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IN FUTURE ISSUES

- Preparing and Using Production Contracts

Sixth Circuit Upholds Milk Marketing Order

In an opinion noteworthy for its clear explanation of how milk prices are set under the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. §§ 601-74, the Sixth Circuit has upheld the Secretary's authority to make "location adjustments" to the base minimum milk price under 7 U.S.C. section 608c(5) without considering the economic criteria required in the setting of minimum milk prices under 7 U.S.C. section 608c(18). *Lansing Dairy, Inc. v. Espy*, Nos. 92-2231, 92-2232, 92-2233, 92-2448, 92-2449, 1994 WL 590247 (6th Cir. Oct. 31, 1994). Without discounting the significance of the court's holding to those affected by milk marketing orders, the court's navigation through the AMAA's "labyrinthine complexity" commends its reading by those whose primary interest in milk is as a esophageal lubricant for the consumption of chocolate chip cookies. As an added treat, the court also speculates on whether the phrase "unambiguously expressed intent of Congress" as it is used in determining the applicability of the deference standard under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), has become an "oxymoron." *Lansing Dairy*, 1994 WL 590247 at *11 ("The AMAA, . . . like much federal legislation, is not a model of clarity or succinctness.").

Stated without adornment, the issue before the court was whether the AMAA's use of the term "minimum price" meant the price of milk before adjustments for location or after such adjustments. If the term meant the price before adjustments, the Secretary was bound to consider certain economic criteria which he had failed to do in making the challenged location adjustments. The statute was of little help — "If anything about this statute is plain, it is that if Congress had intentions with respect to the issue before us now, they certainly failed to make these intentions explicit in the text of the Act." *Id.* Thus, in the absence of the "unambiguously expressed intent of Congress," the court applied *Chevron's* deference standard and held that the Secretary's interpretation was neither unreasonable nor in conflict with Congress' intent. In doing so, it rejected claims that the Secretary's alleged prior inconsistent interpretations defeated *Chevron* deference, relying on the principle that "an agency may change its interpretation of a statute so long as its position is reasonable and does not conflict with congressional intent." *Id.* at *15 (citing *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991)).

—Christopher Kelley, Lindquist & Vennum, Minneapolis, MN.

Manure Application Agreements

Operators of animal confinement facilities often need to dispose of the manure produced in the facility on lands owned by others. In many states, operators of such facilities are required to show that they have made arrangements for the land application of manure before receiving a permit to operate. Manure application agreements, therefore, can be an important aspect of the facility's operation.

As with other business agreements, manure application agreements should clearly and completely address the needs and concerns of both parties. Before entering into the agreement, the parties should carefully consider and discuss their goals, including their need to avoid risks they are not willing to assume. If the parties are not going to be able to work together, the time to make that discovery is before the agreement is signed.

Most animal confinement facility operators want a long-term agreement. In some cases, the operator will want an easement that runs with the land if the land is sold. If the facility operator will be applying the manure on the landowner's property, the operator may also want to ensure that he has access to all field roads and other ways of entry at the appropriate times.

From the facility owner's perspective, the agreement should provide assurances

Continued on page 2

that the property will provide sufficient capacity to meet the facility's manure disposal needs. In some states there are restrictions on the timing of manure applications and on the amount of nitrogen or phosphorous that can be applied to a particular parcel. Additional governmental restrictions may be forthcoming. The agreement, therefore, should specify that all nutrient applications on the land, including commercial fertilizer applications, will be managed in a manner that will permit the timely application of the facility's manure. In addition, if governmental requirements mandate the establishment and maintenance of edge-of-field, grass strips to separate water courses from runoff carrying eroded soil or manure particles or other physical barriers, the agreement should specify that the landowner will implement those requirements or permit the facility to do so. The allocation of the costs for the maintenance of such barriers and other measure designed to prevent ground and surface waters should be addressed in the agreement.

The landowner will want to receive the benefits associated with the manure's application without incurring liability for the potential harm that may result from the applicator's negligence or other improper application of the manure. Accordingly, the landowner may want to be held harmless and to be indemnified for any losses resulting from the livestock facility's creation of a nuisance on the landowner's property or from trespasses on to adjoining properties. The landowner may also want to retain some control over the use of the land and, therefore, may want the facility to provide advance notice of manure applications, possibly in writing. In addition to notice, the landowner may want limit the time and place of particular applications to avoid interference with farming operations or for other reasons, such as the desire to avoid the odors associated with the application during social events or times when a member of landowner's household is seriously ill. The landowner may also want to avoid groundpiling or other stacking of manure on his or her premises and may want assurances that matter not normally found in livestock manure will not be applied on the land.

