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Almond marketing orders held not to be a "taking"

Under the Agricultural Marketing Act of 1937, the Secretary of Agriculture may enter into agreements with producers to implement market controls governing the supply and distribution of certain agricultural commodities. 7 U.S.C. §§ 601-602, 608, 608a-c, 610, 612, 672-674 (1988 & Supp. IV 1992). These controls are imposed through regulations known as "marketing orders." The U.S. Court of Federal Claims has dismissed the claims of several almond handlers and producers contending that portions of the almond marketing orders in effect for the 1982 through 1985, 1988, and 1990 crop years constituted a "taking" for which compensation must be paid under the fifth amendment. *Cal-Almond, Inc. v. United States*, 30 Fed. Cl. 244 (1994).

In general, marketing orders control supply by placing restrictions on the quantity and quality of marketed products, by providing for differentiations in pricing between primary and secondary markets, and by limiting production. Marketing orders for certain commodities, including nuts, are administered by industry committees. Among other responsibilities, the industry committees submit marketing recommendations to Secretary based on anticipated yield and demand. The Secretary may then adopt these recommendations through regulations as the marketing orders for the particular crop year.

At issue in the *Cal-Almond* litigation were marketing orders requiring a percentage of the anticipated almond crop be placed in reserve for sale in non-competitive markets such as for use in school lunch programs, charities, and animal feeds. The "set-aside" contemplated by the reserve program was implemented by requiring handlers to withhold from sale in the open market a percentage of the almonds under each handler's control equal to the specified reserve percentage. *See* 7 C.F.R. § 981.50 (1993). Ultimately, handlers received payment from the sale of the reserves, but at a price substantially below the open-market price. During the crop years at issue, the plaintiffs claimed losses of several million dollars in sales because of the reserve requirements.

The plaintiffs in *Cal-Almond* also challenged the financial responsibilities imposed on handlers for the industry committee, known as the Almond Board of California. The Almond Board assessed handlers for its expenses through levies on all almonds

Supreme Court denies certiorari in Chapter 12 case

The United States Supreme Court recently denied certiorari in the agricultural bankruptcy case of *Lindsey, Stephenson & Lindsey v. F.D.I.C.*, Docket No. 93-804, 1993 W.L. 495242. In the case below, *Matter of Lindsey*, 995 F.2d 626 (5th Cir. 1993), the Fifth Circuit reviewed the lower court's dismissal of a Chapter 12 bankruptcy on eligibility grounds. Specifically at issue were the Chapter 12 debt limitation requirements. The debtor, a family farm partnership, owed a large non-recourse obligation to the FDIC. This debt, if combined with the other partnership obligations, put the debtor over the maximum debt limit of $1,500,000. The debtor, however, argued that non-recourse obligations should not be counted as debt for purposes of the maximum debt provision, as there is no personal liability attached to it. The creditor objected and requested relief from the automatic stay and the dismissal of the bankruptcy case. The bankruptcy court granted the creditor's requests. On appeal, the district court affirmed. On further appeal to the circuit court, the Fifth Circuit also affirmed. It held that non-recourse obligations must be included when computing the amount of debt for purposes of the Chapter 12 maximum debt limitations, concluding that the terms "debt" and "claim" were coextensive. The Fifth Circuit court also noted that even though the non-recourse obligation did not impose personal liability, it did create a legal obligation that constituted "liability on a claim."

—*Susan A. Schneider, Hastings, MN*

received by a handler for the handler's own account. *See* 7 C.F.R. § 981.81 (1993). The plaintiffs claimed these levies amounted to several thousand dollars for the crop years at issue.

The plaintiffs' "takings" argument was twofold. First, they maintained a "*per se* taking" occurred because, through the marketing orders, "the Government has relegated unto itself the most essential attribute of commodity ownership — control over disposition — while leaving plaintiffs in the position of having to accept whatever value such disposition might yield, no matter how minimal." 30 Fed. Cl. at 246. Second, the plaintiffs argued that "the reserve system deprives a handler of substantially all economic value in the almonds placed in reserve and therefore amounts to a taking by regulation." *Id.*

The court rejected each of the plaintiffs' arguments. In essence, the court found the plaintiffs had failed to show they had a property right "to market their almonds free of regulatory controls." *Id.* The court observed:

> Government regulation of the almond industry . . . has been a fact of life for now well over forty years. Thus, parties, like our plaintiffs, who have been active participants in that industry throughout that time, must be understood to have accepted, as a condition of their continuing presence in that industry, the very mode of regulation about which they now complain. One who 'embarks in a business which public interest demands . . . be regulated . . . must know regulation may ensue.'

