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WHAT EVERY LAWYER SHOULD KNOW ABOUT CROP INSURANCE

AALA 2002 Conference
Indianapolis, Indiana
Friday, October 25, 2002

[ABA Agricultural Finance and Agri-Business Subcommittee]

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American Agriculture Law Association 2002 Annual Meeting
Indianapolis , Indiana
October 25, 2002

2002 Update: Commercial Law

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Update: Agricultural Bankruptcy Law

AALA Annual Educational Conference
Indianapolis, Indiana

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I. Update on Bankruptcy Reform Legislation (As of September 1, 2002)

- The U.S. House passed H.R. 333, *The Bankruptcy Abuse Prevention and Consumer Protection Act of 2001* on March 1, 2001.

- The U.S. Senate passed its own bankruptcy reform bill, S. 420, *The Bankruptcy Reform Act of 2001* on March 15, 2001.

- In July, 2001, the Senate substituted the language of H.R. 333 with that of S. 420. A number of amendments were made to the new H.R. 333 and on July 17, 2001, the Senate passed the bill with a vote of 82-16. Given the substitution, there were now substantial differences between the Senate version of H.R. 333 and the original House version of H.R. 333. A conference committee was appointed to resolve the differences.

- Both House and Senate versions of the H.R. 333 make Chapter 12 a permanent part of the Bankruptcy Code. However, the Senate version includes several "pro-farmer" amendments to Chapter 12 that are not part of the House bill. A voice vote motion to instruct the conferees regarding Chapter 12 passed the House on July 31, 2001. This motion instructed the conferees to agree to the Senate provisions relating to the protection of family farmers and fishermen.

- The two most controversial issues to be resolved by the Conference Committee concerned:
  1) Senate limitations imposed on the homestead exemption that is available in certain states; and,
  2) Senate attempts to ensure that abortion protestors be prohibited from avoiding court ordered fines by declaring bankruptcy.

AGRICULTURAL ADMINISTRATIVE LAW DEVELOPMENTS

Christopher R. Kelley[1]

INTRODUCTION

The most significant development in the federal regulation of agriculture in the past year occurred on May13, 2002, when President Bush signed the Farm Security and Rural Investment Act of 2002,[2] commonly known as the 2002 farm bill. The Act authorizes farm income support for the next six years at levels projected to be substantially higher than those authorized by the previous farm bill, the Federal Agriculture Improvement and Reform Act of 1996.[3] The Act's basic mechanisms for subsidizing farm income are briefly summarized in the Legislative Developments portion of this article.

Noteworthy judicial developments in the past year include three court of appeals decisions involving challenges to USDA rules and rulemaking. In *McDaniels v. United States*,[4] a Fourth Circuit panel sharply disagreed over the standard of review to be applied to a USDA rule that Congress permitted to be adopted without compliance with the notice and comment rulemaking procedures of the Administrative Procedure Act. The D.C. Circuit, in *Hershey Foods Corp. v. Department of Agric.*,[5] faced the unusual question of whether a congressional override of a district court injunction prohibiting implementation of a USDA rule converted the rule to a statute. In *Sugar Cane Growers Cooperative of Florida v. Veneman*,[6] the D.C. Circuit remanded, without vacating its provisions, a USDA program that had been promulgated by a press release. These and other decisions are discussed in the Judicial Developments portion of this article.

The Administrative Developments portion of this article notes changes to certain rules of practice. While most administrative developments in the past year involved relatively minor USDA programs, the coming year promises to be replete with administrative developments as the USDA implements the new farm bill.

PART I. JUDICIAL DEVELOPMENTS

A. Divided Fourth Circuit Panel Upholds USDA Rule Promulgated Without Notice and Comment or Agency Explanation

In *McDaniels v. United States*,[7] several farmers challenged rules that rendered them ineligible for assistance under the 1998 Crop Loss Disaster Assistance Program (CLDAP) and

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[1] Associate Professor, University of Arkansas School of Law, Fayetteville, Arkansas; Of Counsel, Vann Law Firm, Camilla, Georgia.
[2] Pub. L. No. 107-171, 116 Stat. 134 (2002).
[3] Pub. L. No. 104-127, 110 Stat. 888 (1996).
[4] Nos. 01-2086, 01-2087, 01-2088, 2002 WL 1733812 (4th Cir. July 29, 2002).
[5] 293 F.3d 520 (D.C. Cir. 2002).
[6] 289 F.3d 89 (D.C. Cir. 2002).
[7] Nos. 01-2086, 01-2087, 01-2088, 2002 WL 1733812 (4th Cir. July 29, 2002).

