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Agricultural Law Update

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INSIDE

IN FUTURE ISSUES

Bureau of Reclamation rules for aid under the Disaster Assistance Act of 1988

On April 10, 1989, the Bureau of Reclamation issued its interim rules for Emergency Loans, Temporary Water Sales, and other Assistance under the Disaster Assistance Act of 1988 (the Act) (102 Stat. 924 (1988)). 54 Fed. Reg. 14228 (1988). These rules add a new Part 423 to Title 43 of the Code of Federal Regulations. As emergency rules, they become effective immediately.

Under these programs, qualified applicants may obtain loans and other assistance from the Bureau of Reclamation to remedy the effects of actual or prospective economic injury resulting from drought conditions in either 1987, 1988, or 1989. 54 Fed. Reg. 14230 (1989). To be eligible for assistance, an area must meet three criteria: it must be located within one of the seventeen Reclamation States, be an area in which the governor of the state has declared a drought emergency, and be in an area that is eligible for disaster relief under USDA regulations. 54 Fed. Reg. 14230 (1989).

The primary program under these regulations provides transfers of water between willing buyers and willing sellers in order to redistribute water supplies to where they are most critically needed as the result of a drought. Interested buyers are asked to submit the following information to the appropriate Reclamation Regional Director: the amount of water supply and timing of water release requested, the proposed purchase price, the expected use of the water supply, and the location of use. Interested sellers are encouraged to submit the following types of information: the amount of water available for sale, the proposed sale price, the timing of its availability, and the source of the water supply. Moreover, the seller is also asked to provide legal information relating to the seller's right to the water and the normal use or purpose of the supply. 54 Fed. Reg. 14230 (1989).

This information will be used by Reclamation Regional Directors to match potential exchanges. Where sufficient water supplies exist, buyers and sellers will be encouraged to negotiate an exchange agreement that is consistent with state law. 54 Fed. Reg. 14230 (1989). However, when buyer demand exceeds the available

(Continued on next page)

"Justice" prevails in Arizona federal court

A federal district court in Phoenix has ruled in *Justice v. Lyng*, Civ. No. 87-1569 PHX WPC, that the Secretary of Agriculture acted arbitrarily, capriciously, and in direct contravention of the Department's own regulations in combining all thirty-three partners of Red Mountain Farming Company, Red Mountain Farms Management Company, and the Aztec Partnership into one "person" for 1986 ASCS program purposes.

The plaintiffs, who raised cotton, wheat, and feed grain on two Arizona farms, filed their lawsuit in 1987, seeking a declaratory judgment that they were entitled to be treated as thirty-three separate persons for the 1986 ASCS program year. They alleged the 1987 decision by the Deputy Administrator for State and County Operations (DASCO), which combined them into one person for 1986, was arbitrary, capricious, unreasonable, and otherwise not in accordance with the law. See 5 Agric. L. Update 1 (July, 1988) for a discussion of previous developments in this case.

First, plaintiffs contended that two separate farming agreements entered into by Red Mountain Farms Management Company (the Management Company) with Red Mountain Farming Company (the Farming Company) and with the Aztec Partnership (Aztec) were joint ventures, which are expressly exempted by 7 C.F.R. section 795.7 from the Department's so-called "financing" rules contained in 7 C.F.R. section 795.3. Second, the plaintiffs alleged that there was no authority for treating a late land lease payment from Aztec to the Farming Company as financing of Aztec by the Farming Company in violation of 7 C.F.R. section 795.3. Third, plaintiffs challenged a finding by DASCO that certain bank loans made to the partners

(Continued on page 7)

supply, priorities will be established. In those instances where state law establishes use priorities, those priorities will be used to allocate the water. 54 Fed. Reg. 14230 (1989).

The second program under the regulations implements the Act's policy of making Reclamation project water or water conveyance capacity available, on a temporary basis, to mitigate losses and damages from a drought. This policy is to be accomplished through contracts that are consistent with the interstate compacts governing the use of the water, with state law, and with existing contracts. 54 Fed. Reg. 14230-31(1989). The application for program participation must be made to the appropriate Reclamation Regional Director and must contain the following information: the identification of water conservation plans; the quantities of water involved; the perennial crops or crops for foundation livestock uses that are involved; other relevant data on water uses and expected results; and financial data demonstrating the applicant's repayment ability. 54 Fed. Reg. 14231 (1989).

