# Agricultural Law Update

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## INSIDE



## IN FUTURE ISSUES

- Louisiana and the U.C.C.
- The Plant Variety Protection Act



## *Scope of "saved seed" farm sale provision*

In 1970, Congress passed the Plant Variety Protection Act (PVPA), giving the developers of novel varieties of sexually reproduced plants eighteen-year legal protections and creating a system to protect their innovations from infringement. The PVPA contains certain exemptions including a farmer exemption, which gives farmers the right to "save seed" for future uses.

The controversy in *The Asgrow Seed Company v. Winterboer*, Civ. No. C91-4013, N.D. Iowa, September 30, 1991, amended November 14, 1991, concerned the application of the farmer exemption, found in 7 U.S.C. § 2543, and in particular, a provision which authorizes farmers to sell "saved" seeds to other farmers. The main issue in controversy was whether there is a reasonable limit that can be placed on the amount of seed a farmer can "save" and sell to other farmers or whether the provision is unlimited.

Section 2543 reads:

> it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section: *Provided*, That without regard to the provisions of section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable.

The plaintiff is a division of Upjohn and a major agricultural seed company, which has successfully developed and marketed varieties of soybean seeds. The Winterboers are family farmers doing business under the name DeeBee's Farm and Seed. The plaintiff alleged that its investigation revealed the Winterboers were "brown-bagging," that is, reproducing Asgrow's seeds and then harvesting and selling the seeds in non-descriptive brown bags, as being "just-like" Asgrow's varieties. In December, 1990, an Asgrow agent visited the Winterboer farm to purchase soybean seed. Mr. Winterboer informed him he had soybean seed for sale that was just like Asgrow varieties A1937 and A2234. In fact, Winterboer conveniently called his "just-like" varieties 1938 and 2235. The agent purchased twenty bags of each variety. Asgrow's testing determined that the seeds were in fact Asgrow A1937 and A2234.

Asgrow brought an action for an injunction against the Winterboers and after two hearings the parties agreed that the defendant would not sell any seed for the 1991 planting season. No agreement was reached concerning the 1992 season or damages for past sales. The district court's ruling was made on both parties' motions for

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## Esch v. Lyng *extended*

On December 17, 1991, the District Court for the District of Columbia declined to dismiss a complaint filed by four farming partnerships, holding that the district court was "equipped and authorized" to entertain suits for a review of a farmer's entitlement to farm program payments.

In *Peterson Farms I v. Madigan*, C.A. No. 91-2340, 1991 WL 3003313, the farming partnerships challenged USDA's suspension of their participation in the farm program and the withholding of their payments in a complaint, which asked for, *inter alia*, injunctive and declaratory relief. At the hearing on plaintiffs' Motion for Preliminary Injunction, plaintiffs' counsel withdrew their motion (not being able to show irreparable harm) but still requested that the court deny defendant's pending motion to dismiss on the ground that plaintiffs' claim for declaratory judgment was a sufficient jurisdiction basis for the court to review the case. The court agreed.

The Fresno County Committee determined that plaintiffs were considered twelve persons eligible to receive program benefits for the 1987 crop year. One and a half years later, plaintiffs were selected for payment limitation review by a special task force. In 1989 plaintiffs were notified that they were eligible for only one payment

*Continued on page 2*

summary judgment. Judge O'Brien granted the plaintiff's motion for summary judgment and granted the request for a permanent injunction against Winterboer from making sales of other than "saved seed" (as defined by the court). The judge also denied the Winterboer's motion for summary judgment and set a separate hearing on the issue of damages for past sales.

The Winterboer's whole defense was that their sales were protected under the farmer exemption. They argued that because the majority of their soybean crop, over eighty percent, was sold for other than reproductive purposes, they fell within the "saved seed" exemption.

Asgrow's position was that the farmer sale provision was limited by the concept of "saved seed," meaning farmers can save only what is necessary for replanting purposes and then sell portions of that "saved seed" if their planting needs or intentions change. Asgrow argued that to read the exemption as claimed by the Winterboers would mean farmers could buy and raise protected varieties and then sell up to half of their crop to other farmers. The company argued that such a broad interpretation of the "saved seed" exemption would not forward the congressional intent for enacting the PVPA, which was to create economic incentives for plant breeders to develop and market novel varieties.

Judge O'Brien concluded that Congress had not intended to give farmers an unrestricted right to sell seed, otherwise the exemption would not have been needed. In his view, the inclusion of the modifier "saved" to describe the amount of seed a farmer is allowed to sell indicates "a clear congressional intent to place limits on the amount of seed a farmer can sell to other farmers under the Act."

