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Agriculture and related industries have been suffering economic stress for the last decade. The resulting business failures in related industries have further burdened farmers. California's multi-billion dollar agricultural industry has experienced its share of the financial pressure. In the past ten years, two dozen canning companies in Northern California have gone out of business. Analysts of the industry predict that the trend toward fewer processing and canning plants will continue. When processing businesses fail, farmers are often among the unpaid creditors. The California Legislature has responded by adopting measures intended to ameliorate the effects of processing company insolvencies on the state's farmers. Presently, the most important such measure is the pro-


2. BUREAU OF THE CENSUS, UNITED STATES DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1984, at 663 (104th ed. 1983) (in 1982 California had $14.32 billion total farm marketings for crops and livestock) [hereinafter cited as STATISTICAL ABSTRACT]. Processing companies are major buyers of farm products. For example, in 1982 processing companies purchased $421 million worth of California tomatoes, while $148 million worth were purchased for the fresh produce market. CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, CALIFORNIA AGRICULTURE—1982, at 7 (1983).

3. San Francisco Examiner, Sept. 2, 1984, at D2, col. 3; see also STATISTICAL ABSTRACT, supra note 2, at 768 (number of establishments manufacturing preserved fruits and vegetables in the United States fell from 3528 in 1967 to 2379 in 1977).

4. Rough Times Ahead for Canning Industry?, FOOD ENGINEERING, Dec. 1980, at 70, 71 ("[T]he most important change likely to occur in the 1980's [is] a further decline in the number of canners"); see also Demand, Inputs Blast Canning Industry, CAL. FARMER, Sept. 3, 1983, at 13, 27 (number of small and medium-sized canneries in California has declined sharply since 1957, "and the number is still dropping").

5. See, e.g., sources cited supra note 1.
ducer's lien, which provides the farmer with a lien on his products sold to a processing company until he receives payment for them. The protection afforded the farmer by the producer's lien is most critical if the processing company becomes involved in federal bankruptcy proceedings. If the company becomes insolvent, the producer's lien should make the farmer a secured creditor with a likelihood of avoiding financial loss. The federal bankruptcy system, however, regards state-created liens like the producer's lien as potential disruptions of federal supremacy in the regulation of bankruptcy. The Bankruptcy Code, while generally recognizing state property law, has special provisions invalidating certain statutory liens in federal bankruptcy proceedings. These provisions preclude the recognition of state statutory liens that could not be enforced against a bona fide purchaser of the goods to which the lien applies. The producer's lien is subject to attack under these provisions. The producer's lien therefore could be invalidated in the one situation—bankruptcy—in which farmers most need its protection.

In other states, grain farmers have encountered similar problems following grain elevator insolvencies. Congress and several state legislatures have responded to grain industry problems by enacting legislation protective of grain farmers. The legislative measures for the grain

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7. Id. §§ 55631, 55639.
9. See id. § 101(39) (defines “statutory lien” as a “lien arising solely by force of a statute on specified circumstances or conditions”). This provision distinguishes such a lien from a consensual lien: “[A] secured transaction within Article 9 of the Uniform Commercial Code is contractual rather than statutory, even though without the statute the agreement of the parties would not effectively create a lien valid under non-bankruptcy law.” 4 COLLIER ON BANKRUPTCY § 545.02 (15th ed. 1984) [hereinafter cited as COLLIER].
12. Holt v. Crucible Steel Co., 224 U.S. 262 (1912); In re Leach, 15 Bankr. 1005, 1009 (Bankr. D. Conn. 1981); see COLLIER, supra note 9, § 545.04(2).
14. Id. § 545(2).
17. See Looney, Hamilton & Culver, supra note 15, at 575 (state insurance funds as response to elevator insolvencies).
industry provide useful comparisons for analysis of the California producer's lien.

This Note analyzes the features of the producer's lien and the conflict it has engendered among California farmers, processing companies, and lenders to processing companies. The Note discusses the federal bankruptcy law regarding state statutory liens and evaluates the status of the California producer's lien in federal bankruptcy proceedings. The Note concludes that the producer's lien is probably invalid in bankruptcy and suggests legislative improvements in the lien statute that would be adequate to make the lien legally effective in bankruptcy. The Note also considers the possibility that such a valid producer's lien would create some significant economic costs for California farmers.

The Note then analyzes several alternative methods of protecting farmers against financial loss in processor insolvencies. These alternatives are treated in terms of their legal effectiveness in bankruptcy, their scope of financial relief, and the direct and indirect costs they can impose on farmers. The alternatives considered include changes in federal bankruptcy law, establishment of a state or federal statutory trust in favor of farmers selling their products to processors, an enlarged California state insurance fund, high-coverage surety bonding of processors, and private insolvency insurance. These methods of protecting farmers are compared to the proposed amended California producer's lien. The Note concludes that an enlarged state insurance fund would offer California farmers the cheapest effective relief from financial losses threatened by processor insolvencies.

The California Producer's Lien

Farmers raising vegetable and fruit crops produce perishable goods which must be sold at harvest. A farmer need not receive cash payment in full at harvest, however, and there can be tax advantages in agreeing to deferred payment. The processor purchasing a farmer's crop benefits from deferred payment by spreading purchasing costs over periods longer than the harvest season. Thus, processing companies faced with high financing costs increasingly make deferred payment.

18. Grain industry problems are somewhat different from the problems of other farm industries because grain can be stored by the farmer in an elevator for long periods before sale. See Note, supra note 15, at 117-20 (discussion of grain marketing).
19. Estes, Congress Rescues Farmer Deferred Crop Payment Contracts from IRS Attack, 3 AGRIC. L.J. 1, 9-11 (1981) (farmers can use such contracts to shift income from one crop year to another for tax advantage).
20. Richardson & Pickett, Marketing Co-Ops Face a Time of Reckoning, CAL. FARMER, Sept. 3, 1983, at 6 ("[C]ommodity canners have . . . gotten themselves into a cash crunch by the increased use of debt in overall financing . . . . When interest rates soared [in recent years], there was simply no way to finance this debt."); see The Man Who Tried to Save Cal Can, CAL. FARMER, Nov. 5, 1983, at 50 (High interest rates in the 1980's cost California
contracts with farmers. Such contracts, however, expose farmers to the risk of nonpayment for a variety of reasons, including the possible insolvency of their processors before payment is made.

The California producer's lien seeks to improve the position of a farmer who has not yet received payment for his products by making him a secured creditor of the processing company which purchases his crop. The lien statute provides that the sale to a processing company of any farm products "grown by him" gives the farmer a lien on the products "and upon all processed or manufactured forms" of them which are "in the possession of the processor without segregation of such product." The lien is for the contract price, or for the value of the farm products if there is no agreed price. The lien attaches to the farm products "from the date of delivery of such farm product or any portion of it" to the processor and is "complete from the date of delivery . . . , or, if there is a series of deliveries" under a given contract, "from the date of the last delivery." The statute requires no further steps, such as filing notice, for the perfection of the lien. The statute makes the producer's lien "a preferred lien prior in dignity to all other liens, claims, or encumbrances," except employee wage and salary claims and warehousemen's liens as provided by division 7 of the Uniform Commercial Code. The producer's lien continues in force until the farmer releases the lien. The farmer may release the lien upon payment or "upon arrangements

Canneries & Growers, a major cannery, about $30 million per year. Cal Can filed for bankruptcy in 1983.

21. Demand, Inputs Blast Canning Industry, CAL. FARMER, Sept. 3, 1983, at 13, 27 (The industry trend is towards "agreements made between large canners and farmers, in which farmers receive final payments after processing and marketing of the crop.").


23. Id. § 55631.

24. Id.

25. Id. § 55634. The phrase "without segregation" is apparently aimed at the fact that farm products sold to a processor are immediately commingled with other purchased products.

26. Id. § 55631.

27. Id. § 55632. The time of attachment is the point at which the lien becomes effective against the processor. See Bramble Transp., Inc. v. Sam Senter Sales, Inc., 294 A.2d 97, 102 (Del. Super. Ct. 1971) (defining attachment).

28. CAL. FOOD & AGRIC. CODE § 55635 (West 1968 & Supp. 1985). The term "completed" is apparently used for the more usual "perfected." Black's Law Dictionary defines "perfected" as "completed." BLACK'S LAW DICTIONARY 1023 (rev. 5th ed. 1979). Perfection is the completion of all steps required to make the lien effective against the processor's creditors. See Bramble Transp., 294 A.2d at 102 (defining perfection).

29. See 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 435-37 (1965) (discusses automatic perfection, for which no steps are required after attachment).


31. Id. § 55633(a).

32. Id. § 55633(b).

33. Id. § 55637 (West 1968).
being made for such payment which are satisfactory” to him.34

The lien statute prohibits a processor from moving farm products to which producer’s liens have attached “from this state or beyond [the processor’s] ownership or control,” unless there is a sale of the products and “the total proceeds of the sale are used to satisfy” the claims of lienholding farmers.35 Violation of this provision by a processor is a misdemeanor.36

A farmer seeking to enforce his lien against a processor has several choices. The farmer may obtain an injunction prohibiting removal of the processed farm products beyond the reach of the court,37 or he may proceed with a foreclosure action.38 He may also file a personal action for the debt without foregoing his lien rights.39

Two of these general features of the lien stem from recent changes in the law. In 1979 the California Legislature amended the producer’s lien statute, introducing two particularly important changes: an increase in the lien’s duration from sixty days to an indefinite period,40 and repeal of a procedure permitting secured lenders to achieve priority over lienholders.41 The legislature enacted these changes to strengthen the position of farmers as against lenders to the processor.42 The duration of the lien was extended because a significant number of deferred payment contracts provided for final payment as long as a year after delivery of the farm products to the processor.43 Before the amendment, the protection of the lien ended too soon for many farmers.

In addition, prior to the amendment, the lien statute had qualified the priority of the producer’s lien by permitting the processor’s secured lender to obtain a security interest in the processor’s inventory which took precedence over the producer’s lien.44 The lender obtained this pro-

34. Id. Lenders have seen in this language a possible way to include terms waiving the lien protection in contracts between farmers and processors. See infra notes 48-59 & accompanying text.

In addition, the farmer may release the lien upon the processor’s posting of a security bond, cash deposit, or other security. CAL. FOOD & AGRIC. CODE § 55637 (West 1968).

