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INSIDE

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- Farm products rule
- Minnesota's anti-corporate farm statute revisited

Production flexibility contracts: Winstar *doctrine to apply?*

On October 2, 1996, Cong. Pat Roberts (R-Ks.), the Chairman of the House Committee on Agriculture and principal author of the production flexibility provisions of the 1996 Farm Bill[1], put into the Congressional Record[2] his explanation as to why the recent Supreme Court ruling in *United States v. Winstar Corp., et al.,* 135 L.Ed.2d 964 (1996) should apply to production flexibility contracts. It was clear from Chairman Roberts' unusual but forceful statement of legislative intent that he is deeply concerned that future Congresses may modify or even nullify the terms of the Farm Bill and that he wants to ensure that if that occurs it will not be to the detriment of grain and cotton formers who have entered into the seven-year production flexibility contracts under the Farm Bill.

His concern is justified because no one seriously doubts that over the course of the next seven years attempts will be made to alter the language of the 1996 Farm Bill. President Clinton, in signing the Farm Bill into law, stated that he would like Congress next year to change the production flexibility program to strengthen the farmer "safety net."[3] And, already this year, there was one attempt, by the House Appropriations Committee in June, to reduce funding for contract payments.[4] In beating back this year's attempt by the Appropriations Committee to take money away from production flexibility contracts, Chairman Roberts was quoted as saying, "I guess the battle is never over."[5]

Cong. Roberts argues that the *Winstar* ruling provides a firm legal basis for farmers to hold the Department of Agriculture to the terms of the production flexibility contracts as currently written, regardless of any later congressional revisions to the Farm Bill. But, others have a different view on the matter[6], and it is an open question as to whether the government would honor production flexibility contracts on their current terms if Congress later changes the statutory underpinnings for the contracts. As a result, it might be said that Roberts' statement of legislative history is but the opening shot in a political and legal battle yet to be fully joined.

The 1996 Farm Bill substituted production flexibility contracts for the old farm programs under which farmers agreed to restrict production in return for price support payments and loans. Rather than having farmers go cold turkey into the world of free markets, the Farm Bill provides for production flexibility contracts that make transition payments to producers. The Farm Bill specifies the amount to be spent each year for production flexibility contract payments and gradually reduces the amount available--from roughly $5.6 billion in 1996, to about $4 billion in 2002 (the last year the contracts are in effect).

Under a production flexibility contract, the farmer agrees to engage in good conservation practices and to not plant fruits and vegetables on his or her grain or

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1994 USDA Reorganization Act in the courts

The Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, 108 Stat. 3176, 3242 (codified in scattered sections of 7 U.S.C. and elsewhere) authorized numerous organizational changes within the USDA. Among these was the creation of the USDA National Appeals Division (NAD) to hear administrative appeals from decisions made by the Farm Service Agency and certain other agencies. *See* 7 U.S.C. §§ 6991-7002. The USDA Reorganization Act also imposed a broad exhaustion of administrative remedies requirement as a prerequisite to the judicial review of determinations made by the Secretary. 7 U.S.C. § 6912(e). The USDA NAD statutory scheme and the exhaustion provision recently have been interpreted by federal district courts in ways that could have significant conse-

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cotton acreage. In return, the CCC promises to provide the farmer a payment calculated each year by multiplying eighty-five percent of eligible acreage by the farm's established yield by the payment rate. The payment rate is determined by dividing up the available funds for the year by the acreage enrolled in the program.[7]

As Cong. Roberts began his efforts this summer to protect the integrity of the production flexibility program under the Farm Bill, the Supreme Court handed down its ruling in the *Winstar* case on July 1. As reported in the *Agricultural Law Update*,[8] the Supreme Court, in a 7 to 2 ruling, held the government liable for damages for breach of contract in a case in which the breach was caused by the enactment, after the contract was entered into, of legislation that made it impossible for the government to continue to meet its contract obligations. The *Winstar* case involved contracts that federal regulatory agencies had entered into with merged savings and loan associations during the S&L crisis of the early 1980s in an attempt to keep some shaky associations afloat.

The case is especially significant because the plurality opinion[9] made an effort to review the broad range of case law on the effects of subsequent legislation on government contracts, including discussions of the so-called "unmistakability" rule of construction and "sovereign acts" doctrine. Further, it effectively limited the scope of the modern "unmistakability" rule as set out in three Supreme Court cases decided in the 1980s: *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986); and *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987).

The unmistakability rule, as expressed in the *Merrion* case (455 U.S. at 148), is that "sovereign power ... is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." In *Winstar*, the government argued that, in entering into the contracts with the merged S&Ls, it had not unmistakably surrendered the right to enact later laws that might prove to undermine the contracts.

