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INSIDE

IN FUTURE ISSUES

GAO questions effectiveness of payment limitation rules

A recent General Accounting Office (GAO) report concludes that the 1987 amendments to the federal farm program payment limitation rules have not reduced program costs. U.S. Gen. Accounting Office, Agriculture Payments: Effectiveness of Efforts to Reduce Farm Payments Has Been Limited 9 (Pub. No. RCED-92-2, Dec. 1991)(hereinafter GAO Report). The report also offers more effective ways to reduce the number of individuals eligible to receive federal farm program payments. *Id.*

The GAO report is significant for at least two reasons. First, GAO reporting on payment limitations provided much of the impetus for the 1987 amendments, amendments which were intended to end abuses of the payment limits. *See, e.g.,* U.S. Gen. Accounting Office, Farm Payments: Basic Changes Needed to Avoid Abuse of the $50,000 Payment Limit (Pub. No. RCED-87-176, July 1987). Second, although the payment limitation rules have always been controversial, the GAO's report comes at a time when the rules have received new scrutiny by the media. *See, e.g., Farming the Taxpayer: USDA Subsidies Bountiful for Some*, Kansas City Star, Dec. 8-14, 1991 (Special Report), at 5; *Mississippi Christmas Tree* (CBS "60 Minutes" television broadcast, Dec. 7, 1991); *Cash Crop: Many Farmers Harvest Government Subsidies in Violation of Law*, Wall St. J., May 8, 1990, at 1, col. 6 (S.W. ed.). Consequently, the GAO's recommendations for tightening the rules may find a receptive audience.

The payment limitation rules have three major functions. First, they cap the dollar amount of certain program payments a person may receive in a crop year or other period. Second, the rules restrict eligibility for program payments to persons who are "actively engaged in farming." Third, they limit an individual's ability to create entities that separately qualify for program payments. Collectively, the rules are intended to reduce federal farm program expenditures and to direct payments to their intended beneficiaries. *See generally* Christopher R. Kelley & Alan R. Malasky, *Federal Farm Program Payment-Limitations Law: A Lawyer's Guide*, 17 Wm. Mitchell L. Rev. 199, 201-10 (1991)(describing the history and purposes of payment limitations law)(hereinafter Kelley & Malasky).

Payment limitations have been imposed since 1970. Under the 1990 farm bill, deficiency and diversion payments currently are capped at $50,000. Findley Amendment payments, marketing loan gains, and other payments are capped at $75,000. All of these payments are also subject to a $250,000 combined limit. 7 U.S.C. § 1308(1), (2).

Limiting payments to persons deemed to be "actively engaged in farming" is more recent. The requirement was imposed by the payment limitations amendments

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Eighth Circuit rules on milk producers' challenge to marketing orders

In a complex case involving both the legal and political issues surrounding the federal milk marketing scheme, the Eighth Circuit issued a decision reversing the district court's dismissal of the producers' claims. The appellate court held that judicial review of milk marketing orders promulgated under the Agricultural Marketing Act of 1937 (AMAA) is available and that the plaintiff-producers have standing to raise their challenge. *Minnesota Milk Producers Association v. Madigan*, No. 91-1594, 1992 WL 21813 (8th Cir. February 11, 1992).

In January 1990, the Minnesota Milk Producers Association filed suit under the Administrative Procedures Act (APA) challenging certain milk marketing orders issued by the Secretary of Agriculture pursuant to the AMAA. The plaintiffs sought, among other things, an injunction ordering the termination or suspension of the challenged orders as contrary to the AMAA. The district court dismissed the case,

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contained in the Farm Program Payments Integrity Act of 1987, enacted as a part of the Omnibus Budget and Reconciliation Act of 1987, Pub. L. No. 100-203, §§ 1301-07, 101 Stat. 1330, 1330-12—1330-19 (1987). The 1987 amendments became effective beginning with the 1989 crop year.

The "actively engaged in farming" requirement is intended to restrict program eligibility to persons who are actively involved in a farming operation and to exclude persons, such as capital investors, whose involvement is only passive. It is premised on the notion that payments should be made only to persons who depend on agricultural production for their livelihood. *See* Kelley & Malasky, *supra*, at 225-55.

The 1987 amendments also limited an individual's ability to create entities that separately qualify for program payments. The limitation, commonly known as the "permitted entity" or three-entity rule, attributes payments to persons having a "substantial beneficial interest" in one or more entities that also receive payments. It precludes a person who receives program payments from also receiving, directly or indirectly, payments from more than two entities. A person who does not receive payments in his or her own right may receive payments from up to three entities. *See Id.* at 317-30.

