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Supreme Court rules SAWs can sue over procedures of 1986 Immigration Act

In *McNary v. Haitian Refugee Center, Inc.*, No. 89-1332, 59 U.S.L.W. 4128 (February 20, 1991), the U.S. Supreme Court ruled on the extent of judicial review available to those bringing a cause of action under the Immigration Reform and Control Act of 1986. Pub. L. No. 99-603, 100 Stat. 3359. In a 7-to-2 decision, the Supreme Court affirmed the view that the 1986 law explicitly bars judicial review of individual amnesty applications until an alien is about to be deported. More importantly, however, the Court also held that this explicit limitation to individual judicial review does not encompass suits that challenge common agency practices and procedures used in enforcing the 1986 immigration act.

The Immigration Reform and Control Act of 1986 (IRCA) established two amnesty programs under which aliens could secure the legal right to remain in the U.S. The first program permitted any alien who had resided in the U.S. continuously and unlawfully since January 1, 1982, to qualify for status as a lawful permanent resident. *See* 100 Stat. 3394, as amended, 8 U.S.C. § 1255a. The other option, known as the Special Agricultural Worker (SAW) program, was available to aliens performing at least ninety days of qualifying agricultural work during the twelve-month period prior to May 1, 1986 and also meeting a six-month residency requirement. *See* 100 Stat. 3417, as amended 8 U.S.C. § 1160(a)(1)-§ 1160(a)(2). In *McNary v. Haitian Refugee Center, Inc.*, the plaintiffs represented a class of Haitian farm workers seeking amnesty under the SAW program.

The Immigration and Naturalization Service (INS) determined SAW status eligibility based on evidence presented at a personal interview with each applicant. The applicant could meet this burden through production of his or her employer's payroll records (*see* 8 U.S.C. § 1160(b)(3)(ii), or through submission of affidavits "by agricultural producers, foreman, farm labor contractors, union officials, fellow employees, or other persons with specific knowledge of the applicant's employment."

Continued on page 3

Cotton: warehouse receipts and security interests

The Food, Agriculture, Conservation and Trade Act of 1990 (the 1990 Farm Bill) contains a provision that has potentially far-reaching significance for the marketing and financing of cotton. All cotton gins, cotton brokers, cotton farmers, and cotton financiers (banks, governmental agencies, landlords) need to be aware of this new statutory provision.

Section 508 of the 1990 farm bill authorizes the Secretary of Agriculture to create a central filing computer system to record electronic warehouse receipts for cotton. These electronic warehouse receipts are in lieu of paper warehouse receipts and will contain the same information as currently shown on paper warehouse receipts. Only federally licensed cotton warehouses are eligible to use electronic warehouse receipts and they can do so only if they have the facilities to electronically transmit and receive information to and from the central filing system. Participation in the central filing system for electronic warehouse receipts on cotton is entirely voluntary.

Furthermore, section 508 authorizes the Secretary of Agriculture to use the central filing system for electronic warehouse receipts as the central filing system for liens that represent perfected security interests. If the central filing system also becomes the repository for filing perfected security interests, the liens that are so recorded are the only liens that are enforceable against owners and purchasers of cotton. (Warehousemen's liens are not affected by the existence of the central filing system for liens.)

Section 508 clearly has significant preemptive potential upon Articles 7 and 9 of the Uniform Commercial Code. The precise preemptive impact cannot be known until the Secretary decides to implement section 508 and issues regulations about the central filing system. As of March 1, 1991, the Secretary had not issued any regulations under section 508.

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

INSIDE

IN FUTURE ISSUES

Court of Appeals upholds USDA regulation on "soring" of horses

In *American Horse Protection Association v. Yeutter*, 917 F.2d 594, 1990 U.S. App. Lexis 18906 (October 30, 1990), the Court of Appeals for the District of Columbia reversed a District Court opinion related to USDA regulations promulgated under the Horse Protection Act concerning the use of "action devices' on the forelegs of show horses to accentuate a horse's natural gait.

The case grew out of a challenged of regulations issued following amendments of the Horse Protection Act in 1976. The amendments were designed to stop the practice of "soring" of horses by expanding the statutory definition of prohibited practices to include any "practice involving a horse" that "reasonably can be expected" to cause a horse to suffer pain, distress, inflammation, or lameness while walking, trotting, or otherwise moving. 15 U.S.C. § 1821(3)(D). The regulations subsequently issued originally permitted the use of rollers weighing fourteen ounces and chains weighing ten ounces as "action devices" in training to aid in the accentuation of the gait. The act did not specifically prohibit such training devices but in *American Horse Protection Ass'n v. Lyng*, 681 F. Supp. 949 (D.D.C. 1988), they were declared invalid based on evidence from an Auburn University study that showed that such weights could reasonably be expected to sore horses and on the failure of USDA to take a "hard look" at the Auburn study.

Following this decision, USDA issued interim regulations permitting both rollers and chains up to six ounces. The American Horse Protection Association (AHPA) had urged USDA to prohibit such devices altogether, but USDA failed to amend the regulations and adopted a final rule in February 1989 allowing such devices. 54 Fed. Reg. 7174 (Feb. 17, 1989).

