

THE LIVESTOCK SELLER'S LIEN: A SOURCE OF PROTECTION FOR THE CATTLE PRODUCER

MEGAN CRENSHAW*

I. INTRODUCTION

In November 2010, several cattle producers in the Midwest and South sold their cattle to Eastern Livestock Co., LLC (Eastern).¹ These transactions proved disastrous when the cattle producers received bad checks they later could not cash.² As a result, these individuals were left uncompensated,³ largely because the obligation the buyer owed to the cattle producers existed without a security interest.⁴ If Article 9 of the Uniform Commercial Code (UCC), or some similar legislation, had applied to these transactions, the cattle producers would have been in a better position to receive compensation.⁵

Taking note of the plight of these cattle producers, Oklahoma enacted the Livestock Owner's Lien Act of 2011 in an effort to protect them.⁶ The Act created a statutory lien in the cattle producer's favor, meaning that the cattle producer retains a claim in the livestock sold or the proceeds from the resale.⁷ In 2012, Kentucky's General Assembly considered similar legislation, however, as of the writing of this Note, Kentucky has not enacted a comparable statute.⁸ Although the statutes are not identical, both seek to protect cattle producers and ensure payment for cattle subsequent to delivery.⁹

* Staff Member, Kentucky Journal of Equine, Agricultural, & Natural Resources Law, 2012-2014. B.S. Psychology, *cum laude*, 2010, University of Florida, J.D. May 2014, University of Kentucky College of Law.

¹ Jeff Todd, *The Oklahoma Livestock Owner's Lien Act: A Response to the Eastern Livestock Debacle*, AGRIC. L. UPDATE, Jun. 2011, at 1, available at <http://www.namanhowell.com/Livestock-Owner-s-Liens.pdf>.

² *Id.*

³ *See id.*

⁴ *See id.*

⁵ *Id.* at 2.

⁶ *Id.* at 1; *see also* OKLA. STAT. tit. 4, §201.3C (2011).

⁷ Todd, *supra* note 1, at 2 ("The intended benefit of the Act is to put Oklahoma producers in the position of holding secured claim either in (i) the livestock sold, or (ii) the proceeds held from the resale of the livestock.").

⁸ David L. LeBas, *Livestock Owner's Liens: New Legislation*, AGRIC. L. UPDATE, Jun. 2011, at 5, available at <http://www.namanhowell.com/Livestock-Owner-s-Liens.pdf>; S.B. 94, 2011 Gen. Assemb., Reg. Sess. (Ky. 2011); *see also* S.B. 92, 2011 Gen. Assemb., Reg. Sess. (Ky. 2011).

⁹ LeBas, *supra* note 8, at 2 ("Both statutes seek to protect cattle producers who fail to require payment when they deliver cattle to a buyer."); *see also* OKLA. STAT. tit. 4, §201.3C (2011); S.B. 94, 2011 Gen. Assemb., Reg. Sess. (Ky. 2011).

This Note examines the effect of an unsecured transaction when cattle producers sell their livestock, analyzes the inadequate remedies available to a cattle producer when placed in such a predicament, and explains how a cattle producer would benefit from the creation of a statutory lien ensuring payment from a cattle sale. Section II of this Note outlines the structure of the cattle industry and how sales are conducted, and Section III explains secured transactions within the cattle industry. Section IV addresses the methods a cattle producer may use to obtain payment when no statutory lien exists and the difficulty associated with these remedies. Section V introduces Oklahoma's Livestock Owner's Lien Act of 2011, and Section VI describes Kentucky's similarly proposed legislation. Finally, Section VII discusses the potential results if the legislation is enacted, and urges for its future adoption.

II. LIVESTOCK INDUSTRY AND SALES

A. Industry Practices

The cattle sales industry can be divided into a three-tier system: Cattle producers at the bottom, feed yards or "middlemen" in the middle tier, and slaughterhouses at the top.¹⁰ Producers have many options when it comes to selling their cattle: They may sell them directly to feed yards or by auction to middlemen who buy them on speculation, commission,¹¹ or credit. Additionally, producers may sell their cattle to middlemen at buying stations.¹² The feed yards and middlemen often resell the cattle to third parties.¹³

Most livestock producers sell their cattle at stockyard auctions.¹⁴ At an auction, animals are sold individually or in a group.¹⁵ The owner of the auction receives a fee for selling the livestock.¹⁶ These stockyards are either private and unregulated, or regulated by the United States Department of Agriculture (USDA).¹⁷ Selling at a USDA regulated stockyard provides payment protection, while selling at an unregulated stockyard offers none.¹⁸ USDA stockyards ensure that the buyer can provide payment for the cattle

¹⁰ LeBas, *supra* note 8, at 2 ("The modern beef industry can be thought of as a square pyramid, with the slaughterhouses at the peak, feedyards in the middle, and producers at ground level.").

¹¹ *Id.*

¹² *Senate Bills 92 & 94 (2011)*, CMTY FARM ALLIANCE, http://communityfarmalliance.org/?page_id=134 (last visited Feb. 17, 2013).

¹³ *See* LeBas, *supra* note 8, at 2-3.

¹⁴ Lowell Atchley, *Livestock Lien*, LEGIS. RESEARCH COMM'N 5 (Nov. 2011), <http://www.lrc.ky.gov/lrcpubs/lb236.pdf>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

prior to the transaction.¹⁹ Producers that sell at buying stations are subject to the same risks as those that utilize private and unregulated stockyards; in fact, a buying station is defined as “a private livestock market that offers stockyard services.”²⁰

B. Payment System

Many cattle producers who sell to middlemen do not require payment on delivery because they believe they can get lucrative prices for their calves from middlemen who buy on a speculative basis.²¹ Middlemen that purchase on a speculative basis cannot pay the cattle producers for the cattle received until they sell the cattle to a subsequent purchaser.²²

Cattle producers engaging in these middleman transactions accept payment at some designated date after delivery.²³ This payment system allows the middleman to either resell the cattle or obtain the funds necessary from a lender to pay the cattle producer.²⁴ As an example, Eastern's typical payment system was as follows: a middleman, Eastern, purchased cattle from a cattle producer and then resold the cattle, and likely received payment for the resale before its payment to the cattle producer had cleared.²⁵ After Eastern received payment from its sale, it would then pay the cattle producer from the proceeds.²⁶ Though seemingly risky, cattle producers are willing to accept payment at a later date in the off chance that they can obtain a much larger profit margin.

Although the USDA does not regulate buying stations and only regulates some stockyards, several companies that purchase their cattle at these locations remain subject to federal regulations.²⁷ Pursuant to federal regulation, select auction markets are prohibited from demanding payment the same day of a sale if a company “ha[s] the proper credentials from the USDA.”²⁸ This does not eliminate the buyer's obligation to the seller, but it

¹⁹ *Id.*

²⁰ *See Senate Bills 92 & 94 (2011)*, *supra* note 12.

²¹ LeBas, *supra* note 8, at 2.

²² *Id.* at 2-3.

²³ *Id.* at 3.

²⁴ *Id.*

²⁵ Todd, *supra* note 1, at 1.

