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Farmer Sales of Protected Varieties

On January 18, 1995, the U.S. Supreme Court in an 8-1 opinion in *Asgrow Seed Co. v. Winterboer*, (1995 U.S. Lexis 693), interpreted the "farmer exemption" (7 U.S.C.§ 2543) of the Plant Variety Protection Act [PVPA] narrowly to limit the amount of seed that can be saved and possibly sold by farmers.

The much anticipated ruling resolves a dispute in which one of America's largest plant breeding concerns accused an Iowa farmer of illegally infringing a protected variety of soybeans by raising and selling large quantities to other farmers, a practice known as "brown bagging." The case originated in the Northern District of Iowa where the federal court ruled the "farmer exemption" was limited to the amount of seed a farmer needed to replant a crop, with any allowable sales being from what was left of this saved seed. [795 F. Supp. 915 (1991).] The U.S. Court of Appeals for the Federal Circuit reversed this ruling [982 F.2d 486 (1992)] and held the farmer exemption allowed a much larger quantity of seed, perhaps as much as one half of the amount produced, to be saved and sold to others whose primary occupation was farming. [For a discussion of the lower court decisions, see Neil D. Hamilton, "*Asgrow v. Winterboer Case Tests Interpretation of Controversial PVPA Farmer Exemption*," Diversity, vols. 9 #1 and 2, pp. 48-51 (1993).

The appeals court ruling was a serious setback both for Asgrow and the seed trade, which saw the ruling as an invitation for increased brown bagging by producers. The seed industry has had as a goal for many years reforming the farmer exemption of the PVPA. It finally succeeded in the fall of 1994 when Congress amended the PVPA to repeal the farmer sales provision of the farmer exemption. However, the amendment is effective only for new varieties certified after April 4, 1995, [See, *Farmers' Rights to Sell "Brown Bagged" Seed Under PVPA Restricted*, Agric. L. Update, Dec. 1994, p. 1; and section 10, Pub. L. No. 103-349, and 1994 Congressional Record, H8026-H8034, August 12, 1994], meaning the amendment created a two-tier system of farmer exemptions depending on when a variety was certified. This meant the issue in *Winterboer* was not moot, and the case remained of great significance to the seed trade as to protections for existing varieties.

In essence, the Supreme Court's ruling reached the same result as the district court, although in terms of legal analysis, the Court drove around the other side of the mile to get to the same place. At issue in the case was the proper interpretation to be given a section of the PVPA which the Court admitted "...is quite impossible to make complete sense of...." The issue of statutory interpretation involved was the question of how to read the clause allowing some saved seed to be sold. Was the ability to sell

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Strict Liability in Sales of Animals: Is Section 402A of the Restatement (Second) of Torts A Trojan Horse?

In a 1982 article in the *Iowa Law Review*, three cases were reviewed that had considered the applicability of strict liability concepts from the *Restatement (Second) of Torts*, section 402A in the sale of animals. Note, *The Applicability of Strict Liability to Sales of Animals*, 67 Iowa L. Rev. 774 (1982). These were apparently the only cases to that point to have considered the question. Two of these were intermediate appellate court decisions in Illinois in which the theory was found inapplicable [*Anderson v. Farmers Hybrid Co.*, 87 Ill. App. 3d 493, 408 N.E.2d 1194 (1980); *Whitmer v. Schneble*, 29 Ill. App. 3d 659, 331 N.E.2d 115 (1975)]; one was a New York Supreme Court decision that allowed a cause of action on strict liability in tort where sick hamsters had apparently transmitted a disease to humans. *Beyer v. Aquarium Supply Co.*, 94 Misc. 2d 336, 404 N.Y.S.2d 778 (Sup. Ct. 1977).

The central question in these cases is whether a living creature can be considered a "product" within the concept of strict liability as developed in section 402A of the *Restatement (Second) of Torts* and as set out by statute in many states. [Section 402A

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seed limited by other restrictions, such as that the seed being sold had to have been legally "saved" in the first place, or was the sales exception a somewhat open-ended exemption from the PVPA's scheme to protect the rights of seed breeders and companies in their creations. The Supreme Court reached its narrow result based on a combination of what it thought was the most appropriate reading of the statute, as influenced by the Congressional purpose of enacting the PVPA to protect creators of new varieties.

