Agricultural Law Update

VOLUME 7, NUMBER 4, WHOLE NUMBER 76 JANUARY 1990

Official publication of the American Agricultural Law Association

INSIDE

IN FUTURE ISSUES

Cash rent tenant provisions of payment limitation law amended

On December 11, 1989, President Bush signed into law H.R. 3620, a bill to clarify the cash rent tenant provisions of the Food Security Act of 1985, as amended by the Agriculture Reconciliation Act of 1987 (7 U.S.C. § 1308(5)(D)).

The 1987 amendments to the Food Security Act became applicable commencing with 1989 crops. Under those amendments, a landlord would automatically be combined as one "person" for payment limitation purposes with a cash rent tenant, or a tenant renting land for a crop share guaranteed as to the amount of the commodity, if the tenant did not make a significant contribution of either (1) active personal labor and capital, land, or equipment, or (2) active personal management and equipment. This provision was inserted in the 1987 amendments to counter perceived abuses of the payment limitation rules in cash rent landlord-tenant situations.

It soon became apparent, however, that the automatic combining of a landlord as a single person with any out-of-compliance tenant could have a harsh and inequitable impact on innocent landlords who had no control over the farming operations of their tenants and who in no way participated in the failure of a tenant to comply with the rules requiring that each "person" be actively engaged in the farming operation in order to qualify for participation in federal farm programs. The 1987 amendments would have had a particularly acute impact on Indian tribal farming ventures, since many tribes cash lease large portions of their reservation lands to non-Indiana farming entities. Prior to 1989, tribal farming ventures had been granted a regulatory exemption from the number and amount of payments that a tribe could receive as a result of participation in federal farm

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Eighth Circuit rules on Chapter 12 eligibility

In the case of *In re Easton*, 883 F.2d 630 (8th Cir. 1989), the Eighth Circuit Court of Appeals addressed the controversial issue of whether cash rental income can be construed as farm income for purposes of Chapter 12 eligibility. The court vacated the bankruptcy court's finding that the cash rent at issue constituted farm income and remanded the case for consideration consistent with the test set forth in its opinion.

Previous caselaw on this issue left the courts generally divided between the total exclusion of cash rent from the category of farm income and an analysis based on the totality of the circumstances. *See In re Armstrong*, 812 F.2d 1024 (7th Cir.), *cert. denied* U.S. , 108 S.Ct. 287 (1987) (majority holding that cash rent is excluded as not being at risk; dissent espousing totality of the circumstances test). In response to this split, however, the Eighth Circuit rejected both positions and imposed a third interpretation, which requires that the debtor have "had some significant degree of engagement in, played some significant operational role in, or had an ownership interest in the crop production which took place on the acreage they rented." *Easton*, 883 F.2d at 636.

In reaching its decision, the court focused on the statutory definition of the term "family farmer." 11 U.S.C. § 101(17)(A)(Supp. V 1987). This definition includes a fifty percent income requirement applicable to income "received from such farming operation." *Id.* Emphasizing this language, the court expressed concern that the opinion of the bankruptcy court, affirmed by the district court, virtually eliminated the requirement that the income be from the farming operation.

The court also relied upon its analysis of some of the previous caselaw on this issue and other farmer bankruptcy issues. While rejecting and limiting some of these cases, the court noted that the "theme common" to the remaining cases was "the existence of some indicia of involvement on the part of the debtor in the farming activity." *Easton*, 883 F.2d at 635. Focusing on this theme, the court articulated a new test, as stated above, to be applied to the rental income at issue.

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CASH RENT TENANT PROVISIONS OF PAYMENT LIMITATION LAW AMENDED / CONTINUED FROM PAGE 1

programs. Following enactment of the 1987 amendments, however, the USDA interpreted the cash rent tenant provision of the 1987 law to apply to all farm landlords, including Indian tribes. This interpretation, which would have limited a tribal farming venture to a single program payment if *any* cash rent tenant of the tribe were found to be out of compliance, would have been devastating to numerous tribal economies.

As initially offered, the bill would have applied solely to cash rent situations on Indian reservations. It was amended, however, so that its provisions would be applicable to all cash rent tenant situations throughout the United States. The President signed the bill into law as Public Law 101-217 on December 11, 1989.

The new legislation provides that, for 1989 crops, a landlord will not be combined as one "person" with an out-of-compliance cash rent or guaranteed crop share tenant if the Secretary of Agriculture has at any time made a determination regarding the number of persons with respect to the tenant's operation on the land for the 1989 crop year and if the landlord did not consent to or knowingly participate in the tenant's failure to comply with the "actively engaged" provisions of the law. Any tenant found to be out-of-compliance with respect to 1989 crops will be eligible only for such payments as it would have received if it had been combined as one "person" with the landlord under the regulations in effect immediately prior to the enactment of the new legislation.

