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INSIDE

IN FUTURE ISSUES

Farmers' Right to Sell "Brown Bagged" Seed Under PVPA Restricted

President Clinton recently signed into law a bill restricting the rights of farmers to sell saved seed. [Pub. L. No. 103-349.] The bill, introduced by Senator Kerry of Nebraska as S. 1406 (H.R. 2927 in the House), was a main priority of the American Seed Trade Association. The new law makes a number of changes in the Plant Variety Protection Act (PVPA) [7 U.S.C. section 2321 et seq.], the primary method breeders of crops such as wheat, soybeans, and cotton use to protect rights in new varieties. The goal of the changes was to bring U.S. law into agreement with a 1991 international treaty on "breeder's rights," which the U.S. negotiated. The law includes a number of new provisions such as the "essentially derived varieties" system. The text of the bill can be found in the Congressional Record, August 12, 1994. at H8026 - H8034. The most important change for producers is the repeal of the provision that allows farmers to sell "saved seed" to other farmers [Section 10 of the act]. This practice, commonly referred to as "brown bagging," has become increasingly controversial to the seed industry, which argues the former broad exemption allowed farmers to steal markets for seeds. The controversy over how much seed a producer can sell under the old law is being tested in the case of *Asgrow v. Winterboer*, now before the U.S. Supreme Court. The Court heard oral arguments in the case on November 7, 1994.

Under the new law, farmers may save PVPA protected seed and use it for planting future crops, but they cannot sell it as seed, unless they have obtained the permission of the owner of the variety. It is important to realize the new law does not make all brown bag sales illegal, at least yet. This is because under the new law, two different systems will be in place, depending on when a variety was protected. Under the "transitional" provisions of the new law, the prohibition on selling saved seed applies only to varieties certified after April 4, 1995 [180 days after the bill became effective]. This means farmers will still retain the right to save and sell protected seed to other farmers if a variety was already certified under the existing law. For new varieties, there will be no right to sell protected seeds unless the owner of the variety grants permission. During consideration of the law, there was discussion of an exception of "incidental sales." While the law does not contain such an exception, the non-binding Senate Committee Report includes a discussion that seed companies should grant permission in exceptional situations, such as excess treated seed, financial distress, or weather problems. In such situations, producers should contact their seed companies to see if permission can be obtained. The new law does include an exception to allow sales by producers who raise lawn, turf, or forage grass seed, or alfalfa or clover seed under contract. If the owner of the variety does not pay for the seed after thirty days notice, the law gives producers the right to sell the seed.

—Neil D. Hamilton, Drake University Law School, Des Moines, IA

"Word of Mouth" Referral Disqualifies Employer from MSAWPA Family Farm Exemption

The Sixth Circuit has held that the employment of a farmworker through "word of mouth" referral was sufficient to disqualify the employer from the family farm exemption under the Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA), 29 U.S.C. §§ 1801 et seq. *Flores v. Rios*, No. 93-3670, 1994 WL 518285 (6th Cir. Sept. 26, 1994). Although it ultimately denied the employer's family farm exemption claim on other grounds, the court also became the first court of appeals to consider whether the family farm exemption was lost through the employer's use of a state employment service. The panel split on that issue, with the majority holding that the exemption was not lost on that ground.

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The MSAWPA broadly regulates farm labor contracting activities by variously imposing registration, disclosure, recordkeeping, safety, compensation, and other requirements on farm labor contractors, agricultural employers, and agricultural associations. Farm labor contracting activities include "recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant and seasonal agricultural worker." 29 U.S.C. § 1802(6). Under the MSAWPA, farm labor contractors must obtain a certificate of registration before undertaking farm labor contracting activities. 29 U.S.C. § 1811(a). Also, farm labor contractors, agricultural employers, and agricultural associations that recruit migrant or seasonal farmworkers must disclose certain information regarding the employment, including the place of employment; the wage rates; the period of employment; and the availability and cost of transportation, housing, or other employment benefits. 29 U.S.C. §§ 1821-1823, 1831-1833.

Family farms and certain other family businesses are exempt from the MSAWPA's requirements. To qualify for the exemption, family members must perform all of the farm labor contracting for the farm. 29 U.S.C. § 1803(a)(1) (exempting "[a]ny individual who engages in a farm labor contracting activity on behalf of a farm ... which is owned or operated exclusively by such individual or an immediate family member ..., if such activities are performed only for such operation and exclusively by such individual or an immediate family member").

The defendants in *Flores* were the Gibsonburg Canning Co. (GCC), a tomato farm and cannery operated by John and Jerry Schuett, and Reyes Rios, a farmworker employed by GCC. Although none of GCC's farmworkers had the authority to hire workers for GCC, GCC's farmworkers would sometimes call the Schuetts and tell them they knew of other farmworkers who were looking for work. If GCC had work and housing was available, the Schuetts would tell the caller to tell the prospective workers to come. If work was not available, the Schuetts would tell the caller to tell the farmworkers to contact them before the season began to see if work was then available.

