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Eighth Circuit Interprets "Disposable Income" Requirement in Chapter 12

The Eighth Circuit recently addressed the issue of the duty of Chapter 12 debtors to pay disposable income to unsecured creditors during the term of the plan. *Rowley v. Yarnell*, 22 F.3d 190 (8th Cir. 1994). The court held that the debtors' Chapter 12 plan required them to pay all actual (as opposed to projected) disposable income to the unsecured creditors. *Id.* at 193. The opposite result was reached by the Ninth and Fifth Circuits in Chapter 13 cases interpreting the same statutory language.

The debtors' Chapter 12 plan provided for no payments to unsecured creditors unless either the trustee or one of the unsecured creditors objected to confirmation of the plan. The United States Trustee and three unsecured creditors objected. The Chapter 12 Trustee recommended the case for confirmation, noting his understanding that "the Debtors have offered to pay all of their net disposable income to the unsecured creditors as promised." *Id.* at 191. The plan as confirmed provided that "[n]o dividend or distribution of any kind is projected" for holders of unsecured claims. *Id.* at 192.

At the end of the three-year plan period, the debtors filed a motion for discharge, alleging that they had complied with all of the requirements of their plan. The Chapter 12 trustee and two unsecured creditors objected, arguing that the debtors had failed to pay net disposable income realized during the plan years to their unsecured creditors.

The arguments center of the statutory requirement for Chapter 12 plan confirmation set forth in section 1225(b). This section requires that:

> [i]f the trustee or the holder of an unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless ... the plan provides that all of the debtor's *projected disposable income* to be received in the three year period ... will be applied to make payments under the plan.

11 U.S.C. § 1225(b) (cited in *Rowley*, 22 F.3d at 192.) (emphasis added).

The debtors argued that the statute's inclusion of the term "projected" disposable income obligated them only to payments based on the projections or estimates of disposable income set forth in the plan. Because no disposable income was projected, they had no further requirement. The creditors and the trustee argued that the statute should be interpreted to require that all *actual* disposable income be paid to the unsecured creditors. *Rowley*, 22 F.3d at 192.

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Liquid Manure Spreading Ruled Clean Water Act "Point Source"

The Second Circuit has ruled that "liquid manure spreading operations are a point source within the meaning of [the Clean Water Act when] the farm itself falls within the definition of a concentrated animal feeding operation ('CAFO') and is not subject to the agricultural exemption." *Concerned Area Residents for the Environment v. Southview Farm*, Nos. 93-9229, 1608, 1994 WL 480646, *1 (2d Cir. Sept. 2, 1994). The court's decision is significant because it offers more guidance on the meaning of the term "point source" as used in the Clean Water Act (CWA). In general, the CWA prohibits the discharge of a pollutant from a "point source" into the waters of the United States without a permit.

The litigation was brought by private citizens who alleged state law damages claims for nuisance, negligence, and trespass in addition to five violations of the CWA. After a jury verdict in favor of the plaintiffs on the CWA claims and the trespass claim, the district court dismissed the CWA claims.

The defendant was a 2,200-head dairy operation that also owned 1,100 acres of cropland. The dairy had five manure lagoons on the main farm, with one lagoon having a capacity of 6 to 8 million gallons of liquid manure. The dairy applied liquid

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The court first examined the statutory language. While noting that the statute "may be less than facially ambiguous," the court found a literal reading of the "projected disposable income" provision to yield "an absurd result." *Id.* at 192-3. The court cited legislative history regarding the purpose of Chapter 12, finding that it was designed "primarily to provide family farmers with a faster, simpler, and cheaper alternative to Chapter 11 and Chapter 13 procedures, while preserving the fair treatment of creditors under those chapters." *Id.* at 193. The court then referenced Chapter 11 provisions, noting the "balancing of power" between creditors and the debtor. The court found that this balancing is designed to "ensure fair treatment of creditors and thereby preserve the availability of capital." *Id.*, citing *In re Windsor on the River Associates. Ltd.*, 7 F.3d 127, 131 (8th Cir. 1993). Applying this to the Chapter 12 disposable income provision, the court held that it "[could] not assume that Congress intended to depart from these general purposes of bankruptcy law." *Id.* The court then referenced the potential "drying up" of farm credit if the debtors' interpretation prevailed. *Id.*

As a further rationale for its decision, the court found that the debtors' plan did not actually provide a projection of disposable income. Although the plan contained the required provision that projected disposable income would be paid to unsecured creditors and further provided that "[n]o dividend or distribution of any kind would be provided" for unsecured claim holders, the court was unwilling to link these provisions to find a projection of zero disposable income. *Id.* at 193. Accordingly, the court held that a reference to actual disposable income must be made. *Id.*

Among other defenses raised by the debtors was the argument that the meaning of "projected disposable income" is an issue that should be raised at confirmation, not at discharge. The court also rejected this argument, finding it to be "unreasonable." *Id.* at 194.

