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Agricultural Law Update

VOLUME 7, NUMBER 12, WHOLE NUMBER 85 SEPTEMBER 1990

Official publication of the American Agricultural Law Association

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Eleventh Circuit expands lender liability under Superfund

In the first appellate court decision on lender liability for pre-foreclosure activities under Superfund, the Eleventh Circuit Court of Appeals has significantly increased the exposure of lenders to liability. *United States v. Fleet Factors*, 901 F.2d 1550 (11th Cir. 1990), *reh'g denied*, Table No. 89-8094 (11th Cir. July 17, 1990). The federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or Superfund) imposes liability for costs incurred when the federal government, state and local governments, or private parties respond to a release or threatened release of a hazardous substance from a facility. 42 U.S.C. § 9607. This liability is of importance to agricultural lenders because hazardous substance disposal facilities, for example, dumpsites, landfills, or sites contaminated by chemicals used in farming operations, are often located on agricultural land.

CERCLA liability extends to, among others, current and past owners and operators of the facility from which the hazardous substance is released. 42 U.S.C. § 9607. The definition of owner or operator expressly excludes a person who "... without participating in the management of a facility, holds indicia of ownership primarily to protect his security interest in the facility." 42 U.S.C. § 9601(20)(A). This security interest exception gives lenders some protection from CERCLA liability but the exemption has been construed narrowly by most federal courts.

CERCLA and the regulations implementing CERCLA, promulgated by the Environmental Protection Agency, do not provide a definition of "participation" or a description of management activities that will cause a lender to lose the security interest exemption. Prior to the *Fleet Factors* ruling, most federal district courts followed the rule that a secured creditor could lose the security interest exemption only if the creditor involved itself in the day-to-day management of the operational, production, or waste disposal activities of a facility. *See, e.g., United States v. Nicolet*, 712 F. Supp. 1193, 1204-05 (E.D. Pa. 1989). The trial court in *Fleet Factors* had applied this construction of the security interest exemption.

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Milk marketing orders challenged

The Minnesota Milk Producers Association (MMPA) filed a class action lawsuit on January 17, 1990, in federal court in Minneapolis, challenging two provisions of the USDA's current milk marketing orders that the producers feel to be unfair to upper Midwest dairy producers. Farmers' Legal Action Group, Inc. (FLAG) is representing MMPA, its 10,000 dairy producer members, and all dairy farmers in the state of Minnesota.

Under the current milk marketing orders, Minnesota has lost over 5,000 diary producers and over 100,000 dairy cows since 1985. At the same time, dairy production has been expanding rapidly in other parts of the country. The suit alleges that this is the result of grossly uneven profitability caused by the USDA orders. The MMPA lawsuit seeks to remedy this unfairness with two legal challenges.

First, the lawsuit challenges the formula for setting the price that handlers must pay for milk sold for fluid consumption. Specifically, the lawsuit challenges the current Class I price differentials that are contained in the various orders. The Class I price differentials consist of two parts— a base differential and a "distance" differential.

The base differential is designed to act as an incentive for dairy farmers to incur the extra costs necessary to produce Grade A rather than Grade B milk. Only Grade A milk can be used for fluid consumption.

The "distance" differential for each order east of the Rocky Mountains generally increases in direct proportion to the market area's distance from Eau Claire, Wisconsin. Eau Claire is, thus, the "basing point" from which the Class I prices are adjusted.

The original rationale for the "distance" differential was based on the assumption

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On appeal, the Eleventh Circuit found that, given the "overwhelmingly remedial" goal of CERCLA, this construction of the security interest exception was too permissive towards secured creditors who are involved with toxic waste facilities. Instead, the Eleventh Circuit narrowed the exception by ruling that a secured creditor could be liable under CERCLA by participating in the management of a facility to a degree indicating a capacity to influence the debtor's treatment of hazardous waste. A secured creditor is liable if its involvement with the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal if it so chose. The court added that a creditor's motive of protecting a security interest was immaterial to the court's construction of the exception, which rested solely on the nature and extent of the creditor's involvement with the facility.

The court noted that under the new standard a secured creditor could monitor any aspect of a debtor's business without risk of liability. The court then applied the new standard to the *Fleet Factors* facts. The court found the following actions by the creditor to be within the security interest exception: (1) regularly advancing funds to the debtor against the assignment of the debtor's accounts receivable; (2) paying and arranging for security deposits for the debtor's utility services; and (3) informing the debtor that the creditor would not make further advances.

Activities by the creditor sufficient to establish that the creditor had the capacity to influence the debtor's disposal of hazardous waste and, therefore, was not entitled to the exception included: (1) requiring the debtor to seek the creditor's approval before shipping goods to customers; (2) establishing the price for excess inventory; (3) dictating when and to whom finished goods could be shipped; (4) determining that employees should be laid off; (5) supervising the activity of the office administrator at the facility; (6) receiving and processing the debtor's employment and tax forms; (7) controlling access to the facility; and (8) contracting for disposal of fixtures and equipment at the facility. The court did not make clear whether all these facts were necessary to show that the creditor was outside the exception or whether any lesser combination would suffice to establish that the creditor had lost the exemption.