To summarize, the Supreme Court reached its decision based on the following statutory interpretation of section 2543. First, farmers have an unlimited right to raise and sell seed for "nonreproductive purposes" free of claims of infringement. Second, the right of a farmer to save seed for other purposes, such as reproduction, is limited by the requirement a variety may not be sexually multiplied "as a step in marketing" the variety for seed purposes. This limitation arises because of the incorporation of the section 2541(3) prohibition into the section. Conversely, the exemption that allows farmers to save seed for replanting is an exception to the restriction on "multiplying" seed for marketing. Third, it then follows that the further exception which allows farmers to sell saved seed to other farmers is limited by the prohibition of multiplying seed for the purposes of marketing it for reproduction. Fourth, this means the seed that can be legally sold for reproduction as seed to other farmers, must be limited to the "saved" seed left over after a farmer has replanted the crop or as a result of a change in planting intentions. In the Court's view, to read the exemption more broadly, as done by the court of appeals, would mean farmers could multiply the seed and save it specifically for sale as seed to other farmers as done by the Winterboers. But this would be a direct violation of the statutory limitation to not reproduce seed "as a step in marketing" the seed for purposes of reproduction.

Unfortunately, as the summary indicates, the analysis in Winterboer defies simple explanation. This is the result of both the convoluted nature of the wording of the exemption and the technical statutory interpretation which it requires. The Court noted its own dissatisfaction with the statute when Justice Scalia, writing for the majority, began the opinion by saying:

> It may be well to acknowledge at the outset that it is quite impossible to make complete sense of the provision at issue here. One need go no further than the very first words of its title to establish that. Section 2543 does not, as that title claims and the ensuing text says, reserve any "right to save seed" — since nothing elsewhere in the Act remotely prohibits the saving of seed. Nor, under any possible analysis, is the proviso in the first sentence of § 2543 ("Provided, That") really a proviso.
>
> With this advance warning that not all mysteries will be solved we enter the verbal maze of § 2543. The entrance, we discover, is actually an exit, since the provisions begin by excepting certain activities from its operation: "Except to the extent that such action may constitute infringement under subsections (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him ... and use such saved seed in the production of a crop for use on his farm, or for sales as provided in this section...." Thus a farmer does not qualify for the exemption from infringement liability if he has "sexually multiplied the novel variety as a step in marketing (for growing purposes) the variety; or (4) used the novel variety in producing (as distinguished from developing) a hybrid or different variety therefrom." 7 U.S.C. §§ 2541(3)-(4).

The Court continued by noting the act does not define "marketing" but determined that under an ordinary meaning this would include any sales of seed, even those based solely on word of mouth. As a result, the Court concluded the farmer exception which allows saving and sales of seed does not cover saving seed grown specifically for marketing as seed.

The Court concluded its analysis by ruling:

> We hold that a farmer who meets the requirements set forth in the proviso to § 2543 may sell for reproductive purposes only such seed as he has saved for the purpose of replanting his own acreage. While the meaning of the text is by no means clear, this is in our view the only reading which comports with the statutory purpose of affording "adequate encouragement for research, and for marketing when appropriate, to yield for the public the benefits of new varieties." 7 U.S.C. § 2581. Because we find the sales here were unlawful, we do not reach the second question on which we granted certiorari — whether sales authorized under section 2543 remain subject to the notice requirement of section 2541(6).

Justice Stevens wrote the sole dissent to the opinion, and based his reading of the exemption on a different interpretation of "marketing." He concluded the statute as a whole "indicates Congress intended to preserve the farmer's right to engage in so-called "brown bag sales" of seed to neighboring farmers. Under his view, not all sales of seed are "marketing" but only those which involve merchandising, such as sales through other distributors and advertising. He believed "Congress wanted to allow any ordinary brown-bag sale from one farmer to another ... [but not] to permit farmers to compete with seed manufacturers on their own ground...." He concluded by observing the Court's ruling was inconsistent with the "time honored practice of viewing restraints on the alienation of property with disfavor."

Justice Scalia in a footnote rejected Steven's view of the Court's ruling as a restraint on property, noting the purpose of the statute is "to create a valuable property in the product of botanical research by giving the developer the right to 'exclude others from selling the variety, or offering it for sale, or reproducing it, or importing it, or exporting it,' etc." 7 U.S.C. § 2483. Applying the rule disfavoring restraints on alienation to the PVPA is rather like applying the rule disfavoring restraints on freedom of contract to interpretation of the Sherman Act."

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provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

For an example of a statute incorporating this concept, *see e.g.* Ark. Code Ann. § 16-116-101 *et seq.*]

While application of the strict liability concept in the sale of animals is premised on the construction of the word "product," if a court finds animals to be "products," it must also find that the defective condition of the product (animal) renders it unreasonably dangerous to the user or consumer.

In the best known of the Illinois cases, *Anderson v. Farmers Hybrid Companies, Inc.*, 87 Ill. App. 3d 493, 42 Ill. Dec. 485, 408 N.E.2d 1194(1980), the court dealt specifically with the issue of whether defective livestock would be considered "products," and found the strict liability theory inapplicable. In that case, the buyer sued the suppliers of allegedly defective gilts that were to be used for breeding purposes. The gilts apparently had a contagious and infectious disease called "bloody dysentery," which spread to the buyer's existing swine herd. Since warranties had been disclaimed, the buyer proposed a strict products liability theory as a basis for recovery. In the earlier case in the same court, *Whitmer v. Schneble*, 29 Ill. App. 3d 659, 331 N.E.2d 115 (1975), the court had found that a dog was not a "product" in a dog-bite case where the plaintiff attempted to use the strict liability concept.