A significant weakness in the *Rowley* opinion, however, is the court's failure to address in any way, the identical "projected disposable income" requirement in Chapter 13. 11 U.S.C. § 1325(b)(1)(B). As noted in the *Collier Farm Bankruptcy Guide*, Chapter 12 was based on the provisions of Chapter 13, and "[n]umerous cases have held that decisions in Chapter 13 cases construing identical provisions of chapter 13 may be relied on in chapter 12 cases." Randy Rogers & Lawrence P. King, *Collier Farm Bankruptcy Guide*, at 4-6 (citing *In re Martin*, 130 B.R. 95 (Bankr. N.D. Iowa 1991) and the cases cited therein).

Moreover, the court did not address the Ninth Circuit opinion recently interpreting the identical "projected disposable income" provision in Chapter 13, and reaching the opposite result. *In re Anderson*, 21 F.3d 355 (9th Cir. 1994). The *Anderson* court found the statutory language in section 1325 to be "clear" in requiring only an examination of "projected" disposable income, not actual disposable income computed during the plan. *Id.* at 357. Citing *Webster's Ninth New Collegiate Dictionary*, the court found "project" to mean "to plan, figure or estimate for the future" and thus, held that the debtor could not be required to pay "actual" disposable income when the statute only required payment of "projected disposable income." *Id.* The *Anderson* court cited the Fifth Circuit case of *Matter of Killough*, 900 F.2d 61 (5th Cir. 1990) (per curium) as setting forth a two part process for establishing "projected disposable income" prior to plan confirmation. *Id.* The *Anderson* court adopted this process and the Fifth Circuit approach as "fully [in] accord[] with the plain language of the statute." *Id.*

— *Susan A. Schneider, Hastings, MN*

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Liquid Manure/Continued from page 1

manure to the cropland through a center pivot irrigation system, a hard hose traveler that could spray liquid manure 150 feet in either direction, and conventional liquid manure spreaders with 5,000 gallon capacities pulled by tractors.

At trial, witnesses testified that on one occasion manure pooled in a field during a rain and ran through a swale into a drainage pipe that led to a stream. In another incident involving "'brown' water runoff flowing off the field," the evidence indicated that there was "[e]xtra heavy application of manure in fields" and a "heavy cover of liquid manure." All told, the evidence caused the court of appeals to state that "[w]e think the jury could properly find that the run-off was primarily caused by the over-saturation of the fields rather than the rain and that sufficient quantities of manure were present so that the run-off could not be classified as 'stormwater.'" 1994 WL 480646 at *8-9.

The appellants also argued that the evidence established that the manure was discharged from a point source. They contended that "even if the liquid manure flowing from [the field] into the swale could be characterized as 'diffuse run-off,' the manure pollutant was nevertheless thereafter channelled or collected sufficiently to constitute a discharge by a point source." *Id.* at *5. The court of appeals agreed, ruling "that the swale coupled with the pipe under the stonewall leading into the ditch that leads into the stream was in and of itself a point source." *Id.* Alternatively, the court held that "the manure spreading vehicles themselves were point sources. The collection of liquid manure into tankers and their discharge on fields from which the manure directly flows into navigable waters are point sources ...." *Id.* at *6 (citations omitted).

Because of the number of confined cows on the farm's feedlot, the court of appeals also ruled that the dairy was "a concentrated animal feeding facility" (CAFO). The CWA defines the term "point source" to include CAFOs. The court rejected the dairy's argument that the presence of cropland outside the feedlot meant the facility was not a CAFO. *Id.* at *9-11. (When this article was written, the court's decision was still subject to revision or withdrawal.)

— *Christopher R. Kelley, Lindquist & Vennum, Minneapolis, Minnesota*

Eighth Circuit Upholds $46 Million Judgment In Corn Seed Case

In 1981, Pioneer Hi-Bred International brought an action against Holden Foundation Seeds in United States District Court for the Southern District of Iowa. Pioneer alleged that Holden violated section 43(a) of the Lanham Act, 15 U.S.C. section 1125(a), and in addition brought pendent state law claims of trade secret misappropriation, unjust enrichment, interference with business advantage, conversion, and unfair competition. The district court, finding for Pioneer on all theories except conversion and unfair competition, awarded Pioneer $46,703,230 in lost profits. *Pioneer*, No. CIV. 81-60-E, 1987 WL 341211 (S.D. Iowa Oct. 30, 1987). *See generally*, Wolf, *The "Genetic Message" from the Cornfields of Iowa: Expanding the Law of Trade Secrets*, 38 Drake L. Rev. 631 (1989).

In *Pioneer Hi-Bred International v. Holden Foundation Seeds*, 1994 WL 328600, ___ F.3d ___, 31 U.S.P.Q.2d 1385 (8th Cir. July 12, 1994), the Eighth Circuit upheld the district court judgment, concluding that the scientific evidence was sufficient to support the finding that Holden misappropriated certain of Pioneer's inbred corn seed lines.

