Agricultural Law Update

VOLUME 15, NUMBER 1, WHOLE NUMBER 170 NOVEMBER 1997

Official publication of the American Agricultural Law Association

INSIDE

Solicitation of articles: All AALA members are invited to submit articles to the Update. Please include copies of decisions and legislation with the article. To avoid duplication of effort, please notify the Editor of your proposed article.

IN FUTURE ISSUES

Attorneys' fees in NAD hearings

Two North Dakota brothers have won the right to claim compensation for their costs and attorneys' fees incurred in successful USDA National Appeals Division (NAD) appeals. Their victory opens the door to all farmers and ranchers in the region covered by the Eighth Circuit Court of Appeals—North Dakota, South Dakota, Minnesota, Iowa, Nebraska, Missouri, and Arkansas—to try to recover such costs after a successful NAD appeal. It is yet unclear whether the ruling will lead to a general change in USDA policy that would allow farmers and ranchers in other states to bring such claims.

The Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, provides that claims for costs and fees may be made for any adjudication brought under the federal Administrative Procedure Act (APA), found at 5 U.S.C. § 554. The APA establishes procedures and requirements for "on the record" adjudications by federal agencies. USDA has always contended, and the NAD regulations so state, that the APA and EAJA do not apply to NAD appeals. The Lanes' case was, according to USDA, the first to challenge USDA's NAD regulations barring EAJA claims.

In 1992 brothers Dwight and Darvin Lane applied for delinquent loan servicing from FmHA. After FmHA discovered possible loan agreement violations, USDA's Office of General Counsel (OGC) issued a "bad faith" determination for each brother, and the Lanes' applications for loan servicing were denied. The Lanes appealed the bad faith determinations.

While the appeals were pending, USDA was reorganized, and the Lanes' appeals were transferred to the new NAD. After the transfer, a NAD hearing officer ruled in the brothers' favor, finding "serious flaw[s]" in the OGC report. As successful appellants, the Lanes then applied for reimbursement of their fees under EAJA. NAD denied the applications without submitting them to the hearing officer for review. In rejecting the EAJA claim, the agency relied on then-proposed (now final) USDA regulations stating that the APA and EAJA do not apply to NAD appeals.

The Lanes sought judicial review of the rejection of their EAJA application and the USDA regulation that was the basis for the denial. In June, 1996, United States District Judge Rodney Webb of the District of North Dakota issued a ruling in the Lanes' favor, finding that the APA and EAJA do apply to NAD appeals and overturning the USDA regulation that states the contrary. USDA appealed to the Eighth Circuit Court of Appeals, continuing to argue that the APA and EAJA are not

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*Heifer raising contracts**

Changes taking place within the U.S. dairy industry have spawned several efforts to reexamine the industry to look for opportunities that will enable dairy producers to more efficiently utilize their land, animal, human, and mechanical inputs. An example of this has been the effort to break down a typical dairy production enterprise into a series of the essential tasks that make up a fully operational business. Once the essential tasks are identified, each task is then examined closely to determine if the activity can be more effectively performed as a specialized activity, distinct or separate from all other tasks. This process of task specialization is common to manufacturing and other industries and recognizes that fundamental changes are taking place in the agricultural sector today. In this article, a number of important legal issues arising from the decision to enter into a contract to raise dairy heifers for replacement animals in a producing dairy herd are considered.

Type of farmer generally involved

Based on the experiences of farmers from three distinct regions of Pennsylvania, it seems that the typical farmer who raises heifers for someone else is a farmer who uses this activity as a sideline enterprise, or as a part-time activity to supplement

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applicable to NAD appeals.

In *Lane v. USDA*, 120 F.3d 106 (8th Cir. 1997), decided July 14, 1997, a three-judge panel of the Eighth Circuit Court of Appeals affirmed Judge Webb's ruling that the APA and EAJA do apply to NAD hearings and that successful appellants may claim costs and attorneys' fees from the government. The court considered the elements of EAJA and APA applicability and determined that NAD hearings clearly fall within the intended scope of those laws.

Only parties to adjudications conducted under section 554 of the APA are eligible for EAJA fee reimbursements. Therefore, for EAJA compensation to be available for NAD hearings, those hearings must be shown to fall under section 554 of the APA. There are three prerequisites for a government proceeding to come under section 554. The proceeding must be an adjudication, there must be statutory opportunity for a hearing, and the hearing must be on the record.

The Eighth Circuit found that NAD hearings meet all three prerequisites: (1) NAD hearings are agency proceedings for the purpose of formulating an order based upon resolution of disputed facts; (2) once a NAD hearing is requested by a participant, the hearing is mandatory for the agency; and (3) NAD orders are based upon evidence presented by the agency and the participant in a trial-type process.

