Agricultural Law Update

VOLUME 7, NUMBER 9, WHOLE NUMBER 81 JUNE 1990

Official publication of the American Agricultural Law Association

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Sixth Circuit finds land contract to be executory: contract cannot be reorganized in Chapter 12

In the recent case of *In re Terrell,* 892 F.2d 469 (6th Cir. 1989), the Sixth Circuit Court of Appeals found a land contract or contract for deed to be an executory contract under section 365 of the bankruptcy code. This finding means that the contract must be affirmed or rejected as is under the provisions of section 365. It cannot be altered pursuant to section 1225, the "cram-down" section that authorizes the reduction of secured claims to the value of the collateral.

The court adopted the Ninth Circuit's interpretation of section 365, holding that federal law defines the term executory contract, but state law defines the rights and obligations of the parties to the contract. Under section 365, the applicable federal law, a contract is executory if mutual obligations remain. Performance must remain due on both sides of the contract. Whether this mutual obligation test is met is determined under state contract law. *Terrell,* 892 F.2d at 472, citing *In re Cochise College Park, Inc.,* 703 F.2d 1339, 1348 n. 4 (9th Cir. 1983).

Applying this to the Michigan land contract at issue, the court looked to the state law rights of the parties. It found that under such a contract, unlike under a mortgage contract, performance remains due on both sides until payments have been completed and the deed transferred. Up until this point, breach by one party excuses the other party's continued performance and gives rise to an action for rescission or specific performance.

The *Terrell* opinion is particularly controversial in that it rejects as not controlling opinions characterizing land contracts by the Michigan Supreme Court and

(Continued on next page)

Securities law and agricultural enterprises

In *Securities & Exchange Commission v. W.J. Howey Co,* 328 U.S. 293 (1946), the Supreme Court ruled that the sale of orange groves accompanied by an optional management contract was an investment contract which is a security. In reaching this conclusion, the Supreme Court emphasized four elements: (1) an investment of money; (2) in a common enterprise; (3) an expectation of profit; (4) based solely on the efforts of others. As such, the investment contract either had to be exempt from registration or registered under the federal securities law before the promoter could offer it for sale. Two agricultural cases recently decided in the federal courts reiterate the importance of the *Howey* test to agricultural enterprises.

In *Eberhardt v. Waters,* 901 F.2d 1578 (11th Cir. 1990), T. J. Eberhardt paid $100,000 to International Cattle Embryo, Inc. [ICE] to purchase 40 Santa Gertrudis embryos. In return, ICE promised to store the embryos in liquid nitrogen while the investor decided whether to implant the embryos in ICE recipient cows or to have the embryos transferred to any alternative ranch for implantation in cows selected by the investor. If the investor selected ICE recipient cows, ICE additionally promised to raise the resulting calves. If a calf was female, ICE would use the female calf, upon reaching maturity, as a embryo donor cow. If the investor selected any alternative ranch, ICE promised to maintain records on the embryos so that the calves produced could be registered with the Santa Gertrudis Breed Association. The investor accepted the risk that too few calves would be born from the implanted embryos and the risk that too many of the calves would be male.

Eberhardt had no experience in the cattle business and no knowledge about embryo breeding technology prior to purchasing the embryos.

When ICE encountered financial difficulties, Eberhardt requested that the purchased embryos be transferred to an alterative ranch. ICE failed to transfer the embryos to another ranch. When the embryos were lost, Eberhardt sued ICE and its directors under the Georgia securities law, which uses the identical definition of security as the Federal Securities Act of 1933. Eberhardt claimed that the

(Continued on page 3)

the Michigan Court of Appeals. *Terrell*, 892 F.2d at 472. These courts have held that land contracts were functionally equivalent to purchase money mortgages (*Rothenberg v. Follman*, 19 Mich. App. 383, 387 n. 4 (1969)) and that the vendor in such a contract holds title only as security for the payment of the purchase price (*Barker v. Klinger*, 302 Mich. 282 (1942)). The *Terrell* Court discounts these cases, and several bankruptcy cases based upon them, as not determinative. According to *Terrell*, how the state courts chose to characterize land contracts is not controlling. Rather, applying the federal executory contract definition, the court must look to whether performance remains due and what rights each of the parties have in the event of breach. Under this analysis, the court found mutual obligations remaining. On this basis, the confirmation of the debtor's reorganization plan, which called for the reorganization of the land contract debt pursuant to section 1225, was reversed.

