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Wetlands Reserve Program

The third annual sign-up for the Wetlands Reserve Program (WRP) commenced on May 30, 1995. The WRP continues to be a voluntary program that offers landowners a chance to receive payments for restoring and protecting wetlands on their property. The WRP obtains conservation easements from participating landowners and provides cost-share payments for wetland restoration. The WRP is authorized by the 1985 Farm Bill (as amended by the Food, Agriculture, Conservation, and Trade Act of 1993), and has recently experienced a few changes to streamline the program and give administrative authority to the Natural Resources and Conservation Service (NRCS). The changes are contained in the June 1, 1995 Federal Register.

The rule establishes that permanent easements will be given the highest priority for sign-up, as there is also an allowance for 30-year easements as well as non-permanent easements. For the first year since the program was instituted, all states are eligible for sign-up. NRCS will request the services of a closing agent to conduct title searches, acquire title insurance, and do any other activities necessary to develop the easement. The landowner controls access to the property and may use the land for designated uses, including hunting and fishing and other non-intensive recreational uses. The landowner may be paid no more than the agricultural value of the land prior to wetland conversion.

Landowners may have questions concerning legal documentation involved with the transaction. From the time a landowner expresses interest in signing up land for the program until the time NRCS determines the land's eligibility, an "Option Agreement to Purchase" secures NRCS's opportunity to enroll the land. The Option provides for $1 consideration. Once the land is accepted into the program, a "Warranty Easement Deed" will be completed by the landowner(s) and NRCS.

Attorneys working with landowners wishing to enroll in the WRP may also need to answer tax questions. A position paper diseussing "bargain sale" or "part-sale-part-gift" transactions is forthcoming from NRCS and an appropriate tax expert.

The 1995 Wetlands Reserve Program is funded at $92 million and an estimated 118,000 acres are expected to be enrolled. The program's second sign-up, conducted in 1994, was available in 20 states. Although there was a statutory limit of 75,000 acres, landowners sought to enrol 590,000 acres. That year, 75,000 acres were accepted at a cost of $39 million.

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Agricultural Credit Associations' federal loan dragnet clause

The case of *Western Farm Bank v. Auza*, 95 D.A.R. 6229 (9th Cir., January 19, 1995), provides an informative discussion of the operation of "dragnet clauses" in security instruments, and their securing of subsequent obligations.

These proceedings arise out of an action by the *Western Farm Credit Bank (WFCB)* as successor-in-interest to the Arizona Agricultural Credit Association and Arizona Livestock Production Credit Association. WFCB intervened in the Chapter 11 bankruptcy of the Auzas. Originally, the Auzas had renewed promissory notes to the WFCB in 1989, totalling approximately $2,800,000.00. Subsequent modification of this debt occurred in 1990. The security agreements contained dragnet clauses. *Id.* at 6229. In 1987, prior to the renewal of the Auza farm loans, WFCB extended loans to Quality Gin Incorporated (QGI). These loans were made jointly to QGI and an Auza/Riley Investment Group. *Id.* at 6229. Auza, in his capacity as a corporate officer of QGI, as partner of Auza/Riley Investment Corp., and as personal guarantor, executed promissory notes in favor of WFCB, totaling approximately $710,000.00. The QGI loans were secured by QCI property. The QGI loans also stated that they were secured

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Clean Water Act reauthorization — House and Senate bills

Two bills have entered the legislative mainstream for reauthorization of the Federal Water Pollution Control Act (Clean Water Act). The House version (HR 961), sponsored by Rep. Shuster, and the Senate version (S. 851), sponsored by Senator Johnston, both significantly change wetlands provisions and the current Clean Water Act (CWA) section 404 permitting process.

Both versions would establish a wetlands classification process, in conjunction with a permitting process for otherwise restricted wetlands activities, that would label all wetlands as Class A, B, or C. Lands delineated as Class A wetlands would contain lands serving critical wetlands functions and providing critical habitat. To meet Class A standard, the wetlands would have to be ten acres or more with a defined surface, or if potholes, one acre or more. Class B wetlands would consist of lands providing habitat for significant populations of wetland dependent wildlife or other significant wetlands function. In determining permitted activity within a Class B wetland, a balancing of the benefits from the proposed activity would be weighed against functions served by the wetland that would be affected by the activity. Class C wetlands would be those wetlands areas providing marginal function or those lands in commercial or industrial development areas. No permit would be required for proposed activities within Class C wetlands.

