Agricultural Law Update

VOLUME 23, NUMBER 1, WHOLE NUMBER 266 JANUARY 2006

Official publication of the American Agricultural Law Association

INSIDE

Solicitation of articles: All AALA members are invited to submit articles to the Update. Please include copies of decisions and legislation with the article. To avoid duplication of effort, please notify the Editor of your proposed article.

IN FUTURE ISSUES

Fifth Circuit on disaster payments in Chapter 7

The Fifth Circuit Court of Appeals recently weighed in on the debate as to when crop disaster assistance payments become property of a Chapter 7 bankruptcy estate. *Burgess v. Sikes* (*Matter of Burgess*), — F.3d ——, 2006 WL 205043 (5th Cir., Jan. 27, 2006). In line with the Eighth Circuit decision in *Drewes v. Vote* (*In re Vote*), 276 F.3d 1024 (8th Cir. 2002), the Fifth Circuit held that the debtor does not have a legal interest in crop disaster assistance payments until the disaster legislation is enacted.

Burgess involved the crop loss disaster assistance program and a payment that the debtor received after the bankruptcy case was closed. The debtor filed a Chapter 7 bankruptcy petition in August, 2002 and received his discharge in December, 2002. The Agricultural Assistance Act of 2003 became law on February 20, 2003 and provided crop disaster assistance for crop years 2001 and 2002. The earliest date that a farmer could sign up for the assistance was June 21, 2003. When the debtor received his assistance check, the bankruptcy was reopened, and the trustee claimed the check as property of the estate.

Section 541 of the Bankruptcy Code provides that the commencement of a bankruptcy case, i.e., the filing of the petition, "creates an estate." 11 U.S.C. § 541(a)(1). This estate includes of "all legal or equitable interests of the debtor in property" at that point in time. In addition, the estate will include, "[p]roceeds, product, offspring, rents, or profits *of or from property of the estate ....*"11 U.S.C. § 541(a)(6) (emphasis added).

At issue was what legal interest the debtor had in the yet-to-be-enacted disaster relief program as of commencement of the bankruptcy case. The bankruptcy court ruled in favor of the trustee, finding the payment to be property of the estate and the district court affirmed. The debtor appealed to the Fifth Circuit and in a panel decision, the court reversed, holding that as of commencement of the case, the most that the debtor had was a "mere hope" that Congress would enact future legislation. *Burgess v. Sikes* (*Matter of Burgess*) 392 F.3d 782, 787 (5th Cir. 2004). The panel held that the debtor had no legal or equitable right to disaster relief absent enactment of the legislation; therefore he had no right to the relief as of commencement of the case. *Id*.

However, at nearly the same time as the panel decision in *Burges*s was issued, another panel within the 5th Circuit issued an unpublished decision in direct conflict. *Matter of Westmoreland*, 110 Fed. Appx. 412 (5th Cir. 2004). Petitions for rehearing both cases en banc were granted in March of 2005, although *Westmoreland* was subsequently

Cont. on page 6

Federal courts rule for farmers in two SAA challenges

In late 2005, two federal district courts ruled in favor of farmers challenging certain aspects of the Farm Service Agency's (FSA) enforcement of Shared Appreciation Agreements (SAAs).

Missouri district court rejects use of highest-and-best-use appraisal

On December 5, 2005, Judge Ortrie Smith of the Western District of Missouri issued an order setting aside a National Appeals Division (NAD) determination that had upheld FSA's calculation of recapture due under an SAA and remanding the case to USDA for reconsideration. An amended order was issued January 11, 2006. *Davies v. Johanes*, No. 05-6009-CV-W-ODS (W.D. Mo. January 11, 2006). (In both orders, Agriculture Secretary Johanns is erroneously named Johanes.) Unlike most SAA disputes that have reached the federal courts, the key issue in the *Davies* case was not a challenge to FSA's ability to claim recapture at the end of the 10-year agreement. Instead, the focus in *Davies* was on how the recapture amount was determined.

In 1992, when the farmers received a writedown of their debt and entered into the SAA, their property was valued under regulations requiring that farm property be appraised at its agricultural value, with an emphasis on income potential from farming.

Cont. on page 2

By 2002, when the property was reappraised to determine appreciation during the term of the SAA, FSA's appraisal regulations had been changed to require valuation at highest and best use, with agricultural value determined, if applicable, by rental rates.

For the recapture calculation, the farmers submitted an agricultural value appraisal in response to FSA's highest-and-best-use appraisal. This was rejected by FSA, and the farmers filed a NAD appeal, claiming that FSA was required to use the same appraisal method to determine the value of their property at the end of the SAA term as was used at the start. The NAD hearing officer upheld the agency's decision, holding that FSA had properly applied the regulations in effect in 2002 and that those regulations considered essentially the same variables measured under the regulations in effect in 1992. Upon the farmers' request for further review, the NAD Director upheld the hearing officer's determination.

The farmers filed suit in federal district court. After rejecting USDA's argument that the case belonged in the Court of Claims, the court found that the case presented two distinct questions: (1) was FSA required to comply with the 1992 regulations when determining the end value of the property; and (2) did FSA's 2002 appraisal satisfy those regulations.

The court concluded that it was "rather obvious" that the answer to the first question presented by the case was "Yes." The court held that FSA could not retroactively apply amended regulations to alter the terms or construction of contracts it already had entered into. The court further held that it would be arbitrary and capricious of FSA to use different formulas to determine the start and end values of the property. The purpose of the valuation was to measure the change, if any, over time; therefore, the court held, "the only way to accurately measure that change is to use the same formula 'before' and 'after.'"