The practical effect of the permitted entity rule is to allow the doubling of the program payment caps. For example, an individual who receives the maximum deficiency payment of $50,000 can still receive up to fifty percent of the payments earned by two entities in which the individual has an interest. This allows the individual to receive two additional payments of $25,000 each, thus resulting in a total of $100,000 in deficiency payments.

In its recent report, the GAO focused on three aspects of the 1987 amendments that it claims diminished the amendments' effectiveness in reducing program expenditures. First, the GAO concluded that the amendments' "equitable reorganization" provision allowed many producers to maintain the payments they were receiving prior to the 1987 amendment's effective date. GAO Report, *supra*, at 5.

The equitable reorganization provision was designed to allow producers to make the transition to the new rules during the 1989 crop year by reorganizing their operations without satisfying the more stringent requirements that would apply in subsequent years. Although equitable reorganizations could not increase the number of persons eligible for payments, they allowed farming operations to maintain previous payment levels. *See* 7 C.F.R. § 1497.27 (1991).

The GAO also found deficiencies in the "actively engaged in farming" requirement's application to corporations. Under the 1987 amendments, a corporation may be deemed to be "actively engaged in farming" if its shareholders collectively make the required contributions of inputs and services to the farming operation. Nevertheless, the amended rules permit a single shareholder owning fifty percent of the corporation's stock to satisfy the contribution requirements even if, for example, the corporation had ten shareholders. GAO Report, *supra*, at 5. *See* 7 C.F.R. §§ 1497.6, 1497.9 (1991)(renumbered in 1991 as 7 C.F.R. §§ 1497.204 & 1497.201, respectively. 56 Fed. Reg. 15,974-975 (1991)).

Finally, the GAO was critical of the "permitted entity" or three-entity rule. Noting that the rule allowed the doubling of the payment limits, the GAO recognized that with some crops, notably rice, the $50,000 limit did not cover the costs of production. Specifically, the legislative history of the 1987 amendments reflected that Congress was aware that "the average rice farmer would reach the $50,000 payment limit at about 200 acres, but because of the high cost of fixed inputs . . . necessary to cultivate and harvest rice, a farming operation of more than 200 acres is needed to ensure an economically viable farming unit." GAO Report, *supra*, at 5-6 (citing H.R. Rep. No. 100-391(I), 100th Cong., 1st Sess. *reprinted in* 1987 U.S.C.C.A.N. 2313-1.)

Nevertheless, even though rice producers might need to exceed the $50,000 payment limit to cover production costs the 1987 amendments did not limit the three-entity rule to rice or any other crop with high input costs. Hence, as noted by the GAO, the rule was available to all commodity program participants. *Id.* at 6.

The GAO report concluded by recommending that Congress consider applying the payment limits to individuals only, "whether these payments (1) are earned from their own operations or (2) are attributed to them as owners in one or more entities." It suggested that a limit higher than $50,000 could be established for specific, high-input cost crops. *Id.* at 9.

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Federal Register in brief

The following matters were published in the *Federal Register* during the month of February.

1. FmHA; Agricultural Resource Conservation Demonstration Program (Farms for the Future Act of 1990); interim rule with request for comments; comments due 5/4/92; 57 Fed. Reg. 4336.

2. IRS; Special valuation rules; final rule; effective date 1/28/92; 57 Fed. Reg. 4250.

3. IRS; Adjustments under special valuation rules; notice; comments due 5/4/92; 57 Fed. Reg. 4278.

4. IRS; Treatment of partnership liabilities; correction; effective date 12/28/91; 57 Fed. Reg. 5054.

5. IRS; Income tax; partnership liabilities treatment; allocations attributable to nonrecourse liabilities; correction; 57 Fed. Reg. 5511 and 6072.

6. ASCS; Wetlands Reserve Program; proposed rule; 57 Fed. Reg. 4378.

7. USDA; Federal regulatory review; 57 Fed. Reg. 6483.

—Linda Grim McCormick, Toney, AL

Milk producers' challenge to marketing orders / continued from page 1

holding that the AMAA precluded judicial review of the producers' challenge and that the producers likely lacked standing because the relief they sought would not redress the claimed injury. The producers appealed.

