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INSIDE

IN FUTURE ISSUES

Mississippi federal district court reinstates farm program payments; impermissible Congressional interference found

The United States District Court for the Northern District of Mississippi has ruled that determinations by the ASCS's Deputy Administrator for State and County Operations (DASCO) holding six Mississippi farming operations ineligible for any federal farm program benefits for the 1989, 1990, and 1991 crop years are invalid under the due process clause of the Fifth Amendment to the U.S. Constitution and were arbitrary and capricious in violation of the Administrative Procedure Act. The court held that DASCO's determinations were impermissibly tainted by Congressional interference, making it impossible for the producers to obtain a fair and impartial hearing at the national level of the USDA, as guaranteed by the Fifth Amendment. *DCP Farms v. Yeutter*, No. DC90-194-B-O (N.D. Miss. Feb. 4, 1991).

On April 6, 1989, the Tunica County, Mississippi ASC Committee approved the 1989 farm operation plans of DCP Farms and Flowers and Parker Farms. One week later, the Coahoma County, Mississippi county committee approved the 1989 farm operating plan of Flower Farms.

Following press accounts of a report issued by USDA's Office of Inspector General (OIG) regarding what OIG characterized as abuses of payment limitations, top USDA officials were summoned to a meeting with House Agricultural Committee staffers on Capitol Hill where concerns were raised regarding plaintiffs' 1989 farming operations. At the time, plaintiffs' 1989 farming operations were being reviewed by DASCO officials in Washington, DC.

On December 6, 1989, Rep. Jerry Huckaby, Chairman of the House Subcommittee on Cotton, Rice, and Sugar, wrote to Agriculture Secretary Yeutter about the plaintiffs' eligibility for federal farm program benefits, stating his strong feelings that the farm operations violated both the spirit and letter of the 1987 payment limitation law (of which Huckaby was the principal author), and admonishing Secretary Yeutter that "if the Department is unable to correct this situation, it is my intention to enact legislation making all trusts and estates ineligible for payments, beginning retroactively with the 1989 crop year." Chairman Huckaby strongly urged the Secretary to adopt the conclusion that the reorganization of plaintiffs' farming operation was a "scheme or device" to avoid the payment limitation law.

In February 1990, USDA officials responded to Chairman Huckaby's letter, noting that the USDA shared his concerns and assuring him that it would take "a very aggressive position" in dealing with the plaintiffs' case.

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Payment limits extended and revised by 1991 Farm Bill

The 1990 Farm Bill (the Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, Nov. 28, 1990, 104 Stat. 3359 *et seq.*) extended the per-person payment limitations under the federal farm programs to the 1991 through 1995 crops. The legislation also makes several changes to the rules governing the application of the limits, including the "person" determination rules.

Two pre-existing **limits** on annual program payments were **extended** to the 1991 through the 1995 crops essentially without change: (a) the $50,000 per-person limit on wheat, feed grain, cotton, and rice deficiency payments and land diversion payments, and (b) the overall $250,000 per-person cap on all types of program payments (except honey, wool, and mohair benefits). Secs. 1111(a)(1)(B) and 1111(a)(2)(A), 104 Stat. 3497 and 3498; 7 U.S.C. § 1308(1) and 1308(2).

The 1990 Farm Bill also extended through 1995 the prohibitions against program payments to foreign persons. Sec. 1111(b), 104 Stat. 3498; 7 U.S.C. § 1308-3(a). Similarly, a special rule governing cash rent tenants that was applicable to the 1990 crops was

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extended through 1995. Sec. 1111(i), 104 Stat. 3500; 7 U.S.C.§ 1308(5)(D). Briefly, this rule states that a cash rent tenant that contributes management to the farm operation but not labor is ineligible for program payments unless the person also contributes equipment.

There is a **new $75,000** per-person annual **limit** on marketing loan benefits, loan deficiency payments, and so-called "Findley payments." Sec. 1111(a)(1)(C), 104 Stat. 3497; 7 U.S.C. § 1308(1). This limit, like the $50,000 limit, is a sub-limit within the overall $250,000 limit.