Id. at 246-47 (citing *Nebbia v. New York*, 291 U.S. 502, 534 (1934)).

The court also declined to find merit in the plaintiffs' argument that the marketing orders have gone beyond what reasonably could have been anticipated at their inception. In doing so, it cited the United States Supreme Court's recent decision in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2899 (1992), for the proposition that "'by reason of the State's traditionally high degree of control over commercial dealings, [an owner of personal property] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale).'" 30 Fed. Cl. at 247.

Finally, the court expressly disclaimed any agreement with the plaintiffs' contention "that the almonds held in reserve represent a separable component of property, distinct from the remainder of the annual crop." *Id.* at 247, n.4. The court observed that "[i]t is at least arguable, therefore, that correctly defined, plaintiffs' 'property' consists of the *entirety* of their respective annual crops. Pursuing this definition would, presumably, moot any claim to compensation since plaintiffs do not contend that their businesses, *as a whole*, have been rendered unprofitable by the Secretary's regulations." *Id.* (emphasis in original).

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

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AALA Editor..........................Linda Grim McCormick
Rt. 2, Box 292A
2816 C.R. 163
Alvin, TX 77511

Contributing Editors: Neil D. Hamilton, Drake University, Des Moines, IA; Susan A. Schneider, Hasting, MN; Christopher R. Kelley, Lindquist & Vennum, Minneapolis, MN; Linda Grim McCormick, Alvin, TX.

State Roundup. Scott D. Wegner, Lakeville, MN.

For AALA membership information, contact William P. Babione, Office of the Executive Director, Robert A. Leflar Law Center, University of Arkansas, Fayetteville, AR 72701.

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Conference Calendar

1994 Drake Summer Agricultural Law Institute

June 13-16: Agricultural taxation and business planning — Prof. Jim Monroe

June 20-23: Migrant and seasonal farmworker law — Beverly Clark

June 27-30: Water law and agriculture — Prof. J.W. "Jake" Looney

July 5-8: International agricultural trade law — Prof. Louis Lorvellec

July 11-14: Agricultural insurance: analysis of the farmers comprehensive liability policy — Prof. John D. Copeland

July 18-21: Legal issues in industrialization of agriculture— Prof. Neil Hamilton

For more information, call Prof. Neil Hamilton, (515) 271-2065.

The Pesticide Regulation Conference

May 23-24, 1994, The Grand Hotel, Washington, D.C.

Topics include: Pesticide registration and tolerance procedures; food safety; environmental exposure and ecological risk assessment.

Sponsored by: Executive Enterprises.

For more information, call 1-800-831-8333.

Federal Register in brief

The following is a selection of matters that were published in the *Federal Register* during the month of March, 1994.

1. CCC; Revisions to the upland cotton user marketing certificate program; proposed rule. 59 Fed. Reg. 9674.
2. CCC; Emergency livestock assistance; final rule; effective date 3/2/94. 59 Fed. Reg. 9918.
3. FCA; Federal Agricultural Mortgage Corporation; conflicts of interest; final rule. 59 Fed. Reg. 9622.
4. FCA; Collection of claims owed the U.S.; final rule. 59 Fed. Reg. 13187.
5. IRS; Estate and gift tax marital deduction; final rule. "...property included in the surviving spouse's gross estate under 2044 is treated as passing from such spouse's estate upon such spouse's later death for purposes of determining whether the estate is eligible to pay the estate tax liability in installments under section 6166. 59 Fed. Reg. 9642.
6. FGIS; U.S. standards for soybeans; proposed rule; effective date 9/1/94. 59 Fed. Reg. 10569.
7. PSA; Amendment to certification of central filing system; Oklahoma. 59 Fed. Reg. 14135.
8. FMHA; Removal of the prohibition against charging interest on interest on FmHA guaranteed loans; proposed rule; 59 Fed. Reg. 14769.

