Agricultural Law Update

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INSIDE

IN FUTURE ISSUES

- Eighth Circuit issues U.C.C. 9-307(1) opinion
- FmHA ordered to pay "refund"
- Migrant housing: MSPA
- Cooperative director — conflict of interest issue

Law is the backbone which keeps man erect.

— *S.C. Yuter*

FCA forbearance policy: Rights of borrowers

Farm Credit Administration (FCA) regulations require Farm Credit System (FCS) institutions to institute a "policy" that "shall provide a means of forbearance for cases when the borrower is cooperative." 12 C.F.R. § 614.4510(d)(1).

Recent cases have left open the question of whether this is a substantive rule or simply a general statement of agency policy. A 1985 amendment to the Farm Credit Act adds statutory authority to the heretofore regulatory forbearance policy, but does little to resolve this issue.

The court in *DeLaigle v. Federal Land Bank of Columbia*, 568 F.Supp. 1432 (S.D. Ga. 1983), held that § 614.4510 requires Federal Land Banks to establish loan servicing techniques and inform borrowers of these procedures. The court emphasized the section's mandatory language: "The policy *shall* provide..." [emphasis in original] in holding that the regulation is a substantive provision that has the force and effect of law. 568 F.Supp. at 1436, 1437.

The Eleventh Circuit Court of Appeals subsequently overruled *DeLaigle* on this issue in *Smith v. Russellville Production Credit Association*, 777 F.2d 1544, 1548 (n. 1) (11th Cir. 1985), holding that the regulation provides a general statement of FCS policy, but does not support private rights of action, and is not a substantive rule.

The *Smith* court conceded that the language of § 614.4510(d)(1) is mandatory, but emphasized that the regulation expressly refers to a "policy" of forbearance. 777 F.2d at 1548.

A recent Iowa county court case held that the Federal Land Bank must practice the regulatory policy. *Federal Land Bank of Omaha v. Doyle and Donna Schroder*, Equity No. 20630, Warren Co., Iowa, Sept. 19, 1985. In this case, the plaintiff declared defendants in default on a promissory note and mortgage, and sought to foreclose on the loan. Pursuant to this action, the plaintiff moved for summary judgment.

(continued on next page)

USDA issues regulations for certified central filing

The U.S. Department of Agriculture (USDA) has published regulations and interpretive opinions to aid states in the implementation and management of a certified central filing system. 51 Fed. Reg. 10795 (March 31, 1986) (to be codified at 9 C.F.R. pt. 205).

These regulations and interpretations became effective March 24, 1986, and will be of interest to persons residing in states that are considering the certified central filing option contained in § 1324 of the 1985 Farm Bill, P.L. 99-198. That section provides for federal preemption of the "farm products exception" contained in U.C.C. 9-307(1), effective Dec. 23, 1986.

Under this law, buyers of farm products and commission merchants cannot be liable to holders of perfected security interests in farm products unless: 1) The buyer or commission merchant has received direct notice of the security interest in the form and manner prescribed at § 1324; or 2) The buyer or commission merchant has received or is charged with notice pursuant to the operation of a statewide central filing system, certified by the USDA. See Uchtmann, *1985 Farm Bill to Preempt Farm Products Exception of Uniform Commercial Code 9-307(1)*, *Agricultural Law Update*, January 1986.

Certain of the provisions of the new regulations include:

- Details of how states may request mandatory certification by the USDA of a statewide central filing system. (Sec. 205.101)
- Minimum information states must require of buyers, commission merchants, or selling agents who wish to register and receive master lists from the central filing office. (Sec. 205.104)
- Format requirement for the master lists of effective financing statements. (Sec. 205.105)

(continued on next page)

FCA FORBEARANCE POLICY

CONTINUED FROM PAGE 1

The court denied plaintiff's motion, citing § 614.4510(d)(1). It found that material issues of fact existed as to whether the plaintiff adopted a policy of forbearance and communicated same to defendant, and as to whether the defendants had been cooperative, made an honest effort to meet the conditions of the loan contract, and were capable of working out their debt burden as required by the regulation. § 614.4510(d)(1), cited at Equity No. 20630 at 2.

Apparently, the Iowa court supported the *DeLaigle* contention that the regulation carries the force and effect of law. Currently, the case is up for assignment. *But see Larryann Hunt Inc. v. Federal Intermediate Credit Bank of Omaha*, Civil # 85-566B U.S. Dist. Ct., S.D. Iowa (Dec. 19, 1985) (motion to dismiss action alleging failure to provide forbearance granted).

After these cases were decided, Congress amended the Farm Credit Act of 1971. Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, 99 Stat. 1678. Section 301(b) of the Amendments will insert § 4.13(b) into the Act as follows:

> In accordance with regulations of the Farm Credit Administration, System institutions *shall* develop a *policy* governing forbearance. Each System institution shall provide borrowers with a copy of the institution's policy regarding forbearance at such time or times as the Farm Credit Administration shall prescribe in such regulations. [emphasis added].

Although the statutory amendment arguably will add authority to the need for FCS institutions to practice forbearance, its use of the words "shall" and "policy" retains the conflicting terminology of the regulatory provision at 12 C.F.R. § 614.4510(d)(1).

