Agricultural Law Update

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"Jewell" lender liability case reversed

A California court of appeals has reversed a multi-million dollar jury award in favor of farm borrowers of the Bank of America. *Kruse v. Bank of America*, 201 Cal. App. 3d 354, 248 CAL, RPTR 217, AO 33064, AO 39161 (May 18, 1988). The jury's award had drawn considerable interest and attention to the burgeoning area of agricultural lender liability.

The appellate court's reversal was based exclusively on a finding that the evidence was insufficient to support the verdict. Thus the court appears not to have altered the law governing the theories on which the action was based.

The Jewells, husband, wife, and son, were apple growers and brokers. Their co-complainant against the bank, Irene Kruse, had been the sole owner of one of the two major apple processors in the Sebastopol region of California.

In 1974, the company owned by Mrs. Kruse, the O'Connell Company, encountered serious financial difficulties, including the loss of its long-standing operating lender. For both business and personal reasons, the Jewells sought financial assistance from the Bank of America to aid the company. The bank obliged with loans to the elder Jewell, which he loaned to the O'Connell Company, enabling it to improve its immediate financial condition.

Subsequently, the company desired to build a new dehydration facility in order to remain competitive. Again, the Jewells sought financing from the bank. Initially rebuffed, the Jewells obtained intermediate-term financing from a production credit association, but they continued to seek long-term financing from the Bank of America.

The company became increasingly indebted to the Jewells, and the Jewells became increasingly indebted to the bank, their growers, and the production credit association. However, the desired long-term financing from the bank was never forthcoming.

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Review of "person" determinations

On June 10, 1988, a federal judge in Phoenix, Arizona, issued an important ruling upholding the right of farm producers to challenge in their local Federal District Courts adverse "person" determinations under the various farm programs administered by the Agricultural Stabilization and Conservation Service of the U.S. Department of Agriculture.

The case, *Justice v. Lyng*, No. Civ. 87-1569-PHX-WPC, involved an action brought by the partners of three general partnerships engaged in a joint farming venture in Arizona. The partners filed a lawsuit in the United States District Court in Phoenix last October seeking a declaratory judgment that the decision of the ASCS combining them as one person under the 1985 cotton program was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

The government moved to dismiss the action. It argued, first, that the federal district court did not have jurisdiction to hear the case because it was really an action for money damages and that, under the Tucker Act, all claims for money against the federal government must be brought in the U.S. Claims Court in Washington, D.C. Second, the government argued that the case was really an effort to enjoin conduct by the Commodity Credit Corporation (CCC), and that Congress, in establishing the CCC, provided that no injunction could be issued against that entity.

The court rejected each of the government's contentions and denied the motion to dismiss. The court held that the Tucker Act applies only to claims for presently due and owing money damages, and does not preclude review by a district court of an agency's actions when, as in this case, the relief sought from the court is for other than money damages. The court added that even though its entry of a declaratory judgment in the plaintiffs' favor in this case may serve as a basis for a money judgment in their favor in the future, "this action is simply a review of an

(Continued on next page)

Although the Jewells had earlier declined to provide the bank with deeds of trust to their farm to secure the long-term financing, they did so in 1980 after the O'Connell Company was placed on the market for liquidation and following representations by a bank officer that the proceeds of the sale of the Jewells' properties would be used to pay the growers and to "protect" the Jewells from the demands of the production credit association. Slip Op. at 13.

In the words of the appellate court, the essence of the Jewells' claims against the bank was that ". . . the Bank wrongfully induced them to borrow heavily in order to finance the O'Connell Company; that once the Jewells were hopelessly overextended, the Bank reneged on its promise to provide long-term financing to the O'Connell Company, which would have enabled it to repay the Jewells; further, that after obtaining the Jewells' assets, the Bank betrayed them by failing to pay their other creditors. . . ." Slip op. at 16. The court found the evidentiary basis for each claim insufficient.

With respect to the wrongful inducement claim, essentially one for actual and constructive fraud, the Jewells asserted that the bank had failed to disclose "1) critical information regarding the O'Connell Company's bank history; 2) its low opinion of Dan O'Connell [Mrs. Kruse's son] as a business manager; and 3) the benefits it derived as a result of the Jewells' loans to the O'Connell Company." Slip op. at 18. In essence, without questioning whether a duty to disclose existed, the court found that there was insufficient reliance on the part of the Jewells on the bank's failure to disclose. Slip op. at 20.

With respect to the failure to provide long-term financing, the court characterized the Jewells' claim as the tort of bad faith denial of a contract, an actionable theory in California. *See, Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*, 36 Cal. 3d 752, 206 Cal. Rptr. 354, 586 P.2d 1158 (1984). However, the court found that the evidence failed to demonstrate that there was a contract, oral or written, between the bank and the Jewells for long-term financing. Slip op. at 27. The court noted that no proof was offered as to the terms of a contract and that preliminary negotiations do not make a contract.