USDA relied on the Auburn study, which indicated that devices of this weight would likely cause no harmful effects on horses. AHPA did not challenge the Auburn study or USDA's reliance on it, but challenged the new regulations on the basis that the use of action devices served to encourage and foster the abusive practice of soring in that the devices, used as bracelets, would produce gait-altering effects when used on horses previously subjected to chemical sensitization of the forelegs but accentuating soreness already present.

In the renewed challenge in the district court, the argument of AHPA was persuasive, and the court concluded that the use of such devices constituted a "practice" that "can reasonably be expected" to cause or perpetuate the practice of soring and that the Secretary had effectively ignored this crucial issue in promulgating the final rule. The district court vacated the regulation and remanded the matter to the USDA for future consideration. *AHPA v. Yeutter*, 1990 U.S. Dist. Lexis 6928 (June 1, 1990). On June 14, 1990, the court of appeals granted a stay upon the appeal of USDA and two trade associations representing interests of the Tennessee Walking Horse industry. The district court's decision was challenged as impermissibly encroaching on the secretary's enforcement authority and improperly substituting the court's judgment for an agency decision adequately supported by the rulemaking record.

The court of appeals found no express duty on the part of the Secretary to prohibit any practice that *might perpetuate* abuses prohibited by the legislation or regulations; rather, the court found that the Secretary's duty was to require the elimination of practices that can reasonably be expected to *directly cause* soring. Once this construction of the act was adopted, the Secretary's decision to issue the six-ounce regulation was clearly not arbitrary and capricious and the regulations were permissible.

—J.W. Looney, University of Arkansas School of Law

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

Contributing Editors: Drew L. Kershen, Norman, OK; John D. Reilly, Washington, D.C.; J.W. Looney, Fayetteville, AR; Linda Grim McCormick, Toney, AL; Christopher R. Kelley, Fayetteville, AR;

State Reporters: Jeffrey A. Russell, Fresno, CA; John H. Davidson, Vermillion, SD.

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

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Federal Register *in brief*

The following is a selection of matters that have been published in the Federal Register in February 1991.

1. USDA; Regulations governing the financing of commercial sales of agricultural commodities; interim rule; effective date 2/1/91. 56 Fed. Reg. 3966.

2. USDA; Providing information regarding undue price enhancement under the Capper-Volstead Act; 56 Fed. Reg. 4594.

3. FmHA; Clarification of eligibility criteria in Farmer Program regulations; final rule; effective date 2/1/91. 56 Fed. Reg. 3971.

4. FmHA; Termination of interest accrual on FmHA guaranteed loans; proposed rule. 56 Fed. Reg. 4567.

5. FmHA; Pleding all assets as collateral for insured farmer program loans; proposed rule. 56 Fed. Reg. 6315.

6. FmHA; Annual operating loans to delinquent farmer program borrowers; interim rule. 56 Fed. Reg. 6795.

7. FmHA; Revision of Guaranteed Farmer Loan regulations; interim rule with request for comments by April 29, 1991. 56 Fed. Reg. 8258.

8. CCC; Farmer Owned Reserve program; 1990 crop wheat as collateral; final rule; effective date 2/13/91. 56 Fed. Reg. 5745.

9. CCC; Food, Agriculture, Conservation, and Trade Act; implementation; proposed rule. 56 Fed. Reg. 8044.

10. Ag. Marketing Service; Rules of practice applicable to reparation proceeding, and rules applicable to determination as to whether a person is responsibly connected with a licensee under PACA; final rule; correction. 56 Fed. Reg. 5151.

11. Ag. Marketing Service; Dairy Promotion programs; procedure for denying, suspending, or terminating certification of qualification; final rule; effective date 4/1/91. 56 Fed. Reg. 8257.

12. ASCS; Disaster Payment Program for 1990 crops; proposed rule; 56 Fed. Reg. 6994.

13. FCIC; Request for comments on new standard reinsurance agreement. 56 Fed. Reg. 7325.

—Linda Grim McCormick

See 8 C.F.R. § 210.3(c)(3)(1990). At the conclusion of the interview and of the review of the application materials, the INS either denied the application or made a recommendation to a regional processing facility that the application be either granted or denied. *See* 8 C.F.R. §210.1(q)(1990). A denial, either at the local or regional level, could be appealed to the legalization appeals unit, which was authorized to make the final administrative decision in each individual case. *See* 8 C.F.R. § 103.3(a)(2)(iii)(1990).

The IRCA explicitly prohibited judicial review of a final administrative determination of SAW status except as authorized by §210(e)(3)(A) of the amended Immigration and Nationality Act. *See* 8 U.S.C. § 1160(e)(3)(A). That subsection permitted judicial review of such a denial only in the judicial review of an order of exclusion or deportation. In view of the fact that the courts of appeals constitute the only forum for judicial review of deportation orders (*see* 75 Stat. 651, as amended, 8 U.S.C. § 1105a), it appears the IRCA plainly foreclosed any review in the district courts of individual denials of SAW status applications.

