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The will of the people is the only legitimate foundation of any government, and to protect its free expression should be our first object.

— Thomas Jefferson

Private causes of action under the Farm Credit Act revisited

Claims of an implied private right of action under the Farm Credit Act have not fared well. *See Bowling v. Block*, 785 F.2d 556 (6th Cir. 1986); *Smith v. Russellville Production Credit Association*, 777 F.2d 1544 (11th Cir. 1985); *Spring Water Dairy Inc. v. Federal Intermediate Credit Bank of St. Paul*, 625 F. Supp. 713 (D.Minn. 1986); *Apple* v. *Miami Valley* Production Credit Association, 614 F.Supp. 119 (S.D. Ohio 1985); *Hartman v. Farmers Production Credit Association of Scottsburg*, 628 F.Supp. 218 (S.D.Ind. 1983).

The recent decision of *Aberdeen Production Credit Association v. Jarrett Ranches Inc.*, 638 F.Supp. 534 (D.S.D. 1986), however, may foreshadow an improvement in the fortunes of such claims, at least where the claim is premised on a violation of the Farm Credit Act Amendments of 1985.

In *Jarrett Ranches*, the farm corporation sought to resist a state court foreclosure action by (among other things) bringing a third-party proceeding against the Federal Intermediate Credit Bank of Omaha (FICB). The claims against the FICB included the assertion that the FICB had failed to supervise the plaintiff production credit association as required by regulations promulgated under the Farm Credit Act, specifically 12 C.F.R. § 614.4510(d)(2).

That regulation requires Farm Credit System institutions to institute a "policy" that "shall provide a means of forbearance for cases when the borrower is cooperative." See Ansbacher, *FCA Forbearance Policy: Rights of Borrowers*, *Agricultural Law Update*, May 1986; Wright, *Forbearance Policy of Farm Credit System Questioned*, *Agricultural Law Update*, July 1986.

After being named as a third-party defendant, the FICB removed the action to federal district court and moved to dismiss on the grounds that the Farm Credit Act does not create a private cause of action. In essence, the FICB contended that because the Act failed to proscribe any conduct as unlawful, or to create any specific enforceable rights other than the limited right to an informal hearing for unsuccessful loan applicants that is found at U.S.C. §§ 2201 and 2202, there was no support for an implied private cause of action.

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Lyng v. Payne: Disaster Relief Loan Program notice case

The events culminating in the controversy over the subject of this opinion originated with P.L. 92-385 and its provisions for agricultural disaster relief loans (provisions including 1% interest and the potential for cancellation of up to $5,000 of principal).

As provided for by P.L. 93-24, which succeeded P.L. 92-385, agricultural disasters designated between Jan. 1, 1982 and Dec. 27, 1982 were to be governed by the provisions of P.L. 92-385. P.L. 93-24 became effective April 20, 1973.

Left unprovided for was the period between Dec. 27, 1972 and April 20, 1973. Congress passed P.L. 93-237 to fill in the gap. It provided that the interim period would be governed by the more generous terms of P.L. 92-385, rather than the more harsh strictures of P.L. 93-24, which included 5% interest and no cancellation of principal.

P.L. 92-237, signed into law on Jan. 2, 1974, provided 90 days (ending April 2, 1974) in which eligible farmers (i.e., those suffering disasters during the interim period) could apply for loans under the terms of 92-385.

During the interim period of Dec. 27, 1972 to April 20, 1973, severe rains in Florida led to a disaster declaration on May 26, 1973, embracing several counties. Following the disaster declaration, and until the 90-day provision of P.L. 93-237 became effective in January 1974, the disaster loan program was governed by P.L. 93-24. No loan applications were filed during this period.

In February 1974, the Secretary of Agriculture published in the *Federal Register* the provisions of P.L. 93-237. As directed by staff instructions, the media in affected counties were notified of P.L. 93-237. Ensuing media releases did not set out the provisions themselves, but merely stated that loan applications would be taken pursuant to P.L. 93-237. In response, only four farmers applied for emergency loans.

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The response of the farm corporation included reference to the assertion of Representative De LaGarza before the House of Representatives in support of the Farm Credit Act Amendments of 1985 that the bill would "establish a set of borrowers' rights...enforceable in courts of law." 131 Cong. Rec. H11518-19 (daily ed. Dec. 10, 1985). Commentators have urged that the legislative history now supports a finding of an implied private cause of action. *E.g.*, Ansbacher, *supra*.

In sustaining the FICB's motion to dismiss, the court specifically declined to consider the significance of the 1985 amendments to the existence of a private cause of action for three reasons. First, no violation of the amendments was claimed. Second, the conduct complained of occurred prior to the passage of the amendments. And third, the probative value in using legislative history that developed subsequent to the original enactment of the legislation was deemed insignificant. 638 F.Supp. at 537.

The *Jarrett Ranches* decision should not necessarily be seen as a roadblock for those seeking to advance a private right of action under the Farm Credit Act. Counsel taking that position should be mindful that the Farm Credit Act Amendments of 1985 mandate the development of a forbearance policy by each system institution. 12 U.S.C. § 2199(b).