Consistent with this general pattern, the plaintiff, Jose Flores, had been referred to GCC by Rios. The referral had been made after Flores, on his own initiative, approached Rios and expressed his and his family's interest in working for GCC. Flores asked Rios to call the Schuetts, and Rios did so. Jerry Schuetts responded by telling Rios that work was available. After Rios relayed this information to Flores, Flores and his family traveled from Texas to Ohio and began working for GCC. In the process, GCC admittedly violated the MSAWPA in several respects. GCC, however, claimed it was exempt under the MSAWPA's family business exemption.

Flores disputed GCC's exemption claim by asserting that GCC had used nonfamily members to perform farm labor contracting for the farm in three instances. First, Flores argued that GCC's occasional borrowing of surplus farmworkers from other farms disqualified GCC from the exemption. The court, however, disagreed, reasoning that the "labor contracting activities that brought the borrowed workers to Ohio ... were not performed 'on behalf of' the Schuetts' farm, and therefor cannot affect GCC's eligibility for the family business exemption." *Flores*, 1994 WL 518285 at *3.

Flores' second attempt to defeat GCC's exemption was grounded in GCC's use of the Ohio Bureau of Employment Services (OBES) as a referral source in hiring farmworkers. Flores maintained that OBES referrals constituted farm labor contracting on GCC's behalf because such activities were either the "recruiting," "soliciting," or "furnishing" of farm labor within the scope of the MSAWPA. While Flores' argument persuaded one member of the court's panel, the other two members declined to hold that GCC's use of the OBES disqualified GCC from the exemption. Instead, construing the MSAWPA's definition of farm labor contracting as involving activities that are "distinctly contractual in nature," the court reasoned as follows:

> OBES referrals do not 'recruit, solicit, or furnish' farms with labor in any contractual sense. The OBES is a state agency that simply helps job-seekers locate prospective employers. The agency charges no fee for its services, and does not purport to represent either the employee or the employer. Both the farmer and the worker remain free at all times to accept or reject any of the agency's recommendations. An agency referral provides the worker with absolutely no assurance of employment—it merely provides the worker with a chance to find a job at a farm in need of labor. Within this framework, OBES job referrals plainly do not constitute non-family farm labor contracting activities.

Id. at *5.

The court, however, accepted Flores' third argument for defeating GCC's exemption claim. As his third ground for defeating the exemption claim, Flores contended that Rios' word of mouth referral was sufficient to disqualify GCC from the exemption. In agreeing with Flores, the court found that there was a sufficient delegation of authority from the Schuetts to Rios to make Rios the Schuetts' agent. The court explained its conclusion as follows:

> we believe the formation of a binding employment contract—in the absence of any direct contact between Schuett and Flores—necessitates the delegation of some authority.... By submitting Flores' job application, by vouching for Flores as a good farm worker, and by relaying the ensuing offer of employment, Rios's played a far more influential role in the recruiting process than some disinterested maker of gratuitous recommendations. We cannot avoid concluding that Rios performed farm labor contracting activity on GCC's behalf, as the exemption forbids.

Id at *8.

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

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EPA Reaches Proposed Agreement on Lawsuit Concerning Pesticides and the Delaney Clause

A has reached a proposed agreement with plaintiffs in a lawsuit concerning pesticides and the Delaney clause. The agreement establishes a schedule for the Agency that will set policy that could lead to cancellation of the uses of thirty-six pesticdes and will lead to further review of at least forty-nine others.

The state of California, the Natural Resources Defense Council, and others sued EPA in 1989 over the Agency's application of the Delaney clause of the Federal Food, Drug, and Cosmetic Act. In certain circumstances this law prohibits residues of pesticides that "induce cancer" from being present in processed food

The major terms of the agreement are:

- EPA would agree to rule on a 1992 petition of the National Food Processors Association (NFPA) within 60 days from the court approval of the settlement agreement. NFPA petitioned EPA among other things to discontinue its policy that links processed food tolerances with raw food tolerances. Under the Agency's "coordination policy," if a processed food tolerance is needed but is prohibited under the Delaney clause, the corresponding raw food tolerance is not permitted. For example, prohibition of a tolerance on processed tomato puree would also prohibit a tolerance on raw tomatoes, because EPA cannot ensure that raw tomatoes bearing pesticide residues will not enter processing channels and result in residues over tolerance in downstream processed tomatoes. The proposed agreement does not dictate the decisions EPA will make on this or other issues raised in the NFPA petition, but does set a deadline for making these decisions.
- EPA would agree to decide within six months of the court's approval of the agreement, whether any of approximately 60 processed food tolerances (409s)(earlier identified by EPA as potentially violating the Delancy clause) violate the Delancy clause. Final decisions on revocations would be required within 18 months thereafter.
- EPA would agree to decide within 24 months of the court's approval of the agreement, which of the approximately 80 raw food tolerances that are associated with existing or needed processed food tolerances that are associated with existing or needed processed food tolerances that may violate the Delaney clause are subject to revocation under EPA's coordination policy, as defined in EPAs response to the NFPA petition. Final decisions on any proposed raw food tolerance (408) revocations must be issued within five years of the agreement.
- EPA would agree to review within five years any carcinogenicity and processing studies already submitted to the Agency but not yet reviewed to determine if additional processed and raw food tolerances are subject to the Delaney clause and must be revoked. If processing data are lacking, EPA must take steps within one year to obtain such data.

