Agricultural Law Update

The Official Newsletter of the

AMERICAN AGRICULTURAL LAW ASSOCIATION

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Inside This Issue

A Word from the Editorial Committee

If you were stuck at home like most of us for the 2020 Annual Educational Symposium and not able to hear as many sessions as you would have liked, this issue is our gift to you. We asked a selection of discerning AALA members to recommend to us their presentations from the conference.

It was hard to choose but we narrowed down our list and found several presenters who graciously agreed to write about their chosen topics for this issue. We also invited our traditional Symposium "Update" speakers to submit updates to their updates. This means that rather than a traditional "single theme" for this issue, you are getting a diverse array of topics including agricultural finance, food law, environmental law, taxation, land use and resource law, farm loan stress, climate change and PFAS. We are grateful to everyone who made suggestions for articles and volunteered their time to write the articles and pull this issue together.

Thank you for reading! We hope you enjoy this Symposium encore edition of the Ag Law Update.

AALA Update Editorial Committee
Peggy Kirk Hall, The Ohio State University, aglaw@osu.edu

Jesse Richardson, West Virginia University College of Law, jesse.richardson@mail.wvu.edu

Jackie Schweichler, Penn State Law, jks251@psu.edu

Tools of the Trade

AALA members from Penn State offer a few ideas that may aid you in your work. If you have a tip to share with members, please send it to the editors.

During Remote Work, Focus on Small Tasks to Help with Concentration and Motivation

Chloe Marie

Chloe is a Research Specialist for the Penn State Center for Agricultural and Shale Law.

I have been working as a researcher for the Center for Agricultural and Shale Law for over five years, including four and a half years as a remote employee. I was used to working from home long before the COVID-19 pandemic hit the world and disrupted our work environment. When I first started working from home, I realized that staying focused would be more challenging than in a traditional office setting because of all the outside distractions. Over time, however, I realized that whether we are at home or at work, we are always prone to distractions and interruptions, but what matters most is being able to refocus.

My tip is that if you have a dip in concentration or motivation while completing a large task, focus on completing simpler and concrete tasks, even non-work-related ones. Finding a way to remain productive in multiple facets of your life is what can give you a boost in attitude and mindset when focusing back on work, helping you finish larger tasks while keeping your stress down.

Maintaining good mental health is crucial to being effective when working from home over long periods of time so it is important to realize that there is nothing wrong with stepping away from work to ensure that your mindset remains at its best.

It's the Cases You Don't Take That Make Your Life Better

Brook Duer

Brook is an attorney with the Center for Agricultural and Shale Law at Penn State Law.

For eighteen years, before the last 14 in government and academia, I was in private practice and the lesson I learned over time was that it is the work or clients you don't take that make your life better. Having said that, I certainly opened matters that I should have let walk out the door. It sounds like common sense to say lawyers should do less things but do them well, as opposed to doing more things and doing them "less well." But if that were so, most lawyers would not be guilty of taking on too much work and doing it "less well."

It is hard to turn away work. The practice of law is competitive. Hoarding available work is a natural tendency when hours worked are supposed to equate to revenue in the door. It is difficult to fight the urge to solve someone's problems. There is a "rush" from being that person. Saying yes is so much easier than saying no, particularly when the reason may simply be that you are too busy for this matter (although you may not have been had the matter appeared more lucrative financially or professionally).

What is an attorney, particularly one in their first decade or so of practice, to do? All things in life require the same qualities – being comfortable with yourself. Don't judge yourself by someone else's yardstick. Have professional goals of your own and work to achieve them, but some matters or clients carry red flags. Eventually, I learned to spot them and became confident enough to turn them down.

Taking on work out of sympathy or "to do a favor," rarely ends well. Make professional friends and contacts specifically for the purpose of developing referral outlets. If something looks like a mess, it probably is. Just because you may be able to sort it out and maybe even get paid to do so doesn't mean you need to be the one to do it.

Students at Work

Meet Audrey Thompson, student at Penn State Law

This issue's student work section features Audry Thompson, a research assistant at the Penn State Center for Agricultural and Shale Law. Audry writes about current legal agricultural developments in the Agricultural Law Weekly Review and hosts the weekly Agricultural Law Podcast. In January, she presented at the 2021 Pennsylvania Farm Show Agricultural Law Symposium on national legislative and litigation developments in "The Year 2020 in Agricultural Law: The Year of Living Dangerously." As a former public school band director in Missouri's rural "bootheel" region, Audry loves researching food law, and takes a special interest in school lunch and nutrition programs. A joint J.D.-Ph.D. student with Penn State Law and the Penn State College of Education's Department of Educational Policy Studies, Audry currently holds an Associate Editor position with the Penn State Journal of Law & International Affairs and served as a graduate research assistant in the College of Education. In 2019, Audry and her team took third place in the annual AALA Quiz Bowl Contest. This year, she looks forward to attending the 2021 Annual Educational Symposium for a chance at another title. Congratulations to Audry on her hard work and dedication to the field of agricultural law.

2019 AALA Quiz Bowl team, "Back in Blackacre"
From Left: Audry Thompson, Penn State Law; Erin Lieberman, Penn State Law; and Katie Vculek, Drake Law

Feature Articles: Topics from the AALA Annual Educational Symposium 2020

Our 2020 annual conference was an unusual one due to its largely online COVID-19 format, but that didn't hinder the value of education provided by our presenters. We asked a collection of AALA members to tell us about the sessions they enjoyed at the conference. While we couldn't include all of them here, we invited speakers from three popular conference sessions to convert their presentations into articles. Many thanks to these speakers for spending the time to share their knowledge not just at the conference, but also here in the Update.

A Primer for Successfully Resolving Distressed Agricultural Loans

Michael D. Fielding, Stefan Knudsen and Richard Beheler

Michael is a Partner, Food & Agribusiness, with Husch Blackwell LLP in Kansas City, Missouri, Stefan is the Vice President and General Counsel for MFA Incorporated in Columbia, Missouri and Richard is a Senior Attorney in Commercial & Special Assets for SouthLaw, P.C., in Overland Park, Kansas.

The past few years have been tough for farmers with the 2019 trade wars and the 2020 COVID-19 pandemic. Despite the recent surge in commodity prices, many producers are still hurting financially. This article briefly discusses how secured lenders view distressed agricultural loans in various contexts. By understanding the rights and remedies that each party has, borrowers can engage in more meaningful discussions with their creditors with the goal of reaching an amicable resolution.

Pre-Loan Enforcement Considerations for Distressed Agricultural Loans

Pre-loan enforcement begins with the lender reviewing its file to ensure that loan documents have been properly completed and security instruments have been properly recorded and perfected. The lender will also verify whether it has obtained assignments of federal government payments and crop insurance and whether proper notices have been issued under the Food Security Act. Lenders will also determine their respective order of priority versus other secured creditors and consider the financial status of all guarantors in evaluating possible avenues for repayment. Loan workouts are opportunities to fix past mistakes and structure the deal to enhance the likelihood of full loan performance.

When signs of financial distress appear, lenders may increase the number of on-site visits as they more closely monitor their collateral. If the collateral is livestock the lender will want to ensure that it has been properly tagged, branded, or microchipped. Lenders will also need to verify the location of collateral—particularly items that are easy to move. Lenders should confirm that the collateral is insured and that the lender is named as loss payee. The nature of the collateral and, if living, the collateral's life-cycle will greatly influence how and when a lender may act to protect its interests.

Prudent lenders will also evaluate the borrower's incentives, including their need or desire to continue farming if the collateral is liquidated. The borrower's responsiveness, sophistication, and honesty are also vitally important. Proactive, responsive, and trustworthy farmers are much more likely to work something out while non-responsive producers who fail to maintain credibility will tend to draw the lender's ire as the level of trust deteriorates. As a lender considers a possible loan resolution it will want to know what assets, collateral pledges, or turnovers it can voluntarily receive through settlement that may be difficult or impossible to achieve through loan enforcement.

