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INSIDE

- *Federal Register* in brief
- Springsnail Endangered Species Act listing set aside
- Fulbright Scholar Awards competition
- In Depth: Broken fences — ineffective and unfair fence laws
- Conference Calendar

IN FUTURE ISSUES

- Legal issues in contract production of commodities

Kansas adopts hybrid form of landowner's duty to entrants

In a significant ruling, the Kansas Supreme Court jettisoned the common law rules governing a landowner's duty of care to entrants on the land and has joined a growing minority of jurisdictions that evaluate a property owner's negligence on a standard of reasonable care under all of the circumstances. However, in *Jones v. Hansen*, 1994 WL 14425, the court extended the minority rule of reasonable care under all of the circumstances only to lawful entrants (invitees, licensee and social guests), retaining the more rigid common law classification test with respect to trespassers.

In *Jones*, the plaintiff was invited to play bridge in the defendants' home. Upon being dealt the "dummy" hand, the plaintiff got up from the table to inspect the defendant's artwork. The defendant told the plaintiff that there were more paintings in another room. That room was adjacent to the one in which bridge was being played and was dimly lit. The plaintiff did not turn the light on in this room and did not ask the defendant where the light switch was located. Also, this was the first time that the plaintiff had been in the defendant's home. As the plaintiff walked sideways around the room looking at the paintings, she fell down a flight of stairs and was severely injured. The stairwell was blocked off on two sides by a bookcase, which the defendants had placed there to prevent people from walking into the stairwell. The paintings had hung at that location since 1977, and no one other than the plaintiff had been injured on the stairway.

Before *Jones*, Kansas law retained the common law classifications of trespassers, licensees, and invitees to determine the duty owed by an occupier of land to the entrants on that land. The landowner's duty owed to entrants was dependent upon the status of the entrant. The possessor of premises on which a trespasser intruded owed a trespasser the duty to refrain from willfully, wantonly, or recklessly injuring the trespasser. To licensees, individuals who receive either express or implied permission to enter or remain on the premises, the possessor owed a duty to refrain from willful or wanton injury. In Kansas, social guests (persons who enter land by express invitation of the owner or possessor) were given the status of licensees and the host owed such persons only the duty to refrain from willful, intentional, or reckless injury. Invitees are individuals who enter or remain upon the premises at the possessor's express or implied invitation for the benefit of the invitor, or for the mutual benefit and advantage of both parties. The possessor had a duty to protect and warn invitees against any danger that may be reasonably anticipated.

Presently, courts in approximately twelve states have abolished the common law rules that base the landowner's or possessor's duty of care on the classification of the entrant. Courts in these jurisdictions have formulated a more flexible approach that applies a standard of reasonable care based upon foreseeability of harm to the entrant. Under this view, the primary focus is on the conduct of the owner or occupier of the

Continued on page 2

District Court rules on disaster payments in bankruptcy

In a recent decision by the U.S. District Court for the District of Georgia, the court affirmed the bankruptcy court's categorization of disaster payments as proceeds of the farmer's crops. *In re Ring*, 160 B.R. 692 (M.D. Ga 1993). The facts involved a Chapter 7 farm bankruptcy that was filed in January of 1992. In April of 1992, the farmer-debtor received $58,987.00 in crop disaster payments for losses suffered in 1990 and 1991. As these payments were received post-petition, the debtor argued that they were not property of the Chapter 7 bankruptcy estate.

The bankruptcy court rejected the debtor's argument, holding that the disaster payments were proceeds included in the estate under § 541(a)(6) of the Bankruptcy Code. This section provides that property of the estate includes "proceeds of ... or from property of the estate." 11 U.S.C. § 541(a)(6)(1993).

Continued on page 2

land rather than the status of the entrant.

In an even smaller number of jurisdictions, courts have been reluctant to reject the traditional common law test of liability as to trespassers or other unlawful entrants, but have extended the standard of reasonable care in all of the circumstances to all other types of entrants. The *Jones* case has placed Kansas in this category with approximately five other states. In these jurisdictions, the common law status as invitee or licensee is no longer determinative, although it may be pertinent in establishing foreseeability of harm. Under this approach, the landowner's duty is to use reasonable care for the safety of all individuals on the premises except for trespassers.

In *Jones*, the court listed several factors that will be considered in determining whether a particular landowner exercised reasonable care to an entrant. These factors are to include the foreseeability of harm to the entrant, the magnitude of the risk of injury to others in maintaining such a condition on the premises, the individual and social benefit of maintaining such a condition, and the burden upon the landowner or occupier in terms of inconvenience or cost in providing adequate protection. Arguably, the Kansas Supreme Court has adopted an economic interpretation of negligence.

The economic interpretation of negligence can be traced to Judge Learned Hand's decision in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). In *Carroll Towing*, Judge Hand opined that if an individual's cost of enacting safety measures to prevent harm to entrants onto the premises exceeded the benefit in accident avoidance (measured in terms of the probability of the injury multiplied by the gravity of the resulting injury), society would be better off, in economic terms to forego accident prevention. Hence, in those circumstances, the landowner would not be found negligent, and would be deemed to have exercised reasonable care under all of the circumstances.