²⁶ *Id.* at 2.

²⁷ Memorandum in Opposition to Trustee's Motion for Partial Summary Judgment Regarding Statutory Trust and Constructive Trust at 8, *Friona Indus., LP v. E. Livestock Co.* (In re *E. Livestock Co.*), 2012 Bankr. LEXIS 3630 (Bankr. S.D. Ind. July, 27, 2012) (No. 10-93904) (“The [Packers and Stockyards Act] PSA is remedial legislation which is required to be construed liberally...The industry is regulated, like other industries, to protect the integrity of the system...to protect against monopolistic behaviors by the largest involved, and to protect the smallest involved, the numerous U.S. producers and sellers . . .”); *see also* Todd, *supra* note 1, at 9 (“The PSA contains a number of certain minimum and fundamental requirements for all who operate in the industry...”).

²⁸ Tim Thornberry, *\$30 Million Wanted in Lawsuit by Eastern Livestock Plaintiffs*, FARM WORLD (Nov. 14, 2012), <http://www.farmworldonline.com/news/ArchiveArticle.asp?newsid=15557>.

does leave the seller in a vulnerable position.²⁹ If a producer sells his cattle at USDA regulated stockyards, then he is not subjected to this risky payment system.³⁰ Regulated livestock auctions maintain bank accounts, ensuring prompt payment to sellers for their livestock.³¹

C. The Eastern Livestock Debacle

In November 2010, this long-practiced pay after delivery procedure at unregulated stockyards proved disastrous when several cattle producers received no payment for cattle sold to Eastern.³² Prior to this event, Eastern was one of the largest cattle brokerage companies in the United States.³³

Eastern technically functioned as a middleman although it was able to pay on delivery, instead of paying after delivery.³⁴ Eastern purchased cattle from cattle producers with checks drawn on its credit line.³⁵ When Eastern's primary lender, Fifth Third Bank, Inc., (Fifth Third) froze Eastern's accounts, checks Eastern had written to purchase cattle were deemed unfunded and were unpaid.³⁶ As a result, Eastern failed to pay for \$130 million of livestock it purchased from 743 sellers in thirty states.³⁷ Several cattle producers lost both their compensation from the cattle sales and their cattle.³⁸

Producers who sold at USDA regulated stockyards within Kentucky were largely unaffected because those auctions maintained bank accounts established to promptly pay sellers.³⁹

However, cattle producers selling at unregulated Kentucky stockyards and buying stations, and in particular, those engaged in transactions at the Edmonton Buying Station in Metcalf County, Kentucky, (Edmonton) were not protected.⁴⁰ Eastern purchased livestock in Edmonton, which subjected the cattle producers to the fallout that occurred when Fifth Third froze Eastern's accounts.⁴¹

("Under federal regulations those auction markets cannot demand payment the same day of a sale from companies such as ELC, as long as they have the proper credentials from the USDA.").

²⁹ *Id.*

³⁰ Atchley, *supra* note 14, at 5.

³¹ *Id.*

³² Todd, *supra* note 1, at 1.

³³ *Id.*

³⁴ *See id.*

³⁵ LeBas, *supra* note 8, at 3.

³⁶ Kristy Foster, *Eastern Livestock Files Bankruptcy After Fifth Third Bank Files Lawsuit*, FARM & DAIRY (Dec. 16, 2010), <http://www.farmanddairy.com/news/18908/18908.html>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Atchley, *supra* note 14, at 5.

⁴⁰ *Senate Bills 92 & 94 (2011)*, *supra* note 12.

⁴¹ Susan Tebben, *Issues Arise with Area Livestock Purchaser Federal Agency Investigates Claims of Bad Checks from Eastern Livestock Company*, GLASGOW DAILY TIMES (Nov. 15, 2010).

Although the buying station was not USDA or state regulated; the Packers and Stockyards Act (PSA) subjected Eastern to several federal regulations.⁴² The Grain Inspection, Packers, and Stockyards Administration (GIPSA) enforces the PSA.⁴³ GIPSA governs everyone who operates within the regulatory environment of the cattle industry.⁴⁴ Under the PSA, Eastern was licensed as a dealer and a market agency.⁴⁵ These regulations permitted Eastern to make prompt payment after delivery or at a later time pursuant to a written agreement between the parties.⁴⁶ GIPSA began investigating Eastern when it received a seller's complaint.⁴⁷ The livestock seller reported that a check he had received from Eastern had been returned due to insufficient funds.⁴⁸ The ensuing investigation revealed Eastern could not fulfill its current obligations to cattle producers, resulting in Fifth Third's freezing of Eastern's accounts.⁴⁹

Fifth Third then sued Eastern and sought an order placing Eastern in receivership, which it eventually obtained.⁵⁰ Consequently, Eastern was forced into an involuntary Chapter 11 bankruptcy.⁵¹ Eastern is currently mired in its bankruptcy proceeding, rendering it nearly impossible for cattle producers to collect any payment owed.⁵² The primary concern for cattle producers is that Eastern immediately resold the purchased cattle.⁵³ Any producer in possession of a bounced check likely has minimal, if any, rights to the cattle⁵⁴ and may "be found to hold merely unsecured claims against Eastern," which are subject to the bankruptcy proceeding.⁵⁵ Individuals holding secured claims against Eastern receive higher priority than the

⁴² MARKET AGENCIES BUYING ON COMMISSION AND DEALERS IN THE UNITED STATES, U.S. DEPT. AGRIC. (2012), available at http://www.gipsa.usda.gov/psp/regulated/dealersBOC_list.pdf.

⁴³ 2013 EXPLANATORY NOTES, U.S. DEPT. AGRIC. (2013), available at <http://www.obpa.usda.gov/20gipsa2013notes.pdf>.

⁴⁴ *Packers and Stockyards Program (P&SP)*, U.S. DEPT. AGRIC., <http://www.gipsa.usda.gov/psp.html> (last visited Mar. 9, 2013).

⁴⁵ MARKET AGENCIES BUYING ON COMMISSION AND DEALERS IN THE UNITED STATES, U.S. DEPT. OF AGRIC. (2012), available at http://www.gipsa.usda.gov/psp/regulated/dealersBOC_list.pdf.

⁴⁶ Thornberry, *supra* note 28; *Registered and Bonded Market Agencies Buying on Commission and Dealers*, U.S. DEPT. OF AGRIC., <http://www.gipsa.usda.gov/psp/dealer.html> (last visited Jan. 12, 2013).

⁴⁷ *Registered and Bonded Market Agencies Buying on Commission and Dealers*, U.S. DEPT. AGRIC., <http://www.gipsa.usda.gov/psp/dealer.html> (last visited Jan. 12, 2012).

⁴⁸ Thornberry, *supra* note 28.

⁴⁹ *Id.*

⁵⁰ Foster, *supra* note 36.

⁵¹ *Id.*

⁵² *Eastern Livestock Bankruptcy Pleadings Numbered 550-U.S. Bankruptcy Court, Southern District of Indiana, New Albany Division Bankruptcy Petition #: 10-93904-BHL-11, EASTERN LIVESTOCK BANKR.*, <http://www.easternlivestockbkinfo.com/uploads/6/0/4/7/6047139/1248a.pdf> (last accessed Mar. 9, 2013).