The *Terrell* opinion is also controversial in that a different result was recently reached in the Seventh Circuit. As *Terrell* notes, in *In re Streets and Beard Farm Partnership*, 882 F.2d 233, 235 (7th Cir. 1989), the Seventh Circuit found the appropriate analysis to be of federal law for the definition of executory contract and state law for a determination of whether mutual obligations remained. However, applying this analysis to Illinois law, the court found land contracts to not be executory. Noting that the only duty left for the vendor was delivery of legal title, the court stated that this duty was a "mere legal formality" that was "not the kind of significant legal obligation which would render the contract executory." *Terrell*, 892 F.2d at 472, citing *Streets and Beard*, 882 F.2d at 233. Although the *Terrell* court dismisses this as contrary to a correct interpretation of land contracts under Michigan state law, it is likely that the Michigan state courts would disagree.

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VOL. 7, NO. 9, WHOLE NO. 81 JUNE 1990

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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.

Insurance proceeds from destruction of combine by fire: not "farm income" for purposes of Ch. 12

The issue of what constitutes farm income for purposes of Chapter 12 eligibility arose in the recent case of *In re Smith*, 109 Bankr. 241 (Bankr. W.D. Ky. 1989). In this case, the debtors had received insurance proceeds representing payment for the destruction of their combine in a fire. The debtors claimed this income as farm income, but their creditor, Federal Land Bank (FLB), objected to this characterization. FLB moved for the dismissal of the case in that without the insurance proceeds, the debtors would not meet the fifty percent farm income test for eligibility. The court sustained FLB's objection and dismissed the case.

In reaching its decision, the court cited two Seventh Circuit appellate decisions, *Matter of Wagner*, 808 F.2d 542 (7th Cir. 1986) and *Matter of Armstrong*, 812 F.2d 1024 (7th Cir. 1987). With regard to ordinary income, the court stated that it found the *Wagner* approach helpful. *Smith*, 109 Bankr. at 242. Under this approach, analysis is limited to a mechanical test applying income tax standards. Farm income is determined by reference to the debtor's Schedule F. *Wagner*, 808 F.2d at 547.

In *Smith*, however, capital gains, not ordinary income, was at issue. For this type of income, the court referred to *Armstrong*, citing it for the proposition that the focus should be on "the relationship between the property sold and the farming operation." *Smith*, 109 Bankr. at 243.

Unfortunately, the court is not clear as to how *Armstrong* supports its results. In *Armstrong*, the court used the above referenced proposition to find that proceeds from the sale of farm equipment did constitute farm income. In this regard, the *Smith* court actually appears to distinguish *Armstrong*.

Quoting *Armstrong's* reference to farmers with no significant outside employment who may be found ineligible for Chapter 12 solely because of income from the sale of farm equipment, the *Smith* court inferred a new test. It compared the farm and non-farm income, excluding the income in controversy and noted that without the insurance proceeds, the debtors would not qualify. This seems to imply that had the Smiths had more farm than non-farm income, excluding the insurance proceeds, they may have changed the character of the proceeds.

However, the court also adopted the FLB's argument that the destruction of a combine by fire was not a "general farming activity necessary to perpetuate a farming operation." *Smith*, 109 Bankr. at 243. In contract, this seems to imply that insurance proceeds should never be farm income.

In conclusion, *Smith*, although addressing a narrow issue, raises questions that will have to be resolved in future litigation.

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

Farm financial standards

The American Bankers Association has recently circulated an exposure draft, "Recommendations of the Farm Financial Standards Task Force," dated March, 1990. The report was developed under leadership of the American Bankers Association and Extension representatives from throughout the U.S. to create widely accepted standards for farm accounting practices and financial statements.

A sixty-day public comment period is in process. Review copies are available from John Blanchford of the ABA in Washington, D.C. at 202-663-5100 for a charge of $35.50 each.

– *Walter J. Armbruster, Farm Foundation* transaction was an investment contract which was neither exempt from registration nor registered. Eberhardt asked for summary judgment on this issue.

ICE and its directors contested the summary judgment on the basis that factual disputes existed as to whether a common enterprise existed and as to whether Eberhardt expected solely the efforts of others to be the source of profit from the investment. The Court of Appeals for the Eleventh Circuit affirmed summary judgment for Eberhardt.