The legislative history for the 1985 Farm Credit Act Amendments makes interesting reading, however. The above-quoted statutory language appears in the new borrowers' rights section that is the subject of the following exchange on the floor of the House of Representatives:

> Mr. PENNY. I thank the gentleman for yielding.
>
> Mr. Speaker, I rise in support of H.R. 3792 and to enter into a brief colloquy with you as one of the principal authors of this legislation. One major section of this bill establishes rights farmers have as borrowers from the Farm Credit System. I know you share with me the belief that applicants and member/borrowers need assurances throughout the process that they are being treated fairly. In addition to such guidelines and regulations, will this legislation provide applicants and member/borrowers the option of utilizing the court system to ensure they are properly enforced?
>
> Mr. De La GARZA. Mr. Speaker, I thank the gentleman for assisting us in clarifying this issue.
>
> Yes, Mr. PENNY, as you indicate, a major section of this bill does establish a set of borrowers' rights, and it would be my understanding that the rights of applicants and member/borrowers as set forth in this act and in the regulations of the Farm Credit Administration shall be enforceable in courts of law. I thank the gentleman from Minnesota for his contribution and his support.
>
> Mr. PENNY. I thank the gentleman.
>
> Congressional Record, H11518-H11519 (Dec. 10, 1985).

In light of this legislative history, there is a legitimate question as to whether the courts can continue to hold that FCS borrowers have no private cause of action.

Indeed, the decision in *Springwater Dairy Inc. v. Federal Intermediate Bank of St. Paul*, 625 F.Supp. 713 (D. Minn. 1986), is certainly called into question. In this case, the court held that the plaintiff debtor farmers could not assert a private cause of action under the Farm Credit Act or its reg-

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CERTIFIED CENTRAL FILING REGULATIONS

CONTINUED FROM PAGE 1

- Ninety-six discrete farm products around which the master lists are to be organized. (Sec. 205.106)
- Clarification as to the meaning of "crop year," including its applicability to animals and poultry. (Sec. 205.107)

Among the points covered by the interpretive opinions are these:

- Interpretation that would allow effective financing statements to be filed locally, so long as the local entity forwards the information to the Secretary of State or his designee. (Sec. 205.203)
- Interpretation that a state can establish a certified central filing system as to some commodities only. (Sec. 205.206)
- Clarification that registrants will be deemed to have failed to register as to those portions of the master list for which they do not register. For example, a cattle buyer who only registers to receive information concerning apricots is not protected from perfected security interest in the cattle purchased. (Sec. 205.208)
- Clarification that registrants are protected from security interests that are entered into the central filing system before purchase of the farm products, but which are not yet brought to the attention of the registrant at the time of the purchase. (Sec. 205.208)
- Guidance concerning amendment or continuation of effective financing statements. (Sec. 205.209)
- Interpretation that out-of-state buyers of farm products who are not registrants in the state where such products are produced will take subject to security interests in such products. (Sec. 205.210)

Persons with an interest in these issues should review the regulations and interpretive opinions as published. Comments, questions and suggestions can be sent to: James L. Smith, Deputy Administrator, Packers and Stockyards Administration, 3039A South Building, USDA, Washington, D.C. 20250, and John J. Casey, Packers and Stockyards Division, Office of the General Counsel, 2446 South Building, USDA, Washington, D.C. 20250-1400.

— Donald L. Uchtmann

ulations against the local production credit association, bank and governor of the FCA.

First, it stated that the FCA provisions at 12 U.S.C. § 2201-02 (providing unsuccessful applicants for credit the right to receive reasons for the denial and an informal hearing to question the denial) did not provide due process rights to actual borrowers. 625 F.Supp. at 716.

Second, citing *Cort v. Ash*, 422 U.S. 68 (1975), the court held that no implied private right of action occurred under the Act or § 614.4510. 625 F.Supp. at 717-20.

Point by point, it determined that the plaintiffs failed the four-prong *Cort* test: 1) The statute did not confer federal rights in favor of the plaintiffs' class, i.e., debtor farmers; 2) Legislative history did not indicate an explicit or implicit right to private action; 3) The Act's purposes, providing credit to farmers, did not imply a private cause of action; and 4) The plaintiffs' claims traditionally were such that are relegated to state law. *Id.*

Much the same analysis appears in *Bowling v. Block*, 785 F.2d 556 (6th Cir. 1986).

The comments of Representatives Penny and De La Garza cast a *shadow* on the reasoning of *Springwater* and *Bowling*. The congressmen's statements suggest legislative intent that the forbearance policy is a substantive rule and that private rights of action by the class of FCA borrowers may be pursued in federal (as opposed to state) courts.

Federal courts would be well-advised to review this legislative history before dismissing any more claims to private rights of action arising under the Farm Credit Act.

— *Sidney F. Ansbacher*

Class action against a cooperative

A federal district court has approved a settlement in a suit involving a class action of cooperative member growers against Land O' Lakes Inc. *Muehler v. Land O' Lakes Inc.*, 617 F.2d 1370 (D. Minn. 1985).