No longer does that requirement arise solely from regulations, and the Farm Credit Administration is begrudgingly adding more specificity to the policy requirements. *See* 51 Fed. Reg. 17,048 (1986) (to be codified at 12 C.F.R. Part 614, Subpart N) (proposed May 8, 1986). Moreover, an uncodified provision in the 1985 amendments, Pub. L. No. 99-205, § 307, 99 Stat. 1678, 1709 (1985), grants to certain system borrowers a right of review for possible restructuring of their loans.

Also, current borrowers are arguably granted (heretofore unavailable) rights of review within the institution by a change to 12 U.S.C. § 2202 that appears to expand the class of borrowers entitled to review to include those denied forbearance relief. Therefore, counsel should examine the 1985 amendments with a view toward ascertaining whether any of its provisions have been violated before forsaking a claim under the Act.

— Christopher R. Kelley

LYNG v. PAYNE
CONTINUED FROM PAGE 1

On Aug. 19, 1976, a class action suit was instituted, representing 2,500 farmers eligible for loans under P.L. 93-237, but who failed to apply because of alleged lack of notice of the program and its provisions.

Heeding the plaintiffs' contentions, the District Court (finding that the Farmers Home Administration (FmHA) failed to give adequate notice) granted an injunction requiring the agency to reopen the loan program administered pursuant to P.L. 93-237.

Accepting the District Court's findings, the Court of Appeals for the Eleventh Circuit affirmed on different grounds. In the main, the Court concluded that the FmHA had failed to comply with its own notice requirements. After certiorari was granted, the case was remanded for consideration in light of *Heckler v. Community Health Services of Crawford County*, 467 U.S. 51, 81 L.Ed.2d 42, 104 S.Ct. 2218 (1984), and *Block v. Payne*, 469 U.S. 807, 83 L.Ed.2d 15, 105 S.Ct. 65 (1984).

The Appellate Court adhered to its prior views (finding *Heckler* inapplicable), resulting in a second grant of certiorari. *Block v. Payne*, 474 U.S.____, 88 L.Ed.2d 46, 106 S.Ct. 57 (1985).

The Supreme Court reversed in *Lyng v. Payne*, 476 U.S.____, 106 S.Ct. 2333, 90 L.Ed.2d 921 (1986), citing several theories. The Court held that estoppel was inappropriate because no detrimental reliance was indicated, *id.* at 90 L.Ed.2d 931. It was held that there had been no violation of *Federal Register* notice directives, *id.* at 90 L.Ed.2d 935.

The Court pointed out that applicants for benefits (as opposed to current recipients) have no claim for entitlement protected by due process provisions, *id.* at 90 L.Ed.2d 936; and that notice published in the *Federal Register* (which detailed the specific terms and conditions of the generous loan program) was sufficient to satisfy any remaining due process concerns, *id.* at 936. It was also held that an agency is entitled to substantial deference in construction of its own regulations, *id.* 90 L.Ed.2d 934.

The central ruling, however, was the Court's finding that the FmHA had not violated its own notice rules. *Lyng v. Payne*, 476 U.S. at____, 106 S.Ct. at 2341-42, 90 L.Ed.2d at 933-934. The Court noted that P.L. 93-237 provided that the interim period would be governed pursuant to the program contained in P.L. 92-385, but that 93-237 itself did not describe in detail the provisions of P.L. 92-385. *Id.* 476 U.S. at____, 106 S.Ct. at 2341, 90 L.Ed.2d at 934.

Hence, media releases stating that P.L. 92-385 provisions would govern (pursuant to P.L. 93-237) accurately and fully described P.L. 93-237, and thus, were no less informative "than were the 'provisions' of the Act the release was endeavoring to describe." *Id.*, 476 U.S. at____, 106 S.Ct. at 2341, 90 L.Ed.2d at 934.

Justice Stephens offered a vigorous dissent concerning what notice requirement applied to which period of time, drawing the conclusion that the FmHA had violated its own notice requirements.

— Daniel M. Roper

Eighth Circuit denies rehearing in Ahlers

By an order dated Sept. 17, 1986, the Eighth Circuit Court of Appeals (by the narrowest of margins) has denied the Petitions for Rehearing En Banc previously filed by the secured creditors in *In re Ahlers*,____F.2d____ (8th Cir. 1986).

The court actually voted 5-4 in favor of granting the rehearing. However, 28 U.S.C. Section 46(c) permits rehearing en banc only when "ordered by a majority of the circuit judges who are in regular active service."

Thus, an affirmative vote of six judges would have been required to grant the petition for rehearing. For the moment, therefore, *Ahlers* remains the controlling precedent in the Eighth Circuit. (It was incorrectly reported in the August issue of the *Agricultural Law Update* that the motion for rehearing en banc had been granted.)

— Phillip L. Kunkel

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Agricultural land values

The downturn in U.S. farmland values that began in 1981 has continued into early 1986. As of Feb. 1, 1986, the index of value stood at 112, down 12% from April 1985. The decrease (which follows a 12% drop from 1984 to 1985) marks the largest back-to-back decline since 1932 and 1933, when values fell 17% and 19%, respectively.

Values rose substantially in New England and New Jersey, while Delaware, New York, Virginia and Tennessee recorded smaller gains. Values fell in all other states, however, with 25 states incurring declines of 10% or more. In a few states, values have fallen by more than half since 1981.

