

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
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ROLL NUMBER

DESCRIPTION

1338

2007 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1338

2007 HOUSE STANDING COMMITTEE MINUTES

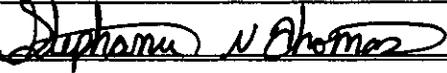
Bill/Resolution No. HB 1338

House Industry, Business and Labor Committee

Check here for Conference Committee

Hearing Date: January 24, 2007

Recorder Job Number: 1858

Committee Clerk Signature 

Minutes:

Chair Keiser opened the hearing on HB 1338.

Steve Tomac, ND Farm Credit Council: See written testimony #1.

Rep. Boe: If these loans did not keep their priority, wouldn't the bank want to purchase them at a substantial discount?

Steve: That's correct.

Fred Eslinger, Ag Retailers: My wife and I are the owners of New Horizon Ag Service in Elgin, ND. The focus that we have to look at is that agriculture has changes significantly in the last 15-20 years. We've had huge differences in the amount on the scale to go by a grain drill for \$2,000-\$3,000, now they're over \$100,000. You used to be able to drive in and get 2/4D to spray your crop, and we could load a whole pickup load up for \$9,000 at the very highest. When we load our Ag products out to the farmers, we keep track, and for years \$10,000 would buy you a whole pickup full of product. Last year I loaded myself a vehicle with \$35,000 worth of product in my truck, and I could have put another \$30,000 on that truck. A lot of Ag businesses are saying well, if we're a little more cautious about who we charge to or what you did, you'd probably still be in business. Well, the problem is when you only have one ticket item that could be over \$30,000-\$40,000, it's really hard to cut a guy off when at that point in

time it's already done. Last year at the end of June, I looked in my accounts receivable, this is Elgin, ND, population around 700 people, and I had almost 3/4 of a million dollars in accounts receivable. These are good customers. We have over 175 active customers in our rural, and I believe all of those intend to pay, but we need this lean protection. The problem we run into is that with the leans there comes a little bit of a downside, and that's do to the fact that our accounts receivable tie up our operating capital, and so many times we could be buying seed at a reduced amount, and that would reflect the statements to the farmers. Unfortunately, if you have all of our money tied up in accounts receivable, we don't get to pass those discounts. I guess what I ask the committee to consider is that I want to keep the original lease, and I would really like you to understand that, and that we be able to sell those and help us to get a working capital when we really need it.

Rep. Keiser: When your customers come in and purchase something from you, do you give it to them on credit? Is that the time you file a lean? Do they have to sign something?

Fred: The latest has to be filed about 120 days after the sale has been made, and we have to inform the person that we are going to be putting a lean against them, so they have the ability to either pay that account, or a lean gets put on.

Rep. Kasper: What I'm getting at is you're at risk if the farmer goes bankrupt, or sells the crop, and decides to go to Las Vegas and play Texas Holdem, and loses all of his money. As part of a good business practice, wouldn't it be expedient on you to file a lean at the point of the extended credit, and let them know at that point in time that you are putting a lean on it?

Fred: I believe in the nature of our business, it's very competitive, and if I did that, I'd have people walking out the door.

Rep. Kasper: What point in time then do you make the decision to file a lean?

Fred: Normally, its 90 days after we've made the sale, and at that point we haven't received payment. I'll put on the 90 day statement that if it hasn't been paid within 15 days, we're going to file a lean.

Rep. Kasper: So, in your business it's typical that you become the banker for 30-60 days, as a good will for competitive purposes, and after 90 than you file a lean. Is this generally in spring before the crops have grown up?

Fred: Typically, within 90 days you're getting very close to harvest, and so we want to get the lean in position before the harvest is completed, so that if the crops are marketed, we can get our money paid.

Rep. Clark: Is that lean only good on the crop? Suppose it gets hailed out after you extend all the credit, he's got no crop anymore. Can you then move it over on his tractor, and plow, or something else?

Fred: It's not transferable.

Rep. Keiser: Say I come to you and I buy your product, and then I go and plant it, and you wait 90 days, and I haven't paid you so you place a priority lean on that crop. What happens if there's already an agriculture loan from the bank?

Fred: They would have a UCC Form 1.

Rep. Keiser: You would have priority?

Fred: Correct.

Rep. Keiser: Does the bank have to sign off on you extending this credit in advance, before they get knocked out of the first position?

Fred: No. All we have to do is inform the person that we're planning to put the lean on. The bank may not know until they start checking the records.

Rep. Kasper: What if this legislation said that in order for you to preserve your priority, you must file your priority lean before any other lending institution gets the UCC.

Fred: The problem with that I see is they're lining up your credit right now. I think for me to get in front of the bank would be almost impossible.

Rep. Boe: Do your clients like these leans being filed?

Fred: In the whole time that I've been in the retail business, I've had one customer that was never an issue. Typically, it's considered an antagonistic move to do that.