For a loan workout to be successful the borrower needs to be honest and personally accountable. The borrower must genuinely understand the reasons for their financial distress, which frequently go beyond market conditions (e.g., poor management, excessive debt, personal issues, etc.). The borrower should be prepared for meaningful discussions with the creditor, providing detailed business records upon request, and creating a truly realistic business plan. Such plans often require the borrower to make substantive compromises. Many borrowers will want to consult with other professionals (e.g., tax advisors, temporary farm managers, or attorneys) for advice.

The following table provides an overview of options that exist for both parties in the context of a troubled loan.

Lender	Borrower/Producer
Amend loan documents	Pledge new collateral
Forbearance agreement	Provide an additional guaranty
Mediation	Mediation
Initiate legal action*	Liquidate or surrender collateral (remember taxes will be associated with selling appreciated land)
Foreclosure/liquidate collateral (real or personal property; judicial* or non-judicial foreclosure)	Refinance with a new lender. Other lenders include: Local banks, National banks, Farm Credit, Non-traditional lenders
Appoint a Receiver*	File bankruptcy*

*Involves legal proceedings

With these options in mind, it is important to consider certain key aspects of distressed agricultural loans to better understand how the lender may pursue its remedies.

Government Payments and Crop Insurance

Government payments are general intangibles for purposes of the Uniform Commercial Code (UCC). For the government to recognize the lender's security interest an assignment of the government payments must be filed with the local USDA's Farm Service Agency (FSA) office. Similarly, crop insurance is also a general intangible under the UCC. To perfect a security interest in crop insurance proceeds the lender needs to obtain an assignment on the insurer's form. Payment will be by joint check to borrower and creditor. Federal preemption ends and the UCC applies once the government payments or crop insurance proceeds are deposited in the borrower's account. Borrowers build trust when they fully cooperate with their lender to ensure the proper assignment of government payments and crop insurance proceeds.

Farm Personal Property

It is important to most agriculture lenders to have a first-priority position in collateral, though some lenders will lend based upon a junior lien position. For a security interest to attach to collateral there must be value given, the debtor must have rights in the collateral, and there must be a security agreement. UCC § 9-203. Perfection in personal property is typically done by filing a financing statement. See UCC §§ 9-310, 9-312, 9-502 and 9-503. However, perfection in titled vehicles must be done through a notice filed though the state's vehicle registration agency responsible for titled vehicles. The general rule regarding priority is the creditor that is either first in time of filing or perfection wins. UCC § 9-322. But there are special priority rules that apply to purchase money security interests (i.e., security interests where the lender provides the capital to obtain the personal property). UCC §§ 9-103 and 9-324. Additionally, certain collateral (most notably a deposit account) requires control for priority purposes. UCC § 9-327.

Significantly, not all methods of protecting an interest in farm products are covered by the UCC. Congress has enacted the Food Security Act (FSA). 7 U.S.C. § 1631. The FSA's general rule is that "a buyer who in the ordinary course of business buys a farm product from a seller engaged in farming operations shall take free of a security interest created by the seller, even though the security interest is perfected; and the buyer knows of the existence of such interest." 7 U.S.C. § 1631(d). But there is a major exception—if the lender has submitted a Notice of Security Interest then the buyer will acquire the farm products subject to the lender's lien if the buyer fails to remit payment to the lender as instructed. 7 U.S.C. § 1631(e). To facilitate the notice process the FSA allows states to create a centralized filing system that allows a single filing noting the lender's security interest, but so far only 19 states have adopted a such a system. [1]

Lenders will employ traditional means as allowed by the UCC to enforce their liens in collateral. This includes pursuit of both nonjudicial and judicial remedies to enforce a security interest. UCC § 9-601. "After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing." UCC § 9-610(a). A secured party may set-off a deposit account and apply the cash to debt. Regarding personal property, they may repossess the collateral or render it unusable. UCC § 9-609. However, a secured party cannot "breach the peace" in pursuing its default remedies. UCC § 9-609. Some borrowers will post "No Trespassing" signs on their property or otherwise prevent unauthorized entry by repossession professionals. Sales of collateral may be by private or public sale. Sales must be commercially reasonable or the lender will lose its deficiency rights. Notice is required before disposing of collateral. UCC § 9-611. Secured creditors may also accomplish a strict foreclosure by accepting the collateral in full or partial satisfaction of the obligations owed. UCC § 9-620.

Farm Foreclosures

Some states require a judicial proceeding to foreclose mortgages on real property while other states have a non-judicial foreclosure process whereby foreclosure occurs without a legal proceeding being filed. Regardless of the method the final result is the same: the property is liquidated to pay the debt owed. A borrower's right of redemption will vary from state to state, but as a general rule, the property may remain in possession of the property during the redemption period and may redeem the foreclosed property by paying the debt that was secured by the property.

[1] States with centralized filing systems: Alabama; Colorado; Idaho; Louisiana; Maine; Minnesota; Mississippi; Montana; Nebraska; New Hampshire; New Mexico; North Dakota; Oklahoma; Oregon; South Dakota; Utah; Vermont; West Virginia; and Wyoming. Source: https://www.gipsa.usda.gov/laws/cleartitle.aspx (last visited Aug. 28, 2020).

Farm Receiverships

Both state and federal law allow for the appointment of a receiver. The grounds for appointing a receiver can be contractual (i.e., a specified remedy in the loan documents) or legal (e.g., imminent danger of loss of assets, possible fraud, or managing property pending a foreclosure and redemption period). Receivership benefits include: (a) the receiver has control of assets instead of the borrower; (b) the receiver prevents waste or mismanagement of assets; (c) the order appointing a receiver can be very broad and include additional protections; and (d) the receivership proceeding allows for the orderly liquidation of assets. Conversely, courts sometimes refuse to appoint a receiver. When granted, receiverships can be expensive due to the engagement of professionals and the requirement to post a bond. And even then an adverse borrower can try to thwart the receiver's efforts.

Chapter 12 (Farm) Bankruptcies

Borrowers file for bankruptcy protection because it immediately invokes the automatic stay which stops enforcement of all creditor actions. 11 U.S.C. 362. During the stay period the borrower can sell real or personal property free and clear of liens and restructure debt repayment terms while keeping their essential property. Bankruptcies can be expensive and their outcomes uncertain. In the context of a corporation or limited liability company, the filing may trigger personal guaranty obligations of the owner.

Only "family farmers" or family fisherman with regular annual income may file for Chapter 12 relief. The term "family farmer" is broadly defined, however, and in addition to individual farmers, includes any entity in which 50% or more is owned by a farmer, 80% of its assets are related to farming, and at least 50% of its debts is related to farming. There is a $10 million debt limit for Chapter 12 bankruptcy filings. Any person or entity with debts exceeding that limit must seek Chapter 11 bankruptcy protection, which is more costly and complicated than a Chapter 12 proceeding.

A Chapter 12 debtor retains all property (except property voluntarily surrendered to a creditor). A Chapter 12 debtor can use the bankruptcy to modify liens on real and personal property. Secured debts can be bifurcated into secured portions and unsecured portions. If the debtor completes all of the payments over the required three or five year period then the debtor typically obtains their bankruptcy discharge, which is an injunction barring creditors from seeking to collect certain debts of the debtor. Factors that tend to make a bankruptcy successful for a borrower include: (a) sufficient liquidity; (b) a realistic and feasible plan of reorganization; and (c) sufficient operating capital to make the bankruptcy plan work. If a farmer cannot cash flow their farm within a Chapter 12 bankruptcy proceeding then it is unlikely that a plan will be confirmed or that a plan will be successful.

Conclusion

While financial troubles can be an emotional experience, wise borrowers will take a business-like approach when addressing such challenges. Agricultural lenders prefer amicable workouts for distressed loans, but successful resolution often requires the producer to communicate, cooperate, and make meaningful compromises. A borrower who does not want to make genuine concessions will quickly find themselves mired in costly and uncertain legal proceedings as the lender likely transitions from focusing on a voluntary work-out to enforcing its rights.