The *Winstar* decision overcame the unmistakability rule by saying, "so long as [the] contract is reasonably construed to include a risk-shifting component that may be enforced without effectively barring the exercise of [the government's sovereign] power, the enforcement of the risk allocation raised nothing for the unmistakability doctrine to guard against, and there is no reason to apply it." 135 L.Ed.2d at 995. The risk-shifting referred to in this excerpt was the assumption by the government of the risk that the law permitting use of certain goodwill in capitalized merged S&Ls might be changed in the future, with the result that under the changed law what the contract envisioned would become illegal.

In addition, the court in *Winstar* held that the "sovereign acts" doctrine would not apply to the facts in the case. As described in the decision, the "sovereign acts" doctrine holds that, "[w]hatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specifically to alter, modify, obstruct or violate the particular contracts into which it enters with private persons." 135 L.Ed.2 at 1001. In other words, a later "public and general" act that makes it impossible for the government to continue to perform under the contract cannot be considered an act of breach by the government-as-contractor. The court in *Winstar*, however, stated that the subsequent statute involved in the case that prohibited the use of the particular type of good will for capital could not be considered a public and general act.

In his *Congressional Record* statement, Cong. Roberts says that the reason he is speaking out is to provide some legislative history and background for those farmers who have signed a production flexibility contract with the Department of Agriculture. He states flatly that the ruling of the Supreme Court in *Winstar* should serve as a precedent and apply in the event there is an amendment to the Farm Bill that could have the effect of breaching the contractual obligations of the government to fulfill the provisions of production flexibility contracts. He points out that, in the *Winstar* case, there was no attempt to bind Congress from enacting such new legislation inimical to the contracts as written; the contracts simply had the government take on the risk of this happening. Then, he draws an analogy between the *Winstar* S&L contracts and his production flexibility contracts: "Under the production flexibility contract risks are allocated among the parties.. As in *Winstar*, the issue does not turn on whether the Government can subsequently change the rules under which producers operate if they elect to participate in a program, the issue is whether enforcing the risks shifted among the parties will infringe upon the sovereign jurisdiction of the United States."

He goes on to suggest, regarding the application of the "sovereign acts" doctrine, that any changes to the statutory authority for production flexibility contracts should follow the same analysis as that relied upon by the court in *Winstar*. "To the extent that the farm programs would be altered, it would be likely that the Government would have substantial self-interest in any relief it might obtain from risks allocated it under the contract. Most likely this would result in some legislative change to reduce the amount of money paid to producers."

While Cong. Roberts sees the *Winstar* contracts as closely resembling the production flexibility contracts for purposes of applying the *Winstar* legal rulings, there are some differences that should be pointed out. As he even acknowledges in his statement, the production flexibility contracts specifically include a provision allowing the Department of Agriculture to modify the contract if a law is enacted during the effective period of the contract. To the contrary, in *Winstar*, it appears that the contracting parties wanted to apply the law as it existed at the time that the contracts were signed for the entire term of the contract, regardless of any subsequent change in the law.

Further, the "risk" assumed by the government in *Winstar* was, in the eyes of the Supreme Court, the risk that the governing law might be changed—and that change is precisely the matter that the unmistakability rule and the sovereign acts doctrine address. However, Cong.

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Roberts' analysis of the production flexibility contracts speaks of the government assuming other sorts of risk, having to do with the risk of less control over supplies of various agricultural commodities or termination—but not having anything to do with the risk of the law changing.

Nonetheless, Cong. Roberts' statement must be given substantial weight, because he was the Chairman of the House Committee on Agriculture during the Farm Bill debate, and was a signer of the conference report on it. More importantly, he is generally acknowledged as the father of the production flexibility provisions. Thus, his views—now that they are on the record—should provide good ammunition for those who might be called to defend the sanctity of production flexibility contracts, as currently written, if and when the next Congress amends the Farm Bill.

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[1] *These provisions are found in the Agricultural Market Transition Act, which is title I of the Federal Agriculture Improvement and Reform Act of 1996 (i.e., the 1996 Farm Bill), Pub. L. No. 104-127, Apr. 4, 1996, 110 Stat. 896-950.*

[2] *142 Cong. Rec. E1,903-4 (daily ed. Oct. 2, 1996)(statement of Cong. Roberts).*

[3] *President Clinton's Statement on Signing the Federal Agricultural Improvement and Reform Act of 1996, 32 Weekly Comp. Pres. Doc. 614 (Apr. 4, 1996).*

[4] *See Patricia Peak Klintberg, Word of Honor: Congress Hints There's Nothing Sacred About Seven-Year Contracts, Top Producer, Aug./Sept. 1996, at 23.*

[5] *Id.*

[6] *Id.*

[7] *For a more detailed description of the production flexibility provisions of the 1996 Farm Bill, see Wayne Watkinson and John Sheeley, The Federal Agriculture Improvement and Reform Act of 1996, Agricultural Law Update, July 1996, at 4.*

[8] *David Barrett, Federal Government Liable for Contractual Obligations, Agricultural Law Update, Aug. 1996 at 1.*

[9] *The majority in the case was made up of Justices Souter, Stevens, Breyer, and (excepting one division of the opinion) O'Connor, joined by Justices Scalia, Kennedy, and Thomas in a concurring opinion.*

—Phillip L. Fraas, Tuttle, Taylor & Heron, Washington, D.C.