Rep. Boe: So, you say that most clients would prefer to go back to their bank and get their credit there, rather than having this lean filed.

Fred: I would think it would be important for them to do that. Many of them don't want to go back to the bank, and beg for extra money. They figured they might have been close on their ratios that the bank uses to determine the amount of money that you'll borrow so, they'd rather stick with us carrying their loan.

Rep. Boe: What does it cost to file the lean?

Fred: It's either \$15 or \$17, I can't remember directly, but somewhere in that range. Once the lean has been satisfied, then you have to go over and take the lean off.

Rep. Ruby: Who has the priority? If the bank wouldn't, who would?

Steve: That's part of the clarification that we're seeking.

Rep. Ruby: So, is it possible that if the supplier has the original priority and the additional credit, then that would not follow here. So, is it possible then that the bank would have the right to do that?

Steve: When I read the legislative history, an issue of concern at that time was selling these to large harvest states, and selling them along the way. So, when I read the language in there and it talks about monies, ect, that appears to gel with what the discussion was in 1997. It was

poorly written in my mind when it doesn't address whether or not it can be assigned or sold, or whether or not the priority doesn't extend there, but does that mean that you do an additional purchase. One of the challenges that suppliers have is that farmers don't make their purchases all in one day.

Rep. Keiser: If this bill does create a condition where they're saleable and sizeable, and if you want to transfer that to the bank with the priority position, would you then be able to issue additional credit to the same farmer, with the same provisions, the priorities?

Fred: I believe that once that additional sale would be done, we'd have to take another lean approval there.

Steve: The moment we file a lean, that's another reason we wait a little longer than we should. It's because of these multiple purchases.

Rep. Johnson: If then the lean is sold, would it still be limited to that year?

Fred: That's correct.

Rep. Nottestad: So, if a farmer buys fertilizer in 2006 to put out in the fall, that would go on the 2007 crop lean, even though it was purchased in 2006?

Fred: It has to fall in the time constraints, and typically that lean probably wouldn't be filed until after the 1st, which can fall into 2007.

Rep. Boe: How often do you run into clients that applied fertilizer in the fall, and don't pay for it so, they wouldn't be able to take tax deductions for it?

Fred: This is quite a normal situation, and we have guys getting close to the end of the year that do their tax planning, and decide they have to pay for it, or 60% in 2006, and the rest in the first part of 2007.

Rep. Boe: I think what you're talking about is the pre pay for spring applied, and what I'm talking about is applying it in the fall, and getting it paid for. If you made a decision to apply it

in the fall, it's because you wanted the deduction for the 2006 years, and the only way you're going to be able to do that is if you pay for it. Is that correct?

Fred: Correct.

Rep. Clark: If you sell that farmer something in the spring and come November that crop is in the bin, and you haven't been paid. Do you take the title to that grain and sell it, or do you force the sell of that grain, and get paid?

Fred: We can't force them to sell that grain at any particular time, so we just have to sit and wait. If he decides two years from now he wants to sell that grain, until our name is removed we're going to be on that check until we cancel our lean.

Bobby Walker, Wilber Alice Company, Minot: We are a chemical seed fertilizer distribution company. I called on accounts in the northern central part of ND, and as I call on wheat sellers, I find this problem is unique with the accounts receivable throughout the whole area. Some of the problems that cause these people are when we had fertilizer last fall at a pre paid price, which is \$120.00 cheaper than it is today. Those retailers with their accounts of money tied up in accounts receivable, didn't have funds available to buy fertilizer. Prior to working for Wilber Alice, I worked for a retailer up in Mohall, and it's been a problem with the accounts receivable, and we've always put on supply leans, and up there it hasn't been a real big issue with the producers, it's almost automatic, they know they are coming. I try to polish who's established within minutes. It's been a very useful tool for us up there, but yet if it ties up our money, we have no way to buy product when we needed to. I talked to one of my friends, and I visited with him on what he thought of being able to sell them to the bank, and he was in favor of it, because what he's paying now is an 18% service charge so, if he can sell it to a bank the interest rate is anywhere from probably 8%-10%. I'm somewhat concerned that we may have some opposition from the banks, because they may feel that this might remote the use of crop

leans, but as an Ag dealer I really think any Ag retailer out there at 120 days should have a crop lean filed.

Rep. Thorpe: If a bank is going to buy that lean, wouldn't they also be buying the interest rate that's in that?

Bobby: I think there we can negotiate a rate with the bank before we sold it. I would assume that if you're going to sell it to a bank, you'd probably sell it to the existing bank you're doing business with now.

Claude Sem, Department of Credit Services of ND: The bottom line for us is the clarification bill. Can we buy a suppliers name and will the priority no longer apply? It has nothing to do with screwing with the suppliers itself. How can I work with those individuals to help their businesses prosper, how can I help the farmers' prosper, and how can we all get together and get along? It seems like the bill has presented a bank being able to buy it, and have the priority go along with it, and that makes some good sense. I think it would benefit farmers, and the supplier and wholesalers,

Rep. Amerman: So, this bill will make it so you will know for certain if you can sign it with the priority?

