

# Agricultural Law Update

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## INSIDE

- Precautionary principle reinforced in France
- Lysine: a case study in international price fixing

*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

- USDA-Rural development

## Farmers' legal rights in USDA civil rights cases get a boost with passage of federal legislation

On October 21, 1998, President Clinton signed into law legislation that includes a provision waiving the statute of limitations for farmers bringing actions against the U.S. Department of Agriculture (USDA) for damages under the Equal Credit Opportunity Act (ECOA) and other laws. The legislation also has a related provision allowing disabled farmers to collect damages against USDA for unlawful discrimination under the Rehabilitation Act of 1973. These two provisions are designed to deal with deficiencies in current law that deny farmers with otherwise meritorious civil rights claims the relief they should be entitled to.

These provisions were part of the mammoth Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999 (Public Law 105-277; 112 Stat. 2681, *et seq.*) that Congress patched together in the waning days of the 105th Congress in October. (See also "Farm provisions in Omnibus Spending Bill" on page 1 of the October 1998 issue of *Agricultural Law Update*.) Section 101(a) of Division A of the bill is the Agricultural Appropriations Act for fiscal year 1999, and the statute of limitations waiver is section 741 of that appropriations, with the Rehabilitation Act provisions following it as section 742. Section 741 will be codified as a note to 7 U.S.C. 2279; section 742 will be codified at 7 U.S.C. 2279d).<sup>1</sup>

### Background and need for statute of limitations waiver in the *Pigford* case

In early 1997, Secretary of Agriculture Dan Glickman began an effort, one that is still on-going today, to eliminate and remedy racial discrimination against minority farmers by local and national USDA offices in the administration of the farm programs. USDA has recognized that, from the time that the Reagan Administration abolished the civil rights enforcement section at USDA in 1983 until Glickman re-established it in 1997, civil rights violations within USDA have been allowed to go unpunished, and farmers injured by discrimination have not been compensated for their injuries.

Following Glickman's initial actions to reinstate USDA's civil rights enforcement

*Continued on page 2*

## CFTC administrative law judge finds flex HTA contracts to be futures

Commodity Futures Trading Commission Administrative Law Judge George H. Painter on November 6 issued a lengthy [53 pages] opinion finding the now-defunct Grain Land Coop's flex hedge-to-arrive contracts to be illegal, off-exchange futures contracts under the Commodity Exchange Act. The CFTC decision set up a direct conflict with an earlier federal district court decision on the same contracts involving Grain Land and the producer-sellers. A Minnesota federal district in October 1997 ruled that Grain Land's flex HTA contracts were cash forward contracts excluded from regulation under the Commodity Exchange Act.

The administrative law judge's decision was entered in a CFTC administrative enforcement action brought against Grain Land in November 1996. The CFTC opinion contains detailed factual findings on Grain Land's contracts and distinguishes the Grain Land case from other state and federal court cases finding HTA contracts to be legitimate forward contracts.

The administrative law judge reached the following conclusions:

*Continued on page 6*

program, a number of African-American farmers joined together to file a class action suit in the U.S. District Court for the District of Columbia, *Pigford, et al., v. Glickman* (Civil Action No. 97-1978 (PLF)), for damages and other remedies for USDA discrimination since 1983. The court in that case on October 9, 1998, certified the class for purposes of determining liability. The class, as defined by the court, is:

All African-American farmers who (1) farmed between January 1, 1983, and February 21, 1997, and (2) applied, during that time period, for participation in a federal farm program with USDA, and as a direct result of a determination by USDA in response to said application, believed that they were discriminated against on the basis of race, and subsequently filed a written discrimination complaint with USDA.

Many of the African-American farmers included in the *Pigford* class, along

with a number of those farmers to whom Secretary Glickman would like to provide administrative relief to correct past injustices at USDA, had severe statute of limitations problems that barred them from damages under ECOA. ECOA is involved because the bulk of the civil rights problems faced by African-American and other minority farmers in recent years have centered around discrimination in the award of farm loans and loan servicing benefits.

Section 701(a) of ECOA (15 U.S.C. § 1691(a)) makes it unlawful for any creditor (including the U.S. government if one of its agencies, such as USDA, is the lender) to discriminate against any applicant for a loan or loan services; and section 706(a) of ECOA (15 U.S.C. § 1691e(a)) provides for the award of damages for violations of ECOA. However, section 706(f) of ECOA (15 U.S.C. § 1691e(f)) requires that any suit for damages must be brought within two years of the violation.

This short statute of limitations stood to exclude most of the 426 named plaintiffs in *Pigford*, and prevent the Secretary of Agriculture helping many farmers.

The USDA, which in the early 1990's, did not find out that they had not gotten a fair review of their cases until 1997. When they sought reconsideration of their cases in 1997, the statute of limitations for damage suits under ECOA had expired.

Similarly, for the smaller number of farmers with non-ECOA discrimination complaints, there is a six-year statute of limitations for Administrative Procedure Act (APA) suits against USDA's agency that operates these programs—the Commodity Credit Corporation. The statute of limitations applicable to the Corporation is found in section 4(c) of the Commodity Credit Corporation Charter Act, 15 U.S.C. § 714b(c).