In addressing the issue of judicial review, the Eighth Circuit noted that review of agency action under the APA is available unless review is statutorily precluded. *Minnesota Milk Producers Association*, No. 91-1594, 1992 WL 21813 at *1, citing 5 U.S.C. §§ 701(a)(1), 702. The AMAA does not preclude all judicial review in that it explicitly provides a private cause of action for milk handlers, nor does it expressly preclude producer review. *Id.*, citing 7 U.S.C. § 608c(15). Rather, the issue before the court was whether the AMAA implicitly precludes the producers' claims. *Id.*

In reaching its decision, the Eighth Circuit analyzed two Supreme Court opinions interpreting the AMAA. Most recently, in *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984), the Court held that the AMAA implicitly precluded judicial review of challenges to milk marketing orders raised by consumers. The court relied in part on its concern that allowing parties to go outside the regulatory scheme could undermine the objectives of the AAMA. In so holding, the court distinguished the earlier case of *Stark v. Wickard*, 321 U.S. 288 (1944) in which it held that judicial review of certain producer claims was allowed. *Minnesota Milk Producers Association*, No. 91-1594, 1992 WL 21813 at *1-2.

The Eighth Circuit also discussed two subsequent appellate decisions that have reached conflicting interpretations of the Supreme Court opinions. In *Pescosolido v. Block*, 765 F.2d 827 (9th Cir. 1985), the Ninth Circuit Court interpreted *Community Nutrition Institute* as holding that citrus producers have a cause of action under the AMAA only when there is no handler to protest the action of the Secretary. Applying this interpretation to the present case, because handlers could challenge the marketing orders at issue, under *Pescosolido* they alone would have access to judicial review. *Minnesota Milk Producers Association*, No. 91-1594, 1992 WL 21813 at *2.

In contrast, in *Farmers Union Milk Marketing Cooperative v. Yeutter*, 930 F.2d 466 (6th Cir. 1991), the Sixth Circuit found that judicial review was available to producers who challenged a marketing order that the producers claimed reduced the prices they received for their milk. The court rejected *Pescosolido* and focused on the Supreme Court's concern that the regulatory scheme established by the AMAA be respected. The court reasoned that the objectives of the statute would be furthered by judicial review of the producer's claim and accordingly allowed such review. *Minnesota Milk Producers Association*, No. 91-1594, 1992 WL 21813 at *3.

The Eighth Circuit rejected the *Pescosolido* interpretation as too narrow and concurred with the approach taken in *Farmers' Union*. *Id.* The court reconciled *Stark* and *Community Nutrition Institute* by noting the reference to the difference between consumers and producers, the specific personal rights of the producers and the underlying purpose of the AAMA to protect producers. *Id.* at *1, citing *Community Nutrition Institute*, 467 U.S. at 351-2. It held that the fact that handlers could raise the challenge at issue was not dispositive and that other considerations prevailed. Among these considerations were the fact that handlers would have no reason to raise the present challenge, that the producers had asserted a definite personal right as referenced in *Stark*, and that the producers did not have the opportunity to vote to repeal the challenged orders under the administrative proceeding set forth in the AMAA because the orders challenged were not in their region. *Id.* *2. On this basis, the court reversed the district court's dismissal, holding that the producers were entitled to judicial review of their challenge to the orders. *Id.* at *3.

On the issue of standing, the court also reversed. The court noted that the producers alleged that the challenged marketing orders directly reduce the price they receive for their milk. Construing this allegation in the light most favorable to the plaintiffs, the court stated that it had "little trouble concluding" that the remedy sought would redress their injury. *Id.* Although the Secretary of Agriculture argued that the ongoing rulemaking proceedings to adopt new marketing orders should suffice, the court stated that until new rules are adopted and implemented, the allegation regarding the old orders remained viable.

Senior District Judge Stuart dissented from the majority opinion based upon the nature of the challenge raised by the producers. He found that their claim involved a judgment as to whether or not the challenged marketing order violated the purposes of the AMAA and that this judgment involved the Secretary's expertise. *Id.* at *4. He concluded that the challenge raised by the producers was not the type of claim that Congress intended to be subject to judicial review. *Id.*

In support of his conclusion, Judge Stuart noted that producers from other regions that benefit from the challenged order would likely disagree with the plaintiff's allegations, but yet were not party to the pending action. In addition, he noted that the AMAA provides an explicit right of action to handlers, but is silent as to producers; that the AMAA provides an administrative remedy to producers to terminate a marketing order to which they are subject; and that the complex regulatory scheme established by the AMAA calls for deference to the expertise of the Secretary. For these reasons, Judge Stuart concurred with the reasoning and analysis in *Pescosolido*. *Id.*

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IRS issues proposed Form 1099 B regulations

On March 6, 1992, the IRS issued proposed regulations setting forth guidance on when buyers of agricultural products need to file Form 1099 B information returns. Importantly, the *Federal Register* (57 Fed. Reg. 8098) set forth a transition rule which protects agricultural buyers "for sales effected before the date of publication of final regulations." **The transition rule continues in effect the exemption from the Form 1099 B filing requirements set forth in two prior IRS announcements.** Thus companies buying agricultural commodities by cash or forward contract from producers (and CCC-issued commodity certificates if certificates are issued) do not need to be concerned with filing Form 1099 B information returns regardless of the outcome of the proposed regulations until a **final rule** is published in the *Federal Register*. No longer will agricultural buyers need to await periodic announcements from the IRS to determine whether past transactions are subject to the reporting requirements.

