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INSIDE

IN FUTURE ISSUES

- Update of developments in forward contracting of grain

Government agencies lack mutuality for purposes of setoff

Ruling on the much litigated issue of setoff in bankruptcy, the Tenth Circuit Court of Appeals recently ruled that different agencies of the federal government fail to meet the mutuality requirement of section 553 of the Bankruptcy Code. *Turner v. Small Business Association (In re Turner)*, 59 F.3d 1041, 1045-6 (10th Cir. 1995). The court stated that it was the first circuit court to rule on this issue and cited a split of authority among the lower courts. *Id.* at 1044.

The debtors in this case, Curtis and Rita Turner, owed approximately $200,000 to the Small Business Association (SBA). This debt was delinquent and had been accelerated. As participants in the farm programs, the Turners were entitled to deficiency payments. In 1992, when these payments were about to be made, the SBA notified the debtors that they planned to offset against the program payments. Accordingly, between December 30, 1992 and February 8, 1993, approximately $25,000 was offset. The Turners do not challenge the legality of the offset and admit that the SBA followed its offset regulations properly. *Id.* at 1043.

However, on February 10, 1993, the Turners filed a petition for relief in bankruptcy under Chapter 12 of the Bankruptcy Code. Because the offset had occurred within ninety days of the filing, the Turners brought an adversary proceeding seeking turnover of the offset funds as a voidable preference. The government argued that under section 553 of the Bankruptcy Code, setoff was allowed and avoidance was not proper. The bankruptcy court held that the transfers were voidable preferences; the district court affirmed, and the government appealed to the Tenth Circuit. *Id.* at 1043.

The Tenth Circuit affirmed the lower courts, basing its ruling specifically on section 553. The court noted that it found it unnecessary to address many of the government's arguments regarding the interpretation of section 553, because it held that section 553 did not apply to the transactions at issue. *Id.*

One of the requirements for setoff under section 553 is that the obligations between the debtor and the creditor be "mutual." 11 U.S.C. § 553(a). The court stated that "the obligations between debtor and creditor are mutual when both obligations are held by the same parties, in the same right or capacity. *Turner*, 59 F.3d at 1044 (citations omitted). The court further stated that setoff should be given a narrow application in a reorganization and that this is best accomplished by strictly construing the mutuality requirement. *Id.*

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When is a pig pork??

In a lengthy and detailed opinion, the United States District Court for the Southern District of Ohio recently addressed the application of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301, *et seq.*, (hereinafter, "the FDCA") to live swine sold by a livestock broker. *U.S. v. Tuente*, No. C-3-94-336, 1995 WL 34188 (S.D. Ohio May, 19, 1995). Responding to the defendant's motion to dismiss, the court held that the live swine fit within the definition of "food" in the Act. The court further held that the defendants, despite their status as middlemen in the sale of the livestock, could be found to have introduced this food into interstate commerce.

At issue in this case are swine sold for human consumption that were found to contain illegal levels of the animal drug sulfamethazine. These swine had been purchased from producers by the defendants, Tuente Livestock, Ronald Tuente and Roger Tuente, and then sold (still alive) by the defendants to slaughterhouses. At the slaughterhouses, the swine were slaughtered and the edible tissues shipped in interstate commerce. There is no allegation that the defendants themselves gave the swine the drugs in question; rather, it is presumed that they purchased hogs containing the illegal drug residues. The allegations against the defendants are that they failed to take appropriate measures to insure that the hogs they purchased and

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Applying this to the issue of two agencies of the federal government, the court acknowledged that each agency drew from or contributed to the same federal Treasury. *Id.* at 1045. In the corporate context, however, the court noted that it is "well-established" that corporate subsidiaries do not meet the mutuality requirements of section 553, despite financial ties. To treat government agencies more favorably than their private sector counterparts would run afoul of the principle that all creditors be treated equally. *Id.* The court further noted that government agencies frequently "squabble in court," and have "distinct budgets and interests." *Id.* at 1046. Moreover, bankruptcy law does not treat debts to the government as a single claim, and in fact, some agency's claims may be given priority over others. *Id.* For these reasons, the court held that mutuality was lacking between the SBA and ASCS. The administrative offset was found to be a voidable preference. The debtors' request for attorneys fees, however, was denied. *Id.*

—*Susan A. Schneider, Hastings, MN*

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Letters and editorial contributions are welcome and should be directed to Linda Grim McCormick, Editor, RR 2, Box 292A, 2816 C.R. 163, Alvin, TX 77511.

Kansas succeeds in water claim against Colorado

On May 15, 1995, the Supreme Court issued its unanimous opinion in *Kansas v. Colorado*, 541 U.S. ___, 131 L.Ed.2d 759, 115 S.Ct. ___. The opinion was delivered by Chief Justice Rehnquist, whereby the findings of the Special Master were adopted (overruling the exception to the Special Master's conclusions filed by Kansas and Colorado). The opinion followed a ten-year effort by the State of Kansas to prove Colorado's violations of the 1949 Arkansas River Compact that caused a material depletion of the usable "stateline" flow of the Arkansas River.