CERCLA liability is a major concern to agricultural lenders because the cost of cleaning up a contaminated site may greatly exceed the value of the property. In June of this year, the president of the Farm Credit System testified before Congress that CERCLA liability has caused Farm Credit System institutions to deny credit to many farmers and to take heavy losses on defaulted loans rather than foreclose on contaminated properties. Agricultural Credit Letter, June 15, 1990 at 5. Two bills pending before Congress, H.R. 4494 and S. 2827, both provide lenders with greater protection from CERCLA liability in cases where the lender has not caused the release or threatened release or disposal of a hazardous substance.

Prior to the *Fleet Factors* case, the EPA had rejected requests to formulate regulations dealing with the lender liability issue. The threat of CERCLA liability has stimulated the lending community to require environmental audits of potential collateral property and to require owners to clean up the property as a condition of loans. Lenders are also more likely to monitor the debtor's handling and disposal of hazardous waste. The EPA is pleased with these results. The EPA has, however, recently announced that it will develop a rule to give greater definition to the security interest exception. In addition, the EPA will not oppose legislation dealing with the issue, as long as the legislation gives lenders an incentive to act in an environmentally responsible manner when they initially lend funds and when they discover contamination upon foreclosure. 21 Env't Rep. (BNA) 756 (1990).

—Martha L. Noble, Staff Attorney, National Center for Agricultural Law Research and Information

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

STATE ROUNDUP

FLORIDA. *Appellate court rules statute allowing severance of foreclosure counterclaims unconstitutional.* In *Kirian v. Haven Federal Savings & Loan Assoc.*, 560 So. 2d 380 (1990), mortgagors challenged a trial court order granting a mortgagee's motion to sever counterclaims under a foreclosure action under Fla. Stat. section 702.01. That statute states that a court "shall sever for separate trial all counterclaims against the foreclosing mortgagee. The foreclosure claim shall be tried to the court without a jury."

The appellants claim that denied them their right to jury trial as to legal issues. They stated that the statute should be construed as demanding severance only where it does not result in deprivation of jury trial rights.

Further, the appellants claimed that the statute unconstitutionally violated the Florida Supreme Court's plenary jurisdiction to set rules of civil procedure. Florida Rules of Civil Procedure 1.270(b) entitles a trial court to sever claims in its own discretion. The Florida Supreme Court had promulgated this rule pursuant to Article 5, Section 2(a) of the Florida Constitution.

The First District Court of Appeal agreed with appellants that section 702.01 is procedural in nature and that it is unequivocally mandatory. Further, the court agreed that the State Supreme Court holds exclusive jurisdiction to set procedural rules for the courts of Florida. Therefore, the court held "[t]o the extent the statute conflicts with this rule, Section 702.01 violates Article 5 Section 2(a) of the Florida Constitution." The court reversed and remanded for further proceedings accordingly.

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Agricultural Law Update

VOL. 7, NO. 13, WHOLE NO. 85 Sept. 1990

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Judicial review of ASCS decisions: recent cases

In three recent cases reviewing final determinations by the ASCS, courts have addressed several issues that frequently arise in the judicial review of ASCS decisions. The issues concern the jurisdiction of the U.S. Claims Court to entertain claims for damages for alleged breaches of federal farm program statutes or regulations, the scope of judicial review of ASCS decisions, and the due process rights of federal farm program participants.

Claims Court jurisdiction

In general, the Claims Court's jurisdiction under the Tucker Act is limited to claims for money damages against the United States. Among other grounds, claims for damages under the Tucker Act may be premised on the alleged violation of a federal statute or regulation. 28 U.S.C. § 1491(a)(1).

However, not every federal statute or regulation will support a Tucker Act claim. For jurisdiction to exist, the statute or regulation must expressly or impliedly bestow a right to the payment of money or money damages. If it does, the statute or regulation is said to be "money mandating." *See, e.g. Petterson v. United States*, 10 Cl. Ct. 194, 197 (1986)("This court [Claims Court] has jurisdiction under the Tucker Act... to render judgment on claims for money arising ... under a statute or regulation requiring, or fairly interpreted to require, the payment of money."(citations omitted)), *aff'd*, 807 F.2d 993 (Fed. Cir. 1986).

There has been relatively little case law addressing which of the federal farm program statutes and regulations are "money mandating." The regulations for the 1983 Payment-In-Kind (PIK) program have been found to be "money mandating." *Hauprícht Bros., Inc. v. United States*, 11 Cl. Ct. 369, 373 (1986). Two decisions addressing whether the Milk Diversion Program statutes are "money mandating" differed in their conclusion. *Morgan v. United States*, 12 Cl. Ct. 247, 253 (1987)(not "money mandating"); *Grav v. United States*, 886 F.2d 1305, 1307 & 1307 n. 2 (Fed. Cir. 1989) *aff'g*, 14 Cl. Ct. 390 (1988)(distinguishing *Morgan* on the ground that the farmer in *Morgan* did not meet the eligibility requirements, while the farmer in the case before it did. The decision arguably overrules *Morgan*.).

