IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	
ASPEN DAIRY,	)	
	)	CASE NO. BK04-41304
Debtor(s).	)	A04-4050
ASPEN DAIRY,	)	
	)	
Plaintiff,	)	CH. 11
	)	
vs.	)	
	)	
BANK OF AMERICA,	)	
	)	
Defendant.	)	

MEMORANDUM

This matter is before the court on debtor-plaintiff's motion for summary judgment (Fil. #25), and motion for summary judgment by the defendant (Fil. #30). W. Eric Wood represents the debtor, and Jon Blumenthal represents Bank of America. The motion was taken under advisement as submitted without oral arguments. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(K).

The issue in this adversary proceeding is the legal issue of whether post-petition milk proceeds are subject to the lender's pre-petition lien, and if so, whether it would nevertheless be equitable to permit the debtor to use them to continue its operation.

The debtor granted a pre-petition first-priority blanket security interest in, among other assets, "all products of crops or livestock, including, but not limited to, milk, eggs, ginned cotton, wool clip, and other farm products" and "all proceeds, product, offspring, rents and profits of, increases, replacements and accessions to . . . [of any collateral]".

The debtor asserts that 11 U.S.C. § 552(a) cuts off the bank's continuing lien on the property. In contrast, the bank

argues that § 552(b) permits the security interest to extend to "such proceeds, product, offspring, or profits" covered by the security agreement as are acquired by the bankruptcy estate after the commencement of the case.

Section 552 is as follows:

§ 552. Postpetition effect of security interest

> (a) Except as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.
>
> (b)(1) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, product, offspring, or profits of such property, then such security interest extends to such proceeds, product, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

There are two divergent lines of caselaw interpreting § 552. The debtor relies on what shall be called the Lawrence line of cases, after In re Lawrence, 41 B.R. 36 (Bankr. D. Minn. 1984), aff'd, 56 B.R. 727 (D. Minn. 1984), in which the bankruptcy court hewed to a strict reading of § 552, on the basis of an example given in the legislative history, to keep the exception from "swallowing the rule" by holding that "milk produced post-petition is an asset coming into existence totally after the filing and not intended to be covered by the [§] 552(b) exception." 41 B.R. at 38.

Bank of America relies on Smith v. Dairymen, Inc., 790 F.2d 1107 (4th Cir. 1986), which gave effect to a lien on post-petition milk because the pre-petition security agreement by its

terms extended to proceeds, products, and offspring of pre-petition property, which was permissible under state U.C.C. law. Smith distinguishes Lawrence as having relied on legislative history taken out of context and ignoring the plain language of § 552(b).

This court has previously refused to rely on Lawrence, suggesting that its overrefined interpretation of § 552 exceeded the plain language of the statute. In re Beck, 61 B.R. 671, 673 (Bankr. D. Neb. 1985) (finding the language of the security agreement, the bankruptcy code, and cases reaching a different conclusion than Lawrence to be clear that the security interest attached to "the natural increase and products of" the debtor's property, in this case an alfalfa crop).

The plain language of a statute is the beginning – and often the end – of statutory analysis.

> The first place to look for the meaning and purpose of a statute is in the language of the statute itself. Where the statute is clear and unambiguous, there is no need to resort to the legislative history to discern its meaning. "[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute." United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 240-41, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989). "Going behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously' even under the best of circumstances." United States v. Locke, 471 U.S. 84, 105 S. Ct. 1785, 1793, 85 L. Ed. 2d 64 (1985) (citations omitted). "The legislative purpose is expressed by the ordinary meaning of the words used." Id. "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." Id. There is a strong presumption that Congress expresses its intended purpose through the language of the statute. Ardestani v. INS, 502 U.S. 129, 135-36, 112 S. Ct. 515, 520, 116 L. Ed. 2d 496, 505 (1991) (quoting Rubin v. United States, 449 U.S. 424, 430, 101 S. Ct. 698, 702, 66 L. Ed. 2d 633 (1981)). Where the statute is clear, the court should look to the legislative history only to determine whether there is clearly

> expressed legislative intention contrary to the language which would require questioning the strong presumption that Congress expresses itself through the language of the statute. Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6, 120 S. Ct. 1942, 1947, 147 L. Ed. 2d 1, 7 (2000).

In re Farmland Indus., Inc., 294 B.R. 903, 916 (Bankr. W.D. Mo. 2003). See also In re Delbridge, 61 B.R. 484, 489 (Bankr. E.D. Mich. 1986) ("A common sense reading of the plain word 'product' is all that ought to be necessary when applying a statute that simply is not ambiguous. Any ambiguity found by others is created only by going outside the statutory language for a peek at legislative history.")

The Delbridge court went on to speculate as to why other courts had read into § 552 language that was not there:

> I surmise that the real reason certain courts agonized over the meaning of this section is that they didn't like the result that would have occurred had they played the music the way it read. In their view, if the post-petition milk were indeed encumbered by the lender's pre-petition lien, the farmer would be considerably less likely to successfully reorganize. . . . However, policy-based decision making, if defensible at all, is even less so where it is unnecessary. In this context, policy ought to be irrelevant, since § 552(b) itself contains ample room for the exercise of policy-anchored discretion.

61 B.R. at 489 (internal citations omitted).

One of the cases to anticipate the Fourth Circuit's ruling in Smith was In re Underbakke, 60 B.R. 705 (Bankr. N.D. Iowa 1986). It followed the same three-step analysis – applying § 552 "in its literal sense" – as Smith, which was decided less than a week later. The Underbakke court said, "Section 552(b) is unambiguous and its meaning is clear: when the security agreement so provides and applicable nonbankruptcy law permits, a pre-petition security interest which includes pre-petition products and their proceeds continues in the same products and proceeds after the commencement of the bankruptcy case." 60 B.R. at 708.