The court refused to extend the strict liability concept to living creatures in part because they were not contemplated as "products" under generally accepted principles of products liability law but also because the purpose of strict liability would be defeated if the concept extended to "...products whose character is easily susceptible to changes wrought by agencies and events outside the control of the seller, which is the case with living creatures." 408 N.E.2d at 1199. The court noted that living creatures are in a constant state of interaction with the environment and that their nature cannot be fixed prior to the time they enter the stream of commerce.

The second difficulty in using the concept is that the product must not only be in defective condition, but it must be "unreasonably dangerous." "Unreasonably dangerous" means that a product is dangerous "to an extent beyond that which would be contemplated by the ordinary and reasonable buyer, consumer or user." *See, e.g.*, Ark. Code Ann. § 16-116-102(7). This may be illustrated by a recent Arkansas case involving livestock feed, *Purina Mills, Inc. v. Askins*, 317 Ark. 58, 875 S.W.2d 843 (1994), where the court indicated that the plaintiffs would be required to offer proof that the feed was in a "defective condition which rendered it unreasonably dangerous" and the "defective condition was a proximate cause of harm" to cattle, emphasizing that strict liability applies where the product is both defective and unreasonably dangerous. 317 Ark. at 65-66 citing Ark. Code Ann. §§ 4-86-102(a)(2) & (3). The court said:

> Our law is patterned after the Restatement (Second) of Torts § 402A, the comments to which define "unreasonably dangerous" as requiring something *beyond* that contemplated by the ordinary and reasonable buyer, taking into account any special knowledge of the buyer concerning the characteristics, propensities, risks, dangers, and proper and improper uses of the product. The possibility that manufactured feed for livestock might not contain the nutritional constituents recited on labels, or that such levels might be affected by time, weather, or methods of storage, would hardly be beyond the contemplation of the ordinary buyer.

317 Ark. at 66.

In livestock sales, this second problem would also be a serious obstacle, assuming a court is able to get past the "product" concept.

A few courts have been willing to apply strict liability in sales of animals. In the 1982 *Iowa Law Review* article, the only case to have done so at that time was *Beyer v. Aquarium Supply Co.*, 94 Misc. 2d 336, 404 N.Y.S.2d 778 (Sup. Ct. 1977). In that case, the New York court rejected the argument that the strict liability concept should apply only to manufactured products on the basis that diseased animals pose a risk to human safety, just as do manufactured products. *Id.* at 337, 404 N.Y.S.2d at 779. *See*, 67 Iowa L. Rev. at 813 for a discussion of this opinion.

The courts remain divided on the question. Since 1982, there have apparently been only four additional cases in which the issue has been raised. Two of those take the Illinois position, that a live animal cannot be considered a "product"; two suggest that the New York approach is preferable.

In *Kaplan v. C Lazy U Ranch*, 615 F. Supp. 234 (D.C. Colo. 1985), the federal court, applying Colorado law, rejected the contention that a saddled horse could constitute a product. The case involved injury to a guest by a horse that was alleged to have a tendency to expand its chest while being saddled, which meant the saddle could slip to the side. The court rejected the argument that the horse was a product, stating:

> Clearly, no person ever designed, assembled, fabricated (except the Greeks at Troy), produced, constructed, or otherwise prepared a horse.

615 F. Supp. at 238.

The most recent court to consider the issue was the Missouri Court of Appeals in *Latham v. Wal-Mart Stores, Inc.*, 818 S.W.2d 673 (Mo. App. 1991), in which a purchaser's husband allegedly contracted psittacosis, a disease transmittable to humans, from a parrot. The court reviewed all of the prior cases, but agreed with the Illinois position:

> We tend to agree with the Illinois view, that due to their mutability and their tendency to be affected by the purchaser, animals should not be products under § 402A as a matter of law.

Id. at 676.

Two courts have taken the opposite view. In *Sease v. Taylor's Pets, Inc.*, 74 Or. App. 110, 700 P.2d 1054, 63 ALR 4th 113, *review denied* 299 Or. 584, 704 P.2d 514 (1985), the purchaser of a pet skunk, along with friends of the purchaser, all of whom had come in contact with or had been bitten by the skunk, which was found to be rabid, brought suit under the Oregon statute, which is identical to section 402A. The court reviewed both the Illinois and the New York cases (and the *Iowa Law Review* article) and held the live skunk was a "product" within the meaning of the Oregon statute. The court found the statute applicable to products that are "subject to both natural change and intentional alteration." 700 P.2d at 1058. The court emphasized that *Comment e* of the *Restatement (Second) of Torts* section 402A makes it clear that a "product" need not be manufactured or processed. This *comment* uses as an example poisonous mushrooms, which although they "are neither cooked, canned, packages, nor otherwise treated" are nevertheless subject to liability under the section.