These water supply and conveyance contracts must be consistent with subsection 9(c)(2) or 9(e) of the Reclamation Project Act of 1939 (53 Stat. 1187), unless the Act authorizes different provisions. The contracts must terminate no later than December 31, 1989. These contracts may be used to supply water to land that is currently irrigated by nonproject water supplies. Land that receives temporary water supplies, but that is not now subject to federal reclamation law, will not become subject to the ownership limitations of reclamation law as a result of receiving water under this program. In addition, lands currently subject to the ownership limitations will not be exempted from those limitations because of the delivery of the temporary water supplies. 54 Fed. Reg. 14231 (1989).

The price of the water under these contracts must be at least sufficient to recover all federal operation and maintenance costs, and a proportionate share of capital costs. The price of water will be full cost under certain circumstances enumerated in the regulations. 54 Fed. Reg. 14231 (1989).

The third program is the Emergency Loan Program. For the purposes of this program, a "contracting entity" is defined as an "organization or individual determined by the Commissioner of Reclamation to be an acceptable contractor." 54 Fed. Reg. 14230(1989). Under this program, any contracting entity located in a designated drought area may be eligible to obtain loans from the Bureau of Reclamation for the purposes of improving water management, instituting water conservation activities, acquiring and transporting water, and financing drought-induced increases in pumping costs. 54 Fed. Reg. 14231 (1989).

The loan application should be directed to the appropriate Reclamation Regional Director and should contain information relating to the expected use of the loan funds, including water conservation plans; the quantities of water involved; the perennial crops or crops for foundation livestock uses that have been affected by drought; water purchase and sales price criteria; and other relevant data on water uses and expected results. The application must also provide data demonstrating the applicant's repayment ability. 54 Fed. Reg. 14231 (1989).

These loans must be repaid over a five- to ten-year period, beginning not later than the first year following the next year of adequate water supply, as determined by the Secretary of the Interior. Loans for agricultural purposes are interest free. 54 Fed. Reg. 14231 (1989). Contracts for the repayment of these loans will be treated separately from any other loan repayment or water service contracts existing between the U.S. and the contracting entity. 54 Fed. Reg. 14231 (1989).

Under the fourth program, the Secretary of the Interior may make water from a Reclamation project available to prevent or mitigate damage to fish and wildlife resources caused by drought conditions in the eligible areas. 54 Fed. Reg. 14232 (1989). This water may be provided to either a federal, state, local, or private entity responsible for maintaining the relevant fish or wildlife resources. The application for this water must contain the following information: the resource to be protected; the magnitude of this protection; the level and extent of coordination with state and local officials; the source and quantity of the water to be used; the justification for the proposed action; and any relevant information deemed necessary by the Bureau of Reclamation to make a decision concerning the proposed action. 54 Fed. Reg. 14232 (1989).

Julia R. Wilder

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Letters and editorial contributions are welcome and should be directed to Linda Grim McCormick, Editor, 188 Morris Rd., Toney, AL 35773.

Farm Credit System right of first refusal – the conflict persists

With the Eighth Circuit's recent dismissal of *Leckband v. Naylor*, Nos. 88-5301 MN and 89-5141 MN (8th Cir. May 5, 1988), by stipulation, and *Martinson v. Federal Land Bank of St. Paul*, No. 88-5202 ND (8th Cir. May 5, 1988) on grounds of mootness, the prospects for an immediate appellate decision on the issue of whether Farm Credit Banks have to offer the right of first refusal based on the property's appraised value before offering the property at auction have evaporated. Complicating matters is the decision of *Payne v. Federal Land Bank of Columbia*, No. A-C-88-145 (W.D.N.C. April 17, 1988), in which the court held that the right of first refusal did not have to be extended in any particular order, a result contrary to the results reached in *Leckband* and *Martinson*.