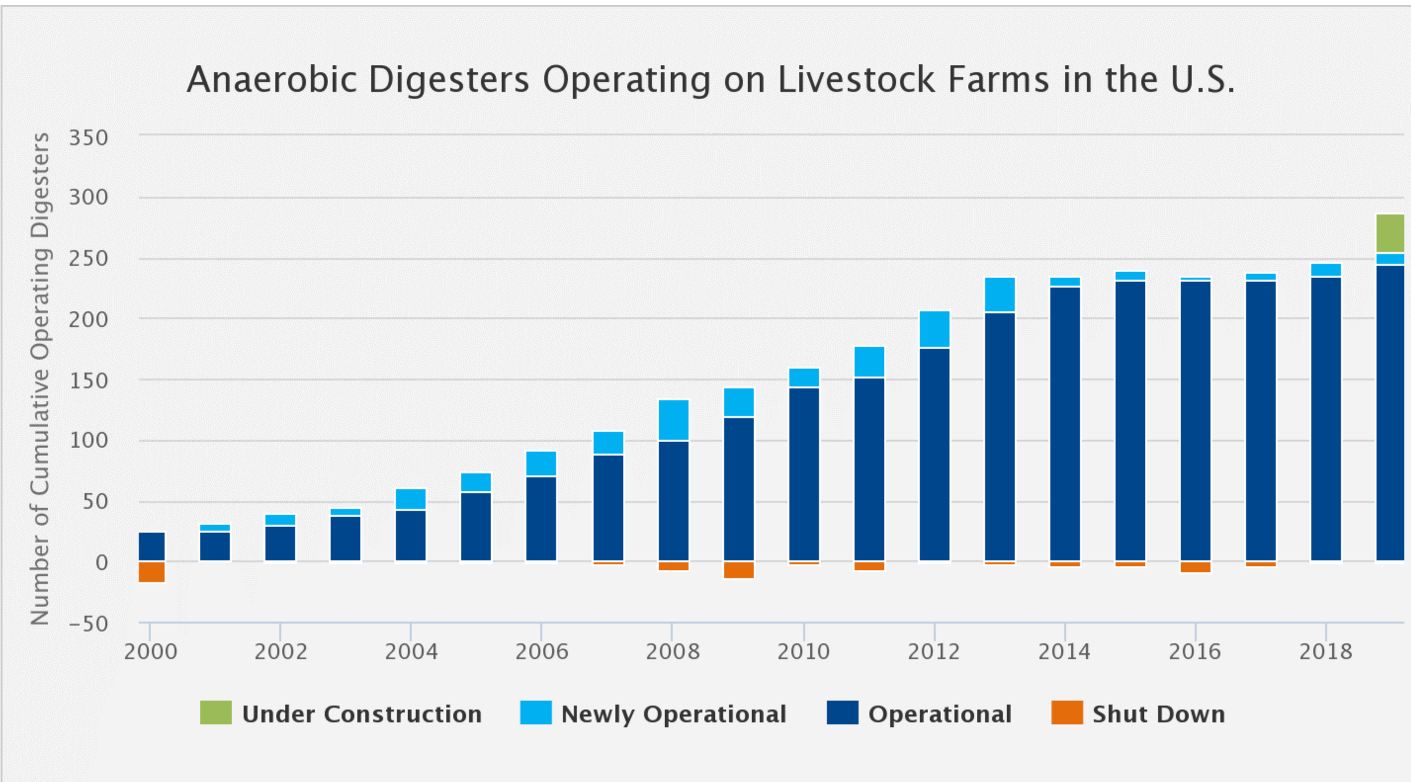
Seven Questions to Ask Before A Dairy Farmer Should Sign a Letter of Intent to Build an Anerobic Digester

Todd J. Janzen and Ashley Ellixson

Todd is the President of Janzen Agricultural Law LLC in Indianapolis and Ashley is the Executive Vice President of Legal and Risk Management for United Dairymen of Arizona in Tempe.

The struggles of the dairy industry have been widely covered by the farm press and national news organizations. Decreased fluid milk consumption, large dairy processor bankruptcies, small dairy exits, and the rise of plant-based alternatives are all causing headaches for the industry. But there is a bright spot. The demand for clean energy is causing a resurgence in interest in anaerobic digesters. Although digesters have been "on the horizon" for years, the economics never made them practical, except at a few farms. That has changed in the last twelve months.

Many farmers are now being approached by developers—typically investors and energy companies--that want to build digesters on their farm. What questions should a farmer ask a developer before deciding to sign a letter of intent to proceed?



SOURCE: US EPA 2020

Do you (the developer) already have a project on the ground? In most instances, the farmer should not be the developer's Guinea pig. The developer should be able to provide examples of other digesters the developer has built and operated in the past. The success (or failure) of these other projects should be a good indicator of a new project's chance of success.

Can I talk to the other farmers involved with your other projects? If the developer has constructed and operated other digesters, you should ask to talk with the farmers involved in those projects. These farmers can explain the problems they have encountered and how the developer responded. The developer may be reluctant to provide references, citing confidentiality concerns. But from my perspective, that should be a red flag. Successful ventures want people to talk about them.

Do you have funding lined up for construction? A good developer should have funding arranged prior to signing a letter of intent with a farmer. If funding will be procured only after the farmer commits to move forward, that may just be an attempt to prevent the farmer from signing a deal with a competitor.

Do you have long-term contracts in place to sell gas or energy? This is equally as important as having funding in place for construction. If the project cannot cash flow after it is constructed, the farmer's revenue stream will dry up. Anyone building a digester should long-term supply contracts locked in.

Who gets the carbon credits? The carbon market is a rapidly evolving place. That also means it is extremely speculative to estimate what an aerobic digester's carbon credits will be worth in years to come. Most likely, the developer will want this potential revenue stream. Understand you may be giving up an enormous upside if these markets take off years from now. However, if the developer has a long-term contract in place with a company ready and able to market the carbon credits to increase returns (ensuring viability), you may be in an even better place financially than having to market those credits yourself.

Who pays for manure transportation costs? This may be trivial at the beginning of the project, but if the developer determines that more manure is needed or required to satisfy its supply contract obligations, the manure may have to be trucked in from further way. This could add significant costs to operation. Who bears the costs to procure and transport future capacity increases?

Who gets the tax credits? There may be significant tax credits for ownership or operation of a digester. Just who gets these credits is an important point and should be negotiated up front.

These are not the only questions to ask a developer. They are a guide to start the discussion. Finally, never be pressured to make a quick decision. Take your time to review the proposal, get a second opinion, and interview references. Take time to discuss with an attorney. A letter of intent can be tricky, some parts may be binding other parts may be only aspirational. The future looks bright for more digesters on the farm. Make sure your decisions are well-thought out for your long-term operations.

PFAS and Agriculture: The Calm Before the Storm

Mary-Thomas Hart and Clay Detlefsen

Mary is the Deputy Environmental Counsel for the National Cattlemen's Beef Association Center for Public Policy in Washington, DC and Clay is the Senior Vice President of Regulatory and Environmental Affairs and Staff Counsel for the National Milk Producers Federation in Arlington, Virginia.

As the Biden administration takes its position in the Executive Branch, agricultural stakeholders anxiously await coming revisions to environmental, labor, food safety, and immigration regulations, just to name a few. Regulatory rollbacks, a hallmark of the Trump Administration, will likely be rescinded and replaced – either with previously finalized "Obama-era" policies or, in the case of environmental regulations like the Waters of the U.S. definition, a hybrid regulation that satisfies the federal courts (the 2015 WOTUS rule was remanded twice in federal court for procedural and substantive issues). But some environmental issues saw the Wheeler EPA as the first to tackle their regulatory management. The use and environmental threat of PFAS chemicals, commonly known as "forever chemicals" were only poorly kept secrets until the development of EPA's PFAS Action Plan in 2019. The Biden Administration has indicated a desire to prioritize drinking water regulations related to PFAS, but it is unclear whether the Biden EPA will continue work started by the Wheeler EPA.