In addition, at least one court has concluded that the payment limitations statutes do "not mandate compensation." *Esch v. Yeutter*, 876 F.2d 976, 985 (D.C. Cir. 1989), *modifying, Esch v. Lyng*, 665 F. Supp. 6 (D.D.C. 1987). The same conclusion has been reached regarding the regulations granting equitable authority to the ASCS Deputy Administrator For State and County Operations (DASCO). *Pope v. United States*, 9 Cl. Ct. 479, 485 (1986). *See* Kelley, *In Depth: ASCS Appeals: The Equitable Authority of DASCO*, 7 Agric. L. Update 4-6 (June 1990).

Two recent decisions have added to the listing of federal farm program statutes that have been found to be "money mandating." In *Frank's Livestock & Poultry Farm, Inc. v. United States*, No. 89-1701 (Fed. Cir. June 11, 1990)(1990 U.S.App. LEXIS 9257), *aff'g*, 17 Cl. Ct. 601 (1989), the Federal Circuit found that the statutory authorization for the 1984-86 farm stored grain reserve program, 7 U.S.C. §§ 1444d, 1444e, and 1446, mandated the payment of money for purposes of the Tucker Act. Similarly, in *Pender Peanut Corp. v. United States*, No. 616-88 C (Cl. Ct. May 23, 1990)(1990 U.S. Cl. Ct. LEXIS 199), the Claims Court found that a claim based on alleged violations of the Peanut Warehouse Storage Loans and Handler Operations regulations, 7 C.F.R. pt. 1446, and their statutory authorization, 7 U.S.C. § 1281 (Agricultural Adjustment Act of 1938), was within the Claims Court's Tucker Act jurisdiction.

Scope of review

Seven U.S.C. sections 1385 and 1429 specifically limit the judicial review of determinations made by the Secretary of Agriculture, including determinations made by the ASCS. The recent decision of *Martin v. United States*, No. 558-88C (Cl. Ct. June 29, 1990)(1990 U.S. Cl. Ct. LEXIS 246), offers a summary of the principles that can be derived from the case law interpreting sections 1385 and 1429. *See also Abound Corp. v. United States*, No. 739-88 C (Cl. Ct. June 22, 1990)(also addressing the scope of review issue).

Neither statute precludes judicial review altogether. Rather, section 1429's language making "[d]eterminations made by the Secretary ... final and conclusive" serves "to limit review to the question of whether the Secretary has acted rationally and within his statutory authority." *Martin, supra*, slip op. at 9 (citations omitted). *Accord Frank's Livestock & Poultry Farm, Inc. v. United States, supra*, slip op. at 3 ("'We do not sit to consider the wisdom of the Secretary's decisions, but only to determine that he has acted rationally and within his statutory authority.'" (quoting *Carruth v. United States*, 627 F.2d 1068, 1076 (Ct. Cl. 1980)(citations omitted)).

Similarly, section 1385's directive that the "facts constituting the basis for any... payment under ... any loan... or price support [program]... when officially determined in conformity with the applicable regulations... shall be final and conclusive..." does not bar the judicial review of questions of law or the judicial determination of whether a decision was arbitrary or capricious. *Martin, supra*, slip op. at 10 (citations omitted). However, it does preclude a de novo review of the Secretary's factual findings, and it confines the scope of a court's inquiry to the administrative record. *Id.*, slip op. at 11.

Due process

In *Frank's Livestock & Poultry Farm, Inc. v. United States*, the plaintiffs alleged unsuccessfully that their due process rights had been violated. A recurring obstacle to the successful assertion of due process claims is the inability of the plaintiff to demonstrate a property interest in the particular farm program payment that was denied. *See* Linden, *An Overview of the Commodity Credit Corporation and the Procedures and Risks of Litigating Against It*, 11 J. Agric. Tax'n & L. 305, 321 (1990).

In *Frank's Livestock*, the court found that the plaintiff was unable to demonstrate a property interest in the long-term grain reserve loan program for 1984 because the plaintiff's grain did not meet one of the two conditions for program eligibility, the ability to be safely stored until the maturity of the loan. *Frank's Livestock, supra*, slip op. at 7. *See* 7 C.F.R. § 1421.748(d). Moreover, it had no property interest in the 1985 and 1986 loan programs because the Secretary was found to have properly exercised his discretion in offering alternative forms of price support. *Id.*

This conclusion is consistent with other decisions finding that the ASCS appeal process satisfies due process requirements. *See, e.g. Westcott v. U.S.D.A.*, 611 F. Supp. 351, 353 (D. Neb. 1984)(existing procedures "more than meet the minimum due process requirements of the Fifth Amendment"), *aff'd*, 765 F.2d 121 (8th Cir. 1985). *But see Prosser v. Butz*, 389 F. Supp. 1002, 1005-06 (N.D. Iowa 1974)(pre-termination hearing required to satisfy due process). *See generally* C. Kelley & J. Harbison, *A Lawyer's Guide to ASCS Administrative Appeals and Judicial Review of ASCS Decisions* (1990)(discussing in detail the ASCS appeal process).