USDA argued that even if NAD proceedings satisfied the requirements under section 554 of the APA, the NAD statute had superseded the APA and taken NAD proceedings out of the APA realm, thereby precluding EAJA claims. The Eighth Circuit rejected this argument, noting that the APA was enacted to provide uniform and comprehensive procedures for federal agency adjudications. The panel quoted from the APA to the effect that only express language in subsequent statutes would be held to modify or supersede the APA. Courts cannot infer—as USDA here urged them to do—that the APA has been superseded.

The court rejected USDA's attempt to draw an analogy to the United States Supreme Court's ruling in *Marcello v. Bonds*, 349 U.S. 302, 75 S. Ct. 757, 99 L.Ed. 1107 (1955), that deportation hearings fall outside of the APA. They found that the Supreme Court's ruling in *Marcello* was based on the Immigration and Nationality Act's comprehensive and express preemption of the APA in the deportation context. No such statutory provision could be found for NAD proceedings; therefore the APA applies.

EAJA provides that fees will not be awarded where the adjudicator finds that the government's position in the dispute was substantially justified. On review, Judge Webb found that the NAD hearing officer made no such finding, USDA had not argued the point, and the hearing officer's order contained language that would, if necessary, allow Judge Webb to make an independent finding of "no substantial justification." Judge Webb found that the Lanes were entitled to recover their costs and remanded the case to NAD for a determination of the amount to be paid.

On appeal, the Eighth Circuit reversed Judge Webb's finding as to the lack of substantial justification, holding that the NAD hearing officer had not addressed the justification of USDA's position because the agency had rejected the EAJA applications without submitting them to the hearing officer. The panel found that the hearing officer must consider the merits of an EAJA application before the application could be considered under judicial review. The fee application was remanded to NAD for a determination of whether FmHA's position against the Lanes was substantially justified.

It is not certain what the effect of the ruling in *Lane v. USDA* will be for NAD appeals brought by farmers and ranchers outside the Eighth Circuit. Although the court interpreted generally applicable federal laws and overturned a federal NAD regulation, the ruling is not binding on USDA in any states outside that circuit.

USDA may decide to accept the ruling and change the regulation to the benefit of farmers and ranchers nationwide, or it may continue to deny EAJA applicability and reject claims for costs and attorneys' fees in states outside the Eighth Circuit. Suits by farmers and ranchers in the other circuits may bring different outcomes, resulting in different EAJA eligibility from region to region.

—Karen R. Krub,
Farmers' Legal Action Group, Inc. (FLAG),
St. Paul, MN

Editor's note: Appreciation is extended to FLAG for sharing this article with the Update. A related article discussing *Lane* will appear later this month in the forthcoming issue of the newly reformatted *Farmers Legal Action Report*. For information about this *Report*, call 612-223-5400.

Conference Calendar

Environmental issues in animal feedlots
November 18, 1997, St. Louis Airport Hilton, St. Louis, MO.
Topics include: state and federal regulation of feedlots; common law legal actions; feedlot nuts and bolts and compliance issues; and using feedlot wastes as valuable resources.
Sponsored by: ABA Section of Natural Resources, Energy, and Environmental Law, Special Committee on Agricultural Management, and AALA in association with Council for Agricultural Science and Technology.
For more information, call 312-988-5724.

Agricultural Law Update

VOL. 15, NO. 1, WHOLE NO. 170 November 1997

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

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If you desire a copy of any article or further information, please contact the Law School Library nearest your office.

Farmers Legal Action Group (FLAG) of St. Paul has an interesting and worthwhile site on the Internet. FLAG has posted, among other documents and links, information relating to Farm Service Administration programs, disaster relief, and other programs relevant to the smaller farmer. The FLAG site is well worth reviewing by agricultural lawyers. The site URL is http://www.flaginc.org/

—Drew L. Kershen, Professor of Law, The University of Oklahoma, Norman, OK

Federal Register in brief

The following is a selection of items that were published in the *Federal Register* from September 17 to October 16, 1997.

1. NRCS; Notice of proposed change to NRCS's National Handbook of Conservation Practices. 62 Fed. Reg. 48983.

2. NRCS; Wildlife Habitat Incentives Program; final rule; effective date 9/19/97. 62 Fed. Reg. 49358.

3. FCA; Capital adequacy and related regulations; miscellaneous amendments; proposed rule; comments due by 11/24/97. 62 Fed. Reg. 49623.