Not only would the classification and permitting process be new or revised for the wetlands provisions of the Clean Water Act, but the delineation standards would be as well. First, new delineation procedures within both versions of the bills call for "clear evidence" that waters have wetland hydrology, hydrophytic vegetation, and hydric soil during the "growing season." The "growing season" is defined as the average date of the last spring frost until the first fall frost. Second, water on or above the surface of the ground would have to be present for at least twenty-one consecutive days. This requirement extends the present procedure for wetland delineation by a seven day duration. Finally, the wetland must not be temporarily or incidentally created as a result of adjacent development activity.

Delineation of agricultural wetlands will remain under the discretion of the Secretary of Agriculture, and those areas of agricultural land determined to be exempt from the provisions of Swampbuster would be deemed exempt from the delineation procedures under the CWA section 404.

The largest and possibly most controversial difference between the House and Senate version of the wetlands provisions within the proposed CWA rewrite comes from the House's proposed "Right to Compensation" subsection. This subsection calls for the government to compensate a landowner for any portion of his or her property that has been limited by agency action under the wetlands provisions that diminishes the fair market value of that portion by twenty percent or more. If the diminution is greater than fifty percent, the government shall purchase that portion for its fair market value at the option of the owner. Many opponents to this "takings" issue believe that requirements such as this are essentially requiring the government to pay landowners not to do things which would be harmful to the environment or neighboring property. Many feel such a provision will have severe financial impacts on the budgets of affected agencies.

Fiually, an added provision would establish the authority for "mitigation banks" allowing landowners to mitigate wetlands found on their property by restoring, creating, or enhancing a wetland in another location. This concept of "no net loss" intends to add flexibility to mandatory wetlands compliance by providing wetlands "credits" in a "bank" that a landowner can purchase or establish in return for converting the wetland located on his or her own property.

Wetlands policy — added flexibility

Many agree that wetlands policies and laws need revision and added flexibility. This has largely surfaced as a result of private property rights activists and their claims asserting "takings." Although agricultural wetlands generally escape the "takings" rhetoric because of the benefits landowners receive in return for their compliance in federal farm programs, the Department of Agriculture and other agencies are seeking to adopt more flexibility in wetlands provisions and consistency among agencies involved with the issue.

One such attempt was a Memorandum of Agreement (MOA) issued by the Departments of Agriculture, Interior, Army and Environmental Protection Agency. The MOA was committed to minimizing duplication and inconsistencies between Swampbuster and the CWA Section 404 program.

In the present farm bill reauthorization process, USDA is seeking to pursue amendments to the wetland conservation provisions of the 1985 farm bill to ensure that the program focuses on conserving significant and important wetland functions and values, while providing greater flexibility to the agency as it works with farmers, particularly with regard to the mitigation provisions. USDA is also seeking to change the mitigation provisions so that the agency and the farmer can focus on restoring significant functions and values on a watershed basis, and provide for the creation and use of wetland mitigatiou banks.

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Federal Register *in brief*

The following is a selection of matters that were published in the *Federal Register* from June 1 through 23, 1995.

1. Natural Resources Conservation Service, Wetlands Reserve Program; Responsibility transferred from Consolidated Farm Service Agency to NRCS; interim rule with request for comments by July 31, 1995. 60 Fed. Reg. 28511.

2. Supplemental standards of ethical conduct; interim rule with request for comments by July 12, 1995. 60 Fed. Reg. 30778.

4. PSA; Amendment to certification of central filing system; Oklahoma. 60 Fed. Reg. 32651.

—Linda Grim McCormick, Alvin, TX

Dragnet clauses/Continued from page 1

by the real and personal property assets of QGI and Auza/Riley Investment. The records of the bank reflected a review of the financial histories, and net worth of both Auza and Riley. *Id.* at 6230. Significant in the facts before the court was that the bank records did not indicate that WFCB relied on the dragnet clauses in the security instruments from the Auzas' prior loans.

After the completion of the QGI loans, the Auzas renewed their prior obligations to WFCB in 1990.

After the renewal of the Auza loans, QGI defaulted on its obligation to WFCB and filed bankruptcy. *Id.* at 6230. The Auzas also filed for Chapter 11 bankruptcy protection. WFCB subsequently presented a claim in the Auza bankruptcy action for approximately $1,000,000.00, of which approximately $435,000.00 represented a deficiency balance from the QGI loans. *Id.* at 6230.