This statute of limitations would adversely affect, for example, an African-American farmer who in 1991, was denied such benefits as eligibility for a disaster payment, enrollment in the Conservation Reserve Program, or access to a peanut quota, for racially discriminatory reasons. Without the new law, that farmer could not seek APA redress now based on the new evidence of wrong-doing at USDA uncovered by Secretary Glickman. The prohibition against discrimination in these cases is not spelled out in the APA or the CCC Charter Act (as it is in ECOA), but is inherent in the APA prohibition against agency actions that are "not in accordance with law... [or] contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706.

## Provisions of section 741

Congress, led by the Congressional Black Caucus in the House of Representatives and Senator Charles Robb (D-Va.) in the Senate, saw the need to correct this statute of limitations problem, and passed section 741.

The persons benefiting from section 741 are: Any person who filed a complaint with the Department of Agriculture prior to July 1, 1997, that alleges discrimination by USDA at any time during the period beginning January 1, 1981, and ending December 31, 1996—

- (1) in violation of ECOA in the administration of the farm loan or housing program; or
- (2) in the administration of any CCC commodity program or disaster assistance program.

Section 741(e).

It should be noted that the group covered by section 741 is not limited to African-American farmers, as is the *Pigford* class, but covers all farmers.

The relief that section 741 provides is the right to file suit for damages or other relief on such discrimination—notwith-

standing that the statute of limitations for such suits expired in 1997. The new law, enacted on October 21, 1998, Section 741(a). This new right to sue on their old claims effectively resolves the statute of limitation problems encountered by the *Pigford* plaintiffs.

The United States Court of Federal Claims and the United States district courts are given exclusive jurisdiction over suits under the new law. Section 741(d).

Also, section 741(g) provides that the standard of review for USDA's action with respect to eligible complaints is *de novo* review. Generally, the government insists that court review of USDA cases be only a review of the record made by the agency in deciding against the farmer or depriving the farmer of benefits at the administrative level.

Under this record review procedure the reviewing court can only decide whether the agency made a reversible error in making its determination against the farmer. With the new law, the farmer will get a fresh chance to present his or her entire factual case to the federal court judge hearing it, regardless of what the agency determined as to the facts.

Under section 741, the farmer is given the additional option of using a new administrative review process to have his or her civil rights case heard at USDA, in lieu of immediately filing suit in federal court. Section 741(b) provides for a USDA determination of the merits of any such

Cont. on p.3

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complaint, under a procedure that provides for a hearing on the record and a 180-day time limit for the USDA review. A farmer who goes this administrative review route would have 180 days after the USDA determination to file suit if he or she disputes USDA's determination.

#### Provisions of section 742

Section 742 of the Appropriations Act addresses another problem with civil rights coverage at USDA. Protection against discrimination for disabled persons is not provided under ECOA. But under a comprehensive statute establishing programs and rights for disabled persons, the Rehabilitation Act of 1973.

Section 504(a) of the Rehabilitation Act (29 U.S.C. § 794(a)) states that no disabled person, solely because of his or her disability, can be excluded from, or subject to discrimination under, any program or activity conducted by any Executive Agency. Then, section 505(b) of that Act (29 U.S.C. § 794a(b)) provides remedies for such discrimination. It says that the remedies under title VI of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d *et seq.*), including money damages, will be available to "any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504."

So far, so good. However, a disabled person named James Lane, who was wrongfully denied admittance to the U.S. Merchant Marine Academy in 1991 because he had diabetes, sued the administrator of the Academy—the Secretary of Transportation—seeking reinstatement at the Academy and compensatory damages under sections 504 and 505 of the Rehabilitation Act. The U.S. Supreme Court, in *Lane v. Pena* (518 U.S. 187 (1996)), ruled, however, that the language of section 505(b) was unclear as to whether it effectively waived the Government's sovereign immunity for damages in law suits. Therefore, the court ruled, Lane could not collect damages from then-Secretary of Transportation Federico Pena, the head of the federal agency involved, under section 505(b).

Recently, the *Lane* ruling came to adversely affect a farmer in Michigan, who USDA had found was wrongly denied a USDA farm loan in 1994 because of his disability, which was the loss of his right arm in a farming accident. As a result of the failure to get the loan, the farmer's farm operation failed and he had significant economic losses, for which he sought compensatory damages from USDA. The farmer's senator, Sen. Carl Levin (D-Mich.), took up this farmer's cause and got section 742 added to the appropriations Act, to make section 505 of the Rehabilitation Act apply to USDA in terms that could not be criticized by the

Supreme Court as unclear or equivocal.

This provision straightforwardly states that for any claim brought by a farmer subjected to discrimination under any USDA farm loan program in violation of section 504 of the Rehabilitation Act, "the Secretary of Agriculture shall be liable for compensatory damages."

The coverage of section 742 is limited, however. It applies only to newer cases, that is, claims filed with USDA after January 1994 and before the date of enactment of the appropriations Act—October 21, 1998.