— Scott D. Wegner, Lakeville, MN

Revisions to the Right-to-Farm Law: Using the Barn Door To Close Local Zoning Options

The primary purpose behind the right-to-farm laws enacted by all fifty states over the last twenty years has been to provide farm operators nuisance protection against nonagricultural parties who have moved into the farm area. Neil D. Hamilton, *Right To Farm Laws Revisited: Judicial Consideration of Agricultural nuisance protection*, 14 J. Agric. Tax'n & L. 195 (1992). Conditions related to animal production such as noise and odor have subjected many livestock producers to conflicts with nonagricultural neighbors and, in many instances, nuisance suits. Virginia (joining Illinois, Iowa, and Mississippi) recently amended the Right to Farm Act by incorporating language into its right-to-farm statute that puts limits on county, city, and/or town zoning authority and powers. Va. Code §§ 3.1-22.23, 3.1.22.29 (1994). Using the barn door to restrict local zoning authority, needless to say, has not been received well by many county officials. The Virginia Right to Farm Act was amended in part because of a county's use of "special use" permits to deny entry of an integrated operation to the county. Conversation with Mr. C. Flippo Hicks, General Counsel, Virginia Association of Counties, Richmond, Virginia. July 22, 1994.

Under the Illinois provisions, no county zoning power shall:

> ...be exercised so as to impose regulations or require permits with respect to land used or to be used for agricultural purposes or with respect to the erection, maintenance, repair, alteration, remodeling, or extension of buildings or structures used or to be used for agricultural purposes upon such land except that such buildings may be required to conform to building or set back lines.

Ill. Stat. Ann. Ch 34, § 3151 (1994).

Similarly, Missisippi asserts that:

> No permits shall be required with reference to land used for agricultural purposes or for the erection, maintenance, repair or extension of farm building or farm structures outside the corporate limits of municipalities.

Miss. Code Ann. § 17-1-3 (1994).

Iowa law states that:

> No regulation or ordinance adopted under the provisions of this chapter shall be construed to apply to land, farm houses, farm barns, farm out buildings, structure, or erections which are primarily adapted, by reason of nature and area, for use for agricultural purposes, while so used.

Iowa Code § 358A.2 (1994).

Virginia's recent addition provides that:

> ...no county shall adopt any ordinance that requires special exception or special use permit to be obtained for any production agriculture or silviculture activity in an area that is zoned as an agricultural district or classification. No county, city, or town shall enact zoning ordinances which would unreasonably restrict or regulate farm structures or farming and forestry practices in an agricultural district or classification unless such restrictions bear a relationship to the health, safety and general welfare of its citizens.

Va. Code § 3.1-22.28 (1994).

What the provisions stated above essentially say is that agricultural uses are exempt in part from county zoning ordinances. Neil E. Harl, *Agricultural Law, "Right to Farm Laws,"* 1993, § 124.02(3). Virginia's Right to Farm Act's zoning restrictions, which will become effective April 1, 1995, have yet to be tested in the courts. A legislative challenge is expected in the next session. Illinois and Iowa's zoning related provisions, on the other hand, have been the subject of several court decisions, with varying results. In the case of Illinois, the court has held in two cases that the temporary storage of sewerage sludge for spreading on the land as fertilizer and a poultry hatchery are "agricultural" and therefore exempt from county zoning requirements. *Soil Enrichment Materials Corp. v. Zoning Board of Appeals of Grundy County*, 15 Ill. App. 3d 432, 304 N.E.2d 521 (1973); *Lake County v. Cushman* 40 Ill. App. 3d 1045, 353 N.E.2d 399 (1976).

How to determine the effectiveness of the right-to-farm laws is a difficult task. So much depends on the intended goal of the statute. Is the goal merely to shield existing farms from later intrusion by nonfarm uses, or are the laws designed to preserve all farmland and farming operations by limiting nuisance suits and other legal challenges to farming? Is the right-to-farm statute the appropriate place to make zoning decisions for the counties?

Another new provision to the Virginia statute that has just gone into effect as of July 1, 1994 states that no agricultural operation can be considered a nuisance "... if such operations are conducted in accordance with existing best management practices and comply with existing laws and regulations of the Commonwealth." In the past, the Virginia law has required an agricultural operation to be in existence for one year with no significant changes having taken place in the operation. The one-year requirement and the issue of increasing the size of operation have been deleted from the statute. The statute does **not** provide protection to farmers who run dirty operations, but it does offer conscientious farmers flexibility and peace of mind in their management decisions and operations. It continues to leave to the jury the question of what are the appropriate best management practices.

Livestock producers and agricultural attorneys should be familiar with the right-to-farm law in their states. Neil D. Hamilton and David Bolte, *Nuisance Law and Livestock Production in the United States: A Fifty State Analysis*, 10 J. of Agric. Tax'n & L. 93 (1988). The growth of contract hog operations and other livestock industries in urbanizing states like Virginia, along with the expansion of suburban housing into agricultural areas will likely increase the number of conflicts surrounding land use. The issue remains, is the "right-to-farm act" the place to

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Milk Marketing Order Litigation

By Donald B. Pedersen

Litigation over certain aspects of milk marketing orders for areas east of the Rocky Mountains continues, with the most recent development being the August 10, 1994 response of the Secretary of Agriculture to the April 13, 1994 order in *Minnesota Milk Producers Ass'n [MMPA] v. Yeutter*, 851 F.Supp. 1389 (D. MInn. 1994). Brought by MMPA and certain individuals, the case reflects unhappiness on the part of many Upper Midwest producers with relatively low prices received for their Grade A milk and the pricing of milk in dry or concentrate form when sold for reconstitution into other areas of the country.