Per- and Polyfluoroalkyl substances, better known as PFAS, are a large class of chemicals designed to create a protective barrier on a wide array of products – nonstick pans, stain-resistant furniture and carpet, rain jackets, and tarps just to name a few. These chemicals were originally designed by 3M to coat tanks during World War II, but companies quickly realized their domestic benefits. The difference between PFAS and other naturally occurring chemicals is its long half-life. PFAS does not break down quickly, but instead accumulates over time. It is waterproof and can withstand high temperatures. Its bioaccumulative property can be seen wherever PFAS is found – in nature or the human body. Humans can ingest PFAS when they cook with nonstick pans, drink contaminated water, consume food that was wrapped in fast food greaseproof wrappers or consume produce that was grown in contaminated soil. PFAS are detected in human populations globally, and over 99% of Americans over age 12 have detectable levels of PFAS in their blood. While there is no conclusive evidence that PFAS bioaccumulation causes certain health conditions, contamination has been found in individuals with testicular cancer, high cholesterol, thyroid cancer, and impaired liver function.

While the amount of PFAS in the environment has decreased significantly in recent decades, it still lingers in small pockets across the country. PFAS is primarily found in three environments – in the rust belt where companies like 3M and DuPont have or had manufacturing plants, near military bases where the Department of Defense uses firefighting foam and on farmland where PFAS-contaminated sludge has been applied. Discharges of PFAS into the environment have the potential to trigger a number of federal environmental statues including the Safe Drinking Water Act, Clean Water Act, Toxic Substances Control Act (TSCA), and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Under Administrator Andrew Wheeler, EPA initiated its PFAS Action Plan, a framework to tackle PFAS from all angles. However, Democrats in Congress remain unsatisfied with the unhurried pace of administrative policy development and have urged a congressional designation of all PFAS chemicals as hazardous substances under CERCLA.

Beyond environmental regulation, EPA has joined the cross-agency PFAS task force, a multi-agency effort to tackle PFAS from all applicable agencies including the Food and Drug Administration (FDA), Department of Defense, and Department of Agriculture. The FDA is responsible for studying and determining the risk of PFAS ingestion from food, with much of their effort focused on milk production. General concerns about dairy arose following a finding in 2019 that a dairy in Clovis, New Mexico was contaminated by a neighboring military base. The dairy's wells which provided water to nearly 3,000 dairy cattle, contaminated the animals and adulterated the milk. FDA conducts regular testing on milk supplies and other grocery store food items and in its recent Question and Answers on PFAS in food is stated that "The U.S. food supply is among the safest in the world" and "There is no scientific evidence that supports avoiding particular foods because of concerns regarding PFAS contamination." USDA's Food Safety Inspection Service (FSIS) is tasked with ensuring the safety of our nation's meat supply. Since October 2019, USDA-FSIS has tested previously condemned beef carcasses for PFAS, with no significant finding of contamination.

Agricultural producers, while likely unaware, are unique in their position within PFAS policy development. Will farmers be considered victims of private nuisance or potentially responsible parties? Maybe both. By default, CERCLA liability likely extends to landowners whose soil is contaminated by another facility – a policy most recently affirmed by the Supreme Court in April 2020's Atl. Richfield Co. v. Christian, No. 17-1498 (U.S. Apr. 20, 2020). In this case, the Supreme Court reversed the Montana Supreme Court's ruling that landowners are not "potentially responsible parties" under CERCLA. Chief Justice Roberts pointed to a series of definitions in CERCLA to reach this conclusion: The list of classes of potentially responsible persons, Roberts noted, includes the "owner" of a "facility," which is in turn defined to include any area where a "hazardous substance" – such as arsenic and lead, the pollutants on the landowners' properties – have "come to be located." "Because those pollutants have 'come to be located' on the landowners' properties," Roberts wrote, "the landowners are potentially responsible parties." This likely sets binding precedent for PFAS contamination cases brought under CERCLA. However, the agricultural industry has previously succeeded in achieving exemptions from CERCLA requirements. In 2018, Congress passed the FARM Act, exempting livestock producers from some specific CERCLA's air emission reporting requirements. Additionally, federally permitted releases and the normal application of fertilizer are exempt from CERCLA reporting requirements. For this reason, among others, it is important for EPA to lead a nuanced and science-based consideration of PFAS regulation, as opposed to simply implementing sweeping Congressional mandates.

PFAS-producing companies like DuPont and 3M have been subject to numerous public and private nuisance cases over the years. A landowner can claim nuisance if the actions of the defendant interfered with the plaintiff's use and enjoyment of his property in a substantial and unreasonable way. Often, the most debated element of a nuisance claim is whether an interference is both substantial and unreasonable. Courts will consider financial loss, physical impacts to the property, and whether harm is continuous. A PFAS land contamination scenario likely satisfies all of these factors – especially if the plaintiff is a farmer whose livelihood lies in his real property. Cases involving odors, loud noises, and even a large fence have all been found to be substantial interference amounting to nuisance.

As more research efforts shift to PFAS and its impacts, regulated stakeholders and consumers alike will continue to learn about the risk of PFAS contamination on crop production, livestock production, and dairy production. The body of law will also continue to develop, as environmental and nuisance litigation establishes PFAS-focused precedent nationwide. PFAS-related litigation and regulation, like the chemicals themselves, are not likely to fade away any time soon.

Feature Articles: Updates to the Ag Law Updates Presented at the AALA Annual Educational Symposium 2020

Updates on the law of Ag Finance, Food Law, Environmental Law, Taxation and Land Use and Resource Law are presented each year at the Annual AALA CLE Symposium. Those sessions prove popular with agricultural lawyers, providing up-to-date information in these fast-moving areas of law. The Symposium materials contain the updates presented last November and this section provides interim updates to the Update sessions.

Agricultural Finance Update

Jeffrey A. Peterson

Jeff is a partner with Lathrop GPM in Saint Cloud, Minnesota, where he focuses on commercial transactions, creditor's rights, bankruptcy and agricultural and food law.

Coming off five years of depressed farm commodity prices, the end of 2020 and the beginning of 2021 have seen a resurgence of farm commodity prices. As a result, as we enter the 2021 crop season, there have been a historically low number of new non-real estate loans (or annual operating loans), with the new annual operating loans being made increasing in loan size as farming operations increase in size. As commented by the Kanas City Federal Reserve in January 13, 2021, “stronger prices for agricultural commodities, alongside continued support from government payments, may have reduced financing needs for some farmers and contributed to the slower pace of lending.” Also adding to the shift away from traditional operating lending is the reluctance of traditional lenders to extend credit to under-performing borrowers; with those under-performing borrowers left obtaining operating loans from non-traditional lending sources, which include loans offered by crop input suppliers.

With this background, there has been continued litigation in:

1. State agricultural lien cases

<u>Oklahoma landlord lien requires the landlord to file an action to enforce the lien.</u> Keith Milacek (the “Debtor”) was indebted to Bank of Kremlin (the “Bank”). The debt was secured by a security interest in the Debtor’s crops. The Bank properly perfected its security interest. ARA, LP (the “Landlord”) owned certain crop land. The Landlord leased the cropland to the Debtor and the Debtor planted a [crop]. The Debtor passed away and, as allowed by the lease, the Landlord took possession of the cropland, harvested and sold the crops, and applied the crop proceeds against the unpaid cropland lease. The Bank objected and commenced a legal action for conversion. The Landlord argued a landlord lien under 41 O.S. 2011 §28. The Bank disagreed and argued the Landlord failed to properly perfected its landlord lien because the Landlord never commenced a legal action. The Oklahoma Court of Appeals affirmed the trial court finding that the Landlord failed to properly perfect its landlord lien because the Landlord never commenced a legal action under the Oklahoma landlord lien statute and, therefore, the actions of the Landlord to sell the crop constituted conversion of the Bank’s priority security interest. *Bank of Kremlin v. ARA, L.P.,* 2020 OK CIV APP 30 (Okla. Civ. App. 2020).