35. Id. § 55638.
36. Id. § 9.
37. Id. § 55651.
38. Id.
39. Id. § 55647.
42. Press release from California Assemblyman Floyd Mori (Mar. 7, 1979) (statement by a sponsor of the amendments that banks can protect themselves better than farmers can because the banks have other methods of securing financial arrangements); Cal. Senate Comm. on Judiciary, Analysis of A.B. 774, 1979-1980 Sess. 3-4 (1979) (giving same rationale for the amendments) (copy on file with the Hastings Law Journal) [hereinafter cited as Analysis of A.B. 774].

44. CAL. FOOD & AGRIC. CODE § 55682 (West 1968) (repealed 1979).
tection by filing a financing statement\textsuperscript{45} with the California Department of Agriculture.\textsuperscript{46} Lenders made such extensive use of this procedure that farmers seldom benefited from the statutory priority.\textsuperscript{47}

The 1979 amendments brought a prompt response from bank lenders, who were particularly disturbed by the repeal of the special exception for the processor's secured lender.\textsuperscript{48} Some banks thereafter required a major processor to include in its contracts with farmers a section entitled "Release of Producer's Lien."\textsuperscript{49} The contracts were pre-printed form contracts prepared by the processing company, and their terms were specified by the banks.\textsuperscript{50} The release terms were also printed on the form in a section requiring separate signature.\textsuperscript{51} The release terms stated that the producer's lien was being released by the farmer-seller in return for "arrangements being made for . . . payment which are satisfactory to the producer,"\textsuperscript{52} the "satisfactory arrangements" being the deferred payment terms of the contract.\textsuperscript{53} Many farmers entering into these contracts signed the release.\textsuperscript{54} In this way the banks ensured that their secured claims to the processor's inventory would not be displaced by producer's liens.\textsuperscript{55}

As a result, in the 1983-1984 legislative session, farming interests sought further amendments to the producer's lien statute.\textsuperscript{56} They proposed amendments to delete the provision for release of the lien "upon arrangements being made for . . . payment which are satisfactory to the producer."\textsuperscript{57} Thus, lenders and processors would not be able to rely on

\textsuperscript{45} A financing statement is a document giving sufficient details about the debtor, creditor, amount of the debt, and nature of the collateral to give adequate notice of the adverse interest in the collateralized property. \textit{Cf} \textsc{cal. Com. Code} § 9402(1) (West Supp. 1985) (specifies what must be included in a Uniform Commercial Code financing statement in California).

\textsuperscript{46} \textsc{cal. Food \& Agric. Code} § 55682 (West 1968) (repealed 1979). The former provisions also permitted a farmer to take steps to require a lender to withhold loan proceeds from a processor to the extent the processor had not paid the farmer. \textit{Id.} §§ 55687, 55689-55692. Apparently, no farmer ever used these cumbersome provisions.

\textsuperscript{47} Analysis of A.B. 774, \textit{supra} note 42, at 1-3.

\textsuperscript{48} \textit{See, e.g.}, Banks' Pretrial Statement at 5, \textit{In re T.H. Richards Processing Co.}, No. 282-2614-W-7 (Bankr. E.D. Cal. filed July 9, 1982).

\textsuperscript{49} \textit{See, e.g.}, \textit{id.}

\textsuperscript{50} \textit{See, e.g.}, \textit{id.;} 1981 Tomato Contract between T.H. Richards Processing Co. and various farmers (copy on file with the \textsc{Hastings Law Journal}) [hereinafter cited as Tomato Contract].

\textsuperscript{51} \textit{See, e.g.}, Tomato Contract, \textit{supra} note 50, at 2.

\textsuperscript{52} \textsc{cal. Food \& Agric. Code} § 55637 (West 1968) (farmer could choose to release the lien without receiving payment).

\textsuperscript{53} Tomato Contract, \textit{supra} note 50, at 1.

\textsuperscript{54} \textit{See, e.g.}, Banks' Pretrial Statement at 5, \textit{In re T.H. Richards Processing Co.}, No. 282-2614-W-7 (Bankr. E.D. Cal. filed July 9, 1982).

\textsuperscript{55} \textit{Id.} 57. \textsc{Id.} § 1 (intended to amend \textsc{cal. Food \& Agric. Code} § 55637 (West 1968)).
this statutory language for the validity of release terms included in contracts with farmers. The amendments would have further added a declaration that “[a]ny waiver by a producer of his or her rights to the producer’s lien . . . is void as contrary to public policy.” The Legislature, however, did not adopt these amendments.

In sum, California has provided financial protection for farmers by making them secured creditors of the farm-product processing companies. The form this protection takes, the producer’s lien, has been the object of political conflict among farmers, processing companies, and lenders. The most serious challenge to the effectiveness of the producer’s lien, however, arises when a processing company becomes insolvent and enters federal bankruptcy proceedings.

The Producer's Lien and Federal Bankruptcy Law

If a solvent California processing company fails to make contract payments for farm products, a farmer can utilize the state-law remedies provided in the producer’s lien statute. If, however, the processor becomes insolvent and enters federal bankruptcy proceedings, federal law will determine the rights of a lienholding farmer against the debtor processor.

Congress has the power to make “uniform Laws on the subject of Bankruptcies throughout the United States.” Federal preemption precludes a state from determining the priorities among creditors in bankruptcy. Nevertheless, the “underlying property interests and commercial arrangements” involved in bankruptcy proceedings typically are created by state law. Thus, the states can affect the outcome of federal bankruptcy cases indirectly by exercising the states' acknowledged power to legislate the structure of the underlying property interests. Statutory liens historically have been a favorite technique of state

58. Id. § 2. (intended to add CAL. FOOD & AGRIC. CODE § 55654).
59. See supra note 56 & accompanying text.
60. CAL. FOOD & AGRIC. CODE § 55647 (West 1968) (personal actions); id. § 55651 (injunction and foreclosure); see supra notes 37-39 & accompanying text.
64. Selby v. Ford Motor Co., 590 F.2d 642, 646 (6th Cir. 1979) (citing Chicago Bd. of Trade v. Johnson, 264 U.S. 1, 10 (1923)).
65. See In re Telemart Enters., Inc., 524 F.2d 761, 763 (9th Cir. 1975). The Bankruptcy Code favors equality of distribution of a bankrupt's assets among his creditors. Congress, however, generally recognizes the property interests created by state law. “These two policies are inherently contradictory, and much of the history of the [Bankruptcy] Act chronicles successive attempts by Congress to strike a proper balance between the interests involved.” Id.
efforts to influence bankruptcy law. A state can give some creditors lien rights that are superior to the rights of other creditors, as California has done for farmers in the producer's lien. The Bankruptcy Code normally recognizes the secured status of lien creditors.

Congress, however, has restricted the extent to which state lien laws may disrupt the uniformity of federal bankruptcy administration. Section 545(1) of the Bankruptcy Code allows a trustee in bankruptcy to avoid the claim of a statutory lien on the debtor's property if the statutory lien first becomes effective upon the initiation of federal bankruptcy proceedings or other defined insolvency conditions. Allowing the trustee in bankruptcy to defeat statutory liens that create property rights only in bankruptcy does not invalidate the California producer's lien. The producer's lien is not defined in terms of the insolvency of the nonpaying processor, and the farmer's lien interest is created

66. P. Murphy, supra note 63, § 14.02.
67. Id.
69. 11 U.S.C. § 506(a) (1982); see also S. Rep. No. 1159, 89th Cong., 2d Sess. 2, reprinted in 1966 U.S. Code Cong. & Ad. News 2456, 2456 ("[T]he Bankruptcy Act has traditionally recognized that a lien is a valid property right which must be satisfied out of the assets to which it attaches before any part of those assets becomes available for distribution to unsecured creditors.").
70. See supra note 9 (statutory lien defined and distinguished from consensual liens arising by contract).
71. See S. Rep. No. 1159, 89th Cong., 2d Sess. 2-3, reprinted in 1966 U.S. Code Cong. & Ad. News 2456, 2457 ("If all statutory liens, regardless of what they were in substance, were to be treated as liens in bankruptcy the order of federally created priorities would be completely disrupted."); see also S. Rep. No. 989, 95th Cong., 2d Sess. 86, reprinted in 1978 U.S. Code Cong. & Ad. News 5878, 5872 (another purpose of § 545 was to encourage the free movement of goods in general commerce); Collier, supra note 9, § 545.01[3], at 545-6 to -7. See generally Schneyer, Statutory Liens Under the New Bankruptcy Code—Some Problems Remain, 55 Am. Bankr. L.J. 1, 1-7 (1981) (brief history of Congressional limitations on statutory liens).
The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien—

(1) first becomes effective against the debtor-
(A) when a case under this title concerning the debtor is commenced;
(B) when an insolvency proceeding other than under this title concerning the debtor is commenced;
(C) when a custodian is appointed or takes possession;
(D) when the debtor becomes insolvent;
(E) when the debtor's financial condition fails to meet a specified standard; or
(F) at the time of an execution against property of the debtor levied at the instance of an entity other than the holder of such statutory lien

73. Id. In other words, it must be possible to permit enforcement of the lien without the debtor's insolvency.
at the moment of delivery of the farm products, inevitably in advance of payment problems.

Section 545(2) allows the trustee in bankruptcy to defeat statutory liens if the lien “is not perfected or enforceable at the time of the commencement of the case [in bankruptcy] against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists.” Thus, the Code invalidates liens that would not be enforceable against a bona fide purchaser, real or hypothetical, of the liened goods. The bona fide purchaser test, however, has given the federal courts considerable difficulty in application. Although the state property law determines the rights of a bona fide purchaser under section 545(2), in some instances the state has no clear standard for the rights of a bona fide purchaser under a particular lien statute.

Moreover, section 545(2) reveals no congressional awareness that the rights of a bona fide purchaser can vary in different circumstances. Yet in Louisiana the rights of a bona fide purchaser of personal property

75. 11 U.S.C. § 545(2) (1982), as amended by Bankruptcy Amendments of 1984, Pub. L. No. 98-353, § 460, 98 Stat. 333, 377. The 1984 amendments substituted the phrase “at the time of the commencement of the case” for “on the date of the filing of the petition.” This change should not affect the present analysis.