To close what was perceived to be a loophole in the "person" rules, a new provision is added to the law to bar certain **irrevocable trusts** from being treated as separate persons. Specifically, unless the trust was established prior to January 1, 1987, to be considered a separate "person," the trust must not (a) allow for modification or termination of the trust by the grantor, (b) allow for the grantor to have any future, contingent, or remainder interest in the corpus of the trust, or (c) provide for the transfer of the corpus to the remainder beneficiary in less than twenty years from when the trust is established (except where the transfer is contingent on a remainder beneficiary reaching majority or on the death or the grantor or income beneficiary). Sec. 1111(e), 104 Stat. 3499; 7 U.S.C. § 1308(5)(B)(ii).

The "person" rules applicable to spouses have been revised to allow more **spouses** to qualify **as separate persons**. At the option of the Secretary of Agriculture, a husband and wife can both qualify as separate persons if each is actively engaged in farming, whether or not the farming is done in the same farm operation. The only catch is that to qualify both spouses in a marriage as "persons," each has to agree not to receive program payments indirectly under the "three entity" rule. Sec. 1111(c), 104 Stat. 3498; 7 U.S.C. § 1308(5)(B)(iii).

On January 7, 1991, Secretary Yeutter announced that he would exercise his discretion to initiate this new spousal rule.

Generally, if a person holds a very **small** percentage of the **beneficial interest** in a legal entity, payments from that entity will not trigger the entity being counted against the person for purposes of the three entity rule. Prior to the 1990 Farm Bill, that minimum beneficial interest percentage was set in the statute at ten percent. The Farm Bill gives the Secretary new authority to set the percent at a lower number— ten percent becomes just a maximum. Sec. 1111(f), 104 Stat 3499; 7 U.S.C. § 1308-1(a)(2).

A new rule is established stating that, to determine whether a person growing **hybrid seed** under **contract** is to be considered actively engaged in farming, ASCS cannot take into consideration the existence of a hybrid seed contract. Sec. 1111(d), 104 Stat. 3498 and 3499; 7 U.S.C. § 1308-1(b)(6). This new rule will serve to modify the more general rules in 7 U.S.C. § 1308-1(b) for determining whether a person is "actively engaged" in farming and thus eligible for program b— ASCS has been interpreting the prior statutory language to aggregate producers growing corn for seed corn companies with the company, thus depriving the producer of separate "person" status.

The 1990 Farm Bill added a new section 1001D to the 1985 farm bill provisions, to deal with the **administration** of the payment limits. Sec. 1111(g), 104 Stat. 3499; 7 U.S.C. § 1308-4. This new section gives the **State ASCS office** the power to make the payment limitation determinations in any case where a farm operation consisting of more than five "persons" initially seeks qualification to receive program payments. Originally the county ASCS office first considered payment limitation cases, and the State office became involved only on appeals of county decisions.

Another new section is added to the payment limit provisions, section 1001E, to deal with a problem in the **Conservation Reserve Program payment limit rules**. Sec. 1111(h), 104 Stat. 3499 and 3500; 7 U.S.C. § 1308-5.

Annual land retirement payments made under a CRP contract (which runs for ten years) are subject to the payment limitation rules, including the "person" rules. A problem is created when a person who has a CRP contract succeeds, by devise or descent, to ownership of land under a separate CRP contract. Taking on the second CRP contract might cause the heir to exceed his or her CRP payment limit forcing the heir to remove land from the program. Under the new section, the CRP program can continue payments on the inherited land in this situation without regard to the amount of payments received by the new owner under any other contract.

—Phil Fraas, McLeod, Watkinson & Miller, Washington, D.C.

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Federal Register *in brief*

The following matters were published in the *Federal Register* in January 1991.

1. USDA; Ag Marketing Service; reparation proceedings; rules applicable to the determination as to whether a person is responsibly connected with a licensee under PACA; final rule; effective date 1/3/91; 56 Fed. Reg. 173.

2. USDA; Ag Marketing Service; amendment to the rules of practice under PACA; final rule; effective date 2/4/91. 56 Fed. Reg. 175.

3. USDA; Cooperative marketing associations; eligibility for price support." 56 Fed. Reg. 2147.

4. CCC; Administrative offset; interim rule. 56 Fed. Reg. 359.

5. CCC; Grains and similarly handled commodities; farmer owned program; interim rule. 56 Fed. Reg. 2665.

6. ASCS; Dairy indemnity payment program; beekeeper indemnity program; final rule; effective date 1/14/91. 56 Fed. Reg. 1358.

