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- The problem of non-U.C.C. liens on agricultural collateral

Grain elevator bankruptcy: statutory lien

In the case of *In re Woods Farmers Co-op Elevator Co.*, 107 Bankr. 689 (Bankr. D. N.D. 1989), the bankruptcy court for the District of North Dakota was called upon to sort out the rights of the estate, farm-bailors, and statutory lien holders to grain held by a warehouse that filed for Chapter 7 relief.

When Woods Farmers Co-op Elevator Co. filed its Chapter 7 bankruptcy petition, it possessed a substantial amount of grain. Pursuant to a court order, the trustee sold this grain for just over $1.6 million. A scramble for the proceeds ensued.

North Dakota law creates a first priority lien on grain contained in a warehouse in favor of outstanding receipt holders who have stored, sold, or deposited grain in the warehouse. N.D. Cent. Code § 60-02-25.1 (1985). The court accordingly found that the grain proceeds at issue were subject to liens in favor of the various receipt-holders. Referring to section 101(47) of the bankruptcy code, the court found that these liens were within the definition of "statutory liens." The court then addressed the issue of whether they could be avoided by the trustee under the statutory lien avoidance powers of section 545 of the bankruptcy code.

The court first addressed the rights of the farmer-bailors with grain stored in the warehouse. Although technically lien-holders under the statute, these farmers had more fundamental rights as bailors. The court found that because of this relationship, these farmers retained title to the stored grain. Noting that the avoidance powers under section 545 are limited to liens that attach to property of the debtor, the court held that the trustee had no claim to the proceeds from the sale of the stored grain. This result is consistent with what the court terms to be "well settled" bankruptcy law allowing a bailor to recover property held by the debtor as bailee. *Woods*, 107 Bankr. at 692.

As to the grain owned by the warehouse, the court found that this grain was property of the debtor subject to statutory liens. Section 545 allows the trustee to avoid such liens in certain situations. The court noted that section 545(1) would

(Continued on next page)

Dairy cow leases

The recent decision of the Seventh Circuit in *Auburndale State Bank v. Dairy Farm Leasing Corporation*, 890 F.2d 888 (7th Cir. 1989), provides a good lesson in how *not* to handle leases and secured transactions involving dairy cows. When the dairy farmer in this case went bankrupt there was general confusion over which cows had been leased, which cows were progeny of leased cows, which cows had been purchased, and which cows were progeny of purchased cows. Neither the leasing company nor the bank as secured party had sufficiently supervised the dairy farmer to make certain that cows be appropriately tagged and that accurate records be kept as to progeny and as to culls.

In 1976, when farmer started the dairy operation, some cows were purchased and bank took a non-purchase money security interest in "all livestock now owned or hereafter acquired by debtor and the young of all livestock." Bank filed a financing statement in August, 1976 and a continuation statement in 1981. Dairy Farm leased 12 cows to farmer in April, 1981 and 10 more in March, 1982. The leases provided that Dairy Farm owned the progeny of leased cows. Dairy Farm filed a financing statement in April, 1982.

Because it was determined that the dairy cow leases were true leases, rather than disguised conditional sales, the fact that Dairy Farm had filed a financing statement subsequent to bank was irrelevant to the outcome of the case. *See* U.C.C. § 9-408. The rights of Dairy Farm were ownership rights that could not be affected by the security interest given by farmer to bank – no attachment. *Compare, Whitworth v. Krueger*, 98 Idaho 65, 558 P.2d 1026 (1976) (lease of cows to farmer found to be a conditional sale; no filing of a financing statement by "lessor" under U.C.C. § 9-408; cows subject to after-acquired property clause in security agreement given by farmer to another seller of cows).

At trial the burden of identifying leased cows, replacements, and progeny had

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allow avoidance in the event that the liens became effective upon the initiation of bankruptcy or when the debtor became insolvent. Referring to the specifics of the North Dakota law, the court noted that the statutory liens arose upon delivery of the grain, an event unrelated to bankruptcy or insolvency. As such, section 545(1) avoidance was not available to the trustee.

The court next addressed section 545(2), which allows for avoidance of the lien if it is not perfected or it is not enforceable against a real or hypothetical bona fide purchaser as of the commencement of the bankruptcy. Combining these factors, the court stated that a lien is not perfected if, under state law, a bona fide purchaser could defeat the lien holder's rights. The court cited the North Dakota statutory lien provision, which discharges the lien as to grain sold by the warehouse to a buyer in the ordinary course of business. Finding that under North Dakota law, the phrase "buyer in the ordinary course of business" encompasses the term bona fide purchaser, the court held that section 545(2) applied. On this basis, the liens were avoided.