The key terms “perfected” and “bona fide purchaser” are not defined in the Bankruptcy Code. See supra notes 27-28 for the usual definition of “perfected,” and the related term “attachment.” The term “perfected” was used in the Bankruptcy Act of 1898 to mean “a security interest which is perfected is good against the debtor’s trustee in bankruptcy.” 1 G. GILMORE, supra note 29, at 435. Article 9 of the Uniform Commercial Code makes extensive use of the term, which “does not appear in any of the older security statutes.” Id. However, the term was already used without apparent need for explanation in 1 L. JONES, THE LAW OF LIENS § 106, at 99 (3d ed. 1914).

The term “bona fide purchaser” is defined by applicable local law: “The rights of a bona fide purchaser and how a statutory lien is perfected, or whether such a lien can be perfected against such a purchaser, are matters left for determination to state or federal lien law.” 4 COLLIER, supra note 9, § 545.04[2], at 545-19. In California, “[a] bona fide purchaser is one who has purchased property for value without notice of any defects in the title of the seller.” Walters v. Calderon, 25 Cal. App. 3d 863, 876, 102 Cal. Rptr. 89, 97 (1972); accord Hansen v. G & G Trucking Co., 236 Cal. App. 2d 481, 498, 46 Cal. Rptr. 186, 197 (1965).

77. S. REP. No. 1159, 89th Cong., 2d Sess. 7, reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2456, 2461 (“The holders of such liens have reason to know that their security [interest in the subject property] is extremely vulnerable.”).
78. Holt v. Crucible Steel Co., 224 U.S. 262 (1912); In re Leach, 15 Bankr. 1005, 1009 (Bankr. D. Conn. 1981); 4 COLLIER, supra note 9, § 545.04[2], at 545-19.
79. See Ex Parte Application of Trustee for Order Extending Time in Which to File Applicant’s Opening Brief at 3, In re T.H. Richards Processing Co., No. 84-0835 (E.D. Cal filed July 9, 1984) (no prior reported cases testing the producer’s lien).
80. Schneyer, supra note 71, at 33.
vary depending on whether the purchaser has or has not taken delivery. In New York, the enforceability of an unfiled mechanic's lien against a bona fide purchaser of real property depends on the language of the conveyance.

Lacking state guidance for determining the rights of a bona fide purchaser, federal courts have articulated standards for applying the bona fide purchaser test for statutory lien validity. Unfortunately, courts have employed various and sometimes inconsistent standards for the test. The following section evaluates the bona fide purchaser test standards employed in the federal decisions.

Federal Court Interpretations of the Bona Fide Purchaser Test

Some federal courts have held that a state statutory lien meets the bona fide purchaser test if the lienholder has complied with all the requirements of the relevant state statute. These requirements vary markedly from statute to statute. In In re Allgeier & Dyer, Inc., the bankruptcy court upheld Kentucky mechanics' liens for work done on public improvement projects because the lienholders had met the statutory notice and filing requirements for the liens. In contrast, the bankruptcy court in Michigan upheld city personal property tax liens in In re Cambron Corp., although the only statutory requirement for their perfection was the passing of the date on which the taxes became due.

Courts taking this "statutory requirements" approach do not evaluate the adequacy of the state’s statutory provisions in light of congressional intent. Congress enacted the bona fide purchaser requirement to limit, rather than confirm, the states’ power to regulate property relationships. Yet a bona fide purchaser test that simply reflects the state requirements places no restriction on state power to regulate this aspect of the property relationship. Thus, although the statutory requirements ap-

83. Compare In re Cambron Corp., 27 Bankr. 723 (Bankr. E.D. Mich. 1983) (statutory requirements of the local lien law were met and notice was not treated as an issue; lien upheld) with In re Mission Marine Assocs., 633 F.2d 678, 681 (3d Cir. 1980) (statutory requirements of local lien law were met, but lien provided no notice to subsequent purchasers; lien held invalid).
84. In re Cambron Corp., 27 Bankr. 723, 726 (Bankr. E.D. Mich. 1983); In re Allgeier & Dyer, Inc., 18 Bankr. 82, 87 (Bankr. W.D. Ky. 1982) ("Under the Bankruptcy Act of 1978 . . . as a general rule, statutory liens survive the filing of a petition under the Code so long as statutory requirements have been strictly complied with.").
85. 18 Bankr. 82 (Bankr. W.D. Ky. 1982).
86. Id. at 84-86, 88.
88. Id. at 726.
89. See supra note 71 & accompanying text.
proach is an easy standard to apply, it inadequately enforces the congressional intent underlying the bona fide purchaser test.

Other federal courts look to the face of the statute creating the particular lien for an answer. Under this version of the bona fide purchaser test, the lien is considered valid if the statute expressly provides that a perfected lien is enforceable against a bona fide purchaser.\(^\text{90}\) In *In re Cummins*,\(^\text{91}\) a California county had properly filed liens for delinquent personal property taxes against a debtor. The statute provided that real property liens could be perfected by filing alone.\(^\text{92}\) The liens in *Cummins*, however, concerned personal property and were effective only against a purchaser with actual notice of the liens.\(^\text{93}\) The court concluded: “Because the lien is expressly made invalid against a [bona fide purchaser of the personal property of the debtor], it is also invalid against the trustee” in bankruptcy.\(^\text{94}\)

The “express language” approach inadequately enforces congressional intent by essentially allowing a state to circumvent the force of the bona fide purchaser test. If the bankruptcy court does not ask whether the state lien may be fairly enforced against innocent purchasers, then the test becomes purely formal and is easily overcome by state draftsmen. The express language approach, however, is more restrictive than the statutory requirements approach. States may be reluctant to enact the express language making a perfected lien enforceable against bona fide purchasers because it could burden state commerce.\(^\text{95}\)

A third position taken by the federal courts is that the particular lien survives the bona fide purchaser test if under state law the lien could be enforced against any one of several types\(^\text{96}\) of bona fide purchasers.\(^\text{97}\)

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90. *In re Cummins*, 656 F.2d 1262, 1265 (9th Cir. 1981); *In re J.R. Nieves & Co.*, 446 F.2d 188, 194 (1st Cir. 1971) (“Since the [particular state lien] by its own terms does not provide protection against bona fide purchasers, . . . it is not valid against the trustee.”); *In re Tropicana Graphics, Inc.*, 24 Bankr. 381, 383 (Bankr. C.D. Cal. 1982) (“This court has been unable to find any statute of the State of California which renders [the particular] lien enforceable against a bona fide purchaser. . . .”); *In re Leach*, 15 Bankr. 1005, 1009-10 (Bankr. D. Conn. 1981) (the legislature could have made the lien valid against a bona fide purchaser “with the use of appropriate statutory language”); *In re Hughes*, 9 Bankr. 251, 257 (Bankr. W.D. La. 1981) (state lien “provisions do not in their own terms provide protection against bona fide purchasers”).

91. 656 F.2d 1262, 1264 (9th Cir. 1981).

92. Id. at 1265.

93. Id. at 1264-65.

94. Id. at 1265.

95. P. Murphy, *supra* note 63, § 14.02, at 14-2 (If a given statutory lien were too generally enforceable, that “would severely inhibit the ability of the party on whom it has been imposed to transact business.”).

96. See *supra* notes 80-82 & accompanying text.

97. *In re Chesterfield Developers, Inc.*, 285 F. Supp. 689, 691 (S.D.N.Y. 1968); P. Murphy, *supra* note 63, § 14.02, at 14-3 n.5 (a statutory “lien need only be good as against one type of bona fide purchaser, not all” (emphasis in original)).
In re Chesterfield Developers, Inc.\textsuperscript{98} concerned a New York statute that allowed filing of a mechanic's lien up to four months after the work was performed.\textsuperscript{99} In the interim, the effect of the lien on subsequent purchasers depended upon whether or not language acknowledging the possibility of unfiled liens on the property was included in the conveyance.\textsuperscript{100} The bankruptcy court concluded that this created "two types of bona fide purchasers."\textsuperscript{101} The court declared that it would be unjust to say that the "trustee [in bankruptcy] is considered to be any kind of bona fide purchaser that local law would make superior to the statutory lienor."\textsuperscript{102} The court apparently would invalidate the lien only if it were unenforceable against both types of bona fide purchasers in the New York lien law.

This third position illustrates the inherent ambiguity of the bona fide purchaser test. If a court finds that a state lien law conceives of more than one type of bona fide purchaser, the court must decide which type of bona fide purchaser the trustee in bankruptcy is. Yet that determination is made in a factual vacuum because the trustee is only a hypothetical purchaser. Under the "any one type" approach, the trustee is viewed as a bona fide purchaser with the least priority available under state law. The approach therefore does not lead to vigorous enforcement of the bona fide purchaser test.

A fourth position is that the lien is valid under the bona fide purchaser test if the lien would be enforceable against a bona fide purchaser in the factual circumstances of the actual bankruptcy case.\textsuperscript{103} In In re Trahan,\textsuperscript{104} Louisiana gave the seller of goods a lien for the purchase price, without any filing requirement, so long as the goods remained in the possession of the first purchaser.\textsuperscript{105} Resale of the goods by the purchaser defeated the lien only if the second purchaser took possession of the goods.\textsuperscript{106} The court, stressing the significance of "the reality of the situation between the parties,"\textsuperscript{107} refused to speculate as to the effect of

\textsuperscript{99} Id. at 690-91.
\textsuperscript{100} Id. at 691.
\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} In re Trahan, 283 F. Supp. 620, 626 & n.9 (W.D. La.), aff'd per curiam, 402 F.2d 796 (5th Cir. 1968), cert. denied, 394 U.S. 930 (1969). The Trahan position continues to be followed in the Fifth Circuit. See, e.g., In re Tape City, U.S.A., Inc., 677 F.2d 401 (5th Cir. 1982).
\textsuperscript{104} 283 F. Supp. 620 (W.D. La.), aff'd per curiam, 402 F.2d 796 (5th Cir. 1968), cert. denied, 394 U.S. 930 (1969). The lien in Trahan is called a vendor's privilege in the civil law tradition. Id. at 623. The court, however, had no difficulty classifying this security device as a statutory lien, because it imposed obligations on the debtor by operation of law. Id.
\textsuperscript{105} Id. at 626.
\textsuperscript{106} Id. The court conceded that possession did not necessarily depend on physical movement of the goods, but rather on control over the goods. Id. at 626 n.8.
\textsuperscript{107} Id. at 626.
other hypothetical situations involving the trustee in bankruptcy.\textsuperscript{108} The court emphasized the important position of this seller's lien in Louisiana law: "[I]t is one of the most important and highest ranking security devices recognized in Louisiana. It has formed a cornerstone for credit in the economic structure of the mercantile trade in this State for centuries."\textsuperscript{109} In \textit{Trahan}, the debtor still had possession of the liened goods.\textsuperscript{110} Therefore, the court held that the lien was valid against the trustee in bankruptcy.\textsuperscript{111}

This fourth position evades the problem of the hypothetical nature of the trustee's status as a bona fide purchaser. Because the trustee is not a real purchaser, the trustee probably will never take the additional steps, such as transporting the goods, that a real purchaser routinely would.\textsuperscript{112} Therefore, a bankruptcy court following this "factual circumstances" approach frustrates congressional intent because it rarely invalidates state statutory liens. By disregarding the hypothetical bona fide purchaser status of the trustee, the bankruptcy court fails to recognize that the bankruptcy bona fide purchaser test has purposes independent of the underlying state property law. State property law is merely a vehicle for bankruptcy law in this instance.