Land prices update

Land prices in several central Illinois counties are nearing $5,000 an acre. The Federal Reserve Bank of Chicago reports in its August 1996 newsletter that Illinois farmland has increased fourteen percent in value from July 1, 1995 to July 1, 1996. Indiana's growth was fourteen percent over the same time. Wisconsin's growth was ten percent. Iowa's growth was eight percent.

—Paul A. Meints, Esq., CLU, ChFC, reprinted from Agricultural Law, Illinois State Bar Association, September, 1996.

USDA REORGANIZATION ACT/*continued from page 1*

quences for the USDA and nongovernmental parties in some instances.

In a decision now on appeal to the Eighth Circuit, the NAD statutory scheme has been held to be formal adjudication for purposes of the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. *Lane v. United States Dep't of Agric.*, 929 F. Supp. 1290 (D.N.D. 1996). The EAJA provides that:

> [a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

5 U.S.C. § 504(a)(1). In relevant part, "adversary adjudication" is defined to mean "an adjudication under section 554 [of the Administrative Procedure Act (APA)] ... in which the position of the United States is represented by counsel or otherwise...." *Id.* § 504(C)(i).

The plaintiffs in *Lane*, Dwight Lane and Darvin Lane, were FmHA borrowers who had been denied delinquent loan servicing based on an opinion of the USDA's Office of General Counsel (OGC) that their loan violations demonstrated sufficient "bad faith" to disqualify them for loan servicing. Following enactment of the 1994 USDA Reorganization Act, their then-pending administrative appeals were transferred to the USDA NAD. The NAD hearing officer found in the Lanes' favor, concluding that the OGC opinion had been "seriously flawed" because it was based on erroneous and disorganized information provided by the FmHA. The hearing officer's decision apparently was not appealed to the NAD Director.

As prevailing parties, the Lanes applied for fees pursuant to the EAJA. The NAD denied the application, relying on a regulation now in effect as an interim final rule declaring that USDA NAD proceedings are not subject to the EAJA. 60 Fed. Reg. 67,298, 67,309 (1995)(interim final rule to be codified at 7 C.F.R. § 11.4). The preamble to that rule expresses the USDA's opinion that "the provisions of the APA generally applicable to agency adjudication (5 U.S.C. § 554, 555, 556, 557, 3105) do not apply to NAD proceedings." *Id.* at 67,302.

In the district court, the Lanes challenged both the denial of their EAJA application and the declaration of the interim final rule that USDA NAD proceedings were not subject to the EAJA. In holding in the Lanes' favor on both counts, the court first addressed the issue of whether the adjudication was subject to the EAJA as an adjudication under APA section 554. That section applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing...." 5 U.S.C. § 554(a). In this context, the phrase "required by statute" means a statute other than the APA. Thus, as to the issue of whether NAD hearings were under APA section 554, the first question was whether the USDA NAD statute imposed an "on the record" requirement.

The USDA NAD statute does not use the talismanic words "on the record" in specifying the NAD hearing requirements. Nonetheless, relying on *West Chicago, Ill. v. United States Nuclear Regulatory Comm'n*, 701 F.2d 632, 641 (7th Cir. 1983), for the proposition that the words "on the record" need not appear in the statutory directive for a hearing, the court held that the NAD statute specified formal, on-the-record hearings of the type contemplated by APA section 554. In so doing, the court recited certain of the statutorily required elements of NAD hearings, including the prohibition against ex parte communications, 7 U.S.C. § 6997(a)(2); the requirement that the hearing officer must leave "the record" open after the hearing for further submissions, *id.* § 6997(c)(3); and the requirement that the NAD Director's review of hearing officer decisions is to be based, in part, on the "record from the evidentiary hearing," *id.* § 6998(b).