Another case that takes issue with the Illinois approach is *Worrell v. Sachs*, 41 Conn. Supp. 179, 563 A.2d 1387 (Conn. Super. 1989), a 1989 Connecticut case involving a child's serious eye damage and loss of sight which allegedly resulted from exposure to a diseased, parasite-carrying puppy. The court indicated that in those cases involving a diseased condition (as opposed to animal behavior, this is a defect relevant to the animal as a product. The court suggested that the Illinois approach confuses proof of liability with status. According to the court:

But it does not necessarily follow logi-

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Preparing and Using Production Contracts

By Christopher R. Kelley
An expanded version of this article will appear in the Hamline Law Review in 1995.

Once confined to the poultry and specialty crop sectors, the use of production contracts is increasing throughout American agriculture. For example, from 1980 to 1990, the percentage of hogs produced under contract increased from two percent to eighteen percent. In 1990, contract production accounted for seven percent of food and feed grain production and twelve percent of cotton production. In the sectors where contract production began, over ninety percent of broilers and over eighty percent of processed vegetables are produced under contract. Contract production is projected to increase in both the livestock and field crop sectors. Even the newest competitors for agricultural land, biomass crops, are expected to be produced almost exclusively under contract.

Production contracts can manage risks

One of the economic factors favoring the increasing use of production contracts is the need to realize efficiencies through risk management. Because of the competitive forces within the food and feed industries, the penalty for poor risk management has grown sharply. Risk management is now critical to success. One way to reduce risk is to "line up" supplies and markets. Production contracts are an important device for "lining up" supplies and reducing the risks inherent in agricultural contracts:

- *Market-specification* contracts set the price, quantity, and quality of the product, thus reducing price risks and ensuring a supply of acceptable product;
- *Production-management* contracts give the processor direct control over production methods and are likely to become more prevalent as technologies enhance capabilities to produce products tailored for niche markets;
- *Resource-providing* contracts allow the processor to provide all or part of the inputs used to produce the product, thus incorporating strict quality standards throughout the production process; and
- *Vertical integration* contracts embody a complete shift of production control to the processor, with the producer providing only labor, land, and other fixed inputs.

Production contracts can do more than "line up" supplies, ensure quality, and implement new technologies. They can be used to preserve the confidentiality of pricing and marketing arrangements, to enhance the protection of propriety technology and processes, and to reduce a processor's land and facility costs.

Production contracts also offer economic benefits to producers. Relatively few producers process the commodities they produce. Thus, their economic fate is tied to those who must find a consumer market for their products. That market is changing across the full spectrum of potential customers. Capturing specific markets is becoming more important than producing commodities in volume. Production contracts improve "communication" in the various stages of the marketing process, ultimately permitting producers to gain access to otherwise inaccessible markets.

Producers are also concerned with risk management, and production contracts can manage certain risks. For example, by offering a guaranteed price, production contracts eliminate the risks associated with a volatile open market. Contracts also permit risk-reduction through diversification, often at a lower capital cost than would be required without the processor's participation. The assistance offered by the processor in the production process can lower the producer's management costs and improve management skills.

Production contracts can also create risks

Although production contracts reduce some risks for the processor and the producer, new risks can arise. For the producer, the failure to produce to contract standards will result in loss of the contract's premium prices. Other risks include the nonrenewal or termination of the contract, perhaps for noneconomic reasons. Some contracts impose unique risks, particularly those involving the construction or maintenance of specialized facilities. Even if the contract relationship continues for a facility's useful life, the income realized under the contract may not be sufficient to replace or improve the facility.

Risks can also arise for the processor. Using production contracts successfully depends on a variety of factors, not the least of which is beginning with the carefully drafted contract. Drafting agricultural production contracts involves many of the same considerations encountered with other contracts. The most fundamental consideration is the need to specify, as plainly and completely as possible, how the parties have agreed to do business. Or, as more typically is the case with production contracts, the contract must plainly and completely specify how the processor expects the parties to do business.

Coupled with these generic drafting consideration is a unique one — the increased outside scrutiny of production contracts and the relationships they create. Contract production is changing the structure of American agriculture. Production contracts are replacing open, public markets with closed, private markets. With the substitution of private markets for public markets, producers lose some of their traditional independence and autonomy. As farms cease to be autonomous operations and become closely allied with processors, they function as operating units of the processor. This transition from autonomy to operating unit has been described as the "industrialization" of agriculture.