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

Regulation of the use and disposal of livestock and poultry wastes

By Julia Busfield

Although most attorneys in a commercial or business practice have an in-depth knowledge of their clients' day to day operations, attorneys who advise "agri-business" clients generally are not familiar with the waste disposal aspects of their clients' livestock and poultry operations. However, as the growth of concentrated livestock and poultry feeding operations that confine large numbers of animals to a relatively small space continues into the twenty-first century, there is an increasing awareness of the environmental and economic costs of the disposal of the accompanying wastes. It is not unrealistic to predict that agricultural attorneys will soon be spending an increasing percentage of their time advising their clients on how to comply with the laws and regulations that govern their waste disposal operations.

The problem

On the average, dairy cattle produce the largest amount of manure, seventy pounds per day and thirteen tons annually. Beef cattle produce the second highest amount of fresh manure, sixty pounds per day and eleven tons per year. Hogs produce significantly less manure, nine pounds per day and 1.7 tons annually. Finally, laying hens produce .3 pounds per day and .05 tons annually. U.S.D.A. Fact Sheet: For Part-time Farmers and Gardeners (1985).

The environmental and economic impacts of these vast amounts of wastes can be enormous. The primary adverse environmental impact of animal wastes is in the form of contamination of the water supply from runoff. The Environmental Protection Agency has estimated that half of the nation's water supply is being tainted by manure runoff. Yaukey, *Runoff From Farm Waste Tainting Nation's Water*, Arkansas Gazette, Apr. 18, 1990, at 10A.

Another environmental concern is the unpleasant smell. Odors can reach such a level as to incur legal liability in the form of a nuisance suit. In addition, there are health concerns associated with untreated animals wastes. Bacteria and viruses can live in the waste matter and improper disposal can result in illness being spread to humans and other animals coming in contact with the waste. The economic costs are incurred as producers attempt to dispose of these wastes, minimize the adverse impacts, and comply with any legal requirements.

Producers not only have to dispose of these wastes, but they must do so in an economically viable manner. There are three basic methods of waste disposal generally being used. The traditional method has been to spread the manure and other wastes upon the producer's land as fertilizer or to sell it as fertilizer. Second, methane gas, which is used to produce thermal or electrical energy, may be derived from livestock and poultry wastes, particularly hog manure. (The regulatory framework which governs biomass energy will not be discussed in this article). Third, animal wastes can be treated and recycled into animal feed.

The law— federal

There is little federal oversight in the area of regulation of waste disposal. On the state level, the ad hoc approach predominates. In addition, common law nuisance actions continue to provide a de facto source of regulation as livestock operators attempt to avoid liability by using the best available management practices and by meeting the requirements of their state's right-to-farm statute.

Although no federal statute directly governs the disposal of animals wastes, the Clean Water Act, which was enacted in 1972 to correct the nation's water pollution problems, has the greatest impact upon the disposal of animal wastes. 33 U.S.C. § 1251 et seq. Under the act, no "point source" could discharge any "pollutant" into any of the waters of the United States without a permit. Point sources were defined to include any discharge through a pipe or ditch, but not to include runoff from a general area. By the definition of point source many agricultural operations were excluded from the requirements of the Act. Any nonpoint source could pollute without regard to effect upon water quality. Pedersen, *Turning the Tide of Water Quality*, 15 Ecology L.Q. 69 (1988). As a result, only very large, concentrated livestock operations were regulated by the Act.

The application of the Clean Water Act to concentrated feeding operations is illustrated by *Higbee v. Starr*, 598 F. Supp. 323 (E.D. Ark. 1984). In that case, a tenant on land adjacent to a hog farm in Arkansas brought an action alleging violation of the Clean Water Act. The liquid waste produced by the hog operation was spread on pastureland as fertilizer. The court found that the operation was a "concentrated animal feeding operation," and any discharge of pollutants from the facility would require a permit under the Clean Water Act. It was undisputed that the facility did not have a discharge permit. However, the court found that there had been no discharge of pollutants since water samples of a nearby stream were inconclusive as to levels and sources of pollution. In addition, the court found that the facility complied with state law. Although there was no discharge of pollutants into navigable waters mandating the acquisition of a permit under the Clean Water Act, the facility had the appropriate permits from the Arkansas Department of Pollution Control and Ecology authorizing it to spread the hog litter on pastureland.

The Water Quality Act of 1987 recognized the need to consider nonpoint sources of water pollution as well. This Act resulted from the increased awareness of the growing percentage of the nation's waters that was becoming polluted as a result of nonpoint sources of pollution. The Act requires states to assess their waters to determine which bodies of water are affected by nonpoint sources and to develop Water Quality Management Plans for controlling that pollution. *See*, Clausen and Meals, *Water Quality Achievable With Agricultural Best Management Practices*, J. of Soil and Water Conservation, Nov.-Dec. 1989, at 593. The plans must specifically provide for nonpoint source management and control. The plans are required to describe the regulatory and non-regulatory programs, activities, and Best Management Practices that the agency has selected as the means to control nonpoint source pollution where necessary in order to protect or achieve approved water quality uses. 40 C.F.R. § 130.6(c)(1989).