Perhaps the primary impact of *Jones* is that Kansas farmers and ranchers (and property owners in general) will experience an increase in the premium cost of their comprehensive liability policies, and homeowners and renters will experience increased liability insurance costs. These increased rates will be due to the potential for increased liability with respect to invitees and social guests. For farmers and ranchers, this would include individuals who come to the premises to buy livestock or to sell farm products. In general, Kansas farmers and ranchers will be required to exercise an increased level of care with respect to individuals they either invite to come on their premises or individuals who come onto the premises to conduct business transactions.

Presumably, the *Jones* ruling will have no impact on persons coming onto Kansas farm or ranch real estate for recreational purposes. The Kansas Recreational Use Statute will still apply in those circumstances to prevent recreational users from acquiring any status higher than that of a common law trespasser.

—Roger McEowen, Kansas Stat Univ.

Disaster payments/continued from page 1

In affirming the bankruptcy court decision, the district court held that crop disaster payments "serve as a substitute for proceeds that would have been recovered 'had the disaster or low yields not occurred.'" *Ring*, 160 B.R. at 693 (citing *In re Nivens*, 22 B.R. 287, 291 (Bankr. N.D. Tex. 1982); and, *In re White*, No. BRL88-00971C, 1989 WL 146417, at *4 (Bankr. N.D. Iowa Oct. 27, 1989). Although the payment was received post-petition, the "property at issue was prepetition property which became property of the estate." *Id.*, citing *White*, 1989 WL 146417 at *4.

The district court did not discuss the line of cases that have rejected the categorization of farm program payments as proceeds of crops. *See, e.g., In re Schmaling*, 783 F.2d 680 (1986), *In re Ladd*, 106 B.R. 174 (Bankr. C.D. Ill. 1989). These cases have pointed out that "proceeds" are generally defined to mean anything received from the "sale, exchange, collection or other disposition" of the original property. *See Ladd*, 106 B.R. at 176-77, citing 9-306 of the Uniform Commercial Code. Property which is a substitute for the original property does not fit within this classification, particularly in the case of disaster payments where the original property, the crop, was non-existent. *Id*; *Schmaling*, 783 F.2d at 684. Following this reasoning, farm program payments are more accurately classified as "general intangibles" or "contract rights" which come into existence either at the time that the contract is signed or with specifically regard to disaster payments, when the program is authorized by Congress. Applying this reasoning to disaster benefits, see *In re Woloschak Farms*, 74 B.R. 261 (Bankr. N.D. Ohio 1987) (disaster payments held to be pre-petition obligations where all qualifying events had occurred pre-petition; deficiency payments held to be post-petition obligations), *vacated on other grounds*, 109 B.R. 736 (N.D. Ohio 1989). *In re Hill*, 19 B.R. 375 (Bankr. N.D. Tex. 1982) (disaster and deficiency payments held to be post-petition obligations in Chapter 11 case); *In re Thomas*, 91 B.R. 731 (N.D. Tex. 1988) (disaster payments held to be post-petition obligations where the legislation authorizing them was enacted post-petition), *modified*, 93 B.R. 475 (N.D. Tex. 1988); *In re Stephenson*, 84 B.R. 74 (Bankr. N.D. Tex. 1988) (same); *In re Nielson*, 90 B.R. 172 (Bankr. W.D. N.C. 1988) (same).

—Susan A. Schneider, Hastings, MN

Conference Calendar

Twentieth Annual Seminar on Bankruptcy Law and Rules
April 14-16, 1994, Marriott *Marquis* Hotel, Atlanta, GA
Topics include: Environmental issues; dischargeability; avoiding fraudulent transfers.
Sponsored by: Southeastern Bankruptcy Law Insitute.
For more information, call 404-457-5951.

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Springsnail Endangered Species Act listing set aside

The listing of the Bruneau Hot Springsnail under the Endangered Species Act has been set aside on various procedural and due process grounds. *Idaho Farm Bureau Federation v. Babbitt*, 839 F. Supp. 739 (D. Idaho Dec. 14, 1993). In the notice proposing listing of the springsnail, the primary threat to the springsnail's continued existence was identified by the Fish and Wildlife Service as "'reduction of ... habitat by reduced spring flows caused by drawdown of the water table by ground water pumping for agricultural and other uses.'" *Id.*, 1993 WL 521744 at *1.