The Underbakke court applied the statutory analysis:

> Under applicable nonbankruptcy law, milk is specified as a farm product. . . . It is undisputed that [the creditor] has a perfected security interest in farm products and the proceeds thereof under [the Iowa U.C.C.] Thus, the Court must come to the conclusion that milk produced after the filing of the bankruptcy petition and the proceeds thereof are subject to [the creditor's] security interest.

60 B.R. at 708 (internal citation omitted). See also Smith, 790 F.2d at 1111-12 (to qualify under the § 552(b) exception, (a) there must be a pre-petition security agreement, (b) the security agreement by its terms must extend to the debtor's pre-petition property and to proceeds, product, offspring, etc., of such property, and (c) applicable non-bankruptcy law, i.e. state law, must permit the security agreement to extend to such after-acquired property). Accord In re Nielsen, 48 B.R. 274 (D.N.D. 1984); In re Wiegmann 95 B.R. 90 (Bankr. S.D. Ill. 1989); In re Bohne, 57 B.R. 461 (Bankr. D.N.D. 1985); In re Rankin, 49 B.R. 565 (Bankr. W.D. Mo. 1985); In re Johnson, 47 B.R. 204 (Bankr. D. Wis. 1985); In re Potter, 46 B.R. 536 (Bankr. E.D. Tenn. 1985); In re Hollie, 42 B.R. 111 (Bankr. M.D. Ga. 1984).

In the present case, the parties agree that the bank holds a duly perfected pre-petition lien on, *inter alia*, the cows owned by the debtor and the milk produced by those cows. The security agreement covers "[a]ll livestock now owned or hereafter acquired by Borrower," "[a]ll products of crops or livestock, including, but not limited to, milk, eggs, ginned cotton, wool clip, and other farm products," and "[a]ll proceeds, product, offspring, rents and profits of, increases, replacements and accessions to, and rights under contract of insurance now or hereafter covering, any of the Collateral." Security Agreement (attached to Fil. #26). The financing statement covers "[a]ll milk and other farm products, now owned or hereafter acquired." The Nebraska version of the U.C.C. permits the creation of a security interest in after-acquired collateral. Neb. Rev. Stat. U.C.C. § 9-204(a). "Farm products" in which a security interest may be taken includes "products of crops or livestock in their unmanufactured states." Neb. Rev. Stat. U.C.C. § 9-102(37). Regardless of whether the milk at issue is considered a "product" or "after-acquired property," the bank's security interest in it continues post-petition.

Therefore, because § 552(b) permits the bank's pre-petition security interest in milk to continue post-petition, the portion

of the debtor's motion for summary judgment dealing with that issue will be denied, and that portion of the bank's motion for summary judgment will be granted.

That finding now raises the question of whether the equities of the case nevertheless favor a different result.

Recognizing that "the farmer alone can't turn feed into milk any more than he can spin straw into gold," the Delbridge court developed a formula "intended to yield an equitable division of the products" of the joint commercial venture of the farmer and the financier in producing and selling milk. 61 B.R. at 490. The Delbridge rule states that "the lender is entitled to the same percentage of the proceeds of the post-petition milk as its capital contribution to the production of the milk bears to the total of the capital and direct operating expenses incurred in producing the milk." Id. at 491. The Lawrence court took a similar, although less structured, view of the equities provision, evaluating "the expenditures of time, labor, and funds relating to the collateral, the relative position of the secured party, and the overall rehabilitative theme of bankruptcy law." 41 B.R. at 38, aff'd, 56 B.R. 727, 728. However, the Delbridge "rule" is generally interpreted as a guideline to be applied as the merits of each particular case warrant. See Wiegmann, 95 B.R. at 94; Underbakke, 60 B.R. at 708-09; Johnson, 47 B.R. at 207.

Moreover, the equities exception to § 552 is seldom used. Courts seem to prefer an adequate protection remedy over a balancing-of-the-equities approach. See, e.g., Delbridge v. Prod'n Credit Ass'n, 104 B.R. 824, 826-27 (E.D. Mich. 1989); Underbakke, 60 B.R. at 709; Johnson, 47 B.R. at 207-08; Beck, 61 B.R. at 673-74.

Here, it is clear that feed, utilities, veterinary care, labor, and all the other inputs necessary to keep the dairy operating cost money. However, it appears that the debtor has an adequate remedy via the Bankruptcy Code and a request to use cash collateral. The parties seem to agree, at least in their written arguments, that a motion for use of cash collateral with adequate protection to the lender would be an acceptable manner of resolving the debtor's need to use milk proceeds. Therefore, the debtor's request for relief under § 552(b) will be denied, and the debtor's actual relief shall be from cash collateral agreements or court orders regarding the use of cash collateral.

Separate judgment granting Bank of America's motion for summary judgment and denying Aspen Dairy's motion for summary judgment will be entered.

DATED: February 14,2005

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:
*W. Eric Wood
*Jon Blumenthal
United States Trustee

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.

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Plaintiff,	)	CH. 11
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BANK OF AMERICA,	)	
	)	
Defendant.	)	

JUDGMENT

This matter is before the court on debtor-plaintiff's motion for summary judgment (Fil. #25), and motion for summary judgment by the defendant (Fil. #30). W. Eric Wood represents the debtor, and Jon Blumenthal represents Bank of America.

IT IS ORDERED: For the reasons stated in the Memorandum of today's date, Aspen Dairy's motion for summary judgment (Fil. #25) is denied, Bank of America's motion for summary judgment (Fil. #30) is granted, and judgment is hereby entered in favor of the defendant.

DATED: February 14, 2005

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

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