The Delaney clause in section 409 of the Federal Food, Drug and Cosmetic Act (FFDCA) provides that no processed food tolerance may be approved for any chemical found to induce cancer in man or animals. Pesticides require processed food tolerances only where pesticide residue in the processed food either exceed the residues in the raw food or are added directly to the processed food. The 1988 EPA adopted a policy interpreting the Delaney clause as subject to an exception for carcinogenic pesticides which pose only a negligible risk. EPA's action under the Delaney clause and its negligible risk policy was challenged in two similar but separate suits. In the *Les vs. Reilly* suit, in July, 1992, the plaintiffs successfully obtained a "zero risk" interpretation of the Delaney clause when the United States Court of Appeals for the Ninth Circuit rejected EPA's negligible risk approach to the Delaney clause.

In *California vs. Browner*, the subject of the proposed agreement released today [10/12/94], the parties sought a court order requiring EPA to revoke raw food tolerances (section 408) associated with processed food tolerances (section 409) which are barred by the Delaney clause.

The proposed agreement between EPA and the *California v. Browner* plaintiffs has been given to the intervenors in the case [American Crop Protection Association and the National Food Processors Association and various grower organizations] for comment and will be submitted to the court on December 2 for approval.

—Al Heier, EPA Environmental News

Anglo-American Agricultural Law Symposium

The Agricultural Law Symposium of the United Kingdom and the American Agricultural Law Association announce plans for a joint agricultural law symposium to be held in Oxford, England, September 18-19, 1995. This symposium will be similar to AALA annual conferences in that all speakers and participants pay their own expenses including the registration fee. Moreover, AALA members may attend regardless of whether they make a presentation.

AALA members interested in making a presentation are invited to submit a one-page abstract summarizing a topic within one of the three symposium themes that the author would develop into a twenty-minute presentation and a paper for a symposium proceedings. Abstracts are due February 15, 1995 and should be submited to the theme coordinator. Finished papers suitable for publication will be due September 1, 1995. Prof. Neil D. Hamilton will coordinate the publication of the symposium proceedings.

Theme 1 —**Land Use and the Environment**. David A. Myers, Valparaiso University School of Law, Valparaiso, IN 46383 (tel. 219-465-7864).

Theme 2 — **Pollution Control, Agriculture, and Agribusiness**. Margaret R. Grossman, 151 Bevier Hall, University of Illinois, Urbana, IL 61801 (tel. 217-333-1829).

Theme 3 — **Agribusiness — The Way Ahead**. Terence J. Centner, 3-1 Conner Hall, The University of Georgia, Athens, GA 30602 (tel. 706-542-0756).

—Terence J. Centner, Athens, GA

Ninth Circuit Upholds USDA's Disaster Loss Criteria

The Ninth Circuit has upheld the Secretary's inclusion of the unmarketable portions of a nonprogram crop in determining the crop's production for purposes of the Disaster Assistance Act of 1988. *Greenhorn Farms v. Espy*, No. 92-36546, 1994 WL 595369 (9th Cir. Nov. 2, 1994). The Act authorized payments if the total quantity a producer was "able to harvest" fell below a certain level. Based on the Act's legislative history, the court held that the Secretary's inclusion of harvested, but unmarketable, crops was reasonable.

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

Cooperative Mergers and Dissenters' Rights

By John D. Reilly

Throughout the 1980s, agricultural cooperatives were involved in an increasing number of mergers, consolidations, and acquisitions.[1] Many of these realignments were prompted by the general downturn in the American farm economy during the early part of the decade. However, as farm income and other related indicators rebounded in the late 1980s, merger activity among cooperatives did not abate. This trend continues into the 1990s. Mergers and acquisitions are increasingly used as a proactive response to market pressures. They help co-ops achieve greater operational efficiencies, improved access to information, and better response to changing trends in markets and member demographics.

A merger of two or more businesses involves a combination in which one of the merging firms survives and the other(s) cease to exist. A consolidation occurs when two or more firms combine to form a new entity, with none of the "old" firms surviving. Purchase of assets is the process of one firm acquiring all or substantially all of the assets of another firm.

While mergers, consolidations, and sales of assets have a number of similarities, the statutory requirements for each transaction can differ in such matters as the need for member approval by each of the involved firms or assumption of the other firm's liabilities. This article will focus on mergers.