4. FCA; Cumulative voting by shareholders; final rule; effective date 10/24/97. 62 Fed. Reg. 49907; correction 50984.

5. FCA; Loan underwriting; final rule. 62 Fed. Reg. 51007.

6. FCA; Leasing activities; proposed rule; comments due 12/15/97. 62 Fed. Reg. 53581.

7. Farm Service Agency; Tree Assistance Program; interim rule. 62 Fed. Reg. 50849.

8. USDA; Office of Procurement and Property Management; agriculture acquisition regulations; preference for selected biobased products; notice of proposed rule; comments due 12/5/97. 62 Fed. Reg. 52081.

9. USDA; Dairy tariff-rate import quota licensing; proposed rule; comments due 11/28/97. 62 Fed. Reg. 53580.

10. Foreign Agricultural Service; Public briefing on development of a U.S. action plan on food security. 62 Fed. Reg. 52681.

11. CCC; Regulations governing the financing of commercial sales of agricultural commodities; final rule; effective date 11/10/97. 62 Fed. Reg. 52929.

12. CCC; Noninsured Crop Disaster Assistance Program; aquaculture species; interim rule; effective date 10/17/97. 62 Fed. Reg. 53929.

—Linda Grim McCormick, Alvin, TX

Pick-your-own statutes and their alteration of tort liability

By Terence J. Centner

Many agricultural activities are dangerous, and changes in contract and tort liability have encouraged lawsuits against agricultural producers and others in the agricultural sector. Legislatures have employed Good Samaritan statutes, recreational use statutes, and sport activity statutes[1] to help deserving persons to avoid liability for another's mishap. This article briefly examines new statutory provisions called the "pick-your-own" statutes, introduced to lessen the liability of producers who allow the public to come onto their property to harvest crops. The pick-your-own statutes are a part of a growing number of statutory provisions enacted to reduce liability of persons involved in business activities in a manner previously available only for persons involved in governmental or charitable activities.

Five states have adopted pick-your-own statutes that contain provisions addressing injuries to persons harvesting agricultural and farm products for their personal use: Arkansas,[2] Massachusetts,[3] Michigan,[4] New Hampshire,[5] and Pennsylvania.[6] As with many statutes providing some type of Good Samaritan protection, the pick-your-own statutes attempt to limit liability in qualifying situations. New Hampshire was the first state to adopt these statutory provisions with the purpose of encouraging agriculture.[7] While the spread of pick-your-own statutes has been slow, recent legislative action reveals an interest in these statutory provisions.[8]

Several major distinctions exist among the state provisions that were enacted to achieve similar objectives, with the major difference being the immunity strategy. The most prevalent strategy grants immunity unless a condition creates an unreasonable risk accompanied by enumerated prerequisites.[9] A second egregious misconduct strategy provides an exception from liability whenever the person did not engage in willful, wanton, or reckless conduct.[10]

Qualifications for defendants

An initial issue concerning qualification for statutory protection involves the relationship of the defendant with the premises. While the New Hampshire statute limits qualification to the owners of land, many current pick-your-own statutes cover other persons, including operators, occupants, tenants, lessees, and employees. Given leasing and business arrangements prevalent in agricultural production, the New Hampshire limitation concerning owners probably fails to offer protection to needy individuals involved in pick-your-own operations.

A second qualification involves the type of land upon which the accident occurred. The Massachusetts statute applies only if the injury or damage occurred on a farm. This raises a question of whether a small pick-your-own operator, such as a person allowing the public to pick apples for some extra income, would qualify as an owner of a farm? This would depend on the definition of a farm. A part-time operator may not have a farm, but rather the business may be a hobby.

The liability exception of the New Hampshire statute is limited to an owner of land, raising a question whether general tort law would apply to accidents in huildings of a pick-your-own operation. The other pick-your-own provisions specify land or premises as locations where causes of action cannot be maintained if the statutory conditions are met. The type of land covered by the statute is critical. Given that statutory exceptions from liability may be narrowly construed, it is likely that the qualifications of the New Hampsbire provisions may fail to provide meaningful immunity to operators for some injuries.

Immunity under an unreasonable risk strategy

The Arkansas, Michigan, and Pennsylvania pick-your own statutes provide that persons are not liable for injuries except when enumerated circumstances are met, and the injuries were caused by a condition involving an unreasonable risk.[11] These statutes may be said to have adopted an unreasonable risk strategy. Prerequisites, taken from section 343 of the Restatement (Second) of Torts concerning dangerous conditions known to or discoverable by possessors of property who cause harm to invitees, are specified by the statutes.[12] A dangerous condition is not required, only a condition that involves an unreasonable risk. Moreover, the Arkansas and Michigan statutes delineate an additional requirement concerning the plaintiff's knowledge of the condition or risk.