2. Chapter 12 bankruptcy plans and the administration of Chapter 12 plans

<u>Appropriate interest rate under Till.</u> Key Farms, Inc. (the “Debtor”) raised and sold apples, cherries, alfalfa, seed corn and other crops. The Debtor was indebted to HomeStreet Bank (the “Bank”) and the debt was secured by certain real estate and its crops. The Debtor filed a Chapter 12 bankruptcy and proposed to pay or cramdown the claim of the Bank over twenty years at an interest rate of 4.50% (the prevailing "prime" rate of 3.25% plus 1.25%). The Bank objected to the proposed interest rate and asserted the interest rate fails to adequately account for the credit risk under the U.S. Supreme Court decision in Till v. SCS Credit Corporation, 541 U.S. 541 (2004). The Court agreed and held that 1.25% did not adequately account for the credit risk and the interest rate should be at least 1.75% over the prime rate. In re Key Farms, Inc. (Bankr. E.D. Wash. 2020).

<u>Chapter 12 Trustee Fee.</u> Kevin and Beth Spindler (the “Debtors”) farmed. The Debtors were indebted to Farm Service Agency (“FSA”) and the debt was

secured by the Debtors' homestead. The Debtors filed a Chapter 12 bankruptcy and proposed to pay FSA outside their Chapter 12 plan (meaning that the payment would be made directly to FSA and not administered by the Chapter 12 trustee). The Chapter 12 trustee is entitled to collect a 5% fee on all administered payments – so making the payment to FSA outside the plan allowed the Debtors not to pay the trustee fee. The Chapter 12 trustee object. The Court sided with the majority approach – in the that whether direct payments should be allowed must be determined on a case-by-case analysis. The Court ultimately denied the objection and in doing so held that: 1) the plan payments relate to real estate (with the personal property payments being made through the plan), 2) the plan payments to FSA would continue to be administered after the plan term, 3) FSA is sophisticated and can monitor the payments, 4) the other payments are to be made within the plan, and 5) the savings are necessary for a feasible plan. *In re Spindler,* Case No. 20-11642-12 (W.D. Wisc. 12/28/2020).

3. Lender liability cases

<u>Louisiana Credit Agreement Statute precludes action for breach of oral promises.</u> SMI Companies Global, Inc. (the "Borrower"), an equipment fabricator, and its president and loan guarantor, Vaughn S. Lane ("Guarantor") had two loans with Whitney Bank (the "Bank"); a $1,500,000 ("Loan 1") and $900,000 ("Loan 2") revolving line of credit. Loan 2 was issued in anticipation of a certain $2,000,000 project of the Borrower that required the Borrower have additional credit to complete. The project was delayed – and in the time being - Loan 2 matured. The default on Loan 2 triggered a default on Loan 1. The projected was eventually canceled. The Bank commenced a legal action. The Borrower and Guarantor asserted several counterclaims against the Bank for breach of the loan agreements, negligent misrepresentation, and tortious interference with its business relations as a result of the allegations that the Bank failed to fund Loan 2 through completion of the project. The trial court ruled in favor of the Borrower as to Loan 2 and in favor of the Bank as to Loan 1. The Bank appealed to the 5th Circuit. On appeal, the 5th Circuit reversed the trial court on the basis that any oral promises to fund the loan through the completion of the project is inconsistent with the Louisiana Credit Agreement Statute (La. Rev. Stat. 6 §1121 et seq.), is not enforceable as against the Bank and, therefore, reversed the breach of contract and negligent misrepresentation rulings as against Note 2. Furthermore, there was no evidence of malice to support the judgment for tortious interference by the Bank. The 5th Circuit upheld the trial court ruling that the Bank could not collect its legal fees as against the Borrower and Guarantor on the basis of the discretion afforded the trial court. *Whitney Bank v. Smi Cos. Global*, 949 F.3d 196 (5th Cir. 2020).

Food Law Update
Matthew G. Ball

Matthew is a litigation partner and business trial lawyer with K&L Gates LLP in San Francisco. He focuses on class action defense and strategic commercial litigation for consumer-focused industries such as makers of food and dietary supplements.

Handing the defense a relatively rare victory in a consumer false advertising case in the Ninth Circuit, the Court in *McGee v. S-L Snacks National,* --- F.3d ---, 2020 WL 7087008 (9th Cir. Dec. 4, 2020), upheld the district court's decision to grant a motion to dismiss for lack of Article III Standing. The Ninth Circuit's decision in *McGee* gives defense counsel a perhaps potent new tool to mount a pleadings challenge to certain types of consumer class actions.

In *McGee*, the putative class plaintiff alleged claims under California law for unfair competition, nuisance, and breach of implied warranty of merchantability, arising from her purchase and consumption of popcorn product that contained a partially hydrogenated oil, which was a trans-fat that was source of a toxic carcinogen. The Ninth Circuit held, among other things, that the plaintiff indeed lacked standing. McGee argued that she had standing based on a "benefit of the bargain" theory -- that McGee did not get what she paid for, because she received an unsafe product. The Ninth Circuit rejected that argument because defendant had made no representations about the product's safety, and the alleged unsafe ingredient was disclosed on the popcorn's labeling. 2020 WL 7087009, at *4. McGee further argued for standing based on an "overpayment" theory. The Ninth Circuit rejected this argument as well because defendant had made no actionable misrepresentations or actionable non-disclosures, and because the dangers of trans fat were well known by the time McGee purchased the product. Id. at *5-*6.

Although the Ninth Circuit made sure to note that both theories of Article III standing were still available under the right circumstances, the *McGee* case appears to signal a willingness to tighten Article III standing requirements in consumer class actions, especially where a challenged ingredient is disclosed on the product's labeling. The defense bar did not wait long to make use of *McGee.* In *Engurasoff et al. v. Coca-Cola Refreshments USA Inc.*, attorneys representing Coca-Cola in a class action alleging that Coca-Cola falsely labels its drinks as having no artificial flavors argued to the Ninth Circuit on December 17, 2020, that the listing of phosphoric acid as an ingredient removed any risk that plaintiffs could be deceived by Coca-Cola's labeling. The Ninth Circuit's decision in that case is pending.

Environmental Law Update
Anthony Schutz

Anthony is Associate Professor of Law and Associate Dean for Faculty at the Nebraska College of Law, where he teaches Agricultural Law, Environmental Law, Water Law, Land Use Regulation, State and Local Government Law and Contracts

The fight over regulatory definitions of the term "waters of the United States" for purposes of the Clean Water Act (CWA) was a big story this year, culminating in a shiny new set of regulations called the Navigable Waters Protection Rule, 85 FR 22250 (April 21, 2020). The practical impact of these regulations may be slight, given the 404(f) exemptions, 402(l) exemptions, and statutory definitional exceptions for agricultural stormwater discharges and irrigation return flows. However, there are at least some wetlands (farmed or not) that will no longer be within the scope of the CWA, as well as ephemeral watercourses. One significant issue with these new regulations is the distinction they try to draw between ephemeral (not regulated) and intermittent (regulated) watercourses. Plenty will be written about these regulations in the years to come.

The Court decided a case involving indirect discharges of pollutants to waters of the United States, indicating that WOTUS is not the only game in town when it comes to the scope of the CWA. The case is Maui County v. Hawaii Wildlife Fund, 140 S.Ct. 1462 (2020). It remains to be seen how courts will implement the Court's interpretation of the statutory term "discharge of a pollutant", which will now include the "functional equivalent of a direct discharge from the point source into navigable waters." The specific course of the alleged discharge in Maui was via groundwater. It is unclear how any of this interacts with rainfall-related discharges, especially in light of the agricultural-stormwater exclusion in the CWA (which, confusingly, excludes such discharges from the definition of a point source in 33 U.S.C. 1362(14)).

A portion of the nationwide permits were reissued this year. 86 FR 2744 (Jan. 13, 2021). NWP 40 applies to agricultural activities and allows for up to a half-acre loss of waters of the United States in associated with "the installation, placement, or construction of drainage tile, ditches, or levees; mechanized land clearing; land leveling; the relocation of existing service drainage ditches . . . and similar activities." The most significant change is the removal of a 300-linear-foot limit on streambed loss. Pre-construction notification is required.