Section 108 of the Agricultural Credit Act of 1987, now codified at 12 U.S.C. section 2219a (West Supp. 1988), granted former owners of property acquired by Farm Credit Banks the right of first refusal in repurchasing that property. The plaintiffs in *Leckband*, *Martinson*, and *Payne* each argued that the two prescribed alternatives for implementing that right, purchase at appraised value or purchase at auction by, in effect, matching the highest bid, had to be offered in that order. The district courts in *Leckband* and *Martinson* agreed with the plaintiffs, the *Payne* court did not.

Intertwined with the right of first refusal issue in the *Leckband* and *Martinson* appeals, but not addressed expressly by the district court in *Payne*, was the issue of whether the 1987 Act implied a private cause of action against Farm Credit Banks for violations of the Act. That issue is still before the Eighth Circuit in *Zajac v. Federal Land Bank of St Paul*, No. 88-5353 ND (8th Cir. argued Dec. 12, 1988) and before the Ninth Circuit in *Harper v. Federal Land Bank of Spokane*, No. 88-4033 (9th Cir. argued May 2, 1989). Two federal district courts recently held that no such implied cause of action exists. *Wilson v. Federal Land Bank of Wichita*, No. 88-4058-R (D. Kan. Jan. 30, 1989); *Neth v. Federal Land Bank of Jackson*, No. 88-0324-B-C (S.D. Ala. Dec. 30, 1988). – *Christopher R. Kelley*

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Farmers

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– *Drew Kershen*

AG LAW CONFERENCE CALENDAR

Seventh Annual Western Mountains Bankruptcy Law Institute

June 28-July 2, 1989, Jackson Lake Lodge, Jackson Hole, Wyoming.

Topics include: debtor in possession financing; recent developments in agricultural bankruptcy finance.

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For more information, call 404-535-7722

Third Annual Northeast Bankruptcy Law Institute

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June 5-8; June 12-15; June 19-22; June 26-29; July 10-13; July 17-20; June 5-July 19; Drake University's Agricultural Law Center.

Topics include: The law of federal farm programs (6/5-8); agriculture and the environment (6/12-15); business planning for farm operations (6/19-22); Article Nine and agricultural finance (6/26-29); legal aspects of biotechnology and agriculture (7/10-13); legal aspects of horsebreeding and syndication (7/17-20); introduction to agricultural law problems (6/5-7/19).

Sponsored by Drake University's Agricultural Law Center.

For more information, call 515-271-2947 or 271-2065

Boundaries and Water: Allocation and Use of a Shared Resource

June 5-7, 1989, University of Colorado School of Law.

Topics include: interjurisdictional water quality issues; interjurisdictional groundwater allocation; unique legal issues raised by long distance water transfer proposals.

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For more information, call 303-492-1288

Economic implications of liability rules for groundwater pesticide

by Terence J. Centner

Contamination of groundwater in the U.S. has lately gained increased attention because of numerous discoveries of hazardous waste materials and the identification of toxic chemicals in water supplies.[1] Much of the reported contamination involves spills and point source pollution. However, data suggests that nonpoint source pollution of groundwater from agricultural producers is occurring. Usage of herbicides and insecticides by agricultural producers has been identified as having contaminated groundwater in at least twenty-three states.[2]

Although producers may be financially liable for damages accruing from their pesticide usage under state and federal law, few agricultural producers have been held responsible for damages arising from violation of statutory legislation covering groundwater contamination. Rather, the more likely grounds for producer liability are common law legal actions based on negligence, nuisance law, strict liability in tort, and trespass.[3]

In many states, agricultural producers applying pesticides contaminating groundwater are liable to victims under a strict liability standard for damages despite the fact that the producers applied the pesticides according to label instructions and in conformance with accepted husbandry practices. Thus, nonnegligent producers incur liability for the normal and accepted use of agricultural pesticides.

To eliminate liability of agricultural producers in this situation, the American Farm Bureau Federation has proposed legislation that would exempt agricultural producers from the strict liability standard if they apply pesticides in compliance with label instructions and applicable law and are not negligent, reckless, or misusing the chemical. This legislation may be called the "groundwater exemption legislation." Producers are liable for contamination of groundwater only if they are negligent in their use of pesticides.

This article examines the economic ramifications of the groundwater exemption legislation. After noting the new legislative developments, economic concepts of moral hazard, evidentiary uncertainty, and noncompensatory damages are identified as problems accompanying negligence and strict liability rules for groundwater contamination. The identification of other available responses lends support for consideration of alternative options to provide a more appropriate resolution for nonpoint agricultural pollution.