Mergers

Mergers generally entail four statutory requirements: (1) drafting a merger plan; (2) approval of the plan by the board of directors of each organization; (3) approval of the plan by the members of each organization; and (4) filing the plan with the secretary of state or other appropriate state office.[2]

Most agricultural cooperatives are formed under and governed by state cooperative incorporation statutes.[3] While a number of state cooperative statutes refer to the subject of merger, considerable variation exists in the amount of detail used to describe the process.[4] Some cooperative statutes provide step-by-step merger procedures; others refer to the state business corporation statute for guidance; other state cooperative statutes omit coverage of mergers altogether. Most cooperative statutes state that the general corporation law(s) will apply, except when they conflict or are inconsistent with the cooperative statute.[5]

As co-ops continue to realign, some states have recently amended their cooperative incorporation statutes with respect to mergers, consolidations, conversions, and sales of assets. Recent examples include Hawaii (in 1993), Kansas (in 1991), Minnesota (in 1989), Oregon (in 1987), Utah (in 1994), and Wisconsin (in 1985).[6]

In some cases, greater detail has been added to the subject of merger in the cooperative, requiring less reliance on the corporation statute. This trend has been helpful. Cooperative terminology, equity structure, governance, and other aspects can differ from traditional corporations, with the effect that the corporation code has not always provided clear guidance to co-ops involved in a merger.[7]

In addition to greater specificity, the recent changes in state cooperative statutes are providing cooperatives with added flexibility in mergers. For example, the statute now may provide several alternatives for getting member approval, one based on a percentage of the entire membership, and another based on those in attendance and voting at the meeting.[8]

However, when amendments to merger requirements are being considered, probably the most controversial issue is to what extent, if at all, should dissenters' rights be extended to cooperative members who oppose the merger.

Dissenters' Rights

The general corporation statutes of every state provide for dissenters' rights in a merger.[9] Essentially, this entitles those who oppose the merger to "cash out" their equity interest rather than remain a shareholder after the merger or other restructuring takes place.

Some state cooperative statutes make reference to dissenters' rights in merger situations as well as other major transactions such as consolidation, conversion, and sale of assets.[10] When the state cooperative statute provides for dissenters' rights, it may look to the corporation statute for application, or it may set out the rights of dissenters in the cooperative statute itself. For example, the cooperative statute may provide for dissenters' rights, but require that the dissenters be paid back their equity interest over a period of years instead of within a matter of days, as is typical in corporation statutes.

While some state cooperative statutes extend dissenters' rights to members and possibly others objecting to a merger, other states specifically provide that those objecting to a merger will not be afforded dissenters' rights.[11]

If the cooperative statute makes no reference to dissenters' rights, the question is whether similar rights found in the state business corporation statute should apply to associations organized under the cooperative statute. This may be an issue, particularly if the cooperative statute incorporates, by reference, the state business corporation statute to fill in any gaps in coverage, as long as it is not inconsistent with the cooperative incorporation statute.

It has been argued that dissenters' rights as provided in the business corporation statute should not apply to cooperatives because they conflict with cooperative equity practices.[12] Several reasons support this view:

(1) Because cooperatives are member-owned and -controlled associations, the issuance, transfer, or redemption of cooperative equity is almost always subject to the approval of the board of directors. Providing dissenting members automatic appraisal and payment independent of board action would conflict with this usual cooperative practice.

(2) Automatic payment to dissenters is inconsistent with cooperative principles in which equity is revolved or redeemed on a systematic basis without regard to status as a member or a former member. Permitting dissenters to prematurely "cash out" allows them to be paid the value of their equities ahead of other members and holders of the same equity.

(3) One reason for dissenters' rights — protection of minority shareholders — is not as relevant in the cooperative context. Most cooperative statutes require co-ops to limit voting to one vote per member, regardless of the amount of equity a member may have in the association. Since voting power among members is equal, there are no majority or minority shareholders whose voting power is based on the amount of investment, as is the case with corporations.

(4) If a cooperative statute already contains a provision governing cooperative mergers, legislative omission of dissenters' rights could be interpreted as deliberate in intent. This position is particularly persuasive if the merger procedures provided in the cooperative statute

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make it unnecessary to look to the corporation statute for guidance.

Critics have asserted that not providing dissenters' rights creates a situation of captive equity.[13] This same point has also been raised when a terminated member does not have his or her equity redeemed when leaving, but must wait until the usual revolvement time as decided by the board of directors. The courts generally give great deference to a cooperative board of directors' discretion in deciding when to redeem a class of equity, so long as there is not a clear abuse, such as an accumulation of excessive reserves or unfair dealing in the manner equity is revolved back to members and former members.[14] Essentially, the collective welfare of the co-op has been viewed as the state's "paramount concern" versus the advancement of individual interests in the association.[15]

Recent Legislative Actions Affecting Dissenters' Rights

A handful of states have recently addressed the dissenters' rights subject directly or indirectly as it applies to mergers and similar transactions involving agricultural cooperatives. A synopsis follows:

Illinois

Like a number of other states, the Illinois cooperative statute provides some coverage of the merger process, but does not cover a number of details, including dissenters' rights. In the same section that references merger, 805 Ill. Ann. Stat. § 315/31, it also provides that the Illinois general corporation law applies to associations organized under the cooperative statute "except where those provisions are in conflict with or inconsistent with the express provisions of this [Cooperative] Act...."[16] Because merger procedures are covered in a limited fashion in the cooperative statute, cooperatives have to rely on the Illinois Business Corporation Act, which extends rights to dissenting shareholders.