The Environmental Protection Agency oversees the state management plans and receives reports from the implementing agencies as to their programs' progress. In addition to extensive review of state action in this area, the EPA also provides the states with financial assistance in the form of grants to capitalize the programs.

Title VI of the 1987 Amendments established the State Revolving Fund Program. Under this program, qualifying states will be awarded grants by the EPA to establish and capitalize State Water Pollution Control Revolving Funds. The states may use these funds to provide loans and financial assistance, other than grants, for the implementation of nonpoint source management programs. The assistance may be awarded to local communities, intermunicipal, interstate, and state agencies, and other eligible recipients. The states also

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must contribute to the capitalization of their State Revolving Funds by depositing amounts equal to at least twenty percent of each grant payment. The loan repayments are to provide a continuing source of capitalization for the states. 55 Fed. Reg. 10,176 (1990)(to be codified at 40 C.F.R. pt. 35)(proposed March 19, 1990).

Therefore, federal guidance in the form of water pollution control legislation has increased, but it still directly regulates only the larger operations that qualify as a point source. Although the 1987 amendments were designed to reduce nonpoint source pollution, such as that caused by manure runoff, they do not directly regulate the individual operations. The amendments provide only incentives and guidelines for state regulation of nonpoint source pollution.

Therefore, most producers need to be concerned primarily about state laws and regulations as they apply to their livestock or poultry operation on a daily basis. The regulatory framework of two states, Illinois and Arkansas, will be summarized below in order to illustrate the wide divergence of state oversight in this area.

The law— state

Illinois has a comprehensive regulatory system which controls the storage and application on land of livestock wastes. The Illinois regulations require producers to modify their operations to correct or prevent water pollution problems. For example, liquid manure storage facilities must hold at least 120 days of waste unless the farmer can justify to the state environmental protection agency the basis for less capacity. The manure must be stored in a settling basin, holding pond, lagoon, pit, or other suitable leak-proof facility. Although the application of wastes upon frozen ground is not specifically prohibited, the storage requirements are designed to enable the farmer to store the waste during the winter and spring wet months. "Farming and Protecting the Environment," Illinois Environmental Protection Agency, February 1990.

In addition, the Illinois regulations establish criteria for the manner in which the waste is spread or applied. The regulations specifically apply to farmers spreading the wastes upon their own land and limit the manner, location, and amount of waste that may be applied. The limitations vary depending upon the soil type, crop season, slope of the land, and the location of streams. In general, if the waste is applied to land, the nitrogen cannot exceed the amount a growing crop will use.

The Illinois EPA has compiled a list of the most frequent violations of its regulations. Violations often occur as a result of the following: polluted feedlot runoff caused by rain mixing with the manure and running into a stream; manure in a holding facility overflowing and running into a stream because of incorrect storage or failure to timely remove it; manure which was improperly spread on a steep slope or too close to a stream and washed into the stream; odor from an operation too close to residences or one designed or operated improperly; and odor nuisances from the surface spreading of manure too close to neighboring residences. Id.

Many states, such as Arkansas, provide very little in the way of governmental oversight of on-farm manure spreading. Pursuant to authority granted by the Arkansas Water and Air Pollution Control Act, Ark. Code Ann. §§ 8-4-209 et seq. and 8-5-201 et seq., the Department of Pollution Control and Ecology requires that farmers obtain a permit before disposing of liquid wastes. Generally, hog farmers must obtain a permit since that waste is usually maintained in liquid form. However, the waste from the chicken industry, except that from layer hens, is normally dry waste, which may be spread without a permit.

Although most producers dispose of manure by spreading it upon their own land, many have found that the most economical means of disposal is to sell manure as fertilizer. Most states exclude animal manure and poultry litter from the statutory definition of commercial fertilizers or soil amendments when sold in its unmanipulated or natural state, unless mixed with fertilizers. As a result, producers in many states may sell manure as fertilizer without being forced to meet quality or labelling standards.

However, the growth of organic farming and the increased consumer demand for organically grown produce has resulted in the expansion of state supervision of organic fertilizers. Frequently, states provide for agency oversight of the manufacture and sale of fertilizer which is deemed or labelled organic or one hundred percent natural. For example, in Arkansas, the State Plant Board is authorized to set and collect fees for sampling and analyzing natural, organic fertilizer. Ark. Code Ann. § 2-19-502 (1989). However, the private sale of unprocessed poultry litter is exempted from that chapter. By labelling fertilizer composed of manure as "organic," producers in states such as Arkansas, although exempt from the requirements of commercial fertilizer states, are subjected to equally rigorous "organic" standards.

Producers may find conversion of waste products into feed to be an effective and profitable method of disposal. Researchers and farmers have long known that livestock waste, particularly from chickens, provides an efficient animal feed. In many instances, farmers can sell excess waste as feed. One poultry grower who raises over one million birds a year sells the waste for cattle feed at eight dollars a ton. Overstreet, *Animal Waste to Aid Environment,* United Press International, May 13, 1989.