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The exemption legislation

The groundwater exemption legislation has been introduced in Congress[4] and adopted in Vermont, Iowa, and Georgia. The legislation provides limited protection to producers by precluding actions for contamination of groundwater under a strict liability standard. The provisions do not preclude litigation or strict liability in cases where victims allege that groundwater contamination was caused by improper usage, negligent washing of equipment, or unacceptable disposal of materials. In addition, causes of action in nuisance are permitted.

Vermont's statutory law provides that any person who alters groundwater quality as a result of agricultural activities shall be liable only if the alteration was either negligent, reckless, or intentional.[5]

Iowa's provision to exempt agricultural producers using fertilizer and pesticides from strict liability for groundwater contamination in its Groundwater Protection Law provides that agricultural producers shall not be liable for costs of active cleanup or damages from the application of nitrates or pesticides if certain prerequisites are met.[6] The prerequisites include following label instructions and application in conformance with soil testing results. Compliance with the statutory provisions may be raised as an affirmative defense.[7]

Georgia's legislation exempts agricultural producers who apply fertilizer, plant growth regulators, or pesticides in a manner consistent with labeling and in accordance with acceptable agricultural management practices and applicable state and federal laws.[8] Thus, agricultural producers are exempted from liability unless there is proof of negligence or lack of due care.

Economic analysis

To show the economic implications of the exemption legislation, a comparison of costs associated with regular negligence and strict liability may be developed. Three categories of costs associated with contamination need to be considered: regular production costs, internal precautionary costs to reduce the likelihood of imposing damages on others, and external costs arising from injuries to others.

Regular production costs may be assumed to be the same under both theories of liability. Internal precautionary costs are the costs of exercising precaution. External costs from groundwater contamination arise when damages are inflicted on others. The addition of producer's costs of precaution and expected costs of damages delineates the costs to society of using pesticides.[9]

Negligence

If the liability standard is negligence, there exists a legal standard of care at which liability attaches. If a person's level of care is less than the legal standard, the person incurs liability. However, if a person's level of care is greater than the legal standard, costs of liability under negligence are equivalent to costs of precaution. This discloses that a rationally self-interested person will choose at least the legal standard of care to minimize private costs.

Liability under a negligence standard may involve two major obstacles to efficient economic solution whereby costs to society are minimized: evidentiary uncertainty[10] and moral hazard.[11] First, because of uncertainty in knowing or implementing due care, evidentiary uncertainty may be expected to lead risk-adverse producers to edge away from the minimal legal standard of care and adopt excessive precaution to insure against possible errors in the calculation of due care.

Second, difficulties in establishing a legal standard of care may mean that legislatures, courts, and administrative agencies actually use a legal standard that is excessive. Excessive care may be a result of fear of exorbitant damages or could result from an over-estimation of liability costs.

Third, if precaution is bilateral, or the victim has any control over the severity or likelihood of injuries, a moral hazard problem may exist. Moral hazard concerns the lack of incentives for a person to minimize costs. A victim of groundwater contamination may not have an adequate incentive to minimize contamination injuries when injurers are liable for all damages. This occurs under strict liability when an injurer is liable for all injuries despite actions of the victim that might have increased or aggravated damages from the injuries. Moral hazard

also may exist under contributory or regular negligence because once the injurer is found to be liable for injuries, the injurer is generally liable for all damages. These damages may include excessive amounts arising from actions of the victim.

Strict liability

Alternatively, a strict liability standard whereby the injurer always is liable for the cost of accidents may be adopted. Strict liability rules adopting compensatory damages may provide for an efficient solution by allowing the injurer to minimize costs by selecting a level of precaution so that the sum of precaution and liability costs are minimized. However, since strict liability does not involve a legal standard of care, the injurer may have greater incentive to adopt more efficient technology to reduce costs. Strict liability may also spread risk[12] and reduce administrative and transaction costs.

Although this suggests that strict liability may provide an efficient solution to minimizing costs involved with pollution, two major impediments have been identified as precluding strict liability from serving as an efficient solution. The first impediment involves situations in which the level of damages being awarded to injured victims is not perfectly compensatory. This would exist whenever punitive damages are allowed, and may exist if awards include anticipated profits and lost opportunities. Such damages are not common, but they may be severe.