The WFCB's contention in the case was that the dragnet clauses in the Auza loans secured the deficiency balance. The Auzas contested this and initiated an adversary proceeding against WFCB. The bankruptcy court held that the dragnet clause from the Auza loans did not secure the Auza guarantee of the QGI loans. *Id.* at 6230.

Generally, a dragnet clause is a provision within a security instrument, such as a mortgage, which operates to secure past and future advances, as well as present indebtedness. These clauses are generally upheld. However, courts tend to construe them narrowly because of the broadness of their coverage and the fact that the mortgagor is often not aware of the effect of such a clause. *Id.* at 6230. Treatment of dragnet clauses among the states is not always consistent. *Id.* at 6230, citing 3 A.L.R.4th 690. For example, some courts enforce dragnet clauses based upon the clause's plain meaning. Id. at 6231, citing *First National Bank in Dallas v. Rozell*, 493 F.2d 1196 (10th Cir. 1974). In other jurisdictions, dragnet clauses have been found by their nature to be ambiguous. *Id.* at 6231, citing *Canal National Bank v. Becker*, 431 A.2d 71 (Maine, 1981).

Arizona applies two methods for analyzing whether a dragnet clause secures a subsequent obligation. These two methods are the "relationship of the loans" method and "reliance on the security" method. *Pearll v. Williams*, 704 P.2d 1348 (Ariz. Ct. App. 1985).

The "relationship of the loans" method follows criteria that looks at the facts underlying the transaction to see if the parties' intent, either from an express connection between the loans or from the nature of the loans, was to secure the obligation.

The method of "reliance on the security" pivots on whether the facts of the case show an intent by the parties to rely on the security underlying the obligation.

The court of appeal determined that the applicable tests for reviewing the application of a dragnet clause were those outlined in *Pearll, supra*, and *Union Bank v. Wendland*, 54 Cal. App. 3d 393 (Cal. App. 1976).

Under a "relationship of the loans test," the Ninth Circuit found that the Auza loans and the QGI loans were not connected and that they did not have a substantially similar nature. *Western Farm Credit Bank* at 6233.

The second test, "reliance on the security," was also not supported by the facts of the case. The court of appeals found that the record was void of any facts indicating that WFCB relied on the Auza security in making the QGI loans. Although, WFCB argued that the collateral for the Auza notes was also collateral for the personal guarantees on the QGI notes, the court found that such a distinction did not alter the result. WFCB's loan documents did not show any indication that the personal guarantee of Auza was distinguishable from Riley's personal guarantee, based upon the dragnet clause. *Id.* at 6233. The court of appeals affirmed the bankruptcy court's conclusion that the WFCB claim of approximately $435,000.00, attributable to the QGI deficiency balance, was not secured.

—Thomas P. Guarino, Myers & Overstreet, Fresno, CA

Florida legislature passes property rights bill.

The 1995 Florida legislature passed a landmark property rights bill entitled the Bert Harris Private Property Rights Bill (CS/HB 863), with the effective date of October 1, 1995.

The Harris bill substantially revises prior takings law in Florida. Previously, common law condemnation jurisprudence required a governmental action to "take" all or substantially all economic benefit or productive use of a property before compensation could be ordered. The new bill substantially reduces the level of diminution required to create a compensable taking.

The bill addresses governmental actions that "inordinately burden" a property. Presumably, this can occur without depriving a landowner of all use of the property. The "inordinate burden" must be factually determined, and is not subject to easy statutory definition.

The Harris bill expressly protects existing investment-backed uses and rights to a parcel. Additionally, it states that reasonably foreseeable future uses of a property are vested rights. Reasonable investment backed expectations will be determined on a case-by-case basis. They must not be speculative. They must be suitable for the property. They must be compatible with adjacent property.

The judicial interpretation of "reasonably foreseeable future uses" and "inordinate burdens" will have a substantial bearing upon the applicability of the statutory law. If narrowly construed, the bill may not substantially affect current takings jurisprudence. On the other hand, if judges liberally construe the class of reasonable investment backed expectations, the bill might dramatically alter regulatory law in Florida.

The law is prospective. It covers actions of state, regional, and local governments. A broad range of regulatory actions, including permits, rezonings, and dredge and fill permits are addressed. The law covers actions based on law and regulations enacted after the end of the 1995 regular session on May 11, 1995.