With respect to the second question of the case, whether the 2002 appraisal complied with the 1992 regulations, FSA argued that, since the highest-and-best-use of the farmers' property was determined to be agricultural, the 2002 appraisal actually had measured the same factors as required under the 1992 regulations. The court rejected this argument, holding that the term "agricultural value" had different meanings and measured different things under each regulation. Because the 2002 appraisal did not measure the same values as the 1992 regulations, the court held that the appraisal was unlawful.

The court emphasized that it was not ruling on the relative merits of the 1992 and 2002 appraisal regulations, nor the correctness of any particular appraisal in the record. What it had concluded was that the appraisal methods prescribed by the 1992 and 2002 regulations were different and that FSA was required to use the same appraisal method at the end of the SAA term as it used at the beginning. The case was returned to FSA to reconsider the recapture amount in light of the court's holding.

The *Davies* decision was the first in which a court addressed head-on a challenge to the SAA appraisal process. In earlier cases, where appraisal issues were raised in connection with a broader attack on FSA's power to collect under an SAA, courts gave little consideration to the claims. For example, in *Pandora Farms v. Secretary, United States Department of Agriculture*, the farmer had argued that FSA should not be able to use a different valuation method under the SAA at the end of the 10 years than was used to establish the initial value. No. 00-1753-A (E.D. Va. July 5, 2001). The court rejected this argument, holding that FSA had properly applied the regulations in effect at each valuation period, and therefore there was no error. The court did not directly address the farmer's argument that the change in regulations itself was the problem and should not be enforced.

Colorado District Court rules that FSA "dithered" too long, cannot collect on SAA

On August 29, 2001, a federal district court in Colorado issued an order holding that the NAD Director had wrongly reversed a hearing officer's determination that FSA's appraisal contained errors and could not be used to determine the recapture amount due under the farmers' SAA. *Evans v. Veneman*, No. 99-M-2331 (D. Col. Aug. 29, 2001). The case was remanded to NAD for further proceedings. In November 2001, the court denied a motion by the farmers to modify the order to provide more specific direction to the agency.

In August 2002, the NAD hearing officer issued a "Corrected Remand Determination," which again found that FSA's appraisal contained errors and that FSA's decision to use that appraisal to calculate the farmers' SAA recapture was erroneous. FSA sought further review by the NAD Director, which was denied on June 30, 2003. In November 2003, the farmers filed a motion with the court to reopen the earlier case. This motion was denied in January 2004. In April 2004, the farmers filed a new complaint challenging FSA's recapture efforts. FSA opposed the complaint, arguing that there was no final agency action for the court to review since FSA now intended to obtain a new appraisal that would overcome the infirmities found by the NAD hearing officer. FSA also stated that, although the farmers had paid the underlying note in full, it did not intend to release its deed of trust until the recapture issue had been resolved.

On November 1, 2005, Judge Richard Matsch of the District of Colorado issued an order directing FSA to cancel and mark as paid in full or otherwise satisfied the farmers' original note, written down note, SAA, and deed of trust. Noting that the farmers' SAA had expired in March 1999, and that the farmers had completely paid off the underlying loan, with interest, including interest accruing during the pending case, the court concluded that the farmers were entitled to relief under the APA for "agency action unlawfully withheld or unreasonably delayed." The court castigated FSA for its "dithering response," concluding that "FSA has unreasonably delayed making a determination of any amount of appreciation in the value of the [property] during the term of the SAA." The court also held that the farmers were entitled to attorney fees because FSA's position following the August 2001 remand was not substantially justified.

Although the facts of this case are not likely to be replicated for many farmers in

Continued on page 6

Agricultural Law Update

VOL. 23, NO. 1, WHOLE NO. 266 JANUARY 2006
AALA Editor.....Linda Grim McCormick

2816 C.R. 163, Alvin, TX 77511
Phone: (281) 388-0155
E-mail: apamperedchef@ev1.net

Contributing Editors: Roger A. McEowen, Iowa State University, Ames, IA; Neil E. Harl, Iowa State University, Ames, IA; Drew L. Kershen, University of Oklahoma, Norman, OK; Doug O'Brien, National Agricultural Law Center, Drake Agricultural Law Center; Susan A. Schneider, University of Arkansas, Fayetteville, AR; Robert P. Achenbach, AALA Executive Director.

For AALA membership information, contact Robert Achenbach, Interim Executive Director, AALA, P.O. Box 2025, Eugene, OR 97405. Phone 541-485-1090. E-mail RobertA@aglaw-assn.org.

Agricultural Law Update is published by the American Agricultural Law Association, Publication office: County Line Printing 6292 NE 14th Street, Des Moines, IA 50313. First class postage paid at Des Moines, IA 50313.

Agricultural law bibliography: 4th Quarter 2005

Administrative Law

Clark, *So Near, Yet So Far: The Past, Present, and Future of the Complaints Process within the USDA*, 32 S.U. L. Rev. 139-195 (2005).

Agricultural law: attorney roles and educational programs

Schneider, *Thoughts on Agricultural Law and the Role of the American Agricultural Law Association*, 10 Drake J. Agric. L. 1-6 (2005).

Aquaculture

Student Article, *Thinking Globally, Acting Locally: Cleaning Up Global Aquaculture through Eco-Labeling in the United States*, 26 Pub. Land & Resources L. Rev. 121-147 (2005).

Bankruptcy

Chapter 12

Haupt, *When is a Farmer a "Family Farmer"?: An Analysis of Chapter 12 Income Qualification*, 29 Okla. City L. Rev. 725-735 (2004).

Biotechnology

Ascencio, *The Transboundary Movement of Living Modified Organisms: Issues Relating to Liability and Compensation*, 6 Receil 293-303 (1997).

Comment, *Mutating Nemo: Assessing the Environmental Risks and Proposing the Regulation of the Transgenic GloFish™*, 57 Admin. L. Rev. 903-925 (2005).

