Agricultural Law Update

VOLUME 6, NUMBER 5, WHOLE NUMBER 65 FEBRUARY 1989

Official publication of the American Agricultural Law Association

INSIDE

IN FUTURE ISSUES

- Bankruptcy empowering statute may alter rights in cooperative patronage certificates
- Suppressing unlawful discharge of pollutants

Marketing orders covering imported grapes

Importers of grapes raised three issues concerning barriers to trade incorporated into provisions of a marketing order in *Cal-Fruit Suma International v. U.S. Dept. of Agriculture*, 698 F. Supp. 80 (E.D. Pa. 1988).

The first contention was that inspection standards for imported and domestic grapes were not comparable. The importers argued that the inspection of their grapes should occur at the site of harvest. The court noted that the only relevant market under the Agricultural Marketing Agreement Act (7 U.S.C. § 601 *et seq.*) was the U.S. market. Inspection of all grapes just prior to entry to the U.S. market provided for the same standards.

Second, the importers argued that 7 U.S.C. § 602(4) precludes commencement of a marketing order prior to the normal marketing season. The court disagreed. Marketing orders are to further the orderly supply of the product throughout the growing season. This may include regulating conditions prior to the commencement of the normal marketing season that impact price and supply during the normal marketing season. The threat of immature grapes and higher prices during the early part of the season justified implementation of the marketing order prior to the normal season to further orderly marketing.

The third issue raised by the importers was whether provisions of the multilateral Agreement on Technical Barriers to Trade (19 U.S.C. § 2531 *et seq.*) superceded the regulations of the Agricultural Marketing Agreement Act. The court found no incompatibility between the legislation and reiterated its finding that inspection of imported and domestic grapes at the point of entry into the U.S. market provided comparable inspection treatment for all grapes. – *Terence J. Centner*

Liability for groundwater contamination

An award of $3.6 million based upon a continuing nuisance against salt mining operations in Kansas has been upheld by the Tenth Circuit Court of Appeals in *Miller v. Cudahy Co.*, 858 F.2d 1449 (10th Cir. 1988). The court also approved an award of $10 million in punitive damages.

Plaintiffs, owners and lessees of real property, initiated their claims in 1977 for injunctive relief and actual and punitive damages. Plaintiffs claimed that the defendants had allowed salt to escape from their property into the groundwater of the aquifer under their properties. The salt concentrations rendered the groundwater unfit for irrigation of corn crops, resulting in damages as plaintiffs were forced to switch to less profitable dryland crops.

A major issue on appeal was whether the injuries suffered by plaintiffs were permanent rather than temporary in nature and thus barred by the statute of limitations. The district court concluded that the salt pollution was a continuing abatable nuisance causing temporary damages.

The Tenth Circuit agreed. The evidence indicated that abatement of the salt pollution would remedy damage to the aquifer so that the pollution damages could be categorized as temporary.

Defendants next argued that actual damages had not been calculated correctly. They argued that damages either could not exceed the value of the injured properties or should be based on reduced rental value of the properties.

The district court awarded actual damages of $3.6 million based on the temporary damages to annual crop production. Damages were calculated from the difference between the net value of corn crops that would have been grown using supplemental irrigation if the groundwater was not contaminated and the net value of the wheat and milo crops which were actually grown. The Tenth Circuit found that the district court had correctly applied Kansas law in calculating damages from the value of the use of the property.

The defendants also contended that the evidence was not sufficient to support an award for punitive damages. The appellate court noted that punitive damages could be imposed if there was a showing of a willful and wanton invasion of an injured party's rights. Since the evidence showed that the defendants had maintained the nuisance with a reckless disregard for the rights of others, the conduct was found to be sufficient to support an award of punitive damages. – *Terence J. Centner*

Bibliography of agricultural law review articles

The following is a listing of recent law review articles relating to agricultural law. Persons desiring to obtain a copy of any article should contact the law school library nearest them.

Agribusiness Corporations

Houston, Centner & Morgan, *Uncertainty and Structural Issues Facing the Seed Handling Industry*, 4 Agribus.: An Int'l. J. 347 (1988).

Bankruptcy

Farmers

Chapter 12

Foster & Warren, *Chapter 12 after the First Year: An Analysis of the Issues*, 27 Washburn L. J. 495-527 (1988).

Kressel, *Calculating the Present Value of Deferred Payments Under a Chapter 12 Plan: A New Twist to an Old Problem*, 62 Am. Bankr. L.J. 313-326 (1988).

Note, *Bankruptcy: Determination of An Appropriate Cram-down Interest Rate for the Family Farmer*, 41 Okla. L. Rev. 489-506 (1988).

General

Howard, *An Overview of the State and Federal Tax Responsibilities of Bankruptcy Trustees and Debtors*, 93 Com. L.J. 43 (1988).

Nelson, *Taxation of Abandonments in Bankruptcy*, 10 J. Agric. Tax. & Law 221-242 (1988).

Cooperatives

General

Book Review, 3 J. Agric. Cooperation 107-109 (1988) (reviewing Cooperatives in Agriculture).

Centner, *The Role of Cooperatives in Agriculture: Historic Remnant or Viable Membership Organization*, 3 J. Agric. Cooperation 94-106 (1988).

Dunn, *Basic Cooperative Principles and Their Relationship to Selected Practices*, 3 J. Agric. Cooperation 83-93 (1988).