An example of excessive damages for groundwater contamination is the recent case of *Miller v. Cudahy Co.*[13] Neighboring property owners and lessees had sued for damages from salt intrusion of the aquifer under their property. The court termed the pollution a "continuing abatable nuisance" and awarded actual damages of $3.6 million for temporary pollution damages, which may have exceeded the value of the injured property.[14] In addition, the court upheld an award of $10 million in punitive damages.[15]

The second impediment to strict liability serving as an efficient solution to minimizing costs involved with pollution is bilateral precaution where the victim has some control over the severity or likelihood of an accident.[16] The presence of moral hazard may preclude the minimization of costs. In such cases, some type of non-strict liability rule that incorporates some version of a contributory negligence defense would provide a preferred solution.[17] Such a solution would more accurately apportion costs based upon a party's control over damages.

Application to groundwater contamination

Although the groundwater exemption legislation may be based on economic efficiency arguments regarding precautionary costs, the legislation does not address the real issues of groundwater contamination by pesticide usage. It basically alters who must take care and the burden of proof so that it is less likely that an agricultural producer will be liable for damages. While such a change bestows benefits to producers, the overall merit of the new legislation should consider a broader scope of social needs and objectives. This section identifies additional considerations that need to be analyzed to develop a preferred economic response to contamination by pesticide usage. Such a response would consider costs to society rather than costs to persons in a particular interest group.

Reduced contamination

By simply changing liability standards, costs from contamination damages are assigned to different persons without considering whether economic efficiency could be enhanced through reduced pollution. Although this omission may not reduce benefits accruing from moving from a strict liability standard to negligence, the advantages may be severely limited since no consideration is given to diminished costs that may arise from reduced contamination.

Alternative options

Given the uncertainty regarding potential health problems from contaminated groundwater, resolution of pesticide contamination problems should consider a more expansive array of options. Three major options include modification of liability rules, changes in existing entitlements, and economic incentives to reduce contamination.[18]

The first option entails governmental regulation that restricts the polluter's liability in limited situations in order to reduce excessive damages or respond to equitable considerations. The groundwater exemption legislation falls under this category.

The second option involves legislation that alters existing entitlements. New legislation could grant the public property rights in uncontaminated groundwater and contaminators would pay for water resource damages.[19]

The third alternative would rely on economic incentives to reduce contamination. Tradeable discharge-permit systems, pollution charges, and tax-subsidy solutions through pesticide funds could provide economic incentives to help reduce contamination. The tradeable discharge-permit system has attracted the most attention for nonpoint source pollution because its economic incentives may offer the most feasible means of reducing nonpoint source contamination.[20]

Equity

The groundwater exemption legislation was based on an equitable argument that non-negligent producers deserve special dispensation for their use of pesticides. This equitable argument must be balanced against the needs of victims. By protecting non-negligent producers, are innocent pollution victims left without compensation for their contamination injuries? It is not clear that equitable considerations favor exemption legislation whereby innocent victims are impeded in remedies to collect damages for injuries caused by non-negligent producers.

Investments of property owners

A factor not considered by the analysis is the initial investment of property owners. Does the existence of capital investments by agricultural producers affect an efficiency solution? While not all capital investments would be outmoded if producers could not use pesticides, given the competitiveness of agriculture, the economic consequences of not being able to employ a given technology could force a significant number of producers out of business.

Also, should property owners have a right to potable groundwater? While a considerable body of American jurisprudence holds that property owners do not have the right to pollute others, and such a resolution of competing interests may be best for most situations, an alternative response may be preferred for special situations. If there are many producers using chemicals that have not been identified as constituting a major contamination problem and only a few persons who may be injured from the producers' activities, perhaps efficiency favors granting an entitlement to pollute.

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Assigning liability for precaution

Regular negligence and strict liability assign precaution to only one party, the injurer. However, precaution is not unilateral as victims have the ability to use precaution not to ingest contaminants in groundwater though limiting the amount they drink, purchase of bottled water, or treatment. Toxicology thresholds of some pesticides may depend upon quantities consumed so that victims who ingest groundwater in moderate quantities as opposed to substantial quantities may affect the probability or severity of contamination injuries.