An order had been entered in 1983, enabling qualifying turkey growers selling fowl to Land O' Lakes through the 1980 Cooperative Marketing Pool to maintain a class action.

The claim for relief alleged that Land O' Lakes had breached the marketing agreement with the growers, breached a fiduciary duty owed to the growers, and violated a state statute relating to cooperative marketing agreements.

After extensive pre-trial proceedings and settlement negotiations, the parties agreed to a settlement. The court-approved settlement included $545,000 in attorneys' fees.

— *Terence J. Centner*

Junior FmHA liens: Due process rights

A suit to extend important due process rights to farmers who had granted junior liens to the Farmers Home Administration (FmHA) has narrowly survived a motion to dismiss.

In *Lathan v. Block*, 627 F.Supp. 397 (D.N.D. 1986), plaintiffs alleged an FmHA practice of inducing senior lienholders to foreclose upon FmHA borrowers in default by agreeing to bid on the property at the foreclosure sales. This practice, argued plaintiffs, allows the FmHA to bypass its obligation to provide procedural due process as required by *Coleman v. Block*, 580 F.Supp. 194 D.N.D. 1984.

The government sought dismissal of all due process claims, arguing that the actions challenged were not those of the FmHA, but of private lienholders who were not subject to the strictures of the due process clause.

Citing *Blum v. Yaretsky*, 457 U.S. 991 (1982), the court said that state action could be found when the government exercises such coercive power or provides such significant encouragement (either overt or covert) that the private entity's choice must be deemed to be that of the government.

Plaintiffs' complaint alleged that the FmHA had conspired with other lienholders and induced them to foreclose on plaintiffs' property. The court denied the motion to dismiss, treating these allegations as true for purposes of the motion.

The court, however, held that the statutes and regulations governing foreclosure by prior lienholders did not dictate any particular agency action to protect the FmHA's security interest in a junior lien. 7 U.S.C. § 1985(a) *authorizes* the Secretary of Agriculture to make advances to protect the FmHA's security interest, to bid and purchase at foreclosure sales when the FmHA holds a lien, and to manage and dispose of property acquired — it does not *require* such action.

The regulations do not require the FmHA to purchase the property at the foreclosure sale, nor mandate procedural due process in deciding what action should be taken. 7 C.F.R. § 1872.2(b), (c). Because the FmHA's actions did not violate this statute or its own regulations, this claim was dismissed.

The court also dismissed the claims of all plaintiffs whose property was the subject of a completed foreclosure action as *res judicata*. Claims against "All State Directors," "All District Directors" and "All County Supervisors" were dismissed for failure to effect service under Fed. R. Civ. P. 4(d)(5).

— *Annette Higby*

Ag Law Conference Calendar

Western Water: Expanding Uses/Finite Supplies.
June 2-4, 1986, Fleming Law Building, University of Colorado.

For more information, contact the Natural Resources Law Center, Campus Box 401, Boulder, CO 80309-0401; 303/492-1286.

Agricultural Law 1986: Review and Analysis of the Federal and Minnesota Farm Bills.
June 6, 1986, Marriott Inn, Bloomington, MN.

For further information, contact the Hamline University School of Law, Advanced Legal Education; 612/641-2336.

Western Mountains Bankruptcy Law Institute.

June 27-30, 1986, Jackson Hole, WY.

Program covers agricultural bankruptcies and other topics.

For more information, contact the Institutes on Bankruptcy Law, CCR Publishing Co., P.O. Box 1905, Alexandria, VA 22313-1905; 703/684-0510.

Summer Institute in Agricultural Law.
Topics include: Impact of Banking Regulation on Agricultural Lending, June 9-13; Agricultural Credit: U.C.C. Article 9, June 16-19; Agriculture and the Environment, June 23-26; Cooperative Taxation, June 30-July 3; Government Regulation of Agriculture: The 1985 Farm Bill, July 7-10; Biotechnology and Agriculture, July 14-17; Litigation and Agricultural Lending, July 21-24.

For more information, contact the Drake University Law School, Des Moines, IA; 515/271-2947.

1986 Annual Meeting: American Agricultural Law Association.
Oct. 23-24, 1986, Worthington Hotel, Fort Worth, TX.

Sessions will discuss the Current State of Agriculture, Agricultural Policy, Role of the Bar, the Farmers Home Administration, the Farm Credit System, Innovative Financing, Creditor Responsibilities, Educational Directions, Farm Bankruptcies, The 1985 Farm Bill, Agricultural Labor, Tax "Reform" and U.C.C. § 9-307(1).

Watch for details.

The payment limitation on farm program participation

by Neil D. Hamilton

Introduction

The 1970s was a period of heightened concern about the possible impact of federal farm programs on the structure of agriculture, i.e. the number of farms, their institutional relations and their economic success.

One reform that was added to the major federal farm programs, the loan price support and production control systems, was the concept of a cap on the amount of direct federal payments any "person" could receive. The cap first emerged in The Agriculture Act of 1970, P.L. 91-524, approved Nov. 30, 1970.