Two previous actions brought in the Supreme Court resulted in decisions against Kansas. *See Kansas v. Colorado*, 206 U.S. 46, 51 L.Ed. 956, 27 S.Ct. 655 (1907) (injunctive relief sought by Kansas to reduce Colorado's diversions of the Arkanss River denied) and *Colorado v. Kansas*, 320 U.S. 383, 88 L.Ed. 116, 64 S.Ct. 176 (1943) (in action by Colorado to enjoin litigation by Kansas in lower courts, Kansas' request for equitable apportionment of the Arkansas River denied). Following the second opinion, at the suggestion of the Supreme Court, the two states entered into a compact (pursuant to U.S. Const. Art. I, section 10, cl 3) in 1949.

The Arkansas River Compact, Article IV-D, allows for future beneficial development of the Arkansas River basin, but provides that the developments shall not materially deplete the usable quantity or availability of the river waters for usage in Colorado *and* Kansas. In 1985, Kansas began its action in the Supreme Court. A Special Master was appointed to find the facts and make conclusions concerning the dispute (the first Special Master died in the midst of the proceedings and the second Special Master made the final findings and conclusions).

The Court adopted the Special Master's finding that post-compact well pumping in Colorado materially depleted the usable stateline flow of the Arkansas River. The amount of water pumped from wells by irrigators in Colorado (in the Arkansas River Basin) should not have exceeded that amount used during negotiation of the compact, which was 15,000 acre feet per year.

Two additional allegations in the complaint brought by Kansas were found unproven and were denied. Those allegations of compact violations involved the method of operating the Trinidad Reservoir on the Purgatoire River (a major tributary to the Arkansas River) and the Winter Water Storage Program on the Pueblo Reservoir, which lies below the John Martin Dam and Reservoir. The evidence submitted by Kansas fell short of proving that these practices materially depleted the usable stateline flow of the river.

The Supreme Court remanded the case to the Special Master for trial on the issue of the appropriate remedy (the case had been bifurcated into a liability phase and a remedy phase). Two remedial measures are likely to be considred in addition to a limitation on well pumping in the Arkansas River basin: those are monetary payments for the value of the depletion of usable flow of the Arkansas River and/or increases in the flow of the River to compensate for past depletions. A full reading of the opinion is suggested for a concise history of the dispute between Kansas and Colorado.

—*Van Z. Hampton, Dodge City, Kansas*

CONFERENCE CALENDAR

Mid South Conference on Emerging Torts
October 13, 1995, The Peabody Hotel, Memphis, TN
Topics include: Tobacco litigation; beyond worker's compensation: emerging tort issues in employer/employee relationships; prosecuting a toxic tort case: pesticides; recent developments in tort reform.
Sponsored by: The University of Arkansas School of Law and The University of Mississippi Center for Continuing Legal Education.
For more information, call Tim Angle, 601-232-7282.

Thirteenth Annual Rural Attorneys and Agriculture Conference: Issues in Iowa and Federal Agricultural Law
Novemher 17, 1995, University Park Holiday Inn, West Des Moines, IA
Topics include: Iowa's new swine confinement law; legal issues in developing manure management plans; new developments in income tax and business organizations; improving the drafting and understanding of production contracts; the 1995 Farm Bill and the Clean Water Act; NAD.
Sponsored by: The Agricultural Law Center, Drake University.
For more information, call: Prof. Neil Hamilton, 515-271-2065.

sold were not contaminated and that they failed to establish a system to trace any contaminated swine back to the producer.

In 1987, the Federal Food & Drug Administration (FDA) first notified the defendants that swine that they sold had tested above the legal limit for drug residues and that the FDA considered this to be the introduction of adulterated food into interstate commerce. The FDA suggested certain measures that should be taken to prevent the hogs they purchased from containing the illegal drug residues. The defendants responded in writing to the FDA notice, but the FDA found this response to be insufficient. Specifically, the FDA recommended that the defendants obtain a signed guaranty from the farmers from whom they purchased hogs. However, subsequent inspections of the defendant's operations did not indicate that guaranties had been obtained. After each of these inspections, the FDA notified the defendants that, in the opinion of the FDA, their failure to implement an adequate identification system that would allow tracing of the tainted swine back to the producer rendered them liable for the introduction of adulterated food into interstate commerce whenever testing of edible tissue found illegal residues.

In addition to the FDA notices, the defendants also received notification from the USDA on at least twelve occasions between 1988 and 1993 that the swine they offered for slaughter were found to contain illegal levels of drug residue. Between July 1992 and December 1993, the USDA found that the edible tissues of at least nine hogs supplied by the defendants contained residues of sulfamethazine in excess of the legal limit.

The government responded by bringing the present suit against the defendants under the FDCA. Relying on sections 332(a) and 331(a) of this act, the suit seeks to enjoin "[t]he introduction or delivery for introduction into interstate commerce of any food ... that is adulterated." On this basis, the government seeks an injunction to prevent the defendants from doing business until they have taken certain actions to ensure the purity of the swine they sell.

The defendants moved for a dismissal of the complaint based on two grounds: (1) that live swine are not "food" under the FDCA; and (2) that the defendants do not engage in "[t]he introduction or delivery for introduction into interstate commerce" of the hogs that they purchase and sell.

