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Eighth Circuit rules in grain warehouse inspection case

In the recent case of *Appley Brothers v. United States*, No. 92-3382, 1993 WL 406422 (8th Cir., Oct. 13, 1993), the Eighth Circuit Court of Appeals reversed a district court decision regarding the United States Department of Agriculture's allegedly negligent inspection of a grain warehouse.

The Bird Grain Company operated a federally licensed grain warehouse in South Dakota. In late March of 1988, USDA inspectors examined Bird Grain and cited it for, *inter alia*, corn and soybean inventory shortages. On April 1, 1988, following inspection, USDA inspectors prepared a WA-125 form or a Memorandum of Adjustments. The form indicated corn and soybean shortages and directed Bird Grain to eliminate the shortages.

On August 5, 1988, USDA inspectors conducted a special examination of Bird Grain with the stated purpose of checking compliance with the WA-125 issued on April 1. Thereafter, Bird Grain was allowed to proceed with operations with farmers continuing to deliver grain for storage or purchase. An inspection on November 15, 1988 again revealed grain shortages. Soon after, on November 22, 1988, USDA suspended Bird Grain's federal license. The inventory was liquidated and proceeds distributed on a pro rata basis. Later calculations disclosed that on August 5, 1988, Bird Grain was short approximately 358,011 bushels of corn.

Appley Brothers, among others, brought an action against the United States to recover the value of grain delivered but for which they had not been paid. Appley Brothers contend that their losses were caused by USDA's negligent failure to follow mandatory agency regulations. The district court granted the government's motion to dismiss for lack of subject matter jurisdiction, finding that the claims were barred by the discretionary function exception and the misrepresentation exception to the Federal Tort Claims Act. 28 U.S.C. § 2680(a), (h).

On appeal, the circuit court stated that in applying the discretionary function exception the inquiry is whether the conduct complained of is a matter of choice for the governmental employee. "The requirement of judgment or choice is not satisfied if a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.'" 1993 WL 406422, *2 (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)).

The court agreed with the district court that under the United States Grain Warehouse Act, the Secretary of Agriculture has broad discretion in deciding whether to close a grain warehouse. 7 U.S.C. § 246. *See also* 7 C.F.R. section 736.9. There was no dispute that the ultimate decision to suspend Bird Grain's license was discretionary.

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Obstacles to recovery in defective seed cases — revisited

The in depth article, "Obstacles to recovery in defective seed cases, "*Agricultural Law Update* (March, 1993), reviewed the Indiana Court of Appeals decision in *Martin Rispens & Son v. Hall Farms*, 601 N.E.2d 429 (Ind. Ct. App. 1992), in which recovery for crop losses against a seller of seed alleged to be defective was denied under an implied warranty claim because of an industry practice of limiting liability to cost of the seed. The court applied the "usage of trade" concept of UCC section 1-205 even though the buyer-farmer seemingly had no knowledge of the industry practice. The obstacle to recovery posed by this approach is to make trade usage an *implicit* part of the agreement, thus removing the common argument that such attempted limitations were not part of the original bargain between the parties.

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However, the court found that the claim was based on the inspectors' failure to adhere to mandatory agency policy. The court quoted the following from USDA's Grain Warehouse Examiner's Handbook: "In all instances where a previously issued Form TW-125 has not been completely cleared, the examiner is to issue a new Form TW-125 listing those conditions which remain uncorrected at the time of the special examination." Although the case presents a "very close question," the court concluded that the mandatory nature of the handbook precludes application of the discretionary function exception.

The district court also held that the claims were barred by the misrepresentation exception. A claim based upon communication of misinformation on which the recipient relies is barred under the misrepresentation exception. *Block v. Neal*, 460 U.S. 289 (1983). Here, the court held that Appley Brothers based their claims on negligent inspection and not on negligent dissemination of information. Thus, the misrepresentation exception does not apply.

Senior Judge Ross dissented, opining that since the ultimate decision to suspend Bird Grain's license was at the discretion of the Secretary, the discretionary function exception should apply.

—Scott D. Wegner, Lakeville, MN

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Defective seed cases/continued from page 1

This case was subsequently transferred to the Indiana Supreme Court and in a September 22, 1993 opinion not yet released for publication, 1993 WL 355862 (Ind.), the opinion of the Court of Appeals was vacated and the case remanded to the trial court with still viable claims of express warranties (against both defendants, Petroseed and Rispens) and a claim of breach of implied warranties of merchantability (against Rispens). Summary judgment as to all other claims was granted against the plaintiff.

On the issue of applying "usage of trade," the upper court found the Court of Appeals erred in deciding usage of trade as a matter of law. The Supreme Court determined that the seller and buyer were not in the same trade. The court reasoned:

> Rispens is in the business of selling seeds while Hall Farms is in the business of planting seeds and producing crops. Thus, Rispens can effectively negate the implied warranty of merchantability only by establishing that Hall Farms was or should have been aware of the asserted usage of trade.