7. FmHA; Federal statute of limitations; final rule; effective date 1/10/91. 55 Fed. Reg. 943.

8. FmHA; Implementation of emergency disaster assistance provisions of the 1990 Farm Bill; interim rule. 56 Fed. Reg. 1653.

9. PSA; Surety bonds; final rule; effective date 2/21/91. "Reduce[s] the time for filing claims on surety bonds... posted by packers, market agencies, and dealers.. from 120 to 60 days and reduce[s] th waiting period for filing suit on such bonds from 180 to 120 days." 56 Fed. Reg. 2127.

—Linda Grim McCormick

June 1, 1990, DASCO overturned the Tunica County and Coahoma county decisions approving the plaintiffs' 1989 farm operating plans. Additionally, DASCO took the unprecedented action of endering *initial* determinations denying plaintiffs' request for program benefits for the 1990 crop year, after ordering the two county committees to refrain from making any rulings on plaintiffs' plans for that year. DASCO ruled the plaintiffs ineligible for *any* federal farm program benefits for the 1989, 1990, and 1991 crop years, on the ground that plaintiffs had participated in a scheme or device designed to evade the payment limitation regulations.

On December 11, 1990, after obtaining additional evidence of Congressional interference in documents produced pursuant to the Freedom of Information Act, plaintiffs filed with USDA a Petition to Disqualify the national level of USDA from further participation in any administrative proceedings. Approximately two hours after the Petition was filed, USDA denied the Petition and notified plaintiffs that the hearing would be held as scheduled the next day and that any evidence the plaintiffs wished to submit for the record be submitted at that time or not at all.

The next morning, December 12, 1990, plaintiffs filed suit in federal district court seeking a temporary retraining order to enjoin the national level of USDA from holding the administrative appeal hearing that day and requesting the court to enter declaratory and injunctive relief in plaintiffs' favor. Plaintiffs alleged that the June 1, 1990 DASCO determinations holding the plaintiffs ineligible for any federal farm program benefits for the 1989, 1990, and 1991 crop years were invalid because they were impermissibly tainted by Congressional interference and that such interference made it impossible for plaintiffs to secure a fair and impartial hearing at the national level of USDA. Plaintiffs also alleged that defendants' conduct was arbitrary and capricious, an abuse of discretion, and contrary to law, in violation of the Administrative Procedure Act.

In response to the complaint, USDA argued that the Commodity Credit Corporation was the real party in interest and should be permitted to intervene, that USDA and ASCS should be dismissed as parties, that the case should be transferred to the U.S. Claims Court, and that the district court lacked subject matter jurisdiction because of the Tucker Act and because plaintiffs had not exhausted their administrative remedies.

Congressional interference

Following an evidentiary hearing on plaintiffs' preliminary injunction motion, which the parties agreed to treat as a trial on the merits, the court ruled that chairman Huckaby exerted impermissible influence upon officials at the national level of USDA in an effort to dictate the outcome of the proceedings. Relying on *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966), the court ruled that agency action is invalid if based, even in part, on pressures emanating from Congressional sources. The court held that where agency adjudicative proceedings are involved, impermissible influence may be found where the mere appearance of bias or pressure can be shown.

Intervention of CCC as a party

The court also rejected defendants' argument that the CCC should be substituted as the real party in interest, recognizing that the defendants' real intent in this respect was to then implicate the anti-injunction provisions of 15 U.S.C. § 714b(c), which bars injunctive relief against the CCC. The court ruled that the action was not against the CCC, but rather the Secretary of Agriculture, USDA, and the ASCS, as the CCC was not involved in the legislative and administrative conduct underlying the litigation. Relying on *Justice v. Lyng*, 116 F. Supp. 1576 (D. Ariz. 1988), the court noted that to find otherwise would be to grant immunity to USDA and its administration in matters involving injunctive relief merely because it is funded through the CCC. The court found such a result would be "nonsensical."