The first issue addressed by the court was whether live swine fall within the definition of "food" to be regulated under the FDCA. In addressing this issue, the court looked first to the statute itself, second to the case law interpreting it, and then to the agency's interpretation.

With regard to the statutory definition in the FDCA, the court noted "brazen circularity," in that the act defines food as: "(1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article." *Id.* at *3 (citing 21 U.S.C. § 321(f)). As the court stated, the Act provides us with the direction that "food is food." *Id.* While the defendants argued that the "plain meaning" of this definition excluded live animals, the court found the statute ambiguous and susceptible of more than one reasonable interpretation. *Id* at *9. The court encountered similar difficulties in reviewing the case law. It found only one case that dealt directly with the issue at hand, i.e., whether live animals were considered to be food within the meaning of the FDCA. This case, *U.S. v. Tomahara Enterprises, Ltd.*, Food Drug Cosm. L. Rep. (CCH) ¶ 38,217 (N.D.N.Y. Mar. 29, 1983), held that veal calves raised for food were food within the meaning of the statute. The court found this case to be unpersuasive, however, because the *Tomahara* court simply took judicial notice that the live animals were food. The *Tuente* court found it inappropriate to resolve a disputed question of law in this manner. *Tuente* at *3.

The *Tomahara* case was, in part, based on the Second Circuit opinion in *U.S. v. O.F. Bayer & Co.*, 188 F.2d 555, 557 (2nd Cir. 1951), in which the court took judicial notice of the fact that coffee is made from green coffee beans that have been roasted. On that basis, the court held that evidence was not required to show that coffee beans were considered food. Again, however, the *Tuente* court was not persuaded, because the issue of a living creature was not addressed. *Tuente* at *3.

Unpersuaded by either the statutory language or the case law, the court considered the application of the *Chevron* deference doctrine. *Tuente* at *4 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Noting that the government failed to present a "developed Chevron argument," the court was initially unconvinced that the agency had actually interpreted the definition of food. The government cited no published regulations that define food to explicitly include live animals. The court expressed concern that it would not defer to a position taken only for the purpose of litigation. *Id.*

The court, however, delved into the legislative history of the FDCA and found testimony that revealed a long standing agency interpretation that the definition of food included livestock raised for slaughter. Despite the lack of published regulations on the subject, the court determined that for approximately twenty-five years, the FDA has taken and acted upon the position that the offering of live animals for slaughter exposes one to liability under the FDCA if it is found that the edible tissues contain above-tolerance residues of drugs. *Id.*

The court next addressed whether this agency position was permissible under the terms of the FDCA. In concluding that it was, the court considered not only the current legislation, but its forerunner, the Federal Food and Drugs Act of 1906, Ch. 3915, 34 Stat. 768, 769. *Tuente* at *6-7. Based on this review, the court found that congressional intent supported FDA's position. One specific indication of this intent noted by the court was the defense provision set forth both in the 1906 Act and in the FDCA at section 333(c). According to this provision, if a purchaser receives a guaranty that identifies the source of the product and certifies its compliance with FDA requirements, the purchaser has a complete defense to prosecution under the FDCA. The court found that this statutory scheme supported the inference that the FDCA was intended to be effective as early in the commercial chain as the adulteration may occur, "regardless of where in the chain — from farmer to slaughterhouse to ultimate consumer — responsibility rests." *Id.* at *7.

The defendants also moved to dismiss the complaint against them on the grounds that as middlemen, they had not "introduced" the adulterated livestock into interstate commerce. As noted previously, section 331(a) prohibits the "introduction or delivery for introduction into interstate commerce of any food ... that is adulterated or misbranded." 21 U.S.C. § 331(a). The court conceded that "introduction" does "tend to imply an initial encounter." *Id* at *12. However, based largely on the analysis of the guaranty defense set forth in section 333(c)(2), as discussed above, the court found that liability could not be limited to the first party to introduce the adulterated food into the market. If it were, there would be no need for the guaranty defense provision at all. On this basis, the court denied the motions to dismiss the complaint against the defendants.

—Susan A. Schneider,
Hastings, Minnesota

tation of semen from countries in which rinderpest or foot-and-mouth disease exists (for ruminants and swine). Semen from these countries may be offered for entry only at the port of New York. In addition, the donor animal must have been inspected by a veterinarian of the USDA and shall never have been infected with these diseases nor been on a farm or other premises where these diseases exist nor been with an animal that had been exposed in the past twelve months. Blood samples are also required, and testing for a variety of diseases must be completed at the Foreign Animal Disease Diagnostic Laboratory in Greensport, New York. Semen samples must also be tested. Semen must remain in custory of a veterinarian of the USDA and held for quarantine at the collection isolation facility or in New York in liquid nitrogen containers until all tests and examinations have been completed. The donor animal must remain at the approved isolation facility in the country of origin during that same period.[20]