Regulation of the use of poultry and livestock waste in feeds is also left to the states, with only minor exceptions. The Food and Drug Administration (FDA) initially decided in 1967 that it would not sanction the use of poultry litter as feed or a component of feed for animals and that poultry litter offered as such would be considered adulterated under the Federal Food, Drug and Cosmetic Act, 32 Fed. Reg. 12,714 (Sept. 2, 1967). After various administrative actions in this area, the FDA revoked its earlier policy in 1980. 45 Fed. Reg. 86,272 (Final rule, codified at 21 C.F.R. pt. 500)(Dec. 30, 1980). That revocation resulted in the regulation of the use of recycled animal waste being left to the states. State regulation is generally permissive and concerned primarily with preventing the spread of disease such as salmonella.

Finally, the common law right to recover under the doctrine of nuisance is an ongoing concern to all producers. The odors from poultry and livestock waste, especially when the waste is concentrated, frequently constitute a common law nuisance. During the last fifteen years forty-nine states have enacted what is known as right-to-farm legislation to protect farmers from nuisance liability under certain circumstances. Generally, the statutes require that the agricultural operation predate any change in the neighborhood by at least one year. Also, most statutes require that the operation be conducted in a reasonable, non-negligent manner. *See,* Hamilton and Bolte, *Nuisance Law and Livestock Production in the United States: A Fifty State Analysis,* Drake University Law School, Agricultural Law Center (Feb. 1987). In general, courts strictly interpret these statutes and require that an operation meet all the criteria that the legislation established to receive the statutory protection.

Most right-to-farm statutes were enacted in response to successful nuisance suits against livestock operations and spe-

(Continued on next page)

cifically include in the statute's protection the disposal or use of livestock waste on the farm. For example, the Connecticut statute provides that no agricultural or farming operation, place or establishment or facility shall be deemed to constitute a nuisance, due to alleged objectionable odors from livestock, manure, fertilizer, or feed. In order to receive the statutory protection, the operation must have been in existence for one year or more, must not have substantially changed, and must follow generally accepted agricultural practices. Conn. Gen. Stat. § 19a-341 (1989). Similarly, the Rhode Island statute provides that odor from livestock, manure, fertilizer or feed, occasioned by generally accepted farming procedures shall not be deemed a public or private nuisance for statutory purposes. R.I. Gen. Laws § 2-23-5 (1988).

However, improper handling of manure and other wastes will constitute a nuisance in most jurisdictions. The Florida statute specifically exempts the keeping of untreated offal from its protection. Hamilton at 3, citing, Fla. Stat. Ann. § 823.14. In addition, a Florida case which was not decided under the statute held that a dairy farm was a nuisance when liquified manure overflowed onto a neighboring farm. Id. citing *Bunyak v. Clyde J. Yancey & Sons Dairy, Inc.*, 438 So.2d 891 (Fla. Dist. Ct. App. 1983). Most jurisdictions would reach the same result under their right-to-farm statutes since the protections are generally not available when the operation is conducted in an unreasonable or negligent manner. Specifically, protection from nuisance suits is withdrawn under most state statutes when water pollution is caused.

This brief summary illustrates the lack of a comprehensive, national regulatory scheme. Instead, supervision is left to the states. As a result, the states have adopted a wide variety of statutory and administrative guidelines, ranging from comprehensive to virtually nonexistent.

In advising clients, attorneys must be aware of the state's system of oversight. Also, when evaluating the profitability of a particular operation, thought must be given to alternative methods of disposal and use of wastes. Such consideration should include the legal implications of a particular method, as well as the cost effectiveness. By advising farmers and ranchers on the necessity of employing best management practices for waste disposal, agri-business clients can be better served.

In addition, due to the increasing awareness of environmental issues in this country, initiatives may be anticipated on the national level to address water pollution concerns. Attorneys must be prepared to assist their clients in complying with stricter and more comprehensive regulations.

MILK MARKETING ORDERS CHALLENGED/ CONTINUED FROM PAGE 1

that the Upper Midwest was the primary source of reserve Grade A milk supplies. Therefore, there was a need for an economic incentive to draw the reserve milk from the Upper Midwest to other areas of the country that were experiencing a shortage in fluid milk supplies. However, from 1968 — the time at which the uniform system was introduced in all orders east of the Rockies— to 1985, USDA did not take the necessary action to adjust the Class I differentials to provide the incentive to move milk from the Upper Midwest.

At the time the differentials were initiated, the cost of transporting the reserve Grade A milk supplies from the Upper Midwest was approximately 1.5 cents per hundredweight per ten miles. Even though this cost of transportation had roughly doubled by 1980, increases in the distance differential had not been regulated by the Secretary.

In 1985, Congress took action to amend the Class I price differentials in most of the orders through the passage of the Food Security Act of 1985. This action, however, did not remedy the inequities caused by the use of the Class I price differential formula.

Second, the lawsuit challenges provisions of the milk marketing orders that control what handlers must pay when they buy milk from the Upper Midwest in dry or concentrated form and then reconstitute it and sell it in fluid form in other regions of the country. The "compensatory payment" and "down allocation" provisions of the various orders act as a penalty to the use of reconstituted milk. These provisions make it uneconomical for handlers to use reserve milk from the Upper Midwest to supply other regions of the country with reconstituted fluid milk.