INCOME TAX LAW UPDATE

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U.S. Agriculture In An Increasingly Competitive Global Market

Michael Boehlje
Professor
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Outline

I. Four Fundamental Forces
- A. Expanded Global Production
- B. Growing and Diversified Global Demand
- C. New Simplification Technology
- D. Changes in Competitive Metrics and Returns to Contributed Resources

II. The New Agriculture
- A. Increased Concentration and Consolidation
- B. Expansion of Industrialized Agriculture
- C. Production of Differentiated Products
- D. Precision (Information Intensive) Production and Distribution
- E. Emergence of Ecological Agriculture
- F. Formation of Food Supply Chains
- G. Increasing Risk
- H. More Diversity

III. Redefining the Industry
- A. What We Do
  - 1. Supplier of specific attribute raw materials for nutritional pharmaceutical and industrial uses
- B. How We Do It
  - 1. Biological manufacturing with traceability from inputs to final product
- C. How We Compete
  - 1. Quality (better)
  - 2. Cycle time (faster)
  - E. Cost (cheaper)

The Impact of Revised Article 9 of the Uniform Commercial Code on Security Interests and Agricultural Liens in Farm Products and Goods Used in Farming Operation

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I. Introduction

Revised Article 9 of the Uniform Commercial Code ("Revised Article 9") governs consensual security interests in personal property and fixtures. Revised Article 9 retains the basic structure of the previous version of Article 9 ("Old Article 9"), but Revised Article 9 builds upon Old Article 9's concepts by (1) expanding Old Article 9's scope, (2) modifying some definitions, (3) creating new definitions, (4) modernizing the filing system for financing statements, (5) providing additional methods of perfection, (6) providing additional priority rules, (7) formulating clearer rules for the enforcement of security interests, and (8) providing specific transition rules[1].

These revisions impact agriculture in many ways. In particular, they enhance the efficiency of the perfection process, incorporate agricultural liens within Revised Article 9's scope, change the priority rules for security interests in crops, clear up ambiguities in the priority rules for commingled goods, affect the rights of buyers of farm products in the ordinary course of business, and impose notice requirements for purchase-money security interests in livestock.

[1] Corrine Cooper, The New Article 9, Second Edition, at 18 (2000) (hereinafter, cited as *Cooper*).

Accordingly, this article first reviews the various categories of personal property and fixtures included within Revised Article 9's scope. Next, this article clarifies the distinction between security interests and agricultural liens. This article then explains how to create and perfect a security interest or agricultural lien. Finally, and most important, this article compares priority disputes between various secured parties.

II. Personal Property and Fixtures

As mentioned above, with the exception of agricultural liens, Revised Article 9 governs consensual security interests in personal property and fixtures.[2] Revised Article 9 divides personal property into three distinct categories: (1) Tangible Personal Property (a.k.a. "Goods"); (2) Semi-Intangibles; and (3) General Intangibles. The vast majority of personal property relating to agriculture falls within the first of these categories (Goods); therefore, except for agricultural liens, the remainder of this article focuses exclusively on consensual security interests in Goods.

A. Goods

Revised Article 9 defines "Goods" substantially the same as Old Article 9 to include

> [A]ll things that are movable when a security interest attaches. The term includes (i) fixtures, (ii) standing timber that is to be cut and removed under a conveyance or contract of sale, **(iii) the unborn young of animals, (iv) crops grown, growing, or to be**

[2] Revised Article 9 does not govern mortgage liens or statutory liens, other than agricultural liens. Individual state real property and other statutes govern the creation and imposition of these lien types.

Contracting in Agriculture

Potential Problems

Joseph A. Miller
American Farm Bureau Federation

Contracting of agricultural production and marketing have become much more common the past few years. For example, it is estimated that 80% of all hogs produced in the U.S. are sold on some type of contract. That would equate to approximately 80 million hogs each year! Virtually all of the poultry and eggs produced and sold in the U.S. is done so under contract. Approximately 25% of the U.S. cattle supply is marketed via contract.