Matthews, *Financial Instruments Issued by Agricultural Cooperatives*, Agric. Cooperative Service Research Report #68 (March 1988).

Organizational Issues

Barton & Schmidt, *An Evaluation of Equity Redemption Alternatives in Centralized Cooperatives*, 3 J. Agric. Cooperation 39-58 (1988).

Bravo-Ureta & Lee, *Socioeconomic and Technical Characteristics of New England Dairy Cooperative Members and Nonmembers*, 3 J. Agric. Cooperation 12-27 (1988).

Butler, *Designing Membership Structures for Large Agricultural Cooperatives*, Agricultural Conservation Service Research Report #75 (September 1988).

Gray, *Structuring for Member Control in a Large Cooperative*, Agricultural Conservation Service Research Report #72 (July 1988).

Hopkin, Sporleder, Padberg & Knutson, *Evaluation of Restructuring Alternatives for the Banks for Cooperatives*, 3 J. Agric. Cooperation 71-82 (1988).

Sporleder, *Membership Policy Alternatives for Marketing Cooperatives*, 3 J. Agric. Cooperation 1-11 (1988).

Sporleder, Malick & Tough, *Relationship of Pooling to Equity Capital and Current Assets of Large Producer Marketing Cooperatives*, 3 J. Agric. Cooperation 28-38 (1988).

Tauer & Weersink, *Optimal Equity Recovery for a Cooperative Financial Institution*, 3 J. Agric. Cooperation 59-70 (1988).

Farm Policy and Legislative Analysis

Vasavada & Centner, *Demand for Farm Credit Legislation*, 4 Agribus.: An Int'l. J. 371 (1988).

Forestry

O'Toole, *Reforming the Forest Service*, 13 Colum. J. Envtl. L. 299-317 (1988).

Land Sales/Finance, Mortgages/Foreclosures

Freyfogle, *Vagueness and the Rule of Law: Reconsidering Installment Land Contract Forfeitures*, 1988 Duke L.J. 609-656 (1988).

Land Use Regulation

Land Use Planning and Farmland Preservation Techniques

Centner, *Agricultural Nuisances under the Amended Georgia "Right to Know" Law*, 23 Ga. St. B. J. 36 (1988).

Patents and Trademarks

Centner, *Trademark Law for Specialty Fruits and Vegetables*, 10 J. Agric. Tax. & Law 3 (1988).

Christie, *The Novelty Requirement in Plant Breeder's Rights Law*, 19 Int. Rev. Indus. Prop. & Copyright L. 646-657 (1988).

Taxation

Pett, *The Section 183(d) Presumption: Of No Consequence?*, 10 J. Agric. Tax. & L. 243-263 (1988).

Torts

Quinn, *Food Allergens and Product Liability*, Food Engineering (March 1988 issue).

Veterinary Law

Symposium, *The Animal Drug Amendments of 1968: A Twenty Year Retrospective*, 43 Food Drug Cosm. L.J. 779-877 (1988).

von Oehsen, *The FDA's Regulation of Veterinary Biotechnology: Business as Usual or a New Era of Environmental Protection*, 43 Food Drug Cosm. L.J. 847-877 (1988).

Uniform Commercial Code

Article Two "A"

Miller, Puckett & Suggs, *Leases of Goods in Oklahoma: The New Rules*, 41 Okla. L. Rev. 417-446 (1988).

Federal Preemption of Farm Products Exception

McCubbins, *Farm Products Lending and Oklahoma's New Article IX: A Practical Analysis*, 13 Okla. City Univ. L. Rev. 297-323 (1988).

Water Rights: Agriculturally Related

Anderson & Leal, *Going With the Flow: Marketing Instream Flows and Groundwater*, 13 Colum. J. Envtl. L. 317-324 (1988).

Getches, *Water Planning: Untapped Opportunity for the Western States*, 9 J. Energy L. & Pol'y 1-45 (1988).

MacDonnell, *Colorado's Law of "Underground Water": Looking at the South Platte Basin and Beyond*, 59 Colo. L. Rev. 579-626 (1988).

MacIntyre, *The Adjudication of Montana's Waters: A Blueprint for Improving the Judicial Structure*, 49 Mont. L. Rev. 211 (1988).

Trager, *Emerging Forums for Groundwater Dispute Resolution in California: A Glimpse at the Second Generation of Groundwater Issues and How Agencies Work Towards Problem Resolution*, 20 Pac. L.J. 31-74 (1988).

Willey & Graf, *Federal Water Policy in the United States: An Agenda for Economic and Environmental Reform*, 13 Colum. J. Envtl. L. 325-356 (1988).

– Drew Kershen

Agricultural Law Update

VOL. 6, NO. 5, WHOLE NO. 65 FEBRUARY 1989

AALA Editor Linda Grim McCormick
188 Morris Rd.
Toney, AL 35773

Contributing Editors: Donald B. Pedersen, University of Arkansas School of Law, Fayetteville, AR; Terence J. Centner, University of Georgia, Athens, GA; Drew Kershen, University of Oklahoma School of Law, Norman, OK; Gerald Harrison, Purdue University; Linda Grim McCormick, Toney, AL.

State Reporter: Julia R. Wilder, University of Arkansas; Fayetteville, AR.

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

Agricultural Law Update is published by the American Agricultural Law Association. Publication office: Maynard Printing, Inc., 219 New York Ave., Des Moines, IA 50313.

Federal Register *in brief*

The following is a selection of matters that have been published in the *Federal Register* in the past few weeks.