ICE argued that no common enterprise existed because each investor could have made or lost money independently of other investors. The court of appeals rejected this "horizontal" common enterprise argument, ruling that a common enterprise existed so long as fortunes of all investors were tied to the expertise and efforts of ICE. By this ruling, the court of appeals adopted the concept of a vertical common enterprise.

ICE argued that Eberhardt's own efforts would he the source of profit or loss depending on how skillful Eberhardt was in selecting among options for the implantation of the embryos and the raising of the resulting offspring. The court of appeals rejected this argument, noting that Eberhardt's lack of knowledge about cattle and embryo breeding technology made him totally dependent upon ICE's expertise and that any contractual choices left to Eberhardt were illusory and insufficient to disqualify the investment as a security.

In *Sheets v. Dziabis*, 1990 U.S. Dist. LEXIS 5176 (N.D. Ind. 1990), Sheets purchased one of 40 fractional interests in two different stallion syndications from International Thoroughbred Bloodstock Agency, Inc. [ITBA]. Under the syndication agreements, Sheets was entitled to breed each stallion one time a year and was responsible for one-fortieth of each stallion's upkeep. Sheets was permitted to breed the stallions to his own mares or to sell the stallions' breeding right for one season to third parties. In addition, ITBA also promised in the syndication agreement that the stallion breeding seasons could be sold to ITBA breeding mare limited partnerships. When Sheets purchased the fractional interests, ITBA stressed a 100% return on the sale of the breeding seasons which was perfectly understandable because Mr. Sheets owned no mares himself.

When ITBA encountered financial difficulties, Sheets sued Dziabis claiming that the investment representations and the promise of a ready market through ITBA limited partnerships made the stallion syndication fractional interests securities under both the federal and Indiana securities laws. Mr. Sheets asked for summary judgment on the securities issue.

Dziabis countered that case law [*Keflas v. Bonnie Brae Farms*, 630 F. Supp. 6 (E.D. Ky. 1985)] had established that stallion syndicates are not securities. Moreover, Dziabis argued that factual disputes existed as to whether two elements (the common enterprise and profits solely from the efforts of others) of the *Howey* test were satisfied. Dziabis asked alternatively for summary judgment that the stallion syndicates were not securities or for trial on the disputed issues.

In granting summary judgment to Sheets, the district court ruled that the *Keflas* case was inapplicable. ITBA promised a ready market for the stallions' breeding seasons through the ITBA breeding mare limited partnerships. Hence, the ITBA stallion syndicates were not the standard stallion syndications like the one construed in *Keflas*.

Furthermore, even though Sheets could have bred the stallions to his own mares (if he purchased some) or could have sold the breeding seasons through his own efforts to third parties, whether Sheets used his own skills or relied upon the ITBA limited partnerships to produce a return would only be known after the sale had been completed. The district court stressed that the securities law prohibits the offer of a security for sale, not just the sale, unless registered or exempt from registration. So long as ITBA offered a ready market as an investment return option in the syndication agreement, the district court held that ITBA was offering a security. From the perspective of the time of the offer, the district court ruled that Sheets was in the identical position as the prospective buyers of orange groves in *Howey*. The district court reemphasized that the Supreme Court in *Howey* had ruled that the combination of the offer of the sale of orange groves with optional management contracts was an investment contract even if the purchaser did not elect the management contract option.

The *Eberhardt* and *Sheets* decisions are correct. In both fact patterns, inexperienced persons, who factually could not use the embryos or the stallion breeding seasons in their own present or planned agricultural operations, were persuaded to buy embryos or stallion fractional shares because of the potential investment return offered by the efforts of the promoters. Therefore, *Eberhardt* and *Sheets* are reminders, not surprises, about the impact of securities laws in the agricultural sector of our society.

– Drew L. Kershen,
Professor of Law,
University of Oklahoma College of Law

Federal Register *in brief*

The following is a selection of matters that have been published in the *Federal Register* from May 1 to May 31, 1990:

1. CCC; 1989 Tree Assistance Program; final rule; effective date 5/8/90. 55 Fed. Reg. 19053.

2. CCC; Conservation Reserve Program; final rule; effective date 5/9/90. 55 Fed. Reg. 19243.

3. IRS; General rule for taxable year of inclusion; election to include crop insurance proceeds in gross income in the taxable year following the taxable year of destruction or damage; correction. 55 Fed. Reg. 19423.