With respect to 1990 crops, the new legislation provides that an out-of-compliance cash rent or guaranteed crop share tenant shall be ineligible to receive any farm program payments with respect to the land in question, but removes completely the provision penalizing the landlord by combining it as one "person" with such tenant. It should be noted, however, that any landlord who engages in any scheme or device with a tenant to avoid the payment limitation will still be subject to forfeiting all of its farm program benefits under the prohibitions contained at 7 U.S.C. section 1308-2.

– Alan R. Malasky, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C.

Agricultural Law Update

VOL 7, NO 4, WHOLE NO. 76 JANUARY 1990

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EIGHTH CIRCUIT RULES ON CHAPTER 12 ELIGIBILITY / CONTINUED FROM PAGE 1

Unfortunately, the court provides no guidance for the application of this new test. Although "ownership interest in the crop production" presumably means some type of crop share leasing, the court does not address the factors that may be required for a cash rent landlord to show a "significant degree of engagement" or a "significant operational role." Thus, although the court rejects the *Armstrong* alternatives, it does little to clarify the standard applicable in the Eighth Circuit.

The court also remanded the decision for evidence that certain debts were sufficiently related to the farming operation, also for purposes of Chapter 12 eligibility. At issue were the debtors' cosignatures on a grandson's farm loan. Again, the court stated the requirement that the debtors have some ownership interest in or play an operational role in the debt-producing enterprise. *Easton*, 883 F.2d at 636-7.

Senior District Judge Hansen, sitting by designation, sharply dissented with the majority. He noted that the Code's definition of "farming operation" includes the general concept of "farming" as well as more specific activities such as "tillage of the soil." *Easton*, 883 F.2d at 638, citing 11 U.S.C. section 101(20)(Supp. V 1987). By including this general term in its listing of activities that make up a farming operation, Judge Hansen found a Congressional intent to include a "pattern of activity." On this basis, courts are not justified in breaking down all of the individual activities and making individual determinations. Rather, courts should look to the integrated operation. On this basis, Judge Hansen advocated application of the totality of the circumstances test.

As further support for his position, Judge Hansen noted that circumstances may necessitate the cash leasing of farmland by a traditional family farmer, citing *Matter of Burke,* 81 Bankr. 971 (Bankr. S.D. Iowa 1987). Despite this rental arrangement, such farmers may be clearly among the group that Congress intended to help. In this regard, he found the test proposed by the majority to be unnecessarily narrow and in conflict with the intent of the statute. Nevertheless, he concurred with the remand of the case, stating that the believed that it would "further strengthen the record establishing the Eastons' rights to chapter 12 protection." *Easton*, 883 F.2d at 637.

– Susan A. Schneider, Graduate Fellow, National Center for Agricultural Law Research and Information, Fayetteville, AR

Federal Register *in brief*

The following is a selection of matters that have been published in the *Federal Register* from December 7, 1989 to January 3, 1990:

1. FCA; Prior approval submissions; final rule. 54 Fed. Reg. 50736.

2. FCA; Organization and functions; service of process; final rule. 54 Fed. Reg. 50735.

3. FCA; Reorganization authorities for system institutions; advance notice of proposed rulemaking. 54 Fed. Reg. 51763.

4. EPA; Grants; availability and review of new financial assistance program; wetlands protection; state development grants. 54 Fed. Reg. 51470.

5. CCC; Loan collateral replacement; proposed rule. 54 Fed. Reg. 52040.

6. CCC; ASCS; Federal claims collection; administrative offset; final rule; effective date 12/31/89. 54 Fed. Reg. 52876.

7. PSA; Central filing system; state certification; Oklahoma. 54 Fed. Reg. 52837.

8. Foreign Agricultural Service; Import limitations; review of coverage of import restrictions in the Harmonized Tariff Schedule of the U.S. 54 Fed. Reg. 53344.

9. USDA; DOL; Determination of shortage number under Section 210A of the Immigration and Nationality Act; final rule; effective date 1/2/90. 55 Fed. Reg. 106.

– Linda Grim McCormick

Immigration potpourri: sanctions

[Editor's note:
The following article is the conclusion of the discussion begun in the November issue of the Update.]

Employer sanctions

Employer sanctions summary

Section 274A of the Act, added by IRCA, is designed to control the unlawful employment of aliens in the U.S. by imposing civil and criminal penalties on those persons and entities that knowingly hire or recruit or refer for a fee unauthorized aliens for employment in the U.S. Specifically, section 274A: 1) makes it unlawful to knowingly hire or to recruit or refer for a fee unauthorized aliens; 2) requires those who hire and those who recruit or refer for a fee to verify both the identity and employment eligibility of hired individuals; and 3) makes it unlawful to knowingly continue to employ unauthorized aliens hired after November 6, 1986.

The "sanction" provisions apply to any employer, regardless of the number of persons employed. In addition, the Act amends the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C.S. section 1801 *et. seq.)* to add a violation of the "sanctions" law to the list of proscribed acts warranting denial of a certificate of registration to a farm labor contractor or an employee of a farm labor contractor under section 1813(a)(6), and potential criminal sanctions under section 1851(b). In a related provision, section 274A expressly prohibits an employer from using contract labor to avoid the sanctions provisions; an employer who uses contract labor is still an employer under sanctions law.