In 1993, section 315/31 of the Illinois cooperative statute was amended by adding a new subsection which stated: "The dissenters' rights provisions of the Business Corporation Act of 1983 do not apply with respect to capital stock issued as patronage distributions or to reflect membership in an association organized and operating under this Act."[17] With the 1993 amendment, cooperative associations organized under the Illinois Agricultural Cooperative Act no longer have to prematurely redeem equity held by those objecting to a merger.

Utah

Utah's agricultural cooperative statute was substantially revised in 1994. Among the areas affected were the rights of cooperative members or shareholders to dissent from a plan of merger.

Prior to 1994, Utah Code Ann. section 3-1-40 of the Utah cooperative statute required that those objecting and exercising their dissenters' rights at the time of merger were to be paid the "fair value" of their interest in the cooperative within ninety days of the merger. Voting and dissenters' rights in merger situations were extended to anyone having a financial interest of $50 or more in the cooperative.[18] The financial interest did not have to have voting rights attached to it in order for the holder to be entitled to vote on the merger and exercise dissenters' rights. Thus, the law made it possible for significant voter participation by those who were neither members or active in the cooperative.

The revisions to the Utah cooperative statute in 1994 changed all this. The Utah legislature repealed, without replacement, the sections on dissenters' rights found at sections 3-1-39 and 3-1-40.[19] The dissenters' coverage in the Utah corporation statute cannot be incorporated by reference because the Utah cooperative statute provides that the corporation statute has no applicability to associations governed by the cooperative statute, except for several specified situations involving directors and officers.[20]

The 1994 revisions to the Utah cooperative statute also narrowed the eligibility of those able to vote on mergers to "current" members.[21]

Washington

Washington's cooperative statute expressly authorizes dissenters' rights for "members" objecting to a merger[22] and looks to the business corporation chapter for application.[23] Until recently, members objecting to a merger and exercising their dissenters' rights had to be paid the "fair value" of their membership and equity interest within thirty days from the date of demand following notice of the merger.[24] This could potentially include any appreciated value in the cooperative above and beyond the amount paid in.

In 1989, Wash. Rev. Code Ann. section 23.86.145 was added to the Washington cooperative statute. It amended dissenters' rights somewhat. If provided in the co-op's articles, a member exercising dissenters' rights would be entitled to his or her membership fee plus payment of their retained equity.[25] Dissenters would not receive any appreciated value based on their equity, just the consideration paid as membership as well as the face value of other equity earned through business with the cooperative.

Section 23.86.145 coverage of dissenters' rights was amended again in 1994. Section 23.86.145 still provides that a member has the right to object to a merger and elect to exercise his or her dissenters' rights. However, the cooperative can now return the member's equity interest "on the same time schedule that would have applied if membership in the association had been terminated."[26] So instead of paying dissenting members within thirty days, cooperatives can apply the same redemption policy used for terminated members. For many cooperatives, this typically involves repurchasing the former patron's membership certificate or stock, and then redeeming the other retained equity in the normal course of the co-op's revolvement plan.

This arrangement provides the cooperative with more flexibility than the thirty-day requirement, and is consistent with the traditional cooperative practice of revolving out equity to holders at the same time regardless of their membership status.

Hawaii

Until recently, the merger provision appearing in Hawaii's agricultural cooperative statute, Haw. Rev. Stat. section 421.21.5, specified the required percentage of member votes for approving a merger. Otherwise the "state general corporation laws" governed mergers involving associations organized under the cooperative statute.[27]

In 1993, Hawaii's state legislature repealed section 421.21.5 and adopted a new, more comprehensive version with step-by-step procedures for mergers and consolidations.[28] The prior reference to the business corporation statute found in section 421.21.5 was stricken as part of the 1993 amendment. While the new version of section 421.21.5 provides detailed merger procedures, there is no reference to dissenters' rights.

The comprehensiveness of the new merger procedures enacted specifically for cooperatives, coupled with deleting the cross-reference to the corporation statute, suggests the legislature's intent that section 421.21.5 be the sole source of guid-

Continued on page 6

ance in carrying out a merger. So it is unlikely that dissenters' rights as found in the corporation statute could be invoked by members of a cooperative involved in a merger.

Iowa

Iowa Code Ann. sections 499.65 and 499.66 of the Iowa cooperative statute provide dissenters' rights to any "voting member or voting shareholder" of a cooperative involved in a merger or consolidation.[29] Sections 499.65 and 499.66 have been amended on several occasions in recent years.