1993 WL 366862, 4 (Ind.)

Whether the implied warranty of merchantability was disclaimed by usage of trade is a question of fact to be reached at trial and summary judgment was not appropriate.

The court did conclude that such attempted limitations on the amount of recovery were not substantively unconscionable simply because the defect was latent.

> Although a seller may not limit liability for a defect which he knows to be nonconforming to warranties without disclosing that knowledge the evidence is not conclusive that either Petroseed or Rispens was aware that the seeds carried disease.

1993 WL 366862, 7 (Ind.)

The court concluded that the possibility of latent defects is one of the risks which may be allocated by the parties at the time the contract is formed. In this case it was not clear whether there was mutual assent to the limitation of liability contained on the Petroseed can and the Rispens purchase order (the places where the attempted limitation language appeared) because the buyer claimed not to have read these particular statements. Therefore, a fact question remained precluding summary judgment as a matter of law. This reasoning is, of course, consistent with the argument on behalf of farmer-buyers that such language was never part of the contract.

The March 1993 article also reviewed a recently adopted statutory impediment to recovery in such cases, that is, Arkansas legislation requiring an arbitration procedure prior to filing a suit alleging failure of agricultural seed to produce or perform as represented by the label. Ark. Code Ann. § 2-23-101 to -110. A similar statute has also been adopted in Illinois. See 710 ILCS 25/1 *et seq.*, Seed Arbitration Act. The Illinois statute, like that of Arkansas, requires a purchaser of seed to seek arbitration before filing a civil action related to failure of the seed to produce or perform. To seek arbitration a verified complaint must be filed with the Director of the Illinois Department of Agriculture along with a filing fee. This complaint must be filed within a time that will premit effective inspection of the plants under field conditions and in no case later than thirty days after completion of harvest. A review committee consisting of the Director, the President of the Illinois Seed Dealers' Association and a director of a Cooperative Extension Service (or their designees) reviews the complaint and submits a recommendation to a Seed Arbitration Council, which consists of the Director, the Director of the University of Illinois Extension Services, the Dean of the University of Illinois College of Agriculture, the president of an Illinois seed dealers trade association (selected by the Director), and president of an Illinois farmers organization (selected by the Director).

The Seed Arbitration Council investigates the complaint, attempts to negotiate conditions of settlement and may recommend an administrative hearing be held if the arbitration recommendation is not accepted by the seller and purchaser.

The Department is to hold an administrative hearing no less than thirty days after receiving the Council's report and recommendation. The hearing officer enters an order which serves as a final arbitration decision.

Participation is required by all parties but the decision is non-binding. Failure to participate does not serve as a defense in a civil action but the report can be admitted as evidence in any subsequent court proceeding. This statute, like that in Arkansas, comprises a major impediment to such suits because of the detailed and cumbersome procedure that must be followed in seeking a non-binding arbitration decision prior to a civil action.

—J.W. Looney, University of Arkansas

Judicial review provisions of 1990 farm bill applied to defeat claim against review

A federal district court has held that the ASCS producer appeal provisions of the 1990 farm bill, 7 U.S.C.A. § 1433e(d)(West Supp. 1993), authorize judicial review of a determination of the ASCS National Appeals Division (NAD) notwithstanding a Secretary's claim that judicial review was barred by section 701(a)(2) of the Administrative Procedure Act (APA), 5 U.S.C. § 701(a)(2)(1988). *Nickels v. Espy*, No. 92 C 3766, 1993 WL 265468 (N.D. Ill. July 13, 1993). At issue was the reviewability of a NAD determination concluding that the plaintiff had failed to properly store corn under two price support loans and had improperly commingled new grain with reserve grain. The grain was damaged by a fire caused by a faulty heat sensor in the drying equipment, and the plaintiff sought to avoid liability under the loans.

The Secretary argued that the statute specifying producers' rights and liabilities under the price support program, 7 U.S.C. § 1425, conferred standardless discretion on the Secretary to require producers to assume liability for grade, quality, and quantity deficiencies in the commodity and for failure to properly care for and store the commodity. In seeking to deny review, the Secretary invoked the APA's section 701(a)(2).

The APA's section 701(a)(2) is a narrow exception to the general principle that all agency action is reviewable. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). By its terms, it precludes judicial review to the extent that "agency action is committed to agency discretion by law." As succinctly summarized by the court in *Nickels v. Espy*, section 701(a)(2) precludes review:

> if the statute [on which the agency's decision is based] is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute ('law'), can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely. This construction avoids conflict with the 'abuse of discretion' standard of review in section 706 [5 U.S.C. § 706(2)(A)] — if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'

Nickels v. Espy, 1993 WL 265468 at *4 (citation omitted).

While the APA purports to preclude review of "agency action committed to agency discretion by law," the producer appeal provisions of the 1990 farm bill broadly provide that "[f]inal decisions of the Department of Agriculture under the process provided for in this section [ASCS NAD] shall be reviewable by a United States court of competent jurisdiction." 7 U.S.C.A. § 1433e(d). Thus the threshold issue in *Nickels v. Espy* was whether the Secretary's (NAD's) determination was reviewable.

