgages if the debtor has an interest of record in the real estate.<sup>142</sup> The fact that Chapter 9 provides a different rule for security interests gives rise to two interesting possibilities. First, a perfected crop lender whose security interest is outranked by a mortgage because his debtor has no interest of record in the real estate, as would be the case if the debtor is farming the land of another pursuant to an unrecorded lease, can nonetheless assert his Civil Code privilege (to the extent that he has financed the current year's crop) and perhaps prime the mortgage anyway. Secondly, the difference in the two rules creates the possibility of a vicious circle: the privilege of the furnisher of supplies or money is primed by a previously perfected security interest in crops under Louisiana Revised Statutes section 10:9-322(g); however, that same privilege will prime all real estate mortgages, which will in turn prime the

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139. DAGGETT, *supra* note 11, § 114, at 473–74.

140. See *Purity Feed Mills Co. v. Moore*, 93 So. 196, 197 (1922); *Weill v. Kent*, 28 So. 295, 297 (La. 1900).

141. See Act No. 451, 1987 La. Acts 1106.

142. Louisiana's version of Section 334(i) omits the language of model Section 334(i) that also affords the secured party priority if the debtor is in possession of the real property on which the crops are growing.



security interest if the debtor has no interest of record in the real estate.

In view of the fact that agricultural privileges are now, with very limited exceptions, subjected to the same perfection and ranking rules as security interests affecting crops, there seems to be little point in providing different rules for the relative rankings of agricultural privileges and security interests against mortgages. Placing agricultural privileges within the ambit of Louisiana Revised Statutes section 10:9-334(i) would not only eliminate unnecessary complications that arise from differing ranking rules but would also remove the confusion in Louisiana law surrounding the ranking of agricultural privileges against mortgages.

*B. The Rights of a Lessor Entitled to a Share of the Crop*

In the case of a lease of land for part of the crop, Louisiana Revised Statutes section 9:3204 provides that the part that the lessor is to receive is considered at all times to be his property. As is readily apparent, where the rent is payable in kind rather than in cash, this statute gives the lessor ownership of his share of the crop, rather than a mere privilege on the lessee's crop. Nothing in the 2010 legislation changed the reach or effect of this statute.

*Landreneaux v. Dergin* held that under an agreement between a landowner and a sharecropper providing that the latter would be paid two-thirds of the crop, the relationship between the parties was that of lessor and lessee, rather than employer and employee.<sup>143</sup> Accordingly, the portion of the crop reserved to the lessor was the lessor's own property and was not affected by a crop pledge executed by the sharecropper.<sup>144</sup> A somewhat similar holding was made by the Supreme Court in *In re Meaux Bros.*<sup>145</sup> In that case, the landowner operated its lands "on the tenant-farmer plan," under which the landowner agreed to provide the seed rice for the cultivation of the farm, and the cultivators of the land agreed that the landowner would receive one-fourth of the crop.<sup>146</sup> The court held that the shares of the landowner and of the cultivator belonged absolutely and at all times to them respectively in the proportions fixed by their contract. Accordingly, the share belonging to the landowner was affected by a privilege in favor of the rice mill that furnished the seed rice for the current year's rice

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143. 134 So. 283, 285 (La. Ct. App. 1st 1931).

144. *Id.*

145. 149 So. 886 (La. 1933).

146. *Id.* at 886.

crop.<sup>147</sup> The case apparently did not involve a contention by the rice supplier that its privilege also affected the portion of the crop belonging to the cultivators.

In *Meyhoeffer v. Wallace*,<sup>148</sup> the court held that notwithstanding Louisiana Revised Statutes section 9:3204, the lessor under an agricultural lease providing for payment of rent of one-fifth of the harvest or \$32,000, whichever was greater, did not have any ownership interest in the crops themselves but rather only a lessor's privilege securing his claim to cash rental.<sup>149</sup> In reaching this decision, the court distinguished *Guaranty Bank v. Daniels*, a case in which the lease had provided that the lessor would be entitled to one-fourth of the crop or \$150,000, on the ground that the lease in *Daniels* contained several provisions indicating the lessor's retention of ownership of his share of the crop, such as a prohibition on the tenant's encumbrance of the share of the crop belonging to the lessor.<sup>150</sup> By contrast, in *Meyhoeffer*, the parties either left blank or marked as inapplicable a number of provisions of the form lease that would have dealt with jointly owned property.<sup>151</sup> Moreover, no provision of the lease contemplated the lessor's physical possession or ownership of a share of the crop; indeed, the lease permitted the lessee to sell the entire crop.<sup>152</sup> Finally, the practice of the parties in previous years had been that the lessee sold the entirety of the crop and then remitted cash rent to the lessor.<sup>153</sup> Because the lease contemplated cash rental, Louisiana Revised Statutes section 9:3204 did not apply.<sup>154</sup>

In cases where Louisiana Revised Statutes section 9:3204 applies with the result that the lessor owns an interest in the crops, the tenant farmer has no rights in the lessor's share of the crop, and

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147. *Id.*

148. 792 So. 2d 851, 857-58 (La. Ct. App. 2d 2001).