After the suit was filed, administrative hearings were conducted in the fall of 1990. In the ensuing final administrative decision, the Secretary of Agriculture (through his designate) amended those marketing order provisions governing the pricing of reconstituted milk. 58 Fed. Reg. 12,634 (1993)(March 5, 1993). So called "down allocation" provisions were removed — provisions that made it uneconomical for handlers to purchase dry milk from the Upper Midwest to supply other areas with reconstituted milk. As a result of this opening of opportunities for sales elsewhere in the country, plaintiffs dropped their district court challenge to "down allocation" and "compensatory payment" provisions, but proceeded with other aspects of their suit.

In the 1994 district court decision, plaintiffs lost one of their arguments, but did succeed in convincing the court to require the Secretary to rearticulate the March 5, 1993 administrative determination to retain existing Class I princing. In response to the order of the court, the Secretary on August 10, 1994 issued an Amplified Decision. 59 Fed. Reg. 42,422 (1994).

Developments to date in this litigation may be more easily understood after a brief review of Grade A milk pricing under federal milk marketing orders. Under the current system marketing orders are created for distinct geographical areas. To become effective, orders must be ratified by producers within each particular area. Every order divides Grade A milk into three classes: Class I is fluid milk used for consumption; Class II is milk used in soft dairy products such as yogurt, ice cream, and cottage cheese; Class III is milk used to make storable hard manufactured products such as cheese, butter, nonfat dry milk, and evaporated milk.

Prices paid for Grade A milk depends on its use. Class III milk is priced the lowest and in all marketing orders is set at the M-W base price, which is derived from the average price paid per hundredweight (hwt) for Grade B manufacturing milk in Minnesota and Wisconsin. The M-W price is an unregulated open market price, though supported from time to time by Commodity Credit Corporation purchases of certain manufactured dairy products. The Class II price in all marketing orders is the M-W price plus about ten cents per hwt.

Class I pricing is different in each marketing order and is a focus of this litigation. The Class I price is set for each order and involves adding to the M-W price a differential that varies from $1.20 per hwt in Minneapolis to $4.18 per hwt in Southeastern Florida. Generally, the differential increases as the distance from Eau Claire, Wisconsin increases, although the Secretary denies that all differentials are based on the cost of transportation of fluid milk from Eau Claire to the area of the marketing order. 58 Fed. Reg. 12,648 (1993).

No one knows exactly what use will be made of the milk of a particular Grade A producer. Producers in a particular marketing area are not at the mercy in the pricing of their milk of some arbitrary determination about how it is to be used. A blend price is determined — a weighted average of Class I, II, and III prices actually received — and each producer is paid from a pool the blend price for his or her production. Of course, the higher the Class I price in the area, the higher the blend price. And, the more milk in the area that goes to Class I use, the better blend price for area producers. The complaint from the Upper Midwest is that the two factors operate to give producers in some marketing areas an untoward advantage — the areas of highest Class I differentials often tend to be where the highest percentage of milk is used for Class I purposes. This stands in contrast with areas such as the Upper-Midwest where lower Class I differentials team up with more use of milk for Class II and Class III uses, thus minimizing return to producers under blended pricing.

In this litigation, plaintiffs challenge the system of establishing Class I prices (M-W price + intra-order differential) in essential isolation for each marketing order area, arguing that in so doing the Secretary is acting contrary to Congressional intent. The district court examined various provisions of the Agricultural Marketing Agreement Act of 1937 [AMAA] that direct the Secretary to establish system that provides uniform prices for milk within each marketing order area, but not regionally or nationally. The court also noted that as recently as the Food Security Act of 1985, at section 131, Congress explicitly ratified the intra-order setting of Class I differentials by legislatively setting minimum dollar Class I differentials for a two-year period for a series of marketing order areas — in effect, codifying a wide range of Class I differentials.

Accordingly, the district court in *Minnesota Milk Producers* sustained the intra-order approach as consistent with the express intent of the Congress. Since the intent of the Congress was not unclear, it was not necessary for the district court to go further and do a *Chevron* type of analysis of whether the agency's interpretation is based on a permissible construction of the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984). However, in dictum at n. 9, p. 1396, the judge in *Minnesota Milk Producers* wrote that even if the intent of Congress was not clear, the Secretary's decision to maintain the cur rent intra-order system was a permis sible interpretation of the AMAA. The issue as to the intent of Congress and the proper application of *Chevron* seems likely to find its way to the Eighth Circuit, although an appeal has not yet been filed.