Under a fifth view, some courts uphold the lien only if the state statute requires actual or constructive notice to a bona fide purchaser via recording, seizure of the goods, or equivalent means.\textsuperscript{113} In \textit{In re Mission Marine Associates},\textsuperscript{114} New Jersey law provided a mechanic's lien for work done on marine vessels prior to launching, but did not require recording of the lien.\textsuperscript{115} The Third Circuit discerned a state "policy concerning the protection of bona fide purchasers against secret nonpossessory liens . . . ."\textsuperscript{116} The Third Circuit was "confident the

\begin{enumerate}
\item[108.] \textit{Id.} at 626 n.9.
\item[109.] \textit{Id.} at 627 (court was therefore disinclined to view the lien as a state attempt to disrupt federal bankruptcy law).
\item[110.] \textit{Id.} at 621, 626 n.9.
\item[111.] \textit{Id.} at 626-28.
\item[113.] \textit{In re Cummins}, 656 F.2d 1262, 1264-65 (9th Cir. 1981) (quotes with approval \textit{In re J.R. Nieves & Co.}, 446 F.2d 188, 193-94 (1st Cir. 1971)); \textit{In re Mission Marine Assoc's}, 633 F.2d 678, 681 (3d Cir. 1980); \textit{Nieves}, 446 F.2d at 193-94 (court declared in dictum that "those state liens [should be valid] in which the laws creating them provide specifically for perfection against bona fide purchasers by recording, seizure, or other means of actual or constructive notice"); \textit{In re Leach}, 15 Bankr. 1005, 1010 (Bankr. D. Conn. 1981) ("the State would have no recourse against the third party who gave fair consideration without notice of the State's lien").
\item[114.] 633 F.2d 678 (3d Cir. 1980).
\item[115.] \textit{Id.} at 679-80.
\item[116.] \textit{Id.} at 681. This policy was evident in an earlier New Jersey case, \textit{Lanterman v. Luby}, 96 N.J.L. 255, 114 A. 325 (1921), concerning a different lien: "Secret liens upon chattels are
Supreme Court of New Jersey would apply the . . . policy to protect a [buyer] who purchased from Mission Marine without notice of [the creditor's] claim . . . .”117 Thus, the court viewed notice as the core requirement of the bona fide purchaser test.118

This “notice” approach ensures the most sensible enforcement of congressional intent for the bona fide purchaser test. A statutory lien that includes notice filing manifests to the world the lienholder's interest in the goods.119 Therefore, such a lien is not “tenuous,”120 and lienholders should confidently expect enforcement of the lien even against subsequent purchasers.121 Bankruptcy courts can easily apply a “notice” standard by examining the provisions of particular statutory liens. The courts can distinguish between the validity of the lien statute (whether it provides notice provisions or not) and the validity of a particular creditor's lien (whether properly filed or not), thus providing clearer guidance to creditors generally in that state.

This “notice” approach raises the possibility of a fourteenth amendment due process challenge to other approaches that do not require notice filing provisions. The highest court in New Jersey long ago raised this as a possibility.122 More recently, the United States Supreme Court has affirmed that federal bankruptcy power is subject to the fifth amendment's prohibition against taking private property without compensation.123 Whether a bankruptcy court's enforcement of a state statutory lien against a purchaser without notice violates due process under either the fourteenth amendment or the fifth amendment, however, has not been expressly considered by the federal courts. This question seems especially difficult when the bona fide purchaser can be merely hypotheti-
The due process issue, however, could make the "notice" approach to the bona fide purchaser test of the bankruptcy law the only constitutional approach.

Because of its inherent advantages, the "notice" approach should be uniformly adopted by the bankruptcy courts. The "notice" approach best enforces the congressional intent underlying the bona fide purchaser test. Under this approach, the states are properly limited in their use of statutory liens. If the states want to give certain groups of creditors secured status, then they may give these creditors lien rights that are evidenced in general commerce by a notice filing. Furthermore, bankruptcy courts can readily administer the "notice" approach. This approach reduces the ambiguity created by the hypothetical bona fide purchaser status of the trustee in bankruptcy. The courts more easily can determine if this hypothetical entity could have had notice of a particular lien than they can determine what type of purchaser he is or what actions beyond purchase he may or may not be supposed to have taken.

The California Producer's Lien and the Federal Bona Fide Purchaser Test

This section of the Note evaluates the efficacy of the California producer's lien in federal bankruptcy proceedings under each of the federal court approaches described in the preceding section. The analysis of the application of the federal standards to the producer's lien draws on the details of a recent California bankruptcy case for illustrative material.

The illustrative case, In re T.H. Richards Processing Co., concerned the insolvency of a major California cannery in 1982. Several tomato and pear farmers claimed producer's lien rights against the processed farm products inventory of the insolvent processor. During lengthy proceedings to settle the debtor-company's affairs, the farmer-creditors moved for an order to determine the validity of the producer's lien. On June 18, 1984, the bankruptcy court issued the requested order, declaring: "The producer's lien . . . is a valid state statutory lien . . . not subject to avoidance by the trustee under 11 U.S.C. 545(2)." The order was not accompanied by an opinion.

124. 11 U.S.C. § 545(2) (1982) ("whether or not such a purchaser exists"); see also In re Frosty Morn Meats, Inc., 7 Bankr. 988, 1004 (Bankr. M.D. Tenn. 1980) ("Although the bankruptcy power of Congress is not without limitation, these limitations have never been fully and precisely defined, and, in fact, are probably incapable of definition.").
125. No. 282-2614-W-7 (Bankr. E.D. Cal. filed July 9, 1982).
127. Id. at 4.
T.H. Richards Processing Co. was a large cannery with an inventory worth just over $15 million.\textsuperscript{129} Richards owed three large banks just under $15 million on lines of credit secured by canned goods inventory, as well as accounts receivable.\textsuperscript{130} The banks had required Richards to place some canned goods inventory in a field warehouse maintained by a third party and to issue warehouse receipts to the banks.\textsuperscript{131} Field warehousing has been a traditional method of providing collateral for secured financing in the canning industry.\textsuperscript{132}

A cannery will often process his entire year's product during the few weeks after harvest; the stock is gradually sold off during the year until the cycle begins again. As the goods are sold, they are released from the warehouse and the proceeds devoted to a proportionate reduction of the bank loan.\textsuperscript{133}

Inventory control in the field warehouse may actually be lax, however, because the warehouse company often hires one of the canning company's employees on a temporary basis to staff the field warehouse.\textsuperscript{134} In Richards, the banks conceded that they did not know precisely what inventory Richards had sold or transferred.\textsuperscript{135}

Richards' inventory also contained several million dollars worth of canned goods held on behalf of "bill and hold" customers.\textsuperscript{136} As a routine business practice, bill and hold customers purchased canned goods from Richards, but requested that Richards delay delivery of the goods until a later date.\textsuperscript{137} The bill and hold purchasers included such well-known processed food marketing companies as Castle & Cooke, Libby, and Lawry's.\textsuperscript{138} Lawry's contract with Richards provided that "identification of the Product to the contract shall occur when RICHARDS places the finished Product in its storage facilities."\textsuperscript{139} Moreover, risk of loss was to pass to Lawry's "as soon as the finished Product is

\textsuperscript{129} Debtor's Statement of Affairs, \textit{In re T.H. Richards Processing Co.,} No. 282-2614-W-7 (Bankr. E.D. Cal. filed July 9, 1982).
\textsuperscript{130} \textit{Id.} at Attachment L.
\textsuperscript{131} \textit{Id.} at Attachment E; Banks' Pretrial Statement at 5, \textit{In re T.H. Richards Processing Co.,} No. 282-2614-W-7 (Bankr. E.D. Cal. filed July 9, 1982).
\textsuperscript{132} 1 G. GILMORE, \textit{supra} note 29, § 16.2, at 147-54.
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} \textit{Id.}
\textsuperscript{136} Debtor's Statement of Affairs, Attachment D1, \textit{In re T.H. Richards Processing Co.,} No. 282-2614-W-7 (Bankr. E.D. Cal. filed July 9, 1982).
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} \textit{Id.}
\textsuperscript{139} Response of Defendant Lawry's Foods, Inc. to Bank's First Set of Interrogatories at Exhibit A, \textit{In re T.H. Richards Processing Co.,} No. 282-2614-W-7 (Bankr. E.D. Cal. filed July 9, 1982).
placed in RICHARDS storage facilities." Lawry Foods maintained that goods sold, but held for, were distinctly identifiable within Richards' inventory "because all Lawry's product was produced especially for Lawry's according to formulas belonging to Lawry's and were placed in bottles of a unique shape and size bearing Lawry's labels." Richards also owed forty-three farmers or farming operations a total of $3.5 million in payments on contracts for purchase of farm products in the previous year's harvest.142 The average farmer's claim was $83,500.143 Among these farmer claimants, thirty-two claimed secured status against Richards because of the producer's lien.144

The Validity of the Producer's Lien in Federal Bankruptcy Proceedings

The California producer's lien does not first become effective upon the debtor's bankruptcy145 and therefore is not invalidated by section 545(1) of the Bankruptcy Code.146 The lien's effectiveness against the debtor is defined in terms of the delivery dates of the farm products to the processing company,147 rather than by criteria relating to the processor's solvency or involvement in bankruptcy proceedings.