Definition of "unauthorized alien"

This key term in the sanctions law refers to an alien who, at the time he or she is employed, is neither an alien lawfully admitted for permanent residence (has a green card) nor otherwise authorized to be employed by the INA or by the Attorney General. Section 274A(h)(3) The sanctions provisions apply, then, not only to aliens illegally in the U.S. but to aliens not specifically authorized for the employment under consideration or review.

Specifically excluded from the definition of "unauthorized alien" are all persons hired prior to the passage of IRCA, i.e., prior to November 6, 1986. Such aliens are considered "grandfathered," and no verification forms need be filed on them.

Verification of employment eligibility

In most cases, the employer can avoid sanctions problems by properly completing the verification records. Section 274A(b)(1) requires an employer to attest, on a form issued by INS, that it has independently verified the eligibility for employment of *all persons* hired, not merely those that the employer suspects are aliens. Thus, the verification obligation imposes both its own liability, regardless of whether the person who was hired is or is not an unauthorized alien, and the best answer to an unauthorized employment charge. If the employer has properly completed the paperwork, the employer is exposed to neither a paperwork charge nor a substantive charge of knowingly hiring an unauthorized alien. Although the burden of proving a violation of the substantive charge remains on the government, which must prove its civil case by a preponderance of the evidence, the Act does establish a "good faith" defense if the employer shows that it reviewed the documents specified in the law, that it retained the verification forms, properly completed, and that the documentation appeared on its face to be genuine. Section 274A(b).

The I-9 form

The employer verification form which is the focus of most employer sanctions cases, is a simple, but poorly drafted, one-page form requiring the participation and signature of the employee and the employer. The top part of the form asks the employee to explain the basis on which he or she is allowed to accept employment in the U.S. The bottom part of the form requires the employer to record what documents it has seen to prove the employee's authorization for employment. It is important to note that the employer is not required to keep photocopies of the documents provided by the employee, and the employer should not do so.

The I-9 forms must be retained and be made available for inspection by INS or DOL for three years after the date an individual was hired, or one year after termination, whichever is later.

Penalties

Violation of section 274A(a)(1)(A), the "knowing hire" provision, or violation of section 274A(a)(2), the "continuing to hire an alien knowing he/she is unauthorized" provision, can result in substantial penalties. Employers determined to have knowingly committed one of those violations must cease the activity and may be fined as follows:

First violation: $250-$2,000 per employee

Second violation: $2,000-$5,000 per employee

More than two violations: $3,000-$10,000 per employee.

Section 274A(b), the "paperwork" requirements (Form I-9), carries its own civil penalties. Those who fail to properly "complete, retain and present for inspection Form I-9" may be fined not less than $100 nor more than $1,000 for each person for whom the form was not properly completed. Again, compliance with the verification requirements constitutes an affirmative defense to the substantive violations of sections 274A(a)(1)(A) and 274A(a)(2).

Initiation of a charge

While an I-9 audit can be conducted by either INS or DOL, investigations are conducted only by the INS. Section 274A(e)(1), (2). Typically, the investigation begins with issuance of an administrative subpoena, which gives the employer three days to produce the I-9 forms for inspection. While not self-executing, failure to comply with an administrative subpoena generally has been considered a sufficient basis for the issuance of a court subpoena. If DOL reviews the I-9's, it passes any irregularities on to INS for follow-up.

Following review of the I-9's, INS can request additional information. If an employer does not want to voluntarily comply, INS must seek either a search warrant or a court ordered subpoena, meeting all of the traditional tests for such judicial involvement.

Based upon the review of the I-9's and any other evidence INS has been able to obtain, the employer sanctions unit of the local INS office will issue either a clean bill of health or a "Notice of Intent to Fine." This document, which operates as a formal charging document, is generally settled through negotiation. The employer agrees to pay some part of the

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AG LAW CONFERENCE CALENDAR

Environmental Law
February 15-17, 1990, Hyatt Regency, Washington, D.C.

Topics include: SARA, RCRA, TSCA, NEPA, Clean Water Act developments and underground water developments.

Sponsored by the Environmental Law Institute and the Smithsonian Institution.

For more information, call 1-800-CLE-NEWS or 1-215-243-1630.

Natural Resources Law Institute
Mar. 1-3, 1990, Arlington Hotel, Hot Springs, AR.

Topics include: the Federal Leasing and Mining Act of 1987 and pending mineral legislation; well site operations and surface damages.

Sponsored by Arkansas Bar Association and American Association of Petroleum Landmen.

For more information, call 501-375-4605.

Prompt payment and statutory trust provisions for sellers of livestock,

by J.W. Looney

The Packers and Stockyards Act[1] forms the basis of federal regulation of livestock and poultry marketing. It governs the marketing activities of packers, stockyards, market agencies, livestock dealers, and live poultry dealers. The Act prohibits various unfair trade practices and is a significant force in shaping industry practices.