⁵³ See Todd, *supra* note 1, at 1.

⁵⁴ *Id.*

⁵⁵ *Id.*

cattle producers, thus reducing the likelihood cattle producers will be paid from their sales.⁵⁶

III. SECURITY INTERESTS AND SECURED TRANSACTIONS INVOLVING CATTLE

An obligation or debt can exist without a security interest,⁵⁷ however, any attempt to obtain payment without a security interest may prove difficult.⁵⁸ Cattle producers that sell cattle and accept payment after delivery without an established security agreement are subject to such risks.⁵⁹ A security agreement is an agreement that creates a security interest.⁶⁰ A security interest is “an interest in personal property or fixture that secures payment or performance of an obligation.”⁶¹ When a security interest “attaches” and is “perfected” the transaction is deemed a secured transaction, one in which a cattle producer (the secured party) is able to rely on, rather than just a purchaser’s promise to pay.⁶² Secured parties have a secured claim against the purchaser, should the purchaser not uphold his end of the transaction.⁶³ A cattle producer without a security interest, or a producer with a security interest that has not attached or yet been perfected, has a claim lower in priority than that of a secured party, which could result in nonpayment from a bankrupt party.⁶⁴ Attachment describes the creation of a security interest enforceable against the debtor.⁶⁵ Perfection of a security interest occurs when the interest has attached and when all the applicable steps required for perfection have been satisfied.⁶⁶

If a security interest is not perfected, the transaction remains unsecured.⁶⁷ A clear example of this is contained in *Maryott v. Oconto Cattle Co.*⁶⁸ The *Maryott* court held if there was a perfected security interest in a good, then the interest of an unpaid cash seller who delivered that good was subordinate to the existing perfected security interest.⁶⁹ Essentially, after an unpaid seller delivered the goods to the buyer, the seller only

⁵⁶ U.C.C. § 9-317(a)(2) (2000).

⁵⁷ See U.C.C. § 1-201(b)(35) (2011).

⁵⁸ See U.C.C. § 9-317(a)(2) (2000).

⁵⁹ See *id.*

⁶⁰ U.C.C. § 9-102(a)(74) (2000).

⁶¹ U.C.C. § 1-201(b)(35) (2011).

⁶² See U.C.C. § 9-203(a) (2011) (“A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.”); see also U.C.C. § 9-203(b) (2011) (detailing the necessary requirements for perfection of a security interest).

⁶³ See *id.*

⁶⁴ See U.C.C. § 9-317(a) (2011).

⁶⁵ U.C.C. § 9-203(a) (2011).

⁶⁶ U.C.C. § 9-308(a) (2011).

⁶⁷ U.C.C. § 9-203(b) (2011).

⁶⁸ *Maryott v. Oconto Cattle Co.*, 607 N.W.2d 820 (Neb. 2000).

⁶⁹ *Id.* at 822.

retained an unperfected security interest in the goods, and if not perfected, the seller's security interest would not prevail in priority against any other claims against the buyer.⁷⁰

It is in a cattle producer's best interest to create a security agreement with purchasers paying after delivery. Transactions where the seller retains a security interest in the goods sold are not uncommon.⁷¹

A common type of consensual secured transaction . . . occurs when a person wanting to buy goods has neither the cash nor a sufficient credit standing to obtain the goods on open credit, and the seller, to secure payment of all or part of the price, obtains a security interest in the goods. Alternatively, the buyer may borrow the purchase price from a third-party and pay the seller in cash. The third party lender may then take a security interest in the goods to secure payment of the loan.⁷²

When a seller does not have a perfected security interest or has not executed a security agreement, they remain in a vulnerable position that does not guarantee payment.⁷³ Sellers in this position are likely to hold unsecured claims against a buyer,⁷⁴ and if a buyer has filed for bankruptcy, an unsecured seller's claims will be subordinate to those of other creditors.⁷⁵ The cattle producers selling to Eastern face this predicament⁷⁶ and will likely "be found to hold merely unsecured claims against Eastern, which claims are subject to the bankruptcy proceeding."⁷⁷

IV. CATTLE PRODUCERS SUBJECT TO INADEQUATE REMEDIES UNDER THE UCC

State legislation ensuring payment to a cattle producer would protect sellers, especially sellers with unsecured claims. It would have aided producers affected by the Eastern disaster. These sellers experienced the effect of entering into a transaction with a party later unable to fulfill its obligations.⁷⁸ Cattle producers finding themselves in this scenario are not

⁷⁰ *Id.*

⁷¹ RICHARD A. MANN & BARRY S. ROBERTS, BUSINESS LAW, 782 (Robert Dewey et al. eds., 14th ed. 2009).

⁷² *Id.*

⁷³ *Id.* at 781.

⁷⁴ See generally U.C.C. § 9-312 (2011) (explaining priority among creditors in same collateral).

⁷⁵ LeBas, *supra* note 8, at 3.

⁷⁶ Todd, *supra* note 1, at 1.

⁷⁷ *Id.*

⁷⁸ *Id.*

completely hopeless.⁷⁹ In Kentucky, available remedies are codified within the Uniform Commercial Code, which Revised Article 9 of the UCC governs.⁸⁰ The UCC Division serves as the state repository for financing statements regarding security interests.⁸¹ Despite the existence of UCC remedies, they are inadequate to a cattle producer and can be cumbersome to obtain.

A. Uniform Commercial Code

The power to transfer goods and the protection associated with transfer is one of the first obstacles present within UCC § 2-403.⁸² The first purchaser, the middleman, acquires all title that the cattle producer possessed or had power to transfer.⁸³ When a cattle producer sells and transfers title to a middleman, e.g. Eastern, the middleman's buyers and his lenders gain protections the cattle producer does not.⁸⁴ Under the UCC, a "good faith purchaser"⁸⁵ is permitted to take title from someone with voidable title, which in this transaction is the middleman.⁸⁶ A middleman may resell to a third party and transfer title of a good, although he holds voidable title, even if the good was in exchange for a subsequently dishonored check.⁸⁷ This rule "permits a cattle buyer who buys with a bad check, or who fails to render payment at all, to pass to its buyer rights that defeat the original seller."⁸⁸ The middleman's lender may also qualify as a good faith purchaser for value and prevail over a seller's claims under this provision.⁸⁹ The lender does not qualify as a purchaser under the statute but does qualify as a "good faith purchaser for value,"⁹⁰ giving him priority even in situations where the first purchaser has not paid the seller.⁹¹ Furthermore, if a middleman purchases from a cattle producer and entrusts the cattle to a merchant,⁹² the merchant may transfer all rights of the cattle

⁷⁹ LeBas, *supra* note 8, at 3.

⁸⁰ *Uniform Commercial Code (UCC)*, KY. SEC'Y STATE, <http://www.sos.ky.gov/business/ucc/> (last visited Mar. 9, 2013).