Plaintiffs had wanted the Secretary to be free to look outside individual marketing areas when setting Class I differentials. One proposal advanced in the 1990 hearings called for the creation of a national Class I differential of $1.00 and the deposit of same into a national pool from which interregional transfers would be made. 58 Fed. Reg. 12,641 (1993). Eventually, funds from the pool would be distributed out to all Grade A producers based on their entire production. This, it was argued, would offset some of the inequity that results from low differentials plus heavy Class II and III use ir areas such as the Upper Midwest — with resulting relatively low blend prices. Under this proposal, however, part of the Class I differential for each marketing area would continue to be determined intra-order based on a transportation factor. This proposal, along with many others, was rejected in the March 5, 1993 decision.

The higher differentials in some marketing orders have been explained as essential to encourage the development of local dairy operations in areas of traditionally limited production and to thus generate local supplies of fluid milk

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throughout the nation. While this has happened in significant measure, handlers in some marketing areas continue to find it necessary to purchase fluid milk from outside their area to make up for shortages. The Class I differential, when added to the M-W price, generally sets the minimum price for the area for Class I milk just below the cost of transportation from areas where surpluses exist. The economic theory is that the higher differential on one hand will encourage the desired local production and will also be sufficient to attract adequate supplies to metropolitan areas from other areas when needed. But as supplies in a deficit area become more and more adequate, the Class I differential for that area should fall. This should reduce the prices to consumers and foster the public interest of which the statute speaks. 7 U.S.C. section 608c(18).

The district court in *Minnesota Milk Producers* did side with plaintiffs on one issue, finding that the decision of the Secretary, based on the 1990 hearings to leave Class I differentials unchanged was arbitrary and capricious. The court concluded that the Secretary had failed to explain in the decision at 58 Fed. Reg. 12,634 (1993), how certain applicable statutory factors were considered and applied. The district court remanded to the Secretary directing the issuance of an amplified decision — which issued last month and will likely draw a renewed motion for summary judgment from plaintiffs. The issue is whether after amplification the final decision of the Secretary remains arbitrary and capricious.

The statute in question, 7 U.S.C. section 608c(18), provides in part that prices:

> shall...be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect the supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk to meet current needs and further to assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs, and be in the public interest.

Plaintiffs complained and the district court agreed in its April 13, 1994 order that the decision of the Secretary published on March 5, 1993 did not explain how statutory factors such as price and availability of feed for dairy cows entered into the pricing of Class I milk.

The Secretary, in his August, 1994 amplified decision, first states that parity prices in recent years would be significantly higher than prices actually paid in competitive milk markets. Thus, such prices are not reasonable. This, the Secretary states, requires him to go to the "second step" of section 608c(18) and to the setting for each order of an administratively determined price level that reflects the price of feeds, the available supplies of feeds, and other economic conditions that affect market supply and demand. This, the Secretary asserts, has been accomplished in all federal milk orders for almost twenty years (longer in some cases) not by an item by item analysis of input costs and other factors having an impact on supply and demand, but by the vehicle of the M-W price. The latter price purportedly reflects many economic factors including the relative price and availability of feed for dairy cows. Because the M-W price focuses on Grade B milk for manufactoring, the Secretary states that is reflective not just of regional, but of national economic conditions. It is in the M-W price, says the Secretary, where factors including the cost and availability of feed are constantly and automatically taken into account. Since Grade A Class III milk is used for essentially the same purposes as Grade B milk, it is so priced. Class II milk enjoys a slightly higher price at essentially the same level in all marketing orders.

Class I milk is priced mainly on the basis of the M-W price, but with differentials added that vary from order to order. These Class I differentials, the Secretary points out, are not figured using costs of inputs, but apparently by ascertaining the minimum Class I price required in the particular order to attract needed supplies to points of shortage. The limit for any Class I differential is the cost of transportation and orders, according to the Secretary, generally do not go quite to that limit. Again, the Secretary's amplified position is that the objective is to encourage fluid milk production within deficit areas by setting a differential -- as in Southeastern Florida at $4.18 over the M-W price — that is the minimum to be paid by handlers for Class I milk whether it is produced in the area or elsewhere.

It might seem to the casual observer that there have been major communication problems in this case. The amplified decision by the Secretary presents a rationalization for the March, 1993 decision that one might have expected up front, for it seems to reflect the most commonly advanced economic theory and justification (rational or not) for the existing orders and their differentials — at least in this writer's experience.

Yet, in reading the order of the district court, it is obvious that other rationalizations were communicated by the government to the district court judge — for example, that there is no legal requirement that statutory factors such as the cost and availability of feed need to considered "because they do not become relevant until the Secretary decides that the differentials must be changed." *Minnesota Milk Producers*, p. 1397.

Whether the amplified decision will be treated by the district court as an unacceptable post hoc rationalization (see n. 10 p. 1398), an amplification that is inadequate to place a rational or nonarbitrary cast on the original decision of March 5, 1993, or an adequate explanation of that original decision will doubtless be revealed as plaintiffs continue their challenge under the AMAA. Any attempt to predict arguments of counsel or the next decision of the district court is beyond what can be accommodated in this short article. Plaintiffs ultimately want new hearings, a new final decision from the Secretary applying plaintiffs' reading of the AMAA criteria, and a subsequent referendum.