The bill establishes a complex process a landowner must follow. The landowner must first serve a written claim upon the government that allegedly inordinately burdened the property. The claim must include an appraisal that sets forth the alleged loss in value of the property caused by the governmental action. The claim must be filed within one year after the governmental action. The government has 180 days to respond to the claim. The landowner may file a claim against each unit of government which the landowner believes inordinately burdened the landowner's property.

For example, infrastructure currency requirements could be addressed as follows. A landowner wants to convert from agricultural designation under a local comprehensive land use plan. He is unable to do so because the level of service for the roadway adjacent to the parcel might be inadequate for the proposed use. The landowner might claim that the Department of Transportation has harmed the property because of failure to maintain an adequate level of service. The local government refusing the comprehensive plan amendment has stymied reasonable investment backed expectations for the property.

Unlike most common law taking standards, the landowner need not exhaust available administrative remedies prior to filing suit under the Harris bill. While

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State regulation of products from cows treated with recombinant bovine somatotropin

By Terence Centner

The first genetically-engineered animal drug available for use is recombinant bovine somatotropin (rbST).[1] This drug is used to supplement bovine somatotropin (bST), a protein hormone that naturally occurs in all mammals. In dairy cows, bST is the hormone which regulates the lactation process. There is no significant difference in the levels of bST in the milk of cows treated with rbST as opposed to untreated cows, and no current test can distinguish rbST from bST in milk from treated as opposed to untreated cows.[2]

Laboratory produced rbST is created directly from the genes of cows. To be effective, rbST must be injected. A commercial form of the hormone (POSILAC) is being sold in a slow-release formulation to be injected at two-week intervals. Early studies have shown that by injecting the rbST into cows, milk yields tend to increase by seventeen to twenty-five percent in well-fed and well-managed herds,[3] yet the cost to adopt usage of the hormone is relatively small. Suppliers will be able to increase milk production without having to increase the size of the herd, with only moderate increases in the amount of feed. With a decrease in the ratio of feed per unit of milk, producers using rbST are expected to have lower costs of production.

The Food and Drug Administration (FDA) gave its approval for the product in November 1993,[4] and official rules were adopted in the *Code of Federal Regulations*.[5] However, because of further testing of the product, sales were not allowed until February 1994.[6] In the first seven months of commercial sale of POSILAC, over 10,000 dairy farmers used the product.[7] By the turn of the century, seventy percent of U.S. milk may come from treated cows.[8]

With federal approval of rbST, the opposition to this genetically-engineered product has shifted, and opponents are advancing requirements for the mandatory labeling of milk and milk products from cows treated with rbST. Opponents of rbST maintain that the public has a right to know whether a product was produced with genetically-engineered hormones, especially in view of possible safety concerns. Consumers will have this information if the use of rbST in milk production is acknowledged on all milk and milk products labels.

This article analyzes the legislative and agency responses to the labeling issue. It summarizes the FDA's guidance on the labeling of milk and milk products that facilitates a state-by-state labeling approach, addressing the twin issues of labeling and substantiation. An analysis of state labeling and substantiation requirements shows significant distinctions that have an impact on producers and processors who want to tell consumers that their milk comes from cows that were not treated with rbST. State responses range from the preclusion of labeling to mandatory labeling of milk and milk products from cows treated with rbST.

Consumer and producer responses

The FDA served as the lead agency in the federal approval process of rbST, which was classified as an animal drug. Approval was based on scientific evidence that found rbST to be effective and safe for animals, milk, and food products from treated animals to be safe for human consumption, and that the manufacture of the drug did not adversely affect the environment.[9]

Lower retail milk prices arising from the use of rbST are expected to benefit consumers.[10] Although lower prices may be expected to increase consumption, this may be offset by a reduction in the consumption of milk and milk products by consumers who are hesitant to use products derived from milk from rbST-treated cows.[11] A segmented milk market consisting of rbST- and non-rbST-produced milk may avoid reductions in use by consumers who do not want to ingest products derived from milk produced using rbST. At the same time, concern exists whether a segmented market may involve transaction costs involving tracing and labeling that may adversely affect the dairy industry.