This action was initially brought in the federal district court of Miami, Florida by the Haitian Refugee Center, the Migration and Refugee Services of the Roman Catholic Diocese of Palm Beach and 18 unsuccessful individual SAW applicants. The plaintiffs sought relief on behalf of a class of approximately 20,000 Haitian farm workers who either had been, or would be injured by unlawful practices and policies adopted by the INS in its administration of the SAW program. The complaint alleged that INS conducted the interview process in an arbitrary fashion in violation of both the 1986 Reform Act and the applicants' due process rights under the Fifth Amendment to the U.S. Constitution. The plaintiffs asserted that INS procedures did not allow SAW applicants to be apprised of, or to be given opportunity to challenge adverse evidence on which denials were predicated, and that applicants were denied the opportunity to present witnesses on their own behalf. The INS also failed to provide Creole or Spanish translators, even though ninety percent of the Haitian applicants spoke little or no English. And the INS failed to keep transcripts of interviews, which the plaintiffs claimed inhibited any meaningful administrative review of application denials by INS authorities.

The district court acknowledged that a U.S. court of appeals is the proper forum for reviewing an individual denial of a SAW applicant. The district court, however, still accepted jurisdiction to hear the Haitians' claims since the complaint did not challenge an individual determination of SAW status, but rather contained allegations about the manner in which the *entire program* was being implemented. The district court went on to find that a number of INS practices violated the 1986 Reform Act and were unconstitutional, and entered an injunction requiring the INS to vacate large categories of denials, and to modify its practices in certain respects. *See Haitian Refugee Center, Inc. v. Nelson* , 694 F. Supp. 864 (S.D. Fla. 1988). Among other things, the district court noted that the INS maintained a secret list of employers whose supporting affidavits were routinely discredited without giving applicants an opportunity to corroborate the affiants' statements. The district court moreover found that interpreters were not provided at interviews, even though many Haitians spoke only Creole, and that no recordings or transcripts of interview were made, despite the fact that the interview provided the only face to face opportunity for the INS to assess an applicant's credibility.

The Court of Appeals for the Eleventh Circuit later affirmed the findings and conclusions of the district court both on the jurisdictional issue and on the merits of the lawsuit. *See Haitian Refugee Center, Inc. v. Nelson*, 872 F.2d 1555 (C.A. 11 1989).

In its petition before the Supreme Court, the government did not contest the district court's rulings on the merits or the form of its injunctive relief. Thus, the Supreme Court was left with determining whether the district court had jurisdiction to hear the case. Instead, the government challenged the district court's jurisdiction in light of the IRCA's express limitation on judicial review of final administrative determinations of SAW status.

The Supreme Court ruled, however, that the government had misinterpreted the jurisdictional limits that Congress placed on challenges to the amnesty program. It was the Court's view that while the law barred suits by individual aliens except in the context of their own deportation proceedings, that limitation did not apply to the more general "pattern and practice" lawsuits that challenged policy rather than individual determinations. The majority was convinced that had Congress meant to impose such a drastic jurisdictional limit, "it could easily have used broader statutory language" and done so explicitly. 59 U.S.L.W. at 4131. And, while the case did not directly present a constitutional issue, the Court noted that amnesty is an "important benefit" that the government cannot withhold from illegal aliens without due process of law. 59 U.S.L.W. at 4131.

The Court further observed that "most aliens denied SAW status can ensure themselves review in courts of appeals only if they voluntarily surrender themselves for deportation." 59 U.S.L.W. at 4133.

Chief Justice Rehnquist wrote the dissenting opinion. He was joined by Justice Scalia. Even if the IRCA did not preclude review, the Chief Justice doubted that there was any "final agency action" taken that would be reviewable under the Administrative Procedure Act. 5 U.S.C. § 704. Rehnquist also took issue with the majority's assumption that constitutional rights were ultimately at stake in this case. Rehnquist noted: "The Court never mentions what colorable constitutional claims these aliens, illegally present in the United States, could have had that demand judicial review." 59 U.S.L.W. at 4135. Unlike the majority opinion, Rehnquist gave greater deference to INS' interest in generating "a minimal amount of paperwork and procedure in an effort to speed the process of adjusting the status of those aliens who demonstrated their entitlement to adjustment." 59 U.S.L.W. at 4134.

As mentioned earlier, approximately 20,000 Haitians are directly affected by this decision, and thus could seek new interviews under the new court-ordered procedures which include language translators as well as the opportunity to present supporting witnesses.

Additionally, there are some 100,000 amnesty applicants represented in at least eight other "pattern and practice" suits claiming violations of due process under the 1986 Reform Act which were stayed by circuit courts nationwide pending the Supreme Court's ruling in *McNary v. Haitian Refugee Center, Inc.* A key issue in many of these claims will depend on whether the Supreme Court ruling allowing challenges to INS procedures is interpreted to apply only to the SAW farm worker program, or to both amnesty programs established under the Immigration Reform and Control Act of 1986. --*John D. Reilly, Washington, D.C.*

Separate "person" determinations for spouses under the 1990 Farm Bill

Christopher R. Kelley

One of the most controversial aspects of federal farm program law has been the treatment of married couples for payment limitation purposes. In 1970, when Congress first enacted per-person limits on certain federal farm program payments to producers, Congress directed the Secretary of Agriculture to define the word "person." In essence, the definition adopted by the Secretary provided that individuals and entities, including individual members of partnerships and shareholders of corporations, could qualify as separate "persons" for purposes of the payment limits if they had separate legal and economic interests and responsibilities in the land or crops involved in the farming operation. 35 Fed. Reg. 19339, 19340 (1970) (codified at 7 C.F.R. § 795.3(b)). However, the rules treated married couples as one "person", even if each spouse could satisfy the separate interests and responsibilities requirements. *Id.* (codified at 7 C.F.R. 795.11).