The issue in part will be whether it is rational for the Secretary to set Class I differentials solely on the basis of intraorder supply and demand analysis or whether the differential should also consider returns to dairy farmers given their costs of operation, most significantly the cost of feed for their herds. Put another way, are marketing orders to be concerned with the rate of attrition of dairy farmers, so long as the long-term supplies for the particular area are not threatened? Perhaps what is fundamentally at issue is the currency of the longstanding broad economic theory that purportedly underlies Class I pricing. Has it become irrational is light of the regional differences in blend prices that plaintiffs argue have become so inequitable?

Of course, there is always a change that what is wrong — if anything — is that the Class I differentials in certain areas are now too high given a pure supply and demand analysis — and should be reduced. Then all dairy farmers in the nation might be more or less equally upset and the Congress might be moved to review all aspects of dairy marketing orders — a propitious or not propitious development depending on one's view of the prob-

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able effectiveness of the Congress in dealing with such matters these days.

While the final outcome of the *Minnesota Milk Producers* case is not likely to be known prior to or during the debate in Congress over the 1995 Farm Bill, it will be interesting to see if the litigation spawns any proposals to amend AMAA. Perhaps there will be a Congressional review of and short term adjustments of differentials as there was in 1985. Or, Congress might debate whether regional pricing differences should be lessened for the long term, whether marketing order areas should be made larger, or whether marketing orders should be the tool used if there is to be some effort at the national level to shore up dairy farming in areas where attrition rates are high.

Court Analyzes Hog Contract

In the recent case of *American National Bank v. Joy*, 1994 WL 39142, No. A93-4010 (Bankr. D. Neb. July 8, 1994), the court was asked to determine the interests of the parties to a complex hog contracting arrangement. The case involved a large hog operation in Nebraska that filed for relief in bankruptcy. At issue was who was entitled to the proceeds of hogs that were in the possession of the debtor as of the filing of the bankruptcy and were subsequently liquidated by the trustee.

The debtors, Kirby and Ruth Joy operated "Joys Genetics," a farming business that raised, bred, and sold hogs. As part of this hog operation, Dr. Joy entered into contracts with investors termed "cooperators." Under these contracts, Dr. Joy purported to sell "open gilts" to the cooperators for an amount equal to four times the market price of the hogs at that time. The cooperators generally did not take possession of the hogs, however. Under the contract, Dr. Joy agreed to breed and care for the hogs during their gestation period, with the cooperators paying for feed. Before farrowing, Dr. Joy was to sell the hogs through the debtors' sales barn. The cooperators would then receive an agreed upon price guaranteed under the contract plus a percentage of any additional profit. *Id.* at *1.

Dr. Joy also entered into feeder pig contracts under which he agreed to care for and feed pigs in his possession until they reached the appropriate slaughter weight. Upon sale, the cooperator would receive a price agreed upon in the contract, and Dr. Joy would retain any profits. Dr. Joy testified that these feeder contracts were simply "hedge" contracts or paper transactions used to finance his operation. *Id.* at *2.

These contractual arrangements ran smoothly for some time, although Dr. Joy frequently used new contract income to settle old contract payments. Eventually, however, he fell short and was not able to properly settle numerous contracts. He and his wife filed for relief under Chapter 11 of the Bankruptcy Code. They were subsequently removed as debtors-in-possession for fraud, and a trustee was appointed. The trustee liquidated the remaining hogs, the number of which was substantially less than the number allegedly under contract. Although most of the creditors and cooperators settled their claims, the present action concerned two parties, American National Bank and Clayton Walter, each claiming a right to the hog proceeds. *Id.* at *2-3.

American National Bank was the debtors' primary lender. It based its claim to the hog proceeds on a properly perfected security interest in all of Dr. Joy's present and after-acquired inventory, farm products, and proceeds thereof. The bank argued that the hogs belonged to Dr. Joy, and that the contracts with the cooperators did not constitute actual sales. *Id.* at *4.

In contrast, Mr. Walter was a cooperator with two outstanding gilt contracts and one outstanding feeder pig contract with Dr. Joy. He presented a number of arguments in support of his right to the hog proceeds. First, he alleged that pursuant to the contracts, the hogs had been sold to him and that Dr. Joy did not have a sufficient remaining interest in the hogs for the attachment of the bank's security interest. Second, Mr. Walter argued that even if the bank's security interest had attached, the bank consented to the sale of the hogs. Thus, Mr. Walter took the hogs free and clear of the bank's interest. Third, Mr. Walter argued that even if the bank did not consent to the sale, as a buyer of inventory in the ordinary course of business, under UCC section 9-307, he took ownership of the hogs free and clear. Supporting his arguments, Mr. Walter alleged that he had traced the hogs he purchased to the hogs sold by the trustee. *Id.* at *4-5.