The agricultural interests challenging the listing raised a host of claims, including challenges to the scientific and factual basis of the final decision to list the springsnail as endangered. The court, however, declined "to declare as a matter of law that the decision to list the springsnail had no rational basis in scientific fact." *Id.*, 1993 WL 521744 at *13. Instead, set aside the listing based on procedural and due process violations which the court stated "may have affected the final decision of the agency." *Id.*

Among the procedural violations was the agency's failure to timely promulgate a rule listing the springsnail as endangered. Over seven years intervened between the publication of the proposal to list the springsnail and the promulgation of the rule listing the springsnail as endangered. During that seven year period the total number of locations in which the springsnail was known to exist increased from two to 128. The court held that the Endangered Species Act required the agency to either promulgate a rule listing the springsnail as endangered within one year from publication of the proposal to list, formally extend the one-year period by six months, or withdraw the proposed regulation. *Id.*, 1993 WL 521744 at *6-7 (citing 16 U.S.C. § 1533(b)(6)(A) & (B)). The court also held that it was unlawful for the Fish & Wildlife Service to deny public inspection of the "key scientific study serving as the basis for the proposed listing," reasoning that "'[t]o suppress meaningful comment by failure to disclose the basic data relied upon is akin to rejecting comment altogether.'" *Id.*, 1993 WL 521744 at *9 (quoting *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 252 (2d Cir. 1977)). Other grounds for setting aside the rule listing the springsnail as endangered included the agency's failure to wait until the close of the final comment period before drafting the final rule. As a result of the agency's completion of the rule's preparation before the closing of the final comment period, sixty-two comments were neither considered nor responded to by the agency in promulgating the final rule. *Id.*, 1993 WL 521744 at 9-12.

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

Fulbright Scholar Awards competition

Fulbright opportunities are available for university lecturing or advanced research in nearly 140 countries. Funding for the Fulbright Program is provided by the United States Information Agency, on behalf of the U.S. government, and cooperating governments and host institutions abroad.

Awards range from two months to a full academic year, and many assignments are flexible to the needs of the grantee. Virtually all disciplines participate: openings exist in almost every area of the humanities, social sciences, natural and applied sciences, the arts, and professional fields such as business, journalism, and law. Applicants are encouraged from professionals outside academe, as well as from faculty at all types of institutions.

The basic eligibility requirements for a Fulbright Scholar are U.S. citizenship and the Ph.D. or comparable professional qualifications (for certain fields such as the fine arts or TESOL, the terminal degree in the field may be sufficient). For lecturing awards, university or college teaching experience is expected. Language skills are needed for some countries, but most lecturing assignments are in English.

A single deadline of AUGUST 1, 1994 exists for research or lecturing grants to all world areas. Other deadlines are in place for special programs.

For further information and application materials, contact the Council for International Exchange of Scholars, 3007 Tilden Street, N.W., Suite 5M, Box GNEWS, Washington, DC 20008-3009. Telephone: 202/686-7877. Bitnet (application requests only): CIES1@GWUVM.GWU.EDU.

OREGON. *Remainderman's right to rent.* In *Simpson v. McCormmach*, Nos. CV-92-539, CA A78429, 1994 WL 2541 (Or. App. Jan. 5, 1994), the Oregon Court of Appeals considered a dispute over rent between a remainderman and a life tenant's estate.

Thompson, the life tenant of certain farmland under her late husband's will, leased the farmland for forty percent of the crops after they were harvested. Thompson died in 1991, after the lessee had seeded the crops but before they were harvested. Simpson, holding a remainder interest in the farmland under Thompson's husband's will, brought a declaratory judgment action against Thompson's personal representative and heirs, claiming entitlement to the crops that came due under the lease. McCormmach, one of Thompson's heirs, claimed entitlement to Thompson's interest in the crops under the doctrine of emblements.

The doctrine of emblements gives farmers rights in crops planted by them during the tenancy, but that are unharvested at termination of the tenancy. The trial court granted a declaratory judgment in the remainderman Simpson's favor.

In a brief opinion, the court of appeals affirmed the trial court but did not reach the question of whether the doctrine of emblements applies in a life tenant-remainderman context. The court, noting that the real dispute was not about crops, but about rent, followed the Colorado Supreme Court's reasoning in a similar case. "If a life tenant has leased the land for rents payable by part of the crops to be harvested, the rent belongs to the remainderman, and not to the estate of the life tenant." 1994 WL 2541, *2 (quoting Williams v. Stander, 354 P.2d 492, 497 (Colo. 1960)).

The court held that the principal purpose of the emblements doctrine is to protect the interests of tenant farmers. While not deciding that a lessor could never be sufficiently connected with the lessee's farming operation to be protected by the emblements doctrine, the court found that here, Thompson had no connection to the farm operations or the unharvested crops other than that the rent was paid in the form of crops.

—*Scott D. Wegner, Lakeville, MN*

Federal Register *in brief*

The following matters were published in the *Federal Register* in January, 1994. Because of remodeling in the law library the editor uses, 1/20-21, 1/24-26, and 1/28 were not available. It is hoped that these days will be included in the listing to appear in the April *Agricultural Law Update.*

1. ASCS; Conservation and environmental programs; proposed rule. 59 Fed. Reg. 1293.
2. January 20-21, January 24-26, and January 28.. FmHA; Direct operating, farm ownership, soil and water, and emergency loans; collateral requirements revisions; proposed rule. 59 Fed. Reg. 2307.
3. EPA; USDA; Interagency memorandum of agreement concerning wetlands determinations for purposes of section 404 of Clean Water Act and Subtitle B of the Food Security Act. 59 Fed. Reg. 2920.
4. USDA; Wetlands Reserve Programs; interim rule. 59 Fed. Reg. 3772.
5. FCA; First lien existence; documentation; final rule. 59 Fed. Reg. 3785.