—Linda Grim McCormick, Alvin, TX

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If you desire a copy of any article or further information, please contact the Law School Library nearest your office.

—Drew L. Kershen, Professor of Law, The University of Oklahoma, Norman, OK

Legal issues in contract production of commodities — Part II

By Neil D. Hamilton

This article concludes the two-part series on legal issues in contract production of commodities. The following list represents some legal matters that could arise in grain contracting.

Issues from the application of the U.C.C.

The application of Article 2 of the U.C.C. means a variety of traditional contract issues may arise in grain contracts. Each of these issues has been the subject of recent litigation involving contract production and marketing of grain. The following discussion illustrates how the courts have decided these issues.

The farmer as a merchant

A party's status as a merchant can influence whether or not there is a warranty of merchantability associated with the sale of goods and the applicable rules to determine if a contract offer has been accepted. Courts in the U.S. have divided on these issues. For example, in *Colorado-Kansas Grain Co. v. Reifschneider*, 817 P.2d 637 (Colo. App. 1991), the issue was whether the statute of frauds applied so that the oral agreement between the farmer and the company for the sale of grain did not create a contract. The court held the farmer was a merchant and thus the written confirmation from the company was sufficient to establish a contract. As a merchant, the farmer had ten days to object to the written notice of confirmation. On the issue of whether the farmer was a merchant, the court cited U.C.C. section 2-104(1), which defines the term as:

> a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.

If a transaction is one between merchants then "both parties are chargeable with knowledge or skill of merchants under U.C.C. section 2-204(3)." The Colorado court noted the cases holding farmers may be merchants recognize "the fact that today's farmer is involved in far more than simply planting and harvesting crops. Indeed, many farmers possess an extensive knowledge and sophistication regarding the purchase and sale of crops on the various agricultural markets. Often they are more aptly described as agribusinessmen.

The issue of whether a farmer is a merchant is a question for the trier of fact. The court in *Reifschneider* looked at a number of relevant factors, including:

1) the length of time the farmer had been engaged in the practice of selling his product to markets of his product;
2) the degree of business acumen shown by the farmer in his dealing with other parties;
3) the farmer's awareness of the operation and existence of farm markets; and
4) the farmer's past experience with or knowledge of the customs and practices which are unique to the particular marketing of the product which he sells.

Another recent case holding a farmer is a merchant in the sale of commodities is *Agrex, Inc. v. Schrant*, 379 N.W.2d 751 (Neb. 1986). The case involves a typical situation where a grower agreed to a forward contract for the sale of grain and then the market went up. When the grower decided not to perform the contract, the buyer had to enter the market and buy at a higher price. The buyer then sued to recover the damages. The legal issues were similar to the Colorado case: did the statute of frauds apply and what effect was the farmer's failure to reply to the written confirmation. The court ruled the contract was enforceable and the farmer was a merchant. It said:

> We therefore hold that experienced grain producers who regularly grow and market grain on the open market as the principal means of providing for their livelihood, and by reason of such occupation have acquired and possess knowledge or skill peculiar to the practices and operation of grain marketing, are merchants within the meaning of Neb. U.C.C.-104 and 2-201 (Reissue 190)[379 N.W.2d at 754].

Courts in Indiana, Michigan, Missouri, Nebraska, Ohio, Illinois, and Texas have all determined farmers may be merchants.

But the view a farmer is a merchant is not universal. Courts in other jurisdictions, including Alabama, Arkansas, Iowa, Kansas, South Dakota and Utah, have ruled farmers do not become merchants simply by selling commodities they produce. For example, the Iowa Supreme Court ruled a farmer was not a merchant in *Sand Seed Service, Inc. v. Poeckes*, 249 N.W.2d 663 (Iowa 1975). The Iowa court looked at factors of the farmer's experience, for example, he did not deal in crops on the market, he just sold what he raised, and he had no business experience and only a high school education. The court set out a three prong test for when a farmer might be a merchant:

1) the farmer must be a dealer who deals in the goods of the kind involved; or
2) the farmer must by his occupation hold himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction; or
3) he must employ an agent, broker or other intermediary who by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.