The landowner will want to ensure that the method used to apply the manure does not adversely affect any conservation compliance plan that may be in effect or that could come into effect for the land involved. Some application methods, including certain injection procedures, may disturb more ground cover than is permitted under the land's conservation plan. The agreement, therefore, should require that the application be done in a manner consistent with the land's conservation plan. In some circumstances, it may be appropriate to include site-specific requirements or restrictions in the agreement.

The landowner typically will also want to be protected from liability for injuries suffered by the facility operator while the operator is on the property. At the same time, the operator will want the landowner to take reasonable precautions against creating hazards and to be warned of any hazards on the property. The operator may also want to limit his liability for actions other than the negligent operation of equipment on the premises. The animal confinement facility operator will usually desire to disclaim any express or implied warranty for the fitness of the manure for any purpose. If the agreement can be construed as a sale of "goods," the disclaimer should satisfy the requirements of the Uniform Commercial Code.

The agreement should also specify which lands are covered by the agreement, who bears the cost of transporting and applying the manure, the amount and timing of compensation to the landowner, if any, and who is responsible for securing needed governmental permits. In addition, the parties should consider whether they want to include a mediation or arbitration provision. Because disputes could involve technical issues such as nitrogen levels or the efficacy of application methods, consideration should be given to a mechanism for using technicians in the resolution of such disputes.

The sample agreement that follows offers a general pattern for a basic manure application agreement. Some of its terms, however, may not be desirable or appropriate in all circumstances. Also, this agreement does not contemplate any payment by the facility to the landowner for the right to apply manure, and it omits reference to some of the considerations discussed above. The agreement therefore is only offered as an illustration of some of the possible terms in a manure application agreement.

THIS AGREEMENT is made this _____ day of _____, _____, between Sweet Cow Dairy, a Wisconsin corporation, hereinafter called "SCD", and _____, hereinafter called the "Grantor." Under this Agreement, the parties agree to the following:

RECITALS

A. The Grantor is the owner of real property legally described on Exhibit A attached hereto ("Grantor's Property")

B. SCD is the owner and operator of a dairy facility located on certain real property in Alfalfa County, Wisconsin ("SCD Property").

C. SCD desires access to the Grantor's Property for the purpose of applying on said Grantor's Property manure generated by the dairy facility on said SCD Property.

D. Grantor has agreed to authorize SCD to apply manure generated by the dairy facility located on the SCD Property on the Grantor's Property, subject to and in accordance with the terms of this Agreement.

E. Grantor believes that the application of manure from SCD's dairy facility on the Grantor's Property will have a beneficial effect on crop production on the Grantor's Property.

THEREFORE, in consideration of the application of manure from SCD's dairy facility on the Grantor's Property and the other terms of this Agreement, the parties agree as follows:

1. Grantor hereby grants to SCD for a period of five (5) years from the date of this Agreement a right of ingress and egress to, on, and over the Grantor's Property for the purpose of applying or otherwise disposing of the manure produced by SCD's dairy facility, subject to the follow-

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ing terms and conditions:

2. SCD shall apply manure only on those portions of the Grantor's Property identified on Exhibit B attached hereto. SCD shall not stack or groundpile manure on the Grantor's property. SCD shall be responsible for all costs of transporting the manure to the Grantor's Property and/or applying or otherwise disposing the manure on said Grantor's Property.

3. SCD shall be responsible for obtaining, at its sole expense, any and all necessary governmental permits for the transportation and/or application or other disposal of manure on the Grantor's Property. It is understood and agreed by the parties that SCD shall be considered the "operator" of the Grantor's Property for purposes of the application of manure on the Grantor's Property, but if any required governmental permit's application also requires the signature of the Grantor, the Grantor shall sign said application at the request of SCD.

4. Grantor shall provide SCD with timely access to all field roads and other ways of access to and from the Grantor's Property and the locations on it where manure is to be applied or otherwise deposited.

5. Grantor shall permit SCD to apply manure at a time and in a manner as will allow SCD to comply with any and all governmental permits and other applicable governmental requirements. Grantor shall coordinate any and all nutrient applications, including commercial fertilizers, and/or nutrient or pollution management plans on or for the Grantor's Property with SCD's need to comply with its governmental permits and any other applicable governmental requirements. If any edge-of-field, grass strips to separate water courses from runoff carrying eroded soil and/or manure particles or other physical mechanisms are required by any permit issued to SCD or are otherwise imposed as a governmental requirement for the application of manure on the Grantor's Property, Grantor and SCD shall cooperate in the establishment and maintenance of such edge-of-field, grass strips and other physical mechanisms, including sharing equally in the costs of establishing and maintaining such mechanisms.