4. INS; Replenishment agricultural workers; temporary resident status; admission or adjustment; final rule; effective date 6/20/90. 55 Fed. Reg. 20767.

5. FmHA; Ag Credit Act of 1987; implementation; final rule; effective date 5/25/90. 55 Fed. Reg. 21517.

– Linda Grim McCormick

AG LAW CONFERENCE CALENDAR

1990 Drake University Summer Agricultural Law Institute

July 9-12, July 16-19.

Sessions schedule: the 1990 Farm Bill and federal farm programs by Professor Neil D. Hamilton (7/9-12); Legal aspects of biotechnology and agriculture by Dean J.W. "Jake" Looney (7/16-19).

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ASCS appeals: the equitable authority of DASCO*

by Christopher R. Kelley

In recent years, the federal farm commodity and related resource adjustment programs have represented a significant source of farm income for an increasing number of agricultural producers. For example, in 1982, less than thirty percent of the nation's corn acreage was enrolled in federal price and income support programs. From 1986 to 1988, that figure increased to eighty-eight percent. Similar, though less dramatic, increases occurred in enrollments in the programs for rice, cotton, and wheat. As a result, in the 1980's, federal farm program payments to producers totalled $133.5 billion, with nearly two-thirds of that total having been paid since 1985. N.Y. Times (nat'l ed.), Apr. 25, 1990, at A12, col. 4.

The widespread participation in the federal farm programs in the late 1980's meant that producers were heavily dependent on farm program payments for their farm income. For example, in 1987, federal farm program payments to Indiana producers constituted seventy-four percent of their net farm income. Wall St. J. (s.w. ed.), May 24, 1990, at 1, col. 5. Although the acreage enrolled in the federal farm programs is declining from its recent peak from 1986 to 1988, producers' reliance on farm program payments is still significant. Again using Indiana producers as an example, farm program payments this year are expected to provide nearly forty percent of their net farm income. *Id.*

The Agricultural Stabilization and Conservation Service (ASCS) is primarily responsible for the administration of the federal farm commodity programs. Among other things, the ASCS decides whether a producer is eligible to participate in a program, whether a participating producer is complying with program requirements, and whether to seek repayment of program payments previously made if a program participant fails to comply with program requirements. Thus, for the significant number of producers and others who directly or indirectly benefit from the income derived from federal farm program payments, determinations made by the ASCS are very important.

Typically, in making its determinations, the ASCS is required to assess whether each program applicant or participant has satisfied numerous and sometimes complex requirements that are found in scattered sections in Titles 7 and 16 of the U.S. Code and in Title 7 of the Code of Federal Regulations. In most cases, the assessment will encompass whether the producer has satisfied the requirements for the particular commodity program, whether the producer is a "person" who is "actively engaged in farming" within the meaning of 7 U.S.C. section 1308-1(b)(1), and whether the producer is in compliance with the "sodbuster," "swampbuster," and conservation compliance provisions of the Food Security Act of 1985. *See* 16 U.S.C. §§ 3811-12, 3821-22, 3841-45.

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The burden of establishing eligibility for program benefits is borne by the producer. Accordingly, it is the producer who must convince the ASCS that he or she is entitled to participate in any particular farm program.

The myriad and sometimes arcane program eligibility requirements can result in two situations in which a producer's disqualification from receiving program benefits might be characterized as unfair or harsh. First, faced with the inconvenience or difficulty of finding other sources of information about program requirements, producers commonly turn to the ASCS for information and advice. In some cases, the producer acts on that information or advice only to discover later that it was erroneous. Similarly, a producer might act on an erroneous determination by the ASCS. In either case, the result is that the producer is not in compliance with the program's requirements.

Second, a producer may make a good faith attempt to comply with program requirements, but the performance, while substantial, is incomplete. Accordingly, under a strict application of the law, the producer is ineligible for benefits.

In each of these situations, the problem is identical; the producer is ineligible for program benefits through no compelling "fault" of his own. Fortunately for the producer in each situation, there is a remedy that offers the possibility of relief. This article will discuss that remedy, the equitable authority of DASCO.