Tucker Act

Relying on *Bowen v. Massachusetts*, 487 U.S. 879 (1988), the court also rejected defendants' argument that the Tucker Act required the court to transfer the litigation to the Claims Court. In *Bowen*, the Supreme Court expressly repudiated the argument made by defendants that suits seeking monetary relief from the federal government were necessarily suits seeking "money damages" cognizable exclusively in the Claims Court. In *DCP Farms*, plaintiffs sought a declaratory judgment that the actions of the national level of USDA were impermissibly tainted by Congressional interference and were arbitrary and capricious. In addition, plaintiffs sought injunctive relief barring the national level of USDA from further participation regarding plaintiffs' eligibility for the federal farm programs at issue and reinstating the earlier decisions regarding the 1989 crop year made by the county committees. The court recognized that while relief of this nature may serve as the basis for *future* monetary relief, it is not a substitute remedy but an attempt to give plaintiffs the very thing to which they were entitled in the first place. *See Esch v. Yeutter*, 876 F.2d 976, 977-85 (D.C. Cir. 1989); *Justice v. Lyng*, 716 F. Supp. 1567, 1568-69 (D. Ariz. 1989).

Exhaustion of administrative remedies

Finally, the court rejected defendants' arguments that the court was without jurisdiction because the plaintiffs had not exhausted their administrative remedies. The court ruled that where it would be futile to comply with the administrative procedures or where the administrative process is unlawful or unconstitutional in form or process, the exhaustion requirement is met (*citing, Patsy v. Florida Int'l Univ.*, 634 F.2d 900 (5th Cir. 1981), *rev'd on other grounds*, 457 U.S. 496 (1982)).

Relief

The court held that plaintiffs were entitled to the declaratory and injunctive relief sought in their complaint. Specifically, the court ordered that final judgment be entered (1) denying the motion of the CCC to intervene; (2) overruling and vacating the June 1, 1990 DASCO determinations holding plaintiffs ineligible for any federal farm program benefits for the 1989, 1990, and 1991 crop years; (3) permanently enjoining defendants from allowing the national level of USDA, including DASCO, to participate further in any determinations or appeals concerning plaintiffs' eligibility for 1989, 1990, and 1991 farm program benefits; (4) reinstating the decisions of the Tunica County and Coahoma County ASC committees approving plaintiffs' 1989 farm operating plans; (5) ordering defendant forthwith to either approve plaintiffs' 1990 farm operating plans as filed or remanding those plans to the Tunica county and Coahoma County ASC Committees, as appropriate, for initial determinations, with any administrative appeals therefrom limited solely to the Mississippi State ASC Committee; and (6) awarding plaintiffs their cost of suit.

—Alan R. Malasky, Arent, Fox, Kintner, Plotkin & Kahn, Washington, DC

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Agricultural liability insurance and the pollution exclusion

John D. Copeland

Most farmers protect themselves from liability claims with a Farmer's Comprehensive Liability Policy (FCLP). The standard FCLP is a Commercial General Liability Policy (CGL) that has been modified to take into consideration some of the unique liability aspects associated with farming. While there are many interpretation and coverage problems associated with FCLPs, this article is concerned only with the issue of pollution coverage under the FCLP.[1]

The liability claims which can arise out of polluting events are extensive and varied. Besides the traditional claims of personal injury, property damage, and business interruption, there are also such unique claims as "inverse condemnation," natural resource deprivation, medical surveillance, emotional distress, and environmental cleanup.[2]

But just as farmers are increasingly needing pollution insurance coverage, insurers are limiting the availability of pollution coverage under the standard FCLP. To understand the present restrictions on pollution coverage within FCLPs, it is useful to trace the development of pollution coverage.

Accident-based policies

Before 1966, comprehensive liability policies were "accident-based" policies that made the following promise on behalf of insurers:

> To pay, on behalf of the insured, all funds which the insured shall become obligated to pay as damages because of bodily injury, sickness or disease... sustained by any person, or because of any injury to or destruction of property... caused by an accident.[3]

The term accident implies an event that is rather sudden in nature.[4] Certainly, insurers intended that coverage was available only as to those events that were "sudden, violent, catastrophic and specific."[5] However, the policies failed to define the term "accident," which naturally created some confusion and concern in the courts.[6]

Some courts held that the "plain meaning" of the term "accident" indicated that it excluded coverage for situations that did not involve "the happening of a single event referable to a definite time and place."[7] Other courts, however, permitted coverage for situations in which the events giving rise to liability transpired over a period of time, recognizing the "damage caused by a glacier is every bit as accidental as that caused by an avalanche." Instead of focusing on the amount of time involved, the courts focused on whether the results were intentional.[8]

Questions also arose as to when an accident actually occurred. Did an accident take place at the time the event occurred, or when the injury was manifested? Most courts determined that coverage was triggered when the injury was suffered, as opposed to when the conduct giving rise to the injury took place.[9]