The theory behind the cap is that by limiting the amount of benefits available to larger producers, more federal dollars can be spread to smaller scale farm units, perhaps more in need, as well as more "worthy" of federal assistance. Further, the cap arguably will prevent federal farm programs from operating as an active force for structural change through contributing to farm consolidation, increasing farm size and decreasing farm numbers.

The addition of payment limitation authority was a response both to studies questioning the real economic and political value of federal benefits to small- and medium-sized producers, as well as reports of very large, multimillion dollar payments received by large scale, often corporate, farm operations.

Payment limitations have been a fact of life in federal farm programs since the early 1970s, although the dollar limit and its application has varied by commodity program through a succession of farm bills.

1985 Farm Bill Developments

The Food Security Act of 1985 continues the payment limitation (now set at $50,000 for farm program benefits and $100,000 for disaster payments) essentially unchanged. Sec. 1001, Pub. L. 98-199, 7 U.S.C. § 1308, 99 Stat. 1444.

Payments do not include monies received from loans or purchases, but are defined as direct government payments such as deficiency payments. The payment limitation takes on increased significance under the 1985 farm bill due to other changes in federal programs — most significantly, the substantial reduction in price support loan rates and the relative maintenance of target price levels.

Neil D. Hamilton is an associate professor of law as well as director of the Agricultural Law Center at the Drake University Law School, Des Moines, Iowa.

For example, § 401 of the Act authorizes an additional 20% reduction in the loan rate for feed grains, amending 7 U.S.C. § 1444d, § 105c of the Agricultural Act of 1949. These developments create the potential for significantly larger deficiency payments to farm program participants which, in turn, means that the payment limitation may be approached by an increased number of participating producers.

To illustrate this, the deficiency payment for corn producers could now be as much as $1.11 per bushel (before Gramm/Rudman/Hollings reductions), as opposed to a maximum of 48 cents per bushel under the 1981 farm bill.

The 1985 farm bill, however, specifically provides that the $50,000 payment limitation may not necessarily apply to the full amount of a particular deficiency payment. Section 1001(3) of the Act sets out a number of exceptions to the term "payments."

Specifically, the word "payments" does not include that portion of a deficiency payment which results from the Secretary of Agriculture's use of the discretionary authority to further reduce loan rates from those set by Congress in the Act.

The Secretary has now used that discretionary authority to further reduce loan rates from those established in the farm bill. As an example, for 1986, the corn loan rate was $2.40 before the reduction, but was $1.92 after the reduction.

The effect of the exception is that up to a maximum of 48 cents will not be included for payment limitation purposes. In other words, all of the deficiency payment that amounts to more than the difference between $3.03 (the target price) and $2.40 (the loan rate before reduction) is free of the payment cap. The provisions of paragraph 4, subparagraphs C, D and F of the Agricultural Stabilization and Conservation Service (ASCS) contract specifically refer to which deficiency payments will be included for payment limitation purposes and which will not.

These exceptions to the word "payments" are important, and have to be considered in determining the ultimate effect of the payment limitation on a particular producer. For example, the effect of the exception for corn means that a farm unit with a corn base twice as large will qualify for deficiency payments — yet still be beneath the payment limitation.

This is in contrast to what the situation would be if a deficiency resulting from a further reduction in the loan rate was included in the payment limitation calculation.

Even with this exception, one result of the 1985 farm bill is that more producers and their legal counsel will need to become familiar with the operation of the payment limit.

Only after a consideration of the pertinent ASCS rules can a lawyer determine what flexibility, if any, is available in terms of the organization of the farm operation, so as to maximize the number of persons eligible for individual payment limitation consideration. The option to increase the aggregate payments obtainable is an important factor in deciding whether to participate in available federal farm programs.

Regulations and Interpretations

The U.S. Department of Agriculture (USDA) has promulgated regulations governing the application of the payment limitation provision. 7 C.F.R. pt. 795 (1986), as amended at 51 Fed. Reg. 8453-54 (March 11, 1986).

In addition, administrative interpretations of the regulations exist. These interpretations do not appear in the annual C.F.R. codifications, but can be located at 36 Fed. Reg. 16569 (Aug. 24, 1971), 37 Fed. Reg. 3049 (Feb. 11, 1972), 39 Fed. Reg. 1502 (April 30, 1974), and 41 Fed. Reg. 17527 (April 27, 1976). The continued relevance of these interpretations is established at 7 C.F.R. § 795.22 (1986).

"Person"

The operative statutory language speaks of the "total amount of payments which a person should be entitled to receive * * *." The Secretary, pursuant to a statutory directive, has defined "person" to mean an "individual, joint stock company, corporation, association, trust, estate, or other legal entity." The rule goes on:

> In order to be considered a separate person for the purposes of the payment limitation, in addition to the other requirements of this part, the individual or other legal entity must: a) Have a separate and distinct interest in the land or the crop involved; b) Exercise separate responsibility for such interest; and c) Be responsible for the cost of farming related to such interests from a fund or account separate from that of any other individual or entity. 7 C.F.R. § 795.3 (1986).

The determination of who is a person, for purposes of availability of a separate payment limitation treatment, is a very important consideration in structuring farming arrangements. The rules provide that determinations as to the status of individuals or entities are to be made by the

ASCS by March 1 of the then current year.