In the same manner as section 343 of the Restatement, the pick-your-own statutes prescribe liability to a possessor only if enumerated prerequisites are met. Conditions involving a danger that is known or obvious should not lead to liability unless the possessor of land should anticipate harm despite knowledge of the danger or the obviousness of the condition. If any single statutory prerequisite is not met, a defendant continues to qualify for the immunity provided by the pick-your-own statute despite the existence of a condition involving an unreasonable risk. A plaintiff may establish a cause of action by alleging sufficient facts to meet the statutory prerequisites.

After establishing the initial prerequisite of an unreasonable risk, two circumstances concerning the defendant must be substantiated for the second and third prerequisites. The second prerequisite relates to the defendant's knowledge of a condition or a risk; the defendant must have known or had reason to know of a condition or risk that caused an injury before such defendant will be disqualified from the statutory immunity. The condition about which the defendant knew or should have known would involve an unreasonable risk of harm. Evidence of constructive knowledge of the condition or risk by a defendant would meet this prerequisite.

For the third prerequisite, it must also be shown that the defendant failed to exercise reasonable care with respect to the condition or risk. If the defendant exercised reasonable care to make the condition safe or to warn the plaintiff of the condition or risk, the defendant continues to qualify for the statutory dispensation. Conversely, an allegation that the defendant failed to use reasonable care would present a jury issue and preclude summary judgment for a pick-your-own operator. Thus, under the pick-your-own statutes involving unreasonable risks, actions in negligence may be maintained for some conditions.

Under the Arkansas and Michigan pick-your-own statutes, a fourth prerequisite is required to establish liability in cases where a condition involves an unreasonable risk. This prerequisite consists of the plaintiff's absence of knowledge of the condition or risk that caused the injury. A plaintiff who did not know and had no reason to know of the condition involving an unreasonable risk of harm is estopped from maintaining a lawsuit for injuries under these two pick-your-own statutes.

Terence J. Centner, Professor, The University of Georgia. A more in-depth analysis of these provisions may be found in 30 U. Mich. J. Law Reform 743 (1997).

This requirement is beyond the requirements of sections 343 and 343A of the Restatement (Second) of Torts and means that it may be more difficult for a plaintiff to qualify for relief. However, the requirement does not avert the possibility of a plaintiff presenting facts of conditions involving an unreasonable risk that would present issues to be determined by a jury.

Perhaps the most important aspect of the unreasonable risk pick-your-own statutes (Arkansas, Michigan, and Pennsylvania) is that they probably establish an affirmative duty beyond what a possessor of land owes licensees. Because of the statutory provisions, possessors have a duty to exercise reasonable care in making premises safe or in warning invitees of conditions involving an unreasonable risk.

If evidence exists of constructive knowledge by the defendant of a condition involving an unreasonable risk, a breach of reasonable care to make the condition safe or to warn the injured party of the condition, a plaintiff could establish a cause of action for an injury that would need to be heard by the trier of fact. Given these conditions, it is possible for a defendant who fails to exercise reasonable care to incur liability despite the existence of a pick-your-own statute following the unreasonable risk strategy. The negligence would involve a breach of reasonable care to make the condition safe or to warn the injured party of the condition.

Immunity except for egregious misconduct

The Massachusetts and New Hampshire statutes provide that persons are not liable for injuries to persons engaged in pick-your-own activities, but specifically provide that the statutory provisions are not applicable if the defendant engaged in willful, wanton, or reckless conduct. The Massachusetts statute provides qualifying persons shall not be liable in the absence of willful, wanton, or reckless conduct on the part of said owner, operator, or employee.[13] This strategy pattern may be called an egregious misconduct strategy, with egregious being any one of three different types of conduct: willfulness, wantonness, or recklessness.

Under egregious misconduct provisions, a defendant who is simply negligent or grossly negligent may qualify for the immunity and avoid liability for injuries or property damage. If willful, wanton, and reckless conduct goes beyond gross negligence, then an allegation of gross negligence would be insufficient to raise a cause of action. If, however, a plaintiff presents allegations that a defendant engaged in egregious misconduct, such allegation could present an issue for trial. The allegations would need to be true and sufficient to show egregious conduct, without any defense being applicable for the defendant. Liability under this statutory command may be similar to the duty of care owed to licensees to refrain from wantonly or willfully causing injury.

State courts have interpreted other statutory provisions to ascertain the meaning of willful, wanton, and reckless misconduct. While willful conduct has been described to be action intended to do harm, if a person intentionally persists in conduct involving a high degree of probability that substantial harm would result to another, the conduct may be wanton or reckless. Willful and wanton conduct often involves a conscious disregard for the consequences regarding the safety of other persons. Bare allegations of willfulness, or allegations of simple negligence, do not suffice to preclude summary judgment whenever a plaintiff needs to establish willful misconduct.