Finally, with respect to the bank's failure to distribute the Jewells' assets after obtaining deeds of trust from them, the court found that even if the bank officer's representations about their distribution were false, the Jewells' loss of the property was not the result of the false promise but was rather the result of the Jewells' "self-created" indebtedness: ". . . even had they not assigned the trust deeds, they still would have lost their property to the creditors." Slip op. at 32.

The court also found Mrs. Kruse's claim of fraud to be wanting in evidentiary support. Also rejected were her claims for emotional distress and interference with economic advantage. The former claim was found to be insufficiently supported by the kind of "outrageous" conduct necessary to support an action for intentional infliction of emotional distress. The latter claim was rejected on the grounds that interference with one's own business may not serve as the basis for tort liability. Slip op. at 42-44.

Although the Jewells intend to petition for review by the California Supreme Court, the appellate court's decision has spawned speculation about the continued viability of lender liability actions. See Wall Street J., May 19, 1988, col. 1. Although the court's scrutiny of the facts may give some consolation to lenders, it is unlikely, however, that the decision represents the death knell for agricultural lender liability actions.

– Christopher R. Kelley

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REVIEW OF "PERSON" DETERMINATIONS / CONTINUED FROM PAGE 1

administrative decision pursuant to the judicial review provisions of the Administrative Procedures Act. The Claims Court does not have the authority to issue a declaratory judgment, and due to the administrative decision there is not an actual, presently due, amount owed" to the plaintiffs which requires them to proceed in the Claims Court.

The court next held that the plaintiffs' lawsuit is against the Secretary of Agriculture, not the CCC. In any event, the court said, a request for a declaratory judgment is not the same as a request for injunctive relief. "If this Court were to find that this action ran against the CCC and that declaratory judgments were equivalent to injunctive relief, the Secretary would be, in essence, immune from judicial review of administrative decisions concerning the Agriculture Act. That would be a nonsensical result."

Alan R. Malasky

Federal Register *in brief*

The following is a selection of matters that have been published in the *Federal Register* in the past few weeks.

1. ASCS; CCC; Payment limitation of a married couple with respect to farm operations; interim rule with request for comments; effective date June 3, 1988. 53 Fed. Reg. 21409. "[W]ith respect to the 1988 crop year... a husband and wife may be considered to be separate persons so long as they each maintained separate farming operations prior to and after their marriage."

2. ASCS; Selection and functions of ASCS state, county, and community ASC committees; final rule; effective date June 24, 1988. 53 Fed. Reg. 23749.

3. FCA; Personnel administration; final rule; effective date Jan. 1, 1989. 53 Fed. Reg. 22134. "This regulation has the effect of requiring independent senior management in Farm Credit Banks and associations."

4. BLM; Grazing Administration, exclusive of Alaska; Amendments to grazing regulations; correction; effective date April 28, 1988. 53 Fed. Reg. 22325.

5. FmHA; General revision of Guaranteed Farmer Program regulations; proposed rule. 53 Fed. Reg. 22764. "[A]ction to implement . . . the Agricultural Credit Act of 1987, to make revisions which will encourage lender participation in the

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AG LAW CONFERENCE CALENDAR

Ninth Annual American Agricultural Law Association Conference and Annual Meeting.

Oct. 13-14, 1988. Westin Crown Center, Kansas City, MO.

Topics to include: annual review of agricultural law; international agricultural trade; farm program participation; agriculture and the environment; agricultural taxation; and agricultural financing and credit.

Reserve these dates now.

Borrowers Rights and the Agricultural Credit Act of 1987.

August 6, 1988. Hilton International Hotel, Toronto, Canada.

Topics include: review of the legislative provisions, administrative rules, and recent case developments.

Sponsored by YLD Agricultural Law Committee, the Forum Committee on Rural Lawyers and Agribusiness of the Real Property and Probate Section, and the Agricultural and Agribusiness Financing Subcommittee of the Commercial Financial Services Committee of the Business Law Section of the American Bar Association.

For more information, call Neil Hamilton, at 515-271-2947

Penn State October Federal and State Income Tax Workshops.

Oct. 11-12, Lancaster, PA.
Oct. 13-14, Williamsport, PA.
Oct. 17-18, Souderton, PA.
Oct. 20-21, Bedford, PA.
Oct. 25-26, Pittsburgh, PA.
Oct. 27-28, Meadville, PA

Topics include: individual tax update; farm return issues; and computerized tax filing.

Sponsored by Penn State.

For more information, call 814-865-7656

Fourth Annual Farm, Ranch, and Agri-Business Bankruptcy Institute.

Oct. 6, 7, and 9, 1988. Lubbock, TX.

Topics include: the Agricultural Credit Act of 1987; UCC related issues; tax consideration in Chapters 7, 11, and 12; "life after *Ahlers*".

Sponsored by the Texas Tech University School of Law and the West Texas Bankruptcy Bar Association.

For more information, call Robert A Doty, 806-765-7491

Oral contract with cooperative upheld

In *Gooch v. Farmers Marketing Association*, 519 So.2d 1214 (1988), a marketing cooperative brought legal action against a farmer for losses incurred when the farmer failed to deliver 5,000 bushels of soybeans pursuant to an oral contract.