The issue then became how to quantify how much seed a farmer can save that would possibly be available for sale. The court concluded that the "exception allows a farmer to save, at a maximum, an amount of seed necessary to plant his soybean acreage for the subsequent year." If the farmer's planting intentions changes, the court said he could sell the seed not actually planted.

Judge O'Brien recognized that "this interpretation of 'saved seed' restricts the number of bushels farmers will be able to sell to one another," but concluded "the purpose of Congress in enacting the PVPA was to protect the developer of a new line of seed and to allow a farmer to sell the progeny of a novel variety as limited."

The Winterboer's have appealed the decision to the Court of Appeals for the Federal Circuit, arguing there is no statutory basis for restricting the amount of "saved" seed. They argue the case is an attempt to use the courts to obtain a limitation on the PVPA that the seed industry has not been able to obtain by rule or legislation.

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*Esch v. Lyng extended/continued on page 2*

for 1987. Plaintiffs appealed the decision to the State Committee, which affirmed the county's decision on the grounds that plaintiffs had violated various requirements, including the so-called "financing" and "capitalization" rules.

Plaintiffs then appealed the State Committee's determination to DASCO. At the DASCO hearing, plaintiffs sought reinstatement of the original person determination of the county committee. Plaintiffs also objected to ASCS's imposition of the "capitalization" and "financing" rules, which plaintiffs contended were implemented without the Administrative Procedure Act's (APA) notice and comment procedures. DASCO then released its decision, finding against plaintiffs based on the application of the "capitalization" "financing," "substantive change," and "custom farming" rules. Plaintiffs then filed suit.

The Circuit Court recognized that the Tucker Act vests in the United States Claims Court concurrent jurisdiction over any claim against the government founded upon a contract and exclusive jurisdiction if the contract claim exceeds $10,000 in money damages. It was noted that the District Court would have jurisdiction over due process or APA claims for injunctive relief or "monetary relief." Defendant argued that plaintiffs' claims were for money damages in excess of $10,000 and therefore must lie in the Claims Court. The court disagreed.

The court first asked whether plaintiffs are seeking "money damages" as defined in *Bowen v. Massachusetts*, 108 S.Ct. 2722 (1988) and *Esch v. Yeutter*, 876 F.2d 976 (D.C. Cir. 1989), or "monetary relief." Plaintiffs were not seeking another administrative hearing, nor future benefits, as was sought in *Esch*. Plaintiffs were requesting a determination of whether they received proper payments for the 1987 crop year.

> ...while the litigants in *Esch* expressly disavowed an interest in monetary relief and asked only for a fair hearing, plaintiffs in this action have never disavowed an interest in a sum certain, and a reversal of the administrative decision on the merits would result inexorably in payment of money from defendant to plaintiffs.

Nonetheless, "[t]he fact that judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" *Bowen*, 108 S.Ct. at 2732.

The court noted the distinction between an action at law for damages (to provide monetary compensation for an injury to a person, his property, or his reputation) and an equitable action for specific relief (for the recovery of specific property or monies). *Bowen*, 108 S.Ct. at 2732, which in turn relied on *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949).

Judge Green concluded that plaintiffs were not seeking money in compensation for losses that they may have suffered by virtue of defendant's withholding of their 1987 payments but were seeking a declaration of their *entitlement* to the withheld funds. She stated that while such relief may be "monetary relief," it cannot be characterized as "money damages."

Secondly, Judge Green considered whether the Claims Court could provide plaintiffs with the "'special and adequate review procedure' that will oust a district court of its normal jurisdiction under the APA." *Bowen*, 108 S.Ct. at 2737. She found she could not conclude the Claims Court better suited to consider plaintiffs' APA claims.

In sum, the court expanded the 1987 holding in *Esch v. Lyng*, 665 F. Supp. 6 (D.D.C. 1987) to cover farm plaintiffs who seek a declaratory judgment of entitlement to funds owed them, without obtaining a preliminary injunction as the initial vehicle.

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# Federal Register *in brief*

The following matters were published in the *Federal Register* in the month of January, 1992.

1. CCC; Cooperative marketing associations; eligibility requirements for price support; final rule; effective date 1/14/92; 57 Fed. Reg. 1369.