Essentially, the proposed regulations would exempt from the information return requirement all transactions involving the purchase of agricultural commodities by cash or forward contract by "brokers" if the individual customer-seller "produced" the commodity. Grain and other agricultural products purchased from some individual landlords would be subject to the Form 1099 B return requirements. All purchases of CCC-issued negotiable commodity certificates would be exempt regardless of the seller's identity. **Importantly, the proposed regulations would not alter those portions of existing regulations which exempt purchases from corporate sellers from the Form 1099 B return requirements.** *See* Temp. Treas. Reg. § 5f.6045-1(c)(3)(i)(B). Thus most purchases of grain between commercial entities

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Farm program contracts as executory contracts

By Susan A. Schneider and Christopher R. Kelley

Many farmers participate in some type of program administered by the Agricultural Stabilization and Conservation Service (ASCS). These programs, designed to accomplish different objectives and targeted either to the production of a specific commodity or a specific type of land, vary markedly. Each program, however, involves the signing of a contract between the farmer and a representative of the Commodity Credit Corporation (CCC).

Whether these farm program contracts are executory contracts under section 365 of the Bankruptcy Code is an issue that has been addressed in numerous farm bankruptcies. 11 U.S.C. § 365. In the past several months, two new cases have been added to the fray, *In re Allen*, No. L-90-01473-C, 1178; 1992 WL 8944 (Bankr. N.D. Iowa Jan. 15, 1992); *In re Gerth*, No. 91-10002-INH, 1991 WL 317075 (Bankr. D.S.D. Oct. 25, 1991), with a third case sidestepping the issue. *In re Lund*, No. 90-05312, 1990 WL 323830 (Bankr. D.N.D. Dec. 3, 1990). Nevertheless, as is exemplified by these cases, even among courts that agree that the contracts are executory, there remains a sharp conflict as to the effect of such characterization.

This article discusses the *Allen*, *Gerth* and *Lund* opinions in the context of the two underlying issues, whether farm program contracts are executory contracts under section 365, and, if so, what effect does section 365 of the Code have on their treatment in bankruptcy.

Whether farm program contracts are executory contracts under section 365

Section 365 governs "executory contracts" in bankruptcy. 11 U.S.C. § 365. Although the Code does not define "executory contract," it is generally agreed that it refers to a contract in which material performance remains due on both sides and failure of either party to complete performance would constitute a material breach excusing the performance of the other. 2 Lawrence P. King, Collier on Bankruptcy ¶ 365.02 (1989)(hereinafter Collier). *See also In re Walat Farms*, 69 B.R. 529, 531 (Bankr. N.D. Mich. 1987)(citing Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, Minn. L. Rev. 439, 460 (1973)).

The "executory contract" issue regarding farm program contracts often arises in setoff litigation under section 553 of the Bankruptcy Code. 11 U.S.C. § 553. *See*, Christopher R. Kelley & Susan A. Schneider, *Bankruptcy Setoffs of Federal Farm Program Payments*, 8 Agric. L. Update, Aug. 1991, at 4. Section 553 allows setoff in situations where a three prong test is met. First, the creditor must owe a debt to the debtor that arose prior to the bankruptcy's commencement. Second, the creditor must have a claim against the debtor that arose prior to the bankruptcy. Third, the debt and the claim must be mutual obligations. All three of the recent cases noted herein, *Allen*, *Gerth* and *Lund*, concern payments to be made under farm program contracts and the right of the ASCS to a setoff against them.

In *In re Allen*, the court was asked to rule on an ASCS motion to lift the automatic stay for the purpose of allowing setoff. *Allen*, 1992 WL 8944 at *1. ASCS sought to offset the debt owed to it by the debtor against payments the farmer was to receive under the Conservation Reserve Program (CRP). *Id.* Under the CRP, participants are paid for removing highly erodible cropland from production. The payments are made yearly, usually for a ten-year period. In addition, cost sharing payments may be made for the planting of conserving vegetation. During the program period, the participant must annually apply certain conservation practices and refrain from certain other activities. *See* 16 U.S.C. §§ 3831-36.

In *Allen*, the debtor argued that the CRP contract was an executory contract under section 365, and based his defenses to setoff upon that basic premise. *Allen*, 1992 WL 8944 at *4. It appears that the CCC did not refute this characterization, but argued that its executory nature did not preclude setoff. *Id.* at *5. The court noted that "[t]he only relevant consideration that does not appear in dispute is that the CRP contract qualifies as an executory contract." *Id.* at *6.