Jaffe, *Implementing the Cartagena Biosafety Protocol through National Biosafety Regulatory Systems: An Analysis of Key Unresolved Issues*, 5 J. Pub. Aff. 299-311 (2005).

Lasker, *Federal Preemption and State Anti-"GM" Food Laws*, 20 Legal Backgrounder # 60 Wash. Leg. Foundation 12-2005.

Ludlow, *Cultivating Chaos: State Responses to Releases of Genetically Modified Organisms*, 2004 Deakin L. Rev. 1-40.

Special Issue on Sustainable Regulation of Biotechnology, 8 Asia Pac. J. Envtl. L. 1-220 (2004).

Lyster & Franklin, *Interdisciplinary Reflections on the Sustainable Regulation of Biotechnology*, 1-6

Kemp, *Biotechnology Regulation: GMOs, Agriculture, Science and the Environment*, 7-27

Ahmadi-Esfahani, *Is Regulation of Agricultural Biotechnology Economically Justified?*, 29-46

Irwin, *Scientific Governance in Europe: Towards a Critical Perspective*, 47-66

Wang, Tianbao & Lu, *Cartagena Protocol on Biosafety and China's Practice*, 67-96

Tager & Phelps, *A Critique of the Australian Gene Technology Act and its Implementation*, 97-110

Lyster, *Sustainability, Regulatory Dilemmas and GMOs: The US and the EU Compared*, 111-139

Wheen, *Genetic Modification, Risk Assessment, and Maori Belief under New Zealand's Hazardous Substances and New Organisms Act 1996*, 141-176

Morgan, *International Trade Rules and the Implications for Biotechnology Regulation*, 177-208

Comment, *Harvest for the World: Notes on Modern Biotechnology Regulation in the Philippines*, 209-220

Environmental issues

Garry, *Managing Carbon in a World Economy: The Role of American Agriculture* (National AgLaw Center Publications) 2005 http://www.nationalaglawcenter.org

Note, *Reflexive Law Solutions for Factory Farm Pollution*, 80 N.Y.U. L. Rev. 1505-1548 (2005).

Farm labor

Aliens

Note, *Guest Worker Policy: A Critical Analysis of President Bush's Proposed Reform*, 56 Hastings L. J. 1095-1120 (2005).

Farm policy and legislative analysis

Domestic

Note, *Green Payments: The Next Generation of U.S. Farm Programs?*, 10 Drake J. Agric. L. 173-204 (2005).

International

Note, *The Aerial Eradication of Illicit Coca Crops in Colombia South America: Why the United States and Colombian Governments Continue to Postulate its Efficacy in the Face of Strident Opposition and Adverse Judicial Decisions in the Colombian Courts*, 10 Drake J. Agric. L. 205-245 (2005).

Fruits & vegetables — perishable agricultural commodities

Student Article, *Addressing the Shaky Legal Foundations of Florida's Fight against Citrus Canker*, 20 J. Land Use & Envtl. L. 453-488 (2005).

Hunting, recreation & wildlife

Endres & Uchtmann, *Survey of Illinois Law: The Latest Twist on the Illinois Recreational Use of Land Water Areas Act: Clamping Down on Land-Owners Immunities*, 29 S. Ill. U. L. J. 579-601 (2005).

Lancaster, *Restraining Yellowstone's Roaming Bison*, 20 J. Land Use & Envtl. L. 423-450 (2005).

International trade

Gillon, *The Panel Report in the U.S.-Brazil Cotton Dispute: WTO Subsidy Rules Confront U.S. Agriculture*, 10 Drake J. Agric. L. 7-56 (2005).

Laidlaw, *Is it Better to be Safe than Sorry? The Cartagena Protocol Versus the World Trade Organization*, 36 Victoria U. Wellington L. Rev. 427-468 (2005).

Note, *Rice and Cheese, Anyone? The Fight over TRIPS Geographical Indications Continues*, 30 Brook. J. Int'l L. 1141-1174 (2005).

Note, *From Catfish to Shrimp: How Vietnam Learned to Navigate the Waters of "Free Trade" as a Non-Market Economy*, 90 Iowa L. Rev. 1963-1990 (2005).

Peoples, *International Trade in Agricultural Products: A Research Guide*, 29 Okla. City L. Rev. 683-724 (2004).

Land use regulation

Land use planning and farmland preservation techniques

Cordes, *Fairness and Farmland Preservation: A Response to Professor Richardson*, 20 J. Land Use & Envtl. L. 371-402 (2005).

Organizational forms for agriculture (business law & development)

Incorporation

Deal, *Can an Unhappy Minority Shareholder Divide a Family Farm? Oklahoma's Good Cause Rule for Dissolution of a Family Farm Corporation*, 29 Okla. City L. Rev. 661-682 (2004).

Patents, trademarks & trade secrets

Comment, *Pass the Parmesan: Geographic Indications in the United States and the European Union–Can There Be Compromise?*, 19 Emory Int'l L. Rev. 427-463 (2005).

Kariyawasam, *The Recent Law Reforms and Plant Intellectual Property Law in Sri Lanka: Compliance with the TRIPS and CBD*, 7 Australian J. Asian L. 169-186 (2005).

Note, *Is There an International Solution to Intellectual Property Protection for Plants?*, 37 Geo. Wash. Int'l L. Rev. 997-1029 (2005).

Note, *Intellectual Property: The Overlap Between Utility Patents, Plant Patents, the PVPA, and Trade Secrets and the Limitations on That Overlap*, 81 N. D. L. Rev. 171-198 (2005).

Siebrasse, *Comment on Monsanto Canada Inc. v. Schmeiser*, 83 Canadian B. Rev. 967-992 (2005).

Siebrasse, *Patent Use, Intent and Remedy in Light of Monsanto v. Schmeiser*, 22 Canadian Intell. Prop. Rev. 453-494 (2005).