#### Impacts of the legislation

The section 741 waiver of statutes of limitations for acts of discrimination committed as far back to 1981 will be a lifesaver to the minority farmers who filed discrimination complaints with USDA but never got a satisfactory answer on their complaints. President Clinton said as much in his statement made on the occasion of the signing of the appropriations Act. He noted that:

This bill will also address the longstanding discrimination claims of many minority farmers by adopting my request to waive the statute of limitations on USDA discrimination complaints that date back to the early 1980s. This will finally provide these farmers the fair and expedited hearing—and where past discrimination is found, the fair compensation—they have long deserved.

34 Weekly Comp. Pres. Doc. 2110 Oct. 24, 1998).

It is estimated that literally thousands of farmers will be covered by the section 741 waiver.

Further, it appears that just about all African-American farmers who are covered by section 741 have thereby become eligible for immediate relief in the *Pigford* law suit as class members of the *Pigford* class. Other farmers with minority or protected status, such as Hispanics, Native Americans, women, and older Americans, covered by section 741 will have to exercise their newly-minted rights in their own law suits or administrative claims filed with USDA. For these farmers, the new two-year clock is already ticking.

The coverage of section 742 is substantially smaller. It only covers farmers with disabilities, and the window of opportunity is smaller—claims filed between 1994 and 1998. This section could have significance beyond the farmers it protects, however, if it becomes a model for additional legislation to reverse the restrictive ruling in *Lane v. Pena*.

Beyond those whose rights to sue are directly affected by these two provisions of the Appropriations Act, this legislation sends a powerful signal to farmers that, after many years of being neglected, the civil rights and anti-discrimination

laws are being given new emphasis at USDA.

<sup>1</sup>The Law Revision Counsel of The U.S. House of Representatives has not yet completed the codification of Public Law 105-277, so these code citations are tentative pending completion of that task, which is anticipated to occur in early January, 1999.

—Phillip L. Fraas, Tuttle, Taylor & Heron, Washington, D.C.  
Mr. Fraas and Alex Pires,  
also of Washington, D.C., are co-lead  
counsel in the *Pigford* case.

## Precautionary principle reinforced in France

On 25 September a French court suspended the decision of the Minister for Agriculture and Fisheries that had permitted Novartis to market some varieties of genetically modified (GM) maize (corn) seeds. This is only the latest stage in an ongoing struggle between the agribiotech giant Novartis and the European green lobby. Back in 1994, Novartis (or Ciba-Geigy as it was then) applied for permission to market GM maize. The French Biomolecular Engineering Council approved a dossier on the product and recommended it to the European Commission. After much debate throughout Europe the maize was finally approved, only to then become the subject of a ban on its use by farmers in France. Subsequent to Novartis filing a further three varieties of GM maize seeds onto the "official catalogue" in France this February, Greenpeace protested and asked the courts to annul the decision.

The final decision was largely based on two grounds. Firstly the court decided that the advice given to the Minister by the appropriate scientific body was based on an incomplete dossier provided by Novartis. Under European law, companies applying to market GM products are under an obligation to provide adequate risk management reports. It was argued that the report which was provided in this case did not contain sufficient data to allow for the proper evaluation of the impact on public health that might result from the maize containing a gene coding for ampicillin resistance. Whilst it has been suggested that the use of such genes in the development of GM products probably does not present any public health risks, both the UK Advisory Committee on Releases to the Environment and the recent report of the Royal Society ...

Cont. on p.7

## Lysine: a case study in international price fixing

By John M. Connor

On October 14, 1996 in U.S. District Court in Chicago, Archer Daniels Midland (ADM) company pleaded guilty to price-fixing in the world market for the amino acid lysine. In the plea agreement, ADM and three Asian lysine manufacturers admitted to three felonies: colluding on lysine prices, allocating the volume of lysine to be sold by each manufacturer, and participating in meetings to monitor compliance of cartel members.<sup>1</sup> A corporate officer of ADM testified that his company did not dispute the facts contained in the plea agreement. In addition to precedent-setting fines paid by the companies, four officers of these companies pleaded guilty and paid hefty fines, while four more managers have been indicted and face probable fines and jail sentences for their leading roles in the conspiracy.

The lysine price-fixing episode was one of the largest, best documented, and most important prosecutions in U.S. history under the Sherman Act of 1890. The lysine cartel was striking in its comprehensive, multinational dimensions. Both the structural characteristics of the world lysine market as well as the corporate management cultures of the principal conspirators helped facilitate collusive selling behavior for about three years. Antitrust officials have learned how easy it was for four determined companies with sales spanning five continents to organize a highly profitable cartel that could easily have gone undetected. Managers of companies will see that the penalties for and chances of being caught fixing prices have escalated as a direct result of the lysine episode.