For the court in *Nickels v. Espy*, acceptance of the Secretary's argument that review was precluded by the APA would "ascribe a wholly meaningless enactment to Congress." *Nickels v. Espy*, 1993 WL 265468 at *4. In addition to declining to render section 1433e(d) meaningless, the court held that review was appropriate because "it can scarcely be said that the statutory provision allowing CCC and [the] Secretary to impose personal liability 'for failure properly to care for and preserve commodities' is different either in degree or in kind from the type of standard that courts regularly deal with in reviewing administrative decisions." *Id.* Finally, the court found that any discretion granted to the Secretary by the ASCS's regulations specifying the conditions for the CCC's assumption of losses and the eligibility of commingled crops to serve as collateral, did not preclude it from determining whether the agency had followed its rules and policies. *Id.* (citing *Cardozo v. CFTC*, 768 F.2d 1542, 1550 (7th Cir. 1985) for the proposition that "the use of such discretionary language in a regulation [does not] exempt an agency from its obligation to follow its rules or policies upon which the public justifiably has come to rely.").

Although the court ultimately found that NAD's determination was neither arbitrary nor capricious and that the plaintiff's consitutional claims were meritless, the court's analysis of the interplay between the judicial review provisions of the 1990 farm bill and the APA's section 701(a)(2) is instructive. Whether the judicial review provisions of 7 U.S.C.A. section 1433e(d) limit or override the APA's preclusion of review under section 701(a)(2) is likely to be a recurring issue. *See generally North Dakota ex rel. Bd. of Univ. & School Lands*, 914 F.2d 1031 (8th Cir. 1990)(pre-1990 farm bill denial of review under the APA's section 701(a)(2).

—Christopher R. Kelley, Lindquist & Vennum, Minneapolis, MN

NORTH DAKOTA. *Duty to control weeds.* In *Kukowski v. Simonson Farm, Inc.*, No. 93081, 1993 WL 429748 (N.D. Oct. 26, 1993), the North Dakota Supreme Court reversed a district court decision concerning a farmer's duty to control the spread of weeds.

In 1989, John Simonson leased two quarters of land from Simonson Farms, Inc. and placed the land into the Conservation Reserve Program. Simonson seeded the farmland to grass and applied weed control chemicals. However, a stand of kochia weed and Russian thistle grew on the CRP. After freeze-up, in late October of 1989, Ervin Simonson combined the kochia and Russian thistle in an attempt to control the weeds.

Thereafter, Kukowski brought an action alleging that the combining process broke off the weeds in an unnatural manner, allowing the wind to spread the weeds across his neighboring property. Kukowski claims damages for clean-up costs, reduced crop yields, and present and future weed control costs. The district court, citing *Langer v. Goode*, 131 N.W. 258 (N.D. 1911), granted the Simonsons' motion for summary judgment, holding that a farmer owes no duty to his neighbor to control the spread of naturally occurring weeds.

The Supreme Court agreed that at common law, landowners were not liable for the natural spread of weeds, such as kochia and Russian thistle. 1993 WL 429748, *2 (citing 2 Harl, *Agricultural Law*, section 1102). However, the court determined that the trial court misapplied *Langer*. In *Langer*, the defendant allowed wild mustard to grow, spread seed, and infest a neighbor's crop. A statute required the county commissioners to prescribe a time and manner of destroying noxious weeds. Since the county commissioners had not prescribed the time and manner of destruction, the farmer was under no duty to control the wild mustard.

Here, the Supreme Court concluded that the issue was not whether the Simonsons were under a duty to destroy the kochia and Russian thistle, but rather, whether the Simonsons owed a duty of care once they decided to cut the weeds. The court held that "there is a duty to use ordinary care when attempting to control or remove weeds." 1993 WL 429748, *2. The court cited cases from other jurisdictions for the proposition that liability may attach if some independent or active negligence causes the spread of weeds. *See Vance v. Southern Kansas Ry. Co. of Texas*, 152 S.W. 743 (Texas App. 1912).

Consequently, the issue precluding summary judgment is whether the affir-

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*Final report on U.C.C. Article 7 to the PEB**

By Drew L. Kershen

Introduction

The Article 7 Task Force arose in the spring of 1992 in response to a request from the Permanent Editorial Board (PEB) of the U.C.C. to the Uniform Commercial Code Committee of the ABA. The PEB asked the U.C.C. Committee to form an Article 7 Task Force to study whether Article 7 should enter the revision process similar to the other articles of the U.C.C. In January 1992, Article 7 was the only unstudied article of the U.C.C. in the current revision process undertaken by the PEB. Indeed, Article 7 had remained unstudied and unrevised since its adoption as part of the original Code in the 1950s.

The U.C.C. Committee formed the Article 7 Task Force, which has a current membership of 44. The Task Force decided to subdivide itself into working groups on five topics:

- Bonds/Insurance;
- Electronic Data Interchange (Electronic Commerce);
- International Trade Documents;
- Storage Documents;
- Transportation Documents.