States, of course, remain free to regulate non-waters of the United States and Swampbuster may discourage drainage changes to such areas. There is some level of interaction between the CWA and Swampbuster, but not much. They regulate different sorts of conduct, for different purposes, with different agencies, using different methods and processes, under different statutory and regulatory provisions. However, Swampbuter's "prior converted cropland" (PCC) is shielded from coverage under the CWA to some extent.

The new WOTUS regulations exempt PCC. For the first time, however, they have included a definition and added provisions dealing with abandonment. The definition of PCC is confusingly different from the USDA's definition for Swampbuster because it, among other things, uses the term "agricultural product" rather than "agricultural commodity". The latter is a defined term in the USDA regulations that applies only to annual crops or sugarcane. 7 CFR 12.2(a). The former is undefined in the WOTUS regulations. The provisions on abandonment are fairly broad, allowing PCC to retain its status unless it "is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years" and the land reverts to wetland status. The EPA and Corps explanation for the regulations can be found here, at page 22320 of the Final Rule. The regulatory effort at cohesion may be difficult to navigate.

In Swampbuster news, *Epp v. NRCS*, 425 F. Supp. 3d 1142 (D. Neb. 2019), is a significant opinion concluding that the NRCS had no basis for revisiting certified wetlands determinations that were made in 1990. You may recall that in 1996, a provision was added to Swampbuster that largely prohibited revisiting certified wetlands determinations.

The Wetlands Reserve Program yielded an opinion in Landgraf v. United States, No 20-66C, 2020 WL 24661380 (Ct. Fed. Cl. May 13, 2020) (unpublished), giving the plaintiff a chance at holding the government to its promise to carry out a restoration plan. The plaintiff was a neighbor and the owner of the underlying fee interest in the realty, allowing him to make a contract-based claim in the Court of Federal Claims.

Finally, there has been some interest in using NEPA as a means of challenging FSA lending programs involving livestock facilities. One of the main cases on that front concluded this year, *Food & Water Watch v. USDA*, 451 F. Supp. 3d 11 (D. DC 2020), with the court concluding the EA and FONSI were sufficient. Final Rules were adopted in July 2020 for NEPA that exclude federal loan guarantees. See 85 FR 43304, with the explanation here, on page 43338. Litigation has been reported.

Tax Law Update
Kristine Tidgren

Kristine is the Dolezal Adjunct Assistant Professor in the Agricultural Education & Studies Department and the Director for the Center for Agricultural Law and Taxation at Iowa State University

Between the pandemic, a trade war, and assorted natural disasters, agricultural producers, like most other businesses, faced a difficult 2020. As many farmers file 2020 income tax returns, they and their tax professionals are sorting through unusual sources of income, analyzing whether new COVID-19 tax benefits apply, and determining how to report these items on their income tax returns. This article provides a brief summary of these issues, with the caveat that new legislation could change the provisions at any time.

Tax Considerations of Common COVID-19 Relief

Economic Impact Payments / Recovery Rebate Credits

Many farmers, like most Americans, received two rounds of economic impact payments, also called "stimulus payments" during the past year. The U.S. Treasury generally issued the first round of payments, authorized by the CARES Act, Pub. L. 116–136 (March 27, 2020), in mid-2020. The agency issued the second round, authorized by the Consolidated Appropriations Act of 2021 (the "CAA"), Pub. L. 116-260 (December 27, 2020), in early 2021. Payments under the first program were generally $1,200 per taxpayer and $500 for each qualifying child (generally those under 17 years of age). Payments under the second program were generally $600 per taxpayer and $600 for each qualifying child. Payments were reduced or eliminated as income climbed above $75,000 for single taxpayers and $150,000 for married filing jointly.

Taxpayers must reconcile both set of payments on their 2020 income tax returns. Because these payments were an advance of a newly-created "recovery rebate credit"—a fully tax credit—they are not included in gross income and they do not generate tax liability. Taxpayers who did not receive advance payments in amounts up to the recovery rebate credit to which they are entitled, will claim the credit on their 2020 return. If a taxpayer received a payment that is more than their calculated recovery rebate credit, the taxpayer does not repay the difference.

As filing season opened, the IRS created a new online tool so that taxpayers could verify the amount of economic impact payments they received. This new tool can be accessed here.

Paycheck Protection Program

Perhaps generating more attention and questions than any other COVID-19 relief provision, the Paycheck Protection Program or PPP provided $525 billion in 100 percent federally-guaranteed loans to small businesses, including the self-employed, in 2020. The key to the PPP is that if borrowers spend their loan proceeds on allowable expenses, including payroll and owner compensation, the loan is fully forgiven. Many farmers received PPP loans in 2020.

The CAA's Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (the "Economic Aid Act") allocated an additional $284 billion to a reauthorized and revised Paycheck Protection Program. The new program, authorized through March 31, 2021, allows first draw loans to those borrowers who did not receive a loan in 2020, second draw loans to borrowers who could demonstrate a 25 percent or greater reduction in gross receipts for any quarter in 2020, as compared to the same quarter in 2019, and first draw loan increases to select borrowers, most notably some self-employed farmers.

New Farmer Rule

Section 313 of the Economic Aid Act retroactively changed the way that a PPP loan is calculated for a self-employed farmer or rancher. Rather than calculating the loan amount using net farm income (as shown on line 34 of Form 1040, Schedule F), the new law directs these farmers to calculate their loan amount using gross farm income, as shown on line 9 of Schedule F. Eligible farmers may use this new calculation to (1) request a first draw loan if they did not receive one in 2020, (2) request an increase to a first draw loan that they received in 2020 if forgiveness for that loan has not been granted, or (3) request a second draw loan if they received a first draw loan and otherwise qualify.

As of the time of this writing, only self-employed farmers who file a Schedule F in their own right are eligible to use the new farmer rule. SBA guidance does not allow a farm partnership to use its Schedule F in calculating the partnership compensation portion of the loan.

Tax Treatment of Forgiven Loan Proceeds

The CARES Act provided that the proceeds of PPP loans, if forgiven, are excluded from the gross income of the borrower. Treasury guidance (IRS Notice 2020-32 and Rev. Rul. 2020-27), however, directed that expenses paid with loan proceeds "reasonably expected to be forgiven" were not deductible. This rule, in essence, rendered the exclusion from gross income unhelpful for many businesses because the elimination of the deduction offset the benefit of the income exclusion. In section 276 of the CAA's COVID-Related Tax Relief Act of 2020 (the "Tax Relief Act"), Congress explicitly overrode the Treasury guidance by providing that "no deduction shall be denied, no tax attribute shall be reduced, and no basis increase shall be denied by reason of a forgiven PPP loan's exclusion from gross income."

While some states may treat forgiven loan proceeds and their corresponding deductions differently, PPP loan proceeds will not be reported on a Form 1099 and will not be reported on the borrower's federal income tax return. Businesses that paid otherwise deductible expenses with PPP loan proceeds will continue to deduct those expenses—most notably payroll costs—on their tax returns. Although the new law allows owners of pass-through entities to retain the benefit of the income exclusion by allowing a basis increase when the loan is forgiven, some entities with expenses in one year and forgiveness in the next may face a situation where a loss may not be recognized until a future year.

Economic Injury Disaster Loans

In 2020, some farmers also received Economic Injury Disaster Loans (EIDL) from the SBA. Although these loans were not forgivable, the CARES Act allowed those who applied for such a loan (whether or not they actually took out the loan) to receive an EIDL advance. This was a grant in an amount up to $10,000. The SBA limited to grant to $1,000 per employee, up to a total of $10,000, for eligible businesses. In mid-2020, Congress specifically granted permission for farmers to receive EIDL loans and EIDL advances.

Under the CARES Act, an EIDL advance was not excluded from gross income. The EIDL advance also reduced the amount of PPP forgiveness a borrower could receive. In other words, if a farmer received a $100,000 PPP loan and a $10,000 EIDL advance, the CARES Act required the farmer's PPP loan forgiveness to be restricted to $90,000.