Rural development

Mitchell, *Destablilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism*, 2005 Wis. L. Rev. 557-615.

Taxation

McEowen & Harl, *Selected Farm and Small Business Tax Issues*, 10 Drake J. Agric. L. 37-104 (2005).

Torts and insurance

Comment, *Pennsylvania's Right-To-Farm Law: A Relief for Farmers or an Unconstitutional Taking?*, 110 Penn. St. L. Rev. 163-185 (2005).

Uniform Commercial Code

Cont. on page 6

Federal court strikes down Nebraska corporate farming law

By Roger A. McEowen and Neil E. Harl

In late 2005, the Federal District Court for the District of Nebraska held, in *Jones, et al. v. Gale, et al.*,[1] that the Nebraska Constitutional provision restricting unauthorized corporate involvement in certain types of agricultural activities[2] is unconstitutional on "dormant commerce clause" grounds and on the basis that the provision violates the Americans with Disabilities Act (ADA).[3] The Nebraska Attorney General is appealing the ruling to the United States Court of Appeals for the Eighth Circuit, which has ruled twice on anti-corporate farming restrictions in other states in recent years.[4] The case represents the most recent judicial pronouncement concerning the ability of a particular state's citizenry to shape the future structure of agriculture within that state.

Overview–anti-corporate farming restrictions

Presently, nine states prohibit corporations from engaging in agriculture to various degrees.[5] The restrictions grew out of rising concern across the country that several key sectors of the U.S. economy were becoming controlled by a few large firms and multi-state corporations.[6] While the laws are not designed to slow down or prevent structural change in agriculture, they are designed to control the organizational form of farming operations based on ownership arrangements. Until recently, no appellate-level court at either the state or federal levels had ever held a state anti-corporate farming law unconstitutional.[7]

Initiative 300

The Nebraska anti-corporate farming law (I-300) was added to the state Constitution in 1982 by voters through the initiative and referendum process. The law prohibits a corporation or syndicate from acquiring or obtaining an interest in any title to real estate used for farming or ranching in Nebraska, or from engaging in farming or ranching in the state. A syndicate is defined as a limited partnership other than a limited partnership in which the partners are members of a family or a trust created for the benefit of a member of the family, related to one another within the fourth degree of kindred (first cousins) or their spouses, at least one of whom is a person residing on or actively engaged in the day-to-day labor and management of the farm or ranch. Numerous exceptions exist, but the major one is for family farm or ranch corporations (defined as a majority of the voting stock held by members of the family) or a trust created for the benefit of a member of the family. The majority shareholders must be related to each other within the fourth degree of kindred (or be the spouse of a family member), and at least one family member must either reside on the farm or be actively engaged in the day-to-day labor and management of the farm.[8]

***Jones, et al. v. Gale, et al.*[9]**

The plaintiffs were engaged in agricultural activities to a certain degree. They all claimed that I-300 barred their proposed activities and challenged the law on the basis that it violated the "dormant commerce clause," the Privileges and Immunities Clause and the Equal Protection Clause of the U.S. Constitution. Two of the plaintiffs were disabled and claimed that I-300 also violated the ADA[10] because of the requirement that at least one family member be "a person residing on or actively engaged in the day to day labor and management of the farm or ranch."

The "dormant commerce Clause"

The Commerce Clause of the U.S. Constitution[11] forbids discrimination against commerce, which repeatedly has been held to mean that state and localities may not discriminate against the transactions of out-of-state actors in interstate markets even when the Congress has not legislated on the subject.[12] The overriding rationale of the commerce clause was to create and foster the development of a common market among the states and to eradicate internal trade barriers. Thus, a state may not enact rules or regulations requiring out-of–state commerce to be conducted according to the enacting state's terms.[13] So, states have the power to regulate economic activity within their borders, but cannot do so in a discriminatory manner. If the state has been motivated by a discriminatory purpose, the state bears the burden to show that it is pursuing a legitimate purpose that cannot be achieved with a nondiscriminatory alternative.[14] However, if the state regulates without a discriminatory purpose but with a legitimate purpose, the provision will be upheld unless the burden on interstate commerce is clearly excessive in relation to the benefits that the state derives from the regulation.[15] In essence, a state is free to regulate economic transactions occurring within its borders in the manner it deems appropriate as long as it is done in a nondiscriminatory fashion, but is not free to regulate economic conduct occurring elsewhere.[16]

The court's "dormant commerce clause" analysis

The court held that I-300 was facially discriminatory because it "was conceived and born in protectionist fervor," and that the ballot title and language of I-300 clearly indicated that Nebraskans would be given "favored treatment" on the basis that it would be more economically feasible for those living in close proximity to Nebraska farm and ranches to provide "day-to-day physical labor and management." As such, the court continued down the path established by the Eighth Circuit in two earlier cases involving anti-corporate farming laws from South Dakota and Iowa, where the court did not examine the actual impact on economic conduct by in-state and out-of-state firms, instead relying on statements of legislators and ballot titles to find discrimination against interstate commerce.[17] But, the court appeared to go even further when it stated, "When it is apparent from the *language* of a …state constitutional amendment…that its *effect* is to burden out-of state economic interests and benefit in-state economic interests, the party challenging it should not be required to bear the burden of an evidentiary hearing to prove the obvious" [emphasis added]. Unfortunately, the court did not provide any explanation as to how the text of I-300, by itself, can have a discriminatory impact on interstate commerce. While the court was correct to examine the text of I-300, the text clearly applies to any corporation or syndicate "organized under the laws of any state of the United States." The provision does not provide preferential treatment for Nebraska firms as compared to out-of-state firms. All firms wishing to engage in agricultural activities in Nebraska are subject to an identical set of rules, as far as I-300 is concerned. Consequently, an appropriate question is whether I-300 burdens interstate commerce excessively in relation to the benefits that the state derives from I-300.[18] That is not likely to be the case, particularly since I-300 does not contain any prohibition against agricultural contracting activities.[19]

The court also found a discriminatory effect associated with the requirement that a family member provide (as the court referred to it) "day-to-day physical labor and management." The actual language of I-300 requires that a family member of a qualified entity be a "person residing on or actively engaged in the day-to-day labor and management of the farm or ranch…" The test is one of *active engagement* and not, as the court put it, the provision of "day-to-day physical labor and

Roger A. McEowen is Associate Professor of Agricultural Law, Iowa State University, Ames, Iowa; member of KS and NE Bars and Honorary Member of IA Bar.