The crucial issue in determining the validity of the producer's lien in federal bankruptcy proceedings is the enforceability of the lien against a bona fide purchaser, the test specified in section 545(2).148 To resolve this issue, the lien provisions must be examined against each of the five federal court approaches to the bona fide purchaser test.149

Under the statutory requirements approach, a state statutory lien is valid in bankruptcy if the lienholder has complied with all the requirements of the lien statute.150 A bankruptcy court taking this approach should uphold the California producer's lien. The California lien statute only requires that the farmer has delivered his products to a processing company.

140. Id.
141. Id. at 12-13.
143. Id.
145. CAL. FOOD & AGRIC. CODE § 55632 (West 1968). These provisions are discussed supra notes 27-28 & accompanying text.
146. See supra notes 72-73 & accompanying text.
148. The lien can be avoided by the trustee if it "is not perfected or enforceable at the time of the commencement of the case [in bankruptcy] against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists." 11 U.S.C. § 545(2) (1982), as amended by Bankruptcy Amendments of 1984, Pub. L. No. 98-353, § 460(3), 98 Stat. 333, 377.
149. See supra text accompanying notes 84-124.
150. See supra notes 84-89 & accompanying text.
company and that he has deferred receipt of payment for his products. Farmer-creditors of an insolvent processor have routinely complied with the statutory requirements. In Richards, once the plaintiff farmer had delivered produce to the processor on contract without receiving payment in full, the farmer had done all that the statute requires to benefit from the lien.

Under the express language approach, a state statutory lien is valid in bankruptcy when the statute expressly provides for enforceability against a bona fide purchaser. A bankruptcy court taking this approach is likely to invalidate the producer's lien. The California lien statute makes no reference to bona fide purchasers or to related categories, such as buyers in ordinary course of business. Although the statute provides that the producer's lien is "a preferred lien prior in dignity to all other liens, claims, or encumbrances," a bona fide purchaser is neither a lienholder nor an encumbrancer. The possibility that a bona fide purchaser is a claimant was dismissed by the court in In re Leach, which concluded that a "bona fide purchaser does not have a claim against the debtor." The purchaser has an ownership interest in the goods, rather than a claim. Indeed, the phrase "other liens, claims, or encumbrances" is reasonably interpreted to denote other examples of the category, security interests of creditors, to which the producer's lien belongs. Therefore, the statute has not expressly made the lien enforceable against bona fide purchasers.

This analysis of the lien statute is supported by comparing its language with that of another California agricultural lien, the lien on livestock. In the livestock lien statute, the California Legislature expressly provided that the lien on livestock sold to a meat packer survives resale of the livestock by the packer, except that a buyer in ordinary course of business takes free of such a lien even if he knows the lien

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151. CAL. FOOD & AGRIC. CODE § 55632 (West 1968).
152. Id. § 55631.
153. See supra notes 90-95 & accompanying text.
154. CAL. FOOD & AGRIC. CODE § 55633 (West Supp. 1985); see supra notes 30, 68 & accompanying text.
155. A lien is a "charge or security or encumbrance upon property." BLACK'S LAW DICTIONARY 832 (rev. 5th ed. 1979).
156. An encumbrance is an interest in land, such as a mortgage, lease, lien, or easement. Id. at 473.
158. Id. at 1009.
159. See BLACK'S LAW DICTIONARY 997 (rev. 5th ed. 1979) (ownership is "complete dominion, title").
160. See Pasadena Univ. v. County of Los Angeles, 190 Cal. 786, 790, 214 P. 868, 869-70 (1923).
161. CAL. FOOD & AGRIC. CODE § 55702 (West Supp. 1985) (gives livestock producers a lien on livestock sold to meat packers to secure payment of the purchase price).
162. CAL. COM. CODE § 1201(9) (West Supp. 1985) (defines buyer in ordinary course of
exists. Obviously, the legislature can expressly specify the impact of a statutory lien on subsequent purchasers when impact is intended. Thus, the absence of express language in the producer's lien statute making the lien enforceable against subsequent purchasers implies that the legislature intended no such result.

Under the "any one type" approach, which upholds a state statutory lien in bankruptcy if the bona fide purchaser test is met as to any one type of bona fide purchaser, the validity of the producer's lien is unclear. The lien statute is silent on the subject of bona fide purchasers, and therefore creates no distinctions among types of bona fide purchasers. There are no reported California cases construing the impact of the producer's lien on various types of bona fide purchasers.

Similarly, article 2 of the Commercial Code, which is the California law concerned with the rights of purchasers of goods, provides no clear basis for distinguishing among types of bona fide purchasers. The Commercial Code does not place great weight on delivery of the goods; a purchaser may leave goods in the hands of a seller for a commercially reasonable time without impairing the purchaser's rights. Thus, in Richards, the bill and hold purchasers of canned goods from inventory would not be viewed as a type of bona fide purchaser significantly different from others who purchased and took delivery of canned goods.

Moreover, the distinction under the producer's lien statute between legal and illegal sales by a processor does not create two types of bona fide purchasers under the Commercial Code. Under the California Commercial Code, the possible illegality of a sale of processed farm products by the processor does not affect the rights of the bona fide purchaser. Under the producer's lien statute, a processor is obligated to retain liened processed farm products in his control, unless he sells them and devotes all the proceeds to the satisfaction of lien claims. But the Commercial Code gives the bona fide purchaser good title even if the seller is in violation of his legal obligation. Thus, lacking a basis for distinguishing types of bona fide purchasers of farm products, a bankruptcy court faced

business as a purchaser who in good faith and without notice buys goods "in [the] ordinary course of business from a person in the business of selling goods of that kind").

163. CAL. FOOD & AGRIC. CODE § 55702(b) (West Supp. 1985) (thus contradicting the "without notice" element of the definition, supra note 162).

164. See supra notes 96-102 & accompanying text.


166. Id. § 2402.

167. See supra notes 136-41 & accompanying text.


169. CAL. COM. CODE § 2403(1) (West 1964) (provides in part that "[a] person with voidable title has power to transfer a good title to a good faith purchaser for value"). The Official Comment to Uniform Commercial Code § 2-403 adds: "The many particular situations in which a buyer in ordinary course of business from a dealer has been protected against reserva-
with the producer’s lien probably would adopt a version of the bona fide purchaser test other than the “any one type” approach.

Under the factual circumstances approach, a state statutory lien is valid in bankruptcy if it could be enforced against a bona fide purchaser in the factual circumstances of a particular case. The fate of the producer’s lien in a bankruptcy court adhering to this view is unclear. The California producer’s lien statute does not define the steps a bona fide purchaser must take to defeat the lien. In Richards, probably there were bona fide purchasers who had taken delivery of canned goods. The bill and hold customers of Richards had not taken possession of the canned goods they purchased, but possession has no significance under the California Commercial Code. None of these purchasers of canned goods had notice of the producer’s liens on Richards’ inventory. A bankruptcy court lacking factual circumstances supporting different rights for different bona fide purchasers probably would apply one of the other, more general approaches, rather than the factual circumstances approach.

Under the notice approach, a state statutory lien is valid if subsequent purchasers have actual or constructive notice of the lien. The California producer’s lien should be invalidated by a bankruptcy court taking this approach. The lien statute does not contain any notice or filing provisions. Moreover, in real property cases, the California courts have supported the notice approach, stating that “the policy of the law is against upholding secret liens and charges to the injury of innocent subsequent purchasers . . .” When the legislature has enacted a lien without provisions requiring recordation, the lien will be enforced “so far as it can . . . without injury to the rights of bona fide purchasers . . . .” In addition, the California Supreme Court has enforced the
policy of protecting innocent purchasers in a personal property setting. The Commercial Code also embodies this policy of protecting innocent purchasers without notice.

Finally, in the Richards setting, trade purchasers of canned goods could not know whether the goods they purchased from the processor were subject to producer's liens of farmers. Thus, upholding these liens against the actual purchasers of Richards' inventory would seem unfair.

Improving the Producer's Lien Statute

The California producer's lien is likely to be valid in federal bankruptcy proceedings under only one of the five standards used by the federal courts for the bona fide purchaser test of section 545(2). The producer's lien is likely to be invalid under two standards, and the result is unclear under two standards. Several options are available to the California Legislature to remedy the vulnerability of the producer's lien in federal bankruptcy proceedings.

First, the lien statute could be amended to provide expressly for enforceability against bona fide purchasers. A number of federal bankruptcy courts apparently would feel bound to give effect to reasonably explicit language in the statute.

A better improvement would be to add a recording requirement to the lien statute. The filing requirements need not be onerous, and California farmers, who can organize into marketing associations, surely could comply with them. Moreover, a producer's lien properly filed with the Secretary of State probably would be enforced by federal courts under all of the standards discussed above. Four of the five standards are

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179. See supra note 169.
180. Moreover, amendment to make the producer's lien expressly effective against subsequent purchasers without notice might violate due process of law. See supra notes 122-24 & accompanying text. Amendment of the lien statute to provide for notice and filing procedures might be the only way to make the lien valid in bankruptcy.
183. See supra notes 90-95 & accompanying text. The courts have not said what language would suffice.
185. CAL. FOOD & AGRIC. CODE § 54402 (West 1968) (state policy supports the organization of farmers into cooperative bargaining associations).
186. See CAL. COM. CODE § 9401(1)(c) (West Supp. 1985) (provides that financing statements under the Uniform Commercial Code must be filed in the Office of the Secretary of State).
relevant mainly when a lien statute fails to provide for notice to subsequent purchasers. These four standards allow enforcement of a lien against a purchaser, and the trustee in bankruptcy as a hypothetical purchaser without notice, whenever the statutory requirements are met,\textsuperscript{187} when statutory language expressly condones that result,\textsuperscript{188} when the factual circumstances require the innocent purchaser to have done something more to protect his rights,\textsuperscript{189} or when the state law distinguishes his rights from those of innocent purchasers generally.\textsuperscript{190} A recording provision should obviate all these concerns, making a lien easily enforceable against a subsequent purchaser with notice.

The producer’s lien also could be made unwaivable by the farmers, thus protecting them against processors with superior bargaining power.\textsuperscript{191} Artisans receive such protection under California’s mechanic's lien statute.\textsuperscript{192}

Nevertheless, legal improvements in the producer’s lien do not conclude the analysis. A crucial issue is whether an enforceable producer’s lien truly would be desirable for California farmers. Although farmers who directly experience the insolvency of a processor would benefit from a lien valid in bankruptcy,\textsuperscript{193} legal improvements in the producer's lien may not be desirable for California farmers generally.