As the basic legal instruments fostering the industrialization of agriculture, production contracts are being closely examined by those who react to changes in agriculture's structure, including legislatures. For example, when the Minnesota legislature looked at production contracting, it decided to dictate some of the contract terms. Minnesota production contracts must now have either an arbitration or mediation clause, and the duty of good faith is an implied term. Minn. Stat. § 17.90-.98. A breach of this duty can result in the award of attorneys' fees to the other party. Production contracts and the related issue of vertical integration are also drawing attention in other states. This scrutiny is expected to continue. Recognizing that they are operating under the potential for legislative scrutiny, processors must draft and use production contracts to produce their interests without unreasonably interfering with the interests of producers. A balanced approach to the use of production contracts begins with identifying the risks the processor faces.

Processor risks

For the processor, three broadly-defined categorical risks predominate:

- *Risk of failure to "line up" supply*, or the risk of losing timely receipt of the desired quantity and quality of the product. For example, the producer might secretly encumber the product in a third

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party's favor; fail to care for the product; use substandard animal feed or veterinary products; sell the product at a higher price to another buyer; deliver a substandard or pesticide residue-laden product; or simply decide to "walk away" from the contract, any one of which could cause the processor to fail to "line up" supply.

• *Risk of loss of technological advantage*, or the risk of losing control over proprietary technology or losing the opportunity to promote the use of a desired technology. For example, the producer might resell or put proprietary products to his or her own use or refuse to adopt processor-desired technologies or production practices, thus causing the processor to lose technological advantage.

• *"Garden-variety" risks*, including the risk of liability to the producer and to third parties. For example, the producer might claim a loss because of reliance on the processor's advice; use a pesticide inconsistent with its labeling; violate applicable labor and environmental laws; injure a worker during harvesting; deny access to processor representatives seeking to inspect the product or production facilities; drive off the highway while delivering the product; assert that the parties' relationship was a partnership, joint venture, or employment relationship; or do something else detrimental to the processor's interests.

For the most part, a carefully drafted production contract can offer substantial protection against these broad categories of risk. The production contract's management of risks should be reasonable. A lopsided contract presents its own risks, risks that can be characterized as *contract-created risks*.

Contract-created risks

The first of the contract-created risks is the *risk of "no-takers,"* the risk that no well-advised producer will sign the contract. Whether this risk is a serious one depends on a number of variables, including the likelihood that producers will seek guidance from a competent advisor before signing the contract. The failure of contracting parties to seek legal advice before signing is notorious. Nonetheless, a producer who uses a lopsided contract runs the risk that producers will elect to sign with another processor whose contract is more attractive. Also, lopsided contracts encourage collective action by producers, including collective bargaining and the formation of producer cooperatives designed to capture the product's "added-value" without the participation of existing processors.

Another risk is that producers will sign the contract, but the contract will invite litigation that ends in a costly loss for the processor. This risk can be described as the *risk of unenforceability*. For example, some vegetable contracts permit the processor to enter the producer's premises to apply pesticides if the producer fails to do so. These contracts also place all liability for the processor's improper pesticide application on the producer. The ability of such provisions to insulate the processor from all liability arising out of a failure to follow the pesticide's labeling is doubtful, and public policy considerations may limit such total risk-shifting for negligent pesticide applications. In fact, these provisions have already been criticized by governmental authorities. Other clauses inviting litigation are those that conflict with statutory mandates, particularly mandates designed to protect producers.

A third risk is that the contract or one of its provisions will be deemed an *unfair trade practice* under a law such as Minnesota's Agricultural Contracts statute, which gives the Minnesota Commissioner of Agriculture the authority to prohibit "specific trade practices." The Commissioner has done so by prohibiting "conduct" prohibited by the federal Packers and Stockyards Act, the federal Perishable Agricultural Commodities Act, and the regulations adopted under each Act. Among other things, the Packers and Stockyards Act prohibits the use of "any unfair, unjustly discriminatory, or deceptive practice or device...." The scope of this prohibition is broad; extending beyond anticompetitive practices to include every unjust practice involved in the marketing of livestock. Given the broad scope of the Packers and Stockyards Act's prohibition against "unfair" and "deceptive" conduct, avoiding problems under a law such as Minnesota's Agricultural Contracts statute may mean avoiding contract provisions that could reasonably be characterized as oppressive to the other party or offensive to public policy.

Drafting production contracts to manage risks

Production contracts vary considerably in scope and clarity. Some specify the parties' obligations in understandable language. Others are rich in legalese. A good contract invites the reader's attention and clearly explains the terms of the business relationship. A contract that is read and understood is much more likely to do its job than one that buries its terms in legalese.

Production contracts should be tailored to the product's characteristics and the processor's needs, taking into account the legal requirements of the state in which the contract will be used. Although no one production contract will fit all needs, the following checklist covers many of the basic subjects of a production contract:

I. Preliminary matters

• *Title of the contract*. The title often includes crop year when a crop is under contract.