Claude: Yes. I went to my attorney and said can I buy a suppliers name, have it priority, and go along with it, and he said don't do it, you can't do it. Yet, I see other companies, credit unions doing that. I think that should be clarified.

Rep. Keiser: You can buy them right now, but without knowing the priority, you may not want to buy them right now.

Claude: That is correct.

Gary Knudson, ND Agricultural Association: We'd like to see this clarified as well.

Steve Strege, ND Grain Dealers Association: See written testimony #2.

Don Forsberg, Independent Community Banks of ND: Opposed to HB 1338. See written testimony #3.

Rep. Amerman: If this bill goes away, they'll still have a priority lean, but they won't be able to sign it, correct?

Don: You can still sell the proceedings. They can still get cash for selling those regardless of whether this bill is there or not. There are some financing institutions that are uncomfortable with buying receivables, it's not their area of expertise, but this bill will not change that situation. If the primary lender no longer believes that providing operating credit gives them first priority on loans, why would they do it in the first place. Are you then forcing the producer to go through the field suppliers, and the seed suppliers, and the fertilizer suppliers, and the chemical suppliers, and continue to spread that around to the point where now everybody has a priority lean, and nobody really knows who's first.

Rep. Keiser: If you are a banker, and you do the first loan, aren't you going to take as collateral the receivables?

Don: If my line of credit is through the borrower, and the borrower doesn't have the seed, what he's got is production. He's looking to use the money I'm going to give him, and I want a lean on his production.

Marilyn Foss, ND Bankers Association: See written testimony #4.

See proposed amendment.

Greg Tschider, Mid American Credit Union Association: Opposed to HB 1338.

Hearing closed.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1338

House Industry, Business and Labor

Check here for Conference Committee

Hearing Date: 30 January 2007

Recorder Job Number: 2242

Committee Clerk Signature

Jan Prindle

Minutes:

Chairman Kaiser opened discussion of HB 1338. This relates to agricultural processors and suppliers liens. He distributed amendments provided by Marilyn Foss on behalf of the ND Bankers Association. The amendments clearly state that the priority cannot follow.

Representative Boe: I move the amendments.

Representative Nottestad: I second.

A voice vote was taken. The amendments were adopted.

Representative Boe: I move Do Pass as Amended.

Representative Johnson: I second.

Representative Thorpe: Is there a reason for the priority not following.

Representative Amerman: Some people were doing it and some were interpreting it as not being allowed. They wanted it clear. After our discussion it seemed pretty apparent that not following would be the way to go.

A roll call vote was taken: Yes: 12, No: 1, Absent: 1 (Dosch)

Representative Amerman will carry the bill.

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1338
(Marilyn Foss, on behalf of the North Dakota Bankers Association)

Page 1, line 11, replace "The" with "Except as otherwise provided in this section, the

Page 1, lines 14 and 15, replace "This section does not limit the effectiveness or priority of an agricultural processor's lien under this chapter, after the lien's sale, assignment, or transfer." with "Nothing in this chapter limits the sale, assignment or transfer of an agricultural processor's lien. However, the priority of an effective agricultural processor's lien is not transferable. After sale, assignment or transfer the priority of an effective agricultural processor's lien is to be determined as of the date the lien was filed and in accordance with section 41-09-33."

Page 1, line 23, replace "An" with "Except as otherwise provided in this section, an"

Page 2 lines 3 through 5, replace "This section does not limit the effectiveness or priority of an agricultural supplier's line under this chapter, after the lien's sale, assignment, or transfer." with "Nothing in this chapter limits the sale, assignment or transfer of an agricultural supplier's lien. However, the priority of an effective agricultural supplier's lien is not transferable from the original lien holder. After sale, assignment or transfer the priority of an effective agricultural supplier's lien is to be determined as of the date the lien was filed and in accordance with section 41-09-33."

January 30, 2007

**House Amendments to HB 1338 (70549.0101) - Industry, Business and Labor
Committee 01/30/2007**

Page 1, line 11, overstrike "The" and insert immediately thereafter "Except as otherwise provided in this section, the"

Page 1, line 14, replace "This section does not limit the effectiveness or priority of an agricultural!" with "This chapter does not limit the sale, assignment, or transfer of an agricultural processor's lien. However, the priority of an effective agricultural processor's lien is not transferable. After sale, assignment, or transfer, the priority of an effective agricultural processor's lien is to be determined as of the date the lien was filed and in accordance with section 41-09-33."