Accordingly, although the farmer-bailors were found to be entitled to their share of the grain proceeds, their rights were not enhanced in any way by the North Dakota statute. The claims of the other statutory lien-holders were defeated under the avoidance powers of section 545. The North Dakota statute, presumably enacted to assist all those who rely upon the financial integrity of grain warehouses, was ineffective in providing any protection in bankruptcy.

– Susan A. Schneider, Graduate Fellow, National Center for Agricultural Law Research and Information

DAIRY COW LEASES / CONTINUED FROM PAGE ONE

been placed on Dairy Farm on the theory that Dairy Farm had an interest inferior or secondary to that of bank. The Seventh Circuit found this to be error, holding that no presumption of ownership should apply, that bank would bear the burden of proving its counterclaim under the leases. On remand, the lower court must consider all evidence of ownership presented by both parties in deciding which cows were under lease and which were owned by farmer. The confusing state of farmer's records presented the trial court with an unenviable task.

Dairy Farm also raised a punitive damages issue, arguing that Bank willfully converted leased cows when it repossessed and sold them for slaughter. There was ample evidence that the cows were in poor condition and that the decision to slaughter was reasonable. The proceeds went into an escrow account. The Seventh Circuit found no error in the trial court's determination that there was inadequate proof to support an award of punitive damages. Farmer had refused to continue to care for any of the cows, forcing one or both of the parties to take fast action. However, the Seventh Circuit cautioned that "Dairy Farm comes closest to showing willful conduct on the part of Bank with its argument that the Bank gave it no notice of an intention to sell the cows before they were slaughtered. Auburndale at 895.

Comment: In those states that have adopted Article 2A of the U.C.C., provisions therein will now govern the question of whether a lease is a conditional sale or a true lease. U.C.C. § 2A-103(1)(j).

– Donald B. Pedersen, University of Arkansas School of Law

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Federal Register *in brief*

The following is a selection of matters that have been published in the *Federal Register* from March 1 to 28, 1990:

1. IRS; Income tax; crop insurance proceeds; inclusion in gross income in taxable year following taxable year of destruction or damage; temporary regulations; effective for payments received after Dec. 31, 1973. 55 Fed. Reg. 7316.

2. IRS; Alcohol fuels credit; definition of mixture; final rule. 55 Fed. Reg. 8946.

3. FmHA; Final implementation of Farmer Program Loan provisions of the Disaster Assistance Act of 1989; final rule; effective date 3/2/90. 55 Fed. Reg. 7471.

4. FmHA; Adverse decisions and administrative appeals; multi-party appeal hearings; interim rule with request for comments due 5/15/90. 55 Fed. Reg. 9870.

5. FmHA; Administrative offset; final rule; effective date 5/25/90. 55 Fed. Reg. 11000.

6. CCC; Loans and purchase programs; grains and similarly handled commodities; loan collateral replacement; final rule; effective date 3/5/90. 55 Fed. Reg. 7690.

7. CCC; Livestock Emergency Assistance Programs; proposed rule. 55 Fed. Reg. 7905.

8. CCC; 1990 Feed Grains Program and Farmer-Owned Reserve Program; notice of affirmation of determinations made by Secretary of Agriculture; effective date 3/7/90. 55 Fed. Reg. 8500.

9. CCC; Targeted Export Assistance Program; fiscal year 1991; notice of contingent program for 1991. 55 Fed. Reg. 8502.

10. FCA; Organization and functions; service of process; notice of effective date of 3/6/90. 55 Fed. Reg. 7884.

11. FCS; Service corporations; certified agricultural mortgage marketing facilities; proposed rule. 55 Fed. Reg. 9138.

12. INS; Temporary alien workers seeking classification under the Immigration and Nationality Act; final rule; effective date 3/6/90. 55 Fed. Reg. 7881.

13. USDA; Dairy promotion program; procedures for denying, suspending or terminating certification of qualification; proposed rule. 55 Fed. Reg. 11024.

14. ASCS; Emergency conservation program; maximum cost-share percentages calculation clarification; proposed rule. 55 Fed. Reg. 11384.

– Linda Grim McCormick

Milk-hormone labeling bills

The 1989-1990 Wisconsin legislature recently considered a bill (1989 Senate Bill 146) to require that milk from cows that have not been given the genetically engineered bovine growth hormone (BGH) somatotropin, be so labeled and handled separately from other milk. All other milk would have to be labeled as possibly having been produced from hormone treated cows. Bovine somatotropin has been shown to increase milk production in dairy cows. The bill was rejected in the Wisconsin Senate and returned to committee. This action reflected concerns that some dairy cooperatives would not handle the hormone-treated milk and that consumers would avoid purchasing milk labeled as possibly coming from cows administered the hormone.

The bill proposed a merit system to be administered by the Wisconsin Department of Agriculture, Trade, and Consumer Protection. The permit system would require milk produced by cows that have never been administered somatotropin to be labeled as such. Under the permit system, any milk distributor who "distributes or has distributed" or who "transfers, manufactures or receives" milk processed by a dairy plant that "receives" or "has received, transferred, manufactured, or processed" milk that is not somatotropin-free cannot so label the milk.