Also in issue was from whose perspective the accident was to be viewed. Was the existence of an accident determined from the standpoint of the victim or the insured? If the event was viewed from the standpoint of the victim, then you almost always had an accident. If, however, it was viewed from the standpoint of the insured, then you may or may not have had an accident. The courts generally viewed the event from the standpoint of the insured.[10]

Some courts held that there was no coverage where the damage was foreseeable, but simply that the result was a natural and probably consequence of the activity.[11]

Occurrence-based policies

Confusion over defining the term "accident," as well as demands for increased coverage, led to the 1966 revisions by the insurance industry in which accident-based policies were changed to "occurrence-based" policies. The duty to pay clause was changed to read as follows:

> The company will pay on behalf of the insured all sums which the insured shall become legally liable to pay as damages because of bodily injury or property damage... caused by an occurrence...[12]

Occurrence was defined in such policies as:

> An accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.[13]

In 1973, the occurrence language was changed to read as follows:

> An accident, *including continuous or repeated* exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.[14]

The use of occurrence language clarified to some extent issues that arose under the accident-based policies. For example, while coverage still attached when bodily injury resulted during the policy period, it became clear that the injury-producing incident could occur over an extended period of time and did not have to be a single catastrophic event.[15] Also because an occurrence was defined as damage or injury "neither expected nor intended from the standpoint of the insured," it was clear that unintended results of intentional acts were frequently covered under the standard liability policy.[16] Finally, the issue of whether an occurrence had taken place, which was neither expected nor intended, was to be viewed from the standpoint of the insured.[17]

Although a number of problem areas were resolved under the new language, interpretation problems still existed. All too frequently, from the standpoint of the insurers, these interpretations problems were resolved in favor of the insureds.

A number of courts adopted the position that the occurrence definition wa broader than the term accident and coverage could be found as to intentional acts, so long as the resulting damage was not intended or expected. For example, in *Steyer v. Westvaco Corp.*,[18] Christmas tree farmers sued a neighboring insured paper mill for exposing the trees to pollution. The pollution occurred over a four-year period. The court found an "occurrence" because the injury was not expected or intended.[19]

The same result was reached in *United States Fid. & Guar. Co. v. Armstrong*.[20] Raw sewage dumped onto neighboring property was covered because, even if the damage was foreseeable, it still was not expected or intended from the standpoint of the insured.[21]

Creation of the pollution exclusion

The court decisions finding pollution coverage under the "occurrence-based" liability policy naturally alarmed the insurance industry. The industry became even more concerned as tough environmental laws were enacted in the early 1970s and a series of massive environmental disasters took place, such as the sinking of the oil tanker "Torry Canyon."[22] As a result, the industry created the firs pollution exclusion clause, which was added to liability policies in 1973. The typical clause stated that this insurance

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does not apply:

> To bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants, pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.[23]

In drafting the 1973 pollution exclusion clause, the insurance industry steadfastly maintained that the "occurrence-based" policies already excluded from coverage most acts of pollution. Industry leaders contended that the new exclusion was meant only to clarify the existing exclusion.[24]

However, the exclusion actually goes one step beyond the "occurrence" definition in that damage arising out of the discharge, dispersal, release or escape of pollutants is not insured, regardless of the insured's expectations or intentions. The only exception is for those polluting events that are sudden and accidental.[25]

Court decisions invalidating the exclusion

Although the insurance industry believed it had solved its pollution coverage problems, a long series of court decisions demonstrated otherwise. The validity of the exclusion was first ruled on in *Molten, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co.*[26] The court declared the clause to be ambiguous and refused to deny coverage as to pollution caused by the dispersal of sand and dirt during construction of a subdivision.[27]

From 1981 through 1987 insurers won only 8 out of 35 cases interpreting the 1973 pollution exclusion.[28] Not only did a number of courts find the pollution clause to be ambiguous, one court declared the clause to be superfluous. The court held that the clause was nothing more than another way to define an "occurrence."[29]

Waste management decision

By 1986 the insurance industry had begun to prevail in some of the cases interpreting the 1973 pollution exclusion. The true turning point was the case of *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*[30], which involved a hazardous waste landfill that had leaked into and contaminated a groundwater supply. In construing the pollution exclusion as to insurance coverage for the event, the North Carolina Supreme Court found that:

> (1) The clause was not ambiguous;
>
> (2) The focus of the exclusion is not upon release, but upon the fact that it contaminates or pollutes;
>
> (3) Gradual seepage is not, by definition, "sudden" or "accidental."[31]

Since the *Waste Management* decision, which a number of courts have adopted, insurers have fared much better in the courts. At the very least, there seems to be a fairly equal split. From 1987 through October 1989, of the 51 reported pollution cases, 28 were decided in favor of insurers.[32]

Two agricultural cases

A couple of agricultural cases clearly demonstrate the conflicting views on interpreting the 1973 standard pollution exclusion. In the case of *Farm Family Mutual Insurance Co. v. Bagley,*[33] the insureds were hired to spray oat fields. Using a boom sprayer, the defendants released chemicals approximately 18" off the ground. Unfortunately, the sprayed chemicals were carried to neighboring land, causing damage to vineyards and crops. The insured's policy contained the standard pollution exclusion.[34]

The key issue in the case was whether or not the spraying of the neighboring land was sudden and accidental. The court determined that something is accidental when it is "unexpected, unusual and unforeseen" from the standpoint of the insured.[35] Because the insured had used due care and diligence in spraying the oat fields (no wind was present at the time the oat fields were sprayed), the dispersal of the chemicals on to the neighboring vineyards and crops was unexpected, unusual, and unforeseen from the standpoint of the insured. Thus, the pollution was sudden and accidental and was within the insured's FCLP coverage.[36]

In the case of *Weber v. IMT Insurance Co.*[37], the court was faced with interpreting two insurance policies as to an act of pollution. The insured, the Webers, owned a modern farming operation, which included raising hogs from farrow to finish. As part of this operation they used a spreader to transport manure down a gravel road. During hauling, the spreader sometimes dropped manure on the gravel road. The operation had been conducted for a number of years when the Webers' neighbors, the Newmans, filed an action seeking damages for the contamination of their sweet corn crop, and other property, by fumes from the manure dropped or spread on the road.

The Webers had two policies with IMT. The Webers' primary policy was an FCLP, with a standard pollution exclusion. They also had an umbrella policy to cover any damage claims that exceeded the amount of the primary coverage. IMT, however, denied coverage. As to the FLCP policy, IMT relied on language that stated that coverage was limited to accidents "neither expected nor intended from the standpoint of the insured" and that there was no coverage for the discharge of "waste materials" unless the discharge was "sudden and accidental."[38]

In a declaratory action in favor of the insurance company, the court held the pollution exclusion to be unambiguous. The court stated that the exclusion applied to waste materials and a reasonable interpretation of that would include hog manure.[39]

The court also agreed with the insurance company's contention that the insured's spilling and depositing of manure on the road was not sudden and accidental. Instead, the pollution and attendant circumstances resulted from the Webers' regular and ongoing farming activities occurring over a ten- to fifteen-year period.[40]

The umbrella policy issued by IMT did not contain a pollution exclusion, but did contain the 1973 occurrence definition.

The court found that occurrence obviously means an accident. Furthermore, for there to be coverage under the policy, the court held that the accident must result in damage that was neither expected nor intended. In determining whether an injury is expected or intended from the standpoint of the insured, the court ruled that the test of substantial probability be used. Substantial probability means something is more than reasonably foreseeable.[41]

Applying the substantial probability standard to the facts of the *Weber* case, the court concluded that the damages caused to the neighboring property, from the manure dropping onto the road running off the Newman's property, were highly likely to occur. As a result, there was also no coverage under the umbrella policy of insurance.[42]

On October 17, 1990, the Iowa Supreme Court vacated the court of appeals decision. The court affirmed in part, and reversed in part, the district court decision and remanded the case.[43]

The Iowa Supreme Court affirmed the lower court's ruling, that there was no coverage under the FCLP policy, because

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of the pollution exclusion. The court agreed that the term "waste material" in the pollution exclusion was not ambiguous, even though the term was not defined in the policy. Giving the term its ordinary meaning, the court held that the term would encompass hog manure spilled on the road.[44] The court also agreed with the lower court ruling that there was nothing "sudden and accidental" about the spill.[45]

However, the Iowa Supreme Court differed with the lower court as to the umbrella policy. The court held that, although the Webers were aware they were spilling manure, there was no evidence that they intentionally contaminated the Newman's sweet corn crop.[46]

As to whether the damage was expected, the court held that the evidence did not support the lower court's ruling that the Webers knew, or should have known, that the spilled manure would ruin the Newmans' sweet corn. There was no evidence that the Newmans had previously complained to the Webers that the sweet corn crop was being ruined by the spilled manure, nor was there any testimony that the Webers knew damage was occurring. As a result, it could not be said that the Webers expected property damage to occur.[47]

Absolute exclusion and limited coverage

Weber and *Bagley* are typical of the cases and confusion that can arise in interpreting FCLPs containing the standard 1973 pollution exclusion clause.