Section 278 of the Tax Relief Act changed these rules retroactively. Under current law, EIDL advances are excluded from gross income and corresponding expenses remain deductible. Additionally, PPP loan forgiveness is not reduced in the amount of the EIDL Advance. SBA has automatically remitted amounts withheld from PPP forgiveness to the appropriate lenders.

CARES Act State Grants

Many farmers may have received other grants funded by CARES Act money provided to their states. In Iowa, for example, such programs included the Livestock Producer Relief Fund and the Beginning Farmer Debt Relief Fund. These grants are not excluded from gross income under federal law. As such, they should be reported as regular farm income on the Schedule F. State treatment of these grants may vary.

Employee Retention Credit

Background

Section 2301 of the CARES Act allowed "eligible employers" an employee retention credit (the "ERC"), equal to 50 percent of "qualified wages" paid to each employee for each calendar quarter during the COVID-19 crisis. The ERC is a fully refundable payroll tax credit. "Eligible employers" were those employers whose businesses were fully or partially suspended during the calendar quarter due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings due to COVID-19. "Eligible employers" also included those employers that experienced a "significant decline in gross receipts" for a given calendar quarter.

An employer became an "eligible employer" under the "significant decline in gross receipts" test during the first calendar quarter for which gross receipts for that quarter were less than 50 percent of gross receipts for the same calendar quarter in 2019. The eligibility period ended in the calendar quarter following the first calendar quarter in which gross receipts were greater than 80 percent of gross receipts for the same calendar quarter in 2019. The qualified wages which could be taken into account could not exceed $10,000 per employee for all quarters in 2020. In other words, the total 2020 credit for which an employer could receive for each employee in 2020 was $5,000. The credit was taken against the applicable employment taxes on the qualified wages, but any excess was fully refundable.

Many agricultural producers who would otherwise have been eligible for the ERC in 2020 were unable to claim the credit because the CARES Act required businesses to choose between a PPP loan or the ERC.

Retroactive Changes

Section 206 of the CAA's Taxpayer Certainty and Disaster Tax Relief Act of 2020 (the "Disaster Tax Relief Act") retroactively changed the law to allow employers who received PPP loans to qualify for the ERC, as long as the wages paid by the PPP are not the same wages used to claim the ERC. This change means that many agricultural producers may now qualify for the 2020 ERC. To retroactively claim the credit, they may file a Form 943-X or a Form 941-X, as appropriate.

Prospective Changes

Section 207 of the Disaster Tax Relief Act extended and significantly expanded the ERC for 2021, through June 30, 2021. From January 1, 2021, through June 30, 2021, the new law increases the credit percentage from 50 percent of qualified wages to 70 percent. Additionally, employers can count qualified wages up to $10,000 per employee per quarter (instead of across all quarters) in calculating the credit. This means that an eligible employer can claim up to a $14,000 credit per employee in 2021. And becoming an eligible employer under the decline in gross receipts test is much easier. Employers may now generally qualify for the credit if their gross receipts for a calendar quarter are less than 80 percent of the gross receipts for the same calendar quarter in calendar year 2019. Many farm businesses may qualify for the newly expanded ERC. The self-employed, however, are generally ineligible for the ERC.

Families First Coronavirus Response Act Credits

In March of 2020, the Families First Coronavirus Response Act (FFCRA), H.R.6201, was signed into law. This temporary expansion of the Family and Medical Leave Act, required most private employers with fewer than 500 employees to provide emergency paid sick leave and emergency paid family and medical leave to their employees for coronavirus-related absences from April 1, 2020, through December 31, 2020. The FFCRA created a corresponding refundable paid sick leave credit and paid family leave credit for these employers. The credit includes the amount of health insurance costs paid during the leave period by the employer. Self-employed individuals were offered equivalent tax credits. Section 286 of the Tax Relief Act extended the FFCRA leave credits through March 31, 2021. It did not, however, extend the requirement that employers provide this leave. In other words, employers may choose to provide COVID-19-related leave to their employees, and if they provide it, they are eligible for the FFCRA tax credits.

While most credits under the FFCRA are claimed on the Form 941 or Form 943 payroll tax returns, the self-employed claim tax credits for their lost income when filing their 2020 tax returns. For these taxpayers, the tax credit is calculated on Form 7202 and claimed on the Form 1040.

Net Operating Loss Changes for Farmers

Section § 2303(b) of the CARES Act modified IRC § 172(b)(1) by adding a new subsection (D) providing that net operating losses ("NOLs") arising in tax years beginning in 2018, 2019, and 2020 were carried back five years. The new five-year rule applies to all businesses, including farming businesses and casualty insurance companies. Section 2303 of the CARES Act also modified section 172(a) to provide that, for taxable years beginning before January 1, 2021, a net operating loss carryover and/or carryback may offset 100 percent of taxable income.

After the CARES Act changes, farmers no longer had a two-year carryback option for the 2018, 2019, and 2020 tax years. They now had a five-year carryback or could elect to waive the carryback altogether. But when the CARES Act removed the two-year carryback for those tax years, the new law did not provide farmers with an option to revoke their previous elections. In other words, if a farmer did not carry an NOL back two years in 2018 and 2019, the CARES Act provided the farmer with no option to take advantage of the CARES Act five-year carryback. If a farmer did carryback an NOL two years in 2018 or 2019, the CARES Act allowed that farmer to carryback that NOL five years, either by filing Form 1139 or 1145 for an expedited refund (if the time has not expired) or by filing an amended return to recover a refund. But it remained unclear what would happen if a farmer failed to take action to carry the two-year NOL back five years.

Section 281 of the Tax Relief Act addressed these issues by allowing the farmer to elect—for tax years 2018, 2019, or 2020—to disregard the CARES Act changes. An election under this special provision means that a farmer maintains a two-year carryback (with the 80 percent income limitation) for tax years 2018, 2019, and 2020. This election is made by the due date for filing the taxpayer's return for the first taxable year ending after December 27, 2020. Once made, this election is irrevocable. Farmers who take no action to amend 2018 or 2019 returns are automatically electing to leave the two-year carryback with the income limitation in place. No action is required for this choice, but after the due date for 2020 returns, that inaction becomes an irrevocable election to apply the pre-CARES Act rules. The Tax Relief Act also allows farmers to revoke a prior election to waive a carryback for the 2018 and 2019 tax years. In other words, farmers who previously waived the two-year carryback may now revoke that election and carry the NOL back five years for tax years 2018 and 2019.

New Income Sources and Their Application to the 2020 Return

Market Facilitation Program Payments

Many farmers received a third round of 2019 market facilitation program (MFP) payments in February of 2020. These were the final payments provided by the program intended to compensate farmers for damage stemming from trade disruptions. The 2019 MFP payments to Iowa farmers, for example, totaled $1.6 billion, with the 2020 payment comprising 25 percent of the total. Farmers must include these payments in gross income (subject to self-employment tax) for the year in which they are received. See IRS Chief Counsel Memorandum 2018-21. They are reported on lines 4a and 4b of IRS Form 1040, Schedule F. See Schedule F Instructions, page 4.

CFAP 1 and CFAP 2

The Coronavirus Food Assistance Program ("CFAP") was created to compensate farmers for losses associated with COVID-19. CFAP 1, unveiled in May of 2020, compensated producers through a combination of $9.5 million in CARES Act funding and $6.5 million in Commodity Credit Corporation funding. The first round of payments was issued in June, with the second round paid in August. Approximately $10.5 billion was paid to farmers through CFAP 1, with around 40 percent of those payments made to cattle producers.

CFAP 2 was announced September 18, 2020, with applications allowed through December 11, 2020. USDA issued $13.2 billion in CFAP 2 payments, with 25 percent of those payments made to corn producers.

On January 15, 2021, USDA announced what's been called CFAP 2.1, a program designed to provide allocated funds unused by the first two programs (approximately $2.3 billion) to some poultry, hog, and specialty producers hit especially hard by the pandemic. Although applications are being accepted through February 26, 2021, the new administration has halted payments and implemented a regulatory freeze so that it can further review the program.