No producer or handler could simultaneously hold permits for somatotropin-free milk and other milk. The permits for other milk would require that it be labeled as "possibly produced from cows that have been administered bovine somatotropin." If the milk is from cows that have not been given the growth hormone, the label must so state. The bill appeared to grant authority to the Wisconsin Department of Agriculture to promulgate rules for the inspection, certification, and changes in certification to somatotropin-free, of milk production and distribution.

The bill contained provisions that would require cheese carrying the Wisconsin logotype to be made exclusively with milk that is certified to be somatotropin-free. Additionally, all milk used in the Wisconsin morning milk program would have to come from somatotropin-free cows. Furthermore, there were provisions to regulate the "purchase, sale, distribution, use, nonuse and possession" of somatotropin. Proposed language would have required that all sales of somatotropin be by licensed veterinarians and only to persons holding a BGH permit.

The Minnesota House passed a BGH bill in the 1989 session, but it has not been sent to the Minnesota Senate, partly because of the recent rejection of the Wisconsin bill. It is reported that the Minnesota legislature is rewriting the bill to impose a one- to three-year moratorium on BGH use.

– Thomas P. Guarino, University of Arkansas School of Law, Fayetteville, AR

Position noted

The University of Illinois Department of Agricultural Economics has an opening for a full-time Assistant Professor, Agricultural Law. Teaching responsibilities may include general agricultural law, business organizations, and agricultural taxation at the under graduate and graduate level. Applications should be received by May 18, 1990. For further information, contact Allen Bock or Margaret Grossman at 217-333-1829.

The University of Illinois is an equal opportunity/affirmative action employer.

Criminal aspects of payment limitation rules

Previous discussions of the payment limitation rules have focused on their administrative law and constitutional law aspects. The criminal aspect has been somewhat neglected by commentators, but this may soon change. In *United States v. Linse*, No. 89-CR 73S (W.D. Wis.) the defendant pleaded guilty to conspiring with three other farmers to make false statements to the CCC in order to exceed the $50,000 limit on Feed Grains Program payments.

The defendant had arranged with each co-conspirator to rent farmland and have it enrolled in the Feed Grains Program. He then financed and operated the enterprises himself while the co-conspirators received the subsidy payments and PIK certificates and turned them over to him. He was sentenced to six months in prison, fined $5,000, and put on three years probation. He was also ordered to repay his entire 1987 Feed Grains Program payment plus interest and liquidated damages.

The other co-conspirators cooperated with the prosecution and were granted immunity from prosecution. However, the ASCS imposed stiff administrative penalties, which included a refund of Feed Grain Program payments. The judge, in sentencing the defendant, commented that a jail term was necessary "to deter other individuals who might be inclined to find loopholes in order to obtain greater benefits from farm subsidy payments than they would otherwise be entitled to."

– Winston I. Smart, Smart Ag-Search Services, Madison, WI

State Roundup

IOWA. *Mandamus ordering mediation release upheld.* The case of *Graham v. Baker,* 447 N.W.2d 387 (1989), involves an appeal of a district court order granting a mediation release that was initially denied by the mediation service. In 1979, the Henrys purchased land from the Grahams. In 1987, the Henrys could no longer make payments. The Grahams' attorney filed a notice of foreclosure. This was later withdrawn since Iowa Code section 654A.6 requires a creditor to request mediation and obtain a mediation release before undertaking foreclosure proceedings.

At the single mediation meeting, the Grahams' attorney was so hostile that the mediator refused to grant a release. The Grahams' attorney filed a second notice of foreclosure. The district court enjoined the Grahams from continuing foreclosure proceedings. The Grahams then obtained an order that the release be granted. The Henrys appealed.

The Iowa Supreme Court held that the Grahams' attorney's actions were sufficient under the Iowa statute to satisfy the "participation" requirement, and thus a release should be issued. The court explained that the mediation service is not given the power by statute to compel either side to negotiate, only to set up conditions where the parties might be able to work out a solution to their problems. The mediator does not therefore have the discretion to refuse to issue the release.

– Neil D. Hamilton, Director, Drake Law School Agricultural Law Center

PENNSYLVANIA. *Auctioneer as seller for strict liability.* In a case of first impression, *Musser v. Vilsmeier Auction Co., Inc.,* 562 Pa. 367, 562 A.2d 279 (1989), the Supreme Court of Pennsylvania has held that for purposes of applying the section 402A rule of strict liability in a products liability action, an auctioneer is *not* considered to be a seller of the alleged defective product. In the court's opinion, an auctioneer who is an ad hoc salesman of another's goods is an agent of the property owner and has little likelihood of being able to influence the manufacturer or distributor of the product to produce a safer product. Therefore the court concluded that applying strict liability to auctioneers who have but a tangential relationship to the manufacture and distribution of goods would not serve to advance the policy considerations that underly section 402A. Such auctioneers are not sellers within the meaning of section 402A.