To avoid litigation under the standard FCLP pollution exclusion concerning coverage issues, a number of the liability policies, especially those written since 1986, now contain an absolute pollution exclusion. The following is typical:

This coverage does not apply to:

1. "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants;
   a. At or from premises you own, rent or occupy or borrow;
   b. At or from any site or location used by you or for others from the handling, storage, disposal, processing or treatment of waste.
   c. Which are at any time transported, handled, stored, treated, disposed of, or processed as waste by or for you or any person or organization for whom you may be legally responsible; or
   d. At or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations:
      1. If the pollutants are brought on or to the site or location in connection with such operations; or
      2. If the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.
2. Any loss, cost or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.[48]

The new exclusion is designed to eliminate any ambiguity concerning pollution coverage under the standard FCLP. In particular, the exclusion is designed to settle the issue of insurance coverage for government-ordered clean-up operations, which is a major area of controversy. Clean-up costs are now clearly excluded under section (2) of the absolute exclusion.

Under the Comprehensive Environment Response Compensation and Liability Act (CERCLA) and similar state statutes, government entities frequently incur expenses in cleaning up pollution sites and then seek reimbursement for those costs from the polluters. The courts have reached conflicting results as to whether there is insurance coverage for such reimbursement costs. For example, the Fourth Circuit in *Mraz v. Canadian Universal Ins. Co.*[49] held that superfund cost recovery actions do not constitute claims for "damages" and thus cannot form a basis for either indemnification or defense under the standard liability policy. The Eighth Circuit, however, reached a contrary result. In *Continental Insurance Co. v. Northeastern Pharmaceutical and Chemical Co.*[50], the court found that superfund cost recovery actions constitute claims for property damage.

Because of the absolute exclusion, some farmers are now obtaining an endorsement to their FCLPs for limited farm pollution coverage. The limited coverage is obtained by means of an exception to item (1) of the pollution exclusion permitting coverage for "bodily injury or property damage caused by or resulting from the discharge, dispersal, release or escape of smoke or farm chemicals, liquids or gases used or intended for use in normal and usual farming or agricultural operations."[51] However, the coverage is subject to the following two conditions:

1. The pollutant must not have been released from an aircraft;
2. The agricultural operation must not be in violation of any ordinance or law.[52]

The limited pollution coverage, however, does not encompass one major pollution liability exposure, which is the runoff of animals wastes. Animal waste runoff does not fit the qualification of being "used or intended for use" in farming operations.[53]

Besides the limited pollution coverage, farmers can obtain chemical drift liability coverage. But such coverage is extremely limited, as the insurer only promises to pay sums for which the insured becomes legally liable as a result of physical injury to crops or animals occurring due to the discharge, dispersal, release, or escape into the air of chemicals, liquids or gases the insurer uses in "normal and usual agricultural operations."[54]

Furthermore, the coverage is subject to the following additional conditions:

1. The pollutant must not have been released from an aircraft;
2. The agricultural operation must not be in violation of any ordinance or law;
3. The physical injury to crops or animals must not be expected or intended by the insured.

Also, there is no coverage as to any costs or expenses arising out of any government ordered clean-up operations.[55]

Summary

During the 1990s, farming practices will come under increasing scrutiny from environmentalists and others. This increased scrutiny may result in a greater number of pollution cases, as farmers are increasingly blamed for pollution problems. Unfortunately, many farmers may find their liability insurers unwilling to provide either coverage or defenses to such claims. Farmers who are presently covered under FCLP policies written on an occurrence basis, or containing the 1973 pollution exclusion, will find themselves embroiled in disputes with their insurers over whether the pollution was sudden and accidental, or the damages expecter or intended from the standpoint of the insured. Farmers holding FCLPs with the new absolute exclusion will have almost no hope of coverage for pollution events. Even those farmers with limited pollution coverage, or chemical drift coverage, will find that, in many instances, the conditions imposed upon their coverages will effectively eliminate their insurance coverage.