In the lawsuit, MMPA claims that the Class I price differentials and the "compensatory payment" and "down allocation" provisions violate the Agricultural Marketing Agreement Act (AMAA).

Specifically, the suit argues that the current Class I differentials are too low to cover actual transportation costs to move Upper Midwest milk in fluid form to other regions for sale— resulting in decreased markets for Upper Midwest milk— but are high enough to provide an artificial profit to producers in other regions. In addition, the "compensatory payment" and "down allocation" provisions prevent handlers from supplying distant markets by economically transporting dry or concentrated milk for reconstitution. The challenged order provisions have resulted in very rapid expansion of dairy production in other regions and, in some locations, unnecessary surpluses.

The suit alleges that the net result of the challenged provisions is "disorderly" marketing conditions, with an unfair and illegal impact on the Upper Midwest. Upper Midwest producers suffer from a lower volume of milk being sold, lower prices and profitability, and, ultimately, lower values for their milk producing assets due to the challenged order provision. The AMAA specifically orders the Secretary of Agriculture to maintain milk marketing orders that *avoid* "disorderly" marketing conditions and devaluation of farm assets. Under the existing orders, both are occurring.

The AMAA also prohibits the Secretary of Agriculture from erecting any "trade barriers" to marketing of milk throughout the country. In the lawsuit, MMPA claims that the restrictive provisions imposed on reconstituted milk do just that.

Based on these legal claims, the lawsuit asks the court to do three things. First, it asks the judge to order the Secretary of Agriculture to hold administrative hearings on the challenged provisions of the milk marketing orders to determine how they should be corrected. Second, it asks the court to declare that the challenged provisions of the existing orders are illegal under the AMAA. Finally, it asks the court to issue an injunction requiring the Secretary of Agriculture to terminate the illegal "compensatory payment" and "down allocation" provisions as they relate to reconstituted milk.

MMPA has already won round one of the case. The Secretary of Agriculture, Clayton Yeutter, announced on March 29, 1990, in Minneapolis, that he will hold national hearings on the milk marketing orders. On July 12, 1990, USDA issued a notice of hearing scheduling a series of hearings in six different cities, starting September 5, 1990 and running through mid-October. The hearings will deal with the Class I price differential, as well as the issue of how reconstituted milk is accounted for in the order system. The Class I pricing proposal and the proposals to eliminate the compensatory payments and down allocations as they relate to reconstituted milk submitted by MMPA and a coalition of Upper Midwest dairy organizations will be among the many proposals discussed at the hearings.

While the Secretary has now scheduled national hearings on the provisions challenged in the lawsuit, MMPA is also pushing ahead on its other requests for relief in the lawsuit.

—Lynn A. Hayes and James T. Massey, FLAG, Minneapolis, MN.

Editor's note: This article is excerpted from the article that appeared in the spring issue of Farmers' Legal Action Report and is reprinted with the permission of Farmers' Legal Action Group.

"Drop dead" default provision and Ch. 12 modification

In a recently published decision, a U.S. District Court in Illinois held that it may be possible for Ch. 12 debtors to modify confirmed plans despite the inclusion of "drop dead" clauses in their plans. *In re Mader*, 108 Bankr. 643 (N.D. Ill. 1989).

In this case, the Ch. 12 reorganization plan agreed upon by the debtor, Lee Mader, and his creditors contained what are referred to as "drop dead" clauses. These clauses provided that in the event that Mader defaulted on his obligations under the confirmed plan, his case would be converted to a Ch. 7 bankruptcy, deeds in lieu of foreclosure would be delivered to one of his creditors, Federal Land Bank, or the plan trustee would sell the subject property, at the option of the Federal Land Bank. This plan, including the drop dead clauses, was confirmed by the bankruptcy court in August of 1987.

In the fall of 1988, Mader, a victim of the 1988 drought, did not meet his payment obligations under the confirmed plan. Therefore, he filed a motion with the bankruptcy court to modify the plan pursuant to section 1229 of the Bankruptcy Code. This section authorizes the court to modify a confirmed plan at the request of the debtor at any time before completion of payments under the plan.

The bankruptcy court denied Mader's motion, basing its decision on the provisions of section 1227. Under this section, the debtor is bound to the terms of the confirmed plan. Because the plan made specific provision for default, this provision must be honored, regardless of the circumstances surrounding default.

Mader appealed this decision to the district court, arguing both the legal issues of the interpretation of sections 1227 and 1229 and the issue of the bankruptcy court sitting as a court of equity with an obligation to "prevent manifest injustice."

The district court limited its analysis to the legal issue of whether sections 1227 and 1229 are mutually exclusive. Examining these two sections and the sparse legislative history underlying them, the court found that section 1227 was not intended to preclude plan modification under section 1229, even in the face of a default clause. "The mere inclusion of a 'drop dead' clause in the confirmed plan does not, *ipso facto*, preclude the possibility of modification under section 1229." *Mader*, 108 Bankr. at 648.