– John C. Becker, Associate Professor, Penn State

The dilemma facing rural landowners: liability for injury occur

by John C. Becker

An increase in demand for recreational and open space land has raised the pressure on rural landowners to open their land to recreational or open space users. Given the concern for potential liability from such increased use and the difficulty of managing that threat, various statutes have been enacted to achieve a measure of balance. These statutes recognize the competing interests of users and landowners and offer a landowner some protection from the liability threat if the owner is willing to make his or her land available to recreational or open space users. These statutes impose specific requirements on landowners in order to gain the protection provided by the act.

This article will highlight the two principal theories by which an injured person may recover damages for injuries suffered on another's property and the rules developed for their application. The statutory provisions to modify these rules for a landowner who makes his or her land available to the public will be highlighted to help identify landowners who can benefit from these statutes and the requirements they must meet before coverage can be granted.

Who faces the risk of liability?

Law generally supports the notion that liability for injury to a person occurring on someone else's land is not determined simply by identifying the owner of the land on which the injury occurred. 62 Am. Jur. 2d *Premises Liability* § 3 (1990). Likewise, a person in possession and control of the premises on which the injury occurred cannot be excused from liability simply because he or she is not the record owner of the premises. *Skolwich v. East Boston Savings Bank*, 307 Mass. 1, 29 N.E.2d 585, 130 A.L.R. 1519.

Generally, the risk of liability and the rules for assigning liability are to be applied to the person(s) who genuinely occupies, possesses, or controls the property where the injury occurred. 62 Am. Jur. 2d *Premises Liability* § 6 (1990). Also factored into this equation are separate agreements made between owners and occupiers whereby one assumes an obligation to maintain or repair premises without being in possession or control of it. *Oswald v. Hausmann*, 378 Pa. Super. 245, 548 A.2d 594 (1988). In resolving such issues, the fact finder may note that possession and control vary from tract to tract. Likewise, possession and control may be shared among several people, thereby creating the potential for joint responsibility for an injury. 62 Am. Jur. 2d *Premises Liability* § 24 (1990).

Although, as a general rule, a person who gives up control of the premises also gives up liability for injuries that occur on the premises, there is an important exception. For example, if the person giving up control conceals or fails to disclose a condition that involves unreasonable risk to persons on the land, such person remains liable to one who acquires control and others on the land with the person's consent. *Id.*

How is liability determined?

In determining whether a person is liable to another for injury on land they occupy, possess, or control, the general law of negligence, including the intentional conduct aspect of tort law, is applied. Under these concepts, two different approaches have developed. The first test is the English-based common law test that varies a landowner's duty to a person on his or her property according to the status of the injured person at the time of injury. The second concept, known as the reasonable care approach, developed from perceived weaknesses and problems attributed to the English common law concept. Proponents of the second concept emphasize the fact that England recognized the weakness of the "status equals duty" approach and modified its rules by statute.

Status equals duty owed

The general principle of this approach is that the duty a person in occupancy, possession, and control of property owes to another person on his or her property varies according to the status of the person at the time the injury occurs. For example, someone on the premises at the invitation of the person in possession or control should be entitled to a greater expectation of personal safety than someone who enters the premises without permission of any kind, or perhaps with an intention that is adverse to the person in possession and control. As a concept that describes a duty based on status, as status changes, so does the resulting duty owed.

In its application, three general categories of persons on land have been identified: trespassers, licensees, and invitees. Among the three categories, a general distinction is the circumstance under which the presence of each person is accomplished. Trespassers are neither invited nor permitted. Licensees are not invited, but are permitted. Invitees come by invitation, whether express or implied. *Id.* § 72.

A trespasser is generally a person who enters another's property without right, lawful authority, or express or implied invitation or license. *Id.* § 114. Such a person may enter for a purpose of his own and remain for an undetermined period. In determining status as a trespasser, the motive of the person entering the property is generally immaterial, as is the person's age. *Id.*

Licensees, in comparison to trespassers, rise in status by virtue of the fact that they have the permission and consent of the person who occupies, possesses, or controls the premises to enter and remain on the premises. 62 Am. Jur. 2d *Premises Liability* § 108 (1990). In determining when the permission or consent is given, issues of express or implied consent can arise. For example, in the face of evidence that frequent use is being made of another's property and no action is taken to stop the use, when does the failure to act create implied permission to continue to use the premises? If a person discovers a trespasser on his or her property and is willing to allow that person to remain on the land, has the status changed from trespasser to licensee? Most would answer in the affirmative if an express statement of permission is made, but a case of quiet acquiescence is more difficult to resolve. The case is likewise, in the situation of a social guest, who, although invited, is generally treated as a licensee for liability determination purposes. *Id.* §§ 87-89.