The banking community presses the view that an enforceable pro-

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\item[187.] See supra notes 84-89 & accompanying text.
\item[188.] See supra notes 90-95 & accompanying text.
\item[189.] See supra notes 103-12 & accompanying text.
\item[190.] See supra notes 96-102 & accompanying text.
\item[191.] See supra notes 44-55 & accompanying text. Making the lien unwaivable, without simultaneously improving its enforceability in bankruptcy, would leave farmers the most vulnerable. 11 U.S.C. § 551 (1982) provides: “Any transfer avoided under [several sections including] 545 . . . of this title . . . is preserved for the benefit of the estate.” The legislative history indicates that section 551 “prevents junior lienors from improving their position at the expense of the estate [in bankruptcy] when a senior lien is avoided” by the trustee. S. REP. No. 989, 95th Cong., 2d Sess. 91, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5877. Thus, an unenforceable yet unwaived producer's lien would fail to make the farmer a secured creditor and nonetheless would interfere with the secured bank lender's interest in the canner's inventory.
\item[193.] However, there can still be a long wait for the money. The plaintiff farmers in In re T.H. Richards Processing Co., No. 282-2614-W-7 (Bankr. E.D. Cal. filed July 9, 1982) have not yet received what they are owed after more than two years.
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producer's lien on processor inventories would make financing of processing companies less attractive economically for banks. If this is true, or if the banks react as if it were true, then processors would have to pay more to obtain financing. Because market adversities may make it difficult for processors to pass financing costs to customers, the additional cost of doing business presumably would be borne by the farmers in the form of lower prices offered for farm products. In Richards, if the banks had raised the interest rates for loans to the processing company by just one percent, the additional cost per farmer would have averaged more than $1000. Thus, an enforceable producer's lien would not be a cost-free gift bestowed on the farmers by the Legislature.

Alternative Methods of Protecting Farmers

The possibility that a legally effective producer's lien would entail economic cost to farmers makes it desirable to consider other potential means of protection. In the following section, several alternatives are compared with the producer's lien for cost prior to a bankruptcy, as well as legal and financial effectiveness after a bankruptcy has occurred. The analysis reveals viable alternatives that are preferable to improvements in the producer's lien.

Change Federal Bankruptcy Law

One obvious alternative would be an amendment of the Bankruptcy Code to meet the needs of farmers. Congress could take at least two approaches: the Bankruptcy Code could be amended to provide a federal statutory lien, or to give farmers a priority among other unsecured creditors.

In 1981, Senator Dole of Kansas proposed legislation giving farmers a federal statutory lien on the farm products they sell to storage elevators. Senator Dole's bill would have given farmers selling certain kinds of farm products to a dealer/elevator a lien on the products for

194. Analysis of A.B. 774, supra note 42, at 3; see also Chicago Tribune, Aug. 22, 1982, § 5, at 1, col. 1 (a proposed Illinois law in favor of farmer-creditors led bankers to predict a halt to loans for some grain elevators).
195. See Demand, Inputs Blast Canning Industry, CAL. FARMER, Sept. 3, 1983, at 13 (“[P]rices of processed fruits and vegetables have fallen more than prices in any other food category since 1976.”).
196. This figure is calculated from Debtor's Statement of Affairs, In re T.H. Richards Processing Co., No. 282-2614-W-7 (Bankr. E.D. Cal. filed July 9, 1982).
197. See R. Posner, ECONOMIC ANALYSIS OF LAW 6 (1972) (“[S]ociety could obtain more prevention, at lower cost, using different methods . . . . [E]fficiency . . . . may be an important factor in shaping public choice.”).
sixty days from the date of the sale contract.\textsuperscript{199} The sixty-day limitation was a response to concern expressed by banking groups.\textsuperscript{200} Although the bill contained no filing requirements to perfect the lien, Senator Dole suggested that the banks could protect their interests by “conduct[ing] an examination of the books of the elevator” for the sixty days prior to extending a loan to determine what inventory purchased from farmers in that period was unpaid and thus subject to liens.\textsuperscript{201}

Senator Dole’s bill was passed by the Senate,\textsuperscript{202} but not by the House. Even if this federal lien had been enacted, however, and broadened to include sales to processors, it would have faced problems similar to those presented by California’s lien statute. The bona fide purchaser test of section 545(2) also applies to federal statutory liens,\textsuperscript{203} thus subjecting such a federal producer’s lien to avoidance by trustees in bankruptcy under the case law discussed above. Because Senator Dole’s proposed lien statute contained neither filing requirements for perfection nor express language making the lien enforceable against subsequent purchasers, it probably would have been invalid in bankruptcy. A federal lien might be a viable alternative if it included a filing requirement and/or express enforceability against bona fide purchasers.

A federal lien, however, could increase financing costs for elevators and processors,\textsuperscript{204} thus resulting in lower prices offered to farmers. If the lien had a short duration, such as the one proposed in the Dole legislation, then the cost would likely be lower than that incurred for the California lien.\textsuperscript{205} Thus, the federal lien would not be cost-free to farmers. Moreover, the sixty-day term for Senator Dole’s proposed lien would expose farmers accepting deferred payment contracts of up to a year, as in Richards,\textsuperscript{206} to the risk of an insolvency long after the lien had expired. Although the risk could be ameliorated by a notice filing procedure and a longer term, the protection would increase the economic cost to farmers, thus reducing the desirability of the federal lien alternative.

The second approach to amending the Bankruptcy Code is to give farmers a priority among general unsecured creditors, as is presently

\textsuperscript{199} Id.
\textsuperscript{201} Id.
\textsuperscript{204} 127 CONG. REC. S9831 (daily ed. Sept. 17, 1981) (statement of Senator Dole, conveying reaction of banking groups to his bill); Looney, Hamilton & Culver, supra note 15, at 570-71 (noting concern of banking groups over Senator Dole’s proposed lien).
\textsuperscript{205} See supra notes 194-96 & accompanying text (estimating cost of increased financing passed on to farmers).
\textsuperscript{206} Tomato Contract, supra note 50.
done for wage-earners.\textsuperscript{207} Such a proposal was included in Senator Dole's package of relief for farmers.\textsuperscript{208} The rationale Senator Dole offered was:

The farmer is viewed as a unique producer whose financial security is threatened by such a bankruptcy [of his buyer] in the same manner that a wage-earner is threatened by the unexpected bankruptcy of his employer, in that the farmer's main source of income—the cash crop—is jeopardized. In this respect, the rationale for the priority . . . is analogous to that supporting the priority in favor of wage-earners.\textsuperscript{209} Such a priority among general unsecured creditors would be helpful to farmers. Farmers should experience no additional cost because, lacking an effect on the interests of secured lenders,\textsuperscript{210} the priority would create no costs for processors to pass along. If, however, secured interests in equipment and inventory covered most of a debtor processor's estate in bankruptcy, a priority among unsecured creditors could still leave farmers largely unpaid.\textsuperscript{211}

Changes in the federal bankruptcy law probably are not the best solution for farmers. A federal lien that included notice filing requirements and an extended duration would entail significant costs to be passed along by buyers of farm products. A priority for farmers among unsecured creditors has some value, although the value depends on how much remains available for unsecured creditors after the secured creditors have been satisfied.

Provide a Statutory Trust

A state-legislated statutory trust impressed on farm products or proceeds of their sale by a processor could avoid the problem under section

\textsuperscript{207} 11 U.S.C. \textsection 507(a)(3) (1982) (claims for "wages, salaries, or commissions" earned during the 90 days prior to the bankruptcy, to a maximum of \$2000 per person, are satisfied ahead of other unsecured creditors).


\textsuperscript{209} 127 CONG. REC. S9832 (daily ed. Sept. 17, 1981); see also Joint Indus. Bd. of the Elec. Indus. v. United States, 391 U.S. 224, 227-28 (1968). The purpose of the priority for wage-earners was "to enable employees displaced by bankruptcy to secure, with some promptness, the money directly due to them in back wages, and thus to alleviate in some degree the hardship that unemployment usually brings to workers and their families." Id. at 226-27 (quoting United States v. Embassy Restaurant, 359 U.S. 29, 32 (1959)).


\textsuperscript{211} For example, in \textit{In re} T.H. Richards Processing Co., No. 282-2614-W-7 (Bankr. E.D. Cal. filed July 9, 1982), a \textsection 507 priority probably would not have helped the farmers. The trustee suggested that there was likely to be little left after the secured creditors' claims were satisfied. Application of Trustee for Leave to Appeal at 5, \textit{In re} T.H. Richards Processing Co., No. 282-2614-W-7 (Bankr. E.D. Cal. filed July 9, 1982).
Like a lien, such a statutory trust would give the farmer the equivalent of secured status without any filing or perfection requirements. Yet the validity of a state-imposed trust in federal bankruptcy proceedings is unclear.

The Ninth Circuit Court of Appeals, for example, invalidated an attempt in California to impress a statutory trust (applicable to money order dealers) on the whole of the debtor's commingled assets when the debtor owed any part of them to a protected creditor. The court said that to uphold such a trust, absent a requirement that the creditor be able to trace the funds into the debtor's possession, "would open the door to state creation of priorities... as 'trusts'. This would tend to thwart or obstruct the scheme of federal bankruptcy." The Ninth Circuit thus emphasized the priority of federal bankruptcy policy over state property law.

The Sixth Circuit, however, upheld a similar state statutory trust in the construction industry in Michigan, even as to untraceable commingled funds in the hands of the debtor. This court reasoned that a statutory trust is not part of the debtor's estate in bankruptcy because it belongs to the beneficiary and thus is not subject to the claims of other creditors. The Sixth Circuit emphasized the acknowledged role of the states in defining property interests such as trusts.

Thus, whether California could successfully protect farmers through a statutory trust on the inventory or proceeds in the hands of a processor is unresolved. A bankruptcy court stressing federal bankruptcy policy probably would invalidate a California statutory trust approach as a disguised state priority. A bankruptcy court more deferential to state property law would uphold such a trust.

Congress, however, may give farmers a statutory trust that is valid in bankruptcy and superior to the perfected security interests of lenders. Congress has provided livestock sellers with a federal statutory trust.