The rules also provide that all of the facts regarding the arrangement under which a commodity is produced shall be submitted to the state committee for a decision in situations in which the county committee is unable to determine whether certain individuals or legal entities involved in the production of commodities should be treated as one person or as separate persons

If the state committee is unable to make a decision on these issues, then all of the facts regarding the farming arrangement will be submitted to the deputy administrator for a decision. The rules specifically provide that the various interpretations be considered in a hierarchy because § 795.6 provides that in the cases in which more than one rule would appear to be applicable, the rule which yields the smallest number of persons shall apply.

It is clear that the ASCS has defined "person" so as to minimize the possible number of persons for purposes of the payment limitation and to require evidence of actual separation of farm units and separate material contribution or participation for there to be the separate entities.

Partnerships, Joint Ventures and Co-tenancies

Persons or entities who participate in partnerships, joint ventures, tenancies in common and joint tenancies are not considered to be one person for payment limitation purposes as long as they share in the proceeds derived from the joint operations of the farming venture. 7 C.F.R. § 795.7 (1986).

To receive separate person status, however, the person or entity must be actively engaged in the farming operation. An individual or other legal entity will be considered as actively engaged only if its contribution to the joint operation is commensurate with its share in the proceeds that are derived from farming by such joint operation.

Contributions to the joint operation can take the form of land, labor, management, equipment or capital. Again, the contribution must be commensurate with the claimed share of the proceeds. The rule specifically provides that a capital contribution may be a direct, out-of-pocket input of a specified sum or an amount borrowed, but it cannot take the form of a loan to the joint operation, nor the form of a direct contribution of funds loaned to the individual by the joint operation.

Corporations

Rules for ascertaining the status of corporations and their stockholders appear at 7 C.F.R. § 795.8 (1986). A corporation can be considered one person and an individual stockholder of that corporation another, but only to the extent that that stockholder is engaged in the production of crops as a separate producer.

In a situation, however, in which more than 50% of the stock in a corporation is owned by an individual (including the stock owned by the individual's spouse, minor children or trust for the benefits of such minor children) or by a legal entity, that person or entity shall not be considered as a separate person from the corporation.

The rule provides that when the same two or more individuals (or other legal entities) own more than 50% of the stock in each of two or more corporations, all of such corporations shall be considered as one person.

The percentage of the value of stock that is owned by an individual or other legal entity is determined on March 1 of the crop year, and the rule provides special rules when there are multiple classes of stock. The case of one individual who owns stock in two farming corporations, of which one corporation owns some of the stock of the other, is discussed in the interpretation at 36 Fed. Reg. 16569 (1971).

Trusts and Estates

Rules governing the status of trusts or estates appear at 7 C.F.R. § 795.9 (1986). An estate or irrevocable trust will be considered as one person except in situations where two or more estates or irrevocable trusts have common heirs or beneficiaries with more than a 50% interest.

In these cases, all such estates or irrevocable trusts will be considered as one person. An individual heir of an estate or beneficiary of a trust can be considered as a separate person to the extent that such heir or beneficiary is engaged in the production of crops as a separate producer and meets the other requirements of § 795.3. The rules provide that a revocable trust shall not be considered as a person separate from the grantor.

Administrative interpretations address several trust situations: a widow who holds certain farmland outright, but has the sole right to income from additional farmland held by a residuary trust; a case of two trusts with the same beneficiaries and same trustee, in which one trust with no farm proposes to cash rent part of the farm of the other trust; an irrevocable trust created by a grandfather for grandchildren with the children's father, a farmer, hired to farm on a custom basis land rented by the trust from a third party. See 36 Fed. Reg. 16569 (1971).

Family Members

In the usual family setting, a husband and wife will be considered as one person. 7 C.F.R. § 795.11 (1986). In *Martin v. Bergland*, 639 F.2d 647 (10th Cir. 1981), it was determined that the application of the one person rule to a husband and wife who maintained separate farms before and after marriage is not a denial of equal protection or due process. Neither can this rule be successfully challenged as imposing an unconscionable contract provision.

A minor child and his parents or guardian are considered as one person except that the minor child may be considered as a separate person if the child is a producer on a farm where the parents, the guardian or other responsible person takes no part in the operation of the farm, including any activities as a custom farmer, and owns no interest in the farm or allotment or in any portion of the production on the farm.

Additionally, such minor child must either be represented by a court-appointed guardian, who is required by law to make a separate accounting for the minor, or have established and maintain a different household from his parents and personally carries on the farming operations on the farm (of which there is a separate accounting), or have a farm operation resulting from its being the beneficiary of an irrevocable trust and ownership of the property is vested in the trust or the minor. 7 C.F.R. § 795.12(a) (1986).

Court actions conferring majority status on a person under 18 years of age will not change minority status as to these regulations. 7 C.F.R. § 795.12(b) (1986).

Dividing Ownership or Operations

Part 795 also sets out important rules concerning the treatment of farm operations, in particular, the consideration of arrangements which divide the ownership or operation of the farm for purposes of payment limitation treatment. 7 C.F.R. § 795.14, .15 and .16 (1986).