Page 1, remove line 15

Page 1, line 23, overstrike "An" and insert immediately thereafter "Except as otherwise provided in this section, an"

**House Amendments to HB 1338 (70549.0101) - Industry, Business and Labor
Committee 01/30/2007**

Page 2, line 3, replace "This section does not limit the effectiveness or" with "This chapter does not limit the sale, assignment, or transfer of an agricultural supplier's lien. However, the priority of an effective agricultural supplier's lien is not transferable from the original lienholder. After sale, assignment, or transfer, the priority of an effective agricultural supplier's lien is to be determined as of the date the lien was filed and in accordance with section 41-09-33."

Page 2, remove lines 4 and 5

Renumber accordingly

Date: ~~12-13-08~~ 1-30-07
Roll Call Vote #: _____

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1338

House Industry Business & Labor Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass, AS Amended

Motion Made By Rep. Boe Seconded By Rep. Johnson

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	X		Rep. Amerman	X	
Vice Chairman Johnson	X		Rep. Boe	X	
Rep. Clark	X		Rep. Gruchalla	X	
Rep. Dietrich		X	Rep. Thorpe	X	
Rep. Dosch			Rep. Zaiser	X	
Rep. Kasper	X				
Rep. Nottestad	X				
Rep. Ruby	X				
Rep. Vigesaa	X				

Total Yes 12 No 1

Absent 1

Floor Assignment Rep. Amerman

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1338: Industry, Business and Labor Committee (Rep. Kelsner, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (12 YEAS, 1 NAY, 1 ABSENT AND NOT VOTING). HB 1338 was placed on the Sixth order on the calendar.

Page 1, line 11, overstrike "The" and insert immediately thereafter "Except as otherwise provided in this section, the"

Page 1, line 14, replace "This section does not limit the effectiveness or priority of an agricultural" with "This chapter does not limit the sale, assignment, or transfer of an agricultural processor's lien. However, the priority of an effective agricultural processor's lien is not transferable. After sale, assignment, or transfer, the priority of an effective agricultural processor's lien is to be determined as of the date the lien was filed and in accordance with section 41-09-33."

Page 1, remove line 15

Page 1, line 23, overstrike "An" and insert immediately thereafter "Except as otherwise provided in this section, an"

Page 2, line 3, replace "This section does not limit the effectiveness or" with "This chapter does not limit the sale, assignment, or transfer of an agricultural supplier's lien. However, the priority of an effective agricultural supplier's lien is not transferable from the original lienholder. After sale, assignment, or transfer, the priority of an effective agricultural supplier's lien is to be determined as of the date the lien was filed and in accordance with section 41-09-33."

Page 2, remove lines 4 and 5

Renumber accordingly

2007 SENATE AGRICULTURE

HB 1338

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1338

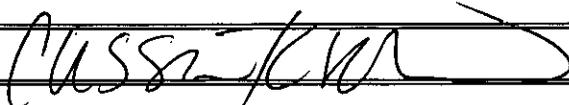
Senate Agriculture Committee

Check here for Conference Committee

Hearing Date: March 1, 2007

Recorder Job Number: 4155

Committee Clerk Signature



Minutes:

Sen. Flakoll opened the hearing on HB 1338, a bill relating to agricultural processor's and supplier's liens. Members (6) were present, absent (1)- Sen. Wanzek.

Steve Tomac, executive director of NDFCC, testified in favor of the bill. See attached testimony.

Marilyn Foss, ND Bankers Association, testified in favor of the bill.

Marilyn Foss- We support the engrossed bill.

Don Forsberg, Independent Community Banks of ND, testified in favor of the bill.

Don Forsberg- We support the engrossed bill and urge a do pass recommendation.

Greg Tschider, MidAmerica Credit Union League, testified in favor of the bill.

Greg Tschider- We also stand in support of the bill.

Christopher Friez, NDGDA testified in favor of the bill and submitted testimony on behalf of

Steve Strege. See attached testimony.

Sen. Flakoll closed the hearing.

Sen. Klein motioned for a Do Pass and was seconded by **Sen. Erbele**, roll call vote 1: 6 yea, 0 nay, 1 absent. **Sen. Taylor** was designated to carry the bill to the floor.

REPORT OF STANDING COMMITTEE (410)
March 1, 2007 2:13 p.m.

Module No: SR-39-4233
Carrier: Taylor
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1338, as engrossed: Agriculture Committee (Sen. Flakoll, Chairman) recommends DO PASS (6 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). Engrossed HB 1338 was placed on the Fourteenth order on the calendar.

2007 TESTIMONY

HB 1338



North Dakota Farm Credit Council

AgCountry FCS • FCS of Grand Forks • FCS of Mandan • FCS of North Dakota

#1

Testimony by Steve Tomac
Executive Director, NDFCC

HB 1338

January 24, 2007

Mr. Chairman and members of the House IBL Committee, HB 1338 clarifies confusing language regarding agricultural processor and agricultural supplier liens. If passed as presented, HB 1338 will make it clear that both liens are assignable and the priority of these liens passes with the assignment.