• *Date and place of contract formation and identification of the parties*. The parties' identification will include name(s) and address(es) and sometimes federal tax or Social Security number(s), telephone number(s), percentage(s) of crop shares, and landowner(s) identification.

• *Legal description of the land*. A description of the land is particularly appropriate where a crop is grown under contract.

II. Statement of the contract's purpose

• *Statement of the contract's purpose*. A statement of the contract's purpose often adds clarity to the nature of the parties' relationship, a subject that should be specifically addressed in the contract.

• *Description of the crop or livestock*. For example, the description might include a listing of approved crop varieties or livestock.

• *Production deadlines and other husbandry specifications*. Often most of the more detailed husbandry specifications, such as pesticide use, fall under "general terms" later in the contract.

• *Duration of the contract*. The contract's duration is often expressed in terms of crop year or other production cycle.

III. Sale and/or payment terms. *Under some contracts, no sale occurs; the producer is paid only for labor.*

• *Quantity*. Quantity is usually expressed per unit; in some contracts, all production is purchased by the processor.

• *Quality*. If government or other third-party grading standards are used, the contract should address the possibility of changes in standards after contract formation.

• *Price*. If a pricing formula based on feed-to-weight or other ratios is used, the formula should be clearly stated.

• *Payment timing and method*. The contract should specify when and how the producer will be compensated.

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IV. Delivery.

• *Date and location.* If the producer must deliver the product to the processor, the date and location of delivery should be specified.

• *Risk of loss and responsibility for delivery costs.* If not covered in a general "risk of loss" clause, risk of loss before the processor's acceptance of the product should be assigned by the contract.

V. Acceptance.

If the contract contemplates a sale of crops or livestock of a specified quality, the contract should address when and how the processor's acceptance will occur, who will pay for grading and testing, whether the producer has a right to inspect the grading and test results, who owns the rejected product, and when and how the rejected product must be removed from the processor's facility if the rejected product is owned by the producer and has been delivered to the processor.

VI. General terms

• *Relationship of the parties.* The contract should specify the nature of the parties' relationship, which, in many cases, will be a bailment relationship, with the processor retaining title to the seed or livestock, or an independent contractor relationship. All inapplicable relationships are usually disclaimed, particularly agency and employment relationships, and the producer may be required to hold harmless and indemnify the processor for any losses or damages arising out of the producer's performance of the contract. For reasons relating to potential liability to the producer and third parties, including governmental entities, processors will want to avoid any hint of an agency or employment relationship between the parties.

• *Title to the crop or livestock.* The contract should specify who holds title and risk of loss in the crop or livestock and when title and risk of loss passes from one party to another, if at all.

• *Encumbrances.* If the producer holds title to the crop or product, he or she may need to grant a security interest in it to obtain operating funds; in such cases, the processor will want to know who the secured party is and will want to provide for either clear title before sale or clear title after payment to the secured party and the producer. If the processor holds title, the processor will want to preclude the producer from encumbering the crop or product, voluntarily or otherwise.

• *Husbandry practices, including pesticide use and other inputs.* Depending on the contract's purpose, the contract may include detailed provisions on how the crops or livestock are to be grown, who is responsible for input applications and costs, who is liable for input failures and misapplications, whether pesticide or antibiotic residues are acceptable, disposal of dead animals at the production facility, etc.

• *Crop failure, catastrophic animal losses, and other nonperformance.* The contract should address crop failure, catastrophic animal losses, or other impediments to either party's performance caused by circumstances beyond either party's control. Such *force majeure* clauses usually require the producer to give the processor notice of the loss within a short period of time after its occurrence and require the affected party to take reasonable steps to minimize losses or delays in performance.

• *Field or facility inspections.* Typically, the processor will want the right to inspect the producer's fields or facilities to assess production. Sometimes contracts will disclaim liability or other responsibility for any advice or direction gratuitously offered during an inspection or an other occasions.

• *Required notices.* The contract should specify to whom the producer should give any notices required under the contract.

• *Termination.* The contract should specify the circumstances under which it will be terminated or not renewed.

• *Assignment, successors in interest, etc.* Typically, the processor's consent will be required before the producer may assign the contract; sometimes, the clause will recite that the contract is one for personal services to bolster its nonassignability.

• *Arbitration or mediation, choice of law, attorneys' fees, etc.* In some states, such as Minnesota, an arbitration or mediation clause is required.

• *Integration, modification, severability, waivers, etc.* Recognizing that the processor's field representatives may have made representations concerning the producer's profits and other aspects of the contractual relationship prior to the contract's signing, the contract should have a carefully drafted integration clause stating that the only agreements between the parties are those contained in the written contract.