⁸¹ *Id.*

⁸² U.C.C. § 2-403 (1), (2) (2003).

⁸³ *Id.*

⁸⁴ LeBas, *supra* note 8, at 3.

⁸⁵ U.C.C. § 2-403(1) (2003).

⁸⁶ *Id.*

⁸⁷ U.C.C. § 2-403(1)(b) (2003).

⁸⁸ LeBas, *supra* note 8, at 3.

⁸⁹ *Id.*

⁹⁰ U.C.C. § 2-403(1)(b) (2003).

⁹¹ LeBas, *supra* note 8, at 3.

⁹² U.C.C. § 2-104 (1) (2003) ("Merchant means a person that deals in goods of the kind or otherwise holds itself out by occupation as having knowledge or skill peculiar to the practices or goods involved in the transaction or to which the knowledge or skill may be attributed by the person's employment of an agent or broker or other intermediary that holds itself out by occupation as having the knowledge or skill.").

to a person that meets the requirements of a "buyer in the ordinary course of business."⁹³

A cattle producer may also seek to establish priority under U.C.C. § 9-324 as a purchase money security interest (PMSI) if it qualifies as such.⁹⁴ A PMSI gives the cattle producer an interest in the cattle, which secures payment from the sale of the cattle.⁹⁵ Compliance with this section as a practical matter is very difficult. Once a middleman resells the cattle to a third party, the cattle producer may have difficulty tracking the livestock.⁹⁶ The cattle producer may not know who the second purchaser of the cattle is or who that purchaser's lender may be.⁹⁷

In addition to the issues inherent in keeping track of later purchasers, a cattle producer must meet several requirements before obtaining a PMSI.⁹⁸ First, a cattle producer must execute a security agreement with the buyer, which creates a security interest in the cattle.⁹⁹ Second, this newly created security interest in the cattle must be perfected, which means properly recorded with the appropriate government agency, upon the buyer's receipt of the livestock.¹⁰⁰ Third, the purchase money lender must send notification to the conflicting security interest holder.¹⁰¹ Fourth, the holder of the conflicting security interest must send this notice no later than six months before the buyer possesses the livestock.¹⁰² Fifth, the notification "must state that the purchase money lender has or expects to acquire a purchase money security interest" in the livestock.¹⁰³ Once all these requirements are met, a PMSI is created and a cattle producer may gain priority over a conflicting security interest.¹⁰⁴

B. UCC Statutory Liens

Outside of the UCC, statutory liens are available to cattle producers and may offer some hope to a cattle seller thwarted by UCC § 2-403.¹⁰⁵ A "possessory lien" is an interest other than a security interest.¹⁰⁶ It "secures payment or performance of an obligation for services or materials furnished

⁹³ U.C.C. § 2-403(2) (2003).

⁹⁴ LeBas, *supra* note 8, at 3; *see also* U.C.C. § 9-324(a) (2000).

⁹⁵ U.C.C. § 9-324(a) (2000).

⁹⁶ LeBas, *supra* note 8, at 3; *see* U.C.C. § 9-324(a) (2000).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² LeBas, *supra* note 8, at 3.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*; *see also* U.C.C. § 9-333(a) (2000).

with respect to goods by a person in the ordinary course of business.”¹⁰⁷ A possessory lien is “created by statute or rule of law in favor of a person.”¹⁰⁸ Its “effectiveness depends on the person’s possession of the goods.”¹⁰⁹ “This lien has priority over a security interest in the goods unless the statute that created the lien provides otherwise.”¹¹⁰ A possessory lien would only be beneficial to a cattle producer if he remained in possession of the cattle.¹¹¹ It is generally not helpful to a cattle producer after delivery.¹¹²

Cattle producers may also utilize agricultural liens.¹¹³ An agricultural lien is an interest other than a security interest in farm products.¹¹⁴ It secures payment or performance of an obligation for goods or services furnished in connection with a farming operation.¹¹⁵ An agricultural lien is created by statute and, unlike a possessory lien, its effectiveness does not depend on the person’s possession of the personal property,¹¹⁶ and an agricultural lien is perfected by filing.¹¹⁷ Since the time of filing determines the priority of an agricultural lien, the lien is usually worthless against an insolvent middleman.¹¹⁸ A cattle producer that files a financial statement perfecting the agricultural lien will not likely receive payment.¹¹⁹ If the agricultural lien is filed after a middleman has become insolvent or entered a bankruptcy proceeding, the cattle producer’s recently filed lien is of no value.¹²⁰ It has lower priority than that of an earlier filed and perfected lien.¹²¹ Cattle producers’ secured claims against a middleman receive higher priority than those of unsecured producers in a bankruptcy proceeding.¹²²

These statutory liens do provide remedies, but these remedies are difficult to obtain.¹²³ As previously mentioned, several steps must be completed before a cattle producer receives relief using these liens.¹²⁴

¹⁰⁷ U.C.C. § 9-333(a) (2000).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ U.C.C. § 9-333(b) (2000).

¹¹¹ LeBas, *supra* note 8, at 3.

¹¹² *Id.*

¹¹³ *Id.* (explaining some statutory liens may be classified as agricultural liens).

¹¹⁴ U.C.C. § 9-102(a)(5) (2000).

¹¹⁵ U.C.C. § 9-102(a)(5)(A)(i) (2000).

¹¹⁶ LeBas, *supra* note 8, at 3.

¹¹⁷ U.C.C. § 9-310(a) (2000).

¹¹⁸ LeBas, *supra* note 8, at 3.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See generally U.C.C. § 9-312 (2000) (outlining priority between conflicting security interests in same collateral).

¹²² See U.C.C. § 9-317 (2000) (regarding subordination of interests to previously perfected interests); 11 U.S.C. § 507 (2006) (detailing priority of unsecured claims in bankruptcy).

¹²³ See Susan A. Schneider, *Statutory Agricultural Liens Under Revised Article 9 of the Uniform Commercial Code*, NAT’L AGRIC. L. RES. CTR., Mar. 2002, at 7-8, available at http://nationalaglawcenter.org/assets/articles/schneider_agliens.pdf (discussing the application of different state laws for filing requirements and interstate markets).

C. Self-Help Remedies

In light of all the problems associated with the aforementioned remedies, an unpaid seller may attempt the “self-help remedies” available once they have learned of problems regarding payment.¹²⁵ A cattle producer may make a timely demand for the cattle under what is known as reclamation.¹²⁶ This remedy may be difficult to adhere to because of the narrow time period available.¹²⁷ It is also problematic because even if the cattle producer acts within the requisite ten days, its interest is subject to the “rights of a buyer in the ordinary course or other good faith purchaser under this Article.”¹²⁸

The seller may stop goods still in a seller's possession or in transit.¹²⁹ Based on this provision, a cattle producer may seek to stop the delivery of the cattle if it learns of the buyer's insolvency prior to the delivery.¹³⁰ A seller may also resell goods still in its possession.¹³¹ Under this provision of the UCC, a cattle producer would be able to resell cattle in his possession and seek the difference lost in the resale; thus providing a remedy for the cattle producer after discovering the middleman would not be able to make payment.¹³² A seller may also pursue an action against the first purchaser for the unpaid purchase price.¹³³

These self-help remedies remain available to a cattle producer; however, they are not very predictable.¹³⁴ A cattle producer cannot rely on them as definite avenues of recovery as they do not guarantee receipt of their sold cattle's value.