The government countered by arguing that the NAD statute superseded the APA, thus preventing NAD hearings from coming under APA section 554. This argument, based on *Marcello v. Bonds*, 349 U.S. 302 (1955), was rejected by the court. After failing to find any express exemption in the NAD statute from the terms of the APA as was found in the statute at issue in *Marcello v. Bonds*, court concluded that the NAD statute neither adapted the APA to the NAD process nor created a complete and distinct set of procedures. The court also concluded that the NAD statute's duplication of APA procedures, such as the prohibition against ex parte communication, did not mean that the NAD statute superseded the APA. The court reinforced this conclusion by noting that APA section 559 provides that a "subsequent statute may not be held to supersede or modify this subchapter ... except to the extent that it does so expressly." 5 U.S.C. § 559.

Having concluded that NAD hearings were under APA section 554 for purposes of the definition of an "adversary adjudication" under the EAJA, the court turned to the second requirement of an EAJA "adversary adjudication"—the requirement that "the position of the United States" must be "represented by counsel

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Farm continuation planning: drafting ideas and alternatives*

By Paul A. Meints, Esq., CLU, ChFC

The recent increase in land values has generated new interest in having an estate plan that reflects current conditions. The need for a good estate plan is most critical when the farm family has a son or daughter who is also farming. Good farm continuation planning needs to be reflected in your clients' estate plan. While some of the planning can be done with "stand alone" documents, the net result of such is often to overlook other problems that could have or should have been addressed. Nearly all of the ideas for enabling a son or daughter to continue farming involve doing something for that child rather than all children collectively. What follows is a collection of some planning problems, ideas, and drafting suggestions to consider when working with your clients.

Tax clauses

Almost everything that is done in family business planning involves giving more of something, tangible (machinery, for example) or intangible (voting rights while the estate is in limbo, for example), to one person. Seldom is this done through one planning document. More often than not, it involves a combination of probate and non-probate type transfers. With the list of non-probate related transfers growing, e.g., the new legislation permitting "transferable on death" to more types of property, the issues will become worse rather than better. The vast bulk of Illinois lawyers' work that I have reviewed over the years has a clause that results in the taxes and estate administration expenses being paid from the "residue" of the probate estate. If you have a boiler-plate tax clause, especially if it is a "pay from the residue" garden variety, then you might want to consider adopting an "apportionment" type approach to all assets. It has been difficult to explain to inactive family members why their share is reduced substantially, perhaps eliminated entirely, while the entire property passing to their dearly beloved brother goes untouched. The following is one short-form version to consider:

All taxes, both state and federal, payable by reason of my death, together with the expenses of my estate's administration shall be apportioned and charged against and paid by the person or entity receiving my property or from the property itself, whether such property passes in a probate related manner or in a non-probate related manner. There shall not, however, be any apportionment if such would cause additional tax liabilities against my surviving spouse with respect to which a marital deduction is allowable for federal estate tax purposes.

Debts

The general rule in Illinois is similar to that found elsewhere: the debt follows the property to which it is attached. This is ordinarily not a problem when all beneficiaries receive an equal interest in the property. It does become a problem when one debt affects other property or the business in general.

Several years ago, a widow farmed with her son. She had two parcels of almost equal value. She had two children whom she loved dearly. The solution chosen was to leave Blackacre to her son and Whiteacre to her daughter. After the estate plan was done, farm income was such that additional funds were needed, in part to finance the new crops and in part to replace older machinery and equipment that was no longer functional. Farm Credit Service required collateral. That collateral was Blackacre. Mom died when interest rates were high, land values depressed, and crop yields virtually nonexistent. Blackacre was sold within a year after her death. Her son now makes about $6 an hour. Her daughter has a good job in St. Louis, is married to a doctor, and has an income from her farm that she really does not need. The following might have prevented this inequity from occurring:

From time to time debt has been or may be incurred to permit the continued operation of my farm. To the extent that such debt is deemed by my Personal Representative (without question by any other person, entity, or court) to be an "operating loan" or a loan incurred to benefit and/or continue my farming operation, then I direct that such debt, whether secured or unsecured, shall be deemed a debt against all of my farming related real and personal property and shall be apportioned accordingly.

Once paid, generally gone forever

The increasing number of ways to pay funds to beneficiaries quickly and without accountability often means that the funds are no longer available to the personal representative in settling the decedent's estate. This often occurs in the joint tenancy convenience account with the tenant who feels she/he is entitled to this because of services rendered. It can occur because of "payable on death" and "transferable on death" designations as well as from beneficiary designations associated with annuities, life insurance, and qualified retirement plans. From time to time, it arises because of the parents' wishes to have the state pay for the cost of the nursing home stay. The "apportionment" referenced above helps deal with these issues. It may not be a total solution. Neither is the following reminder to the kid's conscience:

Should life insurance have been payable by reason of my death then I request, but do not direct, that such beneficiary use such proceeds in a manner which permits the continued operation of my farming operation with the least amount of encumbrances existing against it. Should other property have passed in a manner which avoids probate, then it is my request that such funds be used in a manner which results in the prompt closing of my estate and the continued economic viability of the family's farming operation.