The Secretary's combination of spouses as one "person" for payment limitations purposes did not prevent either spouse from receiving farm program payments. It did, however, prevent each spouse from receiving payments up to the otherwise applicable per-person limit. In other words, even if both spouses received farm program payments, only a single per-person limit would apply. The "person" for purposes of the limit was the "combined person" of the two spouses. The practical effect of the combination was to deny the maximum amount of farm program payments to farm wives who, but for the combination rule, would have qualquified for those payments in their own right.

In 1987, Congress codified the rule that spouses are to be considered to be one "person" for payment limitation purposes. Omnibus Budget and Reconciliation Act of 1987, Pub. L. No. 100-203, § 1303(a)(2), 101 Stat. 1330, 1330-16 (codified at 7 U.S.C. 1308(5)(B)(iii)). However, it also created an exception to that rule by directing the Secretary to provide that:

> [for] any married couple consisting of spouses who, prior to their marriage, were separately engaged in unrelated farming operations, each spouse shall be treated as a separate person with respect to the farming operation brought into the marriage by such spouse so long as such operation remains as a separate farming operation, for the purposes of applying the limitations under this section.

Id. See also 7 C.F.R. § 1497.19 (1990). Thus, beginning with the 1989 crop year, the general rule was that spouses would be combined as one "person" for payment limitation purposes. The only exception to the general rule applied when each of the spouses had been engaged in unrelated farming operations prior to their marriage and those operations had been maintained as unrelated farming operations since the marriage. The rules governing the exception are strict and require all aspects of the two farming operation be kept separate. *See ASCS Handbook for State and County Operations (1-PL)* ¶ 91 (Amend. 2) (hereinafter *ASCS Handbook (1-PL)*. *See also* C. Kelley & A. Malasky, *A Lawyer's Guide to Payment Limitations* 111-13 (1990) (hereinafter Kelley & Malasky).

The combination of spouses into one "person" has been sharply criticized on the grounds that it denies farm wives the ability to benefit fully from their contributions of inputs, labor, and management to the family farm. Indeed, it has been characterized as "relegating farm spouses to a position of servitude." 135 Cong. Rec. H4046 (daily ed. July 21, 1989) (statement of Rep. Marlenee). Nevertheless, the rule has survived two court challenges alleging that it violates equal protection guarantees. *Women Involved in Farm Economics v. United States Dep't of Agric.*, 876 F.2d 994, 1003-07 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 717 (1990); *Martin v. Bergland*, 639 F.2d 647, 649-50 (10th Cir. 1981).

In response to a variety of concerns, including the inequities of the husband and wife rule, Congress made several changes to the payment limitation rules in the 1990 Farm Bill, the Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, § 1111, 104 Stat. 3359, 3497-500. *See* Fraas, *Payment Limits Extended and Revised by 1991 Farm Bill*, Agric. L. Update 1 (Feb. 1991). The changes will take effect beginning with the 1991 crop year, and, for many participants in the federal farm programs, the most significant change is one affecting the treatment of spouses.

Although in the 1990 Farm Bill Congress reenacted the general rule combining spouses into one "person" for payment limitation purposes and continued the exception applicable to spouses who had been engaged in farming operations prior to their marriage, it responded to the inequities of the husband and wife rule by providing for a second, broader exception to the general rule. Specifically, Congress provided that at the option of the Secretary, in the case of any married couple consisting of spouses who do not hold, directly or indirectly, a substantial beneficial interest in more than one entity (including the spouses themselves) engaged in farm operations that also receives farm program payments (as described in paragraphs (1) and (2) [7 U.S.C. § 1308(1), (2)]) as separate persons, the spouses may be considered as separate persons if each spouse meets the other requirements established under this section and section 1001A [7 U.S.C. § 1308-1] to be considered to be a separate person. Pub. L. No. 101-624, § 1111(c), 104 Stat. 3359, 3498 (1990).

On January 7, 1991, Secretary Yeutter announced that he would exercise the authority given to him by the 1990 Farm Bill to add the second exception to the general rule combining spouses. USDA, Office of Public Affairs, Selected Speeches and News Releases 15-16 (Jan. 3 - Jan. 9, 1991). The Secretary's announcement indicated that he would go "as far as the law will allow with me with this decision, and that spouses would "be treated exactly as two siblings who are farming together." *Id.* at 15. In addition, the announcement stated that "spouses must be otherwise eligible to receive payments as separate persons and must agree not to receive farm program payments directly or indirectly through any other entity." *Id.*

After the Secretary's announcement, considerable speculation developed over precisely how the second exception would be implemented. The speculation was spawned by ambiguities in the Secretary's press release and in the statute. For example, the Secretary's statement that spouses would "be treated exactly as two siblings who are farming together" suggested that spouses would be determined to be separate "persons" under the family member rule or under a new rule modeled on the family member rule. *See* 7 C.F.R. § 1497.14 (1990). The family member rule relaxes the requirements for an adult family member being deemed to be "actively engaged in farming." Being "actively engaged in farming" is a prerequisite to being a separate "person" for payment limitation purposes.