The impact of the use of rbST on dairy farmers is less clear. Increases in milk supplies presumably will trigger a decline in milk prices.[12] Possible reductions in the demand for milk by consumers who wish to avoid ingesting rbST may mean that farmers will be worse off because of the use of rbST.[13] Alternatively, if consumers do not notably decrease their consumption of milk because of the use of rbST, farmers may be marginally better off.[14]

The long-term effects of use of rbST on animals and humans is of concern. A specific issue has been the possible increase in the occurrence of mastitis in rbST-treated cows.[15] Recent summaries of research in the United States and Europe support the finding that any increased incidence of mastitis reflects the higher average milk yield relative to untreated controls.[16] The research also supports a conclusion that the incidence of mastitis in cows treated with rbST is indistinguishable from known effects of milk yield, stage of lactation, or season.[17]

Other impacts might be noted. The use of rbST may cause a reduction of use of resources by the dairy industry. Because of increased milk production per cow, there should be a reduction of the number of cows, a reduction in the amount of feed needed for cows, and a reduction of wastes generated by cows.[18] It may also be noted that Monsanto provides an environmentally safe way to dispose of the syringes at no additional cost to milk suppliers.[19]

Federal regulatory response

Because of consumer and governmental concern, the FDA published interim guidance on the labeling of milk and milk products regarding the use of rbST.[20] The thrust of the guidance was to prevent false or misleading claims regarding rbST. The burden of distinguishing the absence of rbST was placed on producers and processors making the claim that no rbST was used in the production of milk.

The FDA's guidance was to supplement the primary enforcement activities of interested states rather than to supersede state regulation. At the same time, the guidance was not intended to bind the FDA or any state. Rather, the FDA retained the flexibility to readdress the labeling guidance in view of new situations or information at a later date. Moreover, the guidance was not intended and did "not create or confer any rights, privileges, benefits, or immunities for or on any persons."[21]

The authority for the FDA guidance was the interstate commerce clause and provisions of the Food, Drug, and Cosmetic Act.[22] Under section 403(a) of this act, a food is misbranded if statements on its label or in its labeling are false or misleading. Further direction is given by section 201 of the act which has the effect of making the absence of information relevant to the issue of whether labeling is misleading. Thus, misbranding precludes more than false or misleading information; it precludes information that without further details might be expected to

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mislead.

The interim guidance concerning false or misleading claims seeks to ascertain truthful labeling information and to preclude labeling from being misleading. Because of the fact that natural bST is in all milk, truthful information means that labels cannot claim that milk is "bST free." Moreover, a claim that milk is rbST free may convey the idea that there exists a compositional distinction between milk from cows that have been treated with rbST and those that have not been treated. Although there is a distinction in the way milk is produced, there is no compositional distinction. To prevent misleading information, differentiation between rbST and bST may be achieved by a statement that the milk comes "from cows not treated with rbST."

Standing alone, however, a statement that milk comes from cows not treated with rbST may be misleading by implying that such milk is safer or of higher quality than milk from treated cows. To avoid this problem, the FDA suggested that such a statement be placed in a proper context with an accompanying notation that: "No significant difference has been shown between milk derived from rbST-treated and non-rbST-treated cows." In the alternative, the accompanying notation could include reasons for choosing not to use milk from cows treated with rbST, as long as the label is truthful, not misleading, and does not list safety or quality as a reason.

The FDA also addressed the issue of the substantiation of labeling claims. To substantiate claims that milk comes from non-rbST-treated cows are true, some type of recordkeeping procedure may be implemented consisting of affidavits signed by producers and processors. Or a state may proceed with a certification program involving the verification of the physical separation of all milk from rbST-treated cows from the farm to the package. The substantiation of labeling claims is solely to ensure the absence of false or misleading information and does not address safety concerns.

State responses

States have been advised to present the regulations regarding rbST to their respective dairy industries and offer further guidance so as to avoid violations of the federal conditions. Since the interim guidance provides states leeway to administer the requirements, states have taken different approaches to address labeling and substantiation of products produced and sold within their jurisdictions.

In the absence of a comprehensive federal procedure, producers must comply with labeling rules in the state where the milk is produced and sellers must comply with the requirements of the state where the milk product is sold. Products sold in more than a single state will need to meet the requirements of each state where they are sold.

Majority response

The response of a majority of states has been to follow the FDA interim guidance. Some states have accepted the interim guidance (*e.g.*, Iowa); others have adopted it as required by state law (*e.g.*, New York); others have acknowledged the FDA's guidance to their dairy industry (*e.g.*, California); and others have not adopted a policy (*e.g.*, Arizona).