Avoiding contract disputes

Contract disputes should not be considered inevitable by-products of the contractual relationship. Nonetheless, there are inherent tensions in many production contract relationships because of the real and perceived inequities in the parties' respective bargaining power. Two modest suggestions may help relieve that tension:

• Use clear, complete, and reasonable contracts, recognizing that "reason" is often in the eye of the beholder: perhaps the test should be "if you were the other party, would you think the contract was clear, complete, and reasonable;" and

• Train field representatives and other personnel in proper contract management.

An attorney's review of processor contracts and procedures can help prevent disputes. A processor "contract procedure. compliance manual," prepared with attorney assistance, might prevent some of the processor misconduct that has produced litigation and legislative reform. While a properly drafted contract can help to reduce the potential for disputes, in the final analysis all aspects of the production contract relationship require careful, continuous attention.

Worker Protection Standard

The Worker Protection Standard (WPS) to protect the health of agricultural workers from occupational exposure to pesticides went into full effect on January 1, 1995. In response to requests that certain elements of the standard, established in 1992, be more flexihle and practical for states and farmers to implement, EPA today also issued five proposed revisions to the standard.

The standard is designed to protect the health and safety of approximately 3.5 million agricultural workers from occupational exposure to pesticides on farms, in forests, greenhouses and nurseries. It was slated to go into full effect on April 15 1994. However, Congress extended the effective date of some provisions of WPS until Jan. 1, 1995. The EPA has issued proposed changes to five areas of the WPS. The agricultural community and the public will have at least 30 days to comment on the proposed changes before the Agency finalizes them, which is expected in March. The proposals include:

— A proposal to reduce the restrictions on performing certain irrigation activities following application of pesticides.

— A proposal to allow workers to enter areas treated with certain lower risk pesticides after four hours rather than 30 hours. Approximately 80 lower risk pesticides are potential candidates for the proposal.

— A proposal to shorten the grace period before which employers must train workers in pesticide safety. The rule also proposes to shorten the interval before which workers must be retrained.

— A proposal to exempt crop advisors from certain provisions of the WPS regulations, particularly those that apply to early entry to treated areas following pesticide application.

— A proposal to reduce the requirements that apply to workers who enter areas treated with pesticides in the case of specified activities that would result in limited conntact to pesticides

—John Kasper, Press Services Division, EPA

State Roundup

TEXAS. *Sale of hay— Breach of Implied Warranty of Fitness.* In *Lester v. Logan*, No. 13-93-031-CV, 1994 WL 683266 (Tex. App. - Corpus Christi, Dec. 8, 1994), the Texas Court of Appeals considered a breach of implied warranty of fitness claim arising from a sale of hay.

Lester grew hay on his land in Gonzales County. On January 1, 1991, Lester delivered twenty-eight round bales of hay to Logan. Logan immediately placed the hay in different locations on his property as feed for his cattle. On January 2, 1991, Logan found that seven of his cows had died. On January 3, he found another six cows dead. In addition, seven other cows aborted their fetuses. Logan filed suit, and a jury subsequently found that the hay was unfit for the particular purpose of livestock consumption, thus finding a breach of the implied warranty of fitness for a particular purpose. Tex. Bus. & Comm. Code Ann.§ 2.315.

On appeal, Lester claimed, *inter alia*, that either no evidence or insufficient evidence exists to support the jury's finding that he breached the implied warrant of fitness for a particular purpose. The appellate court noted that Lester had been selling hay to Logan and other neighbors for many years. Also, Logan testified that he relied on Lester's skill and judgment in getting hay that was appropriate for his cattle. Finally, there was testimony at trial that the cattle had died from nitrate poisoning and that the hay was not fit to be fed to cattle. The court of appeals found sufficient evidence to support the jury's finding.

— Scott D. Wegner, Lakeville, MN

MINNESOTA. *Harvested Crops Covered by Security Interest Despite Lack of Real Estate Description.* The Minnesota Court of Appeals recently held that a lender's security interest attached to harvested crops as "farm products" despite the fact that this interest did not attach to the same crops prior to harvest. *Frost State Bank v. Peavey Co.*, 524 N.W.2d 739 (Minn. Ct. App. 1994). Adopting the UCC provisions for the attachment (9-203) and perfection (9-402) of an interest in growing crops, Minnesota law requires that the real estate description of the land on which the crops are grown must be set forth in the security agreement and on the financing statement. Minn. Stat. §§ 336.9-203(1)(a), 336.9-402(1). In the case before the court of appeals, the Frost State Bank had a valid security interest in farm products and an interest in crops grown on certain acreage farmed by the debtor. Notice of this interest was provided to the defendant, Peavey Co.