The provisions of part 795 were amended in early March 1986 to reflect several provisions in the 1985 farm bill. See 51 Fed. Reg. 8453-54 (March 11, 1986).

One change amends to § 795.15 concerning leases so that it now provides that for a lease to be considered as a "share lease," the "rental agreement" provisions must require the payment of rent on the basis of the amount of the crop produced or the proceeds derived from the crop. Such agreement shall be considered to be a share rental agreement.

Appeal

Reconsideration and review of determina-

(continued on next page)

FARM PROGRAM PARTICIPATION

CONTINUED FROM PAGE 5

tions made under 7 C.F.R. pt. 795 (1986) can be sought pursuant to the ASCS appeal regulations at 7 C.F.R. pt. 780 (1986).

In March 1986, § 795.24 was added to the regulations to provide that in situations where parties have made a good faith request to the county committee concerning the determination of their status as a person (which is then later changed to a more restrictive determination by a higher reviewing authority), the deputy administrator may grant relief — for up to one crop year — to the producer who has not been afforded an opportunity to exercise other alternatives with respect to the producer's farming operation. For example, the producer may take advantage of the opportunity to reduce ACR requirements in accordance with § 713.57, or to otherwise change the farming operation. 51 Fed. Reg. 8453-54 (March 11, 1986).

For a more extensive discussion of ASCS appeal practices and procedures, see Hamilton, *Farmers' Rights to Appeal ASCS Decision Denying Farm Program Benefits*, 29 S.D.L. Rev. 282 (1984).

Exemptions

The recent additions to the payment limitation regulations also provide two minor exceptions, one providing that the payment limitation shall not be applicable to payments made to state's political subdivisions or agencies thereof for participation in the programs on lands that are owned by such entities as long as the lands are farmed primarily in the direct furtherance of public function. The limitation is applicable, however, to persons who rent or lease land owned by these bodies.

The second exemption concerns payments made to Indian tribal ventures that are participating in programs under the guidance of federal officials.

Contract Documents

The payment limitation in the 1985 farm bill as further refined by the rules of 7 C.F.R. pt. 795 (1986) is incorporated into the language of the contract that is used for participation in the 1986 price support programs.

Specifically, the payment limitation is included in paragraph 7 of the appendix to Form CCC-477, where a reference to the provisions of 7 C.F.R. pt. 795 (1986) appears. In addition, the payment limitation is discussed in paragraph 4 concerning deficiency payments. Specifically, subparagraphs C, D and E of paragraph 4 of the contract discuss which deficiency payments will be subject to the $50,000 payment limitation.

Schemes

Persons who seek to evade payment limitations by concocting schemes or devices may be compelled to repay *all* or any part of payments otherwise due. Such schemes include, but are not limited to, instances of concealing information from or submitting false information to the county committee. 7 C.F.R. § 795.17 (1986).

In recent years, several schemes have been uncovered, and the United States has pursued recovery of payments. In *U.S. v. Thomas*, 593 F.2d 615 (5th Cir.), modified on rehearing, 604 F.2d 450 (5th Cir. 1979), cert. denied, 449 U.S. 841 (1980), a paper structure showing joint venture was actually a sham, as virtually all decisions were made by one person who, together with his employees, received all profits.

U.S. v. Clark, 546 F.2d 1130 (5th Cir. 1977), was a leasing scheme involving various tracts of land leased to different individuals, each of whom assigned payments to a lessor who actually farmed all the tracts.

U.S. v. Batson, 706 F.2d 657 (5th Cir. 1983), 782 F.2d 1307 (5th Cir. 1986), involved various schemes, including a farmer's son using his father's name in leasing land and claiming payment in his father's name.

See H. Pickard, *Price and Income Adjustment Programs* in 1 AGRICULTURAL LAW § 1.16 (J. Davidson, ed. 1981 and 1985 Supp.).

Cooperative netting

President Reagan has signed the Consolidated Omnibus Budget Reconciliation Act of 1985, thereby approving a major amendment to subchapter T of the Internal Revenue Code (IRC), the federal income tax provisions applicable to cooperatives. Pub. L. No. 99-272, § 13210 (1986).

This law adds a new subsection to section 1388 of the IRC concerning special rules for the netting of gains and losses by qualifying cooperative organizations.

Cooperatives are specifically provided authority for offsetting patronage losses attributable to one or more allocation units against patronage margins of other units. Under the provision of this Act, cooperatives may ask patrons of one allocation unit to share the losses of another unit without violating the cooperative tax requirement that the cooperative must be operating on a cooperative basis. I.R.C. § 1381(a)(2).

Cooperatives that choose to use this netting provision are obligated to provide written notification to its patrons identifying the offsetting allocation units, stating that the offset may have affected the amount which is being distributed to its patrons, as well as a statement concerning patrons' rights to additional financial information.

Cooperatives, do not, however, have to disclose commercially sensitive information, including data about margins or losses which the cooperative determines its competitors could use against it.

The Act also contains a provision that enables a cooperative to offset selected losses when it acquires another cooperative through certain netting permitted after section 381 transactions. A cooperative acquiring another cooperative is able to offset qualifying losses of one or more allocation units of the acquiring or acquired organization, respectively.