External costs may be affected by the victim's precaution, so that victims should have some type of incentive to reduce injuries. By failing to consider the bilateral nature of groundwater contamination, regular negligence or strict liability without some type of contribution are accompanied by a moral hazard problem so that these rules may not provide an efficient resolution to the pollution problem.

Symmetry of precaution

Adopting the premise that precaution is shared, what is the symmetry between injurers and victims, and how does symmetry affect evidentiary uncertainty? If parties are symmetrically situated, comparative negligence might be a preferable solution, as it minimizes the total amount of excessive precaution of both parties.[21] If the injurer is better able to take precaution, regular negligence may be preferred. Regular negligence would provide a strong incentive for the injurer, the party most able, to take precaution. If the victim is better able to take precaution, contributory negligence may be a better solution, as it would encourage the victim to take precaution.[22]

An additional question is whether the number of victims relative to the number of injurers should affect placement of precaution. Although it may be unclear whether a general rule of symmetry may be established for pesticide contamination of groundwater, can a rule be developed based upon the number of victims relative to the number of injurers? For example, where there are a large number of victims, does symmetry favor injurers taking precaution because it is easier for a few of them to abstain from pesticide contamination? Or when there are few victims and many injurers, does symmetry favor victims taking precaution?

Uncertainty

The analysis bases social welfare on prevention costs and expected contamination costs. In the past, it has been shown that inadequate or faulty information may have resulted in inaccurate estimations of these costs. For example, in the case of DDT and EDB's, later scientific discoveries markedly altered previous acceptable activity levels, showing that earlier contamination costs were underestimated substantially.

In other situations, the contamination costs of a known chemical have resulted in applicators switching to an alternative chemical under a belief that it would reduce costs, only to later learn that the alternative chemical has even greater contamination effects so that substitution of the new chemical has actually increased contamination costs. Uncertainty about safety levels for contaminants and the level of care necessary to controvert negligence offers support for legislation granting victims the right to be free from groundwater contamination. Yet, the inadequate information of injuries from pesticides introduces uncertainty that may obviate any credible attempt to maximize social welfare through liability rules.

Conclusions

Through the adoption of groundwater exemption legislation, agricultural producers are protected against liability for contamination injuries based upon a strict liability cause of action. Unfortunately, it is not clear that the adoption of exemptions for producers' pesticide usage is premised on social welfare or efficiency justifications. Although the analysis discloses that the shift from strict liability to negligence may be beneficial to producers, several issues may preclude any meaningful efficiency gains. Moreover, the legislation does nothing to respond to the growing concern about groundwater contamination.

If legislatures desire to alter liability rules to respond to equitable considerations, they should consider alternative solutions rather than simply rely on liability rules. Modifications of entitlements to incorporate pollution charges or marketable water pollution rights may offer superior mechanisms to provide economic incentives to reduce contamination.

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3. Centner, *Groundwater Quality Regulations: Implications for Agricultural Operations*, 12 Hamline L. Rev. In Press (1989).

4. S. 2035, § 825, 100th Cong., 1st Sess., 1988.

5. Vt. Stat. Ann., § 1410 (Supp. 1987).

6. Iowa Code Ann. § 455E.6 (Supp. 1988).

7. However, the statute also says that it does "not enlarge, restrict, or abrogate any remedy under other statutory or common law which serves the purpose of groundwater protection." Iowa Code Ann. § 455E.6 (Supp. 1988). It thereby is not clear exactly what protection is afforded producers. If the statute does not restrict or abrogate remedies under common law, how can the exceptions for agricultural producers be given any effect?

8. Ga. Code Ann., § 2-7-170 (Supp. 1988).

9. Cooter and Ulen, *Law and Economics*, Glenview, IL: Scott, Foresman & Co., 1988, p. 364.

10. *See* Cooter and Ulen, *An Economic Case for Comparative Negligence*, 61 N.Y.U. L. Rev. 1067 (1986).

11. *See* Burrows, *Idealized Negligence, Strict Liability and Deterrence*, 2 Int'l Rev. Law and Econ. 165 (1982); Shavell, *Strict Liability Versus Negligence*, 9 J. Legal Stud. 1 (1980).