A strikingly similar situation was presented to the court in *In re Gerth*, 1991 WL 8944 at *1-2. There, the court was also faced with an attempted setoff against CRP payments under a contract assumed by a Chapter 12 debtor-in-possession. *Id.* Consistent with *In re Allen*, the court characterized the contract as an executory contract. The court based its finding on the "material, continuing obligations that [the debtor] must perform in order to insure future CRP payments and to avoid having to refund past payments." *Gerth*, 1991 WL 8944 at *4.

In *In re Lund*, the court also faced the setoff issue in a Chapter 12 bankruptcy. The contract at issue involved the "Zero-92" program. *Lund*, 1990 WL 05312 at *1. Although 0-92 is an annual program, it pays the participating farmer for removing acreage from production and performing conservation activities which, in *Lund*, were to be performed post-petition. *Id.* The court found the payments were subject to setoff, but it did not specifically characterize the contract as executory. *Id.* at *4.

Nothwithstanding the apparent agreement between the *Gerth* and *Allen* courts, the issue of whether farm program contracts are executory contracts cannot be answered categorically. The program at issue and the timing of the bankruptcy are inextricably linked to the characterization. Nevertheless, as a leading farm bankruptcy commentator has stated, "[i]t is likely that most contracts in which the debtor receives benefits in the future will be classified as executory." Randy Rogers, Collier Farm Bankruptcy Guide, at ¶ 2.10[2] (Lawrence P. King ed., 1990).

In addition to *Allen* and *Gerth*, numerous courts have found CRP contracts to be executory. *In re Gore*, 124 B.R. 75, 77-78 (Bankr. E.D. Ark. 1990); *In re Ratliff*, 79 B.R. 930, 933 (Bankr. D. Colo. 1987); *In re Evatt*, 112 B.R. 417, 415-16. Similarly, several courts have expressly found deficiency and diversion contracts to be executory contracts. *In re Lane*, 96 B.R. 164, 167 (Bankr. C.D. Ill. 1988); *In re Fryar*, 99 B.R. 747, 750 (Bankr. W.D. Tex. 1989); *In re Walat Farms, Inc.*, 69 B.R. 529, 531 (Bankr. E.D. Mich. 1987); *In re Evatt*, 112 B.R. 417, 415-16 (W.D. Okla. 1990). After the program participant has complied with all of his or her obligations under the deficiency program and is only awaiting payment, however, the contract may no longer be "executory." *In re Lundell*, 86 B.R. 582, 588 (Bankr. W.D. Wis. 1988); *In re Hazelton*, 85 B.R. 400, 404 (Bankr. E.D. Mich. 1988), *rev'd on other grounds*, 96 B.R. 111 (E.D. Mich. 1988).

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What impact does the executory contract characterization have on the farm program contract?

The characterization of a contract as an executory contract under section 365 triggers the application of important rules. Section 365 provides that certain executory contracts may be assumed by the trustee in bankruptcy, subject to approval by the bankruptcy court. 11 U.S.C. § 365(a). In fact, an executory contract **must** be assumed by the trustee or it is deemed rejected. 11 U.S.C. § 365(d). Thus, in *In re Lane*, 96 B.R. 164 (Bankr. C.D. Ill. 1988) the court stated that

> [t]he lesson to be learned from this case is that the Court views Feed Grain contracts as executory contracts which must be assumed in the plan of reorganization. If a Feed Grain contract is not assumed, then it will be deemed rejected. Farmers should not expect the government to waive its right to treat a Feed Grain contract as rejected in the future.

Id. at 167 (ordering payment to the debtor, however, under an equitable estoppel theory). If the contract is not assumed, rejection is deemed to have occurred immediately before the filing of the bankruptcy. 11 U.S.C. § 365(g).

In Chapter 7 bankruptcies, the assumption must occur within sixty days of the bankruptcy filing. 11 U.S.C. § 365(d)(1). In Chapters 11 or 12, the debtor acts as the debtor-in-possession and assumes many of the rights of the trustee including those under section 365. 11 U.S.C. §§ 1107, 1203. In Chapter 13 bankruptcy, section 1322(b)(7) authorizes the debtor to utilize section 365 powers in reorganizing. 11 U.S.C. § 1322(b)(7). Assumption must be accomplished before plan confirmation under § 365(d)(2) or be incorporated into the plan. 11 U.S.C. §§ 365(d)(2), 1123(b)(2), 1222(b)(6), 1322(b)(7).