Even more restrictive requirements are imposed for the import of swine semen from the People's Republic of China. Not only do all the above requirements apply, but the donor boars must pass a sixty-day isolation/collection period in a facility pproved to prevent exposure to infectious diseases. During this period, the boar semen is subjected to a variety of tests for specified diseases. More restrictively, the boar must be selected from facilities that are solely swine-breeding operations located in an area that is at the center of a sixteen kilometer radius that was free of foot-and-mouth disease, swine vesicular disease, and hog cholera for three years prior to collection. In no case may these diseases have been present on the premises for five years and no animals may be introduced into the premises from farms affected by the disease in the past three years. No evidence of brucellosis, tuberculosis, or pseudorabies on these premises or on surrounding permises must have existed in the past year. Finally, the official veterinarian organization of the PRC must certify that the PRC is free of African swine fever, rinderpest, and Teschen's disease before any import may occur.[21]

More relaxed rules apply to the import of semen from Canada. An import permit is not required if the semen is brought in at one of the designated Canadian land border ports and if the donor animal was born in Canada or the U.S. and has been in no country other than the U.S. or Canada. If the animal was imported into Canada from some other country but unconditionally released in Canada for sixty days or longer, the semen may also be brought into the U.S. without the import permit. However, a health certificate is required in all cases.[22]

Effect of GATT and NAFTA

Both the General Agreement on Tariffs and Trade (GATT) and the North American Free Trade Agreement (NAFTA) contain provisions relating to sanitary and phytosanitary measures (SPS) that could potentially affect the importation of animals and animal products. In fact, some of the stutory changes included in the NAFTA implementation legislation related to animal imports.[23] These agreements do, however, permit countries to adopt measures to protect human, animal or plant life, or health.[24] These SPS measures are not to be disguised restrictions on trade but may be adopted to achieve an appropriate level of protection established by the country applying risk assessment and relevant economic factors.[25]

One commentator has provided a good summary of what is necessary to test a measure under NAFTA. A similar test could apply to GATT as well.

> The NAFTA begins with international treatment. If a measure meets this, it is over. If a measure does not then a successful NAFTA prosecution requires that the measure be:
> 1) unnecessary to achieve a party's appropriate level of protection,
> 2) arbitrarily discriminatory,
> 3) unjustifiable discriminary,
> 4) a disguised restriction on trade,
> 5) not based on a level of protection which is internally consistent,
> 6) not based on scientific principles, or maintained without a scientific basis for it, *or*
> 7) not based on a risk assessment.[26]

NAFTA allows SPS measures "to the extent necessary" to achieve the "appropriate" level of protection taking into account "technical and economic feasibility."[27] The NAFTA uses a "scientific principles" test for SPS measures, which requires attention to risk assessment and different geographic conditions."[28] In addition, if an exporting country provides "scientific" evidence that its measures achieve the importing country's appropriate level of protection, these measures must be treated as equivalent to those of the importing country.[29]

Like NAFTA, GATT suggests that SPS measures should he based on "scientific principles," which requires such measures to be based on an assessment of risk.[30] A country imposing standards higher than tbe international levels must prove a "scientific justification" for those. The country must show that the international standards are not sufficient to provide the appropriate level of protection.[31]

Harmonization of conflicting SPS measures is a goal of GATT. If international standards exist, SPS measures are to be harmonized on the basis of the international standard. While NAFTA does not refer to "harmonization" as such, it does call for "equivalent" with other parties "where appropriate."[32] NAFTA suggests the use of international standards in reaching equivalence if this can be done without reducing the level of protection.[33]

A committee on SPS was established under GATT to implement guidelines for international standards.[34] NAFTA also establishes a Committee on Sanitary and Phytosanitary Measures, which is to facilitate "technical cooperation" between the parties and is to seek the assistance of relevant international and North American "standardizing organizations. No specific mention is made of guidelines for international standards.[35]

It can be argued that some "downward harmonization" under NAFTA was provided in the implementation legislation. The Secretary of Agriculture was authorized to allow otherwise illegal imports if "judged to be safe."[36] The provision allows, but does not require, the Secretary to permit imports from Mexico and Canada that might otherwise have been prohibited. For example, cattle may be imported from Mexico and Canada that have been infested or exposed to ticks "upon being freed from the ticks." Likewise, the implementation legislation amended the provisions related to disease-free areas and specifically authorized the Secretary to permit importation of cattle, sheep, other ruminants, or swine (including embryos of the animals) and meat from a region that is and is likely to remain free from foot-and-mouth disease and rinderpest. Prevously, such imports generally would have been prohibited.[37]

The concern with downward harmonization has been expressed by one commentator (in reference to GATT) as follows:

> Although the Uruguay Round cannot directly overturn national laws, the coercive pressure it creates, through threatened dispute resolution and international harmonization, will undoubtedly add political pressure to lower existing regulations and will build a bulwark against the drafters of more stringest standards in the future.[38]

Conclusion

The presence of the GATT and the NAFTA has resulted in some revision of the regulations related to the importation of live animals. Regulations related to the import of animal embryos and aimal semen have seen little revision as a result of

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the agreements themselves. However, the restrictions in place may be challanged in the future as being in violation of the appropriate agreements if they cannot be justified on the basis of "scientific evidence" or if analysis of "risk assessments" has not been conducted. Of course, much of the effect will await the development of international standards and guidelines, and it may be through the comparison of the regulations in place with such international standards that some question of validity might arise. The current approach seems consistent with the intent of both GATT and NAFTA, but the exact effect of the tests imposed on any SPS regulations is yet to be determined.