At the same time, if milk products are labeled in these states to denote production from non-rbST-treated cows, the labels must comply with state law concerning misbranding. Since the law of a particular state may impose a more strict requirement than set forth in the FDA's advisory guidance, the state law would be followed, as is presumably the case in states that are precluding labels containing information regarding rbST.

Preclusion of labeling

By reason of informal agency action, three states preclude dairy products sold within their jurisdictions from being labeled with information concerning rbST. Illinois and Texas have adopted policy statements concluding that state misbranding law precludes label claims that cannot be substantiated. Since the absence of rbST in milk and milk products cannot be proven, the labeling of such products with a claim that they come from non-rbST-treated cows would be misbranding under Illinois[23] and Texas[24] law.

The Nevada State Health Division concluded that "any labeling of milk, milk products, or frozen desserts will *not* be allowed."[25] The decision was based on several enumerated factors. The state was concerned that labeling could lead to a lower consumption of milk products. Nevada also felt that labeling could be misleading and could misinform consumers that one product was better than another. Difficulties in recordkeeping and substantiation and the potential lower prices for milk caused by the use of rbST were also noted.

Mandatory labeling

Vermont passed a statute that would mandate the labeling of milk and milk products from rbST-treated cows,[26] and mandatory labeling legislation has been proposed in several other states.[27] Moreover, the enactment of such legislation remains a goal of some consumers. As of April 1995, the Vermont legislation had not been implemented because of the non-finality of implementing regulations. The proposed implementing regulations also specify voluntary labeling requirements for milk and milk products produced from non-rbST-treated cows.[28]

The proposed Vermont implementing regulations enumerate three alternatives for meeting the mandatory labeling of milk and milk products derived from milk from rbST-treated cows. First, the packages may have labels that conspicuously state that rbST was used or may have been used. Second, a retail display and refrigerated case or part thereof containing milk and milk products derived from milk from rbST-treated cows shall bear a sign indicating derivation or possible derivation from rbST-treated cows. The third exception involves an exception for qualifying small retail establishments that cannot economically install shelf labels.

A more serious delay to the consummation of mandatory labeling requirements may arise because of a lawsuit by the International Dairy Foods Association (IDFA) challenging the Vermont statute. The IDFA lawsuit seeks to enjoin the mandatory labeling requirement as violative of the U.S. Constitution. Three independent constitutional challenges are presented: a violation of the free speech protections provided hy the First Amendment. violation of the Commerce Clause as a substantial and unwarranted impediment to interstate commerce, and violation of the Supremacy Clause by frustrating the purposes of various federal laws.

Specific labeling requirements

Nine states have delineated additional guidelines regarding the advisory guidance on labeling. Wisconsin[29] and Minnesota[30] passed state laws that provide for the development of rules for voluntary rbST labeling of dairy products, and guidelines have heen developed or proposed for these states. By reason of actions by state agencies, North Carolina, Michigan, Missouri, Ohio, Pennsylvania, and Utah have mandatory rules or directives on voluntary labeling. Vermont's proposed regulations on voluntary labeling also contain specific labeling requirements.

Three general requirements of these state labeling requirements may be expected to have an impact on milk producers and dealers. First, labels generally have to be submitted to the requisite state agency for review prior to use. Second, the agency requirements preclude false or misleading advertising as defined by state law. Third, if labeling is used, reasonable substantiation that milk is from cows not treated with rbST may be required to avoid deceptive labeling.

With the exception of Minnesota, these

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states require dual statements to avoid an implication that milk from non-rbST-treated cows is of higher quality. If the statement "from cows not treated with rbST" or similar language is used, it must be accompanied with the statement to the effect that "no significant difference has been shown between milk derived from rbST-treated and non-rbST-treated cows." Additional requirements involving the type size of the accompanying statement are delineated in the Wisconsin proposed rules.[31]

Minnesota allows labels that say: "Milk in this product is from cows not treated with [recombinant bovine growth hormone (rbGH)]," and the product need not contain any further label information. The Organic Growers & Buyers Association is using a label in Minnesota that says: "No rbGH Used" in conjunction with an organic milk product. The State of Minnesota concluded that the organic approval process and general knowledge that rbST is unacceptable for organic foods meant the short label was truthful and was not misleading.

Pennsylvania's Division of Milk Sanitation has developed labeling information so that farmer producers may make pledges concerning their nonuse of rbST.[32] Processors may identify producer pledges on a label, but must also include additional information. The additional information must recognize that there is no difference between milk from rbST-treated cows and non-rbST-treated cows and that no test is available to verify the pledges.