If the reorganizing debtor plans to continue with a farm program contract, it appears that the debtor must assume the contract prior to plan confirmation or provide for the assumption in the confirmed plan. In both the *Allen* and *Gerth* cases, the Chapter 12 debtors had assumed the CRP contracts at issue. *Allen*, 1992 WL 8944 at *3; *Gerth*, 1991 WL 317075 at *1. In *Lund*, it is not stated whether the debtors assumed the Zero-92 contract at issue.

In all three cases, the debtors argued that setoff was inappropriate because the ASCS contract was an executory contract assumed by the debtor-in-possession under section 365. Because of the executory nature of the contract, the obligation to pay occurred post-petition. Each debtor also argued that the assumption of the contract was by a different entity, the debtor-in-possession, and as such, the requisite mutuality of the parties was lacking. These arguments were accepted by the court in *In re Walat Farms*, 69 B.R. 529, 531 (Bankr. N.D. Mich. 1987).

The treatment of the debtor in possession as a new entity for purposes of the mutuality requirement was rejected by the courts in both *Allen* and *Gerth*. In *In re Allen*, the court rejected the new entity approach as inconsistent with the United States Supreme Court decision of *N.L.R.B. v. Bildisco & Bildisco*. *Allen*, 1992 WL 8944 at *13 (citing 465 U.S. 513, 528 (1984)). The *Allen* court noted, however, that both courts and commentators have disagreed as to whether the *Bildisco* decision modifies or eliminates the new entity theory. *Id.* at *13-4. *Allen* characterized the assumed executory contract as a pre-petition obligation despite the post-petition assumption. *Id.*

The court in *Gerth* also found the new entity approach unpersuasive. The court rejected the debtor's argument that the assumption of the contract by the debtor-in-possession indicated a lack of mutuality of parties. *Gerth*, 1991 WL 317075. at *4. In sharp contrast with *Allen*, however, the *Gerth* court found the executory nature of the CRP contract indicative of a post-petition obligation. The court stated that

> [w]here substantial performance remains due under ASCS/CCC contracts, and ASCS/CCC is obligated to make payments only upon completion of performance, such contracts are executory in nature. Upon the debtor-in-possession's assumption of such executory contracts, they become post-petition contracts of the estate. Payments arising under these post-petition contracts do not constitute prepetition debts of the creditor, thus cannot be offset against a debtor's pre-petition debts pursuant to section 553.

Id. at *3. As is emphasized by the conflict between *Allen* and *Garth*, at least in the context of Chapter 12 bankruptcy, the effect of a characterization of a CRP contract as executory is unclear.

In Chapter 7 bankruptcies, there is no provision for the debtor to assume the powers of the trustee. Thus, it appears to be the trustee's responsibility to decide whether to affirm or to reject any executory farm program contract. If the debtor is able to retain the land or commodity that is the basis for the contract, the debtor may wish to reach an agreement with the trustee whereby the trustee assumes the contract and then assigns it to the debtor under the assignment powers in section 365. 11 U.S.C. § 365(f). It is not clear what procedure, if any, is appropriate with regard to contracts that have been successfully claimed as exempt by the Chapter 7 debtor.

The ASCS has apparently taken the position that not only are some ASCS contracts executory, but that the rules regarding assumption are to be followed strictly. For example, one internal memorandum states that contracts under the DTP, the CRP, the deficiency program, and the cost share programs are executory, but that government loan program contracts are not. Memorandum from Arnold Grundeman, Deputy Assistant General Counsel, Foreign Agriculture and Commodity Stabilization Division to Dale Phillips, Chief Claims Administration & Contract Procedures, Fiscal Division, ASCS (Feb. 22, 1988) (on file with authors). This memorandum also makes the strong statement that

> [w]here a trustee or debtor in possession in Chapter 7 rejects an executory government contract, or fails to assume one before 60 days, the contract ends. The government has no duty and no authority to continue payment under that contract to the producer, his estate or his trustee. Any such payment would be unlawful.

Id.

Another internal memorandum on the subject defines an executory contract as "[a] contract whose obligations have not been fully performed by the producer at the time the producer files bankruptcy." Attachment to memorandum from Edward A. Hoffman, Associate Regional Attorney, Office of General Counsel, USDA to Minnesota ASCS - Kathy Kohns (Feb. 6, 1991) (on file with authors). It excepts contracts from the executory categorization, however, where the obligations are fully performed by the debtor before the expiration of the 60 day assumption period in a Chapter 7 or plan confirmation under Chapters 11, 12, or 13. *Id.*

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Conclusion

Thus, it appears that the executory contract issue will continue to be a subject of litigation. Moreover, it may well be an area of concern for counsel who file farm bankruptcies without discussing the risks of assumption, rejection, and setoff with their clients before filing.