The court rejected Mr. Walter's claim and held in favor of the bank. It analyzed the contractual relationships between the cooperators and Dr. Joy and offered alternative reasoning in support of this holding.

The court first addressed the issue of attachment. It acknowledged that bailment or possession alone constitutes an insufficient interest for the attachment of a security interest. If the party's rights to the property exceeds mere possession, however, "the court should consider the outward appearance of the debtor's rights of ownership and control in the collateral." *Id.* at *5. Noting that Dr. Joy either purchased or raised the hogs initially, had complete control over their location, care and eventual sale, did not separate the hogs from any others on the premises, and sold them under the name of Joys Genetics, the court held that Dr. Joy had sufficient interest in the hogs for the attachment of the bank's security interest. *Id.* at *5-6

Addressing the argument that the bank consented to the sale of the hogs to Mr. Walter, the court first questioned whether the hogs were sufficiently identified to the contracts in order for an actual sale to have occured. Relying upon the requirements set forth in UCC section 2-501, the court concluded that some, but not all of the hogs were sufficiently identified. With regard to those that were not identified, no sale occurred, leaving Mr. Walter without an interest. With regard to those that were sufficiently identified, however, the court held that there was a sale and title passed to Mr. Walter. As to whether this title passed free and clear of the bank's interest, the court examined the evidence and concluded that the bank had consented to Dr. Joy's sale of the hogs. Thus, at least initially, under UCC section 9-306(2), Mr. Walter took title free of the bank's interest. *Id.* at *7-8.

The court, however, then applied UCC section 2-326(3) to find that the bank's security interest re-attached as a result of the sales arrangement between the parties. Under section 2-326, with certain specific exceptions, where goods are delivered to a person for sale and such person maintains a place of business dealing in this type of goods under a name other than that of the person making the delivery, the goods delivered are subject to the claims of the buyer's creditors while they are in the buyer's possession. Applying these requirements, the court found "constructive delivery" of the hogs first to Mr. Walter pursuant to the sales contract and then back to Dr. Joy through the contract provision that allowed him to retain possession and eventually sell the hogs. The court then found that the hogs were "delivered" for the purpose of sale, that Dr. Joy maintained a business that dealt in this type of goods, i.e., hogs, and that the goods were not sold under Mr. Walter's name, but under the name Joy Genetics. Accordingly, the court held that the bank's security agreement re-attached to the hogs in the possession of Dr. Joy. *Id.* at *8-10.

As an alternative basis for its decision, the court found that even if section 2-326 did not apply, Mr. Walter was still not entitled to recover. The court held that he had failed to adequately trace his ownership of hogs to the specific hogs sold by the trustee. The hogs were never ear-tagged or segregated, often relocated, and hogs were frequently sold. As such, it was impossible for Mr. Walter to establish that the hogs he "purchased" were the hogs sold by the trustee. *Id.* at *11-12.

—*Susan A. Schneider, Hastings, MN*

able effectiveness of the Congress in dealing with such matters these days.

While the final outcome of the *Minnesota Milk Producers* case is not likely to be known prior to or during the debate in Congress over the 1995 Farm Bill, it will be interesting to see if the litigation spawns any proposals to amend AMAA. Perhaps there will be a Congressional review of and short term adjustments of differentials as there was in 1985. Or, Congress might debate whether regional pricing differences should be lessened for the long term, whether marketing order areas should be made larger, or whether marketing orders should be the tool used if there is to be some effort at the national level to shore up dairy farming in areas where attrition rates are high.

Court Analyzes Hog Contract

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—Susan A. Schneider, Hastings, MN

Arkansas Court Holds Grain Buyer Liable For Landlord's Lien On Seller's Crop

Let the buyer beware is the message that an Arkansas court has sent to buyers of grain in states where landlords are granted statutory liens against crops grown on rented land. An Arkansas trial court held a grain buyer liable for over $25,000 in unpaid rent payments due a landlord when the tenant failed to pay.

Arkansas law provides:

> Every landlord shall have a lien upon the crop grown upon the demised premises in any year for rent that shall accrue for the year. The lian shall continue for six months after the rent shall become due and payable, and no longer.

The Arkansas landlord apparently took no action to enforce its statutory lien until after the grain was purchased from the farmer-seller. When the farmer-seller died and the rent remained unpaid, the landlord sued the grain firm that purchased the grain. The grain buyer argued that it was not liable to the landlord because it received no notices of the landlord's claimed lien against the grain as required by the federal clear title lien law, 7 U.S.C. section 1631. The federal clear title lien law was enacted to protect buyers of farm products from the risk of double payment.

However, the Arkansas court held that the clear title lien law does not apply to a landlord's statutory lien. The court found that only consensual liens — those imposed by agreement between the creditor and debtor — are covered by the federal law. Since the landlord's lien arose under a special statutory provision contained in Arkansas law, the court determined that the federal clear title lien law does not pre-empt Arkansas law dealing with statutory liens. The court went on to find the grain buyer liable to the landlord for the unpaid rent because it found that the grain buyer should have made "a reasonable inquiry into the status of [the farmer-seller's] ownership of the land from which the crops came."