D. Bankruptcy Code

Cattle producers affected by Eastern's bankruptcy proceedings may seek recovery pursuant to the Bankruptcy Code.¹³⁵ This is considered an “after-the-fact”¹³⁶ remedy, employed where a creditor has delivered goods

¹²⁴ See generally Elizabeth R. Springsteen & Jennifer C. Fiser, *Updated States Agricultural Lien Charis*, NAT'L AGRIC. L. RES. CTR (2008) (discussing differences among states regarding requirements and codification locations), available at <http://nationalaglawcenter.org/assets/agliens/index.html>.

¹²⁵ LeBas, *supra* note 8, at 3.

¹²⁶ U.C.C. § 2-702 (2) (1966); LeBas, *supra* note 8, at 3.

¹²⁷ LeBas, *supra* note 8, at 3.

¹²⁸ *Id.*

¹²⁹ U.C.C. § 2-702 (1) (1966).

¹³⁰ *Id.*; see also U.C.C. § 2-705 (1966) (describing procedure for stopping payment).

¹³¹ U.C.C. §§ 2-703(d), 2-706 (2011).

¹³² U.C.C. § 2-706 (1) (2011).

¹³³ *Id.*

¹³⁴ David LeBas & John Huffaker, *Where's the Beef? Legal Issues in the Texas Cattle Industry*, 73 TEX. B.J. 400, 401 (2010).

¹³⁵ LeBas, *supra* note 8, at 3.

¹³⁶ *Id.*

to a “debtor within 20 days before the commencement of a [bankruptcy] case.”¹³⁷ These creditors may be entitled to receive administrative expense priority if successful, which is more likely to guarantee them payment than their current unsecured priority status.¹³⁸ This remedy is problematic due to the strict timing constraints.¹³⁹ Due to these particular time restraints, this remedy was unavailable to the cattle producers in the Eastern case because Eastern’s “petition was not filed until more than 20 days had run.”¹⁴⁰

V. OKLAHOMA’S ENACTED LEGISLATION: LIVESTOCK OWNER’S LIEN ACT OF 2011

As a response to the Eastern situation, many members of the Live Cattle Marketing Committee at the 2011 National Cattleman’s Beef Association Convention and Trade Show agreed that payment methods within the cattle industry should be modified to protect sellers.¹⁴¹ While the committee did not propose enacting a livestock lien, it did recognize that changes were necessary to protect producers selling cattle within the industry.¹⁴²

Eastern’s failure also encouraged Oklahoma to enact new statutes in response.¹⁴³ The Oklahoma Legislature acted quickly and “took prompt steps to protect Oklahomans from being put in a similar position in the future.”¹⁴⁴ The state enacted the Oklahoma Owner’s Lien Act of 2011, with an effective date of November 1, 2011.¹⁴⁵ The Act, as codified at 4 Okla. §§ Stat. 201.1-.11, protects:

[R]ights of Oklahoma livestock owners by granting a statutory lien to secure payment of the sales price negotiated by the livestock owner for his stock. The intended benefit of the Act is to put Oklahoma producers in the position of holding a secured claim either in (i) livestock, or (ii) the proceeds held from the resale of the livestock.¹⁴⁶

¹³⁷ 11 U.S.C. § 503(9) (2005); LeBas, *supra* note 8, at 3.

¹³⁸ LeBas, *supra* note 3b, at 3.

¹³⁹ 11 U.S.C. § 503(9) (2005); LeBas, *supra* note 3b, at 3.

¹⁴⁰ LeBas, *supra* note 3b, at 3.

¹⁴¹ Charlotte Johnson, *Has GIPSA Failed Cattle Traders?*, BEEF SITE (Feb. 22, 2011), <http://www.thebeefsite.com/articles/2664/has-gipsa-failed-cattle-traders>.

¹⁴² *See id.*

¹⁴³ Jeff Todd, *The Oklahoma Livestock Owner’s Lien Act: Legislatures Take Swift Action to Protect Oklahoma Livestock Producers*, MCAFEE & TAFT AGLINC, June 2011, at 3, available at http://mcafeetaft.info/11/1106_AgLINC/AgLINC_Newsletter1106.pdf.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

The statutes creating the livestock lien are “designed to overcome some of the weaknesses of the traditional possessory lien or the UCC agricultural lien.”¹⁴⁷

In Oklahoma, the livestock lien “exists and attaches immediately to all livestock.”¹⁴⁸ There is no need to create a security agreement for a security interest to attach.¹⁴⁹ In addition, “the lien continues uninterrupted upon and after the sale of the livestock and in all proceeds related to the livestock” without lapsing.¹⁵⁰ If the livestock owner does not receive payment, then the lien will continue to exist.¹⁵¹ “The security interest created by this lien attaches to the livestock owner’s right to an owners lien in livestock from the sale of the livestock.”¹⁵² “Any security interest or mortgage lien of the owner's lender will attach to the livestock owner's right to the owner's lien.”¹⁵³ Whether the lien is valid does not depend upon the livestock owner maintaining possession of the livestock.¹⁵⁴ The lien remains valid even if the initial purchaser sells or otherwise transfers his title to another individual.¹⁵⁵

The owner’s livestock lien is “perfected automatically from the effective date of [the Oklahoma Livestock Owner’s Lien Act of 2011].”¹⁵⁶ A livestock owner does not have to file any document to perfect the livestock lien.¹⁵⁷ If livestock that is subject to an existing owner’s lien is commingled with other livestock, the lien remains valid in proportion to the amount of the lien prior to the commingling.¹⁵⁸

Later purchasers could have problems determining the existence of an automatically perfected owner’s lien.¹⁵⁹ The Oklahoma statute is designed to eliminate this type of risk.¹⁶⁰ The livestock owner’s lien does not apply to a secondary purchaser – that purchaser takes free of any owner’s lien.¹⁶¹ Instead, “the owners lien shall transfer to the proceeds paid by the purchaser or sales agent.”¹⁶² This also eliminates the issue associated with knowing who the subsequent owner is of the livestock, a necessary requirement of gaining PMSI priority under the UCC.¹⁶³

¹⁴⁷ LeBas, *supra* note 8, at 3.

¹⁴⁸ OKLA. STAT. tit. 4, § 201.3 (2011).

¹⁴⁹ See § 201.3.

¹⁵⁰ *Id.*

¹⁵¹ § 201.3(c).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ § 201.3(d).

¹⁵⁵ *Id.*

¹⁵⁶ § 201.4.

¹⁵⁷ *Id.*

¹⁵⁸ § 201.5.

¹⁵⁹ Lebas, *supra* note 8, at 4.

¹⁶⁰ *Id.*

¹⁶¹ § 201.6.

¹⁶² *Id.*

¹⁶³ U.C.C. § 9-312(3) (1977).