But contracting is not limited to livestock. A growing portion of the U.S. grain production is grown or marketed under contract. With specialty grains such as high oil corn, food grade soybeans, popcorn, white corn, and various non-biotech crops, we are seeing a rapid move towards contracting as a means to insure access to a particular market as well as the producer attempting to garner larger returns on his/her production. Over 40% of the total commodity production in the U.S. is under a marketing or production contract. This includes fruit and vegetable production, dairy products and all of the other diverse commodities produced in the U.S. And it is expected that the level of contracting will continue to increase in the years ahead.

Given the perceived need by processors and others for a stable supply of agricultural commodities, with certain quality characteristics, and a predictable purchase price, contracting is likely to increase. As processors and retailers move towards branded products and the need for identity preservation of specific crop and livestock traits increases, the need for contracts to ensure a viable supply will increase. Producers see contracts as a way to manage price risk, diversify income sources, access new markets and be paid for adding more value.

Another major impact that contracts can have on a producer is to provide direct feedback as to his/her production output in relation to consumer preferences. Under the traditional marketing system the producer takes his crop or livestock to a market. The market may pay the producer a slight premium or discount, but in general the producer is paid an average price. It is then up to the processor and retailer to try to make sure that the consumer will buy the "average" product. The producer has little feed back as to whether the product being produced is actually what the consumer desires. The producer also has little feed back as to when the processor would prefer delivery of a product. About the only mechanism available for the processor to relay to the producer that it is desired that delivery be postponed or sped up, or to change the genetics of the product being produced, is by severe price movements.

In many respects, that is what happened to hog prices in 1998, when they went to a national average price of 8 cents per pound, a price not seen since the Great Depression (and in real dollars, was actually lower than the price paid during the Depression). Processors were overloaded with hogs and simply could not process all of the hogs being delivered to them each day. But processors cannot, without violating various laws (Packers & Stockyards Act and possible RICO to name two) buy hogs from some and refuse to buy from others. Therefore their only alternative was to keep lowering the price paid to all producers selling without contracts to a level that they simply stopped bringing them hogs.

THE IDEM FERTILIZER INITIATIVE

American Agricultural Law Association Annual Meeting

October 25, 2002

by

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<PRE>[DOCID: f:publ472.106]

[[Page 2057]]

GRAIN STANDARDS AND WAREHOUSE IMPROVEMENT ACT OF 2000

[[Page 114 STAT. 2058]]

Public Law 106-472
106th Congress

An Act

To amend the United States Grain Standards Act to extend the authority of the Secretary of Agriculture to collect fees to cover the cost of services performed under that Act, extend the authorization of appropriations for that Act, and improve the administration of that Act, <<NOTE: Nov. 9, 2000 - [H.R. 4788]>> to reenact the United States Warehouse Act to require the licensing and inspection of warehouses used to store agricultural products and provide for the issuance of receipts, including electronic receipts, for agricultural products stored or handled in licensed warehouses, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States <<NOTE: Grain Standards and Warehouse Improvement Act of 2000.>> of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) <<NOTE: 7 USC 71 note.>> Short Title.--This Act may be cited as the ``Grain Standards and Warehouse Improvement Act of 2000''.

(b) Table of Contents.--The table of contents of this Act is as follows:

Posner, R.A. 1992. *Sex and Reason*. Cambridge, MA and London: Harvard University Press.
Posner, R.A. 1995. *Overcoming Law*. Cambridge, MA and London: Harvard University Press.
Scheppele, K. 1988. *Legal Secrets: Equality and Efficiency in the Common Law*. Chicago: University of Chicago Press.
Symposium on Blackmail. 1993. *University of Pennsylvania Law Review* 141: 1567–1989.
Tal, Y. 1997. Privacy and social norms: social control by reputational costs. University of Chicago Law School, Chicago.
Warren, S. and Brandeis, L. 1890. The right to privacy. *Harvard Law Review* 4: 193–220.

private attorneys general. *See* SECURITIES REGULATION; STANDING.

private commercial law. In the United States, the Uniform Commercial Code supplies a comprehensive set of contract default rules to govern transactions in the sale of goods. Although these rules were explicitly designed to be accommodating to merchant concerns, in many industries merchant transactors have nevertheless systematically rejected state-supplied commercial law. In its place, their trade associations have developed private commercial law, industry-specific sets of contract default rules that are codified in trade rules and interpreted and enforced in association-run merchant arbitration tribunals.