The third class is that of an "invitee," either public or business. *Id.* § 87. A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public. Restatement (Second) of Torts § 332(2). In this context, "invitation" is a technical term that is narrower than its common meaning. Within this classification are persons who enter the land of another for a purpose unrelated to business activities, or whose presence bestows an economic benefit to the occupant. A business visitor, by comparison, is a person who is invited to enter or remain for a purpose directly or indirectly connected with business dealings with the possessor of

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the land. Restatement (Second) of Torts § 332(3).

In determining whether an individual falls into these categories, courts have applied either an economic benefit or invitation test. The economic benefit test looks to a purpose of transacting business with the person in possession or control. Under the invitation test, a person is considered an invitee if the person in possession or control led the entrant to believe that the premises were intended to be used by visitors for the purpose which the entrant was pursuing. *Id.* § 332(2). In concluding whether an invitation has been extended, both express and implied situations are considered. 62 Am. Jur. 2d *Premises Liability* § 94 (1990).

Each status has its set of requirements, and, therefore, a person's status can change such as when permission to enter is withdrawn or a person goes beyond the limit of the permission. *See* the comments of Lord Justice Dennings in *Demster v. Abbott*, 2 All E.R. 1572, 1574 (C.A. 1953) cited in *Antonace v. Ferri Contracting Co.*, 320 Pa. Super. 519, 467 A.2d 833 (1983).

Duty owed under the status approach

Courts that follow this theory generally hold that the only duty owed to a trespasser is to refrain from wilful or wanton conduct that injures the trespasser or damages his property. *Antonace, infra.* Wilful conduct is conduct by which the actor desires to bring about the result that follows from doing the act, or the actor is substantially certain that the particular result will ensue. For wilful conduct to exist, actual prior knowledge of the trespasser's presence is necessary. *Evans v. Philadelphia Transportation Co.*, 418 Pa. 567, 212 A.2d 440, 443-4 (1965) citing Prosser, *Torts* § 33 at 151 (2d ed. 1955). Wanton conduct, however, is intentionally doing an unreasonable act, in disregard of a risk that is known to the actor or so obvious to the actor that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. Such conduct usually accompanies conscious indifference to the consequences of an act. Unlike wilful conduct, actual prior knowledge of the injured person's presence on the property need not be affirmatively established to constitute wanton conduct (*Evans v. Philadelphia Transportation Co.*, at 212 A.2d 440, 443-4 (1965)).

In the Restatement of Tort's view, the words "wilful" and "wanton" are used to describe conduct that it refers to as conduct in reckless disregard for the safety of others. Because of their ambiguous usage, the Restatement chose not to use them, preferring rather to describe situations where liability would arise. Restatement (Second) of Torts § 336, comment e.

In regard to licensees, the duty owed by a person in possession or control of land is to avoid wilful, wanton, reckless conduct that would harm the licensee. Where the possessor is aware of defects or dangerous conditions on premises that a licensee might not discover, the possessor is generally under a duty to warn a licensee of the defects or dangerous conditions. 62 Am. Jur. 2d *Premises Liability* § 159 (1990). In many respects, this duty is similar to the duty owed a trespasser in that intentional acts, and those that exhibit a conscious indifference to the safety of the person on the property, will give rise to liability. The duty to warn is a reflection of the special knowledge held by the possessor and the logic of requiring the possessor to share that knowledge with someone who is on the property with their permission or consent. Since the permission can be given expressly, adequate warning can be given individually or to the public in general in the form of warning signs, barricades, enclosures, etc., that convey information about the condition and the risk. *Id.* § 176, and Restatement (Second) of Torts § 330 (1965).

In regard to invitees, a person in possession or control of property owes a duty to their public and business invitees to have the premises in a reasonably safe condition, for use in a manner consistent with the purpose of the invitation; to avoid exposing them to unreasonable risk; and to give them adequate and timely warning of latent or concealed perils known to the owner, but not the invitee. *Id.* § 136. Invitees are entitled to expect reasonable care has been taken to make the premises safe for their use in its original construction, and by later inspections designed to discover latent conditions and defects that will be followed by repair, safeguarding, or warnings necessary for the protection of the invitees. *Id.*

Reasonable care under the circumstances approach

With some frequency, the wisdom of the common law "status equals duty owed" approach has been called into question. Critics of the approach point to the fact that English civil law has itself seen the wisdom of replacing the status of licensee and invitee with a rule requiring a possessor to exercise reasonable care toward others on his land under the circumstances of the situation. Occupier's Liability Act, 5 and 6, Eliz. 2, c. 31 (1957). Other jurisdictions have gone beyond this approach and eliminated all three classifications in favor of an across the board reasonable care under the circumstances approach.