2. PSA; Amendment to certification of central filing system; Oklahoma; 57 Fed. Reg. 3612.

3. CCC; Farmer Owned Reserve program; 1991 wheat as collateral; final rule; effective date 1/31/92. 56 Fed. Reg. 3716.

*—Linda Grim McCormick*

# Impact of the Agricultural Credit Act of 1987 on real estate titles

By David C. Butler

**Introduction**

The Agricultural Credit Act of 1987 [1] (the "Act", effective January 6, 1988) provided several procedural and substantive protections for agricultural borrowers from the Farm Credit System (Federal Land Banks or FLB's, Farm Credit Banks or FCB's, Production Credit Associations or PCA's) and from the Farmers Home Administration (FmHA). Among these new rights were provisions granting distressed or foreclosed borrowers certain rights to repurchase or leaseback real estate collateral acquired by these lenders through foreclosure, or deeds in lieu of foreclosure. Additionally the Food Security Act of 1985[2] effective December 23, 1985, established a Homestead Protection Program available to borrowers from FmHA, or in certain circumstances, from the Small Business Administration (SBA), to allow such distressed borrowers to retain a 10-acre homestead.

The statutes require the lender to notify the former borrowers of these rights before the lender may market the property to others.

Title questions arise because property subject to this treatment will have neither judicial record nor judicial approval of the actions taken by the lender. Moreover, the statutes neither provide for any period of repose or limitation, nor do they indicate the consequences of any failure by the lender to provide the notices or afford the rights prescribed. There are no provisions to protect bona fide third party purchasers.

Thus the title examiner must rely upon materials and recitations of the lender itself to reconstruct the lender's compliance.

There are some steps to be taken to minimize the risk for the title examiner and for his client. This paper will examine the statutory scheme, evaluate some of the risks inherent therein, and suggest some means of dealing with the problems.

**The Farm Credit System**

The borrower's rights of repurchase under the Farm Credit scheme arise only when the real property in question is acquired by the Farm Credit System (FCS) entity on or after January 6, 1988.[3] Thus, if the property was purchased at foreclosure sale by a third party the borrower's rights problem should not arise.

Only the "previous owner," defined as the prior record owner of land used as collateral for the loan, whether or not such prior owner was also a borrower,[4] is eligible for the notice.

The Act applies only to "agricultural real estate that is acquired"[5] by foreclosure or voluntary conveyance. Unfortunately "agricultural real estate" is not elsewhere defined.

One concern not addressed by the statute is whether additional lands not originally mortgaged, but later acquired by a lender, would be subject to the right of first refusal. Suppose a borrower gives the lender a voluntary conveyance not only of the mortgaged security but also of another tract of agricultural land, or suppose lands are purchased on general execution on a deficiency judgment by the lender after completion of the foreclosure.

The land given by voluntary conveyance is probably subject to the right of first refusal, since the Act in its broad sweep includes agricultural real estate that is acquired by voluntary conveyance.

However, an argument could be made that a general execution to satisfy a money judgment is too attenuated from the initial foreclosure to consider such real estate to be acquired "by a foreclosure".

The prudent practice is of course to obtain waivers from the previous owner, in either case, if possible.

The notice to the previous owner must indicate the appraised value[6] of the property and the terms on which the previous owner may elect to purchase. If the previous owner offers less than the appraised value, the lender may reject or accept such reduced offer, but if rejected, the lender may not sell the property to any other person for a sum equal to or less than the previous owner's offer, without first affording the previous owner another opportunity to purchase under any such altered price, terms, or conditions. Thus, the title examiner, particularly if he is representing the first purchaser from FCS, should make careful review of and comparison of the terms of the purchase contract of his client, and the terms offered to the previous owner, to insure that they are commensurate, except for possible financing terms.[7]

Similar statutory provisions relate to leasing of "any portion of such real estate."[8] The statute fails to specify "leasing for agricultural purposes," which is no doubt the intent. However, since the statute is not specifically so limited, the question arises whether or not a lease for oil and gas, or mining purposes would be subject to the previous owner's right of first refusal.

Again, prudence suggests that such a commercial lessee require compliance with the notice of right of first refusal provisions, or require waivers from the prior owner, if the lease is being taken directly from the lender.

If the lender elects to sell or lease the property through public auction, the previous owner is to be notified by certified mail of the availability of the property at public auction sale, and of the minimum bid, together with other terms and conditions of the sale.[9]

Unfortunately, the statute is not clear whether both notices must be given to the borrower. That is, must the prior owner first be given notice of an opportunity to purchase privately at the appraised value, and thereafter be given another notice that the property is to sell at public auction, or is only a single notice of public auction sufficient?

At least three courts have considered this precise question of statutory interpretation; two found both notices must be given,[10] and one concluded only the single notice was required.[11]

Given these divergent results, the prudent title examiner would wish to see that the lender had complied with both notice provisions in the event of ultimate sale by public auction.