Section 499.66 currently requires that those objecting to a merger and exercising dissenters' rights must have their membership fee returned within sixty days after the merger. The "fair value" of the remaining equity must then be paid back in ten annual equal payments over a fifteen-year period. "'Fair value' means the cash price that would be paid by a willing buyer to a willing seller, neither being under any compulsion to buy or sell."[30]

The requirement that the payment be made "in ten equal payments" was added as part of a 1992 amendment.[31] The change resolved some confusion as to whether payment to dissenters' had to be at one time or could be spread out over the fifteen-year period.[32]

Prior to 1986, section 499.66 required that a dissenting member's equity interest had to be paid back within five years instead of the current fifteen-year period.

Kansas

The Kansas cooperative marketing law was subject to major revision in 1991 and 1992.[33] In 1991, a new series of provisions found at Kan. Stat. Ann. sections 17-1637 through 17-1642 were enacted covering cooperative mergers and consolidations.[34] Prior to 1991, the Kansas cooperative marketing statute provided no guidance for mergers or consolidations. Thus, almost all cooperative combinations in Kansas were carried out through "buy/sell agreements," or transactions involving the sale of substantially all the assets under section 17-1636.

In 1991, section 17-1642 was enacted, along with the new merger provisions. Section 17-1642 provides dissenters' rights for members and voting shareholders. In addition to authorizing dissenters' rights, section 17-1642 covers the appraisal process, including the option for court-appointed appraisers.

Under section 17-1642, a cooperative involved in a merger must pay dissenting members or stockholders their entire financial interest in the cooperative. Payment must be within sixty days of the effective date of the merger.[35] The payment period may be extended if there is a difference of opinion over the appraisal value.

Dissenters' rights under section 17-1642 cannot be exercised in all instances. Members or stockholders of the surviving association or corporation do not have dissenters' rights if: (1) "the active members of the surviving association or corporation continue to be eligible to be members...after the merger" and (2) "the agreement of merger does not amend the articles of incorporation...."[36] Difficulty in meeting this test could arise if the surviving cooperative lacks sufficient stock under its existing authorized capital to carry out the merger.

Dissenters' rights under section 17-1642 also will not be extended to those affiliated with the constituent association or corporation if the "active members" of the constituent are able to join the surviving entity "on the same terms and conditions as other similarly classified members of the surviving association or corporation."[37]

While the Kansas cooperative marketing law provides for dissenters' rights in situations involving merger and consolidation, the law provides some flexibility for the cooperative because the provisions need not apply if the situation of the affected members is not changed materially.

Conclusion

States have taken various approaches to dissenters' rights of cooperative members and stockholders. In some cases, dissenters' rights have been expressly foreclosed, while elsewhere there has been a compromise between unfettered dissenters' rights and no dissenters' rights whatsoever.

States will likely continue to differ in addressing this matter, depending on how they view the inherent tensions between the collective welfare of the cooperative and the individual rights of a dissenting member or group of members. For the most part, cooperatives and their members have been able to show that requiring mandatory dissenters' rights with immediate payout privileges would be a significant impediment to a number of cooperatives contemplating merger or other realignments.

Endnotes

[1] From 1984 through 1993, close to 1,000 known farmer cooperatives merged or were acquired by other cooperative(s) or investor-owned firm(s). R. Richardson, et. al., "Farmer Cooperative Statistics, 1993," U.S. Dep't of Agric., Rural Dev. Admin. - Cooperative Serv., Serv. Rep. 43, at 25 - 27 (Nov. 1994).

[2] For a good overview, *see* K. Sedo, *Cooperative Mergers and Consolidations: A Consideration of the Legal and Tax Issues*, 63 N.D. L. Rev. 377 (1987).

[3] *See* J. Baarda, State Incorporation Statutes for Farmer Cooperatives, U.S. Dep't of Agric., Cooperative Info. Rep. No. 30 (1982).

[4] *Id.* at 119.

[5] *Id.* at 14. This language on the applicability of the general corporation laws appeared in the Bingham Cooperative Marketing Act of 1922 [see Ky. Rev. Stat. Ann. § 883f-30 (Baldwin 1936)]. The Bingham Act served as a model cooperative incorporation statute, and was adopted in similar form by a number of other states in the 1920's.

[6] See Haw. Rev. Stat. § 421-21.5 (1993 Haw. Sess. Laws Act 105, §§ 1-2; Kan. Stat. Ann. § 17-1637 et seq. (Supp. 1992); Minn. Stat. Ann. § 308A.801 (Supp. 1993); Or. Rev. Stat. § 62.615 and 62.625 (1991); Utah Code Ann. § 3-1-30 et seq. (S.B. 180, signed into law on March 17, 1994, eff. May 2, 1994); and Wis. Stat. Ann. § 185.61 (1992).

[7] To illustrate this point, *see Indiana Farm Bureau Cooperative Association, Inc. v. AgMax, Inc.*, 622 N.E.2d 206 (Ind. App. 5 Dist. 1993).