Mr. Chairman it may be helpful to the Committee to provide some background on agricultural processor and agricultural supplier liens. As provided for in 35-30-01 any person who processes a crop is entitled to a lien on that crop until the processing costs are paid. A typical processor might be a custom combiner. Similarly, 35-31-01 has identical language for agricultural suppliers. Typical suppliers would be fertilizer, chemicals, seed, and/or feed suppliers. Both these liens hold a priority over the typical standard UCC 1 liens filed by lending institutions. That is, they must be paid before the lending institution gets their general UCC 1 lien paid; hence, they are referred to as priority liens.

The 1997 Legislature made a couple of changes to the Century Code concerning agricultural processor and agricultural supplier liens. One of the concerns in 1997 was that lenders who purchase these liens would advance additional money and have the benefit of priority on the additional money. The amendment that addressed this concern is shaded in yellow on Page #2 of my testimony.

The language is open to interpretation and needs clarification. We are not sure if the language prohibits the sale or assignment of the lien, or if the language applies to only additional money advanced after an assignment of the lien, or if the language means that if the lien is assigned the priority of the lien disappears.

In the past year or so, several suppliers have approached Farm Credit for this type of financing. A few of those are here today. Our legal counsel has advised us that it appears to be illegal, yet we have observed a few other lenders doing it. We support HB 1338 because it clarifies the issue. It allows the liens to be assigned and makes it clear that the priority is extended to the assignee.

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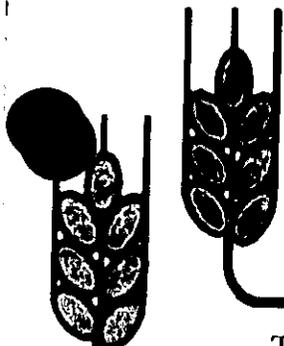
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TO ND HOUSE INDUSTRY, BUSINESS AND LABOR COMMITTEE
REP GEORGE KEISER, CHAIRMAN -- HB 1338 -- JANUARY 24, 2007

Good morning. I'm Steve Strege, Executive Vice President of the North Dakota Grain Dealers Association. Our members are the grain elevators of our state. Many of them take supplier liens to secure payment for seed, fertilizer and farm chemicals. Our organization has been involved with legislation surrounding liens for almost 25 years, that I can remember.

These liens are an important part of North Dakota farmers getting seed in the ground, fertilized, protected against pests, and harvested. These liens are for only the amount of product or service provided and on only that crop. A lien for wheat seed does not extend to a farmer's corn crop for example.

We aren't taking a position on the bill, but want to get something on the record regarding the priority of other liens not purchased by a lender. Let's assume the following:

1. Fertilizer Dealer A has the 1st secured position with its lien for \$2000 of fertilizer sold to Farmer Jones.
2. Grain Elevator B has 2nd position with a lien for \$1000 of chemical for that crop.
3. Lender C has a financing arrangement and UCC-1 filing on Jones.
4. Now Dealer A sells his lien to Lender C.

What we want to establish here is that the only priority Lender C has over Grain Elevator B is for that first \$2000 on that particular crop. That top secured position expires after the first \$2000 in proceeds from that crop are received by Lender C. If, for example, \$10,000 of that crop is sold, Lender C is entitled to the first \$2000 through the lien it purchased from A. Then B gets his \$1000. Then Lender C has the option on the remaining \$7000 if his financing arrangement provides for that much. The top position cannot be retained to secure other payments beyond that first \$2000.

TESTIMONY OF DONALD FORSBERG
INDEPENDENT COMMUNITY BANKS OF NORTH DAKOTA
PRESENTED TO THE INDUSTRY, BUSINESS AND LABOR COMMITTEE

JANUARY 24, 2007

H.B. 1338

Good morning Chairman Keiser and members of the Industry, Business and Labor Committee. My name is Donald Forsberg and I am the Executive Vice President of the Independent Community Banks of North Dakota which exclusively represents community banks throughout the state of North Dakota.

I am here today to testify in opposition to House Bill 1338. The language in the original bill concerns our members in that it will result in inequities and contradictions to providing operating financing for agricultural borrowers. I do not believe the legislators who passed the legislation which created the "Agricultural Processor's and Supplier's Lien" several sessions ago envisioned the potential "commercialization" of the lien's priority status at the time they passed the legislation.

This bill as originally drafted would result in significant inequities among lenders and would result in some inconvenience to the borrower under the best case scenario and possible uncertainty and higher costs in a worst case scenario. The bill will also water down the value of the priority status to the point that all liens securing the producers input are filed as priority liens and therefore none of them will have priority. Allow me to explain.

Let's start with an agricultural borrower who goes to his local lending institution (bank, credit union or Farm Credit) and presents his operating plan for the production year to his lender. The borrower's business plan includes monies needed for operating expenses including fuel, feed, seed, chemicals and fertilizer. The lender decides that his plan is sound and agrees to lend him an agreed upon sum of money to pay for these products. The lender secures the operating line of credit for the borrower by filing UCC1 to secure first position on the current year's crops. The borrower draws on the line of credit as he needs the funds to pay his agricultural suppliers for the fuel, feed, seed,

chemicals and fertilizers. The borrower also knows the cost to financing the operating needs and they know the actual cost of the fuel, feed, seed, chemical and fertilizer they are purchasing since they are paying the "cash" price for them.