The livestock lien is higher in priority than the rights of any purchaser.¹⁶⁴ Allowing producers priority over a middleman's buyers and lenders alleviates the traditional risk of nonpayment associated with the UCC.¹⁶⁵ These liens also take priority over any other lien,¹⁶⁶ except "permitted liens," which are essentially liens existing prior to the producer's lien.¹⁶⁷

The livestock liens expire one year after the last day of the month following the date the livestock owner should have received payment, unless the livestock owner has initiated a court proceeding to enforce his lien.¹⁶⁸ An owner may bring an action to enforce his lien in several jurisdictions: where the agreement to sell was entered; where the owner was to be paid; the location of the livestock; or the location of any sale proceeds.¹⁶⁹ Since sale barns and auctions often assume the risk of payment, a sales agent can assume a livestock owner's rights and enforce the lien to receive payment.¹⁷⁰

A livestock owner is not required to waive his lien as a condition of an agreement, and may only do so upon his receipt of payment for the sale.¹⁷¹ This provision guarantees a purchaser cannot eliminate the livestock lien an owner is entitled to enforce.¹⁷²

Oklahoma cattle producers appear to have so far welcomed the lien.¹⁷³ Prior to the enactment of the Oklahoma Livestock Owner's Lien Act, support of the bill could be summarized as follows:

While this bill will not help those harmed by the bankruptcy of Eastern Livestock from the end of last year, it will offer a level of protection to livestock producers who sell their livestock in the future, give up control of their cattle as they get a check- then later find out the check bounced.¹⁷⁴

Had this Act been in force at the time of the Eastern debacle, Oklahoma cattle producers would have had an owner's lien against the cattle Eastern

¹⁶⁴ OKLA. STAT. tit. 4, § 201.6 (2011).

¹⁶⁵ U.C.C. § 2-403 (1989).

¹⁶⁶ OKLA. STAT. tit. 4, § 201.7 (2011).

¹⁶⁷ Todd, *supra* note 143.

¹⁶⁸ OKLA. STAT. tit. 4, § 201.10(a) (2011).

¹⁶⁹ § 201.10(c).

¹⁷⁰ § 201.10(b); Todd, *supra* note 143.

¹⁷¹ § 201.9.

¹⁷² *Id.*

¹⁷³ *Eastern Livestock Bill Signed Into Law By The Governor*, OKLA. FARM REP. (Apr. 28, 2011), http://oklahomafarmreport.com/wire/news/2011/04/00413_DewaldReactSB530_04282011_034914.php.

¹⁷⁴ *Id.*

purchased.¹⁷⁵ Eastern would still have been able to convey good title to a subsequent purchaser, and the owner's lien would have been maintained.¹⁷⁶ After Eastern resold the cattle, cattle producers would have had a lien against the proceeds from the sale.¹⁷⁷

VI. KENTUCKY'S PROPOSED LEGISLATION

In response to concerns of cattle producers after the Eastern disaster, legislation similar to the Oklahoma Act was proposed during the 2012 session of the General Assembly.¹⁷⁸ The proposed legislation in Kentucky would have had a similar effect as Oklahoma's Livestock Owner's Lien Act.¹⁷⁹ It was designed to overcome the weaknesses of the traditional possessory lien, the UCC agricultural lien, and to protect the rights of livestock owners while not interrupting the auction process.¹⁸⁰

A. Proposed Drafts of The Legislation

The legislation was introduced to the Kentucky Senate on January 10, 2012, and the Senate passed the bill on January 31, 2012.¹⁸¹ It was then sent to the House and assigned to the Agriculture and Small Business Committee, which took no action on the proposal.¹⁸² The version approved in the Senate included amendments to define livestock and specified that the lien was an agricultural lien under UCC Article 9.¹⁸³ The definition of livestock within the provision did not include horses.¹⁸⁴ It was limited only to bovine, porcine, ovine, and caprine species.¹⁸⁵

The livestock seller's lien secured payment or performance of an obligation for goods or services furnished in connection with a debtor's farming operation.¹⁸⁶ Establishing a security interest as an agricultural lien "depend[ed] on the creation of a specific [state] statutory lien."¹⁸⁷ Kentucky's livestock seller's lien, if enacted, would have been a state lien statute.¹⁸⁸ The livestock seller's lien would "place livestock producers in a

¹⁷⁵ OKLA. STAT. tit. 4, § 201.3(c) (2011).

¹⁷⁶ § 201.3(d).

¹⁷⁷ § 201.3.

¹⁷⁸ *Senate Bills 92 & 94 (2011)*, *supra* note 12.

¹⁷⁹ OKLA. STAT. tit. 4, § 201.3 (2011).

¹⁸⁰ *See Atchley, supra* note 14.

¹⁸¹ S.B. 94, 113th Gen. Assem., Reg. Sess. (Ky. 2012), *available at* <http://www.lrc.ky.gov/record/12rs/SB94.htm>.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ KY. REV. STAT. ANN. § 261.200(10) (West 2006).

¹⁸⁵ *Id.*

¹⁸⁶ *Atchley, supra* note 14, at 5.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

position of holding a secured claim, as either stand-alone lien or as an agricultural lien under the UCC.”¹⁸⁹

In contrast to the Oklahoma lien, Kentucky’s livestock seller’s lien would not attach and perfect immediately as to all livestock sold by a livestock owner.¹⁹⁰ Instead, a livestock seller that sells livestock to a buyer “who does not receive payment for the sale of the livestock within three business days of delivery of the livestock shall have a lien.”¹⁹¹ If the buyer does not slaughter or sell the livestock, then the lien will attach.¹⁹² The lien would also attach to any identifiable cash proceeds if the buyer has already sold the livestock.¹⁹³ Finally, the lien would attach to any property of the buyer subject to a security interest if the livestock is slaughtered and/or the cash proceeds are not identifiable.¹⁹⁴

Similar to the Oklahoma law, a subsequent buyer in the ordinary course of business would take free of a livestock seller’s lien.¹⁹⁵ The lien’s attachment to the cash proceeds of the sale of the livestock if it is sold or slaughtered makes this provision successful in securing payment to the livestock owner and not hindering the resale of the livestock.

The lien becomes effective the day the livestock is delivered to the buyer.¹⁹⁶ The lien is perfected once the livestock owner files a financing statement with the Secretary of State within forty-five days after the buyer receives the livestock.¹⁹⁷ The seller’s livestock lien is considered a PMSI.¹⁹⁸ The financing statement must be filed within twenty days after delivery in order to have PMSI priority.¹⁹⁹ This PMSI priority gives the livestock owner a security interest higher in priority than that of a buyer, lessee, or lien creditor arising between the time the security interest attaches and the time of filing.²⁰⁰

A livestock seller that has perfected the lien may enforce it at the time of default in accordance with the statute under which the lien was created.²⁰¹ Pursuant to the livestock seller’s lien, enforcement may occur three business days after the buyer has received the livestock and the owner

¹⁸⁹ *Id.*

¹⁹⁰ S.B. 94, 113th Gen. Assem., Reg. Sess. (Ky. 2012), available at <http://www.lrc.ky.gov/record/12rs/SB94.htm>.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ KY. REV. STAT. ANN. § 355.9-317(5) (West 2006).