In the spring of 1993, the Task Force decided to request members from the working groups to draft reports or supply documents relating to the five topics. The authors and title of these reports are as follows:

- Electronic Data Interchange by Christina L. Kunz, Professor of Law, William Mitchell College of Law;
- U.C.C. Article 7: Issues Regarding Storage Documents by Linda J. Rusch, Assistant Professor of Law, Hamline University;
- Comparing the United States Warehouse Act to U.C.C. Article 7 by Drew L. Kershen, Earl Sneed Professor of Law, University of Oklahoma;
- Bills of Lading: Article 7 of the Uniform Commercial Code and the Federal Bills of Lading Act by Eric E. Bergsten, Professor of Law, Pace University.

These reports and/or documents were circulated, accompanied by a draft of this report, in October 1993 for comment by the full membership of the Task Force. This Final Report to the PEB reflects the reports/documents from the summer 1993 and the comments of the full membership from October 1993.

Recommendation

The Task Force reached the following two conclusions:

- Article 7 does not require a full-scale revision or redrafting.
- Article 7 could benefit from a weekend conference addressing specific issues that appear to be recurring conflicts under its provisions or with respect to other laws.

The Task Force explains the rationale for these two conclusions more fully in the remainder of this report.

Electronic Data Interchange/ Electronic Commerce (EDI)

As Professor Kunz reported in February 1993 to the Task Force, Article 7 is compatible with the new term "record" that the ABA Electronic Writings and Notices Task Force adopted as an EDI term for the U.C.C. Consequently, with minor amendments, Article 7 can be made "EDI-friendly" by substituting the word "record" for the words "writing" or "written."

Professor Kunz did point out that there are many other terms in Article 7 that may need additional clarification or definition if paper documents of title become electronic documents of title.[2] However, the Task Force concluded that it is premature to undertake a revision of Article 7 more fully to accommodate or to take into account EDI.

The UCC should reflect business practices more so than promulgate legal constructs not grounded in business experience. In light of this bias, several events have transpired that shaped the Task Force's conclusion that an Article 7 revision to account for EDI would be premature at present. First, the United States transportation sector began to use electronic bills of lading only quite recently, particularly in the railroad industry.[3] Second, the United States Department of Agriculture finalized administrative regulations for electronic cotton warehouse receipts only within the past month.[4] Third, significant discussion of EDI in international trade has occurred and is occurring in conferences sponsored by the United Nations.[5]

The Task Force felt that Article 7 should be revised to accommodate EDI only after sufficient time has elapsed to see how electronic documents of title actually function in transportation, warehousing, and international trade. In other words, the Task Force felt that it was better to be in the second legal wave in responding to EDI, rather than on the cutting-edge of the first legal wave in responding to EDI. The Task Force decided that it was better to revise Article 7 for EDI once adequate experience with EDI existed to inform the revision process.[6]

The Task Force reached this decision despite the fact that some members of the Task Force, especially Rodman Kober, felt that taking Article 7 into a revision process would allow Article 7 to better accommodate electronic commerce. Those who felt that the impact of electronic commerce was sufficient reason to recommend Article 7 for full revision argued that through the revision process the PEB could provide direction and guidelines to electronic commerce. They felt it was better for the PEB to begin at the early stages of electronic commerce in order to shape it, as opposed to waiting for electronic commerce to develop. By waiting, they argued that the PEB would unnecessarily limit itself to a responsive posture.

Storage Documents

Professor Rusch reported that several issues recur regularly in litigation concerning storage documents (warehouse receipts, scale tickets, weight slips, etc.). However, Professor Rusch also reported that very few cases exist with respect to storage documents under Article 7. In light of the recurring issues and the few reported cases, the Task Force concluded that full-scale revision of Article 7 to address storage documents was unwarranted. Rather, the Task Force concluded that amendments to the present language of Article 7 or additional Official Comments would be adequate to address the recurring issues.

The recurring issues needing amendment or additional commentary include the following:

- Whether all terms listed in § 7-202(2) must be present on a document before the document can qualify as a document of title and before a warehouse lien may be asserted under § 7-209.
- What is the meaning of the term "entrustment" in § 7-209(3) and § 7-503(1) in determining paramount rights and priority between warehouse lien holders versus secured parties and between secured

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**Prepared by Article 7 Task Force, Uniform Commercial Code Committee Business Law Section, American Bar Association. The report reflects the views of the individuals and Task Force that prepared it and does not necessarily represent the position of the American Bar Association, the National Conference of Commissioners on Uniform State Laws, or the American Law Institute.*

parties in goods versus secured parties holding duly negotiated warehouse receipts? Does the term "entrustment" have the same meaning in both sections of Article 7 or a unique meaning in each section? The dispute about entrustment and paramount rights under § 7-503 has generated a goodly amount of debate in the Article 9 revision process because of the interrelationship between § 9-309 and §§ 7-501, 7-502, 7-503, and 7-504.