Substantiation requirements

Eight of the nine states with specific labeling requirements have delineated guidelines regarding the federal interim guidance admonitions on the substantiation of labeling claims. Wisconsin[33] and Minnesota[34] have passed state laws that address the substantiation of claims. Agency action in North Carolina, Michigan, Missouri, Ohio, and Utah adds mandatory directives on substantiation of labeling claims for these states. The proposed Vermont regulation also requires substantiation.

The mandatory substantiation requirements consist of several components. First, verification of the physical separation of all milk from cows treated with rbST is required from the farm to the package. At a minimum, this generally consists of notarized affidavits consisting of a sworn statement to the effect that the milk or milk product comes from cows not treated with rbST.

Second, records must be made available to the appropriate state officials. However, recordkeeping through affidavits from individual farmers and processors is not sufficient in three states. Rather, Michigan, North Carolina, and Utah require a third-party certification program with a tracking system for all herds and cows within the herds.

Additional requirements are specified in the agency directives from some states. Wisconsin's statute delineates a reciprocity requirement for dairy products from other states that requires compliance with comparable labeling provisions. Wisconsin's proposed rules provide that its substantiation requirement is not met if the affidavit is more than one-year old. Minnesota and Ohio[35] require substantiation records to be kept for two years.

Trademark designation

In response to permissible labeling legislation for milk products from rbST-treated cows, the legislature of Maine adopted a law requiring the development of rules regarding the use of the state's certification trademark.[36] The Maine Department of Agriculture has developed detailed rules governing the licensing of milk dealers who desire to use the State of Maine Quality Trademark.[37] Licensing and use of the trademark thereby is not required by law but is completely voluntary. The intent of the trademark policy is to ensure consumers that the milk and milk products certified are produced by cows that were not treated with rbST.

Conclusion

Governments in the United States have long regulated the sale of milk and milk products. Given milk's prominence in the physical development of infants and young children, governments have adopted strict standards for human safety and well-being which include state labeling requirements to prevent misleading, untruthful, or deceiving labels and advertising.

With the development and use of rbST, a question arises whether additional regulation of milk labeling is needed. The FDA has delivered the federal response to this question. Because of the natural presence of bST in all milk, no milk is bST free. Because there is no compositional distinction between bST and rbST, a statement that milk comes from cows not treated with rbST may be misleading in the absence of additional clarification. Thus, most states require an accompanying statement that no significant difference has been shown between milk derived from rbST-treated and non-rbST-treated cows.

The federal interim guidance was intended to facilitate more specific requirements by the states as long as they are consistent with the enumerated federal guidelines. Several states have responded with more specific labeling and substantiation requirements, and a few states have more specialized approaches, including the preclusion of labeling and mandatory labeling. The disparate state labeling and substantiation requirements may encumber the dairy industry by introducing additional regulatory costs. Or, consumers may disregard information on rbST so that labeling ceases to be an issue. This may lead to the non-use of the labeling rules and the demise of existing labeling information.

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[23] Ill. Ann. Stat. ch. 410, §§ 620/2.11, 620/5, 620/11 (West Smith-Hurd 1993).

[24] *Tex. Health & Safety Code Ann* tit. 6, §§ 431.003, 431.082 (West 1992 & Supp. 1995).

State Roundup

VIRGINIA. *Motor cargo liability policy coverage for destruction of livestock.* In *Lumbermen's Mutual Casualty Company v. Keller*, 456 S.E.2d 525 (Va. 1995), the Virginia Supreme Court considered whether an insurance company's motor cargo liability coverage for "death or destruction" of livestock also included coverage for their damage.

In 1990, Shifflett, a Virginia cattle dealer, sold an Iowa farmer eighty-three mixed steers as feeder cattle. Keller, a livestock trucker, proceeded to transport the cattle to Iowa. During the trip, while passing through Illinois, Keller's truck overturned. Several steers were killed and injured in the accident. Shortly thereafter, sixty-eight steers were sold at a livestock auction market in Galesburg, Illinois. Bidders were advised that the steers, many having cracked shoulders and legs and showing evidence of bleeding, had been injured in a truck accident. Further, the average weight of the steers had declined. Consequently, the steers suffered a loss of eighteen and a half percent in per pound value.