²⁰¹ § 355.9-606.

has not yet been paid.²⁰² After default, the livestock owner may notify the debtor to make payment or render performance or take any proceeds to which the owner is entitled.²⁰³ A secured party may reduce a claim to judgment, foreclose, or otherwise enforce the claim or agricultural lien.²⁰⁴

A livestock seller's lien that is perfected has priority as an agricultural lien and a PMSI, if properly executed within the time required.²⁰⁵ A livestock seller's lien is subordinate to a veterinarian lien.²⁰⁶ A veterinarian lien exists where a licensed veterinarian performs professional services for an animal, by contract with, or by the written consent of the owner or authorized agent and secures the cost of the services provided.²⁰⁷ Additionally, the proposed legislation provided that the lien may also be subordinate to conflicting agricultural liens,²⁰⁸ parties related to a prior agricultural lien,²⁰⁹ or by security agreements initiated by the debtor.²¹⁰

If more than one livestock seller's lien exists in particular livestock, the lien holders share in the collateral the percentage each seller is owed.²¹¹ Priority is determined according to the time of filing or perfection.²¹² A perfected agricultural lien has priority over a conflicting unperfected security interest.²¹³

Since the livestock seller's lien is a perfected PMSI in livestock that are farm products, which would have priority over conflicting security interests in the same livestock.²¹⁴ The requirements set forth under the UCC for priority as a PMSI do not seem to be required to obtain a livestock seller's lien since the proposed legislation only requires the twenty day filing period instead of the requirements listed in KRS 355.9-324 (4).²¹⁵

A waiver of a right created by the seller's livestock lien is void and unenforceable.²¹⁶ The lien terminates one year after the livestock is

²⁰² S.B. 94, 113th Gen. Assem., Reg. Sess. (Ky. 2012), available at <http://www.lrc.ky.gov/record/12rs/SB94.htm>.

²⁰³ § 355.9-607(1)(a).

²⁰⁴ § 355.9-601(1)(a).

²⁰⁵ S.B. 94, 113th Gen. Assem., Reg. Sess. (Ky. 2012), available at <http://www.lrc.ky.gov/record/12rs/SB94.htm>.

²⁰⁶ *Id.*

²⁰⁷ § 376.470(1).

²⁰⁸ § 355.9-317(1)(a).

²⁰⁹ § 355.9-317(1)(b)(1).

²¹⁰ § 355.9-317(1)(b)(2).

²¹¹ S.B. 94, 113th Gen. Assem., Reg. Sess. (Ky. 2012), available at <http://www.lrc.ky.gov/record/12rs/SB94.htm>.

²¹² § 355.9-322(1)(a).

²¹³ § 355.9-322(1)(b).

²¹⁴ § 355.9-324(1).

²¹⁵ § 355.9-324(4); S.B. 94, 113th Gen. Assem., Reg. Sess. (Ky. 2012), available at <http://www.lrc.ky.gov/record/12rs/SB94.htm>.

²¹⁶ S.B. 94, 113th Gen. Assem., Reg. Sess. (Ky. 2012), available at <http://www.lrc.ky.gov/record/12rs/SB94.htm>.

delivered, unless it is terminated at an earlier date by the seller filing a termination statement provision.²¹⁷ Unlike the Oklahoma Act, Kentucky legislation did not provide for prolonging the duration of the lien if an action is filed.²¹⁸

B. Arguments in Favor of Kentucky's Livestock Seller's Lien

The livestock seller's lien is a statutory lien that will offer a measure of protection if a producer sells cattle or livestock to a buyer who becomes insolvent or breaches its payment responsibilities.²¹⁹ If a buyer files for bankruptcy, a livestock owner selling its cattle would receive greater priority with a lien documented and filed with the state.²²⁰ The lien would serve as a preventative measure signaling to buyers that they must follow through with their payment responsibilities after the cattle has been delivered to them.²²¹

The industry standard stating that title does "not pass until the seller of the cattle has been paid"²²² is not a correct statement. Although a cattle producer may have a security interest in the cattle sold, if it is not perfected, a first purchaser may transfer title of the cattle to a subsequent purchaser, causing the rights of the cattle producer to become non-existent.²²³ This proposed legislation will act as a remedy to correct this misconception.²²⁴

Advocates of the legislation support the protection of sellers within the cattle industry because the remedies the UCC provides are inadequate and leave the seller in a vulnerable position after relinquishing possession of its cattle.²²⁵

C. Arguments in Opposition to Kentucky's Proposed Livestock Seller Lien

Individuals challenging the legislation warn against it because they believe establishing a livestock seller's lien could cause lenders to become wary of lending money to livestock purchasers.²²⁶ Lenders would be concerned that they may lose their more favorable position in the priority established to repay creditors.²²⁷ If the livestock seller's lien is established,

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ Atchley, *supra* note 14, at 6.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Maryott v. Oconto Cattle Co.*, 607 N.W.2d 820, 824 (Neb. 2000).

²²³ *Id.* at 826.

²²⁴ S.B. 94, 113th Gen. Assem., Reg. Sess. (Ky. 2012), available at <http://www.lrc.ky.gov/record/12rs/SB94.htm>.

²²⁵ Atchley, *supra* note 14, at 6.

²²⁶ *Id.*

²²⁷ *Id.*

it could possibly trump debts owed to the purchaser's lenders causing them to not receive repayment of loans.²²⁸

Opponents are concerned that the livestock seller's lien will give a false sense of confidence to sellers that will lead them to opt for private, unregulated sales, and opponents fear it will cause the seller's to avoid federally regulated livestock markets where prompt payment is guaranteed and fees are charged for the transactions.²²⁹ The new legislation may lead to a decrease in the use of USDA regulated sales and a dramatic increase in private, unregulated sales.²³⁰

Opponents have also voiced concerns about the industry, arguing that the livestock lien could affect commerce in Kentucky livestock.²³¹ They have stated that the legislation might depress the prices producers receive for their cattle and discourage resale or secondary purchase of Kentucky livestock out of a concern that a lien would follow the livestock to good-faith third-party purchasers.²³²

VII. THE EFFECTS OF THE PROPOSED LEGISLATION: DOES THE GOOD OUTWEIGH THE BAD?

Despite livestock lien opponents' compelling arguments, the potential legislation does not create any of the issues they have raised. The protection the lien provides cattle producers outweighs the concerns promulgated by opponents and offers peace of mind that the inadequate remedies presently available under the UCC do not.

A. Benefits and Drawbacks of the Legislation

Lenders should not be wary of lending to purchasers in fear that they will lose their position in priority to sellers enforcing their livestock liens. This is a prominent concern but public policy and the current language of the livestock seller's lien do not hint as this being a likely result of the enactment of the lien.²³³ The public policy and social issues that support a lender's position of priority in terms of repayment can be summarized as two-fold: "[t]he risks to lenders should be minimized" and "[l]enders should have a way to collect unpaid debts."²³⁴ The language of the proposed legislation does not state that sellers enforcing their lien will

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *See id.*

²³¹ Atchley, *supra* note 14, at 6.