12. Alessi and Staaf, *Liability, Control and the Organization of Economic Activity*, 7 Int'l. Rev. Law Econ. 5 (1987).

13. 858 F.2d 1449 (10th Cir. 1988).

14. *Id.* at 1451 & 1461.

15. *Id.*

16. Burrows, *supra* note 11; Ota, *The Fairness and the Efficiency of the Compensation System: An Economic Analysis of the Tort Theories*, 7 Int'l Rev. Law and Econ. 229 (1987); Sbavell, *supra* note 11.

17. Burrows, *supra* note 11; Posner, *Strict Liability*, 2 J. Legal Stud. 205 (1973).

18. Calabresi and Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972); Centner, "Developing an Economic Methodology for Legal Provisions Regulating Groundwater Pollution," scheduled for publication in *Advances In Water Pollution Control*, Oxford: Pergamon Press, 1989.

19. Willey and Graff, *Federal Water Policy in the United States – An Agenda for Economic and Environmental Reform*, 13 Colum. J. Envtl. L. 317 (1988).

20. *Id.* at 344. *See also* Stewart, *Controlling Environmental Risks Through Economic Incentives*, 13 Colum. J. Envtl. L. 153 (1988).

21. Cooter and Ulen, *supra* note 10.

22. *Id.*

"JUSTICE" . . . / CONTINUED FROM PAGE 1

were for operations, rather than for capital contributions, and had been guaranteed by the other partners. Plaintiffs alleged that this finding was based on a clerical error in the bank's records, and that DASCO's ruling totally ignored a sworn affidavit from the bank's loan officer pointing out the clerical error. Fourth, the plaintiffs claimed that DASCO acted arbitrarily and capriciously in refusing to consider substantial capital contributions made by certain of the partners shortly after the April 1, 1986 program deadline date. April 1, 1986 was the very date DASCO ruled, in connection with a 1985 appeal by certain Management Company partners, that capital contributions had to be quantitatively substantial, not just proportionate to a partner's interest, to be deemed "commensurate" with the partner's share in the proceeds derived from farming, as required by 7 C.F.R. section 795.7. As soon as the partners learned of this new interpretation of the commensurate contribution rule, they made significant additional capital contributions, which DASCO ruled were untimely for 1986. Finally, the partners challenged as arbitrary, capricious, and inconsistent with 7 C.F.R. section 795.16 [which defines a custom farming agreement as "the performance of services... for hire with remuneration on a unit of work basis"], DASCO's decision that a provision in the Management Company-Aztec farming agreement, which provided that certain labor and tillage work done by the Management Company's employees would be "deemed to cost $130 per acre, per year" but would be shared equally by the two entities, constituted "custom farming." Neither Aztec nor the Management Company would receive any proceeds unless they exceeded the deemed costs of $130 per acre. On this theory of custom farming, DASCO had combined the twenty-two partners of the Management Company and the four partners of Aztec into one person, and had also ruled that because the Farming Company was one of the partners of the Management Company, the seven partners of the Farming Company had to be combined as one person with the Management Company and Aztec partners as well.

The court held that the Department's determinations were arbitrary and capricious in each critical respect. The court specifically rejected the government's argument that "a grant of Summary Judgment to the Plaintiffs will only result in remand to the Secretary for further fact-finding." Rather, the court sent the case back to the Secretary "to redetermine the separate person eligibility" of the plaintiffs and for "further administrative proceedings consistent with the holdings of this Court."

– Alan R. Malasky

STATE ROUNDUP

FLORIDA. *Ambiguous coop by-laws.*

In *Pittman v. Groveowners Cooperative of Loxahatchee, Inc.*, 534 So.2d 1207 (Fla. Dist. Ct. App. 1988), former members of a marketing cooperative sued that association and some of its board members for negligence and breach of fiduciary duty in the alleged mishandling of profits and the payment of improper salaries.

The cooperative maintained, harvested, and marketed citrus products grown on members' lands from 1978 to 1985. The association distributed profits on a per-acre basis and failed to maintain records as to the amount or type of fruit grown on each owner's land.