The parties had made a "hooking" by telephone for the future delivery of soybeans. The farmer never signed any written agreement, but admitted at trial that he had hooked the soybeans. The statute of frauds was raised as a defense to enforcement of contract.

The court rejected this defense. Evidence introduced at the trial showed that the farmer had performed two other non-signed bookings, had successfully cancelled one oral booking, and had inquired about cancelling the booking at issue.

The evidence supported a finding that the farmer should have known that a booking by telephone resulted in a binding contract. Furthermore, the farmer's previous bookings with the cooperative indicated knowledge of the course of performance of such bookings. Thus, the farmer was bound by the oral contract.

The farmer also disputed the amount of damages, claiming that breach occurred earlier than found by the court. Under state law, adopted from the UCC, damages for repudiation of contract are the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages.

The trial court awarded damages based upon the market price on the last possible date of delivery under the booking. The farmer argued that the cooperative learned of the breach on the date the cooperative mailed a letter requesting performance.

The appellate court affirmed the judgment of the trial court. The letter written by the cooperative expressed hope that the farmer would perform prior to, or on, the last date possible under the contract. This evidence supported the finding that the cooperative learned of the breach on the last date for performance under the contract.

– Terence J. Centner

Security interests in "growing crops" vs. "farm products"

The Supreme Court of Nebraska in *Albion National Bank v. Farmers Cooperative Association*, 422 N.W.2d 86, 228 Neb. 258 (1988) has found that a cooperative's interest in the proceeds of certain corn purchased from a farmer (husband and wife) was inferior to the perfected interest of a bank. The corn had been grown in Platte County. After harvest, the corn was taken to Boone County, the farmer's county of residence, where it was dried and stored. The corn was next delivered to the cooperative, and the cooperative credited the farmer's account with the value of the delivered grain.

The parties stipulated that at no time did the bank perfect a security interest in the corn being grown in Platte County. However, the bank had filed a financing statement covering the farmer's "farm products" in Boone County. The bank based its right to the proceeds from the corn on this financing statement.

The cooperative argued that the bank did not have a perfected security interest in the proceeds because its interest was not perfected while the corn was being grown.

The court rejected the cooperative's argument. While the bank did not have a perfected interest in the growing corn, when the collateral changed to a farm product, the bank's security interest in the collateral became perfected. Under the applicable law at the time of the sale, the corn received by the cooperative was a farm product that was subject to the bank's perfected security interest. The bank's superior interest in the corn continued in the proceeds.

– Terence J. Centner

FEDERAL REGISTER IN BRIEF /

CONTINUED FROM PAGE 2

guaranteed loan program and provide clarification in the processing and servicing of guaranteed OL and FO loans."

6. INS; IRCA; Adjustment of status of certain aliens; final rule; effective date June 22, 1988. 53 Fed. Reg. 23380.

7. FCIC; General Crop Insurance regulations; proposed rule. 53 Fed. Reg. 23770.

8. PSA; Amendment to certification of central filing system; Louisiana. 53 Fed. Reg. 24755.

– Linda Grim McCormick

Farm products central filing update

by Donald B. Pedersen

Introduction

Section 1324 of the Food Security Act of 1985 [FSA], the first Congressional intervention in general UCC issues, preempts state laws governing the rights of buyers of farm products. Pub. L. No. 99-198, 99 Stat. 1535, codified at 7 U.S.C. 1631. The farm products rule survives, however, but in significantly altered federalized form. The principal purpose of section 1324 is to protect buyers of farm products, as well as commission merchants and selling agents. However, the potential still exists for a security interest in farm products to survive their sale.

States are given two choices by the federal statute – implement a USDA-certified central filing system for effective financing statements (not to be confused with a central filing system for perfection of security interests in farm products), OR operate under the direct notice system of the federal statute. This article reports on states that have elected to obtain USDA certification of farm products central filing systems. In addition, it examines a few selected issues associated with such systems.

It is assumed that the reader is familiar with rules governing the filing of effective financing statements and the generation and distribution of master lists and supplements thereto.

As background, consider this brief review of certain basic rules governing a buyer of farm products when the commodity is covered by a USDA-certified central filing system. A buyer of farm products who desires maximum protection will register with the appropriate Secretary of State. Having done so, the buyer will receive from the Secretary of State master lists for the commodity or livestock categories applied for. The buyer can ask for master lists for all counties or selected counties. When a farmer proposes to sell farm products, the buyer will check the appropriate master list and supplements thereto, and if the farmer's name does not appear, the buyer can buy the farm products free of an existing security interest, even if the buyer knows that the security interest exists. If the farmer's name appears for the particular farm product, and if the buyer pays the farmer, the buyer takes subject to the security interest and may have to pay twice – unless, of course, the farmer accounts to the secured party for the proceeds. If the farmer's name appears, the buyer can safely buy free of the security interest, but only by following instructions obtained by direct contact with the lender. The master list and supplements thereto will not include payment instructions. The federal statute and attendant regulations do not specifically authorize the two-party check procedure – cutting a check payable to both the farmer-seller and the secured party. Whether the two-party check approach is safe for the buyer, when not specifically authorized by the lender, is an open question.