More specifically, under the family member rule, an adult family member participating in a farming operation in

Christopher R. Kelley is a staff attorney with the National Center for Agricultural Law Research and Information, Fayetteville, AR.

which family members are the majority does not have to make a significant contribution of land, capital, or equipment in order to satisfy the significant contribution element of the "actively engaged in farming" requirement. The adult family member need only make a significant contribution of active personal labor or management to satisfy that element. The current statute and regulations define a "family member" to be a lineal ancestor, lineal descendent, or a sibling of another member in the farming operation, "including spouses of those family members who do not make a significant contribution themselves." 7 U.S.C. § 1308-1(b)(3)(B); 7 C.F.R. § 1497.3(b) (Family Member) (1990).

The Secretary's announcement that spouses would be treated as siblings was ambiguous for two reasons. First, under the existing definition of a "family member", neither spouse in a husband and wife farming operation would be considered a "family member." Obviously, they would not be siblings, lineal ancestors, or lineal descendants of each other. In addition, neither could be a spouse of a family member who did not make a significant contribution because an adult "family member" must make a significant contribution of active personal labor or management to satisfy the family member rule. Second, the statute creating the second exception does not suggest that the "other requirements" for separate "person" status are to be relaxed in the manner applicable to "family members." Having specifically relaxed the requirements for "family members" when it enacted the family member rule, Congress could have done so in creating the second exception to the general husband and wife rule. However, it did not.

As with the Secretary's press release, the statute contains ambiguities. One of its ambiguities lies in its prohibition against spouses holding, "directly or indirectly, a substantial beneficial interest in more than one entity (including the spouses themselves) engaged in farm operations that also receives farm program payments . . . as separate persons." The parenthetical reference in the statute including the "spouses themselves" within the permitted one "entity" is potentially confusing because, elsewhere, the payment limitation statutes and regulations distinguish between individuals and entities. *See* 7 U.S.C. § 1308(5)(B)(i)(I), (II); 7 C.F.R. § 1497.3(b) (Entity), (Person) (1990). Indeed, for all other payment limitation purposes, an "entity" is a "corporation, joint stock company, association, limited partnership, irrevocable trust, revocable trust, estate, charitable organization, or other similar organization . . . ." 7 C.F.R. § 1497.3(b) (Entity) (1990). Accordingly, under the generally applicable definition, an "entity" is not a married couple.

The statute's inclusion of married couples within the meaning of term "entity" when that term has a specific, well-established meaning that does not include married couples raised the question of whether Congress meant what it said. If it did, then a husband and wife would be permitted only two payment limits. If the parenthetical "including the spouses themselves" is disregarded because of its inconsistency with the meaning of "entity" as that term is used elsewhere in the payment limitation statutes and regulations, then spouses could receive, directly or indirectly, farm program payments from one "entity" in addition to the payments they would be eligible to receive as individuals.

Once these and other ambiguities and uncertainties about the Secretary's press release and the statute surfaced, the expectation was that when the Secretary promulgated regulations to implement the new second exception to the general husband and wife rule the questions would be answered. On February 28, 1991, proposed payment limitation rules for the 1991-95 crop years were published in the Federal Register. 56 Fed. Reg. 8287, 8290-300 (1991) (to be codified at 7 C.F.R. pt. 1497) (proposed Feb. 28, 1991).

For those seeking guidance on the implementation of the new exception, the proposed rules do not resolve all of the ambiguities arising from the Secretary's press release and the statute authorizing the second exception to the husband and wife rule. In essence, the proposed rule implementing the second exception parrots, with minor omissions, the language of the statute. 56 Fed. Reg. 8287, 8296 (1991) (to be codified at 7 C.F.R. § 1497.104(b)) (proposed Feb. 28, 1991).

In contrast to the paucity of guidance offered by the proposed regulations, the ASCS Deputy Administrator for State and County Operations (DASCO) has issued more detailed instructions to the state and county ASCS committees for the implementation of the new second exception to the husband and wife rule. Those instructions are found in Notice PL-45 (Feb. 21, 1991) at 6-12. In addition to instructions on the implementation of the new exception, Notice PL-45 contains nine examples, only two of which are included in the explanatory comments accompanying the proposed rules published in the Federal Register. *See* 56 Fed. Reg. 8287, 8290 (1991).

Based on the statute, the proposed regulations, and the instructions issued by DASCO in Notice PL-45, several points can be made regarding the implementation of the second exception to the general husband and wife rule. First, the prohibition against holding directly or indirectly, a substantial beneficial interest in more than one entity earning federal farm program payments in the exception will be interpreted broadly. Notice PL-45 defines the term "entity" to include "an individual interest in a farming operation." Notice PL-45 (Feb. 21, 1991) at 6, ¶ 4A. It also provides that "each spouse may have 1 interest -- it may be as an individual or it may be a substantial beneficial interest in a 'true' entity." *Id.* Thus, to qualify for the new second exception, neither spouse can hold a substantial beneficial interest in more than one entity receiving farm program payments, and, in this instance, an entity is broadly defined to include an interest in a farming operation.