The Poultry Producers Financial Protection Act of 1987[2], an amendment to the Packers and Stockyards Act, adds provisions applicable to poultry transactions closely analogous to other parts of the Act regulating payment obligations of livestock dealers.

Producers of fruits and vegetables are subject to federal legislation that affects the marketing of these commodities in ways considerably different from the laws that regulate the major grain crops. Producers of certain perishable agricultural commodities (fresh fruits and vegetables) are provided with important protections in the Perishable Agricultural Commodities Act (PACA).[3] PACA was enacted in 1930 to suppress unfair and fraudulent practices in the marketing of those commodities and to promote their orderly flow in interstate commerce.

All three of these regulatory programs provide sellers with specific rights with regard to payment. Buyers are obligated to submit full payment within designated time periods. Failure to do so is not only a violation of the particular Act but also gives rise to rights on the part of the seller under statutory trust provisions. These provisions were added to the basic legislative programs to provide additional protection to unpaid sellers, especially in those situations where the buyer has given a lender a security interest in the commodities (livestock, poultry, or perishable agricultural commodities) or in the inventories of products derived from these commodities.

The interplay between the prompt payment provisions and the statutory trust is the focus of this article. The statutory trust is an important tool for enforcement of payment obligations, and its use will no doubt increase as sellers become more familiar with its operational effect.

Packers and Stockyards Act

Purpose of Act

The Packers and Stockyards Act of 1921 promotes fair trade practices in the livestock and meat packing industries. The Act protects farmers, ranchers, and consumers from economic harm resulting from unfair, monopolistic, or discriminatory marketing practices. The purpose of the Act was considered by the Supreme Court in the case of *Stafford v. Wallace*,[4] to be the promotion of the free and unburdened flow of livestock through stockyards and packers to the consumer in the form of meat products.

Prompt payment provisions/ statutory trust

In 1976, Congress amended the Packers and Stockyards Act in an attempt to assure full and prompt payment. The Act now provides that each packer, dealer, or market agency must deliver to the seller of livestock (or his authorized representative) the full amount of the purchase price for the livestock before the close of the next business day following the transaction unless the parties expressly agree otherwise.[5] In effect, this provision entitles the seller of livestock, in transactions covered by the Act, to next-day payment unless that right is knowingly waived by the seller. An effective waiver must be in writing and not be procured by deceptive means. A copy or other evidence thereof must appear in both the dealer's and purchaser's records and be contained in documents issued by the purchaser relating to the transaction.[6] Furthermore, any attempt on the part of the dealer, market agency, or packer to delay the payment of sale proceeds is deemed to be an unfair practice under the Act.[7]

To further protect livestock sellers from insolvent packers, Congress added a statutory trust provision to the Act in 1976.[8] Although this section applies only to those packers whose annual purchases exceed $500,000 and is applicable solely to cash sales, it establishes a statutory trust under which all meat inventories, receivables, and proceeds are to "be held . . . in trust for the benefit of all unpaid cash sellers" until they have been paid in full for their livestock.[9]

Under the statutory trust provision, a packer holds livestock purchased in cash sales and all "inventories of," or "products derived therefrom," in trust for the benefit of unpaid cash sellers of the livestock until full payment has been received by the seller.[10] The sale of livestock constitutes a "cash sale" unless the seller has specifically signed a credit agreement to the contrary.[11] The seller's acquiescence in accepting late payments for purchases is not an express extension of credit by the seller to the packer.[12]

To receive the benefit of the trust provision, notification of a claim must be made within thirty days of the final date set for payment (if no payment is received at all) or within fifteen days of learning that a payment instrument has been dishonored. The unpaid seller must notify both the packer and the Secretary of Agriculture.[13]

Stockyards and stockyard dealers

The Act prohibits certain activities by stockyard owners, dealers, and market agencies.[14] If a stockyard, market agency, or dealer violates any provision of the Act, or an order of the Secretary that is related to the purchase, sale, or handling of livestock, the Act imposes liability for the full amount of any damages resulting from the violation.[15] Liability can be assessed through a private cause of action through litigation in a U.S. district court or through an agency reparation proceeding.[16]

Market agencies are obligated under the general prompt payment provisions to make payment by the close of the next business day, unless the right is knowingly waived by the seller.[17] The obligation of market agencies also includes provisions requiring the establishment of custodial accounts for the handling of shippers' proceeds paid by buyers for livestock.[18] These proceeds are referred to as "trust funds" in the regulations but this obligation does not, however, fall within the statutory trust provisions applicable to packers. That special enforcement mechanism is not available when livestock are sold through a market agency. Reparation, as an alternative to litigation, may be used. Failure to pay promptly is a violation of the Act that could result in a reparation award.

Marketing of poultry

The poultry marketing system differs from the livestock marketing system in that it operates primarily through vertically integrated companies. Under this arrangement, growers (farmers) raise company-owned birds under a production contract. This contract is essentially a bailment agreement between the grower and the company. The company supplies the birds and inputs such as feed and medication to the growers. The company also supervises the production process. Once the birds reach the stage of development that corresponds to marketing specifications, the company regains possession of the birds. It then pro-

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cesses them and markets the finished poultry products.