212. See generally Schneyer, supra note 71, at 25-33.
213. Id. at 30.
214. Elliott v. Bumb, 356 F.2d 749 (9th Cir.), cert. denied, 385 U.S. 829 (1966); see also Schneyer, supra note 71, at 26-28 (discussing Elliott with approval).
215. Elliott, 356 F.2d at 751.
216. Selby v. Ford Motor Co., 590 F.2d 642, 646-47 (6th Cir. 1979); Schneyer, supra note 71, at 28-30 (criticizing Selby as destructive of congressional intent to combat disguised priorities).
217. Selby, 590 F.2d at 647; see also In re Frosty Morn Meats, Inc., 7 Bankr. 988, 1006 app. A (Bankr. M.D. Tenn. 1980) (statutory trusts are not part of the debtor's estate in bankruptcy).
218. Selby, 590 F.2d at 647.
219. Frosty Morn Meats, 7 Bankr. at 1001-04 (relying on Congress' broad powers under the commerce clause, U.S. CONST. art. I, § 8, cl. 3, and the bankruptcy clause, id. at cl. 4).
trust under the Packers and Stockyards Act, and a bankruptcy court has upheld the trust in bankruptcy proceedings. The court noted that "[i]n the past Congress has frequently changed the priority rights of creditors and in so doing has merely exercised its constitutional prerogative to regulate and control bankruptcies." Most recently, Congress has enacted statutory trust protection for farmers who sell fresh produce to commission merchants, dealers, or brokers. Fresh produce and "inventories of food or other products derived" therefrom, as well as proceeds of the sale thereof, are to be held in trust for unpaid sellers of the produce. The statute expressly states that the purpose of the legislation is to overcome the effects upon farmers' security interests in dealers' inventories of farm produce. A farmer is required to file notice with the Secretary of Agriculture to preserve the benefit of the statutory trust for more than thirty days. In the situation of a deferred payment contract of sale, however, the thirty-day period commences only after the payment date specified by the contract has passed.

Unfortunately for California farmers, the federal Perishable Agricultural Commodities Act defines the term "dealer" to exclude most canneries and processing companies. If, however, the Act were broadened to include coverage of canneries, the protection for farmers would be strong. Farmers would then take priority over secured lenders in bankruptcy proceedings, and farmers would face a filing requirement only when nonpayment was already a reality.

Nevertheless, either a federal or state statutory trust plan could

220. 7 U.S.C. § 196(b) (1982) (impresses a statutory trust on livestock sold to meat packers and on proceeds of packers' resale of the livestock).
221. Frosty Morn Meats, 7 Bankr. at 1001, 1003, 1006 app. A.
222. Id. at 1004 app. A.
226. Id. § 499e(c)(1); see also Frosty Morn Meats, 7 Bankr. at 1001 app. A (enforcing policy of the trust against secured lenders).
228. Id. § 499e(c)(3)(ii); see also H.R. REP. No. 543, 98th Cong., 2d Sess. 7, reprinted in 1984 U.S. CODE CONG. & AD. NEWS 405, 410-12. The Secretary of Agriculture has the authority to regulate what constitutes a reasonable period of time to allow the benefit of this provision. If the Secretary sets a short trust period, then the statutory trust protection would be unavailing to farmers selling on longer deferred payment contracts.
229. 7 U.S.C. § 499a(f)(2) (1982) ("No person buying any commodity other than potatoes for canning and/or processing within the State where grown shall be considered a 'dealer' . . . , unless such product is frozen or packed in ice, or consists of cherries in brine . . . .").
230. It is unclear, however, whether the trust would cover a long enough period for some of the deferred payment contracts used in the canning industry. See supra note 228.
make financing more expensive for processors. Although Congress did not focus on financing problems, bankers were wary of the new produce trust plan unless it was limited to a brief period of thirty to forty days after the sale of the produce. Enforcement of such a restriction would expose farmers who sell to canneries on deferred payment contracts to the risk of an insolvency long after the trust had expired. But any expansive application of the legislation could entail substantial financing costs which would be passed along to farmers.

At the state level, a statutory trust method of protecting farmers has serious disadvantages. The statutory trust might not be legally effective in bankruptcy because the bankruptcy courts could reject it on policy grounds. Moreover, the state statutory trust method probably would be costly for farmers who will bear the increases in financing the costs of their buyers. A federal statutory trust is preferable because it apparently is valid in bankruptcy and would give farmers priority over secured lenders. That priority, however, probably would also impose significant passed-along financing costs on farmers.

Establish a Government Insurance Fund

Another alternative to the California producer's lien is the creation of a state insurance fund to reimburse farmers for losses in buyer insolvencies. California already has such a fund, the Farm Products Trust Fund. The Fund is sustained by an annual fee of $125 per licensed agricultural dealer or processor. The Fund will pay no more than fifty percent of any farmer's claim and no more than $50,000 in total claims against any one licensee. Obviously, the Fund is inadequate for insolvencies on the scale of Richards, in which farmers' claims against a single processing company totaled $3.5 million.

Other states have established far larger insurance funds, chiefly in a


232. Id. at 10-11, reprinted in 1984 U.S. CODE CONG. & AD. NEWS 405, 414.

233. See supra notes 194-96 & accompanying text.

234. See supra notes 214-15 & accompanying text.

235. See supra notes 219-22 & accompanying text.

236. See supra notes 194-96 & accompanying text.

237. An insurance fund method does not seek to make farmers secured creditors or the equivalent.

238. CAL. FOOD & AGRIC. CODE §§ 56701-56733 (West Supp. 1985). This should not be confused with the statutory trusts discussed in the preceding section.

239. Id. § 56703.

240. Id. § 56708. The limit was increased from $25,000 to $50,000 in 1983. Act of July 28, 1983, 1983 Cal. Legis. Serv. 3367 (West).

grain context. Oklahoma has a $10 million fund242 financed by an assessment on grain dealers243 who pay a small fee per bushel of grain purchased from farmers.244 Assessments are suspended whenever the fund actually contains $10 million.245 The fund pays as much as 100% of a farmer's loss in a grain dealer insolvency.246 Claim payments to farmers, however, are made only "on February 1 following the date of the claim."247 Thus, an Oklahoma farmer may have to wait as long as a year for the payment. Similarly, South Carolina provides for a $6 million fund, assessing fees based on crop value but guaranteeing payment within thirty days.248

In these states, the grain dealer presumably would pass his assessments on to the farmers. The estimated annual cost per average farmer for maintaining the state funds would be $81 in Oklahoma249 and $167 in South Carolina.250

Illinois' fund was established in 1983.251 This fund will amount to $3 million when in full operation.252 The fund is financed by annual fees assessed on grain dealers and warehousemen.253 The assessments are made according to a complex sliding scale that depends upon the bond required for licensing. The assessments range from a minimum of $750 to a maximum of $1000 per licensee annually for the first three years and one-half of those amounts thereafter.254 After the first three years, no fees are assessed if the fund's reserves are above the targeted $3 million.255

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243. Id. § 9-44.
244. Id.
245. Id. § 9-45.
246. Id.
247. Id.
248. S.C. CODE ANN. § 46-41-230 (Law. Co-op. Supp. 1983). The fund is financed by assessments levied on grain farmers and collected by grain dealers at the time of sale. Id. § 46-41-220. The assessments are one cent per bushel on soybeans (a higher value crop) and one-half cent per bushel on other grains. Id. Assessments are suspended when the fund actually has $6 million on hand. Id. § 46-41-230. The fund's goal is to pay 100% of a farmer's loss in a dealer insolvency. Unmet farmer claims are carried over for payment in following years. Id. However, the fund's administrator may reduce the payments of claims if he believes that such payments would jeopardize the fund. Id. Farmers' claims are to be paid within 30 days of submission to the fund. Depending upon the amount in the fund, such payment would constitute 25-100% of loss. Id.
249. This amount is based on the average farm size, STATISTICAL ABSTRACT, supra note 2, at 652, average yield of state's leading grain crop, id. at 663, 673, and average price for that crop, id. at 676 (1982 statistics).
250. This amount is estimated as in note 249. Because soybeans, the higher assessment crop, is also the leading grain crop, the true cost is probably lower.
252. Id. § 5(c).
253. Id. §§ 5(a)-(c), 13.
254. Id.
255. Id. § 5(c).
The Illinois fund compensates unpaid farmer-sellers in a grain elevator insolvency "for 85% of a valid claim, to a maximum of $100,000." Moreover, if the fund lacks enough money to cover the claims against it for a given insolvency, the fund statute directs the Illinois Legislature to provide the needed additional money from general revenues.

The Illinois fund uses an assessment method which obscures the probable passing on of the cost to farmers. Conversion of the total annual fees to a per-bushel basis, however, suggests an estimated cost of $13 annually for the average farmer in the state.

The protection provided by government insurance funds like those of Oklahoma, South Carolina, and Illinois is impressive. Because the protection is independent of federal bankruptcy law, its legal effectiveness is unqualified. The cost to the farmer is remarkably low, yet the coverage against loss is complete or nearly complete. Although other state insurance funds pertain only to grain crops, other crops are included in the California context.

The government insurance method is a superior alternative to the California producer's lien because it provides protection for California farmers without significantly raising their costs. The economy of the scheme is illustrated by an estimate of the cost to California farmers of an enlarged California Farm Products Trust Fund. Because California is the largest state in agricultural production, a fund of $10 million seems appropriate. Assume that the fund is accumulated over a period of five years, at $2 million in total assessments per year. Also, adopt the fairer concept of fee assessments based on crop value rather than physical measure. Based on these assumptions, the estimated cost of such a fund would be less than $25 annually for an average farmer in the state. The benefit of this protection far outweighs the annual cost. The California Legislature should provide this kind of large insurance fund.