²³² *Id.*

²³³ *See* S.B. 94, 113th Gen. Assem., Reg. Sess. (Ky. 2012), *available at* <http://www.lrc.ky.gov/record/12rs/SB94.htm>.

²³⁴ MANN & ROBERTS, *supra* note 71.

take priority over a purchaser's lender.²³⁵ The language of the bill explains that "[e]xcept as provided in this subsection, a livestock seller's lien that is perfected under this section shall have priority as provided in KRS 355.9-317 to KRS 355.9-334."²³⁶ KRS 355.9-317 reveals that an agricultural lien is subordinate to the rights of a person becoming a lien creditor before the agricultural lien is perfected.²³⁷

Prior to the Eastern disaster, Eastern entered into a credit agreement and security agreement with Fifth Third.²³⁸ This arrangement granted a first lien to Fifth Third on all livestock in transit and receivable of Eastern.²³⁹ Lenders taking necessary precautions would not have to be concerned about being held subordinate to sellers enforcing their lien. Sellers with livestock liens would actually come second to existing lien creditors and take priority over other vendors with liens perfected at later dates.²⁴⁰

One of the main concerns the Kentucky Senate discussed is that a cattle producer will have priority over all vendor and supplier liens perfected at a later date but below the first purchaser's lender.²⁴¹ Senators were not conflicted by this issue and were not reluctant to align with the passage of this bill.²⁴² Those senators felt that placing vendor and supplier liens perfected after the livestock lien lower in priority would place the cattle producer in a better position.²⁴³

Aside from liens perfected at an earlier date, the language of the bill did provide priority for another lien.²⁴⁴ The bill stated that the livestock seller's lien would be subordinate to the veterinarian's lien.²⁴⁵ No other lien was specifically mentioned to have the priority given to a veterinarian lien, and this does not seem to be unfair.²⁴⁶ Allowing other vendors and sellers to take priority over the cattle producer would be unreasonable because the cattle producer was an initial actor in the transaction, providing the good in question. To pay other vendors and suppliers that were involved with the

²³⁵ S.B. 94, 113th Gen. Assem., Reg. Sess. (Ky. 2012), available at <http://www.lrc.ky.gov/record/12rs/SB94.htm>.

²³⁶ *Id.* at 2.

²³⁷ *Id.*; see also KY. REV. STAT. ANN. § 355.9-317 (West 2013).

²³⁸ *Cloyd v. Fifth Third Bank, Inc.*, No. 1:11-cv-00160-JHM, 2012 WL 1906481 (W.D. Ky. 2011).

²³⁹ *Id.*

²⁴⁰ S.B. 94, 113th Gen. Assem., Reg. Sess. (Ky. 2012), available at <http://www.lrc.ky.gov/record/12rs/SB94.htm>.

²⁴¹ *KET Legislative Coverage Archives: Kentucky General Assembly Senate Chambers*, KET VIDEO, at 193:53 (Feb. 17, 2011), http://www.ket.org/cgi-bin/cheetah/watch_video.pl?nola=WGAOS+012087.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ S.B. 94, 113th Gen. Assem., Reg. Sess. (Ky. 2012), available at <http://www.lrc.ky.gov/record/12rs/SB94.htm>.

²⁴⁵ *Id.*

²⁴⁶ See *id.*

livestock after the cattle producer provided the cattle initially seems unorthodox.

Opponents' concern that creation of a statutory lien would lead sellers to opt for private sales and avoid regulated markets does not seem to be an actual danger created by the bill.²⁴⁷ Although private sales could possibly become more popular with the advent of the lien, the creation of the lien cannot be said to automatically lead to sellers no longer selling within regulated markets.²⁴⁸ This claim has not been researched and is not supported by any data revealing the types of markets producers preferred in light of the livestock seller's lien.²⁴⁹ Some sellers could continue to use USDA regulated markets because of the guarantees of prompt payment while others could continue to use unregulated markets.²⁵⁰ More research would be necessary to render this argument credible.

The claim that "[I]n legislative efforts to help sellers who fail to require payment on delivery risk harming sellers by depriving them of buyers,"²⁵¹ and depressing the prices producers will receive,²⁵² is also untrue. The livestock seller's lien will actually "fashion a remedy that mitigates this risk."²⁵³ Opponents' fear cattle producers will be left without buyers and will receive depressed prices for livestock is unwarranted.²⁵⁴ First purchasers will be able to resell to subsequent purchasers without the lien restraining the sale.²⁵⁵ If the livestock is slaughtered or sold, "the lien shall be on cash proceeds from the sale."²⁵⁶ Subsequent purchasers will actually take the livestock free of the lien because it does not continue in the livestock after the sale.²⁵⁷

VIII. CONCLUSION

The few weaknesses that opponents have used as their support against the livestock seller's lien do not prevail over the protection cattle producers deserve. Producers selling cattle enter into transactions receiving a promise to be paid that must be fulfilled. The apprehension expressed

²⁴⁷ Atchley, *supra* note 14, at 6.

²⁴⁸ S.B. 94, 113th Gen. Assem., Reg. Sess. (Ky. 2012), available at <http://www.lrc.ky.gov/record/12rs/SB94.htm>.

²⁴⁹ Atchley, *supra* note 14, at 6.

²⁵⁰ S.B. 94, 113th Gen. Assem., Reg. Sess. (Ky. 2012), available at <http://www.lrc.ky.gov/record/12rs/SB94.htm>.

²⁵¹ LeBas, *supra* note 8, at 5.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ Atchley, *supra* note 14, at 6.

²⁵⁵ S.B. 94, 113th Gen. Assem., Reg. Sess. (Ky. 2012), available at <http://www.lrc.ky.gov/record/12rs/SB94.htm>.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

among the legislature²⁵⁸ should not act as a barrier against future reintroduction and passage of this bill. Cattle producers should receive payment from the sale of their livestock prior to other vendors and sellers that have provided services for the cattle after the producer relinquished possession. Placement below the lender, for purposes of priority, and above all other liens established by vendors and suppliers is fair to both the lender and seller.

After the Eastern disaster, cattle producers were negatively impacted and left largely without a remedy once Eastern entered bankruptcy proceedings.²⁵⁹ The legislation enacted in Oklahoma,²⁶⁰ and proposed in Kentucky,²⁶¹ overcomes the weaknesses of the remedies available under the UCC to cattle producers that may face situations similar to the Eastern disaster in the future.

²⁵⁸ *KET Legislative Coverage Archives: Kentucky General Assembly Senate Chambers*, *supra* note 241, at 193:53.

²⁵⁹ *In re Eastern Livestock Co.*, No. 10-93904-BHL-11 (Bankr. S.D. Ind. 2011).

²⁶⁰ OKLA. STAT. tit. 4 § 201.3 (2011).

²⁶¹ S.B. 94, 113th Gen. Assem., Reg. Sess. (Ky. 2012), available at <http://www.lrc.ky.gov/record/12rs/SB94.htm>.