The leading case advocating this approach is *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 32 A.L.R. 3d 496 (1968). In *Rowland*, the California Supreme Court criticized the common law approach on grounds that the various classifications have created confusion and conflict.

Since *Rowland*, a number of states have called into question the traditional common law approach. In some instances, courts have taken an approach similar to that of the *Rowland* court and abolished all three status classifications. In several other states, only the distinction between licensees and invitees has been abolished while the trespasser status is retained. In place of the "status equals duty owed" rules, these courts require a possessor of land to exercise reasonable care under the circumstances. Under this standard, the inquiry of the court is focused on whether the owner used reasonable care for the safety of all persons reasonably expected to be on his or her premises. The traditional tort question of foreseeability is the important issue. *Mariorenzi v. DiPonte, Inc.*, 114 R.I. 294, 333 A.2d 127 (1975).

Status of the injured party, although not determinative of the duty owed, will still be a relevant factor in determining foreseeability of the injury and the scope of the possessor's liability. *Id.* If the intrusion is not foreseeable, or is against the will of the landowner, many intruders will be denied recovery as a matter of law. A landowner cannot be expected to maintain his premises in a safe condition for a person who enters against the known wishes of the landowner. *Ouelette v. Blanchard*, 116 N.H. 552, 364 A.2d 631 (1976).

The role of recreational use statutes

Demand for recreational use is increasing, but the supply of land on which such use can take place is not increasing

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to meet the demand. To satisfy the demand, increasing numbers of users look to private landowners as the source of land for hiking, camping, hunting, fishing, swimming, skiing, and other outdoor recreational activities. Recognizing the potential liability risk, many owners refuse to permit others to use their land for recreational purposes. Others, mindful of the liability risk, but eager to seize an opportunity to make a profit, enter into commercial ventures to make land available for a fee.

As a solution to the dilemma facing a private owner or occupier who is unwilling to create a commercial venture for recreational use of his land, a statutory compromise was developed. *Recreational User Statutes*, Betty Van Der Smissen, American Motorcyclist Association, Waterville, Ohio, 1987. These recreational use statutes encourage a landowner to make his or her land available for such use at no cost, fee, or charge to the user. In return, the statute protects the owner or occupier from the risk of liability by modifying the rules that determine liability. At present, nearly all states have enacted such statutes. 62 Am. Jur. 2d *Premises Liability* § 118 (1990). In general, these statutes provide that a landowner owes, to one using his property for recreational purposes and without charge, neither a duty of care to keep the property safe for entry or use, nor a duty to give any warning of a dangerous condition, use, structure, or activity on the property. *Id.* Under these circumstances, a landowner is held to have neither extended to the user an assurance that the property is safe, nor conferred upon the user the status of a licensee or invitee to whom a duty of care is owed. Most statutes provide, however, that a landowner or occupier remains liable for a wilful or malicious failure to guard or warn against a dangerous use, structure, or activity on the land. *Id.* By addressing the liability concern of a private landowner, the recreational use act hopes to encourage such owners to make their land available to the public for such purposes. As such use is generally without charge, cost, or fee to the user, no commercial opportunity is presented to the owner and occupier, other than modification of the liability risk.

In determining application of a statute to an incident, several key considerations must be addressed. The first is the extent to which the statute protects a person in possession or control of the land on which the injury occurred. Under most statutes, the act protects owners, tenants, lessees, occupants, or other persons who are in control of the premises. *Id.* § 120. In regard to governmental agencies or entities that own the property, some courts have held that the act does extend to such entities. *Magro v. Vineland,* 148 N.J. Super. 34, 371 A.2d 815 (1977). Other courts have held it does not. *Goodson v. Racine,* 61 Wis. 2d 554, 213 N.W.2d 16 (1973).

A companion issue is whether the act should apply to a person in possession or control who takes steps to exclude recreational users from the property, or who posts "no trespassing" signs. *Smith v. Dosier,* 29 Pa. D. & C. 3d 660 (Pa. 1984). Implicit in this question is whether a property owner faces a greater risk of liability for injury to a trespasser than to a recreational user.

The second issue deals with the type of land on which the injury occurred. Courts have applied the act to nonresidential, rural, and semi-rural land where the specified recreational activities took place. 62 Am. Jur. 2d *Premises Liability* § 124 (1990). The injury must be the result of recreational activities that can be pursued in the true outdoors (*Ratcliff v. Mandeville,* 502 S.2d 566 (1987)), as opposed to a recreational activity conducted in an indoor facility (*Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.,* 510 Pa. 1, 507 A.2d 1 (1986)). In addition, some states may specify that protection of the act be extended only to certain kinds of property, such as agricultural, range, or forest land. Land that is neither intended nor suitable for recreational use, even though children play there, has been held to be outside the scope and application of these acts. *Colvin v. Southern California Edison Co.,* (2d Dst) 194 Cal. App. 3d 1306, 240 Cal. Rptr. 142 (1987).