Only a few years later, however, the Iowa court ruled that a farmer might be a merchant, depending on the facts of the transaction. In *Dotts v. Bennett*, 382 N.W.2d 85 (Iowa 1986), the court had determined a claim for damages made by the owner of cattle that died from eating hay purchased from the producer. The case involved two issues: 1) whether the buyer was relying on the seller's skill in purchasing the hay that was later determined to have mycotoxins, which kille several cattle, for purposes of establishing a breach of an implied warranty of fitness for a particular purpose; and 2) whether the seller was a merchant for purposes of an implied warranty of merchantability. On the first issue, the court found no evidence of the required reliance and ruled it had been an error to consider that issue. However, on the second issue concerning an implied warranty of merchantability, the court held there was substantial evidence to support the jury finding that the defendant was a merchant of hay as regards the buyer. The court held the instruction given the jury on the merchant issue was insufficient and remanded the matter.

Accord and satisfaction in the acceptance of payment

Another example of a typical U.C.C. issue concerns the doctrine of "accord and satisfaction," which can arise in connection with claims an accepted payment has served to terminate a dispute. A recent Wisconsin case involving production of sweet corn illustrates the application of this doctrine.

In *Myron Soik & Sons v. Stokely USA, Inc.*, 498 N.W. 897 (Wis. App. 1993), growers of sweet corn brought a class actic suit against Stokely on their production contracts. The dispute arose over the amount farmers were paid for "passed acres" — crop acres that were fit for har-

Neil D. Hamilton is Ellis and Nelle Levitt Distinguished Professor of Law, and Director, Agricultural Law Center, Drake University Law School, Des Moines, Iowa

vest but were not taken by Stokely. The contract specified growers would be paid for these acres from a fund made up of contributions from growers and the company based on the total tons of harvested crop. The contract provided that if the fund did not cover full compensation of unharvested acres, the payments would be prorated. Following harvest, the company notified growers the fund was insufficient to meet full compensation and that payments would be prorated on a calculation not yet defined. Shortly thereafter, a second letter and checks prorating payments at 53.49 percent were sent to growers.

At this point, the growers initiated an action against Stokely on the basis that the payments were inadequate; however, some of the plaintiffs had cashed the checks. Stokely raised the defense that the checks had been calculated under terms of the contract, so when growers accepted them it operated as an accord and satisfaction of the contract. Stokely moved for summary judgment to dismiss plaintiffs who had accepted the checks from action over the contract. The trial court denied summary judgment after concluding Stokely could not use accord and satisfaction as a defense; however, on appeal the court of appeals reversed and remanded. The court concluded: 1) there was a dispute at the time the checks were cashed; and 2) the letters and correspondence gave growers notice the check was meant as full payment for "passed acres." Therefore it ruled that Stokely could use accord and satisfaction as a defense, even though the letter accompanying the check made no specific reference to the provision or the effect that cashing the check would have on a grower's right to bring a subsequent claim.

Notice of anticipatory breach

Another issue that can arise in the contract production and marketing of grain is what happens if the producer gives the company notice of an intention to not perform under the contract, for example, refusal to deliver grains that have been forward contracted. The issue involves questions both as to the appropriate amount of damages and what the company should do once it has knowledge of the intention to breach the agreement.

A recent Nebraska Court of Appeals case, *Trinidad Bean and Elevator Co. v. Frosh*, 494 N.W.2d 347 (Neb. 1992) involved a dispute between a Colorado bean buyer that operated an elevator in Nebraska and a producer. On April 26, 1988, Elmo Frosh contracted with the Trinidad Bean and Elevator Co. in Imperial to sell 1,875 cwt. of edible dry beans. The contract included two payment options: option 1 provided for payment of $16.25 per cwt. on January 15, 1989, and option 2 provided for fifty percent payment at $16 per cwt. upon the completion of harvest and for fifty percent at $16 per cwt. on December 1, 1988. Choice of the first option would allow a grower to defer income for tax purposes; however, both payment options were inadvertently marked on the contract with Frosh.

When the contract was noticed by the Denver office of Trinidad, the company contacted him about the need to determine which payment option was desired so the contract could be processed. After communication from the local elevator about correcting the error, Frosh returned to the elevator on May 1 and told them to tear up the contract. At that time the contract price and market price for dry beans were the same. When Frosh returned to the elevator on August 31, 1988, to make sure the contract had been torn up, he was informed the elevator still expected delivery. When he failed to deliver the beans, the elevator sued for the damages it experienced in buying beans now at twice the price because of a drought.