The Arkansas case points out the continued risks to buyers of farm products notwithstanding the enactment of the federal clear title lien law. For those interested in finding out which states have statutory lien laws, an excellent publication is available from the National Center for Agricultural Law Research and Information, School of Law, University of Arkansas, Fayetteville, AR 72701 (Phone: 501-575-7646). Professor Martha Noble has compiled rapid finder charts of "*Statutory Agricultural Liens*" for each state. The 1993 publication is well worth its $35 cost.

— David C. Barrett, Jr., National Grain and Feed Association, Washington, DC

State Roundup

MASSACHUSETTS. *Razed chicken coops considered dumping ground for refuse.* In *Board of Health of Wrentham v. Hagopian*, No. 93-P-975, 1994 WL 447125 (Aug. 18, 1994, Mass. App. Ct.), the Massachusetts Court of Appeals considered whether razed chicken coops constitute a solid waste disposal facility.

Hagopian owns thirty-two acres of land in Wrentham. In 1988 he demolished two four-story chicken coops on his land, pursuant to a permit issued by the town building inspector. The permit conditioned the razing on removing the debris from town. Hagopian removed much of the razed buildings, but left approximately [illegible]00 cubic yards. The Wrentham Board of Health then brought an action to compel Hagopian to remove the remaining debris. The superior court granted the board's motion for summary judgment and ordered Hagopian to remove the material.

The board argued that the razed chicken coop debris constituted a waste disposal facility which had not been granted board approval as required by statute. The relevant statute prohibits the maintenance or operation of refuse treatment or disposal facilities absent site approval by a city board of health. A "facility" includes a dumping ground for refuse. Mass. Gen. L. Ch. 111, § 150A.

On appeal, Hagopian argued that wood material left from the raxed chicken coops does not constitute a "facility" since the debris arises out of an on-site farming operation. Further, Hagopian argued that he has not added to or allowed others to add to the wreckage. In a brief opinion, the court of appeals disagreed, noting that refuse and solid waste are broadly defined. The court then concluded that debris from razed chicken coops constitutes a "dumping ground for refuse" and thus a "facility" for purposes of the statute.

—Scott D. Wegner, Lakeville, MN

Federal Register *In Brief*

The following matters were published in the *Federal Register* from August 1, 1994 to September 9, 1994.

1. FCIC; Nursery crop insurance regulations; final rule; effective date 8/3/94. 59 Fed. Reg. 39413.
2. FCIC; Use of direct final rulemaking; policy statement; effective date 8/18/94. 59 Fed. Reg. 42487.
3. FCIC; Common crop insurance regulations; regulations for the 1994 and subsequent crop years; final rule; effective date 9/19/94. 59 Fed. Reg. 42751.
4. CCC; 1995 Feed Grain Acreage Reduction Program; proposed rule. 59 Fed. Reg. 39707.
5. CCC; Cooperative marketing applications; eligibility requirements for price support; proposed rule. 59 Fed. Reg. 44947.
6. BLM; Interagency memorandum of understanding concerning animal damage control and NEPA compliance; notice. 59 Fed. Reg. 40051.
7. ASCS; CCC; Debt settlement policies and procedure; proposed rule. 59 Fed. Reg. 43504.
8. Department of Justice; Rules of practice and procedure for administrative hearings before Administrative Law Judges in cases involving allegations of unlawful employment of aliens and unfair immigration-related employment practices; final rule; effective date 8/11/94. 59 Fed. Reg. 41242.
9. Department of Labor; Amendment of filing and service requirements in proceedings before the office of Administrative Law Judges; interim rule; effective date 9/14/94. 59 Fed. Reg. 41874.
10. Agricultural Marketing Service; Information about filing fees for reparation complaints under the Perishable Agricultural Commodities Act. 59 Fed. Reg. 44127.

—Linda Grim McCormick, Alvin, TX

Right-To-Farm/Continued from page 3

make local zoning decisions? Should we not develop two types of agricultural zoning — one for plant and grazing animals and a second for animal feedlots and other intensified farming operations? The former could require a variance for a concentrated animal feedlot (defined by statute) and the latter could require a variance to build a house in the intensified farming district. Farmers must choose between agricultural production and land speculation and zone accordingly.

—L. Leon Geyer, Prof., Adam Russ, Research Asst., VA Polytechnic Institute and State U., Blacksburg, VA

ADDRESS
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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Accommodations for the Annual Convention

It is our understanding that finding a hotel room in Memphis over the weekend of the AALA's Annual Convention, October 21-22, 1994 is becoming more difficult because of other events in Memphis at that time. Be sure to contact the Peabody first at 1-800-PEABODY, but if they are not able to accommodate you, feel free to call upon Bill Babione, Director of the AALA at (501) 575-7389 for assistance in finding alternate accommodations. We certainly look forward to seeing everyone.

—The Editor