6. SCD shall exercise reasonable care while on the Grantor's Property to avoid damage to the Grantor's Property and to the Grantor's personal property. SCD shall be responsible for damage caused by its negligence in the operation of its equipment or vehicles to any growing crops on the Grantor's Property, and SCD shall pay to the Grantor(s) or the owner(s) of the growing crops damages based on the loss in value to the growing crops for the damage. Grantor shall provide SCD with a copy of any conservation compliance plans that pertain to Grantor's Property, and SCD shall use manure application methods that are consistent with any conservation compliance plans that may be in effect pertaining to the Grantor's Property.

7. Grantor shall not be responsible for any injuries to SCD's employees or agents or to SCD's personal property occurring as a result of SCD's activities on the Grantor's Property contemplated by this Agreement, and SCD shall indemnify and hold Grantor, his successors, and assigns harmless from and against any such injuries or damage.

8. SCD acknowledges that it is responsible for the proper application of manure on the Grantor's Property, and SCD agrees to hold harmless and indemnify Grantor for any nuisance or trespass caused by the application of manure on Grantor's Property.

9. Grantor and SCD agree that there is no warranty, representation, or guarantee regarding the manure, express or implied, oral or written, including for (a) merchantability or fitness for a particular purpose; (b) quantity and quantity; or (c) pertaining to the benefits or detriments of the manure to the Grantor's Property and/or the crops growing or to be grown on the Grantor's Property, and SCD disclaims any such warranties, representations, and guarantees. Grantor agrees to discharge and hold harmless SCD from all claims hereafter arising out of any damage or injury alleged or proved to crops, animals, people, Grantor's property, or other real or personal property as a consequence of the application or disposal of manure pursuant to this Agreement except as provided for in paragraph 6 herein.

10. This Agreement shall inure to the benefit of and be binding upon the heirs, executors, personal representatives, and successors and assigns of the parties to it. However, SCD may not assign this Agreement without the prior written consent of the Grantor, which shall not be unreasonably delayed or withheld. If SCD or its successors or assigns should cease dairy operations during the term of this Agreement, this Agreement shall automatically terminate upon the cessation of the dairy operations; otherwise, the rights granted to SCD by this Agreement may not be revoked during this Agreement's term, except for the failure of SCD to comply with the terms and conditions specified herein.

11. Grantor warrants and covenants that he or she has full and complete authority and control over the Grantor's Property, that he or she has the power and authority to sign this agreement in the capacity designated below, and that this Agreement will not violate any encumbrance, lien, restriction, covenant, or estate in the Grantor's Property.

12. All notices and communications of similar legal import from any party to the other shall be in writing and shall be considered to have been duly given and served if hand delivered or sent by first class certified or registered mail, return receipt requested, postage prepaid, to the party or parties at its address set forth below, or to such other address as such party may hereafter designate by written notice to the other party or parties.

If to Grantor:
With copy to:
If to SCD:
With copy to:

Such notices and communications shall be deemed to be received, whether actually received or not, three (3) days after mailing as aforesaid. In lieu of mailing a notice contemplated by this Agreement, the parties may transmit a facsimile by telecopier.

13. Grantor and SCD, upon the request of either party, shall execute a Memorandum of Agreement in the form acceptable to both parties. Either party shall be entitled to record the Memorandum of Agreement with the appropriate land title registry for the location of Grantor's Property.

14. This Agreement constitutes the entire agreement and understanding between the Grantor and SCD, superseding all earlier agreements or representations, written or oral. Any change or amendment to this Agreement shall be effective only if it is in writing and signed by both the Grantor and SCD. Any waiver of the terms of this Agreement or breach of this Agreement will not be deemed to be a waiver of any subsequent failure of strict compliance. If any provision is held invalid, the remaining provisions of this Agreement shall remain in full force and effect as if that invalid provision had not been included in this Agreement.

[Signatures and notary public attestations]

The growth and proliferation of animal confinement facilities and the resulting need to put the animal wastes generated by these facilities to beneficial use will require increasing attention to manure application agreements. The authors welcome any comments or suggestions from others who have worked to develop such agreements.

—Christopher R. Kelley, Minneapolis, MN &
Thomas A. Lawler, Parkersburg, IA.

CONFERENCE CALENDAR

Sustainable Agriculture and the 1995 Farm Bill
Jan. 23-25, 1995, Hyatt Regency, Washington DC
Sponsored by: The Council for Agricultural Sciences and Technology
For more info., call 616-429-0300.