Wanton conduct is so reckless or so charged with indifference to the consequences that it is equivalent in spirit to actual intent. Reckless conduct may be defined through state case law, and may vary from state to state. The reckless disregard of safety is generally less than malicious conduct.

The Massachusetts and New Hampshire pick-your-own statutes, with their egregious misconduct strategy, offer greater protection for qualifying defendants than the unreasonable risk statutory strategy. As noted under the unreasonable risk strategy, a pick-your-own operator may incur liability for inappropriate conduct with respect to a condition involving an unreasonable risk. Given the nature of willful, wanton, and reckless conduct, a pick-your-own statute incorporating an egregious misconduct strategy should shield a pick-your-own operator from liability for some inappropriate conduct involving an unreasonable risk.

Finding a legislative strategy

The analysis of the pick-your-own statutes presents several issues that may deserve attention by legislatures. Although statistics suggest that agricultural activities are dangerous, many pick-your-own activities do not involve the dangerous machinery associated with many farm accidents. Lacking any meaningful data concerning accidents and lawsuits involving pick-your-own operations, it may be claimed that pick-your-own operations have not shown a need for legislative relief. Yet, it also may be argued that a legislative body may find merit in taking action to protect this beneficial activity. The legislature may view pick-your-own operations as valuable to consumers because the operations provide lower prices and fresher products. Moreover, supporting the activity encourages small business operations.

Three models may be used in the development of provisions for pick-your-own operations: Good Samaritan, recreational use, and sport activity provisions. A Good Samaritan strategy has been employed in the development of pick-your-own provisions. The two different pick-your-own strategies reveal, however, major distinctions from the Good Samaritan model. The distinctions are the absence of a donation and the absence of an emergency.

Pick-your-own statutes do, however, have similarities with the recreational use statutes. Both sets of statutes adopt standards of care. The unreasonable risk strategy employs a standard of the absence of reasonable care for conditions involving an unreasonable risk. The egregious misconduct strategy retains liability whenever the defendant engaged in willful, wanton, or reckless conduct. A similarity with sport activity statutes is that a person charging for activities can qualify for the statutory dispensation.

Pick-your-own statutes that adopt an unreasonable risk strategy establish an affirmative duty to exercise reasonable care in making premises safe. The defendant must have failed to exercise reasonable care with respect to the condition or risk. Thereby, the Arkansas, Michigan, and Pennsylvania statutes, following the unreasonable risk strategy, allow some cases based on ordinary and gross negligence. This means that these statutes may not offer as much relief for negligence actions as some recreational use statutes. It may be argued that pick-your-own statutes incorporating an unreasonable risk strategy fail to provide adequate additional protection to pick-your-own operations.

Pick-your-own statutes adopting an egregious conduct strategy provide defendants immunity from some injuries. The question that may be raised is whether a sport activity statute might offer a more appropriate strategy for a pick-your-own statute. The sport activity statutes address the assumption of risk and place responsibilities on participants. Under sport activity provisions, participants bear the burden of damages from some injuries to reduce the liability of sport operators. For example, ski statutes immunize the defendant from liability from risks inherent in the sport of skiing.[14]

Pick-your-own statutes could be drafted in a similar manner to place greater responsibility on consumers to take care when engaging in activities involving picking fruits, vegetables, and other products to limit the liability of pick-your-own op-

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erators. This could include duties for persons picking-their-own products or an expanded description of the assumed risks. While existing pick-your-own provisions incorporating an egregious misconduct strategy may be expected to reduce lawsuits and the liability of pick-your-own operators, the sport activity statutes suggest that stronger protection is available.

[1]*Sport activities that may have special statutes include horseback riding (e.g., Ga. Code Ann. §§ 4-12-1 to -4 (Michie 1995)), skiing (e.g., Colo. Rev. Stat. §§ 33-44-101 to -114 (West 1995 & Supp. 1996)), roller skating (e.g., 745 ILCS §§ 72/1 to 72/25 (West's Smith-Hurd Supp. 1996)), whitewater rafting (e.g., W. Va. Code §§ 20-3B-1 to -5 (1996)), hockey facilities (745 ILCS §§ 52/1 to 52/99 (West's Smith-Hurd Supp. 1996)), watching baseball (e.g. Colo. Rev. Stat. Ann. § 13-21-119 (West Supp. 1996)), and hiking (e.g., Idaho Code §§ 6-1201 to -1206 (1990)).*