A buyer who fails to register with the Secretary of State, will not receive master lists and supplements, hut is still on notice of information contained therein. If the farmer is paid directly, an unregistered buyer runs the risk of having to pay twice. Under the federal statute, an unregistered buyer is entitled on a case by case basis to seek an oral report from the Secretary of State and is further entitled to written confirmation. 1324(c)(2)(F).

Survey of state USDA certified systems

As of this writing 16 states have USDA-certified central filing systems for effective financing statements. No further applications are pending at this time. As discussed hereinafter, USDA certification does not assure that the state has activated such a system or that the system continues to be in full compliance with all federal requirements. Pertinent citations are provided for the 16 states.

Alabama: Certified 10/22/87, 52 Fed. Reg. 41312 (1987) (specified farm products). Ala. Code § 7-9-307(4), 7-9-407(3)-(6), 7-9-410 (1975 and 1987 Cum. Supp.).

Arkansas: Certified 12/22/86, 51 Fed. Reg. 46887 (1986); amended 2/23/87, 52 Fed. Reg. 6040 (1986) (all farm products except cattle, calves, goats, horses, hogs, mules, sheep and lambs). Ark. Code Ann. § 4-9-307(4)-(6), 4-9-407(3)-(7) (1987 and 1987 Supp.).

Idaho: Certified 9/23/86, 51 Fed. Reg. 34236 (1986); amended 10/6/86, 51 Fed. Reg. 36257 (1986); amended 4/27/88, 53 Fed. Reg. 15722 (1988) (specified farm products). Idaho Code § 28-9-307, 28-9-402(9), 28-9-407(4)-(5) (1988 Cum. Supp.).

Louisiana: Certified 12/23/86, 51 Fed. Reg. 47036 (1986); amended 4/27/88, 53 Fed. Reg. 15722 (1988); amended 53 Fed. Reg. 24755 (1988)(specified farm products). La. Rev. Stat. Ann. § 3:3651 - 3:3660 (West 1987 and 1988 Cum. Supp.).

Maine: Certified 12/2/86, 51 Fed. Reg. 43941 (1986)(all farm products). 1987 Me. Legis. Serv. Ch. 27 (An Act to Continue the Central Filing System Established Pursuant to the United States Food Security Act of 1985).

Mississippi: Certified 9/17/86, 51 Fed. Reg. 33647 (1986) (specified farm products). Miss. Code Ann. § 75-9-307, 75-9-319 (1972 and 1987 Cum. Supp.).

Montana: Certified 9/9/86, 51 Fed. Reg. 32673 (1986)(all farm products). Mont. Code Ann. § 30-9-407(5)(1987), and related sections.

Nebraska: Certified 12/16/86, 51 Fed. Reg. 45493 (1986); amended 3/17/87, 52 Fed. Reg. 8938 (1987) (specified farm products). Neb Rev. Stat. § 52-1301 -- 52-1321 (1987 Supp.).

New Hampshire: Certified 9/29/87, 52 Fed. Reg. 37192 (1987)(all farm products). N.H. Rev. Stat. Ann. § 382-A:9-307(4), (5) (1961 and 1987 Cum. Supp.).

New Mexico: Certified 12/29/87, 53 Fed. Reg. 158 (1988) (specified farm products). N.M. Stat. Ann. § 56-13-1 -- 56-13-14 (1978 and 1987 Supp. Pamphlet 82).

North Dakota: Certified 12/16/86, 51 Fed. Reg. 45493 (1986) (all farm products). N.D. Cent. Code § 41-09-28(9)-(13), 41-09-28.1, 41-09-46(1)-(5)(1983 replacement and 1987 Supp.).

Oklahoma: Certified 12/23/87, 52 Fed. Reg. 49056 (1987)(specified farm products). Okla. Stat. ann. tit. 12A, § 9-307(3), 9-307.1 -- 9-307.8 (West 1963 and 1988 Supp.).

Oregon: Certified 11/28/86, 51 Fed. Reg. 43647 (1986); amended 8/28/87, 52 Fed. Reg. 33260 (1987) (specified farm products). Or. Rev. Stat. Ann. § 79.6020 - 79.8010 (Butterworth 1988).

South Dakota: Certified 9/29/87, 52 Fed. Reg. 37192 (1987) (all farm products except timber to be cut). S.D. Codified Laws Ann. § 57A-9-403.7 - .8 (1980 revision, 1987 Supp. and 1988 Interim Supp.).

Utah: Certified 10/22/86, 51 Fed. Reg. 37769 (1986); amended 3/18/87, 52 Fed. Reg. 8491 (1987)(all farm products).

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Utah Code Ann. § 70A-9-307(4), 70A-9-400 (1980 replacement and 1987 Supp.).