The cooperative had increased the salary of one officer from $10,450 in 1980 to $63,638 in 1985 and increased the basis of his salary in 1983. During that period, the association's profits rose from $173,000 to $442,000. The members of association approved the increased basis in salary in 1984.

The former members filed suit in 1985, alleging that the board members had improperly calculated profit distribution and that the association was paying an excessive salary to the one officer. The defendants raised various affirmative defenses, including waiver, estoppel, and ratification. They also alleged that ambiguous bylaws allowed per-acre profit distribution.

The trial court directed a verdict for the defendants on all counts except for negligence in the handling of plaintiffs' moneys and in the distribution of profits. The jury found for the defendants on the remaining count.

The appellate court cited Fla. Stat. section 619.03 in affirming the trial court's directed verdict in favor of the association on the claim of breach of fiduciary duty for the per-acre profit distribution. That section provides that non-stock marketing cooperatives and their members shall have contractual rights based on the associations' by-laws. The court held that the former members had failed to show any provision of the by-laws that required distribution based on actual production. The court further pointed out that the members had not objected to the method of distribution for seven years.

The court also affirmed the directed verdict for the association on the claim that it had negligently and in contravention of its fiduciary duties paid an excessive salary to an officer of the coop. The court held that compensation was a business judgment that must be upheld in the absence of a showing of bad faith. It stated that sufficient evidence in the record supported the association's business judgment.

– Sid Ansbacher

TEXAS. *Chapter 12 status report.*

[This article summarizes the report of Walter O'Cheskey, Chapter 12 Trustee in the Northern District of Texas to the Bankruptcy Judges of that District.]

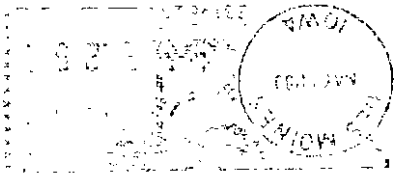
Generally, Chapter 12 has moved through a surge of filings in 1987 with 150 new petitions, of which 42 voluntarily dismissed or converted, and by year-end, 108 were confirmed. Calendar year 1988 showed new cases totaling 54, a substantial decrease from 1987, with 13 cases being dismissed or converted. To date [March 30] in 1989, 11 new cases have been filed, compared with 58 in 1987 and 14 in 1988. A total of 145 Chapter 12 plans have been confirmed, and only six have been dismissed because of inability to complete a confirmed plan of reorganization.

Funds received from debtors from June 1987 through February 1989 total $5,311,406.24 ($417,527.00 in 1987; $3,001,698.00 in 1988; and $1,477,755.45 in 1989). Of funds received, $452,700.61 has been received as disposable income for unsecured creditors.

These divisions have attempted to use uniform procedures in implementing Chapter 12 in the Northern District of Texas. Further they have attempted to combine the most workable parts of both Chapter 11 and Chapter 13 to streamline and adapt Chapter 12 especially for agricultural bankruptcy.

Current work involves streamlining disposable income calculation and reporting and debtor education. To be adopted soon is a form called "Chapter 12 Plan Feasibility, the Test for Disposable Income and Minimum Acceptable Revenue Requirements," which will be a standard part of the confirmation procedure. In regard to debtor education, Monthly Reports have been required for some time and a Debtor School is planned.

– Submitted by the Honorable John C. Akard, Bankruptcy Judge for the Northern District of Texas



AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Sixth Annual Student Writing Competition. The AALA is sponsoring its sixth annual Student Writing Competition. This year, the AALA will award two cash prizes in the amount of $500 and $150.

Papers must be submitted by June 30, 1989, to Thomas A. Lawler, Attorney at Law, P.O. Box 280, Parkersburg, IA 50665; (319) 346-2650.

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

Any AALA member may nominate another member for selection by submitting the name to the chair of the Awards Committee. Any member making a nomination should submit biographical information of no more than four pages in support of the nominee. The nominee must be a current member of the AALA, and must have been a member thereof for at least the preceding three years. Nominations should be sent to Thomas A. Lawler, Attorney at Law, P.O. Box 280, Parkersburg, IA 50665; (319) 346-2650.

1990 Annual Meeting. The 1990 Annual Meeting and Education Conference of the AALA will be held October 5-6, 1990, at the Minneapolis Marriott City Center, Minneapolis, MN.