[2]*Ark. Stat. Ann. § 18-60-107(b & c) (Michie Supp. 1996).*

[3]*Mass. Gen. Laws Ann. ch. 128, § 2E (Supp. 1995).*

[4]*Mich. Comp. Laws Ann. § 324.73301(5 & 6) (West Supp. 1996).*

[5]*N.H. Rev. Stat. Ann. § 508:14 (1983 & Supp. 1995).*

[6]*Pa. Stat. Ann. tit. 42, § 8339 (Purdon Supp. 1996).*

[7]*N.H. Rev. Stat. Ann. § 508:14 (1983 & Supp. 1995). The pick-your-own provisions were adopted in 1981. Id.*

[8]*Legislative bills include: 1996 Ct. H.B. 5524; 1996 Mo. H.B. 1591; 1996 N.J. A.B. 475; 1996 N.J. S.B. 1332; 1995 N.Y. S.B. 1545; 1996 Vt. S.B. 301.*

[9]*Ark. Stat. Ann. § 18-60-107(b) (Michie Supp. 1996); Mich. Comp. Laws Ann. § 324.73301(5) (West Supp. 1996); Pa. Stat. Ann. tit. 42, § 8339(a) (Purdon Supp. 1996).*

[10]*Mass. Gen. Laws Ann. ch. 128, § 2E (Supp. 1995); N.H. Rev. Stat. Ann. § 508:14 (1983 & Supp. 1995).*

[11]*Ark. Stat. Ann. § 18-60-107(b) (Michie Supp. 1996); Mich. Comp. Laws Ann. § 324.73301(5) (West Supp. 1996); Pa. Stat. Ann. tit. 42, § 8339(a) (Purdon Supp. 1996).*

[12]*Restatement (Second) of Torts § 343 (1965)*

[13]*Mass. Gen. Laws Ann. ch. 128 § 2E (Supp. 1995).*

[14]*See, e.g., Northcutt v. Sun Valley Co., 787 P.2d 1159, 1160 (Idaho 1990).*

HEIFER/*Continued from page 1*

income from some other source. As will be mentioned below, the economics of heifer raising situations is not well developed, but based on current experience the financial reward to farm participants is not significant. If there is not a significant economic reward, why would farmers choose to be involved? The answer seems to be that despite the lack of economic reward, participants become involved because they simply like the work and enjoy doing it. If facilities are available, it is an activity that people find enjoyable.

What is the essence of the agreement?

The answer is generally found in two types of arrangements.

In the first type of arrangement, the animal owner releases possession and control of a heifer calf to someone else who agrees to raise it to maturity, which is defined on the basis of either time (generally 700 days after birth) or physical development of the animal (generally 1,200 pounds).

Either of these performance conditions requires clear statement and expression in an agreement if it is to provide meaningful guidance and direction to the parties. The arrangement may start soon after the animal is born and ready to be placed with the caretaker, or the original owner may transfer animals at designated points in time. To provide a sufficient number of animals to make the enterprise economically practicable, a caretaker may require an owner to provide animals periodically over the life of the agreement. In this arrangement, the animal owner can agree to pay the caretaker a fee per day to raise the animal to the determined maturity date. In addition to the basic financial terms, the parties can negotiate for bonus or penalty terms if the party's performance meets conditions which the parties designate in their agreement. Alternatively, the owner's obligation to compensate the caretaker may be based on the caretaker's performance during the contract period and the obligation to perform may not arise until the caretaker has fully performed the agreement. Typically a dairy heifer is ready to join a producing herd at 23 months of age. Therefore, a caretaker's responsibility may run over a period of nearly two years.

While the animal is in the caretaker's possession, the caretaker is responsible to feed, manage, transport, and generally care for the animal. Providing specific feed for the animal may be the obligation of either the owner or the caretaker. Whoever is obligated to provide specified feed bears the risk that the supply and quality of the feed will be adequate to fulfill the purpose of the agreement, as well as the economic risk that price fluctuations may make the purchase of replacement feed an unattractive option to consider. Whoever bears this risk should manage it as effectively as possible.

In most situations where a caretaker is obligated to raise the animal for a fixed period, the caretaker is responsible for interim veterinary care and to deliver the animal in a bred condition. This creates an additional obligation for the caretaker to clarify what is intended as interim care and to assure that the animal is properly bred using artificial insemination means. Selection of the sire may be under the control of the animal owner, or under the supervision of a veterinarian who is responsible to one party or the other. Under this arrangement, the party to whom the veterinarian is responsible bears the cost of the veterinarian's care. Important questions in this area are, "What should happen to the obligations of the agreement if the animal simply cannot be bred? Who should bear the loss of the inputs which have been put into the animal in an unsuccessful attempt to meet the performance conditions of the agreement?