Neil E. Harl is Charles F. Curtiss Distinguished Professor in Agriculture and Emeritus Professor of Economics, Iowa State University, Ames, IA; member of the IA Bar.

management." While the court relied on *Hall v. Progress Pig, Inc*.,[20] for its reasoning, that case involved the construction of the terms "labor" and "management" and did not directly address the question of the meaning of "active engagement" in the context of the provision of labor and management. There is authority for the notion that "active engagement" requires much less than actually rendering labor and management on the premises. For example, under USDA payment limitation rules, one of the requirements that a farmer (or otherwise eligible entity) must satisfy to be eligible for federal farm program payments is the active engagement test.[21] As part of the active engagement test, the individual (or entity) must make a significant contribution of active personal labor or active personal management (or a combination thereof).[22] While hired services do not count,[23] it is clear that active personal management need not be performed on the farm to satisfy the test–a person can contribute active personal management while living in a distant town.[24] Active engagement in labor activities can be achieved via contract. In any event, under I-300, the mere fact that the shareholder resides on the farm negates the requirement that the shareholder be actively engaged in the day to day labor and management of the farm.

The ADA claim

The Court also found that I-300 was invalid under the Constitution's Supremacy Clause because it conflicted with the ADA on the basis that two of the plaintiffs were disabled and could not perform the daily physical labor that the court believed I-300 required. The ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be discriminated by any such entity."[25] While the court noted that "public entity" has been construed broadly to apply to all actions of state and local governments, the court did not address the point that I-300 did not involve the action of a governmental body. Instead, I-300 was the result of the initiative and referendum process and was approved by Nebraska voters.[26] No action or activity of government was involved. The court also did not address the applicability of the ADA to Nebraska farming operations. The ADA only applies to "employers" that have 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.[27]

Conclusion

The court's opinion appears to be seriously flawed in several respects. However, it is questionable whether the opinion will be reversed on appeal. Except for its opinion in *Hampton*,[28] the Eighth Circuit has not shown much willingness to analyze deeply the dormant commerce clause issue. If the decision stands, it will have a dampening effect on a state's efforts to ensure competitive markets for agricultural products and a level playing field for independent agricultural producers. Increased pressure could also be placed on the Congress to address the anti-competitive effects of concentrated agricultural markets and vertically integrated agricultural production supply chains.

Reprinted with permission from the January 6, 2006 Agricultural Law Digest, Volume 17, No. 1.

[1] No. 8:04-CV645, 2005 U.S. Dist. LEXIS 35361 (D. Neb. Dec. 15, 2005).

[2] The Nebraska provision is contained in Article XII, Section 8 of the Nebraska Constitution.

[3] The court did rule, however, that the Nebraska provision did not violate the Privileges and Immunities Clause or the Equal Protection Clause of the U.S. Constitution.

[4] See *South Dakota Farm Bureau, Inc. et al. v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003), *cert. denied*., 541 U.S. 1037 (2004); *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061 (8th Cir. 2004), *vac'g.* and *rem'g.*, 241 F. Supp. 2d 978 (S.D. Iowa 2003).

[5] The states are Iowa (Iowa Code § 9H.1 *et seq*.); Kansas (Kan. Stat. Ann. § 17-5901 *et seq*.); Minnesota (Minn. Stat. Ann. § 500.24 *et seq*.); Missouri (Mo. Ann. Stat. § 350.15); Nebraska (Neb. Const. Art. XII, § 8(1)); North Dakota (N.D. Cent. Code § 10-06.1-02); Oklahoma (Okla. Const. Ar. XXII, 2); South Dakota (S.D. Codified Laws § 47-9A-3); and Wisconsin (Wis. Stat. Ann. § 182.001).

[6] These concerns resulted in passage of the Sherman Act in 1890, the Clayton Act in 1914, the Packers and Stockyards Act in 1921 and the Robinson-Patman Act in 1936. The basic idea of federal intervention in the marketplace was to maintain competition and protect small, independent businesses against unfair competition from vertically integrated, multi-location chain stores.

[7] *See, e.g., Asbury Hospital v. Cass County*, 326 U.S. 207 (1945), *aff'g,* 16 N.W.2d 523 (N.D. 1944) (upholding North Dakota provision against alleged violations of equal protection, due process, privileges and immunities, and contract clauses of Constitution); *State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801 (Mo. 1988) (upholding Missouri provision against equal protection and due process challenge); *Omaha National Bank v. Spire*, 223 Neb. 209, 389 N.W.2d 269 (1986) (upholding Nebraska Constitutional provision against equal protection challenge)

[8] A stockholder can be a corporation or partnership if all of the stockholders or partners are related within the fourth degree of kindred to the majority of stockholders in the family farm corporation.

[9] No. 8:04-CV645, 2005 U.S. Dist. LEXIS 35361 (D. Neb. Dec. 15, 2005).

[10] 42 U.S.C. §§ 12101 *et seq*.

[11] Article I, § 8, Clause 3.

[12] *See, e.g., Dean Milk Co. v. Madison*, 340 U.S. 349 (1951) (holding as unconstitutional city ordinance prohibiting sale of milk in city unless bottled at approved plant within five miles of city); *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333 (1977) (state statute requiring all closed containers of apples sold or shipped into state to bear "no grade other than applicable U.S. grade or standard" held unconstitutional discrimination against commerce).