### The market for lysine

Lysine, an essential amino acid, stimulates growth and lean muscle development in hogs, poultry, and fish. Lysine

has no substitutes, but soybean meal also contains lysine. Sometime in the 1960s, Asian biotechnology companies discovered a fermentation process that converts dextrose into lysine at a much lower cost than conventional extraction methods.<sup>2</sup> By the 1980s, they were importing large quantities of dextrose from U.S. wet corn millers and exporting high-priced lysine back to the USA. ADM became the largest U.S. manufacturer of lysine in February 1991 and quickly gained about half of the U.S. market. U.S. lysine consumption grew 10 percent per year in the 1990s. The U.S. market reached sales of \$330 million in 1995; world sales totaled \$600 million.

### Archer Daniels Midland

ADM is a large and diversified company. In fiscal year 1995, ADM had consolidated net sales of \$12.7 billion. During 1986-1995, ADM's net sales had increased by 10.1 percent per year. ADM's major divisions are oilseed and corn starch products. The corn products division includes corn sweeteners, corn-based alcohols, and a host of biotechnology products. Within the corn products division, fructose and ethanol are mature or maturing industries with slow growth and narrowing margins; however, the other bioproducts from corn generate much higher margins. During 1989-1995, ADM invested \$1.5 billion in its bioproducts division.

For a company of its size and diversity, ADM is managed by a remarkably small number of managers.<sup>3</sup> Dwayne Andreas and a few top officers reportedly made all major strategic decisions from 1970 to 1997. Until late 1996, the ADM board contained a large majority of current and former company officers, relatives and long standing close friends of Andreas, or officers of companies that supply goods and services to ADM.

Andreas has built a legendary network of powerful business and government contacts since the 1960s. He was close friends with and contributor to a wide array of farm-state Congressmen and Senators, including Dan Rostenkowski and Robert Dole. Since 1979, Andreas and ADM have contributed more than \$4 million to candidates for national office or their parties. ADM has benefitted greatly from the U.S. sugar program and from federal ethanol subsidies and usage requirements.<sup>4</sup>

### Economic conditions facilitating price-fixing

With one or two exceptions, the lysine market exhibits all the economic conditions that facilitate price fixing. First,

market sales concentration was very high. The lysine cartel consisted of four manufacturers that produced 95 percent of the world's feed-grade lysine. During 1994, ADM supplied 48 to 54 percent of the U.S. market. Second, lysine is a perfectly homogeneous product. Third, technical barriers to entry are high. Plants are highly specialized in production (implying large sunk costs of investment), and their sizes are large relative to market demand. Patents and technological secrecy impede entry. Fourth, market power is difficult to exercise when accurate price reporting mechanisms exist, such as auctions in public exchanges. Domestic lysine prices are almost completely hidden from public view. Fifth, lysine purchases were large and infrequent. Animal-feed manufacturers purchased lysine by the ton. Large and lumpy orders are easier for a cartel to monitor for compliance than frequent, small transactions.

### Price-fixing, technology and market

In the late 1980s, Ajinomoto, Kyowa, and one South Korean company (Sewon) were exporting about \$30 million of lysine per year to the United States and charging \$1.00-\$2.00 per pound, much less than U.S. organic chemical companies were charging for extracted lysine. Then, ADM discovered why Asian biotechnology companies were buying so much dextrose from the United States—it is the raw material for lysine made by fermentation. In 1989, ADM committed an initial \$150 million to build the world's largest lysine factory in Decatur, Illinois and hired 32-year-old biochemist Mark Whitacre to direct the new lysine division. Production began in February 1991, and a "tremendous price war" erupted. The U.S. price dropped from \$1.30 in 1990 (or \$1.20 in January 1991) to a record low of \$0.64 in July 1992. ADM's cost of production is, reportedly, between \$0.65 to \$0.70 per pound. When the plant is operating as designed, the selling prices near \$0.60, ADM was losing millions of dollars per month. Asian producers were suffering even greater losses per ton.

About this time, the lysine division was placed under ADM V.P. Terrance Wilson. In April 1992, Wilson and Whitacre met with Ajinomoto and Kyowa Hakko in Japan where they proposed the formation of an "amino acids trade association." By this time ADM controlled one-third of the world market. In June 1992, the first of many meetings of the "lysine association" took place in Mexico City. The three companies (and later a

*John M. Connor is Professor, Department of Agricultural Economics, Purdue University. Dr. Connor assisted a group of lysine buyers in estimating the overcharges they may have incurred as a result of the conspiracy. All statements of fact in this paper are based on publicly available materials, and all opinions expressed are Dr. Connor's own and not necessarily those of any party or lawyer involved in the legal proceedings discussed in this paper. The author thanks Jay Akridge, Mike Boehlje, Peter Barry, Lee Schrader, Chris Hurt, and anonymous reviewers of Choices for their constructive comments. Purdue Journal Paper No. 15439.*

South Korean company) discussed raising prices, allocating production, and setting sales shares across several regions of the world.

The conspirators apparently were successful in raising the U.S. price of lysine to \$0.98 for three months (November 1992 to January 1993). From October 1993 to August 1994, prices held at a steady \$1.08 to \$1.13 and then rose again to about \$1.20 for another six months. Industry output growth was constrained to half its historical rate. A year after the conspiracy ended in late 1995, U.S. lysine exports doubled.