Avoid co-ownership whenever and wherever possible

Co-ownerships are common during life. Distributing property equally among the children after the death of the parents is probably even more common. Leaving dad's 160 acres to mom's marital trust and the balance of his property to mom's non-marital trust may not max out the $600,000 but may be a whole lot less complicated over the long run. Leaving the 320 acres in stages to the children is a disaster waiting to happen if more than one child is involved and more than one distribution date is called for. Having property distributed to each of four children at ages twenty-one, twenty-four, and twenty-seven potentially involves twelve separate transfers. If the farming son happens to be the oldest, he will have a hard time dividing any crop share crop income and expenses by and among the various landlords. Leaving one fourth of the John Deere combine to each of the four children works out satisfactorily until repairs are needed or rental rates need to be determined. From here, the picture quickly worsens, often in proportion to the distance away from the property and

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the personal cash flow circumstances of the beneficiary. The following helps:

If my farming son survives me, then I devise and bequeath to him all [substitute a percentage, e.g., 75%, if leaving him all of this property violates the parent's comfort level] of my tangible personal property which is regularly used in or associated with my farming and livestock operation. This bequest includes the right to use such property from the date of my death and further includes the transfer to him of all ownership interests that may exist at the time of my death in machinery, equipment, supplies and prepaid expenses, livestock, harvested crops being held for feed, farm trucks, and the like together with all claims, rights, and insurance policies with reference thereto.

Reward loyalty—encourage the family member to stay close by

Generally most parents at least think about leaving more property to their farming child, especially when they have not heard from the other children even at Christmas. For most families, the picture is a little less clear. "Vesting schedules" are common with qualified retirement plans, deferred compensation arrangements, and pre-marital agreements. The vesting chosen can be extensive or relatively short. It can be flexible or relatively restrictive. It can apply to virtually all forms of business operations by simple substitution of terms, e.g., "XYZ Corporate Stock" for "farm real and personal property." The following is an example of one short-form specific bequest type approach:

If my farming son (i) survives me and has (ii) been actively farming with me up to and including the date of my death then I devise and bequeath to him an amount of my farm real and personal property equal to three percent (3%) of its combined value times the number of years between the date he started farming/the date of this will/etc. and the date of my death; provided, however, that the amount passing to my son by reason of this paragraph shall not exceed the sum of xx% of the property's total value.

A little longer approach done in a slightly different manner is:

On the death of the Settlor's Spouse or in the event of a disclaimer of interests passing to Settlor's Spouse by reason of Paragraph 2 the Trustee shall forthwith divide the balance of the Trust Estate, or all of the Trust Estate in the event that Settlor's Spouse does not survive, into two trusts to provide one trust for each child of the Settlor who is either living at the death of the Settlor or then deceased leaving one or more descendants then living. To the Trust of Settlor's Son, RANDALL XXXXX, the Trustee shall first allocate and distribute (i) an amount of farm real and personal property selected by him equal to 2% of its total combined value times the number of calendar years between 1988 and the date of distribution together with (ii) a reasonable and proportionate portion of the balance of the Trust Estate. Under no circumstances shall the interest passing under (i) exceed 20% of the total adjusted gross estate unadjusted for farm and nonfarm related property. To the Trust of Settlor's Daughter, the Trustee shall allocate and distribute (i) the marital residence situated at 300 Southgate, Anytown, Illinois, together with (ii) a reasonable and proportionate portion of the balance of the Trust Estate.

(a) In the event that the trust of Settlor's Daughter (calculated with reference to the total estates of the Settlor and Settlor's Spouse) is greater than the trust of Settlor's Son, then the Trustee shall allocate additional assets from the former's trust(s) to the latter's trust(s) so that each trust may be equalized. In the event that the share of Settlor's Son (calculated without reference to the farm real and personal property passing by reason of the time from 1988 to and through the date of distribution) is greater than the share of Settlor's Daughter then the Trustee shall allocate additional assets from the former's trust(s) to the latter's trust so that each trust may be reasonably equalized. It is my desire to treat my children fairly without absolaute necessity of equality and that such division and distribution represents to me a reasonable means of distributing my farming property so that it remains a viable economic entity.

(b) My Trustee is not bound by any rules of self-dealing, conflicts of interest, or undivided loyalty in carrying out the terms of my directives as set forth in this instrument.