The Poultry Producers Financial Protection Act of 1987

The Poultry Producers Financial protection Act of 1987, an amendment to the Packers and Stockyards Act, was enacted on November 23, 1987.[19] The Act's key provisions include the extension of "unlawful practices" liability to live poultry dealers and handlers, the establishment of a statutory trust to insure payment to growers under cash sale and poultry growing arrangements, and the requirement of prompt payment by dealers who purchase poultry. The Act's provisions are closely analogous to other Packers and Stockyards Act provisions that regulate payment obligations of livestock dealers and handlers.[20] Amendments to existing regulations have been issued to incorporate the legislative amendment.[21]

The Act defines the following key terms:

(a) Poultry grower: "Any person engaged in the business of raising and caring for live poultry for slaughter by another, whether the poultry is owned by such person or by another, but not an employee of the owner of such poultry;"[22]

(b) Poultry growing arrangement: "Any growout contract, marketing agreement, or other arrangement under which a poultry grower raises and cares for live poultry for delivery, in accord with another's instructions, for slaughter;"[23]

(c) Live poultry dealer: "Any person engaged in the business of obtaining live poultry by purchase or under a poultry growing arrangement for the purpose of either slaughtering it or selling it for slaughter by another . . .;"[24] and

(d) Cash sale: "A sale in which the seller does not expressly extend credit to the buyer."[25]

Live poultry dealers must make prompt payment for poultry. Specifically, a dealer must deliver the full payment amount due to the seller-grower before the close of the next business day following the purchase of poultry, in the case of a cash sale, or by the close of the fifteenth day following the week in which the poultry is slaughtered, in the case of poultry obtained under a poultry growing arrangement.[26] Further, any attempt by a live poultry dealer to delay making payment due under the Act, or any actual delay in making payment, and any attempt made by the dealer for the purpose of, or resulting in, an extension of the normal payment period are to be considered "unfair practices" in violation of the Act.[27]

If after a hearing, the Secretary finds that a live poultry dealer has violated provisions of the Act, he or she may issue a cease and desist order against the dealer.[28] The Secretary may also assess a civil penalty of up to $20,000 for each such violation. However, the provisions state that "in no event can the penalty assessed by the Secretary take priority over or impede the ability of the live poultry dealer to pay any unpaid cash seller or poultry grower.[29]

Statutory trust

The statutory trust is intended to remedy the problem caused by financing arrangements in which live poultry dealers grant a security interest in poultry that they obtain by cash purchase or poultry growing arrangements. The trust applies to all poultry obtained by a live poultry dealer, whether by cash purchase or by a poultry growing arrangement.

The trust assets include all inventories of, or receivables or proceeds from, poultry obtained by the dealer, or the products derived therefrom. The grower-seller is protected from the risk of nonpayment as an "unsecured creditor" under a cash sale because the value of the trust assets is held for the benefit of all unpaid cash sellers or poultry growers until they have received full payment.[30] Payment is considered not to have occurred if the cash seller or poultry grower receives a payment instrument that is dishonored.[31]

Live poultry dealers are exempt from the statutory trust provisions if they (a) have $100,000 or less in average annual value of live poultry, or (b) have $100,000 or less in average annual value of live poultry obtained by purchase or by a poultry growing arrangement.[32]

The Perishable Agricultural Commodities Act

The Perishable Agricultural Commodities Act (PACA)[33] was enacted in 1930 to suppress unfair and fraudulent practices in the marketing of perishable agricultural commodities and to promote the orderly flow of perishable commodities in interstate commerce. The basic regulatory approach of PACA is through the licensing of commission merchants, dealers, and brokers who are engaged in transactions involving perishable agricultural commodities. Most administrative cases under PACA are either reparation proceedings for money damages or disciplinary cases. Reparation cases involve a wide range of disputes. The reparation procedure is designed to provide an informal and inexpensive method by which disputes can be adjudicated. The reparation procedure provides an alternative forum for producers who suffer losses as a result of violations of PACA. Disciplinary cases frequently involve a party's failure to pay promptly or in full, the failure to properly account, or the misbranding of a commodity.