Whitacre was recruited by the FBI as a secret informant (a "mole") in November 1992. Up until June 1995, he provided hundreds of audio tapes of many price-fixing meetings concerning lysine, citric acid, and fructose. The FBI secretly made additional video tapes of the "lysine association" meetings. A federal grand jury was formed in Chicago in early June of 1995 and obtained subpoenas for all information on price-fixing by ADM and its co-conspirators.

More than 70 FBI agents raided ADM's corporate offices in Decatur, Illinois on the night of June 28, 1995; many ADM officers were interviewed in their homes that night as well. Seized documents show 1992-1995 "sales targets" and "actual sales" by all members of the lysine association. Documents were subpoenaed from many other firms as well. In the three following months, ADM's stock price fell 24 percent (\$2.4 billion of market value). At its October 1995 stockholders' meeting, Chairman Andreas did not allow discussion of the price-fixing charges. By February 1996, ADM had a total of at least 85 suits filed against it, 14 by lysine buyers and many others by stockholders claiming mismanagement and failure to divulge material information.

In the spring of 1996, the Department of Justice's criminal case was beginning to falter. No indictments had yet been filed. The DOJ was targeting (Executive V.P.) Michael Andreas and Terrance Wilson for criminal charges, but not a single ADM officer offered to corroborate the evidence. The Asian companies also refused to cooperate. Moreover, Whitacre's credibility was tarnished by his own admission that while an FBI mole he defrauded ADM of \$9 million.

In April 1996, ADM, Ajinomoto, and Kyowa offered to pay "civil damages" of \$45 million to the class of buyers of lysine during 1994-1995. Technically, the three companies were not admitting that they were guilty of price fixing. The class was represented by a Philadelphia law firm that made the lowest fixed-fee bid in an unusual auction held by a U.S. 7<sup>th</sup> Dis-

trict Court judge. The judge refused to consider bids based on conventional *percentage* contingency fees. Buyers had three months to decide whether to accept an assured part of the \$45 million settlement immediately or to "opt-out" of the agreement and possibly win larger settlements in the future. Based on a damage estimate that was 10 to 12 times higher, 32 large companies did in fact opt out. The judge was criticized for rushing to judgement civil penalties that normally follow the completion of the criminal case. Law firms operating under fixed fees have incentives to settle quickly rather than to wrest bigger settlements through protracted negotiations.

In a shocking setback for ADM, in August 1996 the three other lysine co-defendants "copped a plea." In return for lenience, the three Asian companies filed guilty pleas, and three of their executives admitted personal guilt and agreed to testify against ADM. Now isolated, ADM's lawyers began to negotiate in earnest with the DOJ. On October 14, 1996, ADM also agreed to plead guilty to criminal price-fixing, to pay a \$70 million federal fine for its lysine activities, and to fully cooperate in helping the DOJ prosecute M. Andreas and T. Wilson. Numerous changes in ADM's Board of Directors occurred soon after: M. Andreas was placed on "administrative leave;" T. Wilson resigned; and D. Andreas was relieved of his duties as CEO (though he keeps his title of Chairman).

The criminal fines and civil damages have cost the guilty parties at least \$159 million in the case of lysine alone as of late 1997. Legal costs are around \$76 million for lysine and other commodities, and shareholders' suits were settled for \$38 million by ADM. The total monetary costs for price-fixing, mismanagement, and fraud for all three products (lysine, citric acid, and fructose) are \$600 million and rising.<sup>6</sup>

### Price-fixing injuries

The courts have held that price-fixing is *per se* illegal under the 1890 Sherman Act. That is, in a criminal case, prosecutors need only prove that an agreement was "beyond a reasonable doubt" made to restrain prices or output; it is not necessary to prove that the agreement was in fact put into operation. A conspiracy to manipulate prices is illegal even if no economic harm can be identified. However, antitrust offenses typically do cause economic harm to many groups: rival firms, buyers, suppliers, employees, shareholders, and other stakeholders. Plaintiffs in a civil antitrust case bear a heavier evidentiary burden of proof than in a criminal case. The plaintiff must prove "with reasonable certainty" that

the violation occurred (often using evidence from an earlier criminal proceeding to do so) and that it suffered a compensable harm as a *result* of the violation. In order to estimate damages, a plaintiff must determine the difference between the revenue actually earned during the period of unlawful conduct and what would have been earned absent unlawful conduct.

Five potential groups may be harmed by price-fixing.<sup>7</sup> The first and clearest case of damages involves *direct purchasers* who pay an inflated price called the overcharge. Buyers who were overcharged have had standing to recover three times the overcharge since the first federal price-fixing case was decided in 1906. Lysine overcharge estimates ranged from \$15 to \$166 million. Second, a portion of the overcharge is passed on to the *indirect* buyers of products containing lysine. In the present case, hog and poultry farmers who buy prepared animal feeds containing lysine are harmed by both the higher price of animal feed and lost farm sales. Under many state antitrust statutes, indirect overcharges are recoverable in state courts, but since 1977 no standing is given to indirect buyers in federal courts. Several such lysine suits are on-going.