- Whether the revisions to Article 2 and Article 9 concerning enforcement procedures should be reflected in § 7-210 relating to enforcement procedures for warehouse liens.
- Clarification of what makes a document a negotiable document of title and of the concept of "duly negotiated."

Professor Rusch also discussed in her report the confusion and uncertainty with respect to standard of care and damages issues under § 7-204. The Task Force concluded that § 7-204 revision was likely to be wasted effort because courts continually thwart legislative solutions to these standard of care and damages issues.[7]

One possible reason for the few reported cases on storage documents under Article 7 is that warehouse receipts are also governed by the United States Warehouse Act (USWA). Under the USWA, warehouses storing agricultural commodities may elect to be licensed by the federal government. Such election by a warehouse is purely permissive. If a warehouse elects to be federally licensed, however, then the USWA governs and preempts U.C.C. Article 7. Consequently, revising Article 7 would have no impact on the USWA documents of title issued by federally licensed warehouses.

The Task Force considered whether Article 7 should be revised in order to promote uniformity and compatibility between it and the USWA. As Professor Kershen reported, revision to achieve uniformity and compatibility between Article 7 and the USWA is unnecessary because reported decisions construing the USWA indicate that courts interpret the two laws in uniform and compatible ways. Consequently, the Task Force concluded that revising Article 7 with respect to storage documents runs the risk of creating non-uniform and incompatible decisions between Article 7 and the USWA unless the USWA were simultaneously amended. From the perspective of the Task Force, revising Article 7 and pushing USWA amendments through Congress at the same time would a formidable task, especially when such action seems pointless in light of the fact that no significant friction presently exists between the two laws.

Transportation Documents

As Professor Bergsten reported, revision of the bills of lading provisions of Article 7 would be of little practical value unless the Pomerene Act[8] was simultaneously revised. Article 7 provisions on transportation documents are strikingly irrelevant because almost all transportation is interstate or international and therefore governed by federal statutes (such as the Pomerene Act) or federal treaties.[9]

The Task Force concluded, therefore, that revision of Article 7 in the traditional PEB sense of redrafting the Article would be wasted effort. The Task Force decided that revision of Article 7 made sense only if the PEB were to decide to adopt a new model of the revision process. In this new model of revision, the PEB would focus on the task of drafting proposed federal legislation and on persuading Congress to adopt the proposed legislation. In the early 1950s, the PEB debated this model of revision for commercial law and rejected the model.[10] Maybe times, ideas, and reasons have changed and the PEB would now adopt the "federal model of revision" for Article 7 which focuses on federal law, rather than state law.

If the PEB were interested in adopting the "federal model of revision," Professor Bergsten listed eleven points of comparison between the Pomerene Act and U.C.C. Article 7, which should serve as the starting point for the revision process. The Task Force endorsed these eleven points as important comparisons. Moreover, the Task Force endorsed the PEB studying coordination between Article 7 and the federal laws governing transportation of goods under bills of lading.

International Trade Documents

The Task Force concluded that revising Article 7 for reasons dealing with documents of title in international trade was fairly pointless. Revising Article 7 would have little impact on international trade documents because international trade documents are usually governed by federal statutes or treaties. Federal treaties, of course, arise from international negotiations conducted bilaterally, multilaterally, or under the auspices of international organizations such as the United Nations or the Organization of American States. Whatever the manner of their origination, federal treaties originate in ways beyond the ordinary process of the PEB.[11]

The Task Force concluded that the PEB could add more explicit statements in the Official Comments informing the readers of Article 7 of the titles of these treaties and international conventions. The Task Force endorsed the idea that Article 7 provide bibliographic citations to the text of the treaties and conventions and scholarly commentary on these treaties and conventions. The Task Force endorsed studying coordination between Article 7 and international treaties and conventions to insure that documents of title issued under provisions of Article 7 furthered the free flow of international trade and avoided the creation of "bottle-necks" in international trade.

Bonds/Insurance

As presently drafted, Article 7 does not address issues relating to bonds or insurance that sureties issue with respect to documents of title and warehouses or carriers who issue documents of title. The Task Force decided that the scope of Article 7 should remain as presently drafted. The Task Force reaffirmed that Article 7 should not address suretyship issues. Consequently, the Task Force concluded that bonds and insurance do not provide a reason for revising Article 7.

Furthermore, the American Law Institute is presently engaged in the task of formulating the *Restatement (Third) of Suretyship*.[12] The Task Force concluded that whatever issues existed (with respect to bonds, insurance, guarantees, and credit enhancement devices in the warehouse and transportation sectors of the U.S. economy) were better dealt with in the Restatement project than in a revision of Article 7.[13] The Task Force endorsed the idea that any PEB action with respect to Article 7 should always be sensitive to its impact on suretyship concerns. Aside from this reasonable and sensible coordination, the Task Force decided to consider these suretyship issues as outside the scope of any Article 7 revision itself.[14]

Conclusion

With respect to transportation documents and international trade documents, Article 7 is at best peripheral to the laws governing these documents. As a practical matter, no revision process can make Article 7 central to transportation and international trade documents. With respect to storage documents, Article 7 has significant importance (though shared with the United States Warehouse Act).