[1] 21 U.S C. § 101-49.

[2] For a review of the first embryo import regulations, see J.W. Looney, *Regulations Affecting Importation of Animal Embryos*, Agric. L. Update, March, 1986.

[3] Similar restrictions appear with regard to the import of live animals and meat products. See 9 C.F.R. part 92 and 9 C.F.R. §§ 94.1(b) and (c). Under the legislation implementing NAFTA, the Secretary's authority to deal with imports from such countries was broadened.

[4] 9 C.F.R. § 98.3(a).

[5] 9 C.F.R. § 98.3(b).

[6] 9 C.F.R. § 98.2.

[7] 9 C.F.R. §§ 98.3(d) and (e).

[8] 9 C.F.R. §§ 98.3(g), (h) and (i).

[9] 9 C.F.R. § 98.4 (permit) and § 98.5 (certificate).

[10] These ports are listed in 9 C.F.R. § 92.303 for horses, § 92.403 for ruminants, and § 92.503 for swine.

[11] 9 C.F.R. § 98.8.

[12] 9 C.F.R. §§ 98.15(a)(5) and 98.17(g).

[13] 9 C.F.R. §§ 98.15 and 98.17.

[14] 9 C.F.R. §§ 98.18(a) and 98.17(h)(1).

[15] 9 C.F.R. §98.18(c) referriug to § 92.203(a).

[16] 9 C.F.R. § 98.30. Interestingly, while horses, asses and zebras are separately mentioned as included in the term "animals," "horses" are also defined to include "horses, asses, mules, and zebras." "Ruminants" include "all animals which chew the cud, such as cattle, buffaloes, sheep, goats, deer, antelopes, camels, llamas, and giraffes. "Poultry" includes "chickens, doves, ducks, geese, grouse, guinea fowl, partridges, pea fowl, pheasants, pigeons, quail, swans, and turkeys (including eggs for hatching)."

[17] 9 C.F.R. § 98.31(b).

[18] 9 C.F.R. § 98.34 (permits) and § 98.35 (certificates).

[19] 9 C.F.R. § 98.34(a)(3).

[20] 9 C.F.R. § 98.34(c).

[21] 9 C.F.R. § 98.34(c)(7).

[22] 9 C.F.R. § 98.36.

[23] For the complete implementation legislation *see* H.R. 3450, "North American Free Trade Agreement Implementation Act of 1993," reprinted in Holbein and Musch (eds) NAFTA: North American Free Trade Agreement-Treaties, Vol. 1, Booklet 7 (1994).

[24] GATT Article XX; NAFTA Article 7.

[25] NAFTA Article 712.

[26] Charnovitz, *The North American Free Trade Agreement: Green Law or Green Spin?*, 26 Law & Pol'y in Int. Bus. 1 (1994) at 50 (footnotes omitted).

[27] NAFTA Art. 712.

[28] NAFTA Article 712(3).

[29] NAFTA Article 714.

[30] GATT "Agreement on the Application of Sanitary and Phytosanitary Measures" Article 6 and 16. Hereinafter "GATT SPS Agreement."

[31] GATT SPS Agreement Article 11; Miller, "The Effect of the GATT and the NAFTA on Pesticide Regulation: A Hard Look at Harmonization," 6 Colo. J. Int. Env. L. and Policy 201(1995) at 214-216.

[32] GATT SPS Agreement Article 9; NAFTA Article 713(1).

[33] *Id.*; Miller, *supra* n. 31 at 215.

[34] *Id.* at 217; GATT SPS Agreement Articles 38-44.

[35] NAFTA Article 722.

[36] Charnovitz *supra* n. 26 at 31.

[37] NAFTA Implementation Act, section 361.

[38] Miller, *supra* n. 31 at 218.

GAO report criticizes cotton program

A recent report issued by the General Accounting Office (GAO) sharply criticizes certain aspects of the present cotton support program. GAO, COTTON PROGRAM: COSTLY AND COMPLEX GOVERNMENT PROGRAM NEEDS TO BE REASSESSED, GAO/RCED-95-107 (June 20, 1995). The report describes the cotton program as very complex and very costly. From 1986 through 1993, program costs totalled an average of $1.5 billion per year. Moreover, the report notes that cotton farming has become a concentrated business, with 20% of the producers raising most of the cotton and receiving the majority of the benefits. Noting that the severe economic conditions that led to the creation of the program in the 1930's no longer exist, this report suggests that Congress reassess whether the program should be continued in its present form. The report states, however, that changes should be made cautiously, perhaps giving producers and other affected parties ample time to adjust.

—*Susan A. Schneider, Hastings, MN*

Federal Register *in brief*

The following is a selection of matter that were published in the *Federal Register* from August 21 through September 14.

1. PSA; Regulations under the Packers and Stockyards Act; registration, general bonding provisions; proposed rule; 60 Fed. Reg. 43411.

2. PSA; Amendment to certification of central filing system; Oklahoma; effective date 8/16/95; 60 Fed. Reg. 43759.

3. Foreign Agricultural Service; Regulations governing the financing of commercial sales of agricultural commodities; proposed rule; 60 Fed. Reg. 43566.