Private commercial law exists in over fifty industries including diamonds, grain, feed, independent films, printing, binding, peanuts, rice, cotton, burlap, rubber, hay and tea. In some industries, transactors agree to be bound by private commercial law as a condition of membership in a trade association or a commodities exchange. In others, transactors can opt into these private rules on a transaction-by-transaction basis by including a specialized arbitration provision in their contract. The arbitrators who decide cases in merchant tribunals are esteemed members of their trade. When they sit in panels they are similar to Lord Mansfield's merchant juries.

Part I of this essay describes the ways in which private commercial law systems operate and, in an effort to understand why merchant transactors in so many industries have found it desirable to opt out of the public legal system, Part II explores the ways in which these private legal systems facilitate exchange, add value to contracting relationships, and promote commercial cooperation. Part III presents some concluding remarks about the social desirability of private legal systems.

I. THE OPERATION OF PRIVATE COMMERCIAL LAW SYSTEMS. Although many industries have been governed by private commercial law for over one hundred years, and Karl Llewellyn, the drafter of public commercial law, recognized its importance as early as 1925 (Llewellyn 1925), private commercial law has been largely ignored by legal scholars. A survey of trade associations' use of arbitration was conducted in the mid-1950s (Mentschikoff 1961), but the information it collected on the substantive and procedural rules used by association-run arbitration tribunals was never analysed or published. The description and analysis of private systems provided in this essay is based on the preliminary findings of a recent study that explores the way these private legal systems operate and the ways in which their substantive rules, adjudicative approaches, procedural rules, and formal and informal methods of enforcing their judgments influence transactional behaviour, and differ from those provided by the state (Bernstein 1992, 1996, 1997a, 1997b).

Substantive rules. The Trade Rules that govern exchange in private legal systems are drafted by trade association committees and must be approved by the membership-at-large. The preambles to these rules often state that they are codifications of industry customs. However, even when they were first adopted, most rules were not mere codifications of existing practices. Rather, they were modified versions of what committees of merchant transactors considered the 'best' industry practices. Today, most new trade rules and trade rule amendments are responses to technological changes, clarifications of existing rules, or attempts to improve transactional efficiency by changing, rather than adopting, common industry practices. Amendments based on changes in customary practice are rare.

Industry-drafted Trade Rules cover most of the same aspects of a commercial transaction as Articles 1 and 2 of the Uniform Commercial Code ('Code'), including contract formation, performance, interpretation, repudiation, breach, damages and excuse. They also provide industry-specific definitions of common contractual language, such as 'prompt', 'day', and 'F.O.B', as well as detailed quality specifications defining conforming tender. Most trade rules contain bright-line provisions that are either industry-specific refinements of standard-like Code provisions, or variations of Code provisions that would be legally enforceable if included in a contract. The only rules that might not be enforced by a court are several damages rules that might be invalidated as penalties and some insolvency rules that might conflict with the Bankruptcy Code. In industries where many different types of transactions are entered into, associations either promulgate multiple sets of trade rules or supplement a single set of rules with specialized standard-form contracts.

The most striking difference between the Trade Rules and the Code is the lack of trade rule equivalents of the Code provisions that direct courts to take commercial context into account in deciding cases. There are no trade rule equivalents of the Code's non-waivable duty of good faith, which directs courts towards 'interpreting contracts within the commercial context in which they are created, performed, and enforced' (UCC §1–203, and id. Official Comment) or its provisions directing courts to look to course of performance, course of dealing, or usage of trade in interpreting contracts (UCC §2–208, §2–205). There is also no trade rule equivalent of the Code's broad definition of enforceable agreement which includes the 'bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance' (UCC §1–201(3)). Most Trade Rules define the contours of transactors' legally enforceable agreement solely by reference to

FINANCING INTEGRATED AGRICULTURAL BUSINESSES: A TRANSACTIONAL ANALYSIS

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COUNSELING PRODUCERS TO AVOID FARM PROGRAM PAYMENT PROBLEMS

Presented by

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1. Payment Limitation and Payment Eligibility
   a. Person Determination
      i. Separate interest in crops
      ii. Separate responsibility
      iii. Separate accounts
   b. Actively Involved in Farming Determinations
      i. Active personal management
      ii. Active personal labor
      iii. Capital
      iv. Equipment
      v. Land
2. Requirements which are specific to particular programs
3. How is the environment for representing farmers in USDA matters changing?
   a. Entry of the American farmer into the "World Market"
   b. The Freedom to Farm Act of 1996
   c. Increased reliance on crop insurance
   d. Unfavorable weather conditions
   e. Reliance on disaster programs
   f. Agricultural Risk Protection Act of 2000

§777.11 Cumulative liability.