—*Linda Grim McCormick, Toney, AL*

Broken fences: ineffective and unfair fence laws

by L. Leon Geyer and Michael A. Taylor

Let me ride through the wide open country that I love;
Don't fence me in.
Let me be by myself in the evening breeze,
Listen to the murmur of the cottonwood trees.
Send me off forever, but I ask you please,
Don't fence me in.
. . . I can't stand fences;
Don't fence me in.
From *Don't Fence Me In* by Cole Porter.

Our society has a history of resolving and avoiding conflict among neighbors with the use of fences. A fence is most properly treated in law as a guard against intrusion. This guard is usually understood as being a stream, an imaginary line, or obstacle interposed between two parcels of land, traditionally for the purpose of either preventing cattle or other domestic animals from going astray or protecting a property or a field from unlawful encroachment.[1]

Laws enacted to allocate to property owners responsibilities for constructing and maintaining fences have themselves become a source of conflict. This conflict arises in part because the nation's demographics have changed. Originally, the "common law rule . . . require[d] the owners of cattle to keep them upon their own lands on pain of becoming liable in trespass for their entry upon the lands of others."[2] The common-law allocated to the livestock owner the responsibility to "fence-in" his livestock. This allocation of responsibility created an entitlement for the adjoining owner. This entitlement, together with a strict liability protection rule, allocated to the non-livestock-raising property owner the privilege to be free from trespass by livestock without the responsibility to fence out free-roaming livestock.

Early on, legislators in many states concluded that the common-law rule was unsuitable to the open-range conditions then widely prevailing and repudiated by statute the common law rule of a duty to fence in animals. This decision required Herb Homeowner, a flower grower, to pay to fence out Larry Livestock's cattle. The result created a fence-out requirement for the non-livestock owner and the fence-out entitlement with liability rule protection for the livestock owner. The non-livestock-raising landowner was allocated the responsibility (and therefore the cost) of fencing out the livestock owner's animals. Eventually, as many states became more densely populated in urban as well as rural areas, legislators in some states changed fence-out statutes back to the common-law duty to fence-in. However, many states have not returned fence law solely to the common-law rule.* Some states retain "fence out" requirements and some states grant local-option authority to jurisdictions to adopt the common-law rule of "fence-in" by referendum or local legislative action. Thus, within many states there are both *fence-in* and *fence-out* jurisdictions. In addition, many states have rules to require both parties to contribute to a "common fence".[3] Recent attempts to invoke longstanding cost-sharing fence laws in Virginia, New York, and Vermont have resulted in lawsuits.[4]

This article examines current fence laws in the United States and discusses their effectiveness in meeting economic efficiency and equitable benefit distribution. The article recommends a revision of fence laws to an equitable standard and provides information to challenge the unfair law found in many states.

Efficiency and distribution

Economic effectiveness focuses on the dual social goals of economic efficiency and equitable benefit distribution. Economic efficiency is reached when any further change in the distribution of benefits will result in society's loss of utility outweighing its gains. The desired distribution of benefits will be equality and an effective fence law will not result in a benefit to one individual at the expense of another. The goals of economic efficiency and equitable benefit distribution provide us with the decision-making rules for comparing the economic effectiveness of various fence-law alternatives.

Entitlement and protection: the duty to fence in or fence out

The development of economically effective legal relationships occurs in two phases: first, an entitlement is allocated; second, the entitlement is protected. Entitlement means that specific responsibilities have been allocated by common law courts or government to owners of land devoted to certain uses. Where fence law is concerned, the legislature must decide among two alternatives: Whether the livestock owner is to have the responsibility for preventing his animals from causing property damage to a neighbor, i.e., the resulting *fence-in* entitlement benefits the neighbor. Or, whether the neighbor is to have the responsibility for preventing the livestock owner's animals from trespassing, i.e., the resulting *fence-out* entitlement benefits the livestock owner.

The following example illustrates this transfer of entitlement under liability rule protection. Larry Livestock owns a property on which cattle are present. Livestock's property adjoins that of Herb Homeowner. Homeowner does not have any livestock present on his property, but he does take great pride in his prize-winning petunias. Unfortunately, the proximity of Livestock's cattle to Homeowner's petunias often results in the petunia bed being destroyed by straying cattle.

Assume that Livestock's property lies in a *fence-out* jurisdiction and that the fence statute requires Homeowner t fence-out the free-roaming cattle of Livestock. If Homeowner erects, and is non-negligent in maintaining, a legal fence he can be compensated for any trespasses[5] of cattle that violate his property. Therefore, Homeowner can receive his entitlement of being free from Livestock's, and any other party's, free-roaming cattle for the cost of building and maintaining a legal fence on his, Homeowner's, property. Thus, in the *fence-out* jurisdiction, the qualified voters have determined in referendum or the legislature has decreed that the cost of building and maintaining a fence is fair payment by Homeowner to receive his entitlement to be free of untrampled petunias, free of trespass by livestock.