149. *Id.* at 856.

150. 399 So. 2d 790 (La. Ct. App. 3d 1981).

151. *Meyhoeffer*, 792 So. 2d at 854.

152. *Id.* at 855.

153. *Id.*

154. The court in *Meyhoeffer* also considered the priority of the lessor's privilege on the crop against a perfected security interest held by a bank. According to the court, the lessor was able to exercise his privilege only while the crop was still on the premises or within 15 days after removal, provided that it remained in the lessee's possession. Because the lessor did not do so, his privilege on the crop itself was lost. Even assuming that the lessor still held a lessor's privilege on the *proceeds* of the crop after he failed to seize the crop, the privilege was not perfected by a filing in the central agricultural registry and was thus subordinate to the bank's perfected security interest. *Id.* at 857-58.

for that reason any security interest that the tenant might grant to his own lender does not attach to the lessor's share of the crops.<sup>155</sup>

### *C. Secured Interests in Standing Timber*

Under Louisiana property law, standing timber is always immovable, whether belonging to the owner of the ground or someone else.<sup>156</sup> In contrast, unharvested crops are immovable only when they belong to the owner of the ground; they are movables by anticipation when they belong to a person other than the landowner.<sup>157</sup>

Under the rules of the Louisiana Civil Code, the proper means of encumbrance of standing timber, like most other immovables, is through a mortgage.<sup>158</sup> As with all mortgages, the Louisiana Civil Code contemplates that a mortgage upon standing timber becomes effective against third persons upon filing in the mortgage records of the parish in which the standing timber is situated.<sup>159</sup> However, with the adoption of the central agricultural registry law and Chapter 9 of the Uniform Commercial Code, the rules of the Louisiana Civil Code concerning the encumbrance of standing timber as an immovable have become incomplete and are now to some extent deceptive. The potential for confusion is heightened by the fact that these two sets of laws themselves treat standing timber differently: the central agricultural registry law includes all standing timber within the definition of "farm products,"<sup>160</sup> while Chapter 9 of the Uniform Commercial Code specifically excludes

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155. See LA. REV. STAT. ANN. § 10:9-203(b)(2) (Supp. 2011) (requiring that the debtor have rights in the collateral in order for a security interest to become enforceable); see also CLARK, *supra* note 42, ¶ 8.05[2][d].

156. If the standing timber belongs to the owner of the ground, it is a component part of the land and, along with the land itself and all other component parts, is immovable. LA. CIV. CODE ANN. arts. 462–463 (2010). If the standing timber belongs to a person other than the owner of the ground, it is a separate immovable. *Id.* art. 464.

157. *Id.* arts. 463, 474. Even when belonging to the owner of the ground, unharvested crops are movables by anticipation if they are encumbered with security rights of third persons, insofar as the creditor is concerned. They are also subject to being mobilized by a landowner by act translative of ownership or by pledge. *Id.* art. 474.

158. If the standing timber is owned by the owner of the ground, then a mortgage upon the land automatically attaches to the standing timber as a component part. *Id.* art. 3286(1) (2007); see also LA. REV. STAT. ANN. § 9:5391 (2007). If the standing timber belongs to someone other than the owner of the ground, then the timber itself is a corporeal immovable susceptible of mortgage. LA. CIV. CODE ANN. art. 3286 & cmt. (b) (2007).

159. LA. CIV. CODE ANN. arts. 3338, 3346, 3354–3368 (2007).

160. LA. REV. STAT. ANN. § 3:3652(8) (Supp. 2011).

standing timber from the definition of the same term as used in Chapter 9 but nonetheless includes certain categories of standing timber within the scope of Chapter 9 as a whole.<sup>161</sup>

By its terms, Chapter 9 applies to security interests in standing timber that constitutes “goods,” even though immovable.<sup>162</sup> The definition of “goods” in Chapter 9 is nonuniform: it includes the interest of a debtor *other than a landowner* in standing timber that is to be cut and removed under a recorded timber conveyance.<sup>163</sup> Thus, in cases in which there is a recorded timber conveyance, the proper means of granting a consensual security interest in the interest of a person, other than the landowner, in the standing timber is through a security agreement authenticated in accordance with Chapter 9, rather than by means of a mortgage.<sup>164</sup> The security agreement must include a description of the land concerned.<sup>165</sup> Even though the standing timber does not constitute “farm products” as that term is defined in Chapter 9, the security interest is nonetheless perfected by the filing of an effective financing statement in the central agricultural registry.<sup>166</sup> As is the case with crops, the filing serves the additional purpose of protecting the secured party against buyers in the ordinary course of business. These rules were not changed by the 2010 legislation.