This short overview of the procedural provisions of the statute is of course no substitute for the title examiner's careful review of the statutory provisions as they exist or existed at the time of the transactions being reviewed.

Although a number of problems have been noted in discussing the procedural requirements, there are no definitive solutions to them. The reported cases to date give no clear indication of the consequences to a third party purchaser of the lender's failure

to comply with the statutory requisites. The starting point for any consideration of the effect of FCS legislation is whether or not the particular statute grants to a borrower a private right of action directly against the FCS entity. Though it might seem obvious that a statute giving a borrower a "right" of first refusal would also carry with it the power to compel enforcement of that right by action in court, that has not been the judicial interpretation of the Farm Credit Act of 1971.

Several cases have reviewed the borrower's rights provisions of the Agricultural Credit Act of 1987. The majority, including the Eighth, Ninth, and Tenth circuits, have held that a borrower does not possess a private right of action to enforce various borrower rights, including the right of first refusal, directly against the FCS entity.[12]

This essentially means that a borrower

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must assert his rights as defenses in the principal foreclosure action, as he will not be allowed a collateral action against the FCB to enforce the rights.[13] And since judicial sales typically occur after the foreclosure is concluded, it may mean the borrower cannot obtain judicial review of the lender's compliance.

With respect to the consequences to a purchaser and his title, the other reported cases dealing with the borrower's right of first refusal are not particularly enlightening.[14]

However, one court[15] invalidated waivers of the right of first refusal, upon a finding that the FCS entity had, after obtaining the waivers, offered the previous owner an opportunity to bid on the property on which the right had been waived. The court found that the previous owner suffered some sort of detrimental reliance upon the offer to bid and that the previously executed waivers were thus void.

The same court held that the statutory language required sale of a 32,000 acre property as one unit, rather than in smaller parcels, where the FCS entity had elected to sell the "entire" property. This tortured interpretation of the statute invites absurd distinctions, such as whether withholding one acre from the sale would be a sale of less than the "entire property," and thus allow Bank's planned sale of 32,000 acres in 59 parcels.

**Farmers Home Administration**

The procedural steps and the nature of the rights afforded borrowers with respect to lands acquired by FmHA are more convoluted than the similar procedures under the FCS scheme.[16]

FmHA borrowers are entitled to a similar right of first refusal to purchase or lease their lands acquired by FmHA, and in addition to possibly purchase back the dwelling house and up to ten acres of surrounding lands.[17]

The preferential right to repurchase or lease applies only to agricultural lands, and only to "farmer program borrowers."[18]

Certain related entities may also be eligible to repurchase for up to 190 days.[19] Thereafter, a second preference arises for thirty days in favor of the farm tenant, if any.[20]

The previous owner's right to purchase or leaseback the property is conditioned upon his having "acted in good faith with the Secretary, as defined in regulations issued by the Secretary, in connection with such loan."[21] This of course creates another potential "off-record" problem for the title examiner. If FmHA has determined that the borrower acted in bad faith, and was thus not entitled to exercise his right to repurchase, how is that to be evidenced of record? And when will that determination be free of challenge by the previous borrower? The statute is silent.

There are special provisions with respect to the leaseback/buyback program which apply to Indian lands, as defined by the statute,[22] essentially requiring that all Indian lands be conveyed back only to tribe members, tribal entities, or the Secretary of the Interior.

The previous owner, and any other protected parties, can waive their preferential right to buyback or leaseback the subject property, in writing.[23]

Otherwise, after FmHA acquires the property, it must mail notice of the leaseback/buyback provisions to the immediate previous owner who must then apply for buyback or leaseback within 180 days. If rejected, the borrower has certain rights of appeal.

If none of the preferential entities is the purchaser, the land may then be offered for sale, more or less to the general public, but with a preference given to persons who would qualify for FmHA financing. The statute contains certain publication and notice requirements to be followed in advertising the property for sale.

Any unsuccessful applicants to purchase have certain administrative appeal rights within FmHA.

Where a bankruptcy trustee proposed a sale free and clear of liens of property subject to a FmHA mortgage, and debtors had not been furnished notice of their right to repurchase the property because the property had not yet been acquired by FmHA, the court held that such a sale would circumvent the debtors' right to repurchase, and that debtors must be allowed their rights to repurchase the property.[24]

Could such a decision extend to a sheriff's sale, to invalidate sale to a third-party bidder for lack of right of first refusal notice to the previous owner? What if Prudential, as first lien-holder and foreclosure plaintiff, bids in property at sheriff's sale on which FmHA held a second mortgage? Would that "circumvent" the borrowers' rights?