The reverse holds true for a *fence-in* jurisdiction. In this case, Livestock must build and maintain a legal fence to control the trespasses of his cattle. If Livestock is non-negligent in maintaining his fence and Homeowner suffers a trespass (i.e., the cattle cross a legal fence), Livestock is *not* liable for damages. Therefore, Homeowner is not compensated for damages. If Larry Livestock does not maintain a "lawful fence", then he is liable for trespass of his cattle in "fence-in" jurisdictions.

Many legislative bodies have adopted rules regarding a sharing of the burden (i.e., the cost) of fencing. The result is still

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an entitlement transfer, but the cost of this transfer is not the full cost of the fence. Under a cost sharing statute, Herb Homeowner in a "fence out" jurisdiction may force Larry Livestock to pay for one-half the cost of "fencing out" the livestock. And, in many states, even in a "fence-in" jurisdiction, the non-livestock owner may be forced to share in the cost of fencing. Cost sharing statutes are often called "division" fences or "partition" fence statutes.

Benefit-cost analysis of transfer

We will now examine the cost and benefit distributions in both fence-in and fence-out entitlement under liability rule protection. The analysis will include conflict scenarios between neighboring livestock owners and between a livestock owner and a non-livestock owner. Benefit-cost analysis will be used to determine the most effective fence law for meeting the social criteria of economic efficiency and equitable benefit distribution.

The potential impact scenarios for *fence-out* entitlement alternatives are presented in Table 1. This summary of the potential fence-out entitlement impacts under cost-sharing and non-cost-sharing liability rule protection is helpful in analyzing whether the resulting distribution of benefits meets the condition of *equality*. In terms of economic efficiency, many cases of government failure are evident. When the valuation process omits various benefits derived by the livestock owner from the presence of a fence, inefficiency and governmental failure result. The fence is an input to production; it is also a time- and labor-saving device, because the herd may be gathered with greater ease. In addition, the presence of a fence reduces the livestock owner's potential liability for damages due to negligence in allowing cattle to roam in auto collisions and other non-land-related torts.[6]

Scenarios 1 and 2 (Table 1) summarize the cost-benefit relationship under both cost-sharing and non-cost-sharing liability rule protection. The outcome of Scenario 1 (i.e., no cost-sharing) is economically inefficient because of an inherent free-rider problem. The livestock owner who out-waits the other, i.e., the livestock owner who does not construct a fence, receives free use of the constructed fence in production. Therefore, the livestock owner who out-waits the other livestock owner, becomes a free-rider. Scenario 2, however, results in an economically efficient outcome. By requiring each livestock owner to share in the cost of fence construction and maintenance, the distribution of benefits is equal. Each livestock owner buys the entitlement of being free from the other's strays, unwanted pregnancies, and spread of disease, and each receives the use of the fence in production at *half* its total cost. Therefore, the criteria of efficiency and equitable benefit distribution are met.

Unfortunately, this same result cannot be attained when both neighbors do not have livestock on their property. Scenarios 3 and 4 represent a more typical conflict in today's society. In each scenario, the conflict exists between a landowner with livestock and a non-livestock landowner. In Scenario 3, the non-livestock owner receives the entitlement to be free of free-roaming livestock through the full cost of building the fence, and the livestock owner receives free use of the resulting fence in his production. Thus, the fence-out entitlement creates an external economy for the livestock owner. If society desires producers of livestock to be directly supported at the expense of their landowning neighbors, then this outcome is not economically inefficient nor consistent with other subsidies to the agricultural sector.[7] Scenario 4 includes a cost-sharing scheme for fence construction and maintenance between a livestock owner and a non-livestock owner. Although this lowers the cost to the non-livestock owner of his entitlement to be free of free-roaming livestock, it still fails to internalize completely the government-created external economy. *Therefore, the fence-out entitlement protected with a liability rule produces economically efficient outcomes only when each neighbor has livestock and the statute contains a cost-sharing mechanism—Scenario 2.*

The potential impact scenarios for a fence-in entitlement alternatives are presented in Table 2. As in the case of the fence-out entitlement, some of the fence-in entitlement outcomes are economically inefficient and show signs of government failure. Scenarios 5 and 6 (Table 2) exactly parallel their fence-out counterparts. In Scenario 5, the use of a non-cost-sharing liability protection rule on the fence-in entitlement between two livestock owners results in a free-rider problem, just as with the fence-out entitlement. However, Scenario 5 also grants the non-contributing livestock owner a free fence-in entitlement, because the presence of a legal fence also meets his statutory requirements. Using a liability rule that employs a cost-sharing mechanism between the livestock owners, as in Scenario 6, results in an economically efficient outcome. The use of a cost-sharing mechanism allows each livestock owner to benefit from the fence at *less* than its full cost. Therefore, the decision to allocate a fence-in entitlement does not prevent the goal of economic efficiency from being reached in a conflict between livestock owners, when the entitlement protection is a liability rule containing a cost-sharing mechanism.