The liability of any producer for any payment or refund which is determined in accordance with this part to be due to FSA shall be in addition to any other liability of such producer under any civil or criminal fraud statute or any other statute or provision of law including, but not limited to, 18 U.S.C. 286, 287, 371, 641, 1001; and 31 U.S.C. 3729.

§777.12 Appeals.

Reconsideration and review of all determinations made in accordance with this part with respect to a farm or an individual producer shall be made in accordance with part 780 of this chapter.

§777.13 Liens.

Any payment which is due any person shall be made without regard to questions of title under State law and without regard to any claim or lien against the crop, and the proceeds thereof, which may be asserted by any creditor, except agencies of the United States Government.

§777.14 Other regulations.

The following regulations and amendments thereto shall also be applicable to this part:

(a) 7 CFR part 3, Debt Management.

(b) 7 CFR part 12, Highly Erodible Land and Wetland Conservation.

(c) 7 CFR part 707, Payments Due Persons Who Have Died, Disappeared or Have Been Declared Incompetent.

(d) 7 CFR part 719, Reconstitution of Farms, Allotments, Normal Crop Acreage and Preceding Year Planted Acreage.

(e) 7 CFR part 780, Appeal Regulations.

(f) 7 CFR part 790, Incomplete Performance Based Upon Action or Advice of an Authorized Representative of the Secretary.

(g) 7 CFR part 796, Denial of Program Eligibility for Controlled Substance Violation.

§777.15 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

The information collection requirements of this part shall be submitted to the Office of Management and Budget (OMB) for purposes of the Paperwork Reduction Act and it is anticipated that an OMB Number will be assigned.

PART 780—APPEAL REGULATIONS

AUTHORITY: 5 U.S.C. 301; 15 U.S.C. 714b and 714c; 16 U.S.C. 590h.

SOURCE: 60 FR 67316, Dec. 29, 1995, unless otherwise noted.

§780.1 Definitions.

For purposes of this part:

1994 Act means the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (Public Law 103–354).

Agency means FSA and its county and State committees and their personnel, CCC, NRCS, FCIC, and any other agency or office of the Department which the Secretary may designate, or any successor agency.

Appeal means a written request by a participant asking the next level reviewing authority to review a decision.

CCC means the Commodity Credit Corporation, a wholly owned Government corporation within the U.S. Department of Agriculture.

County committee means an FSA county or area committee established in accordance with section 8(b) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h(b)).

FCIC means the Federal Crop Insurance Corporation, a wholly owned Government corporation within the U.S. Department of Agriculture.

Final decision means the program decision rendered by the county or State committee or the FCIC Regional Service Office upon written request of the participant. A decision that is otherwise final shall remain final unless the

ADMINISTRATIVE APPEALS BEFORE THE NATIONAL APPEALS DIVISION OF THE UNITED STATES DEPARTMENT OF AGRICULTURE

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Estate Planning Update*

Roger A. McEowen**

I. Valuation Issues

A. Alternate valuation.

1. **Priv. Ltr. Rul. 200203031(Oct. 17, 2001).** The estate filed a timely estate tax return which did not include an alternate valuation date election. The estate was advised that the election was available and should have been taken. The estate requested an extension of time to file an amended return which would make the alternate valuation date election, decreasing the value of the gross estate and decreasing the estate taxes. The IRS granted the extension.

2. **Priv. Ltr. Rul. 200234037 (May 16, 2002).** An estate's executor and accountant had a misunderstanding and, as a result, the estate failed to make the alternate valuation election. The estate assets were valued as of the decedent's date of death and reported on a timely filed estate tax return. The decedent's estate contained real estate, bonds and marketable securities, along with other assets. The failure to make the election was discovered within one year after the estate tax return was filed and the estate immediately requested an extension of time to make the election. The IRS granted the extension.