Prompt payment provisions

The "unfair conduct" provisions of PACA make failure to make full payment "promptly" a violation of the Act.[34] The Act provides no further definition, but the regulations provide specificity with regard to a variety of transactions.[35] For many transactions "full payment promptly" is defined to mean within ten days of acceptance.[36] If a contract involves an agreement for payment at times different than those provided for in the regulations, the agreement must be in writing before entering into the transaction and a copy of the agreement must be maintained in the records of the parties. The party asserting the existence of such an agreement has the burden of proving it.[37]

Statutory trust

In 1984 PACA was amended to create a statutory trust for the benefit of unpaid suppliers or sellers of perishable agricultural commodities or their agents and on all inventories of food or other products derived from perishable agricultural commodities. This trust applies until full payment for commodities has been received.[38] This provision is designed to protect unpaid suppliers, sellers, and their agents in those circumstances where commission merchants, dealers, or brokers encumber or give lenders a security interest in those commodities or in the inventories of products derived from the commodities.[39]

To obtain the benefit of the trust, the unpaid supplier, seller, or agent must give written notice to the commission merchant, broker, or dealer and file the notice with the Secretary within thirty days after the specified time for payment has elapsed.[40] The notice must include a statement that it is a notice of intent to preserve trust benefits and must include the name and address of the trust beneficiary, the seller-supplier, commission merchant or agent, and the debtor. It

(Continued on page 6)

must also include the date of transaction, commodity, and contract terms, invoice, price, and the date payment was due and the amount past due and unpaid. If the problem results from a payment instrument that has been dishonored, the date of receipt of notice of this fact must be included in the notice.[41]

Strict compliance with notice provisions is required.[42] Oral notice is not sufficient, nor is notice only to USDA even if the debtor had actual knowledge of the intent to preserve trust benefits.[43] The notice may be filed even before the due date of the payment once delivery has been made.[44]

The protection of the statutory trust provisions may be waived if in writing prior to the time any contracts are negotiated. The waiver must be separate and distinct from any agency contract.[45]

The seller's claims are elevated above secured creditors, ahead of administrative costs and expenses, and ahead of other priority and general creditors. The trust assets are not part of the estate in bankruptcy.[46] It is not necessary to seek relief from the automatic stay in bankruptcy in order to file the notice. The bankruptcy petition with the automatic stay does not toll the period for filing the notice.[47]

Trust funds may be recovered from a secured creditor[48] or from third parties who knew or should have known that the assets were transferred to them in breach of the trust.[49] However, dissipated trust funds used to pay antecedent debts in the ordinary course of business may not be traced into the hands of third parties who had no knowledge of the character of the funds received.[50] When trust assets are commingled with nonproduce related assets, the trust beneficiaries are not required to trace the assets; the burden is on the debtor to identify non-trust property.[51]

The USDA may initiate action to avoid dissipation of trust assets and to recover assets transferred to a third party.[52]

Summary

The combination of the prompt payment requirements with the statutory trust provides a powerful tool for sellers of livestock, poultry, and perishable agricultural commodities. Congress has recognized the disadvantage that unpaid sellers face in collecting payment from purchasers of these commodities who become insolvent and has given these sellers special protection. Attorneys advising sellers in these situations should be prepared to make use of this tool as an effective method of achieving the greatest possible protection for their seller-clients. At the same time, those who advise lenders should be aware of the effect of these legislative programs in structuring financing arrangements for purchasers of these commodities.

If this procedure results in successful protection for farmer-sellers of the covered commodities, the concept may be extended to other transactions as well. For example, similar protection might be considered for sellers of grain or other major crops if Congress concludes that grain elevator insolvencies continue to pose a burden on sellers of these agricultural commodities. The experience of sellers of livestock, poultry, and perishable agricultural commodities in successfully using these provisions may determine whether similar protection is appropriate for sellers of other agricultural commodities.

* A more detailed discussion of these matters is found in J. Looney, J. Wilder, S. Brownback, J. Wadley, *Agricultural Law: A Lawyer's Guide to Representing Farm Clients* (American Bar Association, General Practice Section, 1989) from which this article is derived in part.