A third group of buyers may be harmed. If a cartel does not contain all the producers in an industry, nonconspirators ("fringe" firms) may raise their prices toward the cartel's price. Direct buyers from noncartel sellers are harmed, but under the law only the conspirators are liable to pay damages. Thus, noncartel sellers can enjoy excess profits during the conspiracy period. This type of injury did not apply to lysine because almost all sellers in the world belonged to the conspiracy.

Those forced to buy inferior substitutes or those who reduced their purchases in response to the higher price make up a fourth group harmed by price fixing. Although well accepted as a social loss by economists and some legal theorists, the parties incurring deadweight losses generally have been denied standing to sue by the courts. Finally, price fixing harms those suppliers of factors of production to the conspirators who lose sales or income because of output contraction. The courts do not usually allow standing for such parties, such as workers forced into unemployment, because the injuries are viewed as indirect or remote.

Normally a civil class-action suit is settled after the conclusion of the government's case. The lysine story is more complicated because the civil class-action suit was settled three months prior

*Continued on page 6*

- Rejected Grain Land's contention that the Minnesota federal district court's decision prevented or estopped the CFTC from reexamining the facts and law applicable to Grain Land's contracts.

- Concluded that Grain Land's contracts merely provided producers with "optional delivery." Specifically, the administrative law judge found that "[a] producer who entered into [Grain Land's] Flex HTA contract was not binding himself, at the time he signed the Flex HTA contract, to deliver grain – but only to deliver grain *if the producer chose to set basis or if the producer failed to set basis by a certain time and [Grain Land] did [emphasis in original].*"

- Said that Grain Land's "attempt to characterize its Flex HTA contract as 'identical' to the hedge-to-arrive contracts in [cited court cases addressing other HTA contracts] to be disingenuous at best. [Grain Land] overlooks the fact that none of those hedge-to-arrive contracts contained a cancellation clause similar to Grain Land's Flex HTA. Even the Grain Land employee who created the Flex HTA contract testified that he constructed the Flex HTA by adding a cancellation provision to a 'standard' hedge-to-arrive contract."

- Concluded that Grain Land's contracts "served substantially the same function as exchange-traded futures contracts: providing participants with an opportunity to assume or shift the risk of price changes in an underlying commodity *without the forced burden of delivery [emphasis in original].*"

- Entered a "cease and desist order" to prevent Grain Land from "continued efforts to collect grain pursuant to its Flex HTA contracts, through deliveries made to its agent."

- Declined to issue a monetary penalty against Grain Land because its "wrongdoing has caused its demise.... A civil monetary penalty would serve no purpose in the case and, therefore, such a sanction will not be imposed."

The administrative law judge's initial decision in CFTC Docket # 97-1 becomes final 15 days from entry of the Nov. 6<sup>th</sup> order unless an appeal is filed with the full commission, or if the commissioners decide on their own to review it. In that case, the five CFTC commissioners would review and rule on the claims brought by the CFTC Division of Enforcement.

—David Barrett, National Grain and Feed Association, Washington, DC

to the criminal pleas. Settling the class-action suit early gave ADM two enormous advantages in its legal strategy. The criminal guilty pleas could not be entered as evidence in the class-action case, nor could the size of the DOJ fines be used as a guide to settling civil damages.

### Penalties for price fixing

Parties guilty of criminal price fixing are sanctioned by means of fines and imprisonment. The ADM affair signaled a significant escalation in price-fixing fines. A major change in price-fixing penalties came in 1975 when Congress upgraded antitrust crimes from misdemeanors to felonies. Under 1991 federal sentencing guidelines, any felony can be punished by fines equal to twice the harm suffered by victims. Up to 1975, the maximum monetary exposure for violations was three times overcharges plus \$1 million; since 1995, the exposure has risen to *five times* the overcharges, almost a 60 percent increase.

The first application of the "two-times" penalty rule in 1995 resulted in a \$49 million fine for one company. The second time this rule was invoked was in October 1996 when ADM was fined \$70 million for the lysine conspiracy and \$30 million for its leading role in the citric-acid conspiracy. However, the DOJ explicitly rewarded ADM with a discounted fine because the company had agreed to cooperate in prosecuting other companies as well as two of its own officers (M. Andreas and T. Wilson).<sup>8</sup> The Asian lysine producers received even larger discounts because they agreed to cooperate with prosecutors two months before ADM did. The size of the discount awarded to the lysine producers for their good behavior is not known, but could be as high as 50 percent. In addition, the DOJ agreed to forgo prosecuting ADM for its role in the potentially larger corn-sweeteners case. Thus, the \$70 million lysine fine is at most a minimum indicator of the true overcharges incurred by buyers of lysine.

Given ADM's share of the lysine market, one can infer that the total overcharge on direct buyers of lysine was *at least* \$65 million, but it could have been as high as \$140 million. Sales of lysine during the conspiracy were about \$495 to \$550 million, so the conspiracy raised U.S. lysine prices by 12 to 28 percent above the competitive price.