An alternative approach is to have the owner of a heifer calf sell her to someone who agrees to raise the animal until maturity. Under this approach, the original owner may retain the right to purchase the animal at her maturity at a fixed price set in the agreement or a price that is set by a formula in the agreement itself. In this arrangement, the terms of the original transfer would apparently transfer title of the animal to the caretaker. As the party who accepts the animal now becomes the titled owner of it, the original owner effectively shifts away all risk of loss during the raising period in return for a contract right to purchase the animal in the future. Where the original owner does not seek such contractual rights to reacquire the animal, the relationship between the owner and the purchaser of the animal is essentially an independent business agreement.

Foreseeable or likely problems to be addressed in the agreement

A principal concern ought to be the caretaker's ability to deliver an animal that conforms to performance standards that are clearly stated in the agreement. This concern translates into evaluating whether the caretaker has the facilities, experience, judgment, and knowledge to fulfill the terms of the contract. If the caretaker's ability to perform is affected by factors that are beyond his control, such as an animal that will not breed, should the caretaker bear a loss arising from failing to meet the standard when the animal itself is biologically or genetically unable to play its part in meeting the standard? Should the party who is out of possession be given an opportunity to inspect the animals to determine their general conditions while under the possession and control of the other party? If a right of inspection is granted, what impact should it have on either party's ability to object to or defend against claims that the standard of performance is not met being met? In cases where a party's performance, or failure to perform, would be readily apparent, the opportunity to inspect may uncover problems early enough to remedy them to the satisfaction of both parties. Providing for a right of inspection may be interpreted as an indication that trust is lacking, but to a party who takes contract obligations se-

riously, the provision should pose little practical problem.

While being raised, the animals' health is generally a factor that can be influenced by the initial condition of the animals and by management practices of the caretaker If animals under a caretaker's control come from several different sources, contracting communicable diseases is of concern. This concern can be addressed by provisions limiting the number of animals from different sources that can be raised in a group or by a provision that limits responsibility of the caretaker to only specific kinds of problems that could arise, or limits the financial responsibility the caretaker may have. An important point to remember is that the animals may contract a disease that will not be detected until much later than the initial term of the contract. The parties should address the question of responsibility in the event this situation arises.

If death, serious injury, or communicable disease occur during this period, should this occurrence be sufficient to relieve the other party of the obligation to pay for the care provided? Alternatively, should the contract require a "causal relationship" between a management failure or shortcoming of the caretaker and the disease or injury that is at the heart of this issue? Requiring a "causal relationship" while fair, also complicates the agreement by imposing a standard of proof that requires veterinary testimony of the connection between management practices and unwanted injury or disease. Additional expense and creation of a confrontational situation may make this more formal approach less attractive to many parties.

Responsibility for the safety and security of the animal during the raising period logically seems to fall on the person having custody and control of the place where the animals are being maintained. Where the owner has given up possession and control to the caretaker, the caretaker would be that person. Standard risk management concepts generally require that whenever risk is accepted, some risk minimization or management technique be applied to it. In addition to effective animal husbandry measures, insurance coverage may be an effective risk management tool if correct coverage is obtained at a fair price.

In deciding on insurance coverage for a caretaker of another's animals, the extent of coverage found in a comprehensive general liability insurance policy is often a useful initial step. Existing property and casualty insurance coverage should be reviewed to determine the type of losses that are covered as well as any exclusions from coverage which could apply to losses to property owned by others. This could deny coverage to the animal owner who has retained ownership of the animals during the raising period. Liability for damage or loss caused by animals who leave the caretaker's premises and cause damage elsewhere may support the need for both parties to have some type of insurance protection in place as an injured party is likely to look to both the owner and the caretaker to respond in damages for any injuries suffered.

When insuring the risk of harm or loss, a liability carrier must be fully aware of the contractual arrangements that the parties have entered into in their agreement. This is particularly true in those arrangements that define ownership of the animal during the contract raising period where the parties have identified circumstances under which the caretaker faces liability for injury or death of any animals in the caretaker's possession and control.

In any contractual arrangement which calls for payment of money at a future time, the ability of the party to fulfill the future payment obligation is a factor to address in the agreement. Recognizing that the expectation of a large future payment can be tempered by the possibility of nonpayment, caretakers may prefer to negotiate for payment on a current basis, either monthly or quarterly, to minimize the possibility of a large bill remaining after the caretaker's obligations have been fully performed. Animal owners who face such a situation may prefer to shift as much risk as possible to the caretaker by using the alternative form of agreement outlined above. The respective bargaining positions of the owner and the caretaker will determine the outcome of this negotiation preference.