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For storage documents, Article 7 needs amendment and clarification, but not full-scale revision. With respect to bonds and insurance, Article 7 is not the appropriate forum to address the suretyship issues that might arise in the warehousing and transportation industries.

Electronic Data Interchange or Electronic Commerce (EDI) provides the only sensible reason seriously to consider a substantial revision of Article 7. Even with respect to EDI, however, the Task Force concludes that the time has not yet arrived to undertake a substantial revision to Article 7. Until more experience with EDI exists, Article 7 should remain as presently drafted. As previously indicated, this conclusion of the Task Force is the only conclusion to draw serious dissent.

The Task Force stands ready to be of further assistance to the PEB in whatever way the PEB deems most proper.

For those who desire a copy of any background document referred to in this Final Report, please address your requests to Drew L. Kershen, Earl Sneed Centennial Professor of Law, University of Oklahoma, College of Law, Norman, OK 73019-0701. (405) 325-4784; FAX (405) 325-6282.

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[1] This report reflects the views of the individuals and Task Force that prepared it and does not necessarily represent the position of the American Bar Association, the National Conference of Commissioners on Uniform State Laws, or the American Law Institute.

[2] It should be noted that some of these terms that Professor Kunz identified also need definitional clarification when applied to paper documents of title.

[3] The Interstate Commerce Commission mandated a uniform bill of lading for railroad and water transportation in 1919. In 1991 and 1993, the Commission issued for comment a proposal to change the front of the uniform bill of lading in order to ease the shift to electronic bills of lading. 56 Fed. Reg. 67269 (Dec. 27, 1991); 58 Fed. Reg. 34775 (June 29, 1993). Bergsten, *Bills of Lading: Article 7 of the Uniform Commercial Code and the Federal Bills of Lading Act*, REPORT TO THE PERMANENT EDITORIAL BOARD p. 3 at note 9 (Sept. 7, 1993) [hereafter referred to at the Bergsten Attachment].

[4] Proposed Rule: Using Electronic Cotton Warehouse Receipts, 58 Fed. Reg. 43298 (Aug. 16, 1993). (The comment period on the proposed rule expired October 15, 1993.)

[5] Bergsten Attachment Part C. *Electronic bills of lading*. On 6 August 1993, the United Nations Commission on International Trade Law. Working Group on Electronic Data Interchange issued *Draft uniform rules on the legal aspects of electronic data interchange (EDI) and related means of trade data communication*. This draft was supplied to the Task Force by Task Force member Harold Burman, Office of Legal Advisor, Department of State.

[6] Bergsten Attachment Part C. *Electronic bills of lading*.

[7] For an excellent discussion relevant to the comments in the text, read Helmholz, *Bailment Theories and the Liability of Bailees: The Elusive Uniform Standard of Reasonable Care*, 41 Kan. L. Rev. 97 (1992). Professor Helmholz's article demonstrates how peripheral Article 7 is to these issues by the fact that he never cites a single provision from it. Indeed, Professor Helmholz refers only once to the Uniform Commercial Code and this passing reference occurs on the thirty-fifth page of the thirty-eight page article.

[8] 39 Stat. 538, 49 U.S.C. App. §§ 81-124.

[9] Rodman Kober in his response to the *Draft* Report questioned whether federal statutes and treaties preempted Article 7 as often as the *Draft* Report stated. Mr. Kober cautioned that Article 7 may have greater legal viability in transportation documents and international trade documents than many persons think. Consequently, Mr. Kober suggested that during the revision process, primarily undertaken to respond to electronic commerce, issues of preemption and coordination with federal statutes and treaties could be more fully and carefully studied than has been done to date.

[10] Braucher, *Federal Enactment of the Uniform Commercial Code*, 15 Law & Contemp. Prob. 100 (1951); Braucher, *The Uniform Commercial Code — Documents of Title*, 102 U. Pa. L. Rev. 831, 833 (1954).

[11] *E.g.*, Larsen, 1989 *Inter-American Convention on International Carriage of Goods by Road*, 39 Am. J. Comp. L. 121 (1991); Sweeney, *New U.N. Convention on Liability of Terminal Operators in International Trade*, 14 Fordham Int'l L. J. 1115 (1991).

[12] For a thorough presentation of this endeavor, read *Symposium: The Restatement of Suretyship*, 34 Wm. & Mary L. Rev. 985-1290 (1993).

[13] In light of the decision of the Task Force to leave issues of bonds, insurance, guarantees, and credit enhancement devices to the ALI, *Restatement (Third) of Suretyship*, the Task Force did not request a formal, written report from its working group on bonds/insurance in the summer of 1993.