Although "substantial beneficial interest" is defined in the proposed regulations as interest of ten percent or more, the phrase "interest in a farming operation" is not. *See* 56 Fed. Reg. 8287, 8295 (1991) (to be codified at 7 C.F.R. § 1497.3(b) (Substantial Beneficial Interest)) (proposed Feb. 28, 1991). *See also* Kelley & Malasky, *supra* at 78-80 (criticizing the failure of the Secretary to define "interest in a farming operation" in the regulations). Apparently, in this context, an "interest in a farming operation" means a ten percent ownership right or share in the production or the proceeds of the production from a farming operation. *See ASCS Handbook (1-PL)*, Exhibit 2 (Interest In Farming Operation) (Amend. 6). *See also* 56 Fed. Reg. 8287, 8293 (1991) (to be codified at 7 C.F.R. § 1497.3(b) (Farming Operation)) (proposed Feb. 28, 1991). However, it may also include other forms of involvement in a farming operation including being a "[g]eneral partner of a limited partnership

where the limited partnership is a producer in the farming operation" or a "[g]rantor of a revocable trust where the trust is a producer in the farming operation." *See ASCS Handbook (1-PL)*, Exhibit 2 (Interest In Farming Operation) (Amend. 6). Moreover, there may be

Continued on page 6

circumstances in which an ownership interest of less than ten percent will be applied. *See* 56 Fed. Reg. 8287, 8295 (1991)(to be codified at 7 C.F.R. § 1497.3(b) (Substantial Beneficial Interest)) (proposed Feb. 28, 1991).

Second, it appears that the family member rule will not be applied to determine whether spouses are separate "persons" under the new second exception to the husband and wife rule. Rather, the requirements appear to be those applicable to individuals or entities generally, without the relaxation of the "actively engaged in farming" requirements found in the "family member" rule. *See* 7 U.S.C. § 1308-1(b)(2)(A); 56 Fed. Reg. 8287, 8297-98 (1991) (to be codified at 7 C.F.R. §§ 1497.201, 1497.202) (proposed Feb. 28, 1991). In addition to proscribing that a husband and wife may not "hold, directly or indirectly, a substantial beneficial interest in more than one entity (including themselves) engaged in farm operations that also receive program payments", the proposed regulations governing the exception only provide that each spouse must "otherwise [meet] the requirements under this part to be considered a separate person . . . ." 56 Fed. Reg. 8287, 8296 (1991) (to be codified at 7 C.F.R. § 1497.104(b)) (proposed Feb. 28, 1991).

In many instances, it may be assumed that spouses desiring to use the exception will form general partnerships or joint ventures. Accordingly, each spouse will have to satisfy the "actively engaged in farming" and other requirements that must be satisfied for members of joint operations to be considered to be separate "persons". *See* 56 Fed. Reg. 8287, 8294, 8297-98 (1991) (to be codified at 7 C.F.R. §§ 1497.3(b) (Person), 1497.3(b) (Joint Operation), 1497.201, 1497.203) (proposed Feb. 28, 1991). *See also* Kelley & Malasky, *supra* at 130-39. The choice of business organization involves a variety of considerations including the extent of jointly owned property and the amo}ot of labor and management performed by each spouse. If a joint operation is selected, attention will have to be paid to the ownership of contributed land, equipment, and capital and to the relationship of all contributions, including active personal labor and management, to each spouse's claimed share of the profits and losses of the farming operation. In addition, attention should be paid to cash rent contracts and equipment leases. Of course, the tax consequences of any change in the organizational and ownership structure of the farming operation must be considered when making the decision to use the new exception to the general husband and wife rule.

If the spouses operate through separate, wholly owned corporations and both corporations meet the requirements to be considered to be "actively engaged in farming", Notice PL-45 provides that the spouses will be deemed to be separate "persons" only if they reside in a state that is not a community property state. If the state is a community property state, the two corporations will be considered to be one "person" for payment limitation purposes "because each spouse would be considered as having an interest in the operation of the other spouse." Notice PL-45 (Feb. 21, 1991), Example 3, at 11, ¶ 4G.

Notice PL-45 also provides that "[t]he substantive change rule is not required to be met for 1991 if the increase in `persons' is due to the revised `person' rule for husbands and wives and involves only the husband and wife." *Id.* at 8, ¶ 4C. *See also* 56 Fed. Reg. 8287, 8297 (1991) (to be codified at 7 C.F.R. § 1497.108(g)) (proposed Feb. 28, 1991). When the increase involves the addition of a "person" other than the husband and wife and the husband and wife under the new second exception, the substantive change rule must be met only for the addition of the other person. Notice PL-45 (Feb. 21, 1991), Example 3, at 9, ¶ 4D. Neither Notice PL-45 nor the proposed regulations state whether the compliance with the substantive change rule will be required for the addition of a spouse under the exception after 1991.

Finally, Notice PL-45 provides that "[p]arents of minor children with farming interests are combined as 1 `person' with those minor children" except in two instances. First, "[i]f the parents of a minor child are divorced, the minor child will be combined with the parent, or parents having legal custody." Second, "[i]f the parents otherwise qualify as separate `persons', the minor child shall be combined as 1 `person' with the parent receiving the larger amount in payments." When the parents receive equal program payments, they must designate which parent will be combined with the minor child. Notice PL-45 (Feb. 21, 1991), at 10, ¶ 4E.