Regionally, the largest decrease occurred in the Lake States, where Minnesota values dropped 26%. In the Corn Belt and Northern Plains, which sustained the largest losses one year earlier, farmland values continued to decline — but at a slower rate. In the Southern Plains, Oklahoma and Texas showed large losses compared with the previous year, when values in Texas were still rising.

The U.S. index of farmland values now stands only slightly above the 1978 mark. Real values, however, which are adjusted for inflation, have retreated to the levels of the mid-1960s.

The continuing erosion of values in this decade reflects the generally depressed farm economy, severe financial stress on many farmers with large debt loads, cautious attitudes of some farm lenders, as well as the large number of acres offered for sale relative to limited demand. In addition, buyers appear to be waiting for lower values.

Values are likely to decline further during the remainder of 1986, but probably by less than 12%. Decreasing interest rates, lower production expenses and higher payments from government programs will slow the downward trend. Differences among regions will widen, however, as the Northeast posts increases when most of the nation will experience further losses.

Some downward movement is expected for 1987, but the amount is expected to be less than in 1986. In the longer run, land values will mainly depend on farm productivity and income, but factors in the general economy — interest rates, inflation, foreign exchange rates, and growth in foreign and domestic demand — will also have a significant impact. A stronger market for farmland will probably emerge in the late 1980s.

U.S. farmland averaged $596 per acre on Feb. 1, 1986, down from $679 last year and a peak of $823 in the early 1980s. Although values have fallen sharply in most states, they are still above a decade ago in all states except Iowa.

The drop in farmland values is closely linked to financial problems of farmers with heavy debt loads and high interest payments, but low commodity prices and the large acreage of land on the market also have contributed to the decline. The financial problems of farmers have been extended to farm lenders, rural businesses, and agriculturally dependent communities.

Cash rents have declined from 1986 in almost all states, but by less than the decrease in farmland values. Competition among tenants for rented land, unwillingness or inability to purchase land, and leases with rents fixed for more than one year may account for the relative stability of rents.

Rent-to-value ratios are rising, and have reached levels at which returns to land buyers at 1986 values and rents are comparable with returns on alternative investments.

The number of transfers of farmland decreased in the past year, continuing the downward trend of the past five years. Voluntary and estate sales accounted for 57% of the transfers, but foreclosures accounted for 22% of the transfers.

As in previous years, most buyers and sellers were farmers. Farmers who already own some land purchased about three-fifths of the acreage. Non-farmers increased their share of the total number and total value of transfers, however.

The proportion of farmland transfers involving credit has steadily declined since peaking at 91% in 1981. Over the past year, only 76% of all land transfers involved credit — the lowest level in 20 years. Sellers provided the major share — about one-third of all credit extended on the transfers reported. Federal Land Banks are declining as sources of credit, while commercial banks are becoming more important.

This information has been excerpted from *Agricultural Resources: Agricultural Land Values and Markets Situation and Outlook Report*, AR-2, Economic Research Service, U.S. Department of Agriculture (USDA), William H. Heneberry, Situation Coordinator (June 1986); and *Agricultural Resources Outlook and Situation Summary*, Economic Research Service, USDA (April 9, 1986).

— J. Peter DeBraal

PCAs challenge FCA assessments

Twenty Production Credit Associations (PCA) in Texas, headed by the Amarillo PCA, have filed suit in the Federal District Court of Lubbock, Texas, challenging the right of the Farm Credit System's Farm Credit Capital Corp. to make assessments against the PCAs' surplus of capital and reserves for potential losses.

According to Frank Medero, general counsel for the FCA, the PCAs are alleging that they are private corporations and that the FCA's assessment would be an unconstitutional taking.

James Van Pelt, president of the Amarillo PCA, reported that the PCAs' motion for a preliminary injunction to prevent payment of the assessments during the pendency of the case was granted Oct. 10, 1986. Medero indicated that in two other cases (in the District Courts of the District of Columbia and Wichita, Kansas), similar requests for preliminary injunctions were denied.

Beyond its importance to the local PCAs, the case's outcome has the potential significance of interfering with the financial guarantees given by the federal government to the Farm Credit System in the Farm Credit Act of 1985.

— Linda Grim McCormick

"Clear title" final regulations

Final regulations governing the so-called "clear title" scheme for buyers of farm products (§ 1324 of the Food Security Act of 1985, Pub. L. 99-198) have been promulgated. They can be found at 51 Fed. Reg. 29, 449 (1986) (to be codified at 9 C.F.R.§ 205). The effective date of these regulations is Sept. 17, 1986.

— Linda Grim McCormick

Change of venue granted

Plaintiff, holder of a security interest in stored grain, filed suit in the United States District Court for the Northern District of Illinois, charging defendant with breach of duty and failure to exercise due care as a warehouseman. (Although the warehouse was located in Kentucky, both parties were present and doing business in Illinois).

In spite of the fact that convenience of the parties favored Illinois slightly, defendant's motion under 28 U.S.C. § 1404(a) for transfer of the action to federal district court in Kentucky was granted. Convenience of witnesses and the interest of justice supported the Kentucky venue because "the actors, events and property at issue in this lawsuit" were situated there and because key witnesses could then be subjected to process. *Harris Trust and Savings Bank v. SLT Warehouse Co. Inc.*, 605 F.Supp. 225 (N.D. Ill. 1985).