### Implications for producers

Lysine is one of 20 essential amino acids necessary for muscle and bone development in monogastric meat animals. Hogs and poultry cannot manufacture lysine on their own, so it must be ingested. Wheat and corn have traces of

lysine, but soy meal is quite rich in lysine. When soybean prices are high and corn prices low to moderate, a corn-lysine mix is much cheaper than an equivalent amount of soy meal. During 1991-1995, a typical 97-lb.-corn-3 lb.-lysine mix was cheaper than 100 lb. of Midwest soy meal more than 90% of the time.

Experts say that a growing pig needs on average about 22 grams of lysine per day for optimal growth. According to Pete Merna of the Illinois Pork Producers' Association, a typical Corn Belt pork producer that utilizes 100 tons of feed per year would have to buy, directly or indirectly, about 3 tons of lysine. During the height of the lysine conspiracy in 1994, that lysine would have cost farmers or feed manufacturers \$7,200, which was almost double ADM's cost of making lysine. Most farmers had no choice but to pass on the \$3,600 in extra costs to the packer – and, ultimately, the final consumer. In addition, because of a small rise in retail pork prices, the quantity demanded decreased. Some pork producers were forced to cut back on production when lysine prices were artificially inflated. By my rough estimate, farm revenues from hog sales dropped by as much as \$20 million during the conspiracy.

But the greatest injury was to producers and feed companies that were overcharged some \$65 to \$140 million for the lysine they bought during the conspiracy. By curious twist in federal antitrust law, only *direct* buyers of lysine can sue for the treble damages due to them. Michigan and 15 other states allow *indirect* buyers to sue for price-fixing damages under state antitrust laws. To put it in a nutshell, if a pork producer mixes his own feed *or* lives in Michigan, he is entitled to get triple damages (\$11,000 in our example) from the lysine makers. But if the producer buys pre-mix *and* lives in Indiana, he has no right to sue.

### Final observations

The lessons for public policy and managers of multinational agribusiness firms are profound. A statement of U.S. Attorney General Janet Reno (DOJ) on the day ADM pleaded guilty said in part "This \$100 million criminal fine should send a message to the entire world." Measured by the widespread attention of the world's business press and by the sharp reaction of ADM's stock prices, she is certainly right. The lysine settlements demonstrate that the cost of discovered price fixing has suddenly gone up. Moreover, the chances of being caught are now higher than ever.<sup>9</sup> Dozens of investigations of international price fixing have since been launched by federal authorities, and a new era of multilateral coordination among the world's antitrust agencies has begun.<sup>10</sup>

The antitrust agencies have reason to



monitor wet-corn millers closely for price fixing. Lysine and citric acid are but two of a long list of synthetic organic chemicals now being made by ADM and other wet-corn milling companies. The rapid growth of specialty chemicals made from corn starch is partly the result of entry of wet-corn millers into the traditional synthetic organic chemicals industry, which had sales of nearly \$100 billion in 1995. These products include food ingredients (such as sorbitol), feed ingredients (tryptophan), and medicinals (ascorbic acid). For most specialty organic chemicals, only one to three domestic producers are active. For example, in 1994 ADM was one of three U.S. manufacturers of lactic acid, sodium lactate, and sodium gluconate. As wet-corn millers continue to move into these specialty chemical markets with their high sales concentration, the opportunities for price-fixing will increase.

The lysine conspiracy resulted in far-reaching changes in ADM's governance structure and leadership. Three of ADM's officers were convicted on criminal charges, and more are under indictment. The ADM board of directors has been transformed. Up to 1995, the great majority of the 17 board members were insiders by anyone's definition. In 1996, eight insiders on the board resigned, but not all their replacements pleased the stockholders. A resolution by institutional shareholders of ADM that would have imposed stricter guidelines in selecting outside directors nearly passed at ADM's 1996 annual meeting. In April 1997, Dwayne Andreas relinquished his title of CEO to his nephew G. Allen Andreas.

Antitrust prosecutors tend to target companies like ADM that lead their industry. Targeting high profile companies is a wise use of constrained administrative resources because it increases the deterrence effect. Moreover, the DOJ imposed sanctions on ADM that have markedly changed the rules of the price-fixing gambit. Since 1996, price-fixers have faced public penalties and private damages that are *five times* their illegal profits, far higher than their previous exposure. If the "two-times" rule for fines is fully applied, then patient private plaintiffs will have a clearer guide to the treble damages they may seek.

Perhaps the most important lesson of the lysine conspiracy for antitrust enforcers is the ease with which an international cartel was formed and executed. The two smaller lysine producers claimed that they were coerced into joining the cartel by leaders ADM and Ajinomoto, and leaked tapes of the price-fixing meetings corroborate the charge.<sup>11</sup> With just two or three top managers from each company attending meetings around the

world every month or two, the conspirators were able to arrive at complex allocations of production from at least six plants, exports from three countries, and sales to five continents that were, if not optimal, highly profitable. The cartel hung together in the face of gyrating and uncontrollable soybean and corn prices and a presumptive cultural chasm between ADM and its three co-conspirators. Were it not for a well placed whistle-blower, the lysine cartel might still be in full operation today.