The new exception to the general husband and wife rule may contribute significantly to the equitable apportionment of federal farm program payments. However, because it represents a major change in the treatment of spouses for payment limitation purposes, it has generated a host of questions that must be answered before this year's "status date," the time at which payment limitation separate "person" determinations are made. Unfortunately, the proposed regulations answer fewer questions than are answered by Notice PL-45. Moreover, the expanded definition of "entity" for purposes of the exception coupled with the absence of a definition of "interest in a farming operation" in the regulations may present a set of unforeseen problems.

Additional information should be forthcoming from county ASCS offices on the implementation of the new exception to the general husband and wife rule. A copy of Notice PL-45 and the revised *ASCS Handbook* volume covering payment limitations, 1-PL (Rev. 1), may be obtained by calling or writing the Information Division, ASCS, USDA, P.O. Box 2415, Washington, D.C. 20013 (202-447-5875). *A Lawyer's Guide to Payment Limitations* is available for $20.00, postpaid, from the National Center for Agricultural Law Research and Information, University of Arkansas School of Law, Fayetteville, AR 72701 (501-575-7646).

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AG LAW CONFERENCE CALENDAR

Seventeenth Annual Seminar On Bankruptcy Law and Practice
Apr. 11-13, 1991; Marriott Marquis Hotel, Atlanta, GA.
Sponsored by the Southeastern Bankruptcy Law Institute.
For more info., call (404-457-5951.

Environmental Litigation Seminar
April 5, 1991, Pickwick Conference Center, Birmingham, AL.
Topics include: CERCLA litigation; insurance, bankruptcy; and wetlands.
Sponsored by ABICLE.
For more info., call 1-800-627-6514.

Groundwater Contamination: The Legal and Technical Framework in the Rocky Mountain West
May 2-3, 1991, Denver, CO.
Topics include: Federal law governing water contamination and remediation; state constraints on contamination of groundwater.
Sponsored by: Rocky Mountain Mineral Law Foundation.
For more info., call (303) 321-8100.

Fourth Annual Symposium on Agricultural and Agribusiness Credit
May 2-3, 1991, Westin St. Francis Hotel, San Francisco, CA.
Topics include: Environmental matters and assessment in agricultural and agribusiness finance transactions; aquaculture; financing fruits, nuts, and fresh products; trade disputes, GATT, and the Farm Bill.
Sponsored by: ABA Section Of Business Law and others.
For more info., call (312) 988-6200.

Abstracts of writing competition papers, copies available

Members of the AALA are eligible to receive copies of the papers submitted in the 1990 AALA writing competition. The authors have prepared the following abstracts of their papers.

Corporate Ownership Restrictions and the United States Constitution

Many states have instituted restrictions on the ability of corporations to own agricultural land. The restrictions vary in their scope and application. A typical restriction has been adopted by a state constitutional amendment in Nebraska. This paper submits such restrictions to constitutional scrutiny, focusing on Nebraska's amendment. The analysis applies due process, equal protection, and commerce clause principles to reach a result which questions the constitutionality of such schemes— despite the fact that court challenges to these schemes, to date, have been unsuccessful.

—Martin J. Troshynski

A Farmer's Guide to the United States Claims Court

In 1855, Congress waived sovereign immunity by creating the Court of Claims to hear petitions for money damages against the United States. The paper starts with a history of the Court of Claims and continues through the Federal Courts Improvement Act of 1982, which established the Claims Court and the U.S. Court of Appeals for the Federal Circuit. Next, the paper examines farm program litigation in the Claims Court under the Tucker Act. Finally, the paper discusses jurisdictional issues such as whether certain farm program actions must be brought in U.S. District Court instead of the Claims Court.

—Scott Wegner

America's Vanishing Farmland: Responses to the Farmland Crisis and Recommendations for the Future of Farmland Preservation in New Jersey

Comprehensive programs, which cover all aspects of land use planning, not just those dealing with agricultural land preservation, are needed to slow the unnecessary conversion of millions of acres of farmland. In the past, faced with a growing concern over the disappearance of much of the nation's farmland, especially near major metropolitan business centers, a variety of land use planning schemes were implemented. Most have been aimed at the farmer, with the intent of alleviating the burdens created by encroaching development. Unfortunately, many of these programs are employed without concern for their affect on the others which may already be in place.

—David M. Gorenberg

State Roundup

CALIFORNIA. *New agricultural lien law.* California enacted legislation last fall that, as of January 1, 1991, adds a new agricultural lien law to the Food and Agricultural Code. This legislation (Assembly Bill No. 3043) provides substantial new lien rights to suppliers and applicators of agricultural chemicals and seeds, suppliers of feed for poultry and fish.

Agricultural chemical and seed lien

Under this portion of the bill, certain prerequisites must be met before a lien is established. A person who provides agricultural chemicals or agricultural seeds is not entitled to establish a lien unless that person has first sent to the debtor a written notice stating (1) that payment is more than 30 days overdue, (b) the amount overdue, and (c) that the debtor has the following three alternatives: (i) allow the lien to be filed, (ii) grant a consensual security interest in the proceeds, or (iii) pay the amount overdue. Once these requirements have been complied with, and if the amount due remains unpaid, the suppliers has a lien upon the proceeds of the debtor's crop for the amount due and for the cost of enforcing the lien.