[13] *See, e.g.*, *American Meat Institute, et al. v. Barnett*, 64 F. Supp. 2d 906 (D. S.D. 1999) (South Dakota price discrimination statute declared unconstitutional because it applied to livestock slaughtered in South Dakota regardless of where livestock purchased).

[14] *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322 (1979). But, the plaintiff bears the initial burden of proving discriminatory purpose. *Id.*

[15] *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)(state law prohibiting interstate shipment of cantaloupes not packed in compact arrangements in closed containers, even though furthering legitimate state interest, held unconstitutional due to substantial burden on interstate commerce).

[16] *See, e.g., Baldwin v. G.A.F. Seeling, Inc.*, 294 U.S. 511 (1935) (court struck down statute requiring milk purchased out-of-state to not be sold in New York unless out-of-state producers had received New York minimum price); but see *Nebbia v. New York*, 291 U.S. 502 (1934) (court upheld New York law setting minimum prices paid to milk producers, as applied to purchases by New York retailers from New York producers).

[17] *South Dakota Farm Bureau, Inc. et al. v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003), *cert. denied*., 541 U.S. 1037 (2004); *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061 (8th Cir. 2004), *vac'g.* and *rem'g*., 241 F. Supp. 2d 978 (S.D. Iowa 2003).

[18] In *Hampton Feedlot, et al. v. Nixon, 249 F.3d 814 (8th Cir. 2001),* the court upheld against a dormant commerce clause challenge provisions of the Missouri Livestock Marketing Law which barred livestock packers purchasing livestock in Missouri from discriminating against producers in purchasing livestock except for reasons of quality, transportation costs or special delivery times. The court noted that the Missouri statute only regulated livestock sold in Missouri and was indifferent to livestock sales occurring outside Missouri and had no chilling effect on interstate commerce because packers could easily purchase livestock other than in Missouri to avoid the Missouri provision. In addition, the court specifically opined that the Missouri legislature had the authority to determine the course of its farming economy and that the legislation was a constitutional means of doing so.

[19] The court mistakenly stated that I-300 barred one of the plaintiffs from entering into contracts with out-of state firms for the raising and feeding of livestock. That would only be the case if, under a particular contract's terms, an otherwise disqualified organization either obtains an interest in Nebraska real estate used for farming or is deemed to be engaged in farming in Nebraska. Unfortunately, the court did not provide that necessary analysis.

[20] 259 Neb 407, 610 N.W.2d 420 (2000). The Nebraska Supreme Court held that I-300 required the shareholder to render physical labor and participate directly in management of the operation.

[21] 7 U.S.C. § 1308-1(b).

[22] 7 U.S.C. § 1308-1(b)(2)(A)(i).

[23] 7 C.F.R. § 1400.3.

[24] Also, USDA regulations define "active personal management" to include the marketing and promotion of agricultural commodities produced by the farming operation." 7 C.F.R. § 1400.3. That seems to indicate that "active personal management" can be found to be present

Cont. on p. 6

Ag law bibliography/Cont. from page 3

Article Nine (Security Interests)

Meyer, *Current Article 9 Issues and Agricultural Credit*, 10 Drake J. Agric. L. 105-172 (2005).

Water rights: agriculturally related

Aiken, *The Western Common Law of Tributary Groundwater: Implications for Nebraska*, 83 Neb. L. Rev. 541-595 (2005).

MacDonnell, *Out-Of-Priority Water Use: Adding Flexibility to the Water Appropriation System*, 83 Neb. L. Rev. 485-540 (2005).

Note, *From Toilet to Tap: The Growing Use of Reclaimed Water and The Legal System's Response*, 47 Ariz. L. Rev. 773-804 (2005).

If you desire a copy of any article or further information, please contact the Law School Library nearest your office. The National AgLaw Center website < http://www.nationalaglawcenter.org > http://www.aglaw-assn.orghas a very extensive Agricultural Law Bibliography. If you are looking for agricultural law articles, please consult this bibliographic resource on the National AgLaw Center website.

—Drew L. Kershen, Professor of Law, The University of Oklahoma, Norman, OK

Iowa enters into consent decree with Cargill on packer ownership and grower rights

Iowa Attorney General Tom Miller announced on January 19th that the state had entered into a consent decree with Cargill that suspends the state's ability to enforce the state's ban on packer's ownership of livestock1 in return for Cargill's promise to provide contract growers a number of rights.2 The decree runs for ten years. The Cargill decree is very similar to a decree entered into by the state with Smithfield Foods announced on September 16, 2005. The Smithfield decree was the result of Smithfield's challenge to Iowa's law that argued the law violated the dormant commerce clause of the U.S. Constitution. The Cargill decree effectively circumvents both a possible similar challenge by Cargill and the State's ability to enforce the law against Cargill.

Beyond delineating producers' state statutory right, such as the right to use contract grower's liens3 and the right to review production contracts,4 the agreement also prohibits Cargill from retaliating or discriminating against growers who want to join an association, and waives Cargill's ability to argue federal preemption in a suit arising from the Consent Decree. Cargill is also required to bargain in good faith with any such association. The consent decree requires that Cargill provide growers the statistical information on which payments are based and allow growers to observe the weighing of the animals. As to capital investments, the agreement precludes Cargill from requiring added investment during the term of the contract, with special provisions for capital investments required by law or that cannot be financed by the grower.

The decree provides both a private right of action and state enforcement. The private right of action provides growers the ability to obtain damages related to the breach of the consent decree as well as attorney's fees. The law of the state of Iowa applies to any disputes arising form a production contract and venue shall be in the county where the grower resides or in the U.S. District Court in Iowa.