Now let's say the borrower is using a second lender for additional financing and this second lender also files a UCC1 to provide additional security for this same borrower's debt on the loans from their institution including one covering the proceeds on the same crop. The second lender knows they have a second position at the time they extend the credit because they can and will check to see if there are any liens filed with a higher priority to theirs. Finding your place in the priority chain as a lender is relatively easy since under the Uniform Commercial Code the order of priority of claim on the is clear, it is based upon the date and time of filing.

Let's assume the exact same situation, however, instead of a second lender let's substitute suppliers of agricultural products who provide the financing for some of the purchases for crop input or livestock production after the producer has secured their operating line at the local lender. This time, due to the "priority" of agricultural processor's and suppliers' lien law passed by this legislature several years ago, the order of priority no longer follows the decades old standard of first filed receiving first priority. Instead, agricultural processors and suppliers receive "Priority" status for their filed liens. This is made even worse since the supplier can wait until 120 days after they have extended credit and still receive the priority status. Compounding this is the fact that the financing statement does not list the date of the credit but only the date of filing. In exchange for providing funding to the producer, which would likely have been included under the operating line at the lender, the agricultural processor or supplier provides financing (records a receivable) to the borrower and receives a priority position in the collateral. I want to emphasize a point here, that is, the supplier usually "chooses" to provides financing (absorbs the risk) in exchange for the priority lien. The primary lender, whether a bank, credit union or farm credit would have provided funding under an operating line of credit and the processor or supplier would have been paid in cash! The "risk" which was the basis for giving the agricultural processors and suppliers the priority position for liens is a "choice" and a marketing tool (Buy from me and I will finance it).

In the first situation above, the priority of claims on the collateral is clear the creditor who files first has priority. In the second situation, the issue is also clear the properly filed agricultural supplier's lien has priority. However, the language in HB 1338 will result in the situation that if the second or last filed creditor from my first example above were to "buy" the receivables from the agricultural supplier, they would now leapfrog the first creditor and their properly filed UCC1 merely because the last filed creditor bought paper from the supplier instead of lending money to the borrower to pay the supplier. The end result would be that no creditor could be certain of where they stand on security for operating lines of credit secured by crops, livestock or agricultural products. It would not be difficult to see that there would be a slow down in the use of operating lines of credit for borrowers since a lender would merely have to "buy" the paper from the suppliers instead of working with the borrower on detailed production plans to insure they had first priority.

If traditional lenders are no longer offering operating lines of credit the producer (borrower) would now have to seek financing from their suppliers. This would force the borrower to go to different suppliers to secure financing for each one of the production inputs-fuel, feed, seed, chemicals and fertilizer and further "commercialize" the lending process.

The agricultural suppliers and processors would also be exposed to the risks associated with crop or production failures. If every lien filed for fuel, fertilizer, seed and chemicals is a priority lien then the date and time of extending credit will determine who gets first share of the proceeds from the crop. But as stated earlier the financing statement does not show the date and time of extending credit and it can be filed long after the credit is granted. This means there would be a period of time when no supplier or creditor can be certain of how many or how much credit has already been extended on the same crop. There would only be a concern if the producer was dishonest or if weather or disease or poor farming practices impacts the crop value. Then the proceeds from the sale of the crop may not be sufficient to pay all creditors.

I can then foresee the agricultural suppliers wanting to be a named insured on crop and hail insurance, however, as they and everyone in the business knows proceeds from crop and hail insurance are often inadequate to pay off the cost of inputs. The

producer may have a poor crop but it may not be poor enough to collect fully on the insurance and there is still a revenue shortfall. We all know that disaster assistance from Congress is certainly no given.

If this were to happen I can also foresee the agricultural suppliers coming back to you the legislators to "solve" this problem. This will continue to occur because suppliers are vendors not experts in finance. Continuing in my case study, the producer will be in a position that will force him to go from vendor to vendor (remember who would want to put together an operating line of credit if they know they will end up behind multiple suppliers because of "priority" filings. The producer may now have to provide detailed and extensive information to every vendor so that vendor knows where his lien will land in order of priority. It is not hard to envision the "winners" in this contest will be those that are large enough and strong enough financially to aggressively market and sell their input first!

This scenario begs the question, if both financing of the product and the product itself are coming from the same supplier what is the borrowers "real" cost of the input and "real" cost of the financing? Many processors and suppliers use low or no cost financing to prop up the price of their product – in other words this is a marketing tool. The producer who pays cash often gets a better price than one who does not!