In *Lathan v. Block*,[25] borrowers alleged that FmHA had conspired to induce senior commercial lienholders to commence foreclosures where FmHA was in junior lien position, allegedly to allow FmHA to circumvent its duty to offer preforeclosure procedural rights (e.g. debt restructuring consideration) to borrowers. The court found that borrowers stated a sufficient claim for deprivation of property interests without due process to withstand a Motion to Dismiss.

However, the court denied borrowers' request for return of property already foreclosed and sold, finding that third-party purchasers were not before the court, which thus lacked jurisdiction to order those conveyances set aside, and that property purchased by FmHA was pursuant to final decrees of foreclosure which were now res judicata.

Although the second ruling leaving vested titles undisturbed is reassuring to title examiners, the first ruling, validating a due process denial claim on the basis of FmHA's alleged collusionary behavior in allowing or encouraging private entity foreclosures, is disturbingly akin to allowing purchase by third-parties at foreclosure sales.

The Homestead Protection Program applies to property acquired by FmHA, or by the administrator of the Small Business Administration with respect to a farm program loan made under the Small Business Act.[26]

Under the program, a borrower is entitled to lease and purchase up to ten acres of "homestead property" from the foreclosed collateral.

The statute applies when FmHA or SBA acquires title to mortgaged property.[27] However, the statute further provides that the Homestead Protection Program applies whenever a borrower "agrees to voluntarily liquidate or convey such property in whole or in part."[28] Although the intention was undoubtedly to apply to voluntary liquidations in lieu of foreclosure, the literal meaning of the statute is that any time a conveyance is made of property subject to an FmHA or SBA Farm Program loan, compliance with the Homestead Protection Program is required.

Of course, the program by definition only applies where the borrower's homestead is involved, but in most cases nothing appears of record to indicate whether or not a particular property is homestead.

Consequently, the title examiner should require compliance with or waiver of the Homestead Protection Program on every conveyance of rural land mortgaged to FmHA or SBA under a Farm Program loan which occurred on or after December 23, 1985.

**Title evidence**

The title examiner must be able to determine to his satisfaction that title is marketable, and that marketability appears in the record. Unfortunately, all of the actions taken to comply with the borrower protection provisions applicable to FCS or FmHA will have occurred ad-

ministratively, and, at least for the first examiner passing title on the conveyance from the lender to a third party, nothing will appear of record.

The examiner will have to exercise all appropriate inquiry to be personally satisfied that the FCA, FmHA, or SBA complied with all applicable statutes and regulations, and that any appeal times for aggrieved borrowers have expired, and document that inquiry for the record as well as possible.

If waivers were obtained, the waivers, properly identified by affidavit from the lender, should be filed in the local real estate records.

If no waivers were obtained, then appropriate affidavit of the lender should be obtained reciting that all notices required by statute and regulations were given, and either that the entitled parties did not exercise their rights within time, or made application, were rejected, and that any appeals were concluded adversely to the entitled parties, or that appeals were not pursued, and that all appeal times have now expired. In addition, the actual notices, or satisfactory evidence of the giving of notice, should be examined, and where appropriate, copies of such notices, identified by the lender's affidavit, could be filed in the local real estate records.

Careful review of the statutory and regulatory provisions should be made, as of the time FCS, FmHA, or SBA acquired title. Although this is fairly recent legislation, it has already been amended.[29] This is an area which will probably see further change.

In FmHA and SBA loans, the examiner should always satisfy himself by independent inquiry whether or not the property in question was the homestead of the borrower, and in addition should require that the lender so state in his affidavit. If the property was homestead property, compliance with the Homestead Protection Program would need to be evidenced with the supporting affidavit of the lender.

If the real property in question is Indian land, as defined in the statute, the basic rule is that it may ultimately only become owned by an Indian entity of the same tribe, or by the Secretary of the Interior.

[1] Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568 (1988).

[2] Food Security Act of 1987, Pub. L. No. 99-198, 99 Stat. 1354 (1985).

[3] At least that is what the statute says. But so does the applicable FmHA statute, and one court has held the rights arise before a bankruptcy trustee's sale free and clear of liens; see *In re Nelson*, 123 Bankr. 993 (Bankr. D.S.D. 1991). A similar argument was raised but not reached in *In re Duncan*, 107 Bankr. 754 (Bankr. W.D. Ok. 1988).

[4] 12 C.F.R. § 614.4522(a)(2).

[5] 12 U.S.C.S. § 2219a(a); § 4.36 of the Farm Credit Act of 1971, as amended by Pub. L. No. 100-233.