New Statutory Provisions Regarding Liability for Horse Accidents*

By Terence J. Centner

Legislatures may encourage charitable or philanthropic activities through the adoption of legislation that provides immunity against negligence actions or reduces the duties of care owed to others. The good Samaritan laws and recreational use statutes are two examples of such legislation. During the past five years, twenty-eight states have drawn upon this legislation to enact a new set of statutes for qualifying persons associated with horses and other equines,[1] and similar legislation has been proposed in fourteen other states.[2] The statutes, called the equine liability statutes, draw upon the philosophy of the good Samaritan and recreational use models to encourage equine activities by reducing the possibility of a jury award to an injured participant. The statutes do not apply to the horse racing industry.[3]

The expansion of tort liability, increases in insurance costs, and the dangerousness of equine activities constitute unique factors that may be found to justify special dispensation. The new statutes respond to these factors while balancing other equities such as incentives for providing safe equine activities, compensation for injured plaintiffs, and facilitating reasonably priced equine activities.

Equine liability statutes set forth a statutory command whereby qualifying persons "shall not be liable for an injury or the death of a participant" resulting from certain activities.[4] Variations in some statutes assert that no person is liable or a person is not liable for injuries of participants. Such directives are similar to the directives of good Samaritan statutes[5] and should be interpreted as providing immunity to persons meeting the statutory requirements.

The quality of this immunity is augmented by language of some statutes that an equine participant or the participant's representative may not maintain an action against or recover for injuries resulting from qualifying equine activities. Another provision accompanying some of the statutory directives precludes claims, the maintenance of an action, or recovery for injuries, losses, damages, or death resulting from qualifying equine activities.

Terence J. Centner is a professor at the University of Georgia and is a past president of the American Agricultural Law Association.

** A more detailed account of these statutes will appear in vol. 62, issue 4 of the Tennessee Law Review*

Most of the new equine liability statutes incorporate two warning notice requirements that apply to some persons involved in equine activities. Generally, the notice requirements apply to equine professionals, or to both professionals and equine activity sponsors. The first statutory notice command requires the posting of a warning notice by means of a sign. The second command requires the inclusion of a warning notice in written contracts for professional services, instruction, and rental of equipment. The required notice generally is the same for signs and written contracts, and seeks to put equine participants on notice of their assumption of the inherent risks of equine activities.

Classification of the Statutes

Despite the similar directives of many of the equine liability statutes, distinctions among other provisions mean that immunity varies considerably. Three distinct groups of statutes may be observed.

Inherent Risk Statutes

The first category limits statutory immunity for injuries or death of participants to those resulting from the inherent risks of equine activities. These statutes may be called the inherent risk (IR) statutes. Nine statutes may be classified as IR statutes because of their definition of the "inherent risks of equine activities" as a qualification for statutory immunity (AL, CO, GA, LA, MA, MS, MO, SD, TN).

The statutory immunity of each IR statute is prescribed broadly and is available for sponsors, professionals, and any other person, including partnerships and corporations. Limitations on the immunity afforded by these statutes are contained in the definition of inherent risks of equine activities and several exceptions to liability. While the definition of inherent risks restricts the immunity provided to a narrow class of qualifying activities, the broad class of potential defendants afforded immunity and a broad definition of participants engaged in equine activities may mean that IR statutes offer potential defendants greater protection than is provided by other equine liability statutes.

Sponsor and Professional Statutes

The second category limits immunity to equine activity sponsors and equine professionals for injuries or death of participants engaged in an equine activity. These statutes may be called the sponsor and professional (SAP) statutes. Eight SAP statutes limit the grant of immunity to sponsors and equine professionals for injuries and death of participants engaged in an equine activity, and apply to a restrictive set of defendants and plaintiffs (ID, MT, ND, OR, SC, UT, VA, WA).

The immunity proffered by the SAP statutes excludes defendant horse owners who have animals for pleasure rather than a business. Accordingly, if such an owner invites a friend to join in an equine activity and the friend falls off the horse, the statute would not serve as a defense, and the owner may be liable for the injuries under tort law. Generally, the statutory immunity also is not available to defendants who are evaluating an activity, inspecting an equine, serving as a farrier, or rendering veterinary services.

With respect to plaintiffs under the SAP statutes, the statutory immunity is available only against plaintiff-participants who were engaged in an equine activity. This limitation means that actions by plaintiffs who are nonriders, persons evaluating equines or events, persons inspecting equines for potential purchase, farriers, veterinarians, and spectators are not affected by the SAP statutes. Thus, numerous categories of equine injuries are not affected by the immunity proffered by the SAP statutes.