4. IRS; Estate and gift tax; marital deduction provisions, changes; final regulations; effective date 8/22/95; 60 Fed. Reg. 43531.

5. CCC and Consolidated Farm Service Agency; Federal claims collection; administrative offset; final rule; effective date 8/23/95; 60 Fed. Reg. 43705.

6. Consolidated Farm Service Agency; Disaster Set Aside Program; final rule; effective date 9/8/95/ 60 Fed. Reg. 46753.

7. FCA; Eligibility and scope of financing; loan policies and operations; proposed rule; comments due 12/11/95; 60 Fed. Reg. 47103.

8. FCA; Supplemental standards of ethical conduct for employees of the Farm Credit Administration; final rule; effective date 9/13/95; 60 Fed. Reg. 47453.

9. USDA; Dairy tariff-rate import quota licensing; interim rule; effective date 10/30/95; 60 Fed. Reg. 47453.

—*Linda Grim McCormick, Alvin, TX*

KANSAS. Method of selecting Secretary of Agriculture/*Continued from page 7*

tary shall become a member of the governor's cabinet.

Formerly, the Secretary of Agriculture was elected by a twelve member Board of Agriculture which was staffed by way of elections held during the annual meeting of a conglomeration of farm organizations. That method of selecting a secretary was found to violate the equal protection clause of the Fourteenth Amendment in the *Hellebust* opinion.

--Van Z. Hampton, Dodge City, Kansas

Editor's note: The first secretary of agriculture to be appointed by the governor in Kansas is Allie Devine, a 1987 graduate of the LL.M. program at the University of Arkansas.

tation of semen from countries in which rinderpest or foot-and-mouth disease exists (for ruminants and swine). Semen from these countries may be offered for entry only at the port of New York. In addition, the donor animal must have been inspected by a veterinarian of the USDA and shall never have been infected with these diseases nor been on a farm or other premises where these diseases exist nor been with an animal that had been exposed in the past twelve months. Blood samples are also required, and testing for a variety of diseases must be completed at the Foreign Animal Disease Diagnostic Laboratory in Greensport, New York. Semen samples must also be tested. Semen must remain in custory of a veterinarian of the USDA and held for quarantine at the collection isolation facility or in New York in liquid nitrogen containers until all tests and examinations have been completed. The donor animal must remain at the approved isolation facility in the country of origin during that same period.[20]

Even more restrictive requirements are imposed for the import of swine semen from the People's Republic of China. Not only do all the above requirements apply, but the donor boars must pass a sixty-day isolation/collection period in a facility approved to prevent exposure to infectious diseases. During this period, the boar semen is subjected to a variety of tests for specified diseases. More restrictively, the boar must be selected from facilities that are solely swine-breeding operations located in an area that is at the center of a sixteen kilometer radius that was free of foot-and-mouth disease, swine vesicular disease, and hog cholera for three years prior to collection. In no case may these diseases have been present on the premises for five years and no animals may be introduced into the premises from farms affected by the disease in the past three years. No evidence of brucellosis, tuberculosis, or pseudorabies on these premises or on surrounding permises must have existed in the past year. Finally, the official veterinarian organization of the PRC must certify that the PRC is free of African swine fever, rinderpest, and Teschen's disease before any import may occur.[21]

More relaxed rules apply to the import of semen from Canada. An import permit is not required if the semen is brought in at one of the designated Canadian land border ports and if the donor animal was born in Canada or the U.S. and has been in no country other than the U.S. or Canada. If the animal was imported into Canada from some other country but unconditionally released in Canada for sixty days or longer, the semen may also be brought into the U.S. without the import permit. However, a health certificate is required in all cases.[22]

Effect of GATT and NAFTA

Both the General Agreement on Tariffs and Trade (GATT) and the North American Free Trade Agreement (NAFTA) contain provisions relating to sanitary and phytosanitary measures (SPS) that could potentially affect the importation of animals and animal products. In fact, some of the stutory changes included in the NAFTA implementation legislation related to animal imports.[23] These agreements do, however, permit countries to adopt measures to protect human, animal or plant life, or health.[24] These SPS measures are not to be disguised restrictions on trade but may be adopted to achieve an appropriate level of protection established by the country applying risk assessment and relevant economic factors.[25]

One commentator has provided a good summary of what is necessary to test a measure under NAFTA. A similar test could apply to GATT as well.