The jury held Frosh had violated the contract but was not responsible for any damages because the elevator knew in May he was not going to perform. The appeals court affirmed, holding the contract was repudiated in May when there was no difference between the contract and market price. The court determined that under U.C.C. section 2.713(1), upon the anticipatory repudiation the measure of damages for nondelivery or repudiation was the difference between the market price at the time when the buyer learned of the breach and the contract price. The elevator could not wait until the drought had driven prices higher and try to collect from Frosh; instead it was limited to the damages from the difference of price in early May, when there was no difference.

If there is a lesson in the case it appears to be if a party believes they have ended a contract to deliver commodities, it is important to make a record of the action and confirm that the buyer knows of the decision.

Measure of damages for breach

The issue of what measure of damages to apply in a breach of contract action is not simple as noted by the court in *Frosh* because under the U.C.C. the buyer also has the option of following section 2-711(1), which provides a buyer may cancel the contract and recover any amount paid as well as seek damages for cover under section 2-712. This option is in addition to the one followed by Trinidad Bean Co., to choose not to cover and seek damages for the contract-market differential under section 2-713(1).

Another recent case concerning the application of this provision is *Tongish v. Thomas d/b/a Northwest Seed*, 840 P.2d 471 (Kan. 1992). Tongish had a contract with the coop to grow 160 acres of sunflower seeds and sell the crop to the coop for $13 per cwt. for large seeds and $8 for cwt for smaller seeds. The agreement was later modified to 116.8 acres. The coop had a contract to deliver the seed to Bambino Bean & Seed, Inc. at the same prices as Tongish was to be paid. The coop was to receive a 55 cent per cwt. handling fee which was to be the coop's only profit under the agreement. The crop was to be delivered in one-third increments by December 31, 1988; March 31, 1989; and May 31, 1989. In January, a dispute arose between Tongish and the coop because it was mixing Tongish's high quality seed with other seed. At the same time, the price for sunflower seeds was going up because of weather and other factors. Tongish notified the coop he would not be delivering any more sunflower seeds. In May, Tongish sold his remaining seed to Danny Thomas for $20 per cwt. Tongish was paid by Thomas for approximately half of his seed. Thomas deposited the remainder with the court to determine to whom it should go. The coop intervened, seeking damages for Tongish's breach of contract.

The district court had to decide whether the damages should be actual losses or the difference between market and contract prices. The district court found Tongish had breached the contract and awarded the coop $455.51, the amount the coop lost in handling fees concerning the crop. The court of appeals reversed the damages and ordered that they be determined as the difference between the market price and the contract price as set out in Kan. Stat. Ann. section 84-2-713. The Kansas Supreme Court affirmed the court of appeals, ruling the contract between Tongish and the coop obligated the coop to take the seed whether or not it had a market for them. The court therefore disregarded the way the coop had protected itself from market fluctuations through a subsequent contract to sell the seeds with a handling fee as profit. The court held the majority rule of market damages "encourages a more efficient market and discourages the breach of contracts." *Tongish v. Thomas*, 840 P.2d 471, 476 (Kan. 1992).

Oral modifications of contracts

Another important issue that can arise in grain production contracts is the effect of oral modifications made once the production relation is underway. The question of how to deal with oral modifications involves several issues already addressed,

Continued on page 6

including the effect of an "integration clause" or provision in the contract noting that only written modifications are effective, and the question of the application of the statute of frauds.