In summary, when this legislative body passed legislation a few sessions ago giving "priority status" to one class of creditor (agricultural processors and suppliers) I do not believe the legislators at that time intended both to supersede the uniform commercial code AND give "priority status" to third party financing companies of receivables whether banks, credit unions, farm credit system or a large company such as General Electric. I do want to clarify that I am not testifying for this committee to change the agricultural processor's and supplier's lien law already in statute although I would be open to a spirited debate on the matter with anyone. However, I do wonder if the special protection afforded by the "priority" lien status would have passed in that session not so long ago if the legislators back then knew that these same suppliers would use this "priority lien status" to sell off their receivables to the most favorable bidder.

The Uniform Commercial Code was designed to be just that, a uniform set of rules so that all borrowers, lenders, vendors, and suppliers would have a standard process

and procedures to follow and a clear understanding of the security or protection they are entitled to. The existing priority lien laws for one class of supplier given by the agricultural processor and supplier lien already supersedes the standards and priorities established in the uniform commercial code and the proposed bill would only make this inequity even worse. Pandora's box has been unlocked with the passage of the priority lien-do not open the lid and let chaos rein.

Independent Community Banks of North Dakota strongly urges your DO NOT PASS recommendation on this bill.

Independent Community Banks of North Dakota would support the amendment proposed by the North Dakota Bankers association which does clarify that the priority status of agricultural processors and suppliers lien does NOT follow the accounts receivable if the processor or supplier sells, transfers or assigns the receivable.

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#4

TESTIMONY OF MARILYN FOSS
NORTH DAKOTA BANKERS ASSOCIATION
HOUSE BILL 1338

Mr. Chairman, members of the committee, I am Marilyn Foss, general counsel for the North Dakota Bankers Association. I am appearing before you today to support clarification of sections 35-30-01 and 35-31-01, but to suggest that clarification in a different direction than is included in the bill.

HB 1338 involves statutory agricultural processors liens and agricultural supplier's liens. Most liens are a matter of contract between a lender and borrower. Examples of contractual liens are real estate mortgages, liens against motor vehicles and security interest under which a person pledges property as collateral to secure repayment of an obligation to a creditor. A lender generally "perfects" a contractual lien by filing a financing statement or other appropriate document with the secretary of state, county recorder, or, in the case of motor vehicle liens, with the department of motor vehicles or another government office. A lender perfects a lien in order to make it enforceable against a debtor's other secured lenders. The filing date establishes the priority of the lien, while the filing itself notifies creditors and potential purchasers that the debtor has pledged the listed types property as collateral for a loan. If two creditors have perfected security interests in the same collateral, the lender who was first to properly file a financing statement has "priority" over a later filing creditor and has the first right to all proceeds from a sale or disposition of the collateral. The detailed rules are all set out in the Uniform Commercial Code which is codified in North Dakota as N.D.C.C. Chapter 41-09, but the basics are simple, "first in time, first in right".

Ag processors and ag suppliers liens are statutory liens. That means they are created by law as a matter of law, not as the result of an agreement between the processor/supplier and the debtor. Local vendors of ag inputs and providers of services for processing crops or ag products are very protective of their liens and insist they need to exist in order to make sure they are paid by their farm customers. **In the past, they have insisted and agreed that the ag liens are not intended to be used by anyone for the business purpose of financing agricultural operations.** Until 2007, at least, other ag lenders, such as banks, credit unions and the farm credit system have worked to make sure that ag liens are not susceptible to abuse because, under the law, ag liens are given a “super” priority over the UCC liens which an ag producer gives to the bank, credit union, FCS as part and parcel of a package of ag financing , even when the UCC lien has been properly filed before the ag lien existed and even though the ag vendor knows about the UCC lien before supplying products or services to a farmer. This tension between the priority of statutory ag liens and UCC liens has created many fierce legislative tangles as some of you will recall from past legislative sessions or service on the ag committee.

The balance that the legislative assembly has tried to achieve is a law that gives local ag processors and ag suppliers a super priority statutory ag processors or ag suppliers lien under limited conditions to ensure to restrict the ability to obtain an ag lien to the vendor product or provider of the processing service and to restrict the amount of the line to the amount of the product or actual cost of each service that is provided..

When HB 1338 was printed it was apparent that the proposed change in the law could have a variety of consequences: 1) it would encourage and enable circumvention of the current law by allowing ag producers and suppliers to transfer to commercial financiers the advantages of the statutory ag liens (the super priority of the liens), even though , in the first instance, companies that are in the business of financing ag operations (as opposed to selling inputs and providing direct processing services to farmers) are not entitled to use ag lines to secure repayment of what are actually farm operating loans or lines of credit.. However, we recognized that 2) a clarification of the law it could be used to ease the way for ag processors and suppliers to liquidate accounts receivables in the ordinary course of business- something that can be very helpful to the grain dealers and other merchants and vendors who are also our bank's customers. We very much oppose the first likely outcome, but do not oppose the second.