The third consideration is the recreational activity itself and whether it is of the type or kind intended to fall under the act. In some statutes, covered recreational activities are very broadly defined and courts are then able to interpret the term expansively when confronted with an activity that is not included in the definition's list of recreational activities; or an activity that has another purpose as well as a recreational purpose. *Fisher v. United States,* 534 F. Supp. 514 (D.C. Mont. 1982).

A fourth consideration involves the charge of a fee or other cost to the user of the premises. If a charge is made, application of the act may be lost where the statute prohibits charging a fee. Not all payments, however, constitute the type of charge that will trigger the loss of protection of the act. *Livingston v. Penna. Power and Light Co.,* 609 F. Supp. 643 (D.C. Pa. 1985). A more difficult problem in regard to what is a "charge" may be the exchange of favors between possessor and user, or the exchange of items of nominal consideration, such as a share of the game shot by hunters or fish caught by fishermen.

A final important point is the liability from which the statute does not offer any protection. In many of such statutes, the person in possession or control of the land is not relieved of liability for a wilful or malicious failure to warn or guard against dangerous uses, conditions, structures, or activities on the land. *For example, see* 68 Pa. Cons. Stat. Ann. §§ 477-6. For a wilful failure to warn or guard against to exist, courts have held that the person in possession and control must have actual knowledge of a danger that is not obvious to those who enter the premises. *Livingston v. Pa. Power and Light Co.,* 609 F. Supp. 643 (D.C. Pa. 1985), *aff'd.* 782 F.2d 1029, 1030.

How does the wilful and malicious failure to guard or warn compare to the duty to avoid wilful and wanton conduct that injures a trespasser? *Davis v. U.S.,* 716 F.2d 418 (1983), explored this question under Illinois law. The court, in *Davis,* pointed out that an Illinois possessor or occupier of land who permits, but does not invite, someone to enter his land confers the status of licensee on the user. 716 F.2d 418, at 427. Under Illinois law, the duty owed to a trespasser and licensee is identical, namely the duty to avoid wilful or wanton conduct. If wilful or wanton conduct is identical to wilful or malicious conduct, then the landowner receives no protection from the Illinois Recreational Use act, since permitting someone to use land under the act creates an obligation to treat the user in the same way as if the act is not applied. The court in *Davis* held that a wilful and malicious failure to warn or guard against denotes a higher degree of wrongdoing than wilful or wanton. 716 F.2d 418, at 426-427. The court reasoned that if the concepts were identical, the Illinois legislature, by passing the act, codified the landowner's common law liability rule rather than modified it. Given the purpose of the act, the court felt that codifying the rule was not the legislature's intent.

In drawing an ultimate conclusion on whether particular situations constitute wilful and malicious acts, the simple failure to post warning signs and fence or patrol an area has been held not to constitute a wilful and malicious failure to warn. *Gard v. U.S.,* 594 F.2d 1230 (9th Cir. 1979) *cert. denied,* 444 U.S. 866. In another case, a court held that a material issue of fact, sufficient to defeat a motion for summary judgment, existed in a situation where children were injured while swimming in an unposted swimming hole that had been recommended by a park ranger. *Mandel v. U.S.,* 719 F.2d 963 (8th Cir. 1983), *later app.* 793 F.2d 964 (8th Cir. 1986).

(Continued on next page)

Conclusion

While landowners are concerned about their risk of liability, the rules that determine liability are not clear statements that owners and possessors can convert into a plan of action to reduce the risk. Concepts such as wilful and wanton conduct, implied permission that raises a trespasser's status to that of a licensee, and the significance of failing to post "no trespassing" signs as an indication of permission to enter are good examples of legal technicalities that confuse many people, especially juries. The "status equals duty owed" approach of the common law also has been criticized for the seemingly arbitrary and confusing results that it creates. States that have partially or totally replaced the "status equals duty" concept with the rule of reasonable care under the circumstances, force landowners and possessors into a posture of being on constant lookout for others on the land and defective or dangerous conditions. Knowing that an after-the-injury analysis will be made of the facts brought to their attention before the injury occurred, a landowner must be able to establish that his or her conduct was reasonable. Events that occur and facts that are available to the owner/possessor must be evaluated and acted upon, if significant.

The recreational use statute approach has chosen an admirable objective, but it too is loaded with technical traps for the unwary landowner. In many situations, its provisions impose impractical requirements on landowners, such as prohibiting fees and recovery of costs, that discourage many from seeking its protection. In this regard, the key issue is exactly how much protection is afforded by the act. Aside from the *Davis v. U.S.* analysis, the question may still be an open one in many jurisdictions.