The role of DASCO within the ASCS

The ASCS has a three-tiered organizational structure. Within that structure, decision making is largely decentralized. Most initial determinations regarding a producer's eligibility to participate in farm programs are made at the local level with the review of those decisions progressing from the local level, to the state level, and finally, to the national level, in that order. *See* 7 C.F.R. pt. 780.

At the local level, the ASCS operates through county committees (referred to as "COCs" by the ASCS) whose three members are producers elected to the committee by the eligible producers in the county. *See* 7 C.F.R. §§ 7.4-7.18 (1989). Each county committee is "generally responsible" for carrying out the programs administered by the ASCS in its respective county or, if two or more counties have been combined into a single administrative unit, in the combined counties. 7 C.F.R. § 7.21(a). The county committee employs a county executive director (CED) to manage the daily operations of the county ASCS office. *See* 7 C.F.R. §§ 7.21(b)(2), 7.25.

Each county committee within a state is supervised by a state committee (STC) whose members are appointed by the Secretary of Agriculture. *See* 7 C.F.R. §§ 7.4, 7.20. Together, the county and state committees are the field administrators of the federal farm commodity programs. *See, e.g.,* 7 C.F.R. § 1413.2(a); 7 C.F.R. § 7.2.

At the national level, the Administrator of the ASCS is the agency's chief executive officer. Among the Administrator's four deputies is the Deputy Administrator for State and County Operations (DASCO). In addition to developing the policy statements and instructions for the county and state committees, DASCO has the authority to perform the functions of the county and state committees. *See* 7 C.F.R. §§ 7.36, 7.38. DASCO is also the final decision maker in the ASCS appeal process. 7 C.F.R. § 780.9.

The equitable authority of DASCO

Two broadly applicable regulations authorize DASCO to grant producers equitable relief from the strict application of program requirements. The first, 7 C.F.R. § 790.2(a), addresses the first situation described above, a producer's good faith reliance on ASCS advice or action. The second, 7 C.F.R. § 791.2, addresses the second situation, a producer's failure to comply with program requirements despite having made a good faith and substantial effort to do so.

Good faith reliance on ASCS advice or action

Seven C.F.R. section 790.2(a) provides that:

[n]otwithstanding any other provi-

sion of law, performance rendered in good faith in reliance upon action or advice of any authorized representative of a county committee or State committee . . . may be accepted by the Administrator . . . or . . . [DASCO] as meeting the requirements of the applicable program, and price support may be extended or payment made therefor in accordance with such action or advice to the extent it is deemed desirable in order to provide fair and equitable treatment.

The regulations at 7 C.F.R. part 790 impose two significant limitations on the availability of equitable relief under section 790.2(a). First, relief is not authorized "where the producer knew or had reason to know that the action or advice upon which he relied was improper or erroneous." 7 C.F.R. § 790.2(b). Second, relief is not available "where the producer acted in reliance on his own misunderstanding or misinterpretation of program provisions, notices or advice." *Id.*

The equitable authority granted by section 790.2(a) extends "to all programs in . . . Title 7 administered by the . . . ASCS, under which price support is extended or payments made to farmers." 7 C.F.R. § 790.1. In addition, similar authority exists under the payment limitations regulations. *See*, 7 C.F.R. § 1497.26(a).

Failure to comply with program requirements

Seven C.F.R. section 791.2 provides that:

> [i]n any case in which the failure of a producer to comply fully with the terms and conditions of any program to which this part is applicable precludes the making of loans, purchases, or payments, . . . [DASCO] may, nevertheless, authorize the making of such loans, purchases or payments in such amounts as determined to be equitable in relation to the seriousness of the failure.

The relief authorized by section 791.2 is available "only to producers who made a good faith effort to comply fully with the terms and conditions of the program and rendered substantial performance." 7 C.F.R. § 791.2. It applies "to the wheat, feed grain, upland cotton, and rice programs, and to all other programs to which this part [pt. 791] is made applicable by individual program regulations." 7 C.F.R. § 791.1.

Applying for equitable relief

A producer who desires equitable relief should initially request it from the county committee. *See* 7 C.F.R. §§ 790.4, 791.2. In most instances, the producer's noncompliance will have resulted in the county committee making the initial determination that the producer is ineligible for program benefits.