[6] The "appraised fair market value" shall be established by an "accredited appraiser." 12 U.S.C. § 2219a(b). Unfortunately the term "accredited appraiser" is not elsewhere defined in the statute. In practice, the Farm Credit system utilizes its own accredited appraisers, which are not necessarily the same sort of "certified" or "licensed" appraisers as are now, or will shortly be, required under FIRREA, (Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 103-73, 103 Stat. 183 (1989).

[7] 12 U.S.C.S. § 2219a(f).

[8] 12 U.S.C. § 2219a(c).

[9] 12 U.S.C.S. § 2219a(d).

[10] *Leckband v. Naylor*, 715 F. Supp. 1451 (D. Minn. 1988); *Martinson v. Federal Land Bank of St. Paul*, 725 F. Supp. 469 (D.N.D. 1988).

[11] *Payne v. The Federal Land Bank of Columbia*, 711 F. Supp. 851 (W.D. N.C. 1989).

[12] No private right of action in the Farm Credit Act of 1971 was created by the 1987 Act, *Zajac v. Federal Land Bank of St. Paul*, 909 F.2d 1181 (8th Cir. 1990); *Griffin v. Federal Land Bank of Wichita*, 902 F.2d 22 (10th Cir. 1990); *Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172 (9th Cir. 1989); *Farm Credit Bank of Spokane v. Debuf*, 757 F. Supp. 1106 (D. Mont. 1990), (but can assert non-compliance by lender as defense in foreclosure); *Hill v. Farm Credit Bank of St. Louis*, 726 F. Supp. 1201 (E.D. Mo. 1989)(private right of action for injunction, but not for damages); *Federal Land Bank of Spokane v. L.R. Ranch Co.*, 926 F.2d 859 (9th Cir. 1991); *Walker v. Federal Land Bank of St. Louis*, 726 F. Supp. 211 (C.D. Ill. 1989). *Renick Bros., Inc. v. Federal Land Bank Association of Dodge City*, 721 F. Supp. 1198 (D. Kans. 1989).

For the proposition that no private right of action existed in the Farm Credit Act of 1971, as amended prior to the Agricultural Credit Act of 1987, see e.g. *Harper v. Federal Land Bank Association of Spokane*, 692 F. Supp. 1244 (D. Ore. 1988); *Smith v. Russellville Production Credit Assn.*, 777 F. 2d 1544 (11th Cir. 1985), *Apple v. Miami Valley Production Credit Assn.*, 614 F. Supp. 1199 (S.D. Ohio 1985); *Birbeck v. So. New England Production Credit Assn.*, 606 F. Supp. 1030 (D. Conn. 1985); *Suenita Thomason v. Federal Land Bank of Wichita*, No. CIV 86-198-W (W.D. Okla. Jun. 4, 1986; *Griffin v. Federal Land Bank of Wichita*, 902 F.2d 22 (10th Cir. 1990); *Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172 (9th Cir. 1989).

For a succinct discussion of the legislative history of the omitted specific provision for a private right of action in the Agricultural Credit Act of 1987, see *Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172, 1175 (9th Cir. 1989). The initial House and Senate Bills both included an express private right of action, but it was deleted in conference committee from the final Act as passed.

[13] *Federal Land Bank of St. Paul v. Overboe*, 404 N.W.2d 445 (N.D. 1987); *Lilliard v. Farm Credit Services of Mid-America*, ACA, No. 90-CA-1891-Mr, 1991 WL 236875 (Ky. Ct. App. filed Nov. 15, 1991).

[14] See *Meredith v. Federal Land Bank of St. Louis*, 690 F. Supp. 786 (E.D. Ark. 1988); *Leckband v. Naylor*, 715 F. Supp. 1451 (D. Minn. 1988); *Payne v. Federal Land Bank of Columbia*, 711 F. Supp. 851 (W.D. N.C. 1989).

[15] *In re Jarrett Ranches, Inc.*, 107 Bankr. 969 (Bankr. D.S.D. 1989).

[16] At least one court confused these two separate entities, citing Farm Credit System statutes from Title 12, United States Code, as authority for and against actions taken by the Farmers Home Administration, which is controlled by Title 7 of the United States Code, and even stating that FmHA is "chartered by the Farm Credit Association," a non-existent entity. *In re Nelson*, 123 Bankr. 993, 1002 (Bankr. D.S.D. 1991).

[17] 7 U.S.C.S. §§ 1985, 2000; Agricultural Credit Act of 1987, sections 610, 614.