The cost-benefit distribution in a conflict between a livestock owner and a non-livestock owner within the fence-in entitlement alternative can result in an economically efficient outcome. However, Scenario 7 (Table 2) is a cost-sharing scheme with liability-rule protection that produces an inefficient result. An external economy is again being created, by requiring the non-livestock owner to contribute to the fencing costs of the livestock owner. In addition, the non-livestock owner is also required to pay for an entitlement that the statute directs the livestock owner to buy. Scenario 8 (Table 2) avoids this problem by allocating to the livestock owner a fence-in entitlement with protection through a liability rule without a cost-sharing scheme. *This results in an economically efficient outcome, and also satisfies the criteria for equitable benefit distribution.* The livestock owner must pay the cost of the fence to receive his entitlement, being free from having to pay the non-livestock owner for any damages done by stray cattle; meaning no external economies are created through the transfer. *Therefore, the fence-in entitlement with liability rule protection satisfies our criteria of efficiency and equitable distribution in both Scenario 6 and Scenario 8.*

Effectiveness ranking: efficiency and equitable benefit

Ranking each scenario in terms of its effectiveness requires consideration of the criteria of economic efficiency and equitable benefit distribution. *The ideal fence law will not benefit one individual at the expense of another.*

Each scenario from Table 1and Table 2 are characterized as to whether they produce economically efficient results and distribute benefits equally.

In the conflicts involving two livestock owners, Scenario 1 and Scenario 5 are inefficient because they lack a cost-sharing mechanism. Scenario 5 is less desirable than Scenario 1 because of the initial fence-in entitlement structure. The fence-in entitlement creates a statutory responsibility for each livestock owner to contain his animals. In contrast, the fence-out entitlement allows individual livestock owners a choice in fencing, because there is no legal responsibility to fence-out. Consequently, Scenario 1 and Scenario 5 result in free use of the fence for one party, thereby creating a free-rider problem. Scenario 5 also allows the non-contributing livestock owner to meet his obligation through the presence of the neighbor-financed legal fence. This fence also contains the noncontributing livestock owner's livestock, relieving him of his legal duty.

Continued on page 6

Three of the four possible scenarios (Scenario 3, Scenario 4, and Scenario 7) for conflict resolution betweenlivestock owners and non-livestock owners resulted in inefficiency. In the fence-out entitlement scheme, both scenarios 3 and 4 were inefficient because of an external economy for the livestock owner created by placing the burden (i.e., the cost) of the fence with the non-livestock owner. The external economy is also created with the fence-in entitlement of Scenario 7. However, the livestock owner also meets his statutory responsibility to contain his livestock through the required contribution by the non-livestock owner. Therefore, some inefficient fence laws can be more desirable than others.

The ideal fence law would consist, however, of a combination of the economically efficient scenarios 2, 6, and 8. The only economically efficient solution to the conflict between a livestock owner and a non-livestock owner is the fence-in entitlement, with liability rule protection and without any cost-sharing scheme, Scenario 8. When conflict occurred between two livestock owners, both the fence-in and the fence-out entitlement were efficient, provided that the liability rule for protection allowed for an equal sharing of the cost, Scenario 6 and Scenario 8. *Therefore, it is essential that fence law recognize the effects that* ***the use being made of land*** *has upon the economic effectiveness of any legal solution.*

If in the case of two livestock owners where a sharing of the fence entitlement is established, how should it be carried out? One alternative[8] is to require a sharing of the construction cost. Some state statutes do not speak to the issue of how the cost is to be shared.[9] When Prestige Farmer wants 6 ft. board fence and Frugal Farmer wants 4 strands of barbed wire, conflict again may arise. Other states[10] ind of fence that should be built. A second alternative is for each farmer to face each other and maintain the right half of the fence in such repair that it turns the animals.[11] As an alternative, neighbors can always bargain and grant a covenant running with the land (if filed in the public record) to bind current and future owners an entitlement to "fence in", "fence out", cost share, or any combination of entitlement rules.[12]

Non-economic considerations: achieving fairness

Laws are not created on the grounds of economic efficiency alone. ". . . [M]ost trespass lawyers and law professors still believe . . . that the actual as well as the ideal function of tort law is to achieve fairness rather than efficiency."[13] Therefore, in deriving the ideal fence law, it is also important to consider the concept of fairness or justice. Legislators also are believed to respond to some perception of justice when determining how individuals in society should interrelate.