Narrow Immunity [NI] Statutes

A third group of statutes simply limit negligence actions and do not follow the above-noted statutory directive (AZ, CT, FL, HI, KS, ME, NM, RI, WY). Provisions of these statutes alter one of the following: presumptions of negligence, assumptions of risk, or the causal relationship required for liability; or they are part of the state's recreational statute. Thereby, these statutes allow certain negligence claims even in the absence of an act or omission that constitutes a willful disregard for the safety of the participant. Thus it may be expected that these statutes may not markedly affect liability.

Two state statutes do not fit in any of these categories. The Arkansas equine liability statute applies only to officers, employees, or members of the board of directors of nonprofit corporations. The West Virginia statute provides duties and liabilities for horsemen, who have duties to determine the ability of participants, to disclose characteristics and conditions of horses, to divulge dangerous conditions of land and facilities, and to make efforts to provide safe equipment and tack.

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Exceptions to Statutory Immunity

The broad immunity available to qualifying defendants provided by the equine liability statutes is not absolute. Rather,

most of the statutes limit the statutory immunity through several enumerated exceptions. Generally, the exceptions are set forth with language stating that nothing of the statutory grant of immunity shall prevent or limit the liability of a defendant whose acts or actions fall within an enumerated statutory exception.

The import of the statutes is that qualifying defendants are immune from liability unless the plaintiff establishes qualification under one or more of the exceptions. Factual questions may remain for the jury, but questions concerning the application of the law may present questions of law as well as questions of law for the court.[6] Plaintiffs who present facts to establish qualification under an exception may nullify the grant of immunity so that a liability issue remains to be resolved.

Specific Exceptions

Two or more specific exceptions to the statutory grant of immunity are incorporated in most of the equine liability statutes. First, the equine liability statutes do not grant immunity in situations that involve intentional injury of a participant. Persons remain liable for all intentional torts. Second, most statutes provide that an act or omission that constitutes something more than negligence is not entitled to statutory immunity. The statutes generally employ the standard of willful or wanton disregard for the safety of a participant so that conduct of this type would be actionable. This exception may be called the willful disregard exception. References to other statutory provisions concerning animal trespass under fence laws or trespass are included in some statutes as exceptions so that such trespass violations would not be affected by the equine liability statutes.

Faulty Equipment or Tack

A statutory exception concerning equipment or tack, hereafter called the equipment exception, may defeat the immunity provided by the equine liability statutes. For the IR statutes, providers with knowledge or implied knowledge of faulty equipment or tack causing a mishap do not qualify for statutory immunity. This suggests that if an equipment or tack provider fails to inspect the equipment or tack and the injured plaintiff alleged that faulty equipment or tack contributed to the mishap, evidence could exist that would be sufficient to defeat the statutory immunity provided by the equine liability statutes. Furthermore, in the absence of a definition of faulty, an allegation of old equipment or tack that did not meet current industry safety standards may suffice as a viable cause of action.

The SAP statutes delineate a different exception for equipment and tack. Immunity is not available for those persons who provided the equipment or tack and the equipment or tack caused the injury. Failure of the statutory language to delineate a qualification regarding faulty equipment suggests that an equine professional providing nonfaulty equipment may incur liability. The pleadings could allege that the negligent arrangement of equipment caused the mishap for liability under an SAP statute.

Questions of what is faulty, such as functional but worn equipment, are not settled by the statutes so that products liability law or commercial law provisions may be employed to determine the denotation of faulty equipment. At the same time, most of the statutes defer to products liability law so that injured plaintiffs may avail themselves of products liability causes of action. Under these statutes, deference to products liability law allows negligence suits based on the failure to adopt updated safety features or the latest technology in equipment and tack.

Suitability of the Equine

The immunity of the equine liability statutes is not available for persons who provide the equine and fail to determine the ability of the participant and equine to engage in a safe equine activity. This exception, the suitability exception, imposes three separate requirements on providers who desire to qualify for statutory immunity. First, the provider must employ reasonable and prudent efforts to inquire about a participant's ability to engage in equine activities. Second and third, the participant's representations of ability need to be utilized in selecting safe equine activities and in choosing an equine that can be managed safely by the participant.

A fourth provision of some of the SAP statutes expands the suitability exception by requiring a provider to determine the ability of the equine to behave safely with the participant to qualify for statutory immunity. Such a requirement differs from the third requirement by reason of focusing on the ability of the equine rather than the participant.

The suitability exception means that defendants have additional opportunities to defeat liability claims. An analysis of a claim involving an unsuitable equine starts with qualifying defendants having immunity so that a plaintiff alleging negligence involving the selection of an equine has the burden of establishing qualification under one of the three statutory requirements: (1) the participant's ability to engage in the equine activity, (2) employing the participant's representations to select a safe activity, and (3) employing the participant's representations to select a safe equine.