[18] 7 U.S.C.S. § 1991 (b)(1) and § 1985; although the definition of "borrower" in section 1991 of Title 7 specifically excludes any farm borrower, all of whose loans and accounts have been foreclosed or liquidated, section 1985 which relates to right of repurchase, refers to the "borrower from whom the Secretary acquired real farm or ranch property;" further, 7 C.F.R. § 1951.911(a)(4)(i) defines "previous owner" as the individual or entity which held title to the property at the time FmHA acquired it, which may or may not be the individual or entity which was the former borrower. See *U.S. v. Barnes*, 754 F. Supp. 69 (E.D. N.C. 1990) for discussion of the definitions of the various statutes and regulations, concluding that the leaseback/buyback rights are intended to apply to the person who held fee title to the security for the loan at the time FmHA acquired the property. The court found no conflict between the terms "borrower-owner" as used in 7 U.S.C.S. section 1985, and the term "previous owner" as used at 7 C.F.R. § 1951.911(a)(4)(i). In short, the rights apply to non-borrower owner, but not to a non-owner borrower.

[19] 7 U.S.C.S. § 1985(e)(1)(C)(ii). The other preferential entities are the prior owner's spouse or child, if actively engaged in farming, and stockholders if the prior owner is a corporation held exclusively by members of the same family. By regulation, FmHA also extends preferential treatment to members of a farming partnership. 7 C.F.R. § 1951.911(a)(2)(i).

[20] 7 U.S.C.S § 1985 (e)(1)(A)(i).

[21] Food, Agriculture, Conservation and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359 (1990); 7 U.S.C.S. § 1985(e)(1)(A)(i); see interim rule, 56 Fed. Reg. 11,350.

[22] 7 U.S.C.S. § 1985 (e)(1)(D).

[23] 7 U.S.C.S. § 1985 (e)(1)(A)(iii)

[24] In re Nelson, 123 Bankr 993 (Bankr. D.S.D 1991).

[25] *Lathan v. Block*, 627 F. Supp. 397 (D. N.D. 1986).

[26] 15 U.S.C.S. § 631, et seq.

[27] 7 U.S.C.S. § 2000(b)(1)(A) and (B).

[28] 7 U.S.C.S. § 2000(b)(1)(C); but note that the regulation provides that the Homestead Protection Provisions only come into play when FmHA acquires the property, 7 C.F.R. § 1951.911(b), although the borrower is notified of his homestead protection right even before FmHA acquires the property, at the time when the borrower becomes 180 days delinquent; 7 C.F.R. § 1951.911(b)(2)

[29] Agricultural Credit Technical Corrections Act of 1988, Pub. L. No. 100-399, 102 Stat. 989 (1988); Food, Agriculture, Conservation and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359 (1990).

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—*David C. Barrett, Jr. Washington, D.C.*

## Georgia tractor lemon law

Georgia recently enacted legislation, modeled after automobile "lemon laws," to provide buyers of critically defective self-propelled equipment certain legal remedies to secure redress. Ga. Code. Ann. §§ 10-1-810 to -819 (Michie Supp. 1991). The two major provisions involve a manufacturer's duty to repair nonconformities to make new vehicles conform to express written warranties, and a manufacturer's duty to take back a nonconforming new vehicle and replace the vehicle or refund the purchase price.

The statutory duties of the tractor lemon law only apply to qualifying non-conformities occurring and reported within a statutory term of one and one-half years that commences with the date of the original delivery of the tractor. Moreover, actions under the law must be commenced within two and one-half years from the date of the original delivery of the vehicle to the consumer.

The law requires repairs of non-conformities that make it impossible to use the tractor for the designed or intended purpose during a statutory term of protection.

To qualify for a replacement or refund, the nonconformity must "substantially [impair] the use or market value of the farm tractor to the consumer..." within the statutory term. Two alternative qualifications are enumerated.

First, a manufacturer may incur an obligation for a replacement or refund if the same reoccurring nonconformity occurs five times within the statutory term of protection. This qualification discloses that several different nonconformities none of which occurs more than four times within the statutory term do not create a duty of replacement or refund.

The second alternative qualification for a replacement or refund involves the prolonged loss of service due to repairs. The same nonconformity must substantially impair the use or market value of the tractor and cause the consumer to lack the service of the tractor for more than thirty business days. But if a consumer is provided the use of another farm tractor which performs the same function, the statutorily prescribed time period is tolled; any days the consumer has the use of a loaned tractor do not count in calculating the days of lack of service.