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[1] For a detailed discussion of the standard FCLP see Copeland, *The Farmer's Comprehensive Liability Policy*, American Agricultural Law Association (AALA) 1990 Conference Outline.

[2] Dore, *Insurance Coverage*, in Law of Toxic Torts, 28-3 (1988).

[3] *Id.* at 28-18.2

[4] *FC&S Bulletins* Nov. 1987, at Public Liability Cop-1.

[5] *Farnow, Inc. v. Aetna Insurance Co.*, 33 Misc., 2d 480, 483, 227 N.Y.W.2d 634 (Sup. Ct. 1962)

[6] *See White v. Smith*, 440 S.W.2d 497, 511 (Mo. Ct. App. 1969).

[7] See Dore, *supra* note 2, at 28-19, n. 48

[8] *Id.*

[9] *Id.* at 28-20, n. 51

[10] *Id.* at 28-21

[11] *Id.* at 28-21, 22

[12] Dore, *supra* note 2, at 28-23.
[13] *Id.*
[14] *Id.* at 28-24
[15] *Id.*
[16] *Id.*
[17] *Id.* at 28-25.
[18] 450 F Supp 384 (D Md. 1978).
[19] *Id.* at 390
[20] 479 So.2d 1164 (Ala. 1985).
[21] *Id.; see also Buckeye Union Ins. Co. v. Liberty Solvents & Chem. Co.*, 17 Ohio App.3d 127, 477 N.E.2d 1227 (1984), *Pepper's Steel & Alloy v. United States & Guar. Co*, 668 F. Supp. 1541 (S.D. Fla 1987); *Benedictine Sisters v. St. Paul Fire & Marine*, 815 F. 2d 1209 (8th Cir 1987); *but see also American Mut. Liab. Ins. Co. v. Neville Chem. Co.*, 650 F. Supp. 929 (U.O. Pa. 1987) where groundwater contamination from uncorrected disposal problems at a dump site, after notification, was outside the definition of an "occurrence" as the additional damage was to be expected.
[22] Burke, *Pollution Exclusion Clauses: The Agony, The Ecstacy, and the Irony For Insurance Companies*, 17 N. Ky. L. Rev 443, 449 (1990)
[23] *Id.* at 449.
[24] Joest, *Will Insurance Companies Clean the Aegean Stables*, Ins. Coun. J 58, 259 (Apr. 1983).
[25] *FC&S Bulletins*, Nov. 1987, at Public Liability Cop-2
[26] 347 So 2d 95 (Ala 1977).
[27] *Id.*
[28] *See* Burke, *supra* note 22, at 455, n. 78 for a complete listing of the decided cases.
[29] *See Jackson v. Hartford Accident and Indemnity Co.*, 451 A.2d 990 (N.J. 1982)
[30] 315 N.C. 688, 340 S.E.2d 374 (1986)
[31] 340 S.E.2d at 381; *see* Burke, *supra* note 22, at 459.
[32] Burke, *supra* note 22, at 460, n. 98.
[33] 64 A.D 2d 1014, 409 N.Y.S.2d 294 (1978).
[34] 409 N.Y.S.2d at 295
[35] *Id.*
[36] *Id.* at 295-96
[37] No. 9-437-1389, slip op. (Iowa Court of Appeals filed April 29, 1990, decision affirming declaratory judgment).
[38] *Id.* at 3
[39] *Id.* at 4
[40] *Id* at 6-8.
[41] *Id* at 11
[42] *Id* at 12, 13
[43] *Weber v. IMT Insurance Co.*, No. 2851 88-1389, *slip op* (In the Supreme Court of Iowa filed Oct. 17, 1990)
[44] *Id* at 7
[45] *Id* at 9-14.
[46] *Id* at 14, 15.
[47] *Id* at 16
[48] *FC&S Bulletins*, Aug. 1990, at Farms App-1.
[49] 804 F 2d 1325 (4th Cir 1986).
[50] 811 F 2d 1180 (8th Cir. 1987).
[51] *FC&S Bulletins*, Aug. 1990, at Farms App-4
[52] *Id*
[53] *Id*
[54] *Id* at App-2, 3.
[55] *Id*

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