As the plaintiff's ability is a factor to be considered when determining the reasonableness of the defendant-provider's efforts, a plaintiff's representations to a provider may frustrate qualification. A plaintiff also may have difficulty establishing qualification under the suitability exception if the defendant-provider establishes that sufficient effort was made to ascertain plaintiff's ability to engage in the equine activity and the previous experience of the plaintiff with equines suggested that the plaintiff could safely manage the particular equine.

Land or Facilities with a Dangerous Condition

A majority of the statutes contain a statutory exception regarding dangerous latent conditions. A defendant-provider who owns, leases, rents, or is in possession and control of land or facilities with a dangerous latent condition causing an injury for which no warning signs are posted may incur liability. This imposes statutory duties on defendants to post signs regarding dangerous latent conditions and allows an injured person to establish a breach of duty whenever a required sign is missing. Conceivably, the exception for dangerous latent conditions could be interpreted as expanding the duties owed by persons in possession or control of land with natural conditions.

Under the IR statutes, the statutory exception for dangerous latent conditions raises a question of how the provision should be interpreted in view of the definition of inherent risks of equine activities. Inherent risks include hazards such as surface and subsurface conditions so that mishaps occurring because of conditions meeting this definition were intended to qualify for statutory relief. As an example, assume a plaintiff was injured when a horse stumbled because of a hidden subsurface soil condition. How would such a soil condition be classified? Would it constitute a hazard afforded immunity by reason of the definition of inherent risks of equine activities or a dangerous latent condition excepted from the statutory grant of immunity?

Various rules of statutory construction

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may help resolve this question. Exceptions from liability or deviations from existing rights are to be construed narrowly.[7] In a similar manner, statutory grants of rights or benefits should be construed strictly against the grantee.[8] These rules suggest that the statutory grants of immunity from selected common law causes of action of the equine liability statutes should be construed strictly and narrowly. Applying the rules to the exception for dangerous latent conditions, plaintiffs' common law causes of action should be preserved unless otherwise excepted by a more specific statutory provision. Plaintiffs whose injuries arose from a dangerous latent condition may be able to maintain their suits.

Another rule of statutory construction provides that provisions of a statute are to be read as a whole and not in parts, and meaning should be given to each clause to make a consistent whole.[9] When one provision deals in general terms and another in more specific terms, they should be harmonized. If there is a conflict, the definite statute should prevail over the general term.

This rule may be applied to the provisions of the IR statutes where an express provision states that subsurface conditions are part of the inherent risks of equine activities but a general exception excepts dangerous latent conditions. The specific definitional language of inherent risks covering subsurface conditions should be found to prevail. Drawing upon historic distinctions concerning liability for unnatural as opposed to natural conditions, the specific provision for inherent risks might be read with the exception for dangerous latent conditions so that defendants remain liable only for unnatural dangerous latent conditions.

Significance of the Statutes

The review of the exceptions to liability suggests that the equine liability statutes may not be successful in providing meaningful relief from liability. With respect to the negligent maintenance of facilities, the dangerous latent condition exception and willful disregard exception may be expected to enable many plaintiffs to maintain their causes of action. For lawsuits involving the suitability of an equine, a plaintiff will often have an argument that a defendant failed to select an equine that could behave safely with the participant and can usually allege that the defendant failed to prudently consider the ability of the participant to safely manage the equine. Allegations of inadequate supervision may be expected to present triable issues related to the willful disregard exception, equipment exception, and suitability exception.

Returning to the statutory classification, the limited coverage of plaintiffs and defendants suggests that an SAP statute may not provide much assistance to potential defendants involved in equine activities. An IR statute may be expected to apply to more mishaps and immunity may cover mishaps arising from dangerous natural subsurface conditions, but may only be slightly more successful in precluding litigation concerning equine accidents. The inability to curb litigation, however, does not mean that the equine liability statutes will not provide meaningful assistance to the equine industry. Three significant consequences of the statutes may be identified.

Safety

As a result of the statutory warning requirements for sponsors and professionals, these persons may become more aware of potential problems and take action to avoid or eliminate situations that could cause accidents. When attempting to comply with the statutory notice requirements, sponsors and professionals may think of ways to eliminate dangerous conditions. The warning notice requirement of a sign posted at an equine facility for qualification for the statutory immunity increases information of the nature of equine activities. By requiring warnings for participants in written contracts, the statutes provide seasonable information regarding the risks of equine activities that may lead participants to use greater care while enjoying their equine activities. The contractual warning with the posted sign may help some participants realize they need to use care to avoid a mishap, thereby helping reduce accidents. Sponsors and professionals who desire to qualify for statutory immunity for dangerous latent conditions may also post signs regarding such conditions.