1. BLM; Grazing Administration; livestock grazing on public lands; proposed rule; 53 Fed. Reg. 49564.

2. BLM; Grazing Administration; Grazing fee for 1989; effective date 3/1/89. 54 Fed. Reg. 1449.

3. APHIS; Garbage; final rule; effective date 1/12/89. 53 Fed. Reg. 49974. Correction 53 Fed. Reg. 52576.

4. APHIS; Interstate movement of citrus fruit from Florida; interim rule; effective date 12/29/88. 54 Fed. Reg. 97.

5. USDA; Setoffs and withholdings; federal claims collection; final rule; effective date 12/14/88. "[I]ntent of this rule is to extend the regulatory period of time allowed for setoff and withholding to ten years." 53 Fed. Reg. 50201.

6. USDA; Immigration Reform and Control Act of 1986; SAWs program; final rule; effective date 12/15/88. "This final rule redetermines whether the commodity sod meets the definition of "other perishable commodity." 53 Fed. Reg. 50375

7. USDA; Debarment and suspension (nonprocurement); final rule; effective date 3/1/89. 54 Fed. Reg. 4722.

8. CCC; Setoffs and withholdings; federal claims collection; final rule; effective date 12/14/88. "[I]ntent of this rule is to extend the regulatory period of time allowed for setoff and withholding to ten years." 53 Fed. Reg. 50204.

9. CCC; Duty drawback and USDA export programs; advance notice of proposed rulemaking; comments due 4/11/89. 54 Fed. Reg. 987.

10. CCC; Forage Assistance Program; final rule; effective date 1/11/89. 54 Fed. Reg. 964.

11. FCA; Organization; personnel administration; general provisions; disclosure to shareholders; final rule. 53 Fed. Reg. 50381.

12. FCA; Final order barring claims, discharging and releasing the Farm Credit Bank of Louisville and cancelling charter of Mammoth Cave PCA; notice; Dated 11/28/88. 53 Fed. Reg. 51003.

13. FCA; Borrower rights; final rule; correction; effective date 10/14/88. 53 Fed. Reg. 52401.

14. FCA; Organization; conservatorships and receiverships; final rule and affirmation of interim rule. 54 Fed. Reg. 1146.

15. FCA; Personnel administration; loan policies and operations; funding and fiscal affairs, loan policies and operations, and funding operations; general provisions; interim rule; effective date 1/6/89; comments due 3/6/89. 54 Fed. Reg. 1149.

16. FCA; Loan policies and operations; final rule. 54 Fed. Reg. 1151.

17. FCA; Loan policies and operations; disclosure to shareholders; accounting and reporting requirements; final rule. 54 Fed. Reg. 1153.

18. FCA; Funding and fiscal affairs, loan policies and operations, and funding operations; final rule. 54 Fed. Reg. 1156.

19. FDA; Generic Animal Drug and Patent Term Restoration Act; letter setting forth agency policies; availability. 53 Fed. Reg. 50460.

20. PSA; Rules of practice governing proceedings under the Packers and Stockyards Act; rules applicable to rate proceedings; final rule; effective date 1/23/89. 53 Fed. Reg. 51235.

21. IRS; Election, revocation, termination, and tax effect of Subchapter S status; notice of proposed rulemaking. 53 Fed. Reg. 52190.

22. IRS; Treatment of partnership liabilities; allocations attributable to nonrecourse liabilities; final and temporary regulations. 53 Fed. Reg. 53140.

23. IRS; Corporate separations; income taxes; final regulations; effective date 2/6/89. 54 Fed. Reg. 283.

24. ASCS; Farm marketing quotas, acreage allotments, and production adjustment; reconstitution of farms, allotments, quotas, bases, and acreages; interim rules; effective date 12/29/88. 53 Fed. Reg. 52623.

25. ASCS; CCC; Conservation Reserve Program; interim rule. "Expands the land eligibility provisions of the CRP to include certain fields which are subject to scour erosion or which contain wetlands." effective date 1/10/89; comments due 3/13/89. 54 Fed. Reg. 801.

26. FmHA; Drought and Disaster Guaranteed Loan Program; interim rule; effective date 1/3/89; comments due 3/6/89. 54 Fed. Reg. 2.

27. FmHA; Implementation of IRS offset; final rule; effective date 1/11/89. 54 Fed. Reg. 965.

28. FmHA; Revision of Guaranteed Farmer Program loan regulations; final rule; effective date 1/13/89. 54 Fed. Reg. 1534.

29. FmHA; Implementation of the Farmer Program Loan Provisions of the Disaster Assistance Act of 1988; interim rule. 54 Fed. Reg. 2083.

30. FmHA; Interest, penalties and administrative costs; proposed rule; comments due 3/27/89. "Amends its regulations to provide for assessing individual borrowers a $7 fee when the Agency must process an uncollectible item." 54 Fed. Reg. 3610.

31. EPA; Advertising of unregistered pesticides, unregistered uses of registered pesticides and FIFRA section 24(c) registrations; final interpretive rule; effective date 3/13/89. 54 Fed. Reg. 1122.

32. Foreign Agricultural Service; US-Canada Free-Trade Agreement of 1988; procedures to monitor Canadian fresh fruit and vegetable imports; interim rule. 54 Fed. Reg. 1326.

33. Commodity Futures Trading Commission; arbitration and other dispute settlement procedures; final rule; effective date 2/16/89. 54 Fed. Reg. 1682.