A recent grain contracting case involving oral modifications is *Neibert v. Schwenn Agri-Production Corp.*, 579 N.E.2d 389 (Ill. App. Ct. 1991). In 1986 Neibert, an Illinois farmer, contracted with Schwenn to grow sunflowers on 612 acres and sell the seed to the corporation. The corporation agreed to supply seed, pesticide, and herbicide and to pick up seed from farmer's storage. In exchange, the Neiberts would raise and harvest the crop and receive 12 cents/lb for seeds larger than 17/64th of an inch. After four loads of the harvested seed had been picked up, the Neiberts received their first payment and were surprised they were not paid for more of the seed. The company's position was that much of the seed was too small and was being priced at the lower rate. In negotiations between the parties, the Neiberts flew to North Dakota for discussions about possible price reforms in the contract. The Neiberts left the negotiations believing the agreement had been modified so they would be paid 10 cents/lb. for small seed. Schwenn claimed he agreed only to pay for the small seed that had been delivered and for the first load following the negotiation meeting. In October 1986, Schwenn sent a letter to the Neiberts informing them further deliveries would be paid for under the original contract with no amendment. Schwenn claimed the Neiberts then said they would not deliver any more seed as of October 26. The Neiberts requested guarantees of payment in November, but Schwenn covered the contracts by purchasing sunflower seeds from other producers.

The Neiberts brought suit in March, 1987, against Schwenn for breach of contract, and Schwenn counterclaimed, also alleging breach of contract. The trial court found that the Neiberts breached the contract and that the contracts were not modified following the meetings in September. The Neiberts appealed, but the appellate court upheld the trial court's finding of fact that the Neiberts had breached the contract. The appellate court agreed with the trial court's assessment that any modification needed to be in writing.

The suit also involved the question of the appropriate measure of damages for the Neibert's breach. Schwenn argued that it had intended to use the seed from the Neibert contract to satisfy a sales contract to Dalhgren for 1 million pounds at 17 cents per pound. Schwenn argued when the Neiberts refused to deliver more seed, the company filled the contract with seed raised under contract with other growers. The trial court had adopted Schwenn's method for damage determination. This calculation set damages at the figure of 17 cents per undelivered pound of seed. However, in assessing damages, the appellate court reversed the trial court findings and looked to the U.C.C. for guidance. The court found proper damages were the difference between the cost of covering the breach and the 12 cents per pound to be paid under the Neibert's contract. The court ruled Schwenn would have to show what was paid for the seed used to cover the Dahlgren contracts before the damages owed could be assessed. The trial court had also included trucking costs and damages from disputes concerning how much seed and chemicals were used. The appellate court disallowed the trucking costs, found the Neiberts had correctly applied chemical and did not owe damages for it. The Neiberts did owe Schwenn for ten bags of seed that were not used to plant or replant the 612 acres under the contract.

Beneficial interest rules under federal farm programs

The question here is whether the producer has retained a sufficient property interest in the crop so as to be eligible to receive farm program benefits or place the crop into the commodity price support loan program. Under the federal regulations that determine eligibility of producers to enter commodities under price support loans, "a producer must have a beneficial interest in the commodity which is tendered to the CCC for a loan, loan deficiency payment, or purchase." [7 C.F.R. section 1421.5(c)91)(1993)]. The rules provide that in determining whether a producer still retains a beneficial interest, a determination which may be necessary if the crop was produced or marketed under a production contract, the following test in 7 C.F.R. section 1421.5(c)(2), applies:

A producer shall not be considered to have divested the beneficial interest in the commodity if the producer retains control of the commodity, including the right to make all decisions regarding the tender of such commodity to CCC for price support, and the producer:

(i) Executes an option to purchase whether or not an advance payment is made by the potential buyer with respect to such commodity if the option to purchase contains the following provisions:

"Notwithstanding any other provision of this option to purchase, title; risk of loss; and beneficial interest is the commodity, as specified in 7 CFR part 1421, shall remain with the producer until the buyer exercises this option to purchase the commodity. This option to purchase shall expire, notwithstanding any action or inaction by either the producer or the buyer, at the earlier of: (1) The maturity of any Commodity Credit Corporation price support loan which is secured by such commodity; (2) the date the Commodity Credit Corporation claims title to such comodity; or (3) such other date as provided in this option." or

(ii) Enters into a contract to sell the commodity if the producer retains title, risk of loss, and beneficial interest in the commodity and the purchaser does not pay to the producer any amount or any incentive payment amount to enter into such contract except as provided in part 1425 of this title.

If farm program eligibility, such as the opportunity to receive deficiency payments, is an important part of a producer's calculation in entering a contract, it will be important to determine if the terms of the contract as to the risk of loss, title, and payment leave a sufficient beneficial interest with the producer.