Where the issue is the encumbrance of the interest of the landowner himself in standing timber, Chapter 9 has no

161. *Id.* § 10:9-102(a)(34).

162. *Id.* § 9-109(c)(11)(F).

163. *Id.* § 9-102(a)(44). A “recorded timber conveyance” is defined by Louisiana Revised Statutes section 10:9-102(d)(16) to mean a written contract (a) by which standing timber is conveyed to, or upon cutting will become owned by, an identified person other than an owner of the land upon which this timber is standing; (b) which is executed by a record owner of the land; (c) which has been recorded in the conveyance records of the parish in which the land is situated; and (d) which contains a legal description of the land that would be sufficient for purposes of making a conveyance of the land effective against third persons.

164. The use of a document styled as a mortgage would not be fatal to the security interest, however, if the document meets the requirements of an authenticated security agreement under Louisiana Revised Statutes section 10:9-203(b). *See* LA. REV. STAT. ANN. § 10:9-109 UCC cmt. 2 (2002 & Supp. 2011).

165. *Id.* § 9-203(b)(3)(A) (Supp. 2011).

166. *See* Louisiana Revised Statutes section 10:9-311(a)(2), which requires a filing in the central agricultural registry in order to perfect security interests and liens affecting farm products *and standing timber*. However, unlike crops, perfection of a security interest in standing timber is governed by the law of the jurisdiction in which the standing timber is located. Thus, Louisiana is the proper state in which to file to perfect a security interest in standing timber that is growing in Louisiana and that constitutes goods under Chapter 9, regardless of the location of the debtor.

applicability at all. In such cases, standing timber remains susceptible of encumbrance by mortgage with one very important caveat: the central agricultural registry law, which defines “farm products” to include all standing timber, requires a filing in the central agricultural registry in order for the mortgage to be effective against buyers in the ordinary course of business. Before the 2010 revision, the requirement of a filing in the central agricultural registry was quite a trap for the unwary. Because the central agricultural registry law previously provided that a security interest in farm products—standing timber included—was without effect as to *any third person* unless an effective financing statement was filed in the central agricultural registry, a mortgage that was properly filed in the mortgage records, but without a filing in the central agricultural registry, was arguably ineffective as to other creditors insofar as the timber growing on the land was concerned. Thus, the holder of a later arising mortgage who did make a filing in the central agricultural registry might have been able to claim priority as to the timber, though not the land itself. Through the 2010 amendment of Louisiana Revised Statutes section 3:3656(D) limiting the statute’s protection against unfiled interests to buyers in the ordinary course of business, rather than all third persons, this potential argument has been eliminated. In the case of the mortgage of standing timber belonging to the landowner, the only function of a filing in the central agricultural registry is to make the mortgage effective against buyers in the ordinary course of business, not against other creditors. The mortgage upon the timber is effective against persons other than buyers in the ordinary course of business, such as other mortgagees, upon filing in the mortgage records.

#### CONCLUSION

Even with the 2010 legislative revision, Louisiana law governing security interests in crops and agricultural privileges continues to be found in the loose patchwork of statutes described at the beginning of this Article, although two of those statutes have been eliminated. One of the most important rules in this area of the law—that governing the ranking of competing secured interests in crops—has been refined and moved to the location within the Uniform Commercial Code where crop lenders and practitioners across the nation are accustomed to finding crop ranking rules. The 2010 legislation enhances the protection of agricultural laborers, whose first priority ranking is no longer at risk of being lost to other creditors on account of an unawareness of the need to perfect their privileges or the inability to do so properly. Those creditors

who furnish money or supplies used in the making of a crop, though still not able to achieve superpriority over previously perfected interests, are at least no longer subordinated by statute to later perfected interests. Most importantly, the internal inconsistencies and anomalies that previously abounded in this area of the law have largely been removed.

Nonetheless, work remains to be done. With the exception of the elimination of one nearly useless privilege, the 2010 legislative revision made no attempt to modernize those provisions of law that create agricultural privileges or that govern their scope and extent. The legislation was designed to correct substantial problems that existed in the statutory scheme; it did not venture upon the policy judgments inherent in a determination of those agricultural creditors who should benefit from the protections that a privilege affords. Like Keats's *Autumn gleaner*, the 2010 revision leaves a half-reaped furrow; those policy judgments will have to await the next swath of the legislator's scythe.<sup>167</sup>

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167. John Keats, *To Autumn*, in *THE CLASSIC HUNDRED POEMS* 141 (William Harmon ed., 2d ed. 1998).