Vermont: Certified 7/13/87, 52 Fed. Reg. 27035 (1987)(all farm products) Vt. Stat. Ann. tit. 9A, § 9-601 - 9-607 (1966 and 1987 Supp.).

Note that some states do not include "all farm products" under their central filing system. While this appears to be consistent with the USDA regulations, an argument can be made that section 1324 contemplates an "either-or" election – central filing "or" direct notice. 1324(e). If the regulations are at variance with the intent of Congress, they may be subject to a successful challenge. Whether existing certifications could be repaired and continued uninterrupted would, of course, be a critical issue.

Effective date

The effective date of the federalized farm product rule was December 23, 1986. Several states did not receive certification of their central filing systems until several months after the effective date. Accordingly, during the intervening period, disputes between holders of perfected security interests and buyers of farm products would have to be resolved under the direct notice scheme of the federal statute.

Scope of preemption

Administration of the UCC farm products rule has generated an extensive amount of litigation over whether the secured party, through course of dealing or trade usage, has authorized the sale of particular farm products free of the security interest. Frustration with such litigation led New Mexico and Arkansas to amend UCC 9-306(2) to provide that a security interest in farm products shall not be considered waived nor shall authority to sell the farm products be implied from any course of dealing between the parties or by any trade usage. However, litigation has continued in many other jurisdictions – with disparate results. The federal statute is not specific on the issue of whether preemption of the farm products rule extends to preemption of the uniform course of dealing and trade usage language of section 9-306(2), when the collateral is farm products. Taking a broad view of the legislative intent behind section 1324, one writer has argued that "[u]nless the conflicting results under Section 9-306(2) are preempted, the FSA will not have accomplished its presumed goal in creating order, certainty, and simplicity in this area of the law." Sanford, *The Reborn Farm Products Exception Under the Food Security Act of 1985,* 20 U.C.C. L.J. 3, 10 (1987). The point is well taken, but needs to be resolved in early litigation.

Another preemption issue exists because a number of states continue to impose requirements not called for in the federal Act. The state statutes are of great variety and include requirements that the seller directly notify the buyer of liens (with criminal sanctions for noncompliance), various direct notice schemes that are inconsistent with or that go beyond the federal statute, and mandatory special endorsements on checks attesting to no liens. Again, it can be argued that an exploration of the underlying theory of section 1324 requires a finding of preemption. "If submitted to a court, it seems likely that direct notice under the FSA would be viewed as a true preemption situation with FSA compliance offering the exclusive means of preserving rights against buyers of farm products." Reiley, *State Law Responses to the Federal Food Security Act,* 20 U.C.C. L.J. 260, 277 (1988). It would seem equally valid to argue that the consequences to a dishonest seller are fully covered by the federal statute. 1324(h). In other words, to achieve national consistency and to remove burdens on and obstructions to interstate commerce, Congress arguably swept away the morass of state law associated with the sale of collateralized farm products – a total federal preemption.

Not for perfection

Confusion still lingers in some quarters over the fundamental point that the filing of an effective financing statement is not a substitute for filing the traditional financing statement (U.C.C. 1). After federal preemption of the farm products rule, one still looks to state law to determine if a security interest in farm products has attached and has been perfected. Filing rules for financing statements (U.C.C. 1) have not been changed or preempted by the federal legislation. Conflicts between secured parties will be resolved as in the past. The federal legislation focuses solely on conflicts between secured parties and buyers and only where the collateral is farm products. 9 C.F.R. 205.202 (1988) (interpretative rule); H.R. 99-271, pt. 1, p. 110.

Noncomplying certified systems

Consider the possibility that a state may have a USDA-certified central filing system, but that the system never comes into compliance with, or falls out of compliance with federal law. This could result from delays in processing E.F.S. filings, a failure to institute regular distribution of master lists and supplements, or other noncompliance with section 1324. The interpretive regulation at 9 C.F.R. 205.214 (1988) suggests that where a USDA-certified central filing system is in noncompliance, the state will be treated as a direct notice state. This would be true even though decertification has not occurred. In Arkansas, for example, due to funding shortages, there was considerable delay in processing initial E.F.S. filings. While the system was certified by USDA in December, 1986, the first master list was not distributed until September, 1987. Accordingly, many lawyers advised lenders not only to file an E.F.S. 1 with the Secretary of State, but to comply as well with the federal direct notice requirements. In other words, the advice was to cover both possibilities-- Arkansas as a central filing state and Arkansas as a direct notice state. Such advice is still being rendered, given lingering concerns over other issues, such as the "fiche" question discussed hereinafter.

Interstate sales

Given the patchwork of states that have adopted central filing for effective financing statements, it is apparent that there is constant potential for sales in a central filing state of farm products produced in a direct notice state. Reverse transactions also will occur, as will sales from a direct notice state into a neighboring direct notice state, and sales from a central filing state into a neighboring central filing state. How does the system work when transactions occur across state lines?