34. FCIC; General crop insurance regulations; proposed rule; comments due 3/24/89. 54 Fed. Reg. 3048, 3049.

35. Wage and Hour Division; SAWs; employers' reporting and employment regulations; final rule; effective date 1/26/89. 54 Fed. Reg. 3970.

36. INS; SAWs; employment records; final rule; effective date 1/31/89. 54 Fed. Reg. 4756. – *Linda Grim McCormick*

AG LAW CONFERENCE CALENDAR

AgBiotech '89

March 28-30, 1989, Hyatt Regency, Arlington, VA.

Topics include: patents and regulatory affairs; state and local public relations regarding environmental release.

Sponsored by Biotechnology Magazine.

For more information, call 1-800-243-3238, ext. 232.

Fifteenth Annual Seminar on Bankruptcy Law and Rules

April 6-8, 1989, Marriott *Marquis* Hotel, Atlanta, GA.

Topics include: lender liability; creditor strategies; setoff and recoupment.

Sponsored by Southeastern Bankruptcy Law Institute.

For more information, call 404-396-6677.

Farm Bankruptcies under Chapter 12

Videolaw seminar.

Topics include: cash flow; income tax aspects; conversion to Ch. 12; tax liens.

Sponsored by American Bar Association.

For more information, call 1-800-621-8986 or 312-988-6200

Air and Water Pollution Control Law

May 25-27, 1989, Hyatt Regency Hotel, Washington, D.C.

Topics include: implementing the Clean Water Quality Act of 1987 Amendments; wetlands protection; and Superfund/RCRA developments

Sponsored by ALI-ABA.

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

Symposium on Agricultural and Agribusiness Credit

Please see the special announcement of this conference on page 8 of this issue of the *Update*.

U.S. agricultural trade legislation: an overview — Part I ©

by Donald B. Pedersen

Introduction

The goal of this two-part article is to give a brief overview of the statutory framework in which U.S. agriculture seeks to thrive in the international arena. A vast array of intricate statutes are alluded to, including, but certainly not limited to, provisions of the Food Security Act of 1985 (hereinafter farm bill), as amended, Pub. L. No. 99-198, 99th Cong., 1st Sess., 99 Stat. 1354, and the Omnibus Trade and Competitiveness Act of 1988 (hereinafter trade bill), Pub. L. No. 100-418, 100th Cong., 2nd Sess., 102 Stat. 1107-1574; House Conf. Rept. No. 100-576, 100th Cong., 2nd Sess., *reprinted in* 1988 U.S. Code & Admin. News 1547. It is not the purpose of this article to present a transactional guide for export or import transactions.

Several themes have been selected, each of which will be pursued briefly.

Part I – Exports out of the United States
- –Promotion and facilitating
- –Competitive pricing
- –Financing
- –Bilateral and multinational trade agreements
- –Trade remedies – interference with U.S. export markets
- –Export controls*

Part II – Imports into the United States*
- –Import controls*
- –Trade remedies – interference with U.S. domestic markets*

Exports out of the United States

–Promotion and facilitating

The legislative program that authorizes and the appropriations that support the USDA Foreign Agricultural Service (FAS) represent an important aspect of U.S. policy on international agricultural trade. Through its personnel, publications, and programs, FAS seeks to promote and facilitate U.S. exports of agricultural commodities, particularly high-value products.

FAS personnel are assigned to U.S. embassies throughout the world and there carry on the tasks of promoting trade, reporting on foreign trade policies, monitoring markets, evaluating crops, and so forth. About one-half have the title agricultural counselor, some have the more prestigious designation agricultural attache, and as a result of the 1988 trade bill as many as eight will hold the even more elevated diplomatic title of Minister-Counselor. § 4211. Section 4211 requires that the administrator of FAS direct that FAS attaches reassigned to the U.S. spend time consulting with U.S. producers and exporters.

FAS is responsible for some 15 U.S. Agricultural Trade Offices in key markets in the Pacific Rim and in such locations as London, Istanbul, Manama, Lagos, Algiers, and Caracas. 7 U.S.C. §1765b. In addition, there are special offices in Brussels (European Community), Geneva (International Negotiation Center), and Rome (U.N. Food and Agriculture Organization). The fifteen offices consolidate USDA services and provide numerous benefits: home base for U.S. exporters abroad; sponsorship of displays, seminars, food tasting events, and international expositions; and housing for cooperators on a cost-share basis. Cooperators are non-profit groups such as the U.S. Feed Grains Council and the USA Poultry and Egg Council, which seek through various means to develop markets and promote U.S. exports. Pursuant to the 1988 trade bill, the Secretary of Agriculture may make available to cooperators agricultural commodities owned by the Commodity Credit Corporation (CCC), which when sold will generate monies to be used by cooperators for projects designed to expand U.S. markets. § 4214.

FAS has a number of publications and referral services designed to inform and to bring sellers and buyers together. Its Agricultural Trade and Development Missions Program sponsors missions to various countries – Algeria and Tunisia, Cote d'Ivoire, and Kenya in 1989.

The FAS Technical Office monitors non-tariff barriers and assists exporters in many areas such as compliance with foreign labeling requirements. The Technical Office plays a key role in U.S. administration of the GATT Agreement of Technical Barriers to Trade (Standards Code), which is designed to minimize, if not eliminate, technical barriers among the thirty-eight signatory countries as to quality and health standards for food, plants, and animals.