(c) If any beneficiary of a trust shall in any manner, directly or indirectly, attempt to contest or oppose the validity of this trust, including any amendments, or commence or prosecute any legal proceeding of any kind in any court to set aside this trust prior to the distribution of all of the Trust Estate, then in such event such beneficiary and such beneficiary's descendants shall forfeit any right or interest in the Trust Estate. If any beneficiary shall successfully challenge the disposition set forth herein then all legal and other costs of carrying out the Settlor's general intent as expressed in this instrument shall be allocated to the said beneficiary.

(d) It is my intent and direction that my farmland, regardless of allocation, shall be farmed by RANDALL XXXXX or a descendant of his. To this extent, my Trustee is authorized and directed to enter into a Long Term Lease, not less than five years nor longer than ten years, by and between my son or his descendants and the owners of such land pursuant to this instrument. It is my request that such lease be on a 60-40 split with the landlord receiving 40% of the gross farm income and the tenant receiving 60% of the gross farm income subject to the payment of all expenses, but for real estate taxes and general liability insurance which shall continue to be paid for by the landlord, associated with the use of such farmland. [NOTE, however, that for some farm families a split of 70-30 may be more realistic. Also, that in southern Illinois, a 75-25 split seems more appropriate to some families.]

Price versus value

It was and is my simple position that treating the children equally is an emotional, management, and financial impossibility. Notwithstanding the fact the balance sheet notes significant value associated with the business' assets, the end result of the entire process is for one generation to provide another generation

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with a job, a pay check, nothing more and nothing less. How much one is willing to spend for a pay check depends in no small part on what he or she is worth to others. In the last couple of years, hog farmers, for example, have found that they would have been better compensated by working at McDonald's than in the pens.

Simply because two items carry the same price tag does not make them equal. This is probably true more so for agriculture than for other industries. Does an older tractor with a $10,000 price tag have the same value as a $10,000 certificate of deposit at the bank? It requires no work to receive income from the C.D. If the tractor sits idle, there is at best no income and potentially negative income when the costs of insurance, storage, and other expenses are factored in. Even if the tractor is used regularly, positive income is not guaranteed. A broken crankshaft, a blown motor, broken transmission, and the like can quickly take away any positive income, especially when the operator has limited mechanical abilities, tools, or desire.

The tractor and the C.D. become equal in value only if the tractor is sold and the earlier estimate of its value becomes reality. Can a strong case be made for the farmer leaving $200,000 of machinery to his active son and $100,000 in C.D.'s to his daughter? Personally, I think so. The counter-argument is made generally along the lines that the son may sell out a year later and pocket the difference. This too may not be all bad depending on what took place before the father's death. If this is not good enough, it is a relatively simple process to place the son's property into a five-year trust along with instructions to the trustee to equalize the two beneficiaries in the event that the property is sold within five years and the son changes occupations.

Quite often the valuation process overlooks what the business can afford to pay in setting appropriate values. What it can afford to pay depends upon the business profits less future capital needs. When a reasonable time frame is added in the true value of the business for succession purposes results.

Another way to view this process, non-main stream admittedly, begins by determining the amount of revenue which could be shifted each year into something else. For many of the businesses that I've worked with, this figure ranges between five and eight percent. If a time frame of five years is reasonable then a business with a million dollars of annual revenue has a value of from $250,000 to $400,000. If farmland is involved, then beginning with a per acre average yield profit may be helpful. At $50 per acre using five years produces a value of $250, $500 if ten years were committed to the buy-out process, $1,000 if twenty years are committed, none of these reflecting present valuations. These values are significantly different from the land prices now being seen around the state. If life insurance is to be used, then this form of valuation results in a lower insurance recommendation, which in turn lowers the amount of income that must be diverted towards premium payments. If the succeeding generation cannot realistically pay for it, then why do it?

The income can be adjusted according to a weighted average. Most often this is 50% for the current year, 30% for the preceding year, and 20% for the next preceding year. A five-year period can be substituted for the three. A pay-back period of more than ten years can be used but tends to discourage the active family member and often triggers financing problems for capital improvements and internal reinvestment. Whatever value is established for the business has to meet the economic needs of both the buyer and the seller.

If the difference between price and value arises during life, then a "gift" is involved. If it occurs at the time of death, then the higher of the two nearly always controls for federal estate tax purposes. The problem arises, however, when the time of payments and the amount of the payments called for by the actively farming children do not match the needs of the estate for quick settlement. To a certain extent section 6166 may be of help. In other situations, however, the help is often illusory.

* This article is reprinted from the September, 1996 issue of the *Agricultural Law* newsletter of the Illinois State Bar Association.

Federal Register *in brief*

The following is a selection of matter that were published in the *Federal Regis ter* from September 23 through Octobe 15, 1996.