Because it was an international conspiracy, overcharges as large as those in the United States were very likely incurred by buyers of lysine in other parts of the world. In mid-1997, antitrust authorities in the European Union and Mexico opened duplicative investigations of lysine price fixing. The multinational character of the lysine conspiracy underscores the need for multinational legal approaches.<sup>12</sup> Recent court decisions make it clear that U.S. authorities can seek redress from off-shore conspiracies that affect U.S. trade or domestic commerce. However, effective national prosecution is unlikely unless the target companies own significant assets in the affected nation's territory. Bilateral antitrust protocols have been signed, and formal annual meetings have recently begun among the U.S., Japanese, European Union, and other antitrust agencies, but so far cooperation is limited to gathering and sharing of information. It is difficult to envisage a legal structure that would permit multilateral prosecutions of international cartels.

<sup>1</sup> DOJ. *Archer Daniels Midland Co. to Plead Guilty and Pay \$100 Million for Role in Two International Price-Fixing Conspiracies*. Washington, DC: U.S. Department of Justice. ([http://www.usdoj.gov/gopherdata/atrp/press\\_releases/1996press/508at.htm](http://www.usdoj.gov/gopherdata/atrp/press_releases/1996press/508at.htm)).

<sup>2</sup> Connor, John M., *Archer Daniels Midland: Price Fixer to the World*, Staff Paper SP 98-01. West Lafayette: Department of Agricultural Economics, Purdue University (January 1998a). E.J. Kahn, *Supermarketer to the World: The Story of Dwayne Andreas, CEO of Archer Daniels Midland*. Warner Books (1991).

<sup>3</sup> Scott Kilman and Bruce Ingersoll, *Risk A Verse*. The Wall Street Journal, October 27, 1995 at A1.

<sup>4</sup> James Bovard, *Archer Daniels Midland: A Case Study in Corporate Welfare*, Policy Analysis No. 241. Washington, DC: The Cato Institute (September 1995).

<sup>5</sup> Mark Whitacre, *My Life as a Corporate Mole for the FBI*. Fortune, September 4, 1995 at 52-68.

<sup>6</sup> *Supra*, note 2.

<sup>7</sup> William H. Page (editor). *Proving Anti-*

*trust Damages: Legal and Economic Issues*. Chicago, Ill.: Section of Antitrust Law, American Bar Association (1996).

<sup>8</sup> These two were found guilty in District Court in Chicago in September 1998.

<sup>9</sup> Anne K. Bingaman, *The Clinton Administration: Trends in Criminal Antitrust Enforcement*, Speech before the Corporate Counsel Institute, San Francisco, California, November 30, 1995 (also [gopher://justice12.usdoj.gov:70/00/atrp/talks/speech.n30](http://justice12.usdoj.gov:70/00/atrp/talks/speech.n30)).

<sup>10</sup> Connor, John M. *The International Convergence of Antitrust Laws and Enforcement*. Review of Antitrust Law and Economics (forthcoming 1998b).

<sup>11</sup> Kurt Eichenwald, *The Tale of the Secret Tapes: Bizarre and Mundane Mix at Archer Daniels*, New York Times, November 16, 1997 at 3-13 of Section 3.

<sup>12</sup> *Supra* note 10.

France/Cont. from page 6

suggest that leaving genes that code for antibiotic resistance in food products does not constitute good practice.

The second consideration that swayed the court was the "precautionary principle" that is enshrined in the French "rural Code." In broad terms, the principle sets out to impose a cautious approach on the approval of the release of new GM products into the environment. This can be contrasted with the so-called "familiarity principle" that can be found in some U.S. Government Departments' approaches to new GM products. Significantly, the precautionary principle in respect of the environment was emphasized in the Treaty of Maastricht, which has been signed by many European countries. This no doubt had an effect on the precautionary language in the French law. Applying this principle, the court suggested that in the current state of knowledge, the situation was serious enough to suspend the decision of the Minister to approve the GM seeds.

It is clear that more research is needed to satisfy both the public and the courts in Europe that GM products are safe enough to be released into the environment and onto the market. On current evidence, the debate is set to run on and on.

— Ben Thomson, Department of Law, University of Sheffield; reprinted from *Information Systems for Biotechnology's ISB News Report*, November, 1998, pp. 1-2.

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## AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

### *1999 membership renewal notice*

Membership dues for 1999 become due in January. For those of you who may wish to renew in this calendar year, the 1998 dues remain: regular membership-\$75; student membership-\$25; sustaining membership-\$150; overseas-\$95; institutional (up to 3 members)-\$200. Please mail to: AALA, University of Arkansas-School of Law, Fayetteville, AR 72701. Renewal notices will be mailed later this month. We ask that you check and correct, as necessary, the information for the membership and Web directories and return it as soon as possible. Be sure to add your e-mail and web site if applicable. Dues, for persons who joined the Association after May 31st, will be prorated.

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