B. Special use valuation.

1. Interest rates.

	Year of Death	
	2001	2002
Columbia	9.90	9.68
Omaha/Spokane	7.98	7.77
Sacramento	7.99	7.66
St. Paul	8.13	7.88
Springfield	8.97	8.16
Texas	8.22	7.80
Wichita	8.22	7.96

* Presented at the American Agricultural Law Association Twenty-Third Annual Meeting and Educational Symposium, Indianapolis, Indiana, October 26, 2002.
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RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

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American Agricultural Law Symposium 2002
Indianapolis, Indiana
October 24-26, 2002

American Association of Agricultural Law
Annual Conference
Indianapolis, Indiana
October 25-26, 2002

RIGHT-OF-WAY RIGHTS, WRONGS AND REMEDIES
STATUS REPORT, EMERGING ISSUES, AND OPPORTUNITIES

Nels Ackerson
Sommer Barnard Ackerson, P.C.[1]

INTRODUCTION

Right-of-way litigation that has swept across the country in the past decade centers on legal issues as ancient as the origins of the common law of real property and as contemporary as class action procedure and the law of the Internet. It also involves many very human stories. As all trial lawyers know, litigation is much more than merely application of the law to the proof of facts. Litigation involves conflicts that have important and sometimes profound economic or human consequences for the litigants. Right-of-way litigation often involves the homes, farms, ranches and business real estate of persons who care deeply about the results. This litigation involves corridors that form the backbone of the telecommunications industry and the Internet – real estate that contributes to the generation of billions of dollars of revenue annually. In addition to its human and economic impact, right-of-way litigation has resulted in significant precedents that in some cases may result in changes in the legal system and the legal profession, as well as in the practices of the industries involved.

On two earlier occasions I have spoken to the American Agricultural Law Association about ongoing right-of-way litigation. Each time it has been a hard choice for me to decide what issues are most important to address. Today the choices include substantive real estate law; various federal and state statutory schemes in telecommunications, railroad and land use law; the limits of federal pre-emption; newly revived state constitutional issues governing takings and eminent domain; state land use initiatives; federal and state rails-to-trails laws; class action developments; federal/state jurisdictional issues; and judicial sanctions for abusive trial tactics in right-of-way litigation. Other issues of interest arise from our class action settlements,

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[1] The Ackerson Group, Chartered, and Sommer & Barnard, P.C., merged in August 2002 to form Sommer Barnard Ackerson, P.C. The new law firm has offices at 1666 K Street, N.W., Suite 1010, Washington, DC 20006-1217, www.ackersonlaw.com; and 111 Monument Circle, Suite 4000, Indianapolis, Indiana 46204-5198, www.sommerbarnard.com.

BIOPHARMING, BIOSAFETY, AND BILLION DOLLAR DEBACLES: PREVENTING LIABILITY FOR BIOTECH CROPS [1]

As the revolution in protein-based drug therapy (dubbed "proteomics") follows the mapping of the human genome, the agricultural biotechnology industry will likely be rapidly transformed into a production system for large-scale pharmaceutical protein production. At the same time, as thousands of proteins line up waiting their turn to grow in corn or other crops in open fields across the U.S., there will be hundreds of nations overseas who do not consider these crops suitable for growing near food. Under a new international environmental agreement, the Cartagena Protocol on Biosafety ("biosafety protocol"), nations will be able to turn away any shipment of commodity crops (e.g., corn, soybeans, etc.) that "may contain" traces of biotech crops that are not approved for import.

At home in the U.S., moreover, thousands of food processors will be concerned that "biopharming" of crops will lead to commingling with the domestic food supply, causing costly recalls and damaging the brands of major food companies. Biopharming will earn the ardor of the drug companies and their patients, while simultaneously causing great concern among food companies and their customers both at home and overseas due to the threat of commingling these compounds with food.

The answer to the question of peaceful co-existence for the biopharmer, the overseas biosafety authorities, and food companies may lie in a combination of legal tools. This article will focus on the lessons learned from three incidents involving losses estimated in excess of one billion dollars: (1) the recall and mass tort litigation arising from bioengineered l-tryptophan food supplements, (2) the recall and mass tort litigation, including economic losses, from the Starlink™ corn recall, and (3) the loss of corn exports to the European Union, which may lead to liability being imposed upon biotech companies via class action litigation. These multi-billion dollar lessons provide a powerful incentive to build detailed, contractually imposed industry standards for the responsible uses of agricultural biotechnology (in particular, for the "identity preservation" methods appropriate to particular biopharming applications). Once standards are developed, with input from multiple stakeholders, they can be imposed via contract upon the entire chain of biopharming commerce. Once this occurs, the entire chain of commerce in food production in the U.S. will breathe a collective sigh of relief.