In that event, the first step in the ASCS administrative process is a request for reconsideration directed to the county committee. 7 C.F.R. § 780.4. The request for reconsideration should specifically state the equitable relief sought and should be supported by a statement of facts showing why the producer is entitled to that relief. 7 C.F.R. § 780.7. *See also ASCS Handbook* 3-CP (Rev. 2) at 13, ¶ 18 (6-6-86 Amend. 1)(the chapter of the *ASCS Handbook* "short-referenced" as 3-CP contains the instructions to the county and state committees for handling appeals, including the required contents of a producer's supporting statement of facts). *See generally* C. Kelley & J. Harbison, *ASCS Administrative Appeals and Judicial Review of ASCS Decisions* (NCALRI/ABA 1990) (discussing the ASCS administrative appeal process in detail).

County committees are instructed to process requests for equitable relief in accordance with the procedures specified in the *ASCS Handbook* chapter entitled "Failure to Fully Comply." *See* 7 C.F.R. § 7.36. That chapter of the *Handbook* is usually referred to by its "short reference," 4-CP (Rev. 2).

Practitioners representing producers seeking equitable relief should review *ASCS Handbook* 4-CP (Rev. 2). The *Handbook* can be inspected at any ASCS county office, or it may be obtained by calling or writing DASCO:

Information Division
ASCS/DASCO
Room 3702-S, South Agriculture Building
P.O. Box 2415
Washington, D.C. 20250
(202) 447-5875

The *ASCS Handbook* is amended frequently. Accordingly, one should always be certain to consult the most frequent amendments.

DASCO's authority to grant equitable relief may be delegated to the county and state committees. *See* 7 C.F.R. §§ 790.3, 791.3. In situations where the failure to comply with program requirements was the result of the producer's good faith reliance on the actions or advice of an authorized ASCS representative, the state committee may exercise DASCO's authority "in cases where the total of any payments and price support does not exceed $1,500." 7 C.F.R. § 790.3. *But see ASCS Handbook* 4-CP (Rev. 2) at 25, ¶ 39 (11-13-86 Amend. 22)(under certain circumstances, the state committee may act when the relief grant is not more than $2,500). In those situations, the county committee will document the case and refer it to the state committee. *See ASCS Handbook* 4-CP (Rev. 2) at 17, ¶ 30 (10-21-87 Amend. 24). The referral may be accompanied by a recommendation. *Id.* at 20, ¶ 35 (3-14-90 Amend. 29).

In situations where the producer has made a good faith effort to comply with the program requirements, but the performance, while substantial, fell short of complete performance, the county committee has limited authority to grant relief. That authority is detailed at *ASCS Handbook* 4-CP (Rev. 2) at 17-19, ¶ 31 (10-21-87 Amend. 24, 7-15-87 Amend. 23, & 3-14-90 Amend. 29).

When either the county or the state committee lacks the authority to grant relief, the matter is to be referred to DASCO. In addition, if both the county and the state committees have declined to grant relief within their respective authority, the producer may appeal to DASCO. *See* 7 C.F.R. § 780.5.

The significance of the availability of equitable relief

The equitable relief available from DASCO generally is not available from a court. Thus, for the producer who has relied in good faith on the erroneous advice or action of an authorized ASCS representative or who has rendered substantial, but incomplete, performance in attempting to comply with program requirements, the availability of equitable relief from DASCO is very important.

To illustrate the difficulty of obtaining judicial relief in the circumstances where it is available from DASCO, consider the situation in which a producer has relied in good faith on the erroneous advice or action of an authorized ASCS representative. As a general rule, a producer who does so is "at jeopardy." *Esch v. Lyng*, 665 F. Supp. 6, 21 (D.D.C. 1987)(also noting the testimony of an ASCS official who stated that "[f]armers depend heavily on the county offices for advice, too heavily. It's a convenience; they don't have to hire a lawyer until things go bad, and then they hire law-

(Continued on next page)

yers."), *modified sub nom, Esch v. Yeutter*, 876 F.2d 976 (D.C. Cir. 1989).

Neither the county and state committees nor their representatives and employees have the authority to modify or waive the provisions of the regulations governing their respective responsibilities. 7 C.F.R. § 7.1(b). This means that these entities and individuals cannot modify or waive the regulations establishing the various program requirements unless authorized to do so by another regulation, such as section 790.2(a) or section 791.2. *See* 7 C.F.R. §§ 7.20, 7.21(b)(4).