[8] For example, see Kan. Stat. Ann. § 17-1637 (Supp. 1992).

[9] Sedo, *supra* note 2, at 397, n.117. In some states dissenters' rights are made applicable not only to mergers and consolidations but also to sales or exchanges of substantially all assets, conversions, and other possible events of significance depending on the state.

[10] *See* Iowa Code Ann. § 499.65 (Supp 1993); Kan. Stat. Ann. § 17-1642 (Supp. 1992); Ky. Rev. Stat. Ann. § 272.321 (1989); Md. Corps. & Ass'ns Code Ann. § 5-527(b) (1993); Mont. Code Ann. § 35-16-211 (1989); N.C. Gen. Stat. § 54-166 (1990); Vt. Stat. Ann. tit. 11, § 1061 (1984); Va. Code Ann. § 13.1-339 (1993); Wash. Rev. Code Ann. § 23.86.145 (amended 1994 Wash. Legis. Serv. ch. 206, § 2).

Kansas added dissenters' rights to its cooperative marketing statute in 1991. Utah provided dissenters' rights up through early 1994 at Utah Code Ann. §§ 3-1-39 and 3-1-40, at which time they were repealed and stricken from the cooperative statute [1994 Utah Laws, S.B. 180, § 8 (signed into law on March 17, 1994, eff. May 2, 1994)].

[11] For examples, *see* Idaho Code § 22-2622A (1977); 805 Ill. Ann. Stat. § 315/31(b) (Supp. 1994); and Ark. Stat. Ann. § 2-2-313 (Supp. 1991) (subject to certain exceptions).

[12] *See* K. Sedo, *supra* note 2, at 397 - 400; and K. Duft, *Dissenter's Rights and the Issue of One Member, One Vote*, Agribusiness Management, Washington State University Cooperative Extension, p. 1 - 5 (July 1994). For contrary view, *see* D. Crago, *Cooperative Dissent: Dissenting Shareholder Rights in Agricultural Cooperatives*, 27 Ind. L. Rev. 495 (1994).

[13] *See* Crago, *supra* note 12, at 504.

[14] *See Claassen v. Farmers Grain Coop.*, 208 Kan. 129, 490 P.2d 376, 380 (1971).

See also Sedo, *supra* note 12, at 399-400.

[15] *See Atchison County Farmers Union Co-op Ass'n v. Turnbull*, 241 Kan. 357, 736 P.2d 917, 919-920 (1987).

[16] Ill. Ann. Stat. ch. 805, § 315/31(a) (Supp. 1994).

[17] 1993 Ill. Laws P.A. 88-45, § 1; 805 Ill. Ann. Stat. § 315/31(b) (Supp. 1994).

[18] *See* Utah Code Ann. §§ 3-1-39, 3-1-40, and 3-1-33 (1988).

[19] 1994 Utah Laws, S.B. 180, § 8 (signed into law on March 17, 1994, eff. May 2, 1994).

[20] *See* Utah Code Ann. § 3-1-1.1; enacted in 1994 Utah Laws, S.B. 181, § 1 (signed into law on March 17, 1994, eff. May 2, 1994).

[21] *See* Utah Code Ann. § 3-1-33 and 3-1-10(1)(a); amended in 1994 Utah Laws, S.B. 179, §§ 1 and 6 (signed into law on March 17, 1994, eff. May 2, 1994).

[22] Wash. Rev. Code Ann. § 23.86.135 (Supp. 1993). Prior to 1989, coverage of dissenters' rights was provided at Wash. Rev. Code Ann. § 23.86.220(10).

In addition to merger, section 23.86.135 provides dissenters' rights to members of cooperatives involved in consolidations, conversions, or sale or exchange of substantially all assets.

[23] Wash. Rev. Code Ann. § 23.86.145 (1) (Supp. 1993) (amended 1994 Wash. Legis. Serv. ch. 206, § 2).

[24] *See* Wash. Rev. Code Ann. § 23.B13.250 (Supp. 1993).

[25] Wash. Rev. Code Ann. § 23.86.145(2) (Supp. 1993).

[26] 1994 Wash. Legis. Serv. ch. 206, § 2. This amendment applies only to "agricultural associations" and not to other types of cooperatives organized under Washington's cooperative statute, Wash. Rev. Code Ann. ch. 23.86.

[27] Haw. Rev. Stat. § 421.21.5 (1985).

[28] 1993 Haw. Sess. Laws Act 105, §§ 1-2.

[29] *See* Iowa Code Ann. §§ 499.65 and 499.66 (1991 and Supp. 1993).

[30] Iowa Code Ann. § 499.66(1)(e) (1991).

[31] Iowa Code Ann. § 499.66(3) (Supp. 1993); 1992 Iowa Legis. Serv. ch. 1147, § 3.

[32] See *Van Der Maaten v. Farmers Co-operative Co.*, 472 N.W.2d 283 (Iowa 1991).