Questions of Fact or Law

The statutory immunity and exceptions of the equine liability statutes are declarations of law. As such, they appear to change former questions of fact into questions of fact and law.[10] Questions of negligence may be addressed only after a plaintiff overcomes the statutory grant of immunity through qualification under an exception. Qualification will require fact identification and a case-specific inquiry of what happened to establish an exception, questions for a jury.[11] From the facts, a determination of whether an exception applies will involve application of the law, which may involve a question of fact, a question of law, or a mixed question of fact and law. The court's instructions to the jury may determine who applies the law by framing the question in general terms or limiting the jury to specific questions involving fact identification.[12]

The major statutory exceptions that may defeat the immunity of the equine liability statutes involve negligence. The equipment exception involves faulty equipment; the willful disregard exception involves willful or wanton negligence; the suitability exception involves breaches concerning prudent efforts by a provider.

Although the questions of negligence raise issues of fact, it is not clear that the application of a statute is also a question of fact. After a jury determines the facts, the conduct of the particular case must be characterized to determine whether it meets the general legal standard, a mixed question of fact and law. When conduct is elaborated in general terms, it may be found to involve a question of law, and if the facts are not disputed, they may become questions of law for the court. When the specific conduct of a case is characterized to determine whether it meets the general standard, it may be found to involve a question of fact. Once a jury determines what happened, questions of compliance with statutory requirements may be viewed as questions of law involving the legal sufficiency of the evidence.

Thus, under the equine liability statutes, the application of the statutory exceptions may involve questions of law. Judges may allocate through their jury instructions who decides what issues. Generalized verdicts would allow the jury to identify the facts and apply them; special verdicts would allow the jury to decide what happened but reserve for the judge the job of law application, resulting in diminished opportunities for plaintiffs to appeal to a jury.[13]

Perception of Liability

A third major change instituted by the statutes involves participants' perception of liability. By providing qualifying defendants immunity, even though it may be limited, equine participants may be less likely to feel they are entitled to recover damages from equine mishaps. Participants would be aware of this statutory change through the warning notice signs posted by sponsors and professionals. Therefore, the equine liability statutes may help reduce litigation regarding mishaps and could be beneficial to the equine industry.

Conclusion

Historic legal distinctions concerning invitees, licensees, and trespassers raise an issue under the equine liability statutes of whether persons instructing others or renting equines as part of a business should be treated the same as equine activity sponsors. Should instructors and professionals being paid for their services be treated the same as benevolent sponsors with respect to liability and immunity regarding equine activities? The good Samaritan and recreational use statutes generally distinguish among acts and activities that are voluntary from those activities that are part of a vocation or business. Drawing on the good Samari-

tan statutes, the basis for immunity is the good deed or service rendered.[14] Arguably, the equine liability statutes were intended to be similar.

Furthermore, the possibility exists that if an equine liability statue was drafted to apply only to voluntary sponsors, it might grant more definitive immunity than is currently available under a majority of the statutes. By limiting the class of defendants granted immunity, an equine statute could contain fewer exceptions. Thereby, qualifying defendants would have greater protection than currently provided by the IR, SAP, or NI statutes.

Endnotes

[1] Alabama, Arkansas, Arizona, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Kansas, Louisiana, Maine, Massachusetts, Mississippi, Missouri, Montana, New Mexico, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, and Wyoming.

[2] California, Illinois, Indiana, Iowa, Kentucky, Michigan, Nebraska, New Jersey, New York, North Carolina, Oklahoma, Pennsylvania, Texas, and Vermont.

[3] *Contra* N.M. Stat. Ann. § 42-13-3 (Michie Supp. 1994).

[4] *E.g.*, Mass. Gen. Laws Ann. ch. 128, § 2D(b) (West Supp. 1994).

[5] *See*, Danny R. Vielleux, "Construction and Application of 'Good Samaritan' Statutes," 68 A.L.R.4th 294 (1989).

[6] Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 235 (1985).

[7] Norman J. Singer, Sutherland, Statutory Construction § 57.1 (5th ed. 1992).

[8] *Id.* § 63.02.

[9] *Id.* § 46.05.

[10] *See* Henry M. Hart, Jr., and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, 374 (tent. ed. 1958).

[11] Henry P. Monaghan, *supra* note 6, at 235.

[12] Hart & Sacks, *supra* note 10, at 377-79.

[13] Hart & Sacks, *supra* note 10, at 377.

[14] Alvin Lee Block & Charles Bond, *Medical Malpractice: Handling Internal Medicine Cases* § 47.14 (1992).