Consider the case of a sale to a Montana buyer, of crops that have been raised and collateralized in North Dakota. Both states have USDA-certified central filing systems, which shall be assumed to be in active compliance with federal law. A security interest perfected in North Dakota remains perfected for four months after the collateral is removed from the state. UCC 9-109(d)(1). Under the federalized farm products rule, the lender will protect

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itself by filing an E.F.S. 1 in North Dakota. The North Dakota lender probably cannot file an E.F.S. 1 in Montana as state central filing systems are designed to accept information only as to farm products raised in their own counties. In any event 9 C.F.R. 205.210(b)(1988) suggests that an E.F.S. 1 filing in Montana would be meaningless. 9 C.F.R. 205.210(b)(1988) warns that a buyer in Montana runs the risk of taking subject to the security interest if it is reflected on the North Dakota master list. Such a result ensues if the buyer fails to request from and follow payment instructions given by the secured party. This is a federal system and the overriding federal legislation governs across state lines. The buyer in Montana will need to know that he is dealing with a North Dakota producer and will need to register for the pertinent North Dakota master list, or make special inquiry in North Dakota on a case by case basis.

The same analysis ought to control if the collateralized North Dakota crop is hauled out of state and sold to a Minnesota buyer. Minnesota, of course, is a direct notice state. Conservative lenders to the North Dakota farmer might give direct notice to potential Minnesota buyers, but there would appear to be no requirement that this be done. The rights of the secured party vis-a-vis the Minnesota buyer of North Dakota farm products would appear to be governed by the North Dakota central filing system. Such a result would be consistent with 9 C.F.R. 205.210(b)(1987) and would put Montana and Minnesota buyers on equal footing.

Assume that a Missouri farmer borrows from a Missouri lender, but sells his collateralized crop in Arkansas. Missouri is a direct notice state and Arkansas, it is assumed, has an active central filing system for farm products (other than livestock). Whether the security interest survives the sale would be determined by applying the federal direct notice rules. There is no provision for the Missouri lender to file an effective financing statement with the Arkansas Secretary of State's office. Arkansas central filing records are organized by farm product and county and are not designed to store information with respect to crops raised in Missouri. Because the overriding provisions of the federal direct notice scheme apply, the Arkansas buyer would need to be cognizant of the significance of the receipt of a direct notice describing Missouri farm products.

If collateralized Missouri crops are sold in Illinois, the case involves two direct notice states. The federal statute governs as to the content of notice, legal impact of receipt, and virtually all other points. However, the question of when a direct notice is considered received is to be determined by state law and a question thus arises as to whether Missouri or Illinois law would apply on that point. The federal statute at 1324(f) and (g)(3) specifically states that "receipt" shall be defined by the law of the state *in which the buyer resides*. The interpretive regulation is consistent with the federal statute on this choice of law issue. 9 C.F.R. 205.210(c)(1988). State laws on what constitutes receipt vary substantially.

The "gap" problem

Inevitably, under a central filing system, there will be a time lag between the time an E.F.S. 1 is filed with the Secretary of State and the time when the information becomes available on a master list or supplement. If a sale occurs during the gap, is the buyer on notice because the E.F.S. 1 has been filed? Or, is the lender at risk until the information on the E.F.S. 1 appears on an updated distributed master list or supplement thereto? The interpretive regulation purports to answer the question favorably to the buyer. 9 C.F.R. 205.208(c)(1988) suggests that a registered buyer of farm products takes subject to a security interest only if the E.F.S. 1 information is on a current master list available for distribution and received. This suggests that the registered buyer need not make an oral inquiry to ascertain more recent information. Indeed, it is reported that some states are not honoring oral inquiries from registered buyers. This position is consistent with the federal statute. 1324(c)(2)(F). The fact that registered buyers may not be able to obtain recently filed data supports the position taken in the interpretive regulation.

As to the "gap" problem, an unregistered buyer may be in a peculiar position. Information acquired by oral inquiry and written confirmation will include recently filed E.F.S. 1's, in addition to data on available master lists and supplements. 1324(c)(2)(F). In theory, an argument could be made that the more recent data could be ignored by the unregistered buyer, but it is doubtful that this would be a sound practice. Given an unregistered buyer's ability to access recently filed E.F.S. a data, it is conceivable that a court might hold an unregistered buyer to a higher standard than a registered buyer – bound by filed E.F.S. 1 data even though it is not on a master list or supplement thereto. There would be little point in testing the issue by ignoring payment instructions obtainable from the secured party.