Form 1099 B regulations / continued from page 2

(country elevator to terminal or processor) would continue to be excluded from the Form 1099 B requirements. However, in those instances where the middleman is not incorporated, the buyer of the middleman's agricultural products would be required to provide a Form 1099 B to the middleman-seller.

While information return filing duties are arguable narrowed, the proposed regulations would impose significant new record-keeping duties on buyers of agricultural commodities. Buyers of agricultural commodities would be required to obtain sworn certifications from non-corporate seller-customers certifying that the commodities have been or will be produced by the seller. The name, address, and taxpayer identification number of both the seller-customer and the buyer would have to appear on the certificate. Certifications could be obtained on either a transaction or annual basis, but would have to be retained by the buyer for at least four years after the end of the applicable calendar year.

The IRS presently requires the filing of information returns for a number of transactions with individuals under regulations interpreting the broker reporting statute (section 6045 of the I.R.C. of 1986). In the past, the IRS has argued that a broker is any "middleman" engaged in buying or selling goods or services. During 1989, the IRS proposed that penalties of up to $200,000 be assessed against some truck-dealers of grain based on the existing regulations. Under existing law, the IRS may assess aggregate penalties of $250,000 per year against each broker who fails to file with the IRS, and send to his/her customers, the required information returns.

The IRS will hold a public hearing on the proposed regulations on April 21 in Washington, D.C. While written comments on the proposed regulations may be filed with the IRS until May, outlines of oral testimony must be filed with the IRS by April 7.

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Interstate Commerce Commission proposes elimination of bills of lading regulations

On December 27, 1991, in a surprise move that could affect every agricultural firm using rail and/or water transportation, the Interstate Commerce Commission (ICC) proposed revoking the federal regulations governing the form that bills of lading must take when used by rail and water carriers. See 56 Federal Register 67269 (Dec. 30, 1991). Comments were stated to be due February 13, 1992. The existing regulations were developed by the ICC in 1919 and 1921 in response to unfair carrier practices relating to liability for loss and damage claims.

The trade rules used by the majority of firms in the grain, feed, and processing industry treat bills of lading as an important term in every commercial transaction. Order bills of lading generally are used by shippers to retain control over commodities until payment is made by the buyer in exchange for the bill of lading or other shipping documents. Carriers are generally liable to shippers for payment of the commodity if delivery is not made in accordance with the terms specified in the order bill of lading.

In addition to affecting the liabilities of the rail and water carriers, the present ICC regulations (49 C.F.R. Part 1035) require that "order bills of lading" that are negotiable must state "delivery to order or bearer" and must be printed on yellow paper. Nonnegotiable "straight bills of lading" must be printed on white paper.

While the intent of the federal statutes appears to be providing uniform rules governing bills of lading used in interstate commerce, the ICC said in its notice of the revocation proceeding that "[w]ith a Commission-prescribed form, carriers have not been free to follow the [Uniform Commercial Code]." The Uniform Commercial Code is, of course, a law of each state that has enacted it and can be varied by each state. Moreover, the interpretation of even identical provisions of the Uniform Commercial Code can vary substantially because the courts of each state do not necessarily interpret the provisions in a uniform manner. The ICC notice also said the "existing regulations are confusing and outdated" and "it appears unnecessary for us to continue to prescribe the form of bills of lading employed by rail and water carriers."

The Interstate Commerce Commission, in a notice published on February 12, 1992 (57 Fed. Reg. 5123), stayed the comment due date of February 13 "until further notice." The action was announced after petitions were filed by the National Grain and Feed Association and the Transportation Claims and Prevention Council, Inc. (TCPC) seeking extensions of the comment period.

The National Grain and Feed Association urged the ICC to extend the comment period because "the present regulations and prescriptions of uniform bills of lading have been in place for most of this century and the prospect of revoking the regulations creates substantial uncertainty for shippers." The NGFA argued that extending the comment period would permit more substantive comments to be generated regarding the propsoed rulemaking. Additionally, the Transportation Claims and Prevention Council, Inc. argued that the present bills of lading regulations apply to motor carriers as well as rail and water carriers. The ICC's initial *Federal Register* notice was deficient because it failed to assess the impact of the proposed rulemaking on motor carrier bills of lading, according to TCPC's petition.