Although there are limitations, this provision may enable an acquiring cooperative to take advantage of tax loss carryovers on the books of a cooperative being acquired.

For a more extensive analysis of this development, see Baarda and Frederick, *Cooperative Netting Amendments Added to Internal Revenue Code*, to be published in the June 1986 issue of Farmer Cooperative.

— *Terence J. Centner*

Are farmers a suspect class?

In *United States v. Garth*, 773 F.2d 1469 (5th Cir. 1985), the defendant appealed his conviction for criminal conversion of secured property.

In a footnote to the Court's opinion (affirming the conviction), defendant's assertion that he had been singled out for prosecution was dismissed in the following language:

> 11. While his conviction will prevent him from farming for two years, farming is not a constitutional right, nor are farmers a suspect class. *But hear*, W. Jennings and W. Nelson, "Mamas Don't Let Your Babies Grow Up To Be Cowboys," on *Waylon and Willie* side 1, track 1 (1978) (noting that "Cowboys ain't easy to love, and they're harder to hold. They'd rather give you a song than diamonds or gold.").

— *John H. Davidson*

STATE ROUNDUP

COLORADO. *"Truckin' or Farmin'?"* In *State Compensation Insurance Fund v. Indus. Commission*, 713 P.2d 405 (Colo. App. 1985), the claimant, a truck owner, contracted with Gobbo, an onion grower, to deliver onions to a New Orleans, La. buyer.

The claimant and his hired driver were involved in an accident en route. Neither Gobbo or the truckowner carried workers' compensation insurance. Claimant filed for compensation, and the Division of Labor made an award, determining that the farmer was a statutory employer.

The Court of Appeals reversed, stating that Colorado law imposes primary responsibility for workers' compensation coverage upon the contractor, rather than upon the farmer.

Further, the court suggested that even if it were determined that the farmer was a statutory employer, the work involved — delivery of the harvested crop — was part of the farming operation. Therefore, Colorado's agricultural exemption would apply.

— Bruce McMillen

SOUTH DAKOTA. *Action Against Cattle Buyer.* Defendant cattle buyer, acting for plaintiff, bought and delivered a lot of cattle. There was evidence that the cattle were delivered in poor condition — some were malnourished, carried brucellosis, were old, or had been shipped too soon after dipping.

The plaintiff sued on theories of fraud, deceit and negligence. The Supreme Court of South Dakota reversed the trial court's grant of summary judgment in favor of plaintiff, holding that there were questions of fact for trial. *Laber v. Koch*, No. 14977 (S.Ct. S.D. March 12, 1986).

— John H. Davidson

Attachment under U.C.C. § 9-203: A warning to custom feeders

In *Brown v. United States*, 622 F.Supp. 1047 (D.S.D. 1985), the court considered a claim for conversion brought under the Federal Tort Claims Act, 28 U.S.C. § 1346(b). Brown, the plaintiff, claimed that his cattle were converted when they were sold by a Farmers Home Administration (FmHA) borrower and the proceeds of the sale turned over to the FmHA.

The FmHA borrower, Markuson, had executed security agreements with the FmHA, each granting a security interest in "all livestock...now owned or hereafter acquired by Debtor, together with all increases, replacements, substitutions and additions thereto * * *."

In December 1981, Markuson approached Brown, proposing that Markuson purchase 50 head of cattle with funds provided by Brown, then resell the cattle at a higher price. Brown would recover his investment, and the profits would be split.

On or about Dec. 24, 1981, Brown mailed a check for $20,000 to Markuson, and the cattle were purchased. Brown did not file a financing statement, place any notice of the transaction in the public record, nor inform the FmHA of the transaction.

Markuson's cattle operation, including the plaintiff's cows, were sold by Markuson in February 1982 at the urging of the FmHA. The proceeds of the sale were turned over to the FmHA, prompting this action.

Brown argued that his oral agreement with Markuson constituted a bailment, and that the FmHA security interest in after-acquired livestock never attached to the 50 head of cattle under S.D.C.L. § 57A-9-203(1) because the debtor had insufficient rights in the collateral.

The court considered the argument in light of *Rohwedor v. Aberdeen Production Credit Association*, 765 F.2d 109 (8th Cir. 1985), which held that a debtor would not have sufficient rights in the collateral for attachment "if the parties intended to create a bailment, with the [bailor] retaining complete ownership of the [property] and relinquishing only possession."

Under South Dakota law, a bailment consists of the delivery of personal property to another in trust for a specific purpose with an express or implied contract that the trust will be faithfully executed, and the property will be returned or accounted for when that purpose is accomplished.

Because there was no delivery, the court concluded there could be no bailment. Delivery of the check to Markuson could not constitute constructive delivery, since the $20,000 was commingled in Markuson's account, and there was no way to trace the funds to the cattle in question.

Despite testimony by both Brown and Markuson that the plaintiff was to "own the cattle," Markuson exercised "unbridled discretion" in the purchase and sale of the cattle. The court concluded that the evidence failed to establish either the retention of an ownership interest or the relinquishment of possession necessary to establish a bailment.