The statute limits the amount of charges secured by the lien to not more than an amount equal to the reasonable or agreed charges for chemicals furnished within a sixty-day period and for seeds furnished with a forty-five--day period.

The lien shall be effective upon the filing of a Notice of Claim of Lien with the California Secretary of State. The Notice of Claim of Lien shall be filed on the standard form of Financing Statement, with certain changes and additional information (including a statement signed under penalty of perjury that the lien claimant sent to the debtor the written notice described above). As is the case with Financing Statements, the priority of the lien will be determined in accordance with the time the Notice of Claim of Lien is filed. Unlike Financing Statements, the Notice of Claim of Lien is not required to be signed by the debtor. Therefore, the lien claimant is required to provide written notice of the claim of lien to the debtor within ten days of the filing of the Notice of Claim of Lien.

The Notice of Claim of Lien shall remain in effect, no new Notice of Claim of Lien shall be required in order to maintain the lien, so long as the provider of chemicals or seeds either (a) remains unpaid for the amounts secured by the lien, or (b) continues to provide chemicals and labor or seeds and labor on a regular basis to the debtor. The statute provides that chemicals and labor or seeds and labor shall *not* be deemed to be provided on a regular basis if a period of more than forty-five days elapses between applications, deliveries, or preparations.

The lien claimant must provide written notice to secured creditors with an interest in the debtor's crops, farm products or accounts, at least thirty days prior to enforcing a claim of lien. Strangely, no more than two of these liens may be enforced against any one debtor.

Poultry and fish supply lien

This portion of Assembly Bill No. 3043 provides that a person who provides feed or materials to aid in the raising or maintaining of poultry or fish or for the production of eggs has a lien upon the proceeds of the sale of the eggs, poultry, fish, or other products derived from eggs, poultry, or fish, for the reasonable or agreed charges for the feed or materials provided, and for the cost of enforcing the lien.

The mechanics for creating, prioritizing, and enforcing this type of lien are substantially the same as that for the chemical and seed lien with the following exceptions: (a) there is no requirement that any advance notice be given to the debtor prior to the establishment of the lien, (b) the contents of the Notice of Claim of Lien differ slightly, and (c) for the purpose of determining whether a new Notice of Claim of Lien is required in order to maintain an existing lien, feed or materials shall *not* be deemed to be provided on a regular basis if a period of more than thirty (rather than forty-five) days elapses between deliveries.

—Jeffrey A. Russell, Bolen, Fransen, & Boostrom, Fresno, CA.

SOUTH DAKOTA. *Drainage doctrine.* In the case of *Miller v. County of Davison*, 452 N.W.2d 119 (S.D. 1990), open land on the edge of a city contained two sloughs. From 1984 to 1987, heavy rainfall resulted in substantial accumulation of surface water in the slough. The sloughs were contained by a natural land barrier or "collar." When the high water in the sloughs threatened nearby motels, mobile homes, and a building center, the county broke the collar, allowing the waters to flow onto plaintiffs' farms, where it remained for an extended period, rendering a portion of the land untillable. The trial court entered an injunction against the county. In affirming the order, the Supreme Court of South Dakota ordered the natural collar rebuilt. South Dakota's drainage doctrine prohibits the casting of unusual and unnatural quantities of water on servient land.

—John H. Davidson, The School of Law, The University of South Dakota, Vermillion, SD

219 New York Avenue
Des Moines, Iowa 50313

agricultural update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Nominating Committee

The nominating committee invites the general membership of AALA to submit suggestions as to members who should be considered to stand for 1991 election to the Board of Directors (2 positions) and to the post of President-Elect. Any member may offer his or her own name or that of another member. Please contact Donald B. Pedersen, University of Arkansas School of Law, Fayetteville, AR 72701, chair of the committee.

Committee Corrections

The following committees are reprinted with corrections:

AWARDS COMMITTEE:
Leon Geyer, Chair
James B. Wadley
Dean Mohr
Ann B. Stevens, Board liaison
John H. Davidson
James B. Dean
J.W. Looney

FINANCE COMMITTEE
David Purnell, Chair
Marcia Tilley
James B. Dean
Walter J. Armbruster, Board liaison
William P. Babione, Ex Officio

Eighth Annual Writing Competition.

The AALA is sponsoring its eighth annual Student Writing Competition. This year, the AALA will award two cash prizes in the amount of $500 and $250. Papers must be submitted by June 30, 1991, to Prof. Leon Geyer, Virginia Tech, Blacksburg, VA 24061-0401. (703) 231-4528.

Topics include, but are not limited to, agricultural law, agri-business, environmental, and tax issues in agriculture.

AALA Distinguished Service Award.

The AALA invites nominations for the Distinguished Service Award. The award is designed to recognize distinguished contributions to agricultural law in practice, research, teaching, extension, administration, or business.

Any AALA member may nominate another member for selection by submitting the name to the chair of the Awards Committee. Any member making a nomination should submit biographical information of no more than four pages in support of the nominee. The nominee must be a current member of the AALA and must have been a member for at least the preceding three years. Nominations should be sent to Prof. Leon Geyer, Virginia Tech, Blacksburg, VA 24061-0401. (703) 231-4528.