—Doug O'Brien, National Agricultural Law Center, Drake Agricultural Law Center

[1] Iowa Code § 201B.201.

[2] The Attorney General's press release and a link to the actual consent decree can be found at http://www.iowaattorneygeneral.org/latest_news/releases/jan_2006/cargill.html.

[3] Iowa Code Chs. 579A and 579B.

[4] Iowa Code § 202.3.

Chapter 7/Cont. from page 1

settled. *In re* Burgess, 403 F.3d 323 (5th Cir. 2005); *In re* Westmoreland, 403 F.3d 324 (5th Cir. 2005).

The full Fifth Circuit, delayed by hurricanes and in obvious conflict, finally issued its opinion on January 27, 2006. The majority held that the debtor did not obtain a legal interest in the disaster-relief payment until Congress passed the relief statute in 2003. Echoing the *Burgess* panel decision, the court stated that "[a]t the commencement of his bankruptcy case, Burgess had only a mere hope that the legislation would be enacted. A hope will not suffice under [section] 541.". *Burgess*, — F.3d ——, 2006 WL 205043 at * 14.

A lengthy dissenting opinion follows the majority opinion. Chief Judge Edith Jones was joined by six of her colleagues in opposition to the majority. The dissent argued for a ruling that would de-emphasize the "temporal limitation" placed on the definition of property of the estate under § 541(a)(1) and argued alternatively that the payments should be characterized as proceeds of crops under § 541(a)(6). The dissent did not address the requirement that the proceeds be "of or from property of the estate," a problem under the facts of the case, as there were no crops included in the estate.

The same issue is under consideration by the Eleventh Circuit court in the case of *Bracewell, v. Kelley*, (*In re Bracewell*), 322 B.R. 698 (M.D. Ga 2005), appeal docketed, No. 05-11951 (11th Cir. Apr. 8, 2005).

—Susan A. Schneider, Associate Professor and Director, Graduate Program in Agricultural Law, University of Arkansas School of Law

For a discussion of the arguments raised before the court in Burgess, as well as an overall analysis of related issues, see Susan A. Schneider, Who Gets the Check: Determining When Federal Farm Program Payments are Property of the Bankruptcy Estate, 84 Neb. L.Rev. 469 (2005).

SAA/Cont. from page 2

dispute with FSA over SAA recapture amounts, the holding could be read to have broader application for farmers dealing with FSA action that is "unreasonably delayed."

—Karen Krub, FLAG

Nebraska/Cont. from page 5

through a crop marketing agreement with another farming operation. See *Mages v. Johanns*, No. 03-1400, 2005 U.S. App. LEXIS 28735 (8th Cir. Dec. 27, 2005) (issue mentioned but not in issue; reserved for possibility of being raised on remand).

[25] 42 U.S.C. § 12132. Under the statute, "public entity" is defined to include "any State or local government; [and] any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1)(A)-(B).

[26] The court simply referenced an earlier opinion of a different federal court on the same issue for the proposition that I-300 violated ADA. See *South Dakota Farm Bureau v. Hazeltine*, 202 F. Supp. 2d 1020 (2002)(ADA claim involving an amendment to the South Dakota anti-corporate farming law).

[27] 42 U.S.C. § 12111(5)(A)

[28] 249 F.3d 814 (8th Cir. 2001).

Federal Register summary from November 12, 2005 to January 13, 2006

AGRICULTURAL ECONOMICS. The Economic Research Service has issued its 2005 report on the economic outlook for agriculture. The report provides historical estimates and forecasts of farm sector financial information that allow readers to gauge the financial health of the nation's farmers and ranchers. The report is available on the web at http://www.ers.usda.gov/publications/so/view.asp?f=economics/ais-bb/ **Agricultural Income and Finance Outlook, AIS-83, Nov. 2005**.

COTTON. The CCC has adopted as final regulations changing the Extra Long Staple cotton price used to calculate the payment rate from the "average domestic spot price quotation for base quality U.S. Pima cotton" to the "American Pima c.i.f. Northern Europe" price. **70 Fed. Reg. 67342 (Nov. 7, 2005)**.

CROP INSURANCE. The FCIC has issued interim regulations allowing for crop insurance in areas where insurance for a particular crop is not offered, usually because the crop is not commonly grown in the area. Under previous law, the FCIC would provide insurance only after receiving data of a history of production of the crop to be insured. Under Section 780 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2006, crop insurance may be offered after receiving data of the crop to be insured or a similar crop. The interim regulations implement this change. **70 Fed. Reg. 71749 (Nov. 30, 2005)**.

FARM CREDIT ADMINISTRATION. The FCA has issued proposed regulations that allow a Farm Credit System (FCS) bank or association to terminate its FCS charter and become a financial institution under another federal or state chartering authority. The proposed regulations update the existing regulations by separating the FCA review of stockholder disclosure information from the review of the termination itself and by strengthening the role of an institution's directors in the termination process. **71 Fed. Reg. 1704 (Jan. 11, 2006)**.

FARM LABOR. The National Agricultural Statistics Service has issued farm employment figures as of October 9-15, 2005. There were 1,129,000 hired workers on the nation's farms and ranches the week of October 9-15, 2005, down 4 percent from a year ago. Of these hired workers, 840,000 workers were hired directly by farm operators. Agricultural service employees on farms and ranches made up the remaining 289,000 workers. All NASS reports are available free of charge on the internet. For access, go to the NASS Home Page at: http:/www.usda.gov/nass/. **Sp Sy 8 (11-05).**

FRUITS AND VEGETABLES. The AMS has issued proposed regulations which amend the fruits and vegetables regulations to list a number of fruits and vegetables from certain parts of the world as eligible, under specified conditions, for importation into the United States. Some of the fruits and vegetables are already eligible for importation under permit, but are not specifically listed in the regulations. All of the fruits and vegetables, as a condition of entry, would be inspected and subject to treatment at the port of first arrival as may be required by an inspector. **70 Fed. Reg. 75967 (Dec. 22, 2005)**.