As authorized by the 1988 trade bill FAS on November 29, 1988 announced the establishment of a Trade Assessment and Planning Office. § 4206. This office will provide a wide range of information to exporters, including information on foreign export trade barriers, unfair trade practices, and remedies under U.S. law for persons who may have been injured by such practices. *Id.* The office also will coordinate the preparation of an annual Long-Term Agricultural Trade Strategy Report to the Congress. § 4201.

Extra appropriations for FY 88, 89 and 90 are authorized for FAS by the 1988 trade bill – $20 million. § 4215. In addition to stepped up activities generally, FAS is to place an emphasis on developing markets for value-added beef, poultry, and pork products. *Id.*

–Competitive pricing

For various reasons, including world surpluses and the subsidy programs of certain foreign governments, the world prices of some agricultural commodities often fall below U.S. prices and even below the U.S. cost of production. The U.S. response has been complex and multifaceted. Selected pieces of legislation are now examined, but trade tariff and trade remedies are left for later discussion.

The Food Security Act of 1985, P.L. No. 99-198 as amended, has as an overall design the pushing down of prices of certain U.S. raw agricultural commodities. Target prices for target price commodities are ratcheted down at a gradual annual pace over the five-year life of the farm bill. Target prices apply to wheat, rice, corn, sorghum, barley, oats, and upland cotton. CCC price support loan levels are likewise gradually being reduced. Price support loans are available for soybeans, in addition to the indicated commodities. Since price support loan levels tend to set a floor for U.S. prices of impacted commodities, the policy move is obvious – more competitive prices. Of course, in non-drought years when production is high, U.S. producers will receive somewhat lower prices as the farm bill runs its course, and, as to target price commodities, U.S. producers will rely heavily on deficiency payments to support income.

Note also that payments received in cash were reduced by 4.3% in 1986-87 because of Graham-Rudman-Hollings.

In addition, the Secretary has discretion under the Findley Amendment to lower the CCC loan rate as to certain commodities by up to twenty percent. Sec.

Donald B. Pedersen is Professor of Law and Director of the Graduate Agricultural Law Program at the University of Arkansas School of Law.

* These subsections will be addressed in the second installment of this article, to be published in the April issue of the *Agricultural Law Update.*

... 7 U.S.C. § 1444d(a)(3) as to feed ...ains. Again, lower U.S. prices are the ...al and increased reliance by farmers ...n deficiency payments the result. The Findley loan rate has been in use for the 1987 and subsequent crops of wheat, corn, sorghum, barley, and oats.

Beyond this, the Secretary has discretionary authority to activate a marketing loan concept as to certain commodities. *See, e.g.,* 7 U.S.C. § 1444d(a)(4) as to feed grains. When world prices drop below the CCC loan rate, the Secretary may allow producers to repay their CCC price support loans at the lower of the loan rate or the world market price, keep the balance of the loan proceeds, and keep the commodities. Again, the goal is to allow U.S. agricultural commodities to move into export markets at competitive prices. The marketing loan has been activated, though not necessarily triggered, for recent crops of rice and upland cotton.

The 1988 trade bill contains a section entitled "Triggered Market Loans and Export Enhancement." § 4301. Assuming that the U.S. does not have new laws ...plementing the hoped for agreement ...the current Uruguay GATT Round, the President is to report to the Congress not later than forty-five days after January 1, 1990, and is to certify whether or not significant progress has been made. If the certification is negative, the President "shall" instruct the Secretary of Agriculture to permit producers to repay loans for the 1990 crops of wheat, feed grains, and soybeans at the lessor of the loan level or the prevailing world market price – the marketing loan concept. The President may waive this requirement if he determines that implementation might interfere with ongoing GATT talks. The Congressional policy is clear – if necessary, fight with domestic subsidies if the GATT talks are badly stalled.

There also is discretion to engage the marketing loan concept for the 1990 crops of cottonseed and sunflower seed, if the marketing loan program is used for soybeans. § 4302.

The programs discussed thus far are viewed by some foreign competitors as domestic subsidies of the offensive kind. Beyond these programs, the U.S. has export subsidy programs that indirectly impact price. These programs are regularly attacked in commentary by foreign governments.

The Export Enhancement Program (EEP), created in the 1985 farm bill, is currently operational. Farm bill § 1127. As to certain commodities, exporters may bid to receive a bonus from CCC that can in effect allow the exporter to sweeten the deal. For example, on December 20, 1988, the FAS General Sales Manager announced an export bonus to Cafcrown Limited in connection with a sale of 10,000 metric tons of rice to Turkey. The bonus has a value of $11.60 per ton and will be paid to Cafcrown in commodities from the inventory of CCC stocks. Sales to the Soviet Union are eligible for consideration under EEP.

Should the President waive or discontinue the special marketing loan program authorized in the 1988 trade bill, he may instruct the Secretary of Agriculture to make available at least $2 billion in CCC commodities during FYs 1990-1992 to intensify the Export Enhancement Program. § 4301(c)(1). However, the President may decide not to do this if he determines that such action might harm ongoing GATT negotiations. § 4301(c)(4). On the other hand, a tool is provided for a trade war – if that is what we are to have.

The 1988 trade bill also amends the Targeted Export Assistance Program (TEA), originally created in the 1985 farm bill. Farm bill § 1124, amended by trade bill § 4304. Under section 4304, the Secretary of Agriculture may be authorized to use CCC commodities in enhanced amounts to make compensation to U.S. agricultural exporters who have been hit with countervailing duties or other retaliatory action imposed by foreign governments – duties designed to offset perceived benefits of U.S. agricultural programs to U.S. exporters. Non-profit trade associations also may receive benefits under TEA.