In reaching its decision, the court noted its disagreement with *In re Grogg Farms, Inc.*, 91 Bankr. 482 (Bankr. N.D. Ind. 1988). This case held that post-confirmation modification was warranted only in response to an unforeseen change in circumstances. When a plan contains a clause that anticipates default and provides a specific remedy, default cannot be considered unforeseen. *Grogg*, 91 Bankr. at 485. The *Mader* court disagreed, finding that the appropriate inquiry was not whether default was anticipated, but whether there were unanticipated events that caused the default. The court did not elaborate as to what would constitute anticipated or unanticipated reasons for default, ruling solely on the preclusion issue of section 1227. On this basis, the *Mader* court remanded the case to the bankruptcy court for further consideration.

—*Susan A. Schneider, lecturer, University of Arkansas School of Law*

Curbside hiring of migrant workers

A United States District Court in the Southern District of California has temporarily enjoined enforcement of a municipal ordinance prohibiting the hiring of workers for services to be performed in another location. The ordinance was intended to remove job-seeking migrant workers from areas where they typically gather to meet employers who hire day laborers. Many small-scale fruit and vegetable growers in southern California rely on "curbside hiring" as a source of seasonal labor.

In *Tobias v. City of Encinitas*, Civ. No. 90-0849-R(M), the district court found a substantial probability that at a trial on the merits the ban would be held to violate on its face the First Amendment guarantee of free speech. A verbal or written offer to form an employment contract is commercial speech protected by the First Amendment unless it relates to unlawful activity or is misleading. The district court held that "hiring or attempting to hire persons to perform lawful services are perfectly lawful activities, and bona fide employment opportunities are not misleading." *Id.* at 8.

The district court discounted the city's claimed interest in preventing the formation of illegal employment contracts between employers and undocumented workers by noting the plenary power of Congress to legislate in the area of immigration. As to the city's argument that the ordinance promoted its interest in public health and safety by eliminating crowd congestion in public places, the district court noted that "it strains logic to require a *hiring* regulation rather than a crowd control regulation if health and safety are of concern." *Id.* at 10 (emphasis in original).

—*John S. Harbison, San Diego, CA.*

AG LAW CONFERENCE CALENDAR

ASCS Appeals and Payment Limitations for Farmers and Their Attorneys
Nov. 8, 1990, Oklahoma City, OK.
Sponsored by Oklahoma Attorney General and Oklahoma Family Farm and Rural Services.
For more information, contact Ron Johnson, 405-557-0708.

AgBiotech
Nov. 27-29, 1990, Ramada Renaissance Techworld, Washington, D.C.
Topics include: Transgenic plant products; Europe and the U.S—reconciling the regulations.
Sponsored by Bio/Technology.
For more information, call 1-800-243-3238, ext. 256.

Federal Register *in brief*

The following is a selection of matters that have been published in the *Federal Register* from August 1 to 28, 1990.

1. APHIS; Importation of certain animals, poultry, animal and poultry products, and animal embryos; effective date 8/2/90. 55 Fed. Reg. 31484.
2. APHIS; Viruses, serums, toxins, and analogous products; autogenous biologics. 55 Fed. Reg. 32264.
3. APHIS; Animal welfare; standards; proposed rule; comments due 10/1/90. 55 Fed. Reg. 33448.
4. Interstate Commerce Commission; Rail abandonments-- National Trails System Improvements Act; final rule; effective date 9/2/90. 55 Fed. Reg. 31600.
5. FCIC; General insurance regulations; crop insurance; Non-standard Underwriting Classification System; final rule; effective date 8/10/90. 55 Fed. Reg. 32593.
6. FCIC; Standard reinsurance agreement; notice of intent to revise; comments due 10/1/90. 55 Fed. Reg. 34723.
7. ASCS; Cotton warehousemen, licensed; reginned motes, warehouse receipts issuance; proposed rule; effective date 10/22/90. 55 Fed. Reg. 34021.
8. FCA; Reorganization authorities for system institutions; extension of comment period to 10/1/90. 55 Fed. Reg. 34024.

—*Linda Grim McCormick*

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

CONFERENCE ACCOMMODATIONS

Because of the continuing problem with securing a room for Saturday night, October 6th, in Minneapolis, we offer the following list of hotels and accommodations in the Minneapolis area which have agreed to a room rate with the AALA. Both are very conveniently located for access to our meetings:

Omni-Northstar. $79.00/ night. Call 612-338-2288.
Minneapolis Athletic Club. $79.00/ night. Call 612-339-3655.

The next list contains other hotels in the general area. No information is available as to their availability or rates:

Hyatt-Regency. 612-370-1234
Hotel Luxeford Suites. 612-332-2351.
Holiday Inn Downtown Nicollet Mall. 612-332-0371.
Radisson Plaza. 612-339-4900.
Marquette Hotel. 612-332-2351.

For those preferring to stay all three nights at the *Marriott* but who have only two nights reserved, we pass on the word that we are advised by the *Marriott* that some rooms may open. You may wish to check back as to availability of a room for Saturday night. Their number is 612-349-4040.

CLE CREDIT INFORMATION

CLE approvals have come in from most states for our Conference. To check on your particular state and the number of credits approved, call Joe Kaufman, 501-575-3706.