1. CCC; Conservation Reserve Progran — long-term policy; proposed rule. 6 Fed. Reg. 49697.

2. CCC; Market Access Program F 1997 funds availability; applications du 12/16/96. 61 Fed. Reg. 51880.

3. CCC; Agreements of the develop ment of foreign markets for agricultur commodities; final rule; effective date 1 11/96. 61 Fed. Reg. 53303.

4. CCC; Environmental Quality Incer tives Program; proposed rule; commen due 11/25/96. 61 Fed. Reg. 53574.

5. USDA; New York State Agricultur Nonpoint Sources Abatement and Cor trol Matching Grant Program; exclusio from income under section 126 of I.R.C notice of determination. 61 Fed. Re 50800.

6. APHIS; Interstate movements imported plants and plant parts; propose rule; comments due 11/18/96. 61 Fed. Re 51376.

7. PSA; Timely service and open seaso pilot programs; notice; effective date 11/ 96. 61 Fed. Reg. 51674.

8. NRCS; FSA; Announcement of rums on interim rules on conservatio provisions of FAIR Act of 96; 61 Fed. Re 52671.

9. FCIC; Group risk plan of insuranc proposed rule; comments due 11/22/9 61 Fed. Reg. 52717.

—*Linda Grim McCormick, Alvin, T*

Last year's AALA writers

During the past 12 months, the following individuals contributed articles to th *Agricultural Law Update.*

Sidney Ansbacher, Jacksonville, FL
David C. Barrett, Jr., Washington, D.C.
Lonnie Beard, Fayetteville, AR
John C. Becker, University Park, PA
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Michael R. Dicks, Stillwater, OK
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The AALA wishes to thank these in viduals for sharing their time and exp tise with the membership.

—*Linda Grim McCormick, Edit Alvin, T*

USDA REORGANIZATION ACT/*Continued from page 3*

or otherwise." Although the FmHA (now the FSA) was not represented by counsel at the NAD hearing, the court concluded that this element of an EAJA "adversary adjudication" was satisfied in two respects. First, the court noted that the denial of loan servicing had been based on an OGC opinion. In the court's view, this meant that the "position of the United States," a phrase synonymous with the "position of the agency," was essentially framed by the OGC.

Second, the court noted that FmHA representatives had participated in the hearing as advocates for the agency. These advocates, according to the court, were within the "or otherwise" portion of the EAJA definition. In this regard, the court relied on *Pollgreen v. Morris*, 911 F.2d 527, 533 (11th Cir. 1990), for the proposition that "'otherwise' is ... appropriately read in the context of the entire clause to refer to an individual who represents the position of the United States in a manner similar to that of counsel."

The court held that the FmHA's position was not "substantially justified" within the meaning of the EAJA. In addition to remanding the matter to the USDA NAD for a determination of the amount of attorneys' fees to be awarded, the court set aside the interim final rule that declared that the EAJA does not apply to NAD proceedings.

Like the USDA NAD statutory scheme, the statutory exhaustion of administrative remedies requirement enacted in the 1994 USDA Reorganization Act has been the subject of recent judicial interpretation. That statute provides:

> Notwithstanding any other provision of law, a person shall exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring an action in a court of competent jurisdiction against—
> (1) the Secretary;
> (2) the Department; or
> (3) an agency, office, officer, or employee of the Department.

7 U.S.C. § 6912(e).

Section 6912(e) was enacted at the USDA's request in response to *Darby v. Cisneros*, 113 S. Ct. 2539 (1993). *Darby v. Cisneros* relied on APA section 704 to hold that the federal courts could not make exhaustion of administrative remedies a prerequisite for judicial review of otherwise final agency action unless a statute mandated exhaustion or the agency had promulgated a legislative rule requiring exhaustion and making the adverse determination inoperative pending the outcome of the administrative appeal. *Id.* at 2548.

The judicially-created exhaustion of administrative remedies doctrine had several exceptions, exceptions that may not apply to statutory exhaustion requirements. For example, in *Calhoun v. USDA Farm Service Agency*, 920 F. Supp. 696 (N.D. Miss. 1996), the plaintiff argued that questions of statutory interpretation, an often recognized exception to the judicially-created exhaustion requirement, were excepted from the exhaustion requirement of section 6912(e). The court, however, disagreed. It held that exception did not apply to a statutorily-created exhaustion requirement.

On the other hand, in *Gleichman v. United States Dep't of Agric.*, 896 F. Supp. 42 (D. Maine 1995), the court held that section 6912(e) admitted a constitutional exception. In *Gleichman*, the plaintiffs challenged their suspensions from programs administered by the USDA's Rural Housing and Community Development Service on two constitutional grounds. Their first claim was that the suspension procedures violated their substantive and procedural rights to due process under the Fifth Amendment. In addition, the plaintiffs claimed that their suspensions were in retaliation for their exercise of their First Amendment rights.