Commodity specific export enhancement programs also exist, examples being the Dairy Export Incentive Program, farm bill § 153, amended by trade bill § 4308, and the Sunflower Oil Assistance Program.

On the other hand, various U.S. production control programs are designed to avoid surpluses and resulting price depression. The European Economic Community (EEC) has done far less in this regard and from the U.S. point of view this complicates the trade situation as to certain agricultural commodities as the EEC seeks to protect its domestic markets and undercut U.S. foreign markets.

–Financing

An important part of U.S. agricultural trade policy is to encourage the development of new markets by providing special financing tools to enable developing nations to become and remain our customers. Long-term relationships are hoped for.

Under the General Sales Manager (GSM) programs, CCC export credit guarantees are available to protect U.S. sellers who extend credit or U.S. financial institutions that make loans to foreign buyers, to be repaid in dollars over time by unconfirmed letters of credit issued by approved foreign banks. 7 U.S.C. §§ 1691-1736aa. Under GSM-102, three-year guarantees are available. GSM-103 provides a similar guarantee program, but with three- to seven-year financing. U.S. exporters apply for the guarantees, which are assignable and thus facilitate financing. Country by country allocations are made. For example, on December 21, 1988, USDA announced reallocation of available credit guarantees as to transactions in 1989 with Mexican buyers. Particular emphasis was given to feed grains and frozen or chilled meats. The total 1989 allocation of guarantees for sales to Mexico is $1 billion. The President has virtually unlimited discretion to cut off guarantees for foreign policy reasons, as was the case in 1982 when allocations for Argentina were cut off at the start of the Falkland Islands War.

Title I of P.L. 480, the Food for Peace Act, is in essence a program of U.S. government financing through CCC of sales of a variety of agricultural commodities to certain eligible countries. Agricultural Trade Development and Assistance Act of 1954, Pub. L. No. 83-480, as amended. Repayment by the purchasing nation is over twenty years in dollar deals, and over forty years in convertible currency deals. Interest rates are low and there is a grace period before principal payments must start. The major commodities under Title I include wheat and wheat flour, corn, sorghum, vegetable oil, rice and cotton. Financing is approved only as to nations meeting the "friendly nation" requirement and certain human rights standards. No cutoffs have occurred under the human rights standards, but under the friendly nations provision Food for Peace aid to Nicaragua was frozen in 1981 and a wheat sale cancelled. Another provision, as yet unused, allows the President to cut off P.L. 480 assistance to countries that assist

(Continued on next page)

international terrorists. 22 U.S.C. § 2371(a).

Title III of P.L. 480, the Food for Development Program, works in tandem with certain Title I sales to least developed countries. International Development and Food Assistance Act of 1977, Pub. L. No. 95-88. Recipient nations use local currency proceeds from the sale of Title I commodities to fund approved self-help programs in areas such as agricultural and rural development, reforestation, voluntary family planning, and health and nutrition. Under the Food Security Act of 1985, ten percent of Title I funds must be earmarked for Food for Development Programs. Farm bill § 1108.

These P.L. 480 programs, which are to be distinguished from the food donation program under Title II, are designed not only to move U.S. commodities into international markets, but also to foster long-term trading relationships as P.L. 480 countries gain sufficient economic strength to graduate from eligibility. The section 416 program authorizes donations in addition to those authorized under Title II of Public Law 480. The Food for Progress Program provides food assistance to countries that agree to seek certain policy reforms that promote internal free markets. The Food for Progress Program was added to section 416 by section 1110 of the farm bill and authorizes the use of some Title I funds to make purchases if CCC stocks are low.

The Export-Import Bank of the United States, an independent, financially self-sustaining agency of the federal government, is sometimes overlooked when agricultural deals are contemplated. While EximBank's role in agricultural trade has been limited, its programs may sometimes prove useful. Though direct agricultural loans have been rare, EximBank has occasionally stepped in to make below-market loans to foreign buyers or banks to finance livestock and commodity sales when GSM-102 and GSM-103 programs have been short of funds. Sales of livestock to Korea, for example, have been funded. EximBank has financed a hog-raising facility in Columbia and other agricultural construction and equipment deals involving U.S. exports.

Most of EximBank's activity is centered around its Export Credit Insurance program, administered through the Foreign Credit Insurance Association. Various forms of insurance are available to cover certain commercial and political risks. The insurance is issued to the exporter and is assignable.

Other EximBank programs have not been reported to involve agricultural deals – but there may be some potential, particularly in sales of agricultural technology: Section 1912 financing (low interest loans to help domestic buyers meet subsidized financing offered by a foreign export agency); I-Match Program (interest subsidy payments to domestic lenders that have loaned to support U.S. exports at less than market rates in response to subsidized financing offered by a foreign export credit agency); and, "Tied Aid War Chest" (special financing to help U.S. exporters respond to foreign countries that offer potential buyer nations foreign aid and special export credit if they agree to buy from that country's exporters). The Tied Aid Credit Fund is extended through 1989 by the 1988 trade bill. § 3302.