[14] During the comment period on the *Draft* Report from the Article 7 Task Force members, Professor Benjamin Beard, University of Idaho, the Chair, UCC Committee Task Force on Suretyship, Business Law Section, ABA, wrote to endorse the decision of the Article 7 Task Force about bonds/insurance. Indeed, he stated that the Article 7 Task Force's recommendation came at a seasonable time because the Restatement process is just now undertaking discussion of issues relating to miscellaneous types of bonds/insurance — the category into which warehouse bonds and warehouse insurance falls. Hence, Professor Beard felt that warehouse bonds and warehouse insurance can easily and readily be discussed in the Restatement process.

Duty to control weeds/continued from p. 3

mative act of combining the kochia and Russian thistle is a method of weed control. Evidence submitted to the trial court indicated that combining kochia and Russian thistle in the late fall causes weeds to spread more than they would naturally. The supreme court remanded, recognizing that "farmers must exercise ordinary care when actively working the land." 1993 WL 429748, *2.

Chief Justice Vande Walle concurred, cautioning that the court's opinion not be read to require or encourage a reexamination of weed control methods or to discourage experimentation or innovation. Recollecting that at one time the farmer who had the blackest summer fallow was considered the better farmer, the chief justice noted that today farmers use no-till drills and leave a cover on their fields. "Is such a practice now subject to challenge under the majority opinion? I trust it is not." 1993 WL 429748, *4.

—Scott D. Wegner, Lakeville, MN

Federal Register

The following items appeared in the Federal Register from Oct. 1 to Nov. 10, 1993.

1. CCC; Disaster payment and tree assistance programs; final rule; effective date 9/30/93. 58 Fed. Reg. 51757.

2. CCC; Amendments to the acreage conservation reserve and conserving use acreage requirements; interim rule. 58 Fed. Reg. 57721.

3. FCA; Collection of claims owed the U.S.; proposed rule. 58 Fed. Reg. 58137.

4. FCIC; Administrative regulations; fraud, misrepresentation, false claims, etc; sanctions; final rule; effective date 10/14/93. 58 Fed. Reg. 53109.

9. FCIC; Actual production history coverage program; proposed rule. 58 Fed. Reg. 53150.

10. IRS; Hedging transactions; temporary regulations; effective date 10/20/93. 58 Fed. Reg. 54037.

11. FMHA; Management and disposal of FmHA inventory farm property; final rule; effective date 11/3/93. 58 Fed. Reg. 58647.

12. Farm Credit System Insurance Corporation; Collection of claims owed the U.S.; proposed rule; effective date 12/8/93. 58 Fed. Reg. 59215.

—Linda Grim McCormick, Toney, AL

NORTH DAKOTA. *Farmer's delivery of wrong type of wheat.* In *Dakota Grain Co., Inc. v. Ehrmantrout*, 502 N.W.2d 234 (N.D. 1993), the North Dakota Supreme Court affirmed in part, reversed in part, and remanded a district court decision awarding damages for breach of a grain sale contract.

In the spring of 1989, Ehrmantrout orally agreed to sell to Dakota Grain some of his Lenn variety hard red spring wheat. Following delivery, the elevator cleaned and sold 585 bushels of the wheat to four farmers for use as seed. The farmers planted the wheat seed, but the crops did not mature. Subsequently, it was determined that the wheat planted was not Lenn spring wheat, but was actually a winter wheat. Winter wheat planted in the spring will not produce a crop. One cannot visually distinguish winter wheat seed from spring wheat seed. Dakota Grain paid the four farmers $22,201 in damages for selling them the wrong type of seed wheat. Dakota Grain then brought an action against Ehrmantrout for damages alleging breach of contract, breach of warranty, negligence and fraud.

The district court found that Ehrmantrout breached the oral grain sale contract by delivering the wrong type of wheat. The trial court awarded Dakota Grain $125.90 in general damages, representing the difference in market value between the Lenn spring wheat promised and the winter wheat actually delivered. In addition, the trial court awarded consequential damages. Pursuant to a pure comparative fault statute, the district court determined that Dakota Grain was 49 percent responsible for the damages arising from the sale of the wrong type of wheat seed to the four farmers. N.D.C.C. § 32-03.2 -03. Apparently, Dakota Grain performed no testing to determine whether or not the wheat was actually spring wheat. Accordingly, the elevator was awarded consequential damages of $11,332.51, representing fifty-one percent of the total damages incurred.

On appeal, the supreme court decided that the question of Ehrmantrout's negligence in delivering the wrong type of wheat is irrelevant. Rather, the dispute "is a classic breach of warranty case," resolvable by application of Article 2 of the Uniform Commercial Code. 502 N.W.2d at 236. Citing Article 2, the court noted that a contract that includes a description of the goods to be sold creates an express warranty that the goods conform to that description. N.D.C.C. § 41-02-30(1)(b)[U.C.C. 2-313]. The court upheld the trial court's findings that Ehrmantrout breached the contract by delivering goods that did not correspond to the description.

Ehrmantrout also objected to the awarding of consequential damages. After agreeing with the district court that comparative fault principles apply, the court cited the elements to be applied in awarding consequential damages. "Consequential damages resulting from the seller's breach include: a. Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and b. Injury to person or property proximately resulting from any breach of warranty." N.D.C>C. section 41-02-94(2)[U.C.C. 2-715].