Other questions involving the act remain, such as to what extent must landowners publicize the availability of their land to recreational users? Must the land be available at all times during the year? What restrictions can an owner impose on the users? How should the act be interpreted as new forms of recreational activities are developed?

Landowners, understandably, want more certainty about these rules than is now available. Raising the awareness of owners, possessors, and their legislators to the problems created by present rules will begin the process of effecting change in these rules.

NOTE: A segment of the October 5 and 6, 1990 Annual Meeting of the AALA in Minneapolis will be devoted to a discussion of related issues in recreational access, including demand for land, economic opportunities for landowners, liability and other issues associated with alternative use, and the role of insurance. Mark your calendars.

New books of interest

With the recent publication of three books and a booklet, attorneys and others interested in agricultural law have new and useful resources available to them. Three of the publications have national application, and the other will be of particular interest to those seeking an introduction to Kansas agricultural law.

J. Looney, J. Wilder, S. Brownback, and J. Wadley, *Agricultural Law: A Lawyer's Guide to Representing Farm Clients* (1990) offers a single-volume survey of agricultural law. Designed as a basic primer for the rural practitioner, its coverage extends from the workings of the USDA to organizing the farm business. Among the subjects covered are the basics of administrative practice and procedure before the USDA, the FmHA, and the Farm Credit System; ASCS and SCS administered programs; sales of agricultural products; the marketing of livestock and poultry; commodity futures trading; farm cooperatives; and agricultural labor. For most practitioners, the guide will be a convenient way to approach an issue or to gain an overview of one of the covered subjects. A 630-page paperback, it is available from Publications Planning & Marketing, American Bar Association, 750 North Lake Shore Drive, Chicago, IL 60611, for $44.95 to members of the ABA General Practice Section and $49.95 to non-members.

S. Brownback and J. Wadley, *Kansas Agricultural Law* (1989) is intended for non-lawyers. Also a single-volume survey, it addresses many of the subjects covered by *Agricultural Law: A Lawyer's Guide to Representing Farm Clients.* However, in addition to approaching its subjects in a way that non-lawyers can understand, its focus is on Kansas law. In that regard, most of its contents concern state law matters such as civil procedure, fences, trespassing livestock, landowner rights and liabilities, and leases. *Kansas Agricultural Law* does a good job of identifying and describing the wide range of law, statutory and otherwise, that affects Kansas farmers, and it could serve as a model for similar publications for other states. It is available in paperback (378 pages) from Lone Tree Publishing Co., P.O. Box 4728, Topeka, KS 66604, and is priced at $15.95.

H. Hannah, *Agricultural Law Graphics: A Series of Charts Depicting Principles of Law Applicable to the Business of Farming* (1990) is an instructional aid for use in the teaching of agricultural law. It is particularly suited for undergraduate teaching. The 132-page, paperbound book consists of charts listing the major elements or features of many, if not most, of the common law and statutory rules that are likely to be encountered in a survey study of agricultural law. As is indicated in the book's preface, the charts "provide a quick overview of the subject before a student becomes immersed in its details and confronted with illustrative cases." It is available from Stipes Publishing Co., 10-12 Chester St., Champaign, Illinois 61820.

Econ. Res. Serv., USDA, *The Basic Mechanisms of U.S. Farm Policy*, Misc. Pub. No. 1479 (Jan. 1990), should be in the library of everyone who ever wondered such things as how "Findley deficiencies" were calculated, what a "PIK and Roll" was, or what the method of calculating "program production" for deficiency payment purposes was. Not only does the text of this USDA-ERS Briefing Booklet explain such things, it does so with examples and illustrations. Through a combination of understandable, straightforward text and illustrated examples, the booklet guides the reader through each of the basic mechanisms of federal farm programs. It is well worth its $6.50 price. Copies of the 83-page booklet may be obtained from ERS-NASS, P.O. Box 1608, Rockville, MD 20849-1608.

– Christopher R. Kelley,
National Center for Agricultural Law Research and Information

AG LAW CONFERENCE CALENDAR

Environmental Litigation
June 25-29, 1990, University of Colorado, Boulder, CO.

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1990 Drake University Summer Agricultural Law Institute
June 4-7, June 11-14, June 18-21, June 25-28, July 9-12, July 16-19

Sessions schedule: Agricultural taxation and business planning by Professor James Monroe (6/4-7); Agriculture and the environment by Professor Gerald Torres (6/11-14); Analysis of the farmer's comprehensive liability insurance policy by Professor John D. Copeland (6/18-21); International agricultural trade law by Professor Robert L. McGeorge (6/25-28); The 1990 Farm Bill and federal farm programs by Professor Neil D. Hamilton (7/9-12); Legal aspects of biotechnology and agriculture by Dean J.W. "Jake" Looney (7/16-19).

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Agricultural Law Update

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