The "fiche" question

At least one state, Arkansas, is distributing supplements to annual printed master lists only in microfiche format. This, of course, requires registered buyers to acquire a microfiche reader. Is such a practice contemplated by the federal statute? Section 1324(c)(2)(E) provides that the Secretary of State must distribute "regularly as prescribed the State to each buyer, commission merchant, and selling agent on the list described in subparagraph (d)[list of registered buyers] a copy in written or printed form of those portions of the master list described in paragraph (C) that cover the farm products in which such buyer, commission merchant, or selling agent has registered an interest." 9 C.F.R. 205.1(g) (1988) defines "master list" to mean [t]he accumulation of data in paper, electronic, or other form, described in subsection (c)(2)(C) of 1324 of the Act. 9 C.F.R. 205.105(b)(1988) provides the "[s]ubsection (c)(2)(E) [of Section 1324 of the Act] requires the portion [of the master list] to be distributed in "written or printed form." Distribution in machine readable form is discretionary with the State, but it must be in addition to the "written or printed form." This is a substantive rule, not an interpretive rule, and certainly applies to master list supplements, as well as to the master list itself. Accordingly, distribution of a master list or supplements thereto in microfiche (or microfilm) alone would appear to violate the regulations. This raises the potential of a finding that the state's system is not in compliance and invites litigation under the interpretive rule at 9 C.F.R. 205.214 (1988), discussed hereinbefore. Given the existing statutory language and the attendant regulations, it appears doubtful that a state could cease distributing master lists and supplements in "written or printed" form and allow access only through computer terminals.

FmHA's approach

The Farmers Home Administration (FmHA) has elected not to participate in established central filing systems – that is, FmHA is not filing E.F.S. 1's. FmHA AN No. 1703 (1940)(Dec. 22, 1987). Instead, FmHA is giving lists of FmHA debtors to potential buyers of farm products. Assuming a central filing system for effective financing statements, can FmHA protect its security interest by giving lists of FmHA debtors to buyers of farm products? The answer is a clear no. Actual knowledge, acquired by a buyer in this manner, does not prevent the buyer from buying free of the FmHA security interest if the name of the farmer-debtor (with FmHA shown as secured party) does not appear on the current master list or a supplement thereto.

In this regard there appears to be a serious error in the Idaho statute, which provides that the buyer is protected if there is no pertinent listing on the mas-

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ter list or supplement "unless he [buyer] has received written notification [as that term is used in applicable federal law and regulations] of the security interest from . . . his seller, or the secured party." Idaho Code 28-9-307 (1988 Cum. Supp.). Such notices are ineffectual to preserve the security interest in a state with a certified central filing system.

Journal articles

Many other potential issues exist under both the central filing and direct notice scheme of the federal farm products rule, as revealed by the following articles. Comment, *Section 1324 of the Food Security Act of 1985: Congress Preempts the "Farm Products" Exception of Section 9-307(1) of the Uniform Commercial Code*, 55 UMKC L. Rev. 454 (1986-87); Dewey, *Federal Law to Preempt Crop Lien Provisions of the Uniform Commercial Code*, 38 Ala. L. Rev. 503 (1987); Fry, *Buying Farm Products: The 1985 Farm Bill Changes the Rules of the Game*, 91 Com. L.J. 433 (1986); Meyer, *Congress's Amendment to the UCC: The Farm Products Rule Change*, 8 J. of Agric. Tax'n & L. 3 (1986); Meyer, *U.C.C. Issues*, 8 J. of Agric. Tax'n & L. 153 (1986); Meyer, *U.C.C. Issues*, 9 J. of Agric. Tax'n & L. 181 (1987); Note, *Clear Title: A Buyer's Bonus, A Lender's Loss – Repeal of U.C.C. 9-307(1) Farm Products Exception by Food Security Act 1324*, 26 Washburn L.J. 71 (1986-87); Note, *Farm Products Collateral: Still a Problem?*, 1987 U. Ill. L. F. 241; Note, *The Federalization of the Farm Products Exception Rule of U.C.C. 9-307(1): Anomaly or Opening Salvo?*, 36 Drake L. Rev. 115 (1986-87); Reiley, *State Law Responses to the Federal Food Security Act*, 20 U.C.C. L.J. 260 (1988); Richards, *Federal Preemption of the U.C.C. Farm Products Exception: Buyers Must Still Beware*, 15 Stetson L. Rev. 371 (1985-86; Sanford, *The Reborn Farm Products Exception Under the Food Security Act of 1985*, 20 U.C.C. L.J. 3 (1987); Uchtmann, *1985 Farm Bill to Preempt Farm Products Exception of Uniform Commercial Code 9-307(1)*, 3 Agric. L. Update 1 (Jan. 1986); Uchtmann, *Federal Clear Title Rules Preempt State Law on Dec. 23, 1986*, 4 Agric. L. Update 1 (Nov. 1986).

EDITOR'S NOTE:
Mediation funds clarification. In the May, 1988 *Update* it was misstated that congress had appropriated $7,500,000 for state mediation programs. Congress has authorized that amount, but at last check has not actually made the appropriation.

STATE ROUNDUP

NEBRASKA. *Farm Mediation Act.* The 1988 Nebraska Farm Mediation Act establishes a voluntary farm credit mediation system. The act is patterned after Iowa's mandatory mediation statute but is voluntary in that creditors need not mediate even if a farmer requests mediation. Farmers who receive at least half of their gross income from farming will be able to initiate mediation by applying to the state mediation service. Agricultural creditors will be required to notify farmers of the availability of mediation thirty days before creditors may initiate foreclosure proceedings on a farm debt of at least $40,000. The Nebraska Agriculture Department will designate who will act as the mediation service, as well as who will provide legal and financial counseling to farmers seeking mediation. Regulations implementing the Act are expected to be adopted by the Agriculture Department this fall, when the program will go into effect.