There is little time to develop and implement these contractual mandates, with the demand for biopharming capacity expected to accelerate in coming years. Regulatory programs have admitted their limitations in controlling post-harvest commingling. Even if regulatory authority were extended to identity preservation, the attendant public comment delays and limited inspection capacity of the regulatory process leave a gap that industry standards must step in to fill. Given the immediate threat of billion dollar liabilities, prompt action should be taken by those who could be targets for liability (biotech seed companies, growers, grain buyers,

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Legal Issues Related to the Use and Ownership of Genetically Modified Organisms*

Roger A. McEowen**

I. Legal Concerns for Producers

A. Acceptability in Commercial Markets of GMO Hybrids

The Problem: Certain world markets will not accept GMOs, and some United States grain processors have announced that they would not purchase GM grain until it is approved in particular foreign markets. This injects tremendous uncertainty into seed purchase transactions and product sales at or after harvest.

Note: The European mistrust of biotechnology stems from their long history of natural organic agricultural practices, the loss of the small family farm, a fear of monopoly control of their agriculture by foreign corporations, and secrecy and proprietary protections built into the American way of doing business.

1. Always check labels and only utilize non-GM hybrids.

a. But, there is a chance that GMOs may appear in bags of non-GM seed. Due to the cross-pollination problem, seed companies are not likely to be in a position to warrant that non-GM seed is free of GMOs.

(1) Seed companies admit that contamination from pollination occurs (some say it is less than 1/10th of one percent). In addition, contamination can occur from mechanical means - i.e., augers, wagons, storage bins or even the combine itself.

(2) Some of the seed companies concede that their seed purporting to be non-GMO contained low levels of GMO germplasm.

(3) With respect to Bt cotton, the government's request that farmers set aside 20 percent of their land in non-Bt cotton illustrates the government's recognition of the risks of genetic pollution.

(4) A significant question is who will take responsibility for fields that are contaminated with GMO crops when non-GMO crops were planted.

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b. No tolerances have been set for GMO germplasm in non-GMO seed, so

Federal CAFO Regulations

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Existing Statutory Authority for Federal Regulations of Livestock and Poultry Farming

To the extent that livestock and poultry production is subject to federal water quality regulation, it is regulated under the Clean Water Act of 1972, 33 U.S.C.A. §§ 1251-1387 (2002), enacted as an amendment to the Federal Water Pollution Control Act. The sections of the Clean Water Act that the Environmental Protection Agency (EPA) has identified as applying to livestock and poultry production include sections 301, 304, 306, 307, 308, 402, and 501, *National Pollutant Discharge Elimination System Regulation and Effluent Limitations Guidelines and Standards for Confined Animal Feeding Operations, Proposed Rule,* 66 Fed. Reg. 2960 Jan. 12, 2001). These sections of the Clean Water Act apply only to livestock and poultry farms that are categorized as point sources of water pollution. Point sources of water pollution are defined under section 502(14) of the Clean Water Act as "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation [CAFO], or vessel or other floating craft, from which pollutants are or may be discharged." The definition under section 502(14) excludes "agricultural stormwater discharges and return flows from irrigation agriculture." As will be discussed below in greater detail, this exception includes neither stormwater discharges contaminated by matter in the production area of the CAFO nor irrigation systems used for the purpose of spreading animal or poultry waste. The extent to which livestock and poultry farms that are not classed as point sources are regulated under the Clean Water Act or other federal law is beyond the subject matter of this presentation. Suffice to say that livestock and poultry producers have enormous financial incentives to be classified as nonpoint sources rather than as point sources of water pollution.

Section 301 of the Clean Water Act prohibits the discharge of pollutants except in accord with established effluent limitations. Effluent limitations established by EPA must employ the best practicable control technology that is currently available. 33 U.S.C.A. §301(a)(2002). Section 301(d) of the Clean Water Act requires that effluent limitations as established by the EPA must be reviewed every five years and modified as needed. Section 301(k) provides EPA with flexibility to permit innovative technologies if that technology has a substantial likelihood of either achieving a substantially greater effluent reduction than that required under the effluent limitation, or achieves the required reduction at substantially lower cost than that which the EPA determined to be economically achievable.