256. Id. § 8(a). Coverage is 100% for stored grain. Id.
257. Id. § 7. If the legislature fails to act, the state treasurer is directed to transfer the money to the fund anyway. Id.
258. See supra notes 253-54 & accompanying text.
259. The annual total of license fees is allocated to an average size farm, see supra note 249, based on two leading crops, corn and soybeans.
260. See supra note 2 & accompanying text.
261. See supra note 248 & accompanying text.
262. The $25 annual fee is calculated based on an average farm size, an average yield and price for all crops combined, and an allocation of the $2 million assessments based on the value of the average farmer's marketed crops. For the figures used in the calculation, see CAL. DEP'T OF FOOD & AGRIC., CALIFORNIA AGRICULTURE SUMMARY—1982 at 2-3 (1983) (average yield and price for crops); id. at 10 (average size).
Require High-Coverage Bonding of Processors

Prior to the establishment of state insurance funds, surety bonding was the typical protective device mandated by statute.263 California formerly required processors to post a bond in order to obtain a license.264 Although business failure was one of the hazards the bond was intended to cover,265 the amount of coverage required, $5000,266 was far too low to cover potential claims in a processor insolvency. Bonding was replaced in 1977 by the greater, but still inadequate, coverage of the Farm Products Trust Fund.267

Conceivably, the Legislature could require processors to post a bond of meaningful size, for example, $3 million or more. Bonding, however, is usually limited to losses resulting from willful acts, such as violations of licensing requirements and failure to appear in court.268 In that respect, bonding differs from insurance, which creates a pool of funds to cover virtually certain but randomly distributed occurrences of losses in a large class of events.269 When bonding is required for full coverage of financial obligations, rates are high. For such a financial guarantee bond, annual rates would probably be $10 to $20 per $1000 of the principal amount,270 which amounts to $30,000 to $60,000 for a $3 million bond. The surety industry is reluctant to write such large bonds covering deferred payment contracts.271 Moreover, in the Richards example, such a bond expense for the processor, if passed along, would imply an annual cost of approximately $230 to $460 per farmer.272 This cost is much higher than for the insurance alternatives discussed in the preceding and following sections of this Note.

On the ground of high cost alone, high-coverage bonding of proces-

265. Id. §§ 55554, 55557 (failure to meet financial obligations and violations of licensing requirements are both covered by the bond).
266. Id. § 55551.
267. CAL. FOOD & AGRIC. CODE §§ 56701-56733 (West Supp. 1985) (presently, § 56708 authorizes payment of no more than $50,000 in claims against any one processor). As the number of canneries declines, see supra notes 3-4 & accompanying text, the survivors are doing larger volumes of business.
271. Id. The industry had a disastrous experience with mortgage guarantee bonds in the Depression. J. BACKMAN, supra note 269, at 175, 382.
272. This cost is calculated from Debtor's Statement of Affairs, In re T.H. Richards Processing Co., No. 282-2614-W-7 (Bankr. E.D. Cal. filed July 9, 1982).
sors is not recommended as a method of protecting farmers in processor insolvencies.

Private Insurance

Farmers could protect themselves, without any legislative intervention, by purchasing private insurance against buyer insolvencies. But such insurance apparently has been available only to grain farmers in Illinois, Iowa, and Minnesota. Private insurance was withdrawn in Illinois when the state created its own insurance fund.

The provisions of these policies illustrate what a private insurance alternative could offer. The policies offered by Farm-Bureau affiliated companies provided coverage up to $200,000 per member. In Illinois the 1983-1984 annual premium cost ranged from $36 for $50,000 coverage to $87 for $200,000. In Iowa, the 1984-1985 premiums ranged from $50 for $50,000 to $95 for $200,000. The Illinois policy was limited to $10 million in claims for any one elevator insolvency and to $50 million for all insolvencies in any one year, the Iowa policy to $10 million and $25 million, respectively.

These policies protect farmers who have entered into deferred payment contracts from the long exposure to risk of loss. In Illinois, for example, the policies protected insured farmers who contracted for the sale of grain up to thirteen months prior to an elevator insolvency. The Iowa policy covered sales for two years. In general, the policies did not provide for payment in full for a farmer's loss, and the proportion of loss payable declined depending on how long after sale the insolvency occurred. The policies paid 80% of the farmer's loss for the first ninety days after delivery of grain to the buyer. Thereafter, the proportion of loss payable declined one percent a week until it reached 65% in Illinois and 60% in Iowa. Thus, even with the insurance, a farmer would be exposed to a substantial loss in an elevator insolvency, especially on a long deferred payment contract.

The lack of complete protection was partially offset by provision for

273. The policies examined were issued by Country Mutual Insurance Co. in Illinois [hereinafter cited as Illinois Policy], and by Farm Bureau Mutual Insurance Co. in Iowa and Minnesota [hereinafter cited as Iowa Policy] (The Minnesota policy terms were in all respects identical to the Iowa terms.).
276. Iowa Policy, supra note 273.
278. Iowa Policy, supra note 273.
279. Illinois Policy, supra note 273.
280. Iowa Policy, supra note 273.
281. Illinois Policy, supra note 273; Iowa Policy, supra note 273.
283. Iowa Policy, supra note 273.
quick payment of insured losses. Within thirty days of the farmer's submission of his claim, the Illinois policy would pay 60% of the insured proportion of the prospective loss, that is, 39-48% of the loss. The Iowa policy paid 50%, that is, 30-40% of the loss, within thirty days. The advance payment feature is significant because even secured creditors may have to wait two years or more for distributions in bankruptcy.

Private insurance can provide low cost, albeit incomplete, financial protection to farmers. The protection does not depend on legislation at the state or federal level. The private insurance method, however, does impose a burden of choice on farmers: they must decide that they need the protection and then pay the premium directly, rather than indirectly in crop prices. Unfortunately, this small burden has proved too large for farmers offered the insurance opportunity. In Iowa, for example, Farm Bureau Mutual Insurance Company was unable over several years to sell enough policies for commercial viability. The company must sell 8000 to 12,000 policies annually to make the policy commercially feasible, but in 1984 only 2500 policies were sold. Consequently, the policy will not be offered in 1985.

Lacking adequate legislated protection, California farmers would be well advised to seek private insurance against processing company insolvencies. California farm organizations could undoubtedly arrange an offering of such insurance in this state, if it were financially viable. The Iowa experience, however, suggests that California farmers might not buy the policies, even if they were available.

A related issue is whether legislation is appropriate to protect those farmers who are capable of protecting themselves, but nevertheless do not. The solicitude expressed by Senator Dole for the economic vulnerability of farmers suggests that all farmers should receive the benefit of legislated protection.

The courts, however, have answered this policy question more ambiguously. Several courts have been asked to decide whether farmers

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286. For example, in *In re T.H. Richards Processing Co.*, No. 282-2614-W-7 (Bankr. E.D. Cal. filed July 9, 1982), farmers have not received what they are owed in more than two years.
287. In Illinois the policy was withdrawn before a full market test because the state established a government insurance fund. Telephone interview with official from Country Mutual Insurance Co. (Aug. 1984).
290. 127 CONG. REC. S9832 (daily ed. Sept. 17, 1981); *see supra* text accompanying note 209.
should be regarded as merchants under the Uniform Commercial Code.291 The issue is whether a farmer should be seen "as a simple tiller of the soil, unaccustomed to the affairs of business and the marketplace,"292 or as one "whose occupation includes the selling of a commodity . . . [and who] necessarily represents . . . that he has knowledge of the practices and goods involved in” marketing his crops.293 Courts in South Dakota,294 Iowa,295 Kansas,296 Utah,297 Wisconsin,298 Arkansas,299 and Alabama300 have treated farmers as nonmerchants; Illinois,301 Texas,302 and Ohio 303 have treated the farmer as a merchant. An Ohio court remarked that “[f]arming is no longer confined to simple labor. Only an agribusinessman may hope to survive.”304 The view that a farmer is a simple tiller of the soil seems incongruous in this era of elaborate futures markets, deferred payment contracts, and increasingly complex agricultural technologies. The Ohio court’s view recognizes the reality of modern farming.

Legislative protection for farmers who are running complex, modern agribusinesses can be justified. Farmers are likely to pay, whether directly or indirectly, for any form of protection from processor insolvencies. Therefore, as long as the cost of protection is not diverted to taxpayers at large, legislated relief for farmers should not be objectionable. Legislated relief can be seen as a matter of coordinating protection for those who do not manage on their own initiative to provide as much protection at as low a cost.

A Best Way?

The preceding sections of this Note have considered six methods for giving California farmers better protection in processing company insolvencies: improving the producer’s lien, changing federal bankruptcy law,
providing a state or federal statutory trust, establishing a large state insurance fund, requiring high-coverage bonding of processors, and offering private insolvency insurance. Implementation of any one of these methods, with the possible exception of the legally vulnerable state-created statutory trust, would offer farmers substantial relief from potentially heavy losses in a processor insolvency. None of the approaches are cost-free, although some, especially the state insurance fund, are very inexpensive.

In terms of the scope of financial relief from losses, the ranking of probable effectiveness is: state insurance fund, federal statutory trust, high-coverage bonding, a valid federal or state statutory lien, private insurance, and federal priority in bankruptcy. The first three of these could be designed to provide nearly total payment of a farmer's prospective loss. The effectiveness of the valid liens to cover losses depends on whether secured creditors receive complete payment on their collateral in a given insolvency. The state insurance fund and private insurance policies should provide the quickest repayment of all or part of the loss because they would not depend upon the conclusion of federal bankruptcy proceedings.

In terms of the advance cost of relief, there is probably a broad division between methods which create the likelihood of higher financing costs for processors and those which would not. Thus, the methods that would afford relief to farmers at the apparent expense of secured lenders, the valid liens and the statutory trusts, would be the most costly. Higher bonding requirements would be intermediate in cost. Cheaper protection would be afforded by insurance methods and by a federal priority in bankruptcy.

Combining these evaluations, a large state insurance fund seems the best method of protection for California farmers overall. The protection can be very cheap, complete, and prompt. In contrast, an improved California producer's lien is one of the least desirable methods. The protection, though potentially complete, is slow and expensive. Farmers, and their advocates before the California Legislature, should seek a vastly improved Farm Products Trust Fund, rather than further amendments to the producer's lien.

**Conclusion**

California farmers selling their crops to processing companies that become insolvent have been exposed to serious financial losses. California has provided two protections for such farmers: the producer's lien and the Farm Products Trust Fund. The Fund is presently grossly inadequate in scope. The producer's lien is subject to challenge as an invalid state priority in federal bankruptcy proceedings. Although the producer's lien survived an initial test in *Richards* under section 545(2) of
the Bankruptcy Code, an analysis of the federal case law suggests that the lien is likely to be invalidated on appeal.

The California Legislature easily could ensure the validity of the producer's lien in bankruptcy by adding appropriate bona fide purchaser language and by providing for the recording of the lien. These amendments, however, should be enacted only after serious consideration of alternative methods of protecting farmers, including the legal and financial effectiveness and costs of those alternative methods. Upon close inspection of the alternatives, a strengthened producer's lien statute diminishes in desirability. Protection that is cheaper, and yet more effective, could be provided by an enlarged California Farm Products Trust Fund.

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