According to the court, the key factor for awarding consequential damages is whether the losses were foreseeable by Ehrmantrout at the time he entered the contract. In other words, "one must find that Ehrmantrout either knew or had reason to know when he entered the contract, that the spring wheat was going to be resold as seed." 502 N.W.2d at 238, 239. The court cited a factually similar case in which the Idaho Supreme Court upheld a jury's finding that the farmer had reason to know that the wheat he delivered would be resold for seed. *See Nezperce Storage Co. v. Zenner*, 670 P.2d 871 (Idahoa 1983).

Concluding that the trial court's findings on the foreseeability element were unclear, the court reversed and remanded for clarification. However, the court stated that the trial court's findings with regard to the second element, i.e., whether Dakota Grain could have reasonably prevented the consequential damages, were clear and thus the apportionment of fault need not be redetermined.

—Scott D. Wegner, Lakeville, MN

Payment limitation rules, procedures

A notice (AO-1031) issued on October 25, 1993, by the ASCS's Acting Deputy Administrator for State and County Operations (DASCO) indicates that several federal farm program payment limitation rules and procedures may change beginning with the 1994 crop year. While the notice lacks detailed information, the changes apparently will involve the following:

- redesigning the payment eligibility and limitation forms "to require detailed farm operation information only from those producers who are likely to have a payment eligibility or payment limitation problem;"
- revising the payment limitation regulations to include the "substantive change" rules now found only in the *ASCS Handbook*; and
- eliminating "the requirement that payment of equipment leases must occur within 30 calendar days of use to count as a significant contribution."

The proposed changes are not the result of any change in the payment limitation statutes. Instead, they are a result of the ASCS's recently completed initial review of the *ASCS Handbook*.

The *ASCS Handbook* is the ASCS's internal directives manual. The *Handbook* consists of about 200 volumes of instructions prepared by DASCO, with each volume covering a separate subject.

The county and state ASC committees have been instructed by DASCO to follow the *Handbook's* directives in making farm program determinations. The *Handbook's* directives, however, are not legally binding. The only legally binding federal farm program rules are the rules set forth in the statutes enacted by Congress and in the regulations adopted by the ASCS in accordance with the federal Administrative Procedure Act.

Most of the *ASCS Handbook's* directives are consistent with the applicable statutes and ASCS regulations. Recently, however, a federal district court found that the ASCS had acted improperly when it made a payment limitation determination based on a *Handbook* directive that was not found in the applicable payment limitation statutes and regulations. *Jones v. Espy*, No. Civ. A. 90-2831-LFO, 1993 WL 102641 (D.D.C. Mar. 17, 1993).

Partially because of that court decision, the ASCS has begun reviewing the contents of several of the *ASCS Handbook* volumes, including the payment limitations volume, to determine whether the *Handbook's* directives are consistent with the applicable statutes and regulations. The results of the first phase of that review have been published in *Report of Policy and Regulatory Review Task Force: Phase 1* (Aug. 25, 1993).

The *Report* concluded that several payment limitation "operational procedures" were not authorized by the payment limitation regulations. The unauthorized "procedures" include the *Handbook's* embedded entity rules, its definitions of a "farming operation" and an "interest in a farming operation," its "substantive change" rules, its "paper change" rules, its sharecropper rules, its rules relating to when equipment contributions must be paid to be counted as a significant contribution, and its disqualification of land covered by a contract for deed or deed of trust from being used as a significant contribution of land.

DASCO's notice issued on October 25 does not explain what the ASCS intends to do about each of the unauthorized "procedures." Thus, it remains to be seen whether the ASCS will enforce *Handbook* directives that the *Report* concluded are

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agricultural law update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Report on the 1993 Annual Conference

More than 185 practitioners, educators, government officials, industry representatives, and international guests met in San Francisco, California, November 11-13, 1993 at the American Agricultural Law Association's Fourteenth Annual Meeting and Education Conference.

Over thirty-five speakers addressed a variety of topics including the reorganization of USDA, the impact of technology on agriculture, assuring water supplies, business and tax planning for agriculture, and mediation.

Terence J. Centner, Professor, University of Georgia, College of Agriculture, gave the president's address.

Margaret Grossman was awarded this year's "Distinguished Service Award."

J. Patrick Wheeler, Canton, Missouri, is the Association's President-elect. Norman W. Thorson, University of Nebraska, assumed his duties as President. Joining the Board of Directors are newly elected members Patricia A. Conover and William C. Bridgforth.

Retiring Board members are Thomas A. Lawler and Ann B. Stevens. We wish to thank them for their dedicated service to the organization.

Patricia A. Conover announced the winners of the student writing competition. First place was *Wetlands and The Swampbuster Provisions* written by Justin Lamunyon, Norman, OK. Second place was*Soil Erosion, Farm Chemicals, and Sustainable Agriculture* written by James Stephen Carpenter, St. Paul MN.

Next year's Annual Meeting will be held October 21-22, 1994 at the Peabody Hotel, Memphis, Tennessee.