Given these beliefs, a final question arises: Does a shift in the focus of our analysis to a concept of fairness change the conclusions determined by our analysis of economic effectiveness? In several recent court cases that have attempted to declare fence laws in certain states unconstitutional, the fairness question has been the issue.[14]

In each of these cases, a fence was constructed between adjoining parcels of land under existing fence-law statutes with cost-sharing schemes. In each case, the landowner who constructed the fence had livestock present on his land while the owner of the adjoining parcel had no livestock present on his land. In two of these cases, the court determined this legal arrangement to be unfair to the property owner who had no livestock on his land.[15] One court stated that ". . . requiring an adjoining owner . . . who does not keep livestock to share the cost of the fence for the benefit of his neighbor is not reasonably necessary to any legitimate public purpose and is oppressive."[16] This opinion is in agreement with the results drawn from our economic effectiveness analysis, and it further strengthens the self-evident conclusion that there is a need for fence law to distinguish between owners of land on which livestock are present and owners of land on which no livestock are present when determining whether to implement a cost-sharing scheme. "The argument that a landowner without livestock benefits to the extent that he or she is protected [from] straying livestock is delusive, considering the fact that, absent the [fence-law] statute, the liability for trespassing livestock lies solely with the owner of the livestock."[17] In contrast, the less enlightened Virginia case, decided on a presumption of legislative validity, upheld the responsibility of owners of land on which there was no livestock present to "share" in the livestock owner's production costs.[18]

A final argument in support of distinguishing between the *use* landowners make of their land, a crucial element of any ideal fence law, can be found in the tax code. Tax law allows the livestock owner to depreciate the cost of his fence as a cost of conducting business.[19] This same benefit is not extended to a landowner without livestock. The ability to depreciate the cost of a fence makes the livestock owner more distinctly a least-cost avoider, because the final cost of the fence will *always* be less for the livestock owner. In terms of fairness, tax depreciation recognizes the role of a fence as an *input to production*, thereby distinguishing between an owner of land on which livestock are present and an owner of land on which no livestock are present.

The ideal fence law

Economic effectiveness analysis provides us with only three fence-law entitlement and liability rule protection combinations that meet both the criteria Pareto-efficiency and equal distribution of benefits. The only scenario between an owner of land on which livestock are present and an owner of land on which no livestock are present was a fence-in entitlement with liability rule protection and without a cost-sharing scheme. In the case of two livestock-owners with adjoining land, either a fence-in or a fence-out entitlement with a cost-sharing scheme included result in Pareto-efficiency and equal distribution of benefits. Therefore, the ideal fence law is a fence-in entitlement with liability rule protection. In contrast to current fence laws that are based on the single criterion of adjoining property, this ideal fence law distinguishes between individuals with adjoining land on the basis of the use they are making of their land. Only in the case where both individuals have livestock present on their land should cost-sharing be included.

Economics and equity both argue for the re-adoption of the common-law principle of a duty to fence-in with no burden on an adjoining landowner who chooses not to raise livestock and chooses to let their land lay open. Although Cole Porter may hold our spirit in verse, the song is out of touch for livestock. An application Pareto-efficiency and equi argues for a legislative change in the fence law or a litigation to change the law and return to the "good old 'common law' days" of "Fence me in."

**Editor's note: Professor Geyer had prepared an exhaustive table of all fifty states' entitlement, liability standards and cost sharing requirements. Space did not permit its reproduction here, but you may contact Prof. Geyer for a copy.)*

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[1] Ransom H. Tyler. *A Treatise on the Law of Boundaries and Fences.* Albany, N.Y.: William Gould and Son (1876). p.1.

[2] *Poindexter v. May*, 98 Va. 143 (1900).

[3] For example, in Virginia an owner of subdivided land can be required to maintain one-half of the cost of the whole fence. Va. Code Ann. § 55-317 (1993). While in Indiana, each landowner must maintain only the right half of the fence, as he faces his neighbor. The fence is not "common" but rather each neighbor must maintain his separate fence. For example, Ind. Stat. § 32-10-9-2 (1993 WL).

[4] *Sweeny v. Murphy,* 334 N.Y.S.2d. 239 (NY 1972); *Choquette v. Perrault,* 569 A.2d. 455 (Vt. 1989); *Holly Hill Farm v. Rowe et al.*, 241 Va. 425 (Va. 1991).

[5] "Doing of unlawful act or lawful act in unlawful manner to injury of another's person or property." *Waco Cotton Oil Mill of Waco v. Walker,* Tex.Civ.App. 103 S.W.2d 1071, 1072. Henry Campbell Black. Page 1674 *in Blacks Law Dictionary,* Revised Fourth Edition. West Publishing Co.: St. Paul, Minn. (1968).

Table 1: Costs and benefits from *fence-out* (livestock owner has no duty to fence livestock) entitlement with strict liability rule protection