After consultation with our members we would like to propose an amendment to make it clear that the accounts receivable and ag processors and suppliers liens themselves are transferable by the original lien holder to any third party, but that the super lien priority is not transferable. This does not affect the small vendor or processors who use ag lines for their intended purpose and yet allows that vendor or processor to have the same ability to liquidate accounts receivable as other merchants and service providers have. We would not that purchasers of the ag accounts receivable are not disadvantaged because the lien priority of the purchased ag lien will be determined from its date of filing under familiar UCC rules of priority for security interests that are taken

by anyone who is in the business of financing operating loans and lines of credit for farmers. We aren't trying to prevent anyone from being able to sell their accounts receivable and we aren't trying to prevent any ag producer or supplier from revamping business practices to become, in fact, a financier of farm operating debt. All we are saying is that everyone who is in the business of financing farm operating debt should operate under the same rules for establishing the priority of liens that are taken to secure repayment of that debt.

We have discussed the proposed amendment with FCS and agree that it is clear on what it says and means. I believe we also agree that the amendment would be consistent with the system that the legislature intended to put in place. And, finally, I believe that we agree HB 1338 as it was introduced does change the system and open the door as I have described matter. Accordingly, I offer the amendment for consideration of the committee.

Thank you.

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North Dakota Farm Credit Council

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**Testimony by Steve Tomac
Executive Director, NDFCC**

HB 1338

March 1, 2007

Mr. Chairman and members of the Senate Agriculture Committee, HB 1338 clarifies confusing language regarding agricultural processor and agricultural supplier liens. If passed as amended, HB 1338 will make it clear that both liens can be assignable but the priority of these liens will not pass with the assignment.

Mr. Chairman it may be helpful to the Committee to provide some background on agricultural processor and agricultural supplier liens. As provided for in 35-30-01 any person who processes a crop is entitled to a lien on that crop until the processing costs are paid. A typical processor might be a custom combiner. Similarly, 35-31-01 has identical language for agricultural suppliers. Typical suppliers would be fertilizer, chemicals, seed, and/or feed suppliers. Both these liens hold a priority over the typical standard UCC 1 liens filed by lending institutions. That is, they must be paid before the lending institution gets their general UCC 1 lien paid; hence, they are referred to as priority liens.

The 1997 Legislature made a couple of changes to the Century Code concerning agricultural processor and agricultural supplier liens. One of the concerns in 1997 was that lenders who purchase these liens would advance additional money and have the benefit of priority on the additional money. The amendment that addressed this concern is found on lines 12-14 on page one and lines 5-8 on page two of the engrossed bill.

The language is open to interpretation and needs clarification. We are not sure if the language prohibits the sale or assignment of the lien, or if the language applies to only additional money advanced after an assignment of the lien, or if the language means that if the lien is assigned the priority of the lien disappears.

In the past year or so, several suppliers have approached Farm Credit for this type of financing. Our legal counsel has advised us that it appears to be illegal, yet we have observed a few other lenders doing it. We support HB 1338 because it clarifies the issue. It allows the liens to be assigned and makes it clear that the priority does not extend to the assignee.

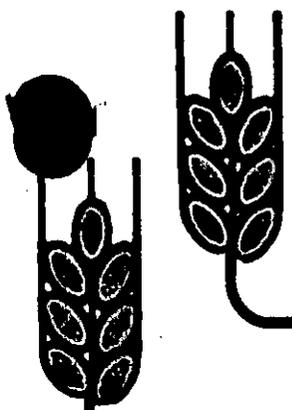
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TESTIMONY TO SENATE AG COMMITTEE RE: HB 1338 -- MARCH 1, 2007

My name is Steve Strege and I represent the North Dakota Grain Dealers Association. We support engrossed HB 1338.

When this bill was introduced we had mixed feelings. At that point it said the priority of accounts receivable covered by a supplier's lien went with those accounts receivable if sold to a third party. Of course that would increase the value of those accounts. On the other hand it changed the character and possible use of the supplier's lien. Bankers offered amendments to say the accounts receivable can be sold, but the priority does NOT go with them, and we agreed. It is a special day when bankers and Grain Dealers agree on a lien bill.

The ag supplier's lien is an important part of North Dakota farmers getting seed in the ground, fertilized, and protected against pests. These liens are for only the amount of the product and/or service provided and only on that crop. A lien for \$2000 worth of wheat seed is good for only \$2000 of the wheat produced from that seed. The lien does not apply to that grower's barley or corn or sunflowers. If the wheat crop fails the lien is essentially worthless. On the other hand lender crop mortgages attach to much more collateral.

As a bit of background, some of these liens have been in state law since the 1930s when financing was difficult to obtain. In the late 1980s threshing liens, seed liens, fertilizer liens and others were combined into the two categories of processors and suppliers. Processors come first in priority, followed by suppliers. Within each category the priority is established by date the supplies or services were furnished.