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1. 7 U.S.C. §§ 181-229.
2. Pub. L. No. 100-173, 100 Stat. 917.
3. 7 U.S.C. § 499a-499s.
4. 258 U.S. 495 (1922).
5. 7 U.S.C. § 228b(a).
6. 7 U.S.C. § 228b(b).
7. 7 U.S.C. § 228b(c).
8. 7 U.S.C. § 196.
9. 7 U.S.C. § 196(b).
10. 7 U.S.C. § 196(b).
11. *See In re Gotham Provision Co., Inc.*, 660 F.2d 1000 (5th Cir. 1982) *cert. den.* 103 S.Ct. 129, 459 U.S. 858, 74 L.Ed. 2d 111 (1982).
12. *In re G & L Packing Co., Inc.*, 20 Bankr. 789 (Bankr. N.D. N.Y. 1982), *aff'd* 41 Bankr. 903 (N.D. N.Y. 1984).
13. 7 U.S.C. § 196(b); 9 C.F.R. § 203.15.
14. 7 U.S.C. §§ 203, 208.
15. 7 U.S.C. § 209(a).
16. 7 U.S.C. § 209.
17. 7 U.S.C. § 228b(a).
18. 9 C.F.R. § 201.42.
19. 7 U.S.C. § 181 *et seq.*
20. *See e.g.*, 7 U.S.C. §§ 196 and 228b.
21. 54 Fed. Reg. 16353, April 24, 1989.
22. 7 U.S.C. § 182(8).
23. 7 U.S.C. § 182(9).
24. 7 U.S.C. § 182(10).
25. 7 U.S.C. §§ 197 and 228b-1.
26. 7 U.S.C. § 228b-1.
27. 7 U.S.C. § 228b-1.
28. 7 U.S.C. § 228b-2.
29. 7 U.S.C. § 228b-2.
30. 7 U.S.C. § 197.
31. 7 U.S.C. § 197(c).
32. 7 U.S.C. § 197.
33. 7 U.S.C. § 499a - 499s.
34. 7 U.S.C. § 499b(4).
35. 7 C.F.R. § 46.2 (aa).
36. *See, e.g.*, 7 C.F.R. § 46.2(aa)(5) where a purchase by a buyer requires payment within ten days of acceptance.
37. 7 C.F.R. § 46.2(aa)(11).
38. 7 U.S.C. § 499e(c)(2).
39. 7 U.S.C. § 499e(c)(1).
40. 7 U.S.C. § 499e(c)(3).
41. 7 C.F.R. § 46.46.
42. *In re D.K.M.B., Inc.*, 95 Bankr. 774 (Bankr. D. Colo. 1989).
43. *In re Marvin Properties*, 76 Bankr. 150 (Bankr. 9th Cir. 1987) *aff'd* 854 F.2d 1183 (9th Cir. 1988).
44. *In re W.L. Bradley Company, Inc.*, 75 Bankr. 505 (Bankr. E.D. Pa. 1987); *In re Monterey House, Inc.*, 71 Bankr. 244 (Bankr. S.D. Tex. 1986).
45. 7 C.F.R. § 46.46(d)(2).
46. *In re Fresh Approach, Inc.*, 51 Bankr. 412 (Bankr. N.D. Tex. 1985); *In re Super Spud, Inc.*, 77 Bankr. 930 (Bankr. M.D. Fla. 1987).
47. *In re Prange Foods Corp.*, 63 Bankr. 211 (Bankr. W.D. Mich. 1986).
48. *In re Fresh Approach*, 51 Bankr. 412 (Bankr. N.D. Tex. 1985).
49. *Lyng v. Sam Compton Produce Co.*, Cir. 3-86-759 (N.D. Tenn. 1987); *Also see In re Harmon*, 11 Bankr. 162 (Bankr. N.D. Tex. 1980).
50. *Forestwood Farm Inc. v. Tanner*, 77 Bankr. 897 (Bankr. N.D. Ala. 1987).
51. *In re Hancock-Nelson Mercantile, Inc.*, 95 Bankr. 982 (Bankr. D. Minn. 1989); *In re W.L Bradley Company, Inc.*, 75 Bankr. 505 (Bankr. E.D. Pa. 1987); *Also see In re Frosty Morn Meats, Inc.*, 7 Bankr. 988 (M.D. Tenn. 1980).
52. *Lyng v. Pellegrino & Sons, Inc.*, 694 F. Supp. 976 (N.D. Mass. 1988); *In re Nagelberg & Co., Inc.*, 84 Bankr. 19 (Bankr. S.D. N.Y. 1988).

Insider guarantees update

In the November issue of the *Update*, the case of *In re Robinson Brothers Drilling, Inc.*, 97 Bankr. 77 (W.D. Okla. 1988) was noted to be on appeal. The district court opinion was simply adopted by the Tenth Circuit in *Manufacturers Hanover Leasing Corp. v. Lowrey*, No. 88-2982 (10th Cir., Nov. 9, 1989). The result follows *Levit v. Ingersoll Rand Financial Corp.*, 874 F.2d 1186 (7th Cir. 1989).

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money sought, agrees to behave itself in the future, and all is forgiven. Even such a negotiated settlement, however, is considered to constitute a "violation" so as to allow the acceleration of penalties should the employer be revisited.

Administrative hearing

If the employer does not accept the Notice of Intent to Fine or any negotiation thereof, the employer can request a hearing before an Administrative Law Judge (ALJ). That hearing must be conducted in accordance with the Administrative Procedure Act. Section 274A(e)(3)(B). If no hearing is requested, and if no settlement is negotiated, the Notice of Intent to Fine constitutes a final order which may not be appealed. Section 274A(e)(6).

If a hearing before an ALJ has occurred, the decision and order of that judge become final unless, within thirty days, the Attorney General modifies it. There is no other administrative review. However, under another provision of the INA, a final ALJ decision can be reviewed in the court of appeals within forty-five days after the date the final order is issued. Section 274A(e)(7). The only sanctions-related action that can arise in district court is that brought by the Attorney General to enforce a civil fine or other civil penalties (Section 274A(f)(2)), or to enjoin a pattern or practice of violations (Section 274A(f)(2)).

Reported decisions

The first court review of sanctions imposed upon an employer in a contested proceeding under section 274A occurred very recently. In *Mester Manufacturing Co. v. INS*, F.2d., No. 88-7296 (9th Cir., June 23, 1989), the Ninth Circuit rejected a challenge to the constitutionality of the statute and affirmed the ALJ decision imposing some civil fines, albeit much reduced from those sought by INS.