Agricultural fair practices protections

Federal and state laws have been enacted to protect the rights of producers to organize and bargain in marketing commodities. The laws, in particular the Agricultural Fair Practices Act of 1967, 7 U.S.C. sections 2301-2305, have been used by poultry producers to challenge the way their contracts were terminated. Congress passed the A.F.P.A. in 1968 to protect the right of farmers and ranchers to join with other growers to form associations to bargain for better prices and terms with handlers and processors. The act sets out a number of prohibited practices for handlers, which is defined to include persons engaged in "contracting ... with ... producers ... with respect to production or marketing of any agricultural product...." The act focuses on prohibiting handlers from discriminating against or intimidating producers because of their membership in or exercise of right to organize associations of growers. The act has been relied on by the federal courts in a suit by Florida poultry producers against Cargill, which had terminated their poultry contracts, allegedly in response to efforts to organize other Florida growers. [See *Baldree v. Cargill Inc.*, 925 F.2d 1474 (11th Cir 1991) aff'd, 758 F. Supp. 704 (M.D. Fla. 1990).] In *Baldree*, the Florida Poultry Growers Association and the U.S. Department of Justice sought a preliminary injunction forcing Cargill to reinstate its growers agreement with Arthur Gaskins, president and organizer of the association. The federal district court granted the preliminary injunction, because it found there was a substantial likelihood the Growers Association and the Department would succeed in showing the agreement was terminated by Cargill to discourage and prevent Gaskins from sup-

Continued on page 7

porting the Association, to hamper the Association's claim against Cargill, and without economic justification in an unfair and unjustly discriminatory and deceptive practice. The court cited the Packers and Stockyards Act and the Agricultural Fair Practices Act as authority for its decision. The dispute underlying the case concerned a suit Gaskins and other growers had filed against Cargill alleging various forms of fraudulent practices such as misweighing.

State regulation of contracting

As noted earlier, a number of states have considered legislation designed to protect agricultural producers who enter production contracts. The most important legislation enacted to date is found in Minnesota, which has enacted two new laws in recent years to accompany the existing anti-corporate farming statute which prohibits both farming and the ownership of agricultural land by corporations. [See Minn. Stat. Ann. section 500.24.]

One law passed in 1990 regulates contract feeding. Minn. Stat. Ann. section 31B.03, amends the Minnesota packers and stockyards act, by placing reporting requirements on packers and stockyard owners. They must now include in their annual report to the commissioner of agriculture "a copy of each contract a packer has with a livestock producer and each agreement that will become part of the contract that a packer has with a livestock producer for the purchase or contracting of livestock." Packers and grain and feed businesses with annual sales over $10 million are required to keep a separate account for transactions relating to contract feeding of hogs, cattle, or sheep. The account may be audited by the commission of agriculture at any time.

The second act passed in 1990, codified at Minn. Stat. Ann. section 17.90 -.98 and section 514.945, is the only state statute enacted to date that directly regulates the provisions of production contracts. Code sections 17.90-.98 establish a number of requirements for all "agricultural contracts." They include the following provisions.

a) A "contract for an agricultural commodity between a contractor and a producer must contain language providing for resolution of contract disputes by either mediation or arbitration."

b) When a producer is required by contract "to make a capital investment in buildings or equipment that cost $100,000 or more and have a useful life of five or more years," the contractor must not cancel or terminate the contract until:

1. "the producer has been given written notice of the intention to terminate or cancel the contract for at least 180 days notice before the effective date of the termination or cancellation" ... [except when the producer abandons the contract or is convicted of an offense related to the contract business], and
2. "the producer has been reimbursed for damages incurred by an investment in buildings or equipment that was made for the purposes of meeting minimum requirements of the contract."

c) If the producer breaches the contract the contractor must still give the producer ninety days notice before terminating the agreement and must give the producer sixty days to correct his breach.

d) Parent companies of subsidiaries licensed to purchase agricultural commodities are "liable to a seller or the amount of an unpaid claim or contract performance claim is the contractor fails to pay or perform according to the terms of the contract."

e) The statute provides that all agricultural contracts must be interpreted by the courts as including a statutory implied promise of good faith. If the court finds there has been a violation of the implied promise of good faith, the court may allow the party to recover "good faith damages, court costs, and attorney fees."

f) If a producer makes prepayments "for agricultural production inputs that include but are not limited to seed, feed, fertilizer, or fuel for future delivery, the producer may demand a letter of credit or bank guarantee from the provider of the inputs to ensure reimbursement if delivery does not occur."