KARNAL BUNT. The APHIS has issued interim regulations adding areas in Maricopa and Pinal counties in Arizona to the list of regulated areas. **70 Fed. Reg. 73553 (Dec. 13, 2005)**.

MEAT AND POULTRY. The FSIS has issued interim final regulations which continue to provide that individual meat and poultry products bearing the claim "healthy" (or any other derivative of the term "health") must contain no more than 480 milligrams (mg) of sodium; and that meal-type products bearing the claim "healthy" (or any other derivative of the term "health") must contain no more than 600 mg of sodium. FSIS is deferring indefinitely, until further notice, implementation of the requirements that individual meat and poultry products bearing the claim "healthy" (or any other derivative of the term "health") contain no more than 360 milligrams (mg) of sodium and that meal-type products bearing the claim "healthy" (or any other derivative of the term "health") contain no more than 480 mg of sodium.**71 Fed. Reg. 1683 (Jan. 11, 2006)**.

MUSHROOMS. The AMS has announced that it plans a review of the Mushroom Promotion, Research, and Consumer Information Order to determine whether the Order should be continued without change, amended, or rescinded (consistent with the objectives of the Mushroom Promotion, Research, and Consumer Information Act of 1990) to minimize the impacts on small entities. AMS will consider the continued need for the Order; the nature of complaints or comments received from the public concerning the Order; the complexity of the Order; the extent to which the Order overlaps, duplicates, or conflicts with other federal rules, and, to the extent feasible, with state and local regulations; and the length of time since the Order has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the Order. **70 Fed. Reg. 73945 (Dec. 14, 2005)**.

POTATOES. The AMS has announced that it plans a review of the Potato Research and Promotion Plan to determine whether it should be continued without change, amended, or rescinded (consistent with the objectives of the Potato Research and Promotion Act of 1971) to minimize the impacts on small entities. **70 Fed. Reg. 73945 (Dec. 14, 2005)**.

TOBACCO. Under 7 CFR part 1463, CCC must determine the market share of a tobacco product manufacturer or tobacco product importer as a percentage of six statutorily specified sectors of the tobacco trade. The CCC has determined that the manner in which it calculates this percentage is subject to more than one interpretation and has determined that changes to the calculation should be made beginning with assessments collected after January 1, 2006. However, this change will not apply to invoices issued February 1, 2006. These invoices will reflect corrections and other necessary adjustments associated with fiscal year 2005. **70 Fed. Reg. 72979 (Dec. 8, 2005)**.

TRANSPORTATION. The CCC has issued a notice to all interested parties regarding additional actions pursuant to the September 20, 2005 announcement to ease transportation issues exacerbated by Hurricane Katrina. The CCC is seeking proposals from interested parties for unloading barges of agricultural commodities located in the New Orleans area to make them available to transport 2005-crop agricultural commodities. Proposals should be submitted November 14, 2005 to be assured of consideration. **70 Fed. Reg. 67410 (Nov. 7, 2005)**.

TUBERCULOSIS. The APHIS has issued proposed regulations regarding tuberculosis in captive cervids that extend, from 2 years to 3, the term for which accredited herd status is valid and increase by 12 months the interval for conducting the reaccreditation test required to maintain the accredited tuberculosis-free status of cervid herds. The proposed regulations also reduce, from three tests to two, the number of consecutive negative official tuberculosis tests required of all eligible captive cervids in a herd before a herd can be eligible for recognition as an accredited herd. The proposed regulations also remove references to the blood tuberculosis test for captive cervids, as that test is no longer used in the tuberculosis eradication program for captive cervids. **71 Fed. Reg. 1985 (Jan. 12, 2005)**.

—Robert P. Achenbach, Jr., AALA Executive Director

agricultural law update
6292 N.E. 14th Street
Des Moines, IA 50313

First Class Mail
U.S. POSTAGE
PAID
Des Moines, Iowa
Permit No. 5297

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

MEMBERSHIP RENEWALS. All current members should have received their membership renewals by now. If you have not yet sent in your 2006 dues, please do so now to prevent interruption of member services, such as next month's Update and inclusion in the 2006 printed membership directory.

2006 MEMBERSHIP RECRUITMENT PROGRAM. As an extra incentive this year, we are offering new members a sign-up premium of a free copy of the 2005 conference handbook on CD. Recruiting members gives you the chance to win a free registration to the 2006 annual conference in Savannah, GA. In 2005, all recruiters received at least a $25 gift certificate from Amazon.com so everyone wins. The CD also contains the archives of the Update from 1999-2005.

UPDATE BY E-MAIL. Many thanks to all the members who switched to the e-mail version of the Update. This has saved and will continue to save the association a considerable amount of expense by reducing our printing and portage costs. If you would like to see a sample PDF file of the e-mail Update, please send me an e-mail at RobertA@aglaw-assn.org and I will send a sample file.

CONFERENCE HANDBOOK ON CD. Again this year, we are offering CD-ROMs of the printed materials from the 2005 conference. The CDs also contain the archives of the Update from 1999-2005. Just send me an e-mail and I will send one to you with an invoice for $45.00.

2006 CONFERENCE. President-elect Steve Halbrook is deep into the planning an excellent program for the 2006 Annual Agricultural Law Symposium at the Hyatt Regency on the Savannah riverfront in Savannah, Georgia, October 13-14, 2006. Mark your calendars and plan a trip to "America's First City." Brochures will be printed and mailed as soon as the program plans are complete.

Robert P. Achenbach, Jr, AALA Executive Director, P.O. Box 2023, Eugene,OR 97402; Ph 541-485-1090; Fax 541-302-1958