Mester's key legal issue concerned when an employer should be held accountable for knowledge of an employee's unauthorized status even if, at an earlier date, the employer was presented with the appropriate documentation to meet the I-9 form requirements. The employer argued that, unless it received official written notice from INS that employees were illegal, it could continue to rely upon the documentation presented by its employees. INS argued that, although it had provided no such written notice, it did orally tell the employer that, pursuant to an I-9 audit, certain of its employees lacked authorization to work.

The ALJ and the Ninth Circuit held that IRCA does not require notice to come to the employer in any particular way. The court held that the employer had "constructive notice" or imputed notice, even if it did not have actual notice, in order to be held accountable under the Act, because it deliberately failed to investigate "suspicious circumstances" – the INS's oral statement that the employees were not eligible for hire.

A second ALJ decision agrees. In *United States v. New El Rey Sausage Company*, Case No. 88100080 (OCAHO July 7, 1989),the ALJ held that once the INS warns an employer that it suspects an alien worker has used false documents to establish eligibility on the I-9 form, a rebuttable presumption arises that the employee is not authorized to work in the U.S. To rebut the presumption, the employer must exercise "due care" to learn whether the alien is really authorized to work. The ALJ relied upon *Mester Manufacturing* in reaching his conclusion.

Search warrants onto farm or ranchland

Historically, INS has been authorized to search without a warrant (8 U.S.C.S. section 1357), and the Supreme Court has sustained a warrantless search onto a farm with a lock and a "no trespassing" sign on the basis that the Fourth Amendment does not protect open fields (*Oliver v. U.S.*, 466 U.S. 170, 104 S.Ct. 1735 (1984)). The IRCA changes that policy. The Act now provides that, in the absence of a properly executed warrant or the consent of the owner or his agent, INS officers may *not* enter onto the premises of a farm or other outdoor agricultural operation for the purposes of interrogating a person believed to be an alien as to the person's right to be in, or to remain in, the U.S. Section 287(d). Unless the farmland lies within twenty-five miles of an international border, this warrant requirement applies.

It is wise for agricultural employers to require INS to live up to the law, since INS usually does not have adequate information to justify issuance of a warrant to search fields. While it is always necessary to weigh the benefits of forcing an agency to fully comply with its own rules and the law against the downside of becoming a target for a disgruntled agency, generally speaking agricultural employers should insist upon INS meeting the warrant provision.

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Response costs recoverable under CERCLA in absence of actual contamination

The First Circuit Court of Appeals has concluded that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA-42 U.S.C. §§ 9601-9675) permits recovery of response costs in "two-site" cases, even in the absence of any actual contamination of a plaintiff's property by hazardous substances in *Dedham Water Company v. Cumberland Farms Dairy, Inc.*, Case No. 889 F.2d. 1146 (1st Cir. Nov. 2, 1989).

The particular facts of this case disclose that the liability provisions of CERCLA are very broad. First, proof of contamination is not necessary; rather threatened releases may give rise to liability. Second, evidence of contamination by a third party may not preclude liability for a nonpolluter; threatened releases also apply to "two-site" cases.

The district court had found that hazardous substances from defendant Cumberland Farms had not migrated onto or contaminated the plaintiff's property, and plaintiff Dedham Water Company did not appeal this finding of no actual contamination. Rather, Dedham Water Company argued that the threatened release of hazardous substances by the defendant was sufficient to justify liability for response costs.

The circuit court agreed. Cumberland Farms could be liable for threatened releases if such contributed to the plaintiff's response costs. CERCLA, as a strict liability statute, provides recovery of response costs for threatened releases without proof of actual contamination.

Second, *Dedham Water* involved two-site contamination. The district court had found that persons other than Cumberland Farms were probable causes of actual contamination and that Cumberland Farms had not contaminated plaintiff's property. However, the evidence disclosed Cumberland Farms had contaminated its own property and there existed a threatened release of hazardous substances that may have generated response costs. The circuit found that these facts were sufficient to support recoverable response costs, and ordered a new trial.

Agricultural users of hazardous substances need to be apprised of these far-reaching CERCLA provisions. Owners or users of a hazardous substance may incur liability even though there is no actual contamination, and the existence of actual contamination by others does not preclude liability for response costs for nonpolluters. For further information on liability for hazardous chemicals, see Wadley and Settle, *Statutory Regulations of Hazardous Chemicals on the Farm*, 6 Agric. L. Update 4-7 (July 1989).

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ADDRESS
CORRECTION REQUESTED

American Agricultural Law Association News

1990 American Agricultural Law Association membership renewal

Membership dues for 1990 are due February 1, 1990. For the 1990 calendar year, dues are as follows: regular membership, $50; student membership, $20; sustaining membership, $75; institutional membership, $125; and foreign membership (outside U.S. and Canada), $65. Dues should be sent to:

William P. Babione,
Office of the Executive Director,
Robert A. Leflar Law Center,
University of Arkansas,
Fayetteville, AR 72701.

Statements will be mailed to the membership shortly.