Section 304(b) establishes parameters for EPA to follow when setting effluent limitation guidelines. 33 U.S.C.A. §1314(a)(2002). EPA is required to identify the chemical, physical and biological properties of each constituent of regulated pollutants along with

THE PROBLEM OF AGRICULTURAL CONCENTRATION: THE CASE OF THE TYSON-IBP MERGER

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INTERNATIONAL PRICE FIXING IN THE MARKETS FOR FOOD AND AGRICULTURAL INGREDIENTS

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Concurrent Session on:

State Programs to Increase Direct Farm Marketing and Farm-Based Food Processing

Topic #1 Current Developments in State Food Systems: Farmers' Markets, Policy Councils, Eco-labels, the 2002 Farm Bill and More – Prof. Neil D. Hamilton

I. Introduction – Direct Marketing and Farm Based Food Processing: Considering Eight Key Opportunities for States

One of the most significant challenges facing state governments, especially those in traditional farm states – is what can the state do to identify new markets to improve farm profitability and create opportunities for new farmers. This challenge is especially real when considered in the context of moving beyond the three traditional areas where existing state marketing initiatives have focused – commodity production; new industrial uses for commodities, such as ethanol; and expanding export markets. A number of trends in the consumer food market – primarily growth in demand for locally grown and "quality food" – foods grown or produced in ways that satisfy a range of consumer demands beyond mere price – offer promising opportunities for the states. Growth in demand for organic food, the growing interest in various forms of direct farm marketing – such as farmers' markets and roadside stands, and the increased attention to where and how food is raised – as seen in various eco-labeling and local food initiatives – all reflect these trends. The goal of this paper is to consider some of the examples of state initiatives that reflect or support this trend and consider how these ideas can be replicated by other states.

As a starting point, it is appears there are at least eight key opportunities for states interested in expanding the market opportunities for farmers as relates to this type of production. These programs, and some of the legal and policy issues they present, are each discussed below.

1. Creating a Policy Context to Support Local Food Initiatives - States need to create a policy context in which to address these opportunities, and in order to ask the type of questions – that may not be asked in traditional commodity based systems – such as do state institutions make any effort to use locally raised foods. Creating and supporting operation of state or local food policy councils, is one way to create the larger context for developing a comprehensive "food policy" for a state or region.

In recent years, at least five states – Connecticut, Iowa, North Carolina, Oklahoma and Utah have formed official state food policy councils, and a number of other states are

PROGRAMS, POLICIES AND ISSUES OF THE FARM BILL

On May 13, 2002, President Bush signed into law the Farm Security and Rural Investment Act of 2002 (Public Law 107-171) ("Act"). The Act will govern the administration of the Department of Agriculture (USDA) commodity, conservation, trade and food aid, food stamp, farm credit, rural development, and research programs through 2007. The Act also changed USDA activities in other areas including forestry, packers and stockyards regulation, food safety, energy, and commodity research and promotion programs. In fact, every mission area of USDA was affected by the Act.

The goal of this paper is to provide a brief summary of the major issues addressed in the commodities, conservation, trade, credit, rural development, and miscellaneous titles of the Act and to provide a context to explain why certain programs were established or changed. This paper is not intended to provide the details of each of the program provisions in the Act. Such information is available from a variety of sources.[1] At the end of this paper is a list of resources that are available on the Internet to provide more detailed information and analysis of the provisions contained in the Farm Security and Rural Investment Act of 2002 and of Federal agricultural policy in general.

I. HOW MUCH DID IT COST?

Before getting into the specific titles of the Act, it may be appropriate to address questions that have been raised regarding how the Act could increase Federal spending in the current Federal budget climate.

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[1] The Department of Agriculture has devoted a portion of its website (www.usda.gov) to the Act. This page contains links to various reports issued by the Economic Research Service, and to fact sheets prepared by the Farm Service Agency, the Natural Resources Conservation Service, and other USDA agencies on the specifics of individual programs authorized or amended by the Act. The House Committee on Agriculture also has detailed background information regarding specific provisions of the Act at its website (www.house.gov/agriculture). The Senate Committee on Agriculture, Nutrition, and Forestry also has background information on the Act at its website (www.senate.gov/~agriculture/index.html) under the heading "briefs".

AVOIDING CONFLICTS OF INTEREST

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