[33] I wish to acknowledge helpful comments on Kansas cooperative law provided by Terry Bertholf, Esq. of Hutchinson, KS.

[34] 1991 Kan. Sess. Laws ch. 74, §§ 1-6.

[35] Under Kan. Stat. Ann. § 17-1642(a) (Supp. 1992), the cooperative must pay the dissenter his or her entire interest within 30 days after a 20 day notice period, which follows an initial 10 day period for mailing notice following the merger.

[36] Kan. Stat. Ann. § 17-1642(j) (Supp. 1992).

[37] Kan. Stat. Ann. § 17-1642(j) (Supp. 1992).

State Roundup

MISSOURI. *Spray damage to watermelon crop.* In *McLain v. Johnson*, No. WD 48954, 1994 WL 579977 (Mo. App. W.D. Oct. 25, 1994), the Missouri Court of Appeals affirmed the denial of damages on a claim that aerial spraying of soybeans had destroyed a neighboring watermelon crop.

For twenty years, McLain farmed watermelon on approximately three acres in Mercer County, Missouri. The watermelon patch was adjacent to farmland planted to soybeans. The soybean farmer contracted for aerial spraying with Johnson Flying Service. Johnson sprayed the soybeans with the chemical 2,4-DB. Soon thereafter, the neighboring watermelon crop died. McLain filed suit alleging that Johnson was negligent in spraying the soybean crop and that such negligence killed his watermelon crop. The court, sitting without a jury, entered judgment for Johnson.

On appeal, McLain claimed that Johnson's aerial crop spraying is an inherently dangerous activity. Accordingly the burden of proof should shift to Johnson to demonstrate that he acted with due care and did not kill the watermelon crop. The court of appeals disagreed, observing that the inherently dangerous activity doctrine is used to impose vicarious liability on one who hires an independent contractor. Here, since McLain brought action against Johnson, the contractor, and not against the landowner, the doctrine did not apply.

McLain next argued that the trial court's finding in favor of Johnson is not supported by substantial evidence since there is no other explanation for the watermelon damage but that Johnson caused it when spraying the soybeans. McLain asserted that the sudden onset doctrine applied. The sudden onset doctrine refers to situations where the injury develops contemporaneously with a negligent act that is the obvious cause of the injury. 1994 WL 579977, *2 (quoting *Carmack v. Bi-State Dev. Agency*, 731 S.W.2d 518, 520 (Mo. App. 1987).

The appellate court rejected this contention. First, McLain did not prove Johnson was negligent in spraying. Second, the watermelons died one week after the spraying so the death did not happen contemporaneously with the spraying. Finally the soybean spraying was not the obvious cause of the watermelon kill. No chemical tests were performed on the watermelons and no soil samples were taken. Further, Johnson presented evidence as to other possible causes, such as residues in the soil from spraying the previous year.

—Scott D. Wegner, Lakeville, MN

GEORGIA. *Oral agreement to harvest peaches.* In *Miami Valley Fruit Farm, Inc. v. Southern Orchard Supply Company*, No. A94A1457, 1994 WL 559566 (Ga. App. Aug. 17, 1994), the Georgia Court of Appeals considered an oral agreement to cultivate and harvest peaches.

In the late 1970's, Miami Valley, owner of 295 acres of land, entered into an oral agreement with Southern Orchard whereby Miami Valley purchased peach trees and Southern Orchard planted, cultivated, and harvested the peach trees. Following the 1993 peach crop harvest, Miami Valley informed Southern Orchard that the oral agreement was terminated and Southern Orchard would not be allowed entry for the 1994 peach cultivation and harvest. Southern Orchard brought an action seeking injunctive relief, contending that it had made substantial investments in equipment and packing facilities in the understanding that the agreement would continue for the economic life of the peach trees. The trial court subsequently issued an interlocutory injunction.

On appeal, Miami Valley argued that the oral agreement was to run from year to year. Further, the agreement was unenforceable for lack of any definite duration as the economic life of a peach tree cannot be determined with any degree of certainty. However, the court of appeals found no abuse of discretion by the trial court, finding instead evidence that the parties intended the contract to continue for more than a single season and that the agreement was to continue for the economic life of the peach trees.

—Scott D. Wegner, Lakeville, MN

Federal Register *in brief*

The following matters were published in the *Federal Register* during the months of September and October, 1994.

1. PSA; Amendment to certification of central filing system; Idaho. 59 Fed. Reg. 47298.

2. FCIC; Actual Production History Coverage Program; final rule; effective date: 10/19/94. 59 Fed. Reg. 47783.

3. Agricultural Marketing Service; Use of direct final rulemaking; policy statement; comments due 12/6/94. 59 Fed. Reg. 51083.

4. APHIS; Brucellosis in swine; whole herds depopulated; fair market value payment; final rule; effective date 11/7/94. 59 Fed. Reg. 51102.

5. FmHA; Disaster set-aside program; interim rule. 59 Fed. Reg. 53079.

—Linda Grim McCormick, Alvin, TX

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agriculture update

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