> The NAFTA begins with international treatment. If a measure meets this, it is over. If a measure does not then a successful NAFTA prosecution requires that the measure be:
> 1) unnecessary to achieve a party's appropriate level of protection,
> 2) arbitrarily discriminatory,
> 3) unjustifiable discriminary,
> 4) a disguised restriction on trade,
> 5) not based on a level of protection which is internally consistent,
> 6) not based on scientific principles, or maintained without a scientific basis for it, *or*
> 7) not based on a risk assessment.[26]

NAFTA allows SPS measures "to the extent necessary" to achieve the "appropriate" level of protection taking into account "technical and economic feasibility."[27] The NAFTA uses a "scientific principles" test for SPS measures, which requires attention to risk assessment and different geographic conditions."[28] In addition, if an exporting country provides "scientific" evidence that its measures achieve the importing country's appropriate level of protection, these measures must be treated as equivalent to those of the importing country.[29]

Like NAFTA, GATT suggests that SPS measures should be based on "scientific principles," which requires such measures to be based on an assessment of risk.[30] A country imposing standards higher than the international levels must prove a "scientific justification" for those. The country must show that the international standards are not sufficient to provide the appropriate level of protection.[31]

Harmonization of conflicting SPS measures is a goal of GATT. If international standards exist, SPS measures are to be harmonized on the basis of the international standard. While NAFTA does not refer to "harmonization" as such, it does call for "equivalent" with other parties "where appropriate."[32] NAFTA suggests the use of international standards in reaching equivalence if this can be done without reducing the level of protection.[33]

A committee on SPS was established under GATT to implement guidelines for international standards.[34] NAFTA also establishes a Committee on Sanitary and Phytosanitary Measures, which is to facilitate "technical cooperation" between the parties and is to seek the assistance of relevant international and North American "standardizing organizations. No specific mention is made of guidelines for international standards.[35]

It can be argued that some "downward harmonization" under NAFTA was provided in the implementation legislation. The Secretary of Agriculture was authorized to allow otherwise illegal imports if "judged to be safe."[36] The provision allows, but does not require, the Secretary to permit imports from Mexico and Canada that might otherwise have been prohibited. For example, cattle may be imported from Mexico and Canada that have been infested or exposed to ticks "upon being freed from the ticks." Likewise, the implementation legislation amended the provisions related to disease-free areas and specifically authorized the Secretary to permit importation of cattle, sheep, other ruminants, or swine (including embryos of the animals) and meat from a region that is and is likely to remain free from foot-and-mouth disease and rinderpest. Prevously, such imports generally would have been prohibited.[37]

The concern with downward harmonization has been expressed by one commentator (in reference to GATT) as follows:

> Although the Uruguay Round cannot directly overturn national laws, the coercive pressure it creates, through threatened dispute resolution and international harmonization, will undoubtedly add political pressure to lower existing regulations and will build a bulwark against the drafters of more stringest standards in the future.[38]

Conclusion

The presence of the GATT and the NAFTA has resulted in some revision of the regulations related to the importation of live animals. Regulations related to the import of animal embryos and aimal semen have seen little revision as a result of

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— State Roundup —

PENNSYLVANIA. *Damages for the sale of two emus as a proven breeder pair.* "An emu is not uncommon in Australia or as a clue in an American crossword puzzle. But unless our research was not extensive enough, we can state that emus have never before in Pennsylvania been the subject of litigation, litigation that has herein produced a small trove of contract law principles." Thus began the Superior Court in *Smith v. Penbridge Associates, Inc.*, 655 A.2d 1015 (Pa. Super. 1995).

In July, 1992, Smith responded to an advertisement placed by Penbridge Farms in the Emu Finder Guide regarding the sale of proven breeder pairs. The trial transcript indicated that a proven breeder pair of emus consists of one male and one female, which had previously bonded, successfully bred, and produced fertile eggs. Thereafter, Smith traveled to the Penbridge farm in Michigan to purchase emus.. While the gender of an emu is not discernable by external observation, Smith was assured that she was getting a male and a female that had successfully produced chicks. The purchase price was $12,500.

In late October, 1992, Smith became concerned that the emus were the same sex. Both emus were grunting, which is a male trait. Penbridge advised Smith to "vent sex" the emus to determine their gender. Vent sexing is a procedure in which the inside of an emu is felt manually to ascertain the presence of a male organ. Smith performed the procedure and discovered that both emus were male. On December 2, 1992, Smith filed suit against Penbridge for damages. Following a bench trial, the court of common pleas entered judgment for Smith in the amount of $105,215.80.

Penbridge raised a number of issues on appeal. First Penbridge argued that Smith failed to inspect the emus either at the time of delivery or within a reasonable period of time thereafter. Penbridge claimed that industry custom required Smith to vent sex the emus at purchase. The appellate court agreed with the trial court that Penbridge's express warranty to provide a "proven breeder pair" controlled any course of dealing or usage of trade. 13 Pa.C.S.C. section 1205(d).

Second, Penbridge maintained that Smith failed to give notice of the alleged breach within a reasonable period of time. The record revealed that Smith notified Penbridge of the breach within two days after the sex venting. While Penbridge asserts that Smith should have discovered the breach earlier, the court noted that Penbridge did not sex vent the emus prior to sale, but did repeatedly assure Smith that the emus were a breeding pair. Further, the trial court found that sex venting was dangerous to both the emu and the person administering it.

Next, Penbridge claimed that the evidence as to lost profit damages was speculative and insufficient. Essentially, Penbridge argued that since emu breeding is a relatively new business, and there exists no reliable data regarding breeding success, claims for loss of chick production are necessarily speculative. Smith alleged that the emu breeding pair would have produced about thirty chicks in the 1992/1993 breeding season. The pair had produced sixteen chicks the previous season and a doubling of chick production was expected. The court of common please used an expected production of eighteen at a value of $5,000 each for consequential damages in the amount of $90,000. The superior court concluded that sufficient evidence existed for the trial court to measure lost profits with a reasonable degree of certainty.