The intent of the tractor lemon law is to provide consumer protection to purchasers of new vehicles. It is not clear, however, that the new law affords consumers significant relief beyond what already exists under state commercial law. Ga. Code Ann. §§ 11-2-313, -314, -315, -714, -715. Relief is limited to defects already covered by express written warranties, and the law does not provide incidental and consequential damages. Furthermore, the loaned-tractor exception provides manufacturers a method to preclude consumers from qualifying for a refund or replacement.

*—Terence J. Centner, University of Georgia, Athens, GA*

## Form 1099B requirements for 1991

The IRS has decided to exempt buyers of agricultural commodities and generic commodity certificates from filing Form 1099B information returns for transactions occurring in calendar year 1991 (IRS Announcement 91-177, Internal Revenue Bulletin 1991-48, Dec. 2, 1991).

The effect of the decision is to extend for another year the retroactive exemption from Form 1099B reporting requirements. See Announcement 91-20, Internal Revenue Bulletin 1991-7. IRS officials have said that proposed regulations under I.R.C. section 6045 will be issued "early in 1992" to deal with this matter on a prospective basis.

Form 1099B information returns are used by the IRS to verify the accuracy of income reporting by taxpayers. Internal Revenue Code section 6045 and the accompanying regulations empower the IRS to require that "brokers" file information returns on transactions involving customers. Some IRS auditors have taken the position that "any middleman is a broker under I.R.C. Section 6045." The term "broker" is defined very broadly in the regulations and includes "a person that, in the ordinary course of a trade or business during the calendar year, stands ready to effect sales to be made by others." Treas. Reg. section 1.6045-1(a)(1). The present regulations require "brokers" to file Form 1099B's on transactions involving customers that are sole proprietorships or partnerships. Transactions with corporate customers are presently exempt from the reporting requirements. Thus, buyers of agricultural products dealing with producers would be required to file Form 1099B's on a majority of their transactions if deemed to be "brokers" under I.R.C. section 6045. Penalties can be assessed for each transaction. They are cumulative and can reach $250,000 per calendar year for information returns due after December 31, 1989.

*—David C. Barrett, Jr., National Grain and Feed Association, Washington, D.C.*

## Lender liability claims against FCS

In an action removed by the Farm Credit Assistance Board to the United States District Court for the District of Columbia, the D.C. Circuit has upheld the dismissal of a lender liability claim brought by a Mississippi borrower against the Federal Land Bank of Jackson, the Federal Land Bank Association of Jackson, and the Farm Credit System Assistance Board on several grounds, including that Mississippi law does not recognize a fiduciary relationship between a lender and its borrowers absent allegations of "facts suggestive of a special relationship." *Williams v. Federal Land Bank of Jackson*, No. 90-5064, 1992 U.S. App. LEXIS 1195, * 11 (D.C. Cir. Feb. 4, 1992). The court also noted that the plaintiff failed to cite any cases "supporting her claim that an agricultural cooperative owes a fiduciary duty to its members." *Id. But see* Barbara J. Hoekstra, *The Fiduciary Duty Owed by the Farm Credit System Cooperatives to Their Member-Borrowers*, 13 J. Agric. Tax'n & L. 3 (1991); Christopher R. Kelley & Barbara J. Hoekstra, *A Guide to Borrower Litigation Against the Farm Credit System and the Rights of Farm Credit System Borrowers*, 66 N.D. L. Rev. 127, 176-85 (1990).

Additionally, the court rejected the plaintiff's claim that the defendants breached the loan agreement and that they failed to act in good faith when they rejected the plaintiff's proposed sale of the property mortgaged to the Federal Land Bank that was more favorable to the plaintiff than a sale subsequently approved.

*—Christopher R. Kelley, University of North Dakota School of Law*

## Damages award for FmHA's violation of Coleman order rejected

Although it declined to "quarrel" with the conclusion of the First Circuit in related litigation that the defendant FmHA employees had been "deceitful" in their dealings with the plaintiffs and it agreed with the district court that the FmHA had violated the injunction in *Coleman v. Block*, the Eighth Circuit has reversed the district court's award of approximately $200,000 to the plaintiffs for the FmHA employees' contumacious violation of the injunction. *McBride v. Yeutter*, No. 89-5135, 1992 U.S. App. LEXIS 1102, * 16 (8th Cir. Jan. 30, 1992) (citing *McBride v. Taylor*, 924 F.2d 386, 387 (1st Cir. 1991).

After affirming the contempt finding, the Eighth Circuit reversed the award of damages on the grounds that the damages "did not flow from the defendants' violation of the notice provision of the *Coleman* injunction," but instead flowed from conduct that preceded the injunction or was not encompassed by it. *Id.* at * 15-16.

*—Christopher R. Kelley*

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