The debtor farmed additional acreage on a share-crop basis, however, and another creditor filed a financing statement claiming an interest therein and listing the proper real estate description. The debtor harvested the crop and delivered it to Peavey Co. Peavey then purchased the crop, issuing a check jointly payable to the debtor and the second creditor. The bank sued Peavey for common-law conversion, alleging that although it did not have an interest in the growing crop, its interest attached as soon as the debtor harvested it. The court agreed, holding that the bank's lien on farm products attached to the crop upon harvest. Although the court noted a split among the various state courts on this issue, it stated that its decision was consistent with Minnesota cases favoring a liberal construction of Article Nine's collateral description requirements.

—Susan A. Schneider, Hastings, MN

MINNESOTA. *No Private Cause of Action Under Anti-corporate Farming Statute.* In *Hommerding v. The Travelers Insurance Company*, No. C6-94-1843, 1995 WL 6438 (Minn.App., Jan. 10, 1995) (unpublished), the Minnesota Court of Appeals considered whether a private cause of action exists under the state's anti-corporate farming statute.

In 1984, Travelers foreclosed on farm property held as security for loans made to Hommerding. Following an offer by Ridgeway Enterprises to buy the farmland, Travelers gave Hommerding a right of first refusal. Hommerding exercised the right, but failed to make a payment. Thereafter, Travelers sold the farmland to Ridgeway. Hommerding brought an action against Travelers and Ridgeway alleging, *inter alia*, a violation of Minnesota's anti-corporate farming statute. Minn. Stat. § 500.24. The trial court granted summary judgment for Travelers and Ridgeway, holding that Hommerding lacked standing to enforce the anti-corporate farming statute.

The court of appeals first noted that the anti-corporate farming statute does not explicitly authorize a private cause of action. Accordingly, the court considered whether to imply a private cause of action. The court set forth the following test: whether Hommerding belongs to the class for whose benefit the statute was enacted; whether the legislature indicated its intent to create a remedy; and whether implying a remedy would be consistent with the underlying purpose of the act.

With regard to the first factor, the court found that while family farmers derive benefit from the statute, the benefit is indirect. Rather, the benefits of restricting corporate farming serve the state's overall interests. More importantly, the court found that the second and third criteria were not met. The court found no indication that the legislature intended to create a private remedy under the statute. Instead, the legislature delegated enforcement powers to the attorney general. Finally, the court opined that creating a private cause of action is not consistent with the statute's provisions for having the state enforce the statute. Absent an express or implied legislative intent, the court declined to create a new statutory cause of action and affirmed the district court.

— Scott D. Wegner, Lakeville, MN

Strict Liability in Sales of Animals/cont. from p. 3

cally, that inability to prove a case because of mutability means that an animal is not a product at all. Rather it means that liability may not attach to that particular product.
563 A.2d at 1387.

The court indicated that the reasoning of the New York court in *Beyer* and the Oregon court in *Sease* was persuasive and that, at least where injury resulted to a consumer from a diseased pet, the strict liability could be used.

Although the courts are equally divided on the issue, if the reluctance to extend the concept of strict liability to living things is overcome, it may not be difficult to find the product both defective and unreasonably dangerous, particularly where the alleged defect is a transmittable disease as opposed to behavior.

A more serious obstacle to use of the theory may be that intangible commercial loss or pure economic loss is ordinarily not recoverable in strict liability but is normally considered under the provisions of the UCC rules governing commercial transactions. Section 402A requires that the unreasonably dangerous product must cause physical harm to the user or consumer or to his property. If diseased livestock transmit the disease to other animals (or worse still, to humans) strict liability might be applicable. But, if the only injury is to the product itself — the purchased animal — the purchasers may be limited to UCC remedies. The difficulty is compounded by the fact that under the law of many of the major livestock producing states, implied warranties in the sale of livestock are excluded by statute. In such cases, the only remaining cause of action may be for breach of express warranty.

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agricultural law update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Recognition Given/Call For Articles:

As is well recognized, the Association is indebted to the hard work of several members who contribute articles for publication on a regular basis. I would like to take this opportunity recognize those individuals whose work was published in 1994 and to thank them for their loyal efforts:

Christopher R. Kelley
Susan A. Schneider
Scott D. Wegner
Neil D. Hamilton
Drew L. Kershen
Roger McEowen
L. Leon Geyer
John C. Becker
Phil Fraas
Donald B. Pedersen
Terence J. Centner
Alan R. Malasky
Gordon W. Tanner
John D. Reilly
David C. Barrett, Jr.
Jo Anne Hagen
Michael A. Taylor
Thomas P. Guarino
Winand K. Hock
Juliana Holway
Pickrell
Larry Frarey

I encourage others of you to consider submitting articles for the *Update*. One can fax to 713-388-0155 or mail items to Rt. 2, Box 292A, 2816 C.R. 163, Alvin, TX 77511.

—Linda Grim McCormick, Editor