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

Seventh Circuit reinstates salmonella regulations

The Seventh Circuit has reversed a district court's invalidation of USDA regulations intended to control the spread of salmonella enteritidis serotype enteritidis. *Rose Acre Farms, Inc. v. Madigan*, Nos. 91-2358, 91-2514, 1992 U.S. App. LEXIS 1623 (7th Cir. Feb. 10, 1992). In part, the district court had invalidated the regulations because their preamble specified that egg producers who must destroy poultry or divert eggs from the table egg market as a result of the regulations would not be indemnified for their financial losses, a result the district court found to be in conflict with applicable statutes and the Fifth Amendment. *Rose Acre Farms, Inc. v. Madigan*, No. NA 90-175-C, 1991 U.S. Dist. LEXIS 8691 (S.D. Ind. June 5, 1991). *See Salmonella Regulations Invalidated*, Agric. L.Update, Nov. 1991, at 1.

In reversing the district court, the Seventh Circuit rejected the district court's conclusion that the appropriate remedy was invalidation of the regulations. The court of appeals reasoned that "[i]f in-

State Roundup

WASHINGTON. *Landlord's lien and priority.* Cipriano Esparza, a Washington potato farmer, took Chapter 12 bankruptcy. At the time Mr. Esparza took bankruptcy, the following liens existed against his harvested potato crop and its proceeds: a security interest/financing statement filed on 12/30/87; a fertilizer/chemicals lien filed on 6/16/88; a seed lien filed on 9/12/88; a landlord's lien filed on 12/18/88. The bankruptcy court certified questions of validity and priority about these liens to the Supreme Court of Washington. In *Starbuck v. Esparza*, 821 P.2d 1216 (Wash. 1992), the supreme court answers questions of first impression.

As to the landlord's lien, the Washington Supreme Court ruled that the lien was valid even through the debtor's name was incorrect (Esparsa rather than Esparza). Using the legal concept of *idem sonans*, the court ruled that the misspelling was not seriously misleading. Therefore, the spelling did not invalidate the lien. As for the date by which a landlord's lien must be filed, the justices ruled that the landlord's lien statute, unlike several other lien statutes, set no mandatory time within which to file the landlord's lien. Therefore, in Washington, a landlord's lien is valid no matter when filed. In this instance, the landlord filed his lien after the harvest was over.

As for the validity of the security interest, the Washington Supreme Court held that it was valid even though the security agreement lacked a description of the real estate where the potato crop had been grown. The court ruled that the collateral description (the potato crop) was sufficient once the potato crop was harvested. If the dispute about the validity had arisen before harvest, no security interest would have attached because the description was inadequate at that time.

As for the seed lien, the supreme court ruled that the seed lien statute did not require the lienholder to claim a particular amount owed. Thus, the fact the lienholder claimed a certain amount on the filed form did not prevent the lienholder from validly claiming a larger amount as the true amount owed.

With validity settled, the Washington Supreme Court turned its attention to the priority disputes between these various valid liens. Despite the language of Wash. Rev. Code section 60.11.050(4) stating that prior liens or security interests are subordinate to a landlord's lien, the supreme court held that the overall structure and language of the lien statute (Wash. Rev. Code § 60.11) gave priority based strictly on time of filing. The court ruled that notice was the cornerstone of the lien statute. Hence, the supreme court gave priority as follows: first, the security interest; second, the fertilizer/chemical lien; third, the seed lien; fourth, the landlord's lien.

—Drew L. Kershen, Law Professor, University of Oklahoma

AG LAW CONFERENCE CALENDAR

Environmental Regulations and Their Impact on Land Use
May 18-19, 1992; Hyatt Regency Atlanta, Atlanta, GA
June 29-30, 1992; Holiday Inn Crowne Plaza, Seattle, WA
Topics include: the Clean Air Act; wetlands; storm water; RCRA; solid waste; hazardous waste.
Sponsored by: Executive Enterprises, Inc.
For more information, call 1-800-831-8333.

International Agricultural Law Conference: The Role of Law In An Agricultural Market Economy
April 27-29, 1992; Iowa State University, Ames, IA
Topics include: the concept of property; contracts between parties; the role of government regulation; legal protection of property; antitrust and trade regulation.
Sponsored by: Iowa State Bar Association—Agricultural Law Section; Iowa State University—Center for International Agricultural Finance; American Agricultural Law Association.
For more information, call 1-515-294-6354.

Southern Forestry Conference: Forest Famers--Ready to Shape Forestry's Future
April 22-24, 1992; Callaway Gardens, Pine Mountain, GA
Topics include: timber tax strategies; future direction of the environmental movement; and estate planning.
Sponsored by: Forest Farmers Association.
For more information, call 1-404-325-2954.

Fifth Annual Symposium on Agricultural and Agri-Business Financing
May 8-9, 1992; Monteleone Hotel, New Orleans, LA
Topics include: agricultural environmental issues; business and legal issues of feedlot financing transactions; and labor issues affecting production agriculture and agri-business.
Sponsored by: American Bankers Association; Farm Credit; and American Agricultural Law Association.
For more information, call 1-402-636