Barter is a method by which certain cash poor countries can trade. The 1985 farm bill encourages the USDA to pursue such transactions and USDA and the Department of Energy have signed a Memorandum of Understanding for pursuing opportunities to trade surplus U.S. agricultural commodities for crude oil for the Strategic Petroleum Reserve. 7 U.S.C. § 1727; 50 U.S.C. § 98e(c). Section 4309 of the trade bill indicates a sense of the Congress that the Secretary of Agriculture should expedite the implementation of pertinent U.S. statutes.

–Bilateral and multilateral trade agreements

As reflected in the 1988 trade bill, the principal negotiating objectives of the U.S. are to achieve, on an expedited basis to the extent feasible, more open and fair conditions of international trade. § 1101(b)(7). The 1988 trade bill includes provisions governing implementation of trade agreements entered into by the U.S., including a fast track procedure. § 1103(b). Here, of course, the discussion is about implementing legislation rather than ratification, as these bilateral and multilateral agreements are not treaties, but executive agreements.

The President is given continued authority to enter into bilateral agreements designed to break down trade barriers. Trade bill § 1102(c). A major example is the United States-Canada Free Trade Agreement signed by Prime Minister Mulroney and President Reagan on January 2, 1988. See House Document 100-216, 100th Cong., 2nd Sess. Under the agreement, tariffs are to be phased out over ten years and other trade distorting practices in the agricultural sector eliminated. See also, Presidential Proclamation to Implement, 53 Fed. Reg. 56,648 (1988); U.S.-Canada Free-Trade Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (1988).

Specific action was taken by the Congress on certain existing agreements. Section 1122 of the trade bill, for example, implements the February 24, 1987 agreement between the U.S. and the EEC, concluded with respect to citrus and pasta.

Some agreements, designed to stabilize trade by setting target purchase levels, do not require implement legislation. The extension through 19[illegible] of the U.S.-U.S.S.R. long-term grain agreement, signed by Deputy USTR Alan Holmer on November 28, 1988, is an example.

At the multinational level, Congress in the trade bill gave approval to the International Convention on the Harmonized Commodity Description and Coding System, done at Brussels on June 14, 1983, and the protocol thereto done on June 24, 1986. § 1201. This system of classification supercedes the Tariff Schedules of the United States (TSUS) effective January 1, 1989. 54 Fed. Reg. 993 (1989).

Further, the 1988 trade bill expresses support for the current GATT Round and other multinational negotiations. At the same time, the trade bill makes provision for responses if there is a failure of the Uruguay GATT Round to achieve meaningful progress. The prospects for the agricultural aspects of the GATT Round are problematical, although talk of compromise has followed upon the Montreal meeting of December, 1988. Beneath the surface of the economic issues are enormous political and social hurdles. Gerrymandering in Japan gi[illegible] the dominant political party gr[illegible] strength in rural areas and a resulting reluctance to upset loyal farm voters. In the EEC vivid memories of two World Wars make difficult any agreements that would require elimination of programs to subsidize small farm structure and the self sufficiency which it appears to assure.

–Trade remedies – interference with U.S. export markets

While the various trade remedies found within U.S. statutes are not limited in application to agricultural cases, they have been frequently used in agricultural settings. Here we examine practices of foreign governments that restrict U.S. offshore markets, saving the subject of unfair imports into the U.S. for a later section in this article.

The statutes that authorize so-called Section 301 petitions are aimed at practices of foreign governments that interfere with our international markets, or that artificially divert goods or services to the U.S. 19 U.S.C. §§ 2411, 2412. Practices of foreign governments could include export subsidies, duties, and a variety of non-tariff barriers such as quotas and hypertechnical import requirements. However, Section 301 [illegible]tions are not designed to lead to re[illegible] against dumped or subsidized *imports into the U.S.*

(Continued on next page)

CONTINUED FROM PAGE 6

...ort. Section 301 is designed to ...s the U.S. to enforce its rights under ...national trade agreements, includ... the GATT. A U.S. firm has no stand... before GATT, but can initiate a Sec...01 proceeding by filing a petition ... the United States Trade Represen... (USTR). The USTR is empowered ... initiate proceedings under section ... Various procedures are then trig...ed, and if the matter is pursued could ...sult in a negotiated resolution, or fail...ng that a GATT panel and possibly, ...hough rarely, a favorable GATT deci...ion. The U.S. may then institute au...horized retaliatory measures – a free ...hot approach which could impact any ...ommodity sent into the U.S. by export...rs within the offending country. The ...S. might withdraw or suspend conces...ions under the trade agreement, impose ...ties, or engage other import restric...ions. Under the statutory scheme the U.S. may act in a Section 301 case even if the GATT does not authorize countermeasures. This was the case in the citrus case involving the EEC, where an increased duty was imposed on pasta imports into the U.S. from the EEC. 50 Fed. Reg. 25685 (1985).

The USTR has discretion to decline to pursue a Section 301 petition, even ...hough the mandatory action section of ...he statute is triggered. § 1301(a). Such was the case with the petition filed ...inst Japan by the Rice Millers Association in 1988. The USTR did indicate that the petition might be revisited if there was a failure by Japan to put rice on the bargaining table and be cooperative in the current GATT Round. Such action now appears unlikely.

Note that Section 301 petitions are not limited to cases where the alleged action by a foreign government is inconsistent with trade agreements such as GATT, but also may include allegations that the action of a foreign government is unjustifiable, unreasonable, or discriminatory and burdens or restricts U.S. commerce.