Relying primarily on *Rafeedie v. INS*, 880 F.2d 506 (D.C. Cir. 1989), the court held that plaintiffs' first claim was not subject to section 6912(e) for it amounted to a substantive attack on the content of the agency's statute and regulations. As to the plaintiffs' second claim, however, the court held it was subject to section 6912(e) because that claim concerned the agency's motivations and reasons for its actions. The court concluded that these issues might be resolved in the administrative appeal process whereas the agency could not decide the constitutionality of its governing statute or its own regulations.

—Christopher R. Kelley, Of Counsel,
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State Roundup

INDIANA. *Whether a testamentary gift included cattle and growing crops.* In *Meyer v. Meyer*, No. 82A04-9602-CV-45, 1996 WL 384643 (Ind. App., June 20, 1996), the Indiana Court of Appeals Construed a will to determine whether a testamentary gift included cattle and growing crops.

August Meyer's last will and testament included the following clause: "If my beloved wife shall predemise me I then give to my nephew Roger Alan Meyer my entire Farm including the Land, Buildings, and Equipment if he takes care of us until our demise." August died on June 10, 1994, his wife having died in 1993. There after a dispute arose as to the above clause. Roger Meyer argued that the phrase "entire Farm including Land, Buildings and Equipment" included cattle and growing crops. The trial court ordered that the cattle and the growing crops were not included in the testamentary gift.

The court of appeals observed that cattle are personal property. As such, cattle are not included in the definition of farm as found in Black's Law Dictionary. Further the court noted that the term "including" is ordinarily used as a term of limitation, not enlargement. However, the appellate court found that growing crops follow title to the realty without an agreement to the contrary. "The concept that growing crops are part of the land is so embedded in our law that August must have intended to include growing crops within the meaning of 'farm'." The trial court was affirmed in part and reversed in part.

—Scott D. Wegner, Beauclair & Cook,
Bismarck, North Dakota

GEORGIA. *Trover action for return of cow.* The Georgia Court of Appeals recently considered a cow owner's trover action against a neighbor for return of a cow and for damages. *Simmons v. Bearden*, No. A96A1427, 1996 WL 408546 (Ga. App. July 23, 1996).

Simmons and his neighbor Bearden have a lengthy history of disputes. On April 14, 1990, a hereford heifer belonging to Simmons crossed a broken fence line and wandered onto Bearden's property. Simmons did not directly request the return of his cow but instead brought a trover action against Bearden for return of the cow and for damages. Following a bench trial, the trial court awarded Simmons the return of the heifer. However, the court denied the request for damages, concluding that Simmons' failure to identify the cow to Bearden and request its return prior to trial precluded his right to damages.

The court of appeals affirmed, noting that to receive damages, Simmons was required to prove either actual conversion or a demand for return of the property and Bearden's failure or refusal to deliver. *Graham v. State Street Bank*, 142 S.E.2d 99 (Ga. 1965).

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ADDRESS
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Agricultural Law Update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Faculty position accouncement: endowed chair in rural-urban policy

The Department of Agricultural Economics in the College of Food, Agricultural, and Environmental Sciences at The Ohio State University, Columbus, Ohio, seeks a distinguished professor in rural-urban policy. This is a tenure track faculty position with extension/outreach, research, and teaching expectations.

A distinguished professor is sought to provide academic and programmatic leadership on issues related to the economic, legal and public policy dimensions of the rural/urban interface: competition for resources, farming on the urban fringe, quality of residential life, externalities and environmental regulations, farm management and public administration, and the industrialization of agriculture. Earnings of the endowment will support activities of the Chair. The Chairholder will provide leadership for a program composed of applied research, outreach, and teaching in the College. The individual will interact with other academic departments within the University, peers at other universities, and with rural and urban leadership outside the University.

A candidate must be an established professional with demonstrated capacity in the subject matter area of public policy, rural-urban issues, and/or legal questions of farm structure and environmental impacts and regulations. An earned Ph.D. in agricultural economics, economics, public policy, and/or a law degree (LLB or JD) with formal training in economics is required. The candidate must be a present or past holder of the rank of associate or full professor or equivalent.

The application deadline is November 15, 1996 or until a suitable candidate is selected. The starting date for the position is July 1, 1997. The salary is commensurate with qualifications.

Applicants should send a letter of interest and curriculum vita to:

Dr. Fred Hitzhusen, Chair, Rural-Urban Policy Search Committee, Department of Agricultural Economics, The Ohio State University, 2120 Fyffe Road, Columbus, Ohio 43210-1067. Phone - 614/292-6244; Fax - 614/292-4749.