The court, citing the Official Comment to U.C.C. § 9-202, said that even if Brown could have established an ownership interest in the cattle, the outward appearance of a debtor's rights of ownership and control in the collateral determined whether attachment was effective.

The court also held that a security interest could attach where a debtor received possession of collateral pursuant to an agreement endowing him with any interest other than naked possession.

The court found that Markuson's "interest and authority" over the cattle significantly exceeded "naked possession." The court justified this harsh result by saying Brown could have protected himself by filing an Article 9 security interest. It added that the decision advances the Code's policy of providing notice and certainty to inventory lenders.

While the *Brown* court relied on *Morton Booth Co. v. Tiara Furniture Inc.*, 564 P.2d 210, 214 (Okla. 1977), and *Kinetics Tech. Intern. Corp. v. Fourth National Bank*, 705 F.2d 396 (10th Cir. 1983), it is curious that it did not cite and seek to distinguish *National Livestock Credit Corp. v. First State Bank*, 503 P.2d 1283 (Okla. 1972) (custom feedlot did not obtain sufficient interest in livestock purchased on behalf of third party to give feedlot rights in collateral under U.C.C. § 9-203).

— Annette Higby

Anti-corporate farming statute — mortgage foreclosure defense?

Debtors in bankruptcy allege that their insurance company lender exercised control over debtors' farmland in contravention of South Dakota's anti-corporate farming statute and the state legislature's stated public policy prohibiting corporate control of agricultural land, S.D.Cod.L. § 49-9A-1 *et seq.*, and seek to have the mortgage declared void as against public policy.

The creditor moved to dismiss the complaint for failure to state a cause of action. The bankruptcy court *denied* the motion. *Sheehan v. Prudential Insurance Co. of America*, Adversary No. 385-0021 (U.S. Bankruptcy Court, District of South Dakota, March 3, 1986).

— John H. Davidson

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

EURO-AMERICAN SYMPOSIUM. The 1986 Euro-American Symposium has been announced in previous issues of *Agricultural Law Update*, and will be held in Plymouth, England, Sept. 8-12, 1986.

Approximately 14 members of the American Agricultural Law Association (AALA) have been selected to present papers at this meeting. There are several additional positions for attendees from North America, which will be filled by the AALA's Board of Directors. Participants are expected to pay their own way. If you would like to be considered as an attendee for this symposium, please contact: Dave Myers, president, Valparaiso University Law School, Valparaiso, IN 46383. Deadline is May 30, 1986.

STATE REPORTERS. Every issue of *Agricultural Law Update* includes a State Roundup, in which agricultural law developments at the state level are reported by members of the AALA who serve as state reporters. If you know of developments in your jurisdiction, including unreported cases that might be appropriate for the State Roundup, contact your state reporter. If no state reporter is listed for your jurisdiction, consider volunteering to fill the vacancy.

ALABAMA, Patricia Conover; ALASKA, Jan Marie Miller; ARIZONA, Douglas C. Nelson; ARKANSAS, Kim Williamson Tucker; CALIFORNIA, Kenneth J. Fransen; COLORADO, Bruce McMillen; CONNECTICUT, vacant; DELAWARE, vacant; FLORIDA, Michael Minton; GEORGIA, Terence J. Centner; HAWAII, Kemp P. Burpeau; IDAHO, vacant; ILLINOIS, Donald L. Uchtmann; INDIANA, Gerald Harrison; IOWA, Neil Hamilton; KANSAS, Keith G. Meyer; KENTUCKY, Kathleen J. Thompson; LOUISIANA, Laura Johnson; MAINE, Sarah Redfield; MARYLAND, Michael C. White; MASSACHUSETTS, vacant; MICHIGAN, vacant; MINNESOTA, Gerald Torres; MISSISSIPPI, James H. Simpson; MISSOURI, Stephen L. Matthews; MONTANA, Donald D. MacIntyre; NEBRASKA, Frank A. Kreitels; NEVADA, vacant; NEW HAMPSHIRE, Sarah Redfield; NEW JERSEY, Gregory Romano; NEW MEXICO, John D. Copeland; NEW YORK, Joseph B. Bogan and Dale Allison Grossman; NORTH CAROLINA, Nathan M. Garren; NORTH DAKOTA, David M. Saxowsky, Vlen C. Hoberg and Owen Anders; OHIO, Paul L. Wright; OKLAHOMA, Drew Kershen; OREGON, Richard N. Beleher; PENNSYLVANIA, John C. Beck; RHODE ISLAND, vacant; SOUTH CAROLINA, Charles H. Cook; SOUTH DAKOTA, John H. Davidson, Jr.; TENNESSEE, Howard B. Pickard; TEXAS, Richard Owens; UTAH, Matthew L. Hilton; VERMONT, William R. ; VIRGINIA, E. Lloyd ; WASHINGTON, Linda Gunn McCormick; WEST VIRGINIA, Anthony Petrise; WISCONSIN, Philip L. Harris; WYOMING, Ann Stevens.

POSITION AVAILABLE. Members of the AALA interested in applying for appointment as [illegible] *Update* (effective October 1986 issue) should contact: Neil D. Hamilton, Drake University School of Law, Des Moines, IA 50311, 515-271-2824.