The law creates a position within the Department of Agriculture to provide information and investigate complaints, dealing with contract production. The law also authorizes the Department to adopt rules to implement the various contracting provisions. In 1991 the Department adopted rules pursuant to this chapter. The rules provide further guidance on the interpretation of the provisions. One requirement added by the rules is that contractors using written commodity contracts must submit samples of contracts they propose to offer producers for review by the Department at least thirty days prior to offering the contracts to producers for signature.

Section 514.945, also enacted in 1990, creates an agricultural producer's lien for products produced by an agricultural producer. The lien is perfected by delivery of the agricultural commodity and is good for twenty days after delivery. It may be extended by filing within the twenty days but is void six months after filing. The agricultural producer's lien has priority over all other liens and encumbrances in the commodity. The lien extends to proceeds from the commodity, the proportionate share of commingled commodity, and products manufactured from the commodity.

Another example of state regulation of certain aspects of production contracts are the State of Wisconsin rules regulating use of "passed acres clauses" in vegetable production agreements. The rules restrict use of such clauses, regulate the method of funding payment pools, and require companies to pay the full contract price for passed acres that were suitable for harvest. [Wis., Dept. of Agriculture, Trade, and Consumer Protection, chaps. Ag. 99 and 101. See discussion in, "Ag 101: New Vegetable Contract Rule Benefits the Industry," *The Badger Common'tater*, Jan. 1993, p. 5.]

Conclusion

The important economic opportunities created by recent efforts to expand value added production and marketing for grain crops means it is essential farmers and their lawyers have a better understanding of the impact of raising crops under contract. The increased use of production contracts that will accompany these developments will undoubtedly result in a growing number of legal questions and disputes over how contract language applies.

State Roundup

NORTH DAKOTA. *Canadian wheat imports.* North Dakota Governor Edward Schafer has signed an executive order preventing Canadian farmers from collecting refunds of taxes paid when selling grain in North Dakota and forcing elevators to account for how much Canadian grain they buy. Executive Order No. 1994-03 (March 31, 1994).

All wheat grown in the state or sold through commercial channels by a producer is subject to a wheat tax, or check-off. Check-off dollars are used to promote domestic use and export of wheat and durum. Farmers subject to the tax may apply to the state wheat commission for a refund. N.D.C.C. § 4-28-07. The executive order places a moratorium on the payment of refunds of the wheat tax collected from non-United States wheat and durum production. The moratorium remains in effect until after adjournment of the 1995 legislative session. The order was "consented to" by the Administrator of the North Dakota Wheat Commission.

The governor also ordered that "the North Dakota Wheat Commission furnish new reporting forms to all licensed grain warehouse operators to separately account for non-United States grain production of wheat and durum check-off dollars collected after March 31, 1994."

The governor reasoned that the action was necessary because the Clinton Administration has yet to control wheat and durum imports through the emergency quota provisions of section 22 of the Agricultural Adjustment Act of 1933. *See* 7 U.S.C. § 624.

—Scott D. Wegner, Lakeville, MN

219 New York Avenue
Des Moines, Iowa 50313

ADDRESS
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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Editor's address/phone number changes:

Effective April 11, 1994, the mailing address for the editor is:
Rt. 2, Box 292A
Alvin, TX 77511

For overnight deliveries, one should use the following address:
2816 C.R. 163
Alvin, TX 77511

The new phone number is (713) 388-0155. As in the past the number functions as the fax number as well as the voice number. If sending a fax from a manual machine, it may be necessary to press *51 after the answering machine message begins. As an alternative, if no voice is detected by the machine after a certain short time period, the machine assumes the incoming transmission is a fax and will so treat it.

My apologies for the lateness of this issue. My family's move to Texas, which had been tentatively scheduled for the end of May, was moved forward to April, with one week's advance notice. Accordingly, my work schedules have all been disrupted. I was able to do the research for the *Federal Register in brief* column before leaving Alabama. I have yet to locate the nearest law library but hope to do so in time to include that column in the June issue.

—Linda Grim McCormick, Alvin, TX