Owner	Costs of Fence	Benefits of Fence
Scenario 1: Livestock owner and livestock owner (no cost-sharing statutes)		
Livestock owner 1	If livestock owner 1 wishes to prevent livestock owner 2's cattle from entering his property, livestock owner 1 must construct and maintain a fence at full cost, and vice versa.	Livestock owner 1 receives the entitlement to be free of livestock owner 2's cattle and use of fence in production at full cost, and vice versa.
Livestock owner 2		Livestock owner 2 receives free use of fence in production and freedom from livestock owner 1's cattle at no cost, and vice versa
Scenario 2: Livestock owner and livestock owner (cost-sharing statute)		
Livestock owner 1 Livestock owner 2	The livestock owners share the cost of constructing and maintaining the fence.	Each livestock owner receives the entitlement to be free of the other's cattle and to use of fence in production at less than the full cost.
Scenario 3: Non-livestock owner and livestock owner (no cost-sharing statute)		
Non-livestock owner	Full cost of fence construction and maintenance.	Non-livestock owner receives the entitlement to be free from property damage by livestock owner's cattle.
Livestock owner	No responsibility for cost of fence	Livestock owner receives use of fence in production.
Scenario 4: Non-livestock owner and livestock owner (cost-sharing statute)		
Non-livestock owner	Non-livestock owner and livestock owner share the cost of constructing and maintaining the fence.	Non-livestock owner receives the entitlement to be free from property damage by Rancher's cattle at less than full cost of fence.
Livestock owner		Livestock owner receives use of fence in production at less than full cost.

Table 2: Costs and benefits from *fence-in* (livestock owner has duty to fence livestock)with strict liability rule protection

Owner	Costs of Fence	Benefits of Fence
Scenario 5: Livestock owner and livestock owner (no cost-sharing statutes)		
Livestock owner 1	If livestock owner 1 builds fence, livestock owner 2 has no responsibility to contribute to construction and maintenance costs, and vice versa	Livestock owner 1 receives the entitlement to be free of compensating livestock owner 2 for any damage by cattle and use of fence in production at full cost, and vice versa.
Livestock owner 2		Livestock owner 2 receives free use of fence in production and free compliance with legal responsibility, and vice versa
Scenario 6: Livestock owner and livestock owner (cost-sharing statute)		
estock owner 1 Livestock owner 2	The livestock owners share the cost of constructing and maintaining the fence.	Each livestock owner receives the entitlement to be free of compensating for damage to the other's property and to use of fence in production at less than the full cost.
Scenario 7: Non-livestock owner and livestock owner (cost-sharing statute)		
Non-livestock owner Livestock owner	Non-livestock owner and livestock owner share the cost of constructing and maintaining the fence.	Although the entitlement regimen states that non-livestock owner should be free of cattle, the statute forces him to help finance the fence.
Scenario 8: Non-livestock owner and livestock owner (no cost-sharing statute)		
Non-livestock owner	No responsibility for costs of fence construction and maintenance	Compensation replaced with removal of trespass by cattle No gain in benefits
Livestock owner	Full cost of fence construction and maintenance.	Livestock owner receives the entitlement to be free of compensating non-livestock owner for property damage and use of fence in production at full cost

Buying the entitlement allows the livestock owner to be free of compensation for property damage, *only if he is non-negligent in his actions*. Without a fence, the livestock owner would be strictly liable for any trespass damage suffered from his cattle. However, after a fence has been constructed, the livestock owner is faced with a negligence standard. Only if the livestock owner properly constructs and maintains the legal fence is he free of liability from property damage.

p.1674.

[6] In most states, the legal standard for liability for livestock that cause property damage on public roadways, i.e., collisions with automobiles, is a negligence standard. The presence of a legal fence is of benefit to the livestock owner's defense in such a case. In other than open range situations, the absence of a fence could be argued as negligence *per se*. And, maybe the concept of open range in 1994 should be challenged as an anachronism.

[7] This situation does not seem to be the case in day's society. Although our government selec-ely subsidizes the agricultural sector, this subsidy is not consistent with requiring individual owners of land to directly support their neighbor's production. Although society does have cost-sharing Best Management Practices (BMPs), the situation created through the fence-law regimen in Scenario 3 is comparable to having the non-livestock owning neighbor directly pay to install a manure handling system on the livestock owner's farm in order to avoid contaminating water through nitrogen and phosphorus loadings.

[8] For example, Virginia, Va. Code Ann § 55-317 (1993).

[9] *Id.*

[10] For example, Minnesota, Minn. Stat. §31-4.02 (1993WL), and Delaware, 25 Del. Code §1304 (1993WL).

[11] For example, Indiana, Ind. Stat. § 32-10-9-2 (1993 WL).

[12] For example, North Dakota, N.D. Cent. Code §47-26-18 (1993); Oklahoma, Okla Stat. Ann. §147 (1993); and Kentucky, Ky. Rev. Stat. & R. §256.020 (1993).

[13] Landes and Posner, *op. cit.*

[14] *Sweeny v. Murphy*, 334 N.Y.S.2d. 239 (1972); *Choquette v. Perrault*, 569 A.2d. 455(1989); *Holly Hill Farm v. Rowe et al.*, 241 Va. 425 (1991).

[15] *Sweeny v. Murphy*, 334 N.Y.S.2d. 239 (1972); *Choquette v. Perrault*, 569 A.2d. 455 (1989).

[16] *Sweeny v. Murphy*, 334 N.Y.S.2d. 239 (1972).

[17] *Choquette v. Perrault*, 569 A.2d. 455 (1989).

[18] *Holly Hill Farm v. Rowe et al.*, 241 Va. 425 (1991).

[19] *U.S. Internal Revenue Code*, sec. 162 (1994).

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