When a farmer initiates a mediation request, the mediation service will notify the farmer of the availability of financial counseling and legal counseling, and will notify all creditors. The initial mediation meeting will be held within twenty days of the mediation request. Neither the farmer nor any of his creditors will be legally required to attend any mediation sessions. Mediation costs will be paid equally by borrower and creditors. If a mediation agreement is reached, the mediator may draft an agreement, have it signed by the parties, and file it with the mediation service. All mediation proceedings and financial data will be confidential. Mediation does not affect a creditor's foreclosure rights beyond the notice requirement.

Whether the Nebraska Farm Mediation Act will be effective in encouraging more voluntary farm debt workouts remains to be seen. In other states voluntary mediation programs generally have had relatively few cases in comparison to mandatory mediation programs. Crucial to the success of the program, however, will be the willingness of farm creditors to voluntarily delay foreclosure to meaningfully participate in mediation sessions. If creditors give farmers the required notice of the mediation program, but then refuse to participate in mediation negotiations, which is permissible under the Act, the program will accomplish little beyond providing legal and financial counseling to farmers facing financial difficulty. Such creditor behavior could result in political pressure to make mediation mandatory.

– J. David Aiken

MINNESOTA. *Corporate farming statute expanded.* The Minnesota Corporate Farming Statute, found at Chapter 500.24 of the Minnesota Statutes, was expanded this last session to include limited partnerships. Principally the amendments include limited partnerships in the prohibition on non-family ownership of agricultural land in Minnesota. Limited partnerships are now allowed if they meet essentially the same requirements as so-called family farm corporations. Thus there is now a category of family farm partnerships. Requirements are that the limited partnership must be formed for the purpose of farming and ownership of agricultural land; the majority of the interest in the partnership must be held by related persons, at least one of whom is residing on and actively operating the farm; none of the partners can be corporations; there can be no more than five members in the partnership, all of whom are natural persons; it must receive most of its gross receipts from farming; its general partners must hold at least fifty-one percent of the interest in the land assets and must reside on the farm; and the limited partners and the farm partnership as a whole cannot own more than 1500 acres which are used for farming or capable of being used for farming in Minnesota. The authorized family farm partnership must be issued a certificate from the Secretary of State.

An additional amendment to the Act was the addition of the following technical change and two new provisions. Subdivision 2(d)(5) changed the language "majority of the shares" to mean fifty-one percent or more of the interest in the corporation. Subdivision 2(d)(6) and (7) provide as follows: "Authorized farm corporation" means a corporation meeting the following standards: "The authorized family farm corporation, directly or indirectly, owns or otherwise has an interest, whether legal, beneficial, or otherwise, in any title to no more than 1500 acres of real estate used for farming or capable of being used for farming in this State"; and "a shareholder of the authorized farm corporation is not a shareholder in other authorized farm corporations that directly or indirectly in combination with the authorized farm corporation own not more than 1500 acres of real estate used for farming or capable of being used for farming in this State." These amendments apparently go to the heart of the statute that land not be monopolized by forms of business ownership that put family farms as a whole at risk. The amendments are, in essence, anticoncentration provisions.

– Gerald Torres

American Agricultural Law Association News

Job Fair. The American Agricultural Law Association's Fourth Annual Job Fair will be held concurrently with the 1988 Annual Meeting October 13 and 14, 1988, at the Westin Crown Center in Kansas City.

Prior to the annual meeting, known positions and information regarding scheduled on-site interviews will be circulated to ABA-approved law school placement offices by the Job Fair Coordinator. Placement offices will forward resumes to interested firms and organizations. Employers can schedule interviews any time during the conference.

To obtain further information or to arrange an interview, please contact: Gail Peshel, Director, Career Services and Alumni Relations, Valparaiso University, School of Law, Valparaiso, Indiana 46383, 219 / 465-7814.

1989 Oberly Award nominations. Nominations are sought for the 1989 Oberly Award for bibliographic excellence in the agricultural or related sciences. To be eligible, a bibliography must have been published in 1987 or 1988, and at least one author, editor, or compiler must be a U.S. citizen. Bibliographies will be judged on usefulness, scope, accuracy, format, explanatory features, and indexing methods. The award is administered by the Science and Technology Section of the Association of College and Research Libraries Division of the American Library Association. It will be presented at the 1989 annual meeting of the American Library Association in Dallas, Texas. Nominations in the form of a letter, including if possible a copy of the bibliography, should be sent by January 1, 1989 to Carolyn L. Warmann, Chair, Oberly Award Committee, Reference Department, Carol Newman Library, Virginia Polytechnic Institute and State University, Blacksburg, VA 24061.