— Kemp P. Burpeau

Euro-American Agricultural Law Symposium: A Report

by Donald L. Uchtmann

The first Euro-American Agricultural Law Symposium was held Sept. 8-12, 1986 in Plymouth, England. The American Agricultural Law Association (AALA) and the European Agricultural Law Committee were co-sponsors of the event.

The Symposium provided an opportunity for 17 North Americans and 25 Europeans to discuss two topics: "Agriculture and Environmental Regulation" and "Legal Issues in Production Control Programs." The Symposium made a significant contribution to knowledge. It also established that agricultural law in Europe and North America has much in common and that both sides of the Atlantic can benefit from an exchange of ideas, perspectives and legal approaches.

This report will highlight discussions of the two topics in a way that will give the reader a flavor of the Symposium. It will conclude with some observations relevant to the future.

Agriculture and Forestry as Creators and Victims of Pollution

A preliminary question was the nature of the agricultural pollution problem. Mr. Zach, a lawyer and legal adviser to the Office for Environmental Protection, Berne, Switzerland, noted that the most significant pollution problems caused by agriculture were:

- Water and soil pollution caused by improper or excessive application of fertilizers (animal manure, commercial fertilizers or sewage sludge), soil conditioners or pesticides, as well as by the tillage of cropland (causing erosion);
- Atmospheric pollution caused by operating grass-drying installations emitting dust and soot;
- Odor and noise emissions caused by operating agricultural machinery and hay ventilation plants;
- Degradation of the landscape and the natural water cycle caused by agricultural land ameliorations; and
- Degradation of valuable habitats of animals and plants (such as banks, fens, marshes or hedges) in order to improve or facilitate farming.

Similar observations about agricultural activities causing pollution problems were voiced by most of the European participants. The kinds of pollution problems both encountered by agriculture and caused by agriculture appeared to be quite similar on each side of the Atlantic.

The principal difference between the European and North American perspective on the agricultural pollution problem was the importance of soil erosion as a pollutant. Soil erosion is a significant environmental problem in the United States, but it was not even mentioned as a problem by most of the Europeans.

Regarding agriculture and forestry as victims of pollution, the concern most frequently expressed by the Europeans was damage to forests from air pollution. Swiss, German and Scandinavian forests are particularly susceptible to degradation. The potential damage to crops caused by a nuclear accident or nuclear attack was also of great concern to all participants — particularly in the wake of the Chernobyl accident.

The Symposium also examined the kinds of regulatory techniques, the public and private remedies available, as well as the use of specialized courts or administrative tribunals existing in the nations of Europe. Most of the European nations include penal sanctions in their environmental regulations. European nations emphasize public law techniques, such as making the state the guardian of environmental quality, or using public funds to restore environmental damage. The use of private remedies such as individual suits for damages or injunctions, however, are not as important in Europe as in the United States.

It was interesting to observe that in European federated states (such as Switzerland and West Germany), the central governments are the most important level of government for setting environmental goals and developing the skeleton of environmental protection laws. The states within the central government (*e.g.*, the Cantons in Switzerland and the Lander in West Germany) have key roles in implementing the general goals of national law. The federated nations of Europe, as well as Canada and the United States, share this common theme.

Most European nations do not have special courts to hear pollution cases. Rather, such cases are heard in courts normally hearing civil, criminal or administrative matters.

Several countries were exceptions, however. For example, Professor Hollo of Finland noted that his country had special "Water Courts," which have jurisdiction over a variety of water-related matters, including water pollution.

Pollution law adapted by the Council of the European Economic Community (EEC) was another topic receiving special consideration. Mr. W.J. Wolff, a Dutch attorney with the Agricultural Board, the Hague, noted that the European Community has an environmental policy which was approved by the European Council of Ministers in 1973.

This environmental policy is actually implemented in guidelines, recommendations and regulations. The guidelines are binding on every member state, while recommendations and regulations are not. The European Community has adopted guidelines regarding water and air pollution, waste disposal and discharge of radioactive materials.

Michele Barbieri, an Italian attorney, observed that compliance with community directives causes some problems. The European Court of Justice has been asked to rule on pollution violations by member states in at least 25 instances. Michele Slater, an attorney from the United Kingdom, noted that when the community approach to a pollution matter differs from the historic practice of the United Kingdom, implementation has been slow.

Mr. Hotzel, a lawyer from Bonn, West Germany, argued for a strengthening of EEC environmental regulation — particularly regarding agriculture and forestry. It should be noted that the EEC's environmental policy has implications beyond the member states. Finland and Switzerland, both non-member states, frequently adopt EEC directives voluntarily.

Pollution across international boundaries was another focus within the environmental topic. This problem is especially important because many rivers flow through several different nations (*e.g.*, Rhine, Danube), or empty into seas that border multiple states (*e.g.*, Mediterranean, Irish, North, Adriatic and Baltic Seas).

Air pollution (acid rain) is also transnational, and Chernobyl vividly illustrates that international contamination can arise from a nuclear accident.

Controlling pollution across international boundaries has been attempted within the EEC by directive (*e.g.*, the Council Directives of the European Community limiting lead (1982) and nitrogen oxide (1985) in the air). Numerous bilateral and multilateral treaties and conventions have also been adopted.