Moreover, the government is not bound by an "improper determination by a county committee which is contrary to applicable regulations." *Willson v. United States*, 14 Cl. Ct. 300, 307 (1988)(citations omitted). The same is true for the representations of a county executive director that are contrary to the regulations. *Raines v. United States*, 12 Cl. Ct. 530, 538- 39 (1987). *See also Durant v. United States*, 16 Cl. Ct. 447, 451 (1988)(holding that because a determination by a county committee is subject to review by the state committee and DASCO, a producer is not entitled to rely on it). As a consequence, the regulations governing the various program requirements and the statutory authority on which they are based provide the only standard by which a producer's eligibility for program benefits can be judicially determined.

To reinforce the ultimate authority of the regulations, courts have consistently invoked the proposition that producers are "charged with knowledge of the applicable regulations." *Durant v. United States*, 16 Cl. Ct. 447, 451 (1988)(citation omitted); *Robinson v. Block*, 608 F. Supp. 817, 821-22 (W.D. Mich. 1985). Thus, the "risk of improper reliance . . . lies with the . . . [producer]." *Willson v. United States*, 14 Cl. Ct. 300, 307 (1988) (citation omitted). *See also* Hamilton, *Legal Issues Arising in Federal Court Appeals of ASCS Decisions Administering Federal Farm Programs*, 12 Hamline L. Rev. 633, 643-45 (1989)(discussing a producer's duty to be aware of program regulations).

The obstacle to judicial equitable relief presented by charging a producer with constructive knowledge of the regulations is avoided by seeking equitable relief from DASCO pursuant to 7 C.F.R. section 790.2(a). Although, under that regulation, a producer is disqualified from equitable relief "where the producer knew or had reason to know that the action or advice upon which he relied was improper or erroneous," that limitation is not to be read to encompass constructive knowledge for two reasons.

First, charging producers with constructive notice of the regulations is analogous to imposing the rule that "ignorance of the law excuses no one." However, that rule is premised on considerations of public policy and necessity, not on the particular circumstances of any individual. *See, e.g., Atlas Realty Corp. v. House*, 192 A. 564, 567 (Conn. 1937). To the contrary, the phrase "reason to know" contemplates a discrete and particularized basis for ascribing knowledge. Thus, constructive knowledge and "reason to know" are not synonymous.

Second, if all producers were presumed to know the regulations in the application of 7 C.F.R. section 790.2(a), the result would be to render the regulation a nullity. Accordingly, any attempt to charge producers with constructive knowledge of the regulations in the application of section 790.2(a) should be rejected as nonsensical.

Judicial review of decisions of DASCO denying equitable relief

The decision to grant equitable relief under either 7 C.F.R. parts 790 or 791 is discretionary. *See Pope v. United States*, 9 Cl. Ct. 479, 485 n. 3 (1986)("That the Secretary's action was discretionary is apparent from the fact that the statute [7 U.S.C. § 1445b-1(f), one of the statutes on which 7 C.F.R. § 791.2 is based] sets forth no objective standards for determining what is 'equitable in relation to the seriousness of the failure' and no procedural requirements for determining it, and there is no established case law on the phrase." (citations omitted)). However, whether a decision denying equitable relief is judicially reviewable has only been squarely addressed in the Claims Court.

The Claims Court has found that it does not have jurisdiction to hear a claim based on 7 C.F.R. section 791.2 because the regulation is not "money mandating." *Id.* at 485. Under the Tucker Act, 28 U.S.C. § 1491(a), when a claim is premised on a federal regulation, the regulation must be "money mandating," that is, it must be fairly said to command the payment of money for the damage resulting from its breach. *E.g., Mitchell v. United States*, 463 U.S. 206, 218-24 (1983).

Under the Administrative Procedure Act, specifically 5 U.S.C. section 706 (2)(A), a reviewing court may assess whether an agency has abused its discretion. *But see* 5 U.S.C. § 701 (the APA's waiver of sovereign immunity is inapplicable where "agency action is committed to agency discretion by law"). Thus, under its general federal question jurisdiction, 28 U.S.C. section 1331, a federal district court may be authorized to review a decision denying equitable relief. However, in such a review, the district court could not redetermine the facts found by DASCO. *See* 7 U.S.C. § 1385; *Pope v. United States*, 9 Cl. Ct. at 485.