Farmers must include CFAP payments in gross income (subject to self-employment tax) for the year in which they are received. They are reported on lines 4a and 4b of IRS Form 1040, Schedule F. See 2020 Publication 225, page 2.

Syngenta Settlement Payments

Although unrelated to the pandemic, Syngenta settlement payments were another source of unusual income for most corn farmers in 2020. Beginning in March of 2020, eligible producers and crop share landlords began receiving interim payments from the $1.5 billion Syngenta settlement. Final payments were issued at the end of 2020, with some farmers not receiving them until early 2021. Because the Syngenta payments were intended to compensate recipients for lost profits from farming, cash-basis farmers should report the payments as ordinary income, subject to self-employment tax, for the year in which they receive them. Crop share landlords report the payments as they would report other crop share income.

Land Use and Resource Law Update

Jesse Richardson and Tiffany Dowell Lashmet

Jesse is a Professor with the West Virginia University College of Law and the Lead Land Use Attorney at WVU's Land Use and Sustainable Development Law Clinic, where he focuses his research and teaching in land use law and water law. Tiffany is an Assistant Professor and Extension Specialist in Agricultural Law with Texas A&M AgriLife Extension, where she manages the Texas Ag Law Blog and hosts the Ag Law in the Field Podcast.

Opinions issued in two cases since November highlight the updates in Land Use and Resource Law. The Murphy-Brown decision involves a nuisance suit in North Carolina, while the Virginia Supreme Court ruled on an interested inverse condemnation case involving oysters and contaminated water.

The United States Court of Appeals for the Fourth Circuit issued a decision recently in *McKiver v. Murphy-Brown, LLC*, one of the numerous nuisance lawsuits filed in North Carolina involving neighbors claiming nearby hog farms constituted a nuisance. Shortly thereafter, the defendants announced a settlement had been reached in all of the pending North Carolina hog farm nuisance cases against Murphy-Brown, LLC.

In *Johnson v. City of Suffolk*, 851 S.E.2d 478 (Va. 2020), the Virginia Supreme Court addressed an inverse condemnation claim involving discharge of raw sewage into a river. The petitioners lease oyster grounds in a river from the Commonwealth in order to raise oysters. *Johnson*, 81 S.E.2d at 480. The claim alleges that the City of Suffolk and Hampton Roads Sanitation District polluted the waters by discharging from a sewer system. *Id*. Portions of the river were closed to oyster harvesting due to the pollution. *Id*.

The trial court dismissed the case based on *Darling v. City of Newport News,* 249 U.S. 540 (1919). In that case, the United States Supreme Court affirmed the Virginia Supreme Court decision that rejected an eminent domain claim by oyster growers and found that cities have a right to discharge raw sewage into the ocean. *Darling*, 249 U.S. at 544. Justice Holmes referred to the ocean as a "great natural purifying basin". Id., at 543. The Virginia Supreme Court referred to the ocean as "the sewer provided therefor by nature". *Darling v. City of Newport News,* 123 Va. 14. 20 (1918).That case had never been overturned.

Although the Virginia Supreme Court acknowledged that "[e]nvironmental protections certainly changed a great deal" since 1918, Johnson, 851 S.E.2d. at 483, the court focused on the limited nature of the property right conferred by a lease of bottomlands. Id., at 482-484. The property right consists mainly of the right to "physically occupy state-owned bottomlands and exclude others", "right to physical possession and harvesting of the oysters". *Id*., at 483. Perhaps most importantly, the court distinguished between the bottomlands and the water itself. Petitioners have no right in the waters. Id. Finally, the court found nothing in statutory or case law that indicated that petitioners have the right to be free from pollution or to profit from the lease. *Id*.

The court distinguished decisions finding an inverse condemnation when sewage overflows damaged commercial or residential property. Id., at 484. Those landowners had a right to exclude sewage or floodwaters. Id. Here, the oyster growers have no right to control the water that flows over the oysters, so the nature of the property right differs. Id. The dismissal of the case was affirmed and the case was dismissed.

The case is available here.

The United States Court of Appeals for the Fourth Circuit issued a decision in November in *McKiver v. Murphy-Brown, LLC*, 980 F.3d 937 (2020) one of the numerous nuisance lawsuits filed in North Carolina involving neighbors claiming nearby hog farms constituted a nuisance. Shortly thereafter, the defendants announced a settlement had been reached in all of the pending North Carolina hog farm nuisance cases against Murphy-Brown, LLC.

The United States Court of Appeals for the Fourth Circuit addressed seven issues raised by Murphy-Brown on appeal. In doing so, the court affirmed the jury verdict with regard to liability for compensatory and punitive damages but vacated and remanded the amount of the punitive damage award.

First, Murphy-Brown claimed the court erred in not finding that the contract farmer (Kinlaw) was a necessary and indispensable party to the lawsuit. They argued that Kinlaw has a "significant pecuniary and contractual interests threatened by this litigation" and that it must be made party to the lawsuit to protect its own interest. The court disagreed.

Murphy-Brown also argued that the court erred in rejecting its three-year statute of limitations defense. The issue here was whether the nuisance at issue was a "continuing" nuisance, for which the three-year statute of limitations bars the claim, or a "recurring nuisance" where the three-year statute of limitations limits the amount of damages available, but allows the claim. The trial court held as a matter of law this was a recurring nuisance, which Murphy-Brown claims was error. Murphy-Brown also claims this question of recurring or continuing nuisance should have been submitted to the jury, not decided as a matter of law. The Fourth Circuit affirmed.

Next, Murphy-Brown claimed that the court erred in submitting the question of annoyance and discomfort damages to the jury. In particular, Murphy-Brown argued that North Carolina private nuisance law limits the recovery of compensatory damages to those for reduction of property's market value or rental value. In other words, other compensatory damages for annoyance or discomfort damages are prohibited. This was supported by a 2017 amendment to the North Carolina Right to Farm Act, which expressly stated this rule. However, since this case was filed in 2014, the amendment did not apply. The issue before the court, then, was whether (as Murphy-Brown argued) the 2017 amendment merely clarified the law that already existed prior to 2017, or whether (as the neighbors argued) the amendment created new law applicable only once passed in 2017. The court agreed with the neighbors.

Next, Murphy-Brown claims that the court erred in allowing testimony from the Plaintiffs' expert, Dr. Shane Rogers, but excluding certain opinions of Murphy-Brown's expert, Dr. Pamela Dalton. The Fourth Circuit affirmed both rulings.

The court also affirmed the trial court's jury instruction on vicarious liability for nuisance. The judge told the jury that a party can be vicariously liable for nuisance if "it employs an independent contractor to do work which that party knows or has reason to know to be likely to involve the creation of a nuisance."

Murphy-Brown argued that the issue of punitive damages never should have gone to the jury and the court erred in not dismissing that claim due to lack of evidence to support a punitive damage award. Murphy-Brown argued that the issue of punitive damages never should have gone to the jury and the court erred in not dismissing that claim due to lack of evidence to support a punitive damage award. The court affirmed the trial court.

Finally, Murphy-Brown's final argument relates to the admission of financial information of Murphy-Brown's parent companies and the refusal to bifurcate the liability and punitive damage portions of the trial. First, the court determined that the financial information was relevant to the question of whether Murphy-Brown could have feasibly taken effective remedial measures. Second, the court agreed with Murphy-Brown that the court erred in refusing to bifurcate the trial.

For a more in depth discussion of the case, visit the Texas Agriculture Law Blog.

Agricultural Law Update

The official newsletter of the American Agricultural Law Association

Agricultural Law Update Committee
Peggy Hall, Jesse Richardson, and Jackie Schweichler

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Peggy Kirk Hall
e-mail: hall.673@osu.edu
Jesse Richardson
email: jesse.richardson@mail.wvu.edu
Jackie Schweichler
email: jks251@psu.edu

For AALA membership information, contact:
Scott Heidner
Executive Director
American Agricultural Law Association
825 S Kansas Ave, Suite 500
Topeka, KS 66612
email: scott@aglaw-assn.org

AALA on the web:
www.aglaw-assn.org