Fourth, Penbridge insists that the trial court erred in measuring damages at the time and place the breach was discovered rather than at the time and place the emus were accepted. The purchase price in August, 1992, was $12,500. AT the time the breach was discovered in October, 1992, the value of the two male emus totaled $15,000. In October, 1992, the value of a proved breeding pair had increased dramatically to $28,000. The trial court awarded Smith damages of $13,000. The superior court found no error in measuring damages at the time the breach was discovered.

Finally, Penbridge maintained that certain witnesses were not qualified to give expert opinions. Smith testified as an expert on the expected future production of the proven breeder pair of emus. Smith had been active in the emu industry since 1991. Since that time, Smith had operated an emu farm and successfully produced forty-five hatched eggs. In addition, Smith belonged to the American Emu Association and read publications and attended seminars on the topic. While the length of Smith's experience was not great, the superior court noted that emu breeding is a young industry. Accordingly, the superior court affirmed the judgment of the court of common pleas.

--Scott D. Wegner, Lakeville, MN

TENNESSEE. *No duty to warn that a bull may be dangerous.* In *Suddath v. Parks*, No. 03A019504-CV-00112, 1995 WL 511962 (Tenn. App., Aug. 30, 1995), a farm hand, injured by a bull, brought a personal injury action against his employer.

Since 1990, Suddath had worked as a farm hand on Parks' cattle farm. In August, 1992, Parks separated his two bulls from his herd of cows for breeding control purposes. Following the separation, Suddath observed that the smaller of the two bulls had become more aggressive. In April, 1993, Suddath, using the tractor, took a bale of hay to the field where the bulls were pastured. Suddath left the tractor to unroll the hay bale and spread corn on top of the hay. While spreading the corn and watching the smaller bull, the larger bull butted Suddath from behind. Suddath suffered injuries to his back, neck, and leg. Subsequently, Suddath sued Parks for $500,000, alleging that Parks failed to provide a safe place for him to work, failed to warn of the larger bull's potentially aggressive nature after being separated from the heifers, and failed to provide instruction and training to enable Suddath to protect himself from attack. As Parks employed fewer than five individuals, workers' compensation laws did not apply. The trial court granted Parks' motion for summary judgment.

The court of appeals framed the inquiry as whether Parks knew of dangers that were not obvious to Suddath. Specifically, did Parks know that the larger bull posed a special danger beyond what might be expected? Suddath suggested that Parks should have known that separating the bulls from the cows might render the bulls aggressive, pointing to a training session on veterinary principles that Parks had attended. However, the court found that Suddath had produced no evidence suggesting that a link between separation and aggressive behavior is known to veterinary science or was made known to Parks. Further, the court stated that "[a]s to the conduct of bulls generally, we believe that it would be obvious to a reasonable prudent person, that a bull may, under normal circumstances, butt a human." To paraphrase a saying, "bulls will be bulls."

Finding no merit in the allegation that Parks knew or should have known of an unusual aggressive propensity on the part of the larger bull, and that there is no duty to warn of an obvious danger, the court of appeals affirmed the trial court judgment.

—Scott D. Wegner, Lakeville, MN

KANSAS. *Method of selecting Secretary of Agriculture.* As a response to the "one man, one vote" principle required by the constitution and mandated in *Hellebust v. Brownback*, 42 F.3d 1331 (10th Cir. 1994), the State of Kansas has amended it method of selecting board members and a secretary for its department of agriculture. The Legislature, in 1995 Kan. Sess. Laws 236, directed the governor to appoint a nine-member Board, which shall nominate three persons from whom the Governor shall select and appoint the secretary for the department. The Secre-

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agricultural update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Task Force on Agricultural Management

The American Bar Association Section of Natural Resources, Energy, and Environmental Law (SONREEL) has recently formed a Task Force on Agricultural Management. The purpose of the Task Force is to address environmental issues (water and soil conservation, water quality, wildlife habitat, soil quality, pesticide regulation, agricultural worker protection, tolerance levels for pesticide residues, international trade and environmental concerns) that have come to the forefront in the agricultural sector in recent years. With this Task Force, SONREEL for the first time has a subunit focused on the substantive area of agricultural law. As the Task Force is just getting underway, the specific issues the Task Force will address are yet to be decided.

SONREEL invites any member of the American Agricultural Law ASsociation interested in the Task Force on Agricultural Management to join the Task Force. The Task Force Chair is Lynn L. Bergeson, Weinberg, Bergeson, & Neuman, 1300 "I" Street N.W., Suite 1000 West, Washington, D.C. 20005 —Tel. (202) 962-8585—FAX (202) 962-8599. The Task Force Vice-Chair is Drew L. Kershen, University of Oklahoma College of Law, 300 W. Timberdell Road, Norman, OK 73019-0701— Tel (405) 325-4784—FAX (405) 325-6282— Inet e-mail: dkershen@uoknor.edu. Ms. Bergeson and Professor Kershen look forward to hearing from you.