In the two most recently reported decisions involving the equitable authority of DASCO, the courts avoided on the ground of ripeness the producers' requests for judicial review of denials of equitable relief. *Brundidge Banking Co. v. Pike County Agricultural Stabilization and Conservation Committee*. No. 89-7072 (11th Cir. May 1, 1990)(1990 U.S. App. LEXIS 6868)(involving 7 C.F.R. § 790.2); *Stegall v. United States*, 19 Cl. Ct. 765, 772-73 (1990)(involving 7 C.F.R. § 790.2(a) and § 791.2). Previously, judicial review under section 790.2 has been avoided on the ground that it applies only where relief would not otherwise be available under the statutes or regulations applicable to the program at issue. *See United States v. Kopf*, 379 F.2d 8, 14 (8th Cir. 1967).

Because of the discretion inherent in 7 C.F.R. parts 790 and 791, their value to the producer probably does not reside in their potential as a basis for judicial review. Instead, they might best be viewed and used as an opportunity for administrative relief.

Conclusion

Representing producers in appeals before the ASCS presents several unique challenges. One is using the equitable authority of DASCO to obtain program benefits. Invoking that authority should be considered whenever the producer's circumstances indicate that equitable relief might be available. As with other aspects of the administrative appeal and judicial review process, what ultimately is required is good lawyering, and there are plenty of opportunities to apply that skill in the law of federal farm programs.

* This material is based upon work supported by the USDA, Agricultural Research Service, under Agreement No. 59-32-U4-8-13. Any opinions, findings, conclusions, or recommendations expressed in this publication are those of the author and do not necessarily reflect the view of the USDA.

Editor's note: The National Center for Agricultural Law Research and Information in cooperation with the Agricultural Law Committee, Section of General Practice, American Bar Association, recently completed the first volume in its Practice Guide Series on federal farm program law, *A Lawyer's Guide to ASCS Administrative Appeals and Judicial Review of ASCS Decisions*. The book's 195 pages describe the ASCS administrative appeal process and the judicial review of final ASCS determinations. In addition, its appendix includes sample pleadings and checklists. It is available from NCALRI, School of Law, University of Arkansas, Fayetteville, AR 72701 (501-575-7642) for $20.00.

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Anyone desiring a copy of any article should contact the nearest Law School library.

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Tenth Circuit finds no implied cause of action under Ag Credit Act of 1987

The Tenth Circuit has held that the Agricultural Credit Act of 1987 does not imply a private right of action against Farm Credit System lenders. *Griffin v. Federal Land Bank of Wichita*, No. 89-3070 (10th Cir. May 2, 1990)(per curiam) (1990 U.S. App. LEXIS 6800). In a short opinion, the court expressed its approval of *Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 876 (1990), which held that no implied cause of action exists. The issue is currently under consideration by the Eighth Circuit (*Zajac v. Federal Land Bank of St. Paul*, No. 89-5365) and the Fourth Circuit (*Payne v. Federal Land Bank of Columbia*, No. 89-1028). Both of those cases were argued in January, 1990.

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Agricultural Law Symposium issue. The office of the Executive Director of the AALA is preparing to mail the Agricultural Law Symposium issue, Spring 1990, U.C. Davis Law Review, which is volume 23, no. 3. It features articles growing out of the 1989 San Francisco AALA convention.

Each year, the AALA arranges with a law review to publish an agricultural law symposium issue. Next spring, the University of Indiana Indianapolis Law Review will publish the symposium with articles that will be prepared by individuals who will be featured on the program of the AALA convention in Minneapolis in October of this year.

Sponsorship of the symposium and distribution of the symposium issue to each active member are two of the services of the AALA and are among the benefits of membership in the association.

AALA Annual Meeting and Educational Conference. The American Agricultural Law Association will hold its eleventh annual conference October 5-6, 1990 at the Marriott City Center, Minneapolis, Minnesota. Some of the general topics to be presented this year include: agricultural resources in the 1990's; agricultural finance and insurance; alternative use of agricultural land – the legal issues in recreational access; international agricultural law; agricultural business and estate planning; and the annual review of agricultural law. Please plan to attend.