Of significance is the fact that section 1301(d) of the trade bill makes "unreasonable" for section 301 purposes foreign practices which constitute a pattern that denies workers the right to organize and bargain collectively, permits forced labor, fails to provide a minimum age for employment of children, or fails to set minimum wages, hours of work, and standards of occupational safety and health.

The 1988 trade bill purports to give more authority to the USTR in Section 301 cases, allowing the USTR to take certain actions formerly reserved to the President. However, the USTR remains subject to the specific direction of the President, if any is forthcoming. § 1301(a).

Beyond section 301, other statutory authority allows relief in trade cases where U.S. export markets have been interfered with by the actions of foreign governments. The recent EEC "consumer preference" ban on imports of U.S. meat – the hormone-ban – provides a subject for discussion. Section 4604 of the 1988 trade bill allows the President to respond when a foreign country as to the importation of meat articles from the U.S. applies standards that are not related to public health concerns which can be substantiated by reliable analytical methods. Pursuant to authority granted, the President, after consulting with the USTR, could prohibit import into the U.S. of meat articles from the EEC until such time as it could be determined that EEC meat articles meet all standards with regard to such meat articles in commerce within the U.S. However, as to the EEC hormone ban the USTR has elected to respond exclusively under section 301 by imposing effective January 1, 1989, one hundred percent ad valorem duties on EEC exports to the U.S. of a variety of products including certain meats, canned tomatoes and tomato sauce, coffee extracts, less than seven percent alcoholic beverages, fruit juices, and specific pet foods. 53 Fed. Reg. 53115 (1988).

The remaining topics will be covered in the second part of this article, to be published in the April issue of the *Agricultural Law Update*

Characteristics of Chapter 12 farm bankruptcy cases in Indiana with confirmed plans

This article reports findings from a questionnaire about seventy-six Indiana family farm bankruptcies with confirmed Chapter 12 plans. Data was collected in February and March of 1988. At that time, about 300 Chapter 12 petitions had been filed in Indiana. By the end of March, however, only about 80 of these cases had orders signed by a bankruptcy judge granting approval of a plan. While data were collected on 76 confirmed cases, several of the characteristics reported are based on fewer than 76 observations. This is due to the nature of the variable, missing data, and certain inconsistencies in the data.

Major findings of the survey include the following.

Farmers with confirmed Chapter 12 plans have an average of 21 years farming experience, compared to 26 years for respondents in the 1988 Indiana Farm ...nance Survey. Barnard, Freddie L., W.D. Dobson, and Jeurene Falck. "Results of the Indiana Farm Finance Survey for 1988," *Purdue Agricultural Economics Report*, Special Edition (October 1988): 1-6.

Respondents to the 1988 Indiana Farm Finance Survey operated on average a total of 361 acres, compared to 511 for farmers with confirmed Chapter 12 plans.

The average number of acres owned by farmers with confirmed Chapter 12 plans was 236, compared to 187 for respondents to the Farm Finance Survey.

The average debt owed on the date of the petition by farmers with confirmed plans was $579,864. The debt was owed to eight different creditors (including the bankruptcy trustee and debtor's attorney), and eighty-nine percent of the debt was secured.

An average of 218 days elapsed from the date the petition for bankruptcy was filed to the date the Chapter 12 plan was confirmed.

Sixty-eight percent of the confirmed Chapter 12 plans had a duration of three years.

The average number of acres farmed under confirmed plans was 470, compared to 495 acres farmed at the time their petitions were filed.

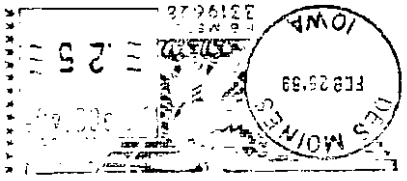
All seven bankruptcy judges in Indiana allowed ten percent of "disposable income" payments for Chapter 12 trustees. The fees on secured payments varied by district. The estimated annual trustee fee is just over $1,400.

Debtor's attorney fees average $6,041 per case, but varied from $1,029 to over $18,000 per case.

Fifty-one percent of the debt classified as secured at the time of the petition was reclassified as unsecured in the Chapter 12 plans. The average amount of debt reclassified per confirmed case was $259,161.

Among lending institutions and entities, FmHA had the highest average amount of secured debt reclassified as unsecured debt, $214,331, or seventy percent.

– *Gerald Harrison*



AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Special announcement —

The American Agricultural Law Association is pleased to announce its co-sponsorship of an outstanding symposium on agricultural and agribusiness credit:

Symposium on Agricultural and Agribusiness Credit
April 27-28, 1989
Westin Hotel, Denver, Colorado

Topics include: Implementing participation in the secondary agricultural financing markets, role of options in agricultural lending; special problems in agri-business lending; agricultural environmental issues; and effect of advances in biotechnology upon agricultural credit.

Co-sponsored by the American Agricultural Law Association, The American Bar Association, the American Bankers Association, the Institute of Life Insurance, and others.

For more information, call David A. Lander at 314-342-1618.

Future Annual Meetings — For those long range planners, the locations for the 1989 through 1992 Annual Meetings of the American Agricultural Law Association are:

1989: Nikko Hotel, San Francisco	1991: Atlanta
1990: Minneapolis/St. Paul	1992: Chicago

1989 American Agricultural Law Association membership renewal — Membership dues for 1989 were due February 1, 1989. Dues should be sent to William P. Babione, Office of the Executive Director, Robert A. Leflar Law Center, University of Arkansas, Fayetteville, AR 72701.