Keller's motor cargo liability insurance policy, issued by Lumbermen's Mutual Casualty Company, insured against liability for "Direct Physical Loss" to covered property. An endorsement covered loss that results in death or destruction to covered property. Lumbermen denied coverage for the injured steers on the ground that their injury and the resulting loss in value was not a "destruction." Keller then brought a declaratory judgment action seeking coverage for the injured steers. The trial court agreed with Keller that the word "destruction" is broad enough to cover the damage to the steers as reflected in their loss in value.

The Supreme Court began by stating the well settled principle that an insurance policy is a contract, and as such, the words used are given their ordinary and customary meaning. The court next cited Webster's Third New International Dictionary defining destruction as "a killing or annihilation ... a bringing to an end ... a condition of having been destroyed."

The court opined that destruction requires that the proeprty be damaged to such an extent as to make it useless for its intended purpose. Keller had argued that the eighteen and a half percent reduction in value constituted destruction of the steers. The only case cited by either party dealing with insurance coverage for death or destruction or animals was *Preston v. National Grange Mutual Insurance*, 317 A.2d 787 (N.H. 1974). In *Preston*, the New Hampshire Supreme Court held that dairy cows were "destroyed" when rendered useless as milk cows following a dog attack. The Virginia Supreme Court noted that here, the steers were not rendered useless as feeder cattle, but were merely damaged and diminished in value as a result of the accident. In fact, the injured steers were subsequently sold as feeder cattle. The trial court was reversed and judgment was entered for Lumbermen's.

—Scott D. Wegner, Lakeville, MN

GEORGIA. *Challenge to disparagement of perishable commodities statute.* In 1993, the Georgia legislature passed a bill entitled "Action for Disparagement of Perishable Food Products or Commodities." GA. Code Ann. § 2-16-1 *et seq.* In *Action For A Clean Environment, et al v. State of Georgia*, 457 S.E.2d 273 (Ga. App. 1995), plaintiffs brought a declaratory judgment action challenging the constitutionality of the statute.

The statute provides a cause of action to any producer, processor, marketer, or seller of agricultural or aquacultural product injured by disparaging remarks about their products. Action for A Clean Environment (ACE), along with Parents for Pesticide Alternatives (PPA), publish newsletters, distribute pamphlets, write letters and lecture on food safety issues. Fearing suits under the disparagement statute, ACE and PPA brought their declaratory judgment action.

The superior court granted the state's motion to dismiss, citing lack of a justiciable controversy. The court of appeals agreed with the trial court, finding no actual controversy between the parties as required by the declaratory judgment statute.

—Scott D. Wegner, Lakeville, MN

Florida property rights bill/Continued from page 3.

the complex procedures under the bill might delay a claim somewhat, the waiver of administrative remedies might somewhat expedite the process.

Nonetheless, it is difficult to imagine many successful claims without exhausting administrative remedies. A landowner should demonstrate just what the governmental actions are that deprive the cognizable use. The absence of administrative process renders claims more speculative in contravention of the goals of the bill.

Another aspect of the Harris bill is an optional alternative dispute resolution provision. The landowner may file a request for an appointment of a special master within thirty (30) days of a development order and enforcement action issued after October 1, 1995. The special master proceeding must be conducted within 165 days unless the parties agree to an extension. If the parties do not agree, the special master may propose a solution. The proposal of the special master is non-binding. The Harris bill also applies alternative dispute resolution to comprehensive plan amendments and implementation ordinances.

The Harris bill may substantially change takings law in Florida. It may have little or no effect. The judiciary will determine the impact of this potentially sweeping legislation.

—Sidney F. Ansbacher, Mahoney, Adams, & Criser, Jacksonville, FL

Continued from page 6.

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[36] Me. Rev. Stat. Ann., tit. 7, § 2901-B (Supp. 1994).

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AALA news

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The AALA recognizes annually the authors whose published legal writings are selected by the Committee on Awards as the "AALA Annual Award for Excellence in Professional Scholarship," and the "AALA Annual Award for Excellence in Student Scholarship." Although the Committee works from what it believes is a comprehensive list, members of the Association are urged to suggest titles that they believe merit consideratino. Write to the Committee Chair — John H. Davidson, School of Law, University of South Dakota, Vermillion, South Dakota 57069.

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The theme for this year's program is Agriculture and the Environment: The Legal Domain. Brochures on the conference should be in the mail by mid-July.