Other issues that should be addressed

In many agreements an important provision is one that deals with alternative means of resolving disputes that arise under the contract regarding key performance related issues. In arbitration, the parties agree to use the services of a panel of individuals who are considered to be fair, knowledgeable, and impartial to decide responsibility between the parties under the agreement. Generally, the terms of the agreement determine the manner in which the arbitration panel is selected and the significance to be given to its decisions. Mediation is an alternative form of decision-making that does not rely on designating winners and losers as the outcome of the dispute but focuses on getting the parties to identify corrective action that each could take to resolve disagreement between the parties.

Caretakers with either limited available space or those concerned about a consistent flow of animals through the facility may impose either minimum or maximum numbers of animals that the animal owner is to provide under the agreement.

If a caretaker accepts animals from a number of different sources, identification of animals from each source and the threat of communicable disease are concerns that are worth addressing before the activity is undertaken. A party's concern about the animals coming in contact with other animals may impose additional obligations, such as restrictions on commingling animals from many sources, and costs that may make the transaction undesirable to one party or the other.

Items to include in a Heifer Raising Contract

• Identify the parties and the date of their agreement.
• Identify the parties' obligations under the agreement.
• Identify the heifers to be raised under the contract.
• When does the contract start, how long will it last?
• Can the contract be renewed? If so, how?
• Can the agreement be terminated during its term? If so, how should the termination occur?
• Clearly state the obligations of each party to the agreement, specifying in a clear and understandable way what must be done, when it is to be done and who is responsible for completing the task.

For example, the agreement should address the following items:

• What will be the health status of incoming animals? Who determines it?
• What are the nutrition requirements?
• What have the parties agreed to be the growth goals/ranges to be met under the agreement?
• What are the breeding requirements and procedures?
• Health specifics during the raising period.
• Can either party be relieved of his or her obligation to perform under the agreement?
• What are the circumstances or situations that will excuse a party's obligation to perform their obligations under the agreement? i.e., how will the agreement be affected by the death, bankruptcy, or insolvency of either party?
• At what point is a party considered to be in default of his or her obligations under the agreement?
• What options are available to a party if the other party defaults on his or her obligations under the agreement?
• How can the parties change the terms of the agreement?
• If the parties should disagree on the meaning and terms of the agreement, how should such disputes be resolved?
• Can the obligations of the agreement be transferred to someone else if a party desires to withdraw from the agreement.

—A production of the Heifer Raising Contract development task force which consists of Penn State faculty John Becker, Robert Yonkers, Jud Heinrichs and Cooperative Extension staff Lehan Power, Rick Smith, Craig Williams, Dennis Ginder, Clyde Myers, Duane Stevenson, Roland Freund, Mike Helms, Jim Sargent, Paul Craig, Patricia Powley, John Tyson, Mary Shick, Gene Schurman, Bill Chess, Gary Sheppard, Gary Miescky, Jodi Marshall, Jim Clark, Terry Maddox, Neal Buss, Bob Brown, and Norm Conrad.

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Keith G. Meyer wins Distinguished Service Award

In recognition of his distinguished service to agricultural law, Keith G. Meyer, E.S. and Tom W. Hampton Professor of Law at the University of Kansas School of Law, has earned the 1997 Distinguished Service Award of the American Agricultural Law Association, which was presented in October at the annual symposium in Minneapolis, MN.

Professor Meyer, one of the founding members of AALA, was a speaker at the first meeting in Minneapolis in 1980. He has served as President of our organization (1985-86) and as member of the Board of Directors.

Professor Meyer has contributed enormously to the development of agricultural law in many ways—and continues to do so. He has published numerous law review articles, and is a coauthor of Agricultural Law; Cases and Materials (West 1985) and Agricultural Law in a Nutshell (West 1995). For several years he served as editor-in-chief of the *Journal of Agricultural Taxation and Law*. In addition he has published in the *Agricultural Law Update* and in the convention manual of the Association. He has not just reported developments in agricultural law, but has also analyzed them and often has promoted improvements.

Professor Meyer has excelled as a classroom teacher and lecturer before professional groups. His long tenure at the University of Kansas School of Law places him in a group of five or six senior law professors in the field. His lectures at AALA meetings typically have packed the room. In addition, he has carried the message of agricultural law and U.S. legal education generally to schools in other countries, most recently in Wales and New Zealand.

Professor Meyer has given of himself tirelessly as a resource person to members of the bar and the academic community. He has responded to innumerable questions and inquiries and has provided materials and guidance to many members of our organization over the years.

Clearly, Professor Meyer is one of the most respected members of the agricultural law community in the United States. In all probability, he has taught virtually every member of AALA, whether in the classroom, at an Association meeting, through his writings, or in individual consultations. This record of service is surely one of the most distinguished in the history of our organization.