State Roundup

ILLINOIS. *Decedent's estate continuing to farm land which had been farmed by tenant-decedent.* In *Ames v. Sayler*, No. 4-94-0315, 1994 WL 615668 (Ill. App. 4th Dist. Nov. 8, 1994), the Illinois Court of Appeals considered whether a decendent's estate may continue to farm land which had been farmed by the decedent as a tenant.

For twenty years prior to his death, Whitney Ames (decedent) farmed land owned by Sayler pursuant to an oral lease. The lease was a 50-50 crop share agreement, with Sayler paying half of the seed and fertilizer costs. In the years immediately preceding Ames' death, the farm work was performed by decedent's son, Mark Ames (plaintiff) and by Copeland (hired by decedent).

Following decedent's death on January 19, 1994, plaintiff was told not to farm the property and that he would be reimbursed for the 1993 crop year expenses incurred. Sayler then signed a lease for the 1993 crop year with a third-party. Nevertheless, plaintiff and Copeland proceeded to apply chemicals and plant corn and soybeans on Sayler's farmland.

The trial court held that a personal services contract existed since, although the decedent had not done all the work himself, Sayler did not know this; the decedent had farmed the land for a long period of time; and Sayler had relied heavily on decendent's advice. Since a personal services contract is not assignable, and does not survive without the consent of both parties, the lease terminated upon the death of decedent. Accordingly, the court entered judgment for Sayler and placed the third-party tenant in possession.

On appeal, the plaintiff focused on the question of whether a landlord-tenant relationship existed. The plaintiff relied on *In re Estate of Flowers*, 420 N.E.2d 216 (Ill. App. 4th Dist. 1981), in which the court of appeals held that two possibilities exist when one who was farming land for another died: the relationship might be landlord-tenant, in which case the tenancy could only be terminated by a statutory four-month notice (735 ILCS 6/9-206); or the relationship might be a personal services contract which would terminate on the death of the one farming the land. The plaintiff argued that a landlord-tenant relationship existed and thus the notice statute applied.

The appellat court disagreed with *Flowers* and opined that the four-month notice statute deals with termination at the end of the year (March 1 to February 28), and not termination upon the death of one of the parties. Further, the court noted that farm tenancies and personal services contracts are not mutually exclusive categories. "No satisfactory reason appears why a farm owner should be forced to accept a substitute, if the farm owner can be said to have entered a 'tenancy,' but not if what is basically the same relationship is labeled a personal services contract." 1994 WL 615668, *2.

Affirming the decision below, the court of appeals stated that determining such cases on the basis of whether a personal services contract existed, whether a tenancy or not, will generally provide the fair result. The court also observed that the parties could resolve the question for themselves by employing a written lease agreement.

—Scott D. Wegner, Lakeville, MN

OHIO. *Septic tank contents used as fertilizer.* In a case of first impression, the Ohio Court of Appeals considered whether the application of contents from residential septic tanks, grease traps, and portable toilets to farmland can be prohibited by township regulation. *Board of Trustees of Allen Township v. Chasteen*, No. 930T055, 1994 WL 518081 (Ohio App. 6 Dist. Sept. 23, 1994).

Chasteen owns and operates A-1 Septic Tank Cleaning Service in addition to owning and farming land in Allen Township. Chasteen uses a vacuum tank truck to clean septic tanks, grease traps, and portable toilets, and then dumps the contents onto his farmland. Allen Township brought suit against Chasteen to enforce a zoning regulations which reads in part: "[t]he dumping and/or burying and/or spreading, in any manner, of sewer sludge and/or industrial waste is fully prohibited...." A temporary injunction issued by a referee was subsequently dissolved by the trial court.

The court of appeals first determined that the materials spread by Chasteen were sewage. The court next examined whether spreading and disking sewage into farmland was an agricultural use of land for agricultural purposes. The trial court's factual findings that spreading the material as fertilizer is commonplace and "a well-recognized benefit to agricultural land" were based on witness testimony. Holding the trial court's decision was supported by some competent, credible evidence, the appellate court affirmed.

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Federal Register *in Brief*

The following matters were published in the *Federal Register* during the month of November, 1994.

1. Farm Service Agency; Wetlands Reserve Program; ASCS abolished and Farm Service Agency established; final rule; effective date 11/23/94. 59 Fed. Reg. 60297.

2. EPA; Plant pesticides subject to FIFRA; proposed rule; comments due 1/23/95. 59 Fed. Reg. 60519.

3. EPA; Plant pesticides subject to ... the Federal Food, Drug, and Cosmetic Act; statement of policy. 59 Fed. Reg. 60496.

4. FCA; Accounting and reporting requirements; high risk assets; interim rule. 59 Fed. Reg. 60886.

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agricultural law update

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