Professor Lichorowicz of Poland described 1961 and 1965 treaties between the U.S.S.R. and Poland concerning water pollution in common rivers, as well as the 1974 Helsinki Convention regarding protection of the Baltic Sea from river-borne contamination and sea-shore agriculture and industry.

Several speakers mentioned the United Nations' 1979 Convention on Long-Range Transboundary Air Pollution and reported that some nations (*e.g.*, Switzerland) have signed a protocol pledging to reduce sulphur emissions by 30% from the 1980 level, while other nations (*e.g.*, United Kingdom) have

Donald L. Uchtmann is a professor of agricultural law at the University of Illinois, Champaign-Urbana. He served as General North American Reporter for the environmental topic, and, along with Professor Neil Harl, Iowa State University, Ames, Iowa, conceived and coordinated North American participation in the Symposium.

not.

A strong sentiment was expressed by those present that much more international cooperation would be required in the future if transboundary pollution is to be controlled.

A final environmental issue discussed who should pay the costs of pollution. The notion that the "polluter must pay" was widely accepted in principle, but it was noted that the public frequently bears the costs — particularly with agriculture-related pollution.

The North American contributions to the environmental topic were well received. An overview and summary was presented by Don Uchtmann. Papers by John Davidson, Norman Thorson and David Myers collectively examined the legal tools used to combat agricultural pollution, including the role of the U.S. government as landowner, the Clear Water Act and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

A paper by Margaret Grossman focused on the shared power of federal and state governments in a federated state such as the United States. Papers by Linda Malone and Leon Geyer discussed the international legal implications of the Chernobyl accident and the cost dimension of pollution, respectively. In addition, Steve Matthews and Walt Armbruster contributed to the discussion of these topics.

Legal Questions Concerning Limitations of Production in Agriculture

The second topic of the Symposium involved production controls. As a general rule, the EEC guarantees prices to producers of agricultural commodities without imposing production controls — the exceptions being controls on sugar and milk production. The European presentations focused upon experience with production controls for these two commodities.

As background information, Dr. W. Dona, presenter of the Italian report, explained that the Common Agricultural Policy was the cornerstone of the EEC. She also noted that the treaty establishing the EEC enumerates the following objectives of the Common Agricultural Policy:

1) To increase agricultural productivity by promoting technical progress and by ensuring the national development of agricultural production and the optimum utilization of the factors of production — in particular, labor;

2) To ensure a fair standard of living for the agricultural community — in particular, by increasing the individual earnings of persons engaged in agriculture;

3) To stabilize markets;

4) To assure the availability of supplies; and

5) To ensure that supplies reach consumers at reasonable prices.

Dr. Dona noted that sugar was the first EEC commodity to be subject to production controls (1967). In essence, a producer receives a full, guaranteed price for his Quota A, a limited price guarantee for an additional quantity (Quota B), and no guarantee for additional amounts which would be sold on world markets at world prices.

Because producers have no incentive to produce beyond Quota A and Quota B, the price support system does not result in excess production. There was general agreement among those in attendance that the system has worked well.

The milk quota system became effective in 1984. According to Dr. J. Lukanow, West Germany, the milk quota system has been successful in capping excess milk production, which had produced "mountains" of excess butter in recent years. The milk quota system is not without its legal problems, however.

Catherine Crishan, a barrister with the United Kingdom Ministry of Agriculture, Fisheries and Food, noted that ownership of the milk quota was particularly problematic. According to community regulations, the quota attaches to the land, but is awarded based on a producer's production in the relevant reference period. In a tenancy situation, the tenant has earned the quota, but the quota attaches to the landlord's land.

Assignability of the quota creates another problem. There seemed to be a general consensus among the Europeans that the milk quota system was not working nearly as well as the sugar quota system.

The Europeans were especially interested in American experiences with production controls. Neil Harl discussed the economic backdrop — that demand for agricultural commodities is generally inelastic, and that high support prices without production controls invariably leads to overproduction.

Keith Meyer provided an historical perspective of U.S. price and income support policies by surveying and synthesizing U.S. government policy from 1935-1985. Larry Bakken discussed the 1985 Farm Bill in general, and Neil Hamilton focused on multi-year land retirement programs.

Terence Centner discussed marketing orders as a device for limiting production, and Phil Harris examined tax policies affecting levels of agricultural production. Sherwin Lyman, senior counsel for Legal Services, Canadian Department of Agriculture, provided a Canadian perspective.

In his closing summary of the production control topic, Harl made the following observations:

> "First, we have serious problems of overproduction in the world, and the problems will likely grow worse. Indeed, the problems may become substantially more serious over the next two or three decades. As an example, the dairy growth hormone may well increase milk output per cow by at least 20% in the next few years...
>
> Second, we must never forget that overproduction in basic foodstuffs should not be viewed as the greatest concern of the human family. As we look at the broad sweep of history, adequacy of foodstuffs has been a far greater concern. Overproduction is now burdening all of our countries, and we must double and redouble our efforts to ease budgetary impacts. But the great challenge is in developing strategies for managing the blessings of overabundance. The problems of overproduction — great as they are — pale by comparison with problems of widespread food shortages, starvation and malnutrition."

Harl also offered the following nine principles that should be considered by governments interested in using market intervention to support agricultural prices or limit production:

1. Overproduction is likely to occur if producers are assured a price for their products which is above fair market value.

2. Limitations on production are necessary as surpluses arise (as a result of producers being assured a price above fair market value).

3. Producers have an almost infinite capacity to circumvent limitations on production.

4. Absent distortions in price from price support programs, the lowest-cost producers will prevail. This is disturbing to those who would like to influence the structure of agriculture through economic intervention. Even with price support programs, producers with the greatest profitability have the greatest capacity to acquire land and other means of production. These people will ultimately prevail unless rigorous and complete limitations are imposed on expansion.

5. The most efficient allocation of resources occurs when farmers produce for the market rather than for government payments.

6. In every country, whether it is the United States, the United Kingdom, or elsewhere, consumers pay two amounts for food: a) The amount paid at the store or other point of purchase; and b) The amount paid through taxation to assist in stabilizing the agricultural sector.

7. It is more expensive (from the standpoint of expenditure of public funds) to maintain farm income in the face of inelastic demand for farm commodities if price is permitted to drop to low levels.

In that situation, relatively less support

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comes from consumers, and relatively more support comes from the government. This is a lesson learned by the United States in the 1930s which is being relearned today. Solutions that are less costly to government involve limitations on production with accompanying rises in commodity price.

8. Diverting land from production to deal with overproduction tends to encourage higher prices for land and, consequently, greater use of non-land inputs.

9. As we evaluate alternative solutions for dealing with overproduction (in a sector with inelastic demand and so many producers that no single producer can influence price with output decisions), it is clear that a global approach is needed if the downsizing of agricultural sectors is to be rational, equitable and effective.

A coordinated international effort is needed to harmonize policies affecting agriculture and the demand for food with particular attention to: a) Trade limitations; b) Conservation and environmental policies; c) Third World debt problems; d) Third World development efforts; and e) Policies relating to food security and necessary reserve stocks.

Harl concluded his summary with three questions for further consideration:

1. Should we be making a greater effort to decouple income support for farmers from production?

2. Should we be less protective of the development of agricultural lands for non-farm residential use or other non-farm uses when agricultural production is in global surplus?

3. Can we continue to cope with the rapidly escalating complexity of the legal structure needed to implement programs to deal with overproduction?

A summary of the European production control presentations was given by Dr. O. Gottsmann, while an overall summary of the Symposium was presented by Professor Kreuzer. The Symposium was adjourned by Professor Costato (Italy), president of the European Agricultural Law Committee, and Professor David Myers, president of the AALA.

Concluding Observations

In a sense, the Symposium in Plymouth was a test to determine the value of international interaction on legal topics of importance to agriculture. In the author's opinion, the Symposium passed "with highest honors."

Regarding the environmental topic, for example, the author was struck by the similarity in environmental problems, the similarity in obstacles to regulation, the common trend of increasing environmental concern on the part of the public, as well as the need for international cooperation on certain environmental issues such as acid rain and pesticide regulation.

On the production control topic, there was a clear consensus among all participants that production controls would be necessary on both sides of the Atlantic — neither the United States nor the EEC can resolve the adverse economic impact of world food surpluses alone. A link between environmental damage and overproduction (increased use of pesticides, more intensive cultivation, draining of wetlands, etc.) was also found to exist on both sides of the Atlantic.

In hindsight, these similarities between Europe and North America should probably not have been so surprising. Western Europe and North America represent affluent, technologically modern, democratic regions of the world which share a western culture and somewhat similar political and legal institutions.

Farmers on both sides of the Atlantic use technologically advanced inputs with similar environmental consequences, and politically active citizens on both sides of the Atlantic demand a reasonably safe environment and can afford to pay for it. Governments on both sides of the Atlantic face similar constraints in attempting to regulate the environment (Constitutional protection of private property rights, and a geographically dispersed agricultural sector which is inherently difficult to police); and public treasuries on both sides of the Atlantic are asked to bear some of the farmer's environmental protection costs because neither European nor U.S. farmers can individually pass on these costs to consumers.

Major differences also exist between the nations of Europe and the United States, however, and these differences cannot be ignored. For example, the central government of the United States clearly has the power to implement national agricultural policies because it is a strong central government. In contrast, the EEC has great difficulty developing and implementing agricultural policy because its power over the sovereign member states is very limited. Such differences exist side by side with the similarities noted above.

The Symposium provided an excellent opportunity for lawyers from both sides of the Atlantic to learn from one another, to gain insight into the laws and political realities of different nations and communities of nations, as well as to see one's own nation and body of law from a different perspective.

Further interaction among lawyers of different nations on agriculture-related issues of mutual interest is desirable, and should be earnestly pursued. In the meantime, a special thanks should go to our host, George Spring of Plymouth Polytechnic, and the Agricultural Law Association of the United Kingdom for their important roles in making the first Euro-American Agricultural Law Symposium an unqualified success.

AG LAW CONFERENCE CALENDAR

Financial Distress in Agriculture: The Legal Issues.
Nov. 7, 1986, Oklahoma City University School of Law, Oklahoma City, OK.
Program covers: Tax Ramifications of Insolvency, Agricultural Bankruptcy Reform, Tax Reform Impacts on Agriculture, Farmers Home Administration and Farm Credit System Litigation, and Agricultural Mediation.
For further information, contact Oklahoma City University Continuing Legal Education at 405/521-5362.

4th Annual Animals and The Law Conference — Litigation Planning Retreat.
Nov. 1-2, 1986, Mills College, Oakland, CA.
Sponsored by the Animal Legal Defense Fund.
For more information, contact the Animal Legal Defense Fund at 415/362-3363.

Water Resources Law.
Dec. 15-16, 1986, Hyatt Regency Hotel, Chicago, IL.
Topics: Water Allocation Rights, Ground and Surface Water Regulations, and Changing Agricultural Property Rights.
Sponsored by The Society for Engineering in Agriculture, in cooperation with the American Agricultural Law Association, and other associations.
For further information, contact Lisa Zielke at 616/429-0300.

Legal Responses to Farm Financial Problems.
Nov. 7, 1986, Marriott Hotel, Des Moines, IA.
Sponsored by the Agricultural Law Center, Drake University.
For further information, contact Jeanne Johnson at 515/271-2955.

STATE ROUNDUP

GEORGIA. *Peanut Agent's Assessment.* Defendant's motion for directed verdict was properly denied where the evidence could show that the discrepancy in peanut weight and grade was the fault of either the purchaser (defendant) or of the agent/procurer (plaintiff). Also, the claim by the agent/procurer was liquidated — entitling him to prejudgment interest.

The case involved a dispute as to weight and grade of peanuts purchased by plaintiff for delivery to defendant and defendant's assessment against plaintiff's commission for that alleged discrepancy. *Gold Kist Peanuts v. Alberson*, 342 S.E.2d 694 (Ga. App. 1986).

— Daniel M. Roper

MONTANA. *Tribal Ordinance Ousts Local District Law.* The Confederated Salish and Kootenai Tribes have recently enacted an ordinance regulating projects on streambeds within the Flathead Indian Reservation in Montana.

The new ordinance asserts authority over all streambed projects on the reservation and requires a tribal permit before any streambed work can begin. Much of the land affected by the tribal ordinance is owned by non-Indians.

Streambed projects on non-Indian land within the exterior boundaries of the reservation have been regulated by local conservation districts under a 1975 Montana law. At the Aug. 6, 1986 public hearing on the tribal regulations, the county conservation district objected to exclusive tribal regulation of streambeds. Representatives of the conservation district proposed a system of shared jurisdiction on the reservation, with the tribal law applying only to projects on Indian lands.

In adopting the ordinance, the tribes rejected the notion of shared jurisdictions. Confederated Salish and Kootenai Tribes of the Flathead Reservation, Ordinance No. 87-A, Aquatic Lands Conservation Ordinance (1986).

— Donald D. MacIntyre

OKLAHOMA. *Farm Products Exception.* The Oklahoma Legislature took no action during the 1986 legislative session to create a central filing system as allowed by § 1324 of the 1985 Farm Bill.

Hence, the Oklahoma Bankers Association is holding seminars which attempt to teach its members the details of "buyer" prenotification as the means by which to preserve their security interests in farm products.

Power of Sale Mortgage Foreclosure Act. Effective Nov. 1, 1986, mortgage lenders in Oklahoma will have the option of foreclosure on real estate through a U.C.C.-style power of sale — in addition to judicial foreclosure.

This Act has limited impact on agriculture because it does not apply to mortgages securing credit made primarily for an agricultural purpose to mortgagors who are natural persons, or farm or ranch business corporations authorized by Oklahoma corporation law.

In addition, the Act does not apply to a mortgagor's homestead if the mortgagor elects judicial foreclosure in accordance with the election procedure set forth in the Act. Okla. Stat. tit. 46, sections 40-48 (1986 Supp.).

Agricultural Employment Retraining Act. Oklahoma farmers and ranchers who have defaulted on agricultural loans, who have been subject to foreclosure on property related to agriculture, or who can prevent default or foreclosure by learning a vocational skill, are now entitled to three years of tuition-free training at Oklahoma Vocational and Technical Schools. Spouses of those who qualify are also eligible for tuition waivers.

The exact details of this tuition-free training are subject to rules and regulations to be adopted by the Oklahoma State Board of Vocational and Technical Education. Okla. Stat. tit. 2, sections 2001-07 (1986 Supp.).

— Drew L. Kershen

PENNSYLVANIA. *Defacto Taking in Highway Ditch Maintenance.* Exercising its right to enter land to maintain highway drainage ditches, the State Department of Transportation is not responsible for flooding damage that occurs on the land after the cleaning — if the work done does not substantially alter the natural flow of water.

In this case, the cleaning of the drainage ditch resulted in the restoration of the flow of water to what it was as far back as 1963. The landowner could not make out a case of statutory entitlement to damages under the State Highway law which requires a substantial change in the natural flow of water.

Neither could he claim a de facto taking, which was noted to require that "the overflow must constitute an actual, permanent invasion of the land amounting to an appropriation thereof, and not merely an injury to the property." *In re Condemnation, Oxford v. Commonwealth*, 506 A.2d 990, 993-94 (Pa. Commw. 1986).

Poultry and Egg Contracts Between Growers and Merchants. Act 1986-74, House Bill No. 976, affects the relationship between the grower and merchant. It provides that unless the parties agree otherwise, all amounts due to a grower by a merchant under a poultry contract are to be paid to the grower within 21 days of the date on which the grower delivers the poultry to the merchant.

If all amounts are unpaid on the 22nd day after delivery, the merchant is liable to the grower for interest on the unpaid amounts, unless otherwise agreed. Further, the court is authorized to award reasonable attorney and expert witness fees. The Act will be codified at Pa. Stat. Ann. tit. 3, Sections 1401-1408 (Purdon 1986).

— John C. Becker

SOUTH DAKOTA. *Conversion Against Sale Barns.* In an action for conversion against five sale barns for selling cattle in which the Aberdeen Production Credit Association (PCA) had a protected security interest, cash flow statements, loan applications and attachments executed by both parties and labeled "authorization or written consent for sale of cattle" did not constitute written consent of sale under the terms of the security agreement.

The internal documents merely recognized the business plans and sale projections for Bellman farms throughout the year. They did not constitute consent to these particular sales.

The PCA's demand for the sale of the cattle and its failure to insist on written consent on prior occasions did not result in an "otherwise" authorization of sale under SDCL 57A-9-306(2). Prior sales were always followed by prompt application of the proceeds to the loan.

Since the PCA was not prejudiced by such sales, its failure to discipline the debtor could not constitute a waiver. *Aberdeen Production Credit Association v. Redfield Livestock Auction Inc.*, 379 N.W. 2d 829 (S.D. 1985).

The dissenting judge construed the PCA's course of dealing as an "otherwise" authorization to the sales under SDCL 57A-9-306(2).

— Annette Higby

VIRGINIA. *Inherent Danger in Horseback Riding.* In *Tarshis v. Virginia Hot Springs Inc.*, No. 85-1465, 85-1466 (4th Cir. Feb. 18, 1986), the court upheld a jury verdict against a resort for wrongful death when an "inexperienced horseman" fell off a rented horse and sustained a subsequently fatal head injury. The decedent had neither a trail guide to lead the horse and help him control it, nor was wearing a riding helmet or other protective hard hat. The decedent had not assumed the risk as a matter of law.

The Fourth Circuit upheld the District Court's jury instructions that the jury might find defendant "negligent" for failure to warn the decedent of the inherent risks of horseback riding.

Under applicable Virginia law, the defense of assumption of risk requires a defendant to show full knowledge and appreciation of the danger on the part of the injured party. Defendant's own witness testified that the average person does not appreciate the danger inherent in horseback riding.

Therefore, the issue of whether the risk was open and obvious was appropriately one for the jury.

— L. Leon Geyer

Address Correction Requested

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Open Letter From the President

The past year has been a very productive one for the American Agricultural Law Association (AALA). The October 1985 Annual Meeting was well received, the first Euro American Agricultural Law Symposium held in England this fall was an outstanding success, and Jim Dean has put together a first-rate program for our meeting this month in Fort Worth.

In addition, the *Agricultural Law Update* continues to be the definitive monthly newsletter covering significant developments in agricultural law. These successes are reflected, at least in part, by the dramatic growth of the AALA — to date, we have grown by over 40% this past year and we now have more than 700 members from across the United States and Canada.

The work of the AALA is conducted through its Board of Directors and its committee structure. I am writing this open letter to our membership in order to recognize the efforts of these individuals and to say thanks for jobs well done. The hard-working Board of Directors include Lawrence Kurland, Karin Littlejohn, Neil Hamilton, Phillip Kunkel, Peggy Grossman and Patrick Wheeler. The officers of the board include Jim Dean as president-elect, Keith Meyer as past president, and Terence Centner, our secretary-treasurer.

This year, we began a long-range planning process with Jake Looney chairing a committee composed of Neil Harl, Jim Hildreth, Phil Harris, Jim Dean and Keith Meyer Don Pedersen chaired the Publications Committee, which included John Becker, Patricia Conover and Ken Fransen. Richard Dees was in charge of the Membership Committee, which included Robert Estes, Julian Juergensmeyer, John Schumann and Clark Willingham.

Keith Meyer chaired the Nominating Committee, which included Don Uchtmann and Don Pedersen. Terry Centner was in charge of the Finance Committee, which included Peggy Grossman and Don Kelley. David Fleming was the chair of the Audit Committee, which included Neil Hamilton and Keith Parr. Pat Costello chaired the Awards Committee, which included Claudia Allen, Ken Fransen and Drew Kershen.

Jim Dean was the chair of the Program Committee for the 1986 Annual Meeting. He was joined by Sam Guyton, Bennett Raley, Richard Owens and Robert Luening. Jim Baarda served as the chair of the Ad Hoc Committee in charge of making arrangements for our 1987 Annual Meeting in Washington, D.C. He was joined by Leslie Mead, Thomas McGivern and Peter DeBraal. Gail Peshel has been planning and coordinating the AALA Job Fairs at our annual meetings, and Don Uchtmann and Neil Harl deserve the credit for putting together the Euro-American Agricultural Law Symposium — at least from this side of the Atlantic

Finally, I would like to welcome aboard Linda Grim McCormick, who has taken charge of the *Agricultural Law Update* with this issue. She succeeds Don Pedersen, who has been the editorial liaison for the Update for the past three years. I cannot begin to think how much we are indebted to Don for the outstanding service he has provided with the newsletter. His efforts, together with the unfailing contribution of the topical and state reporters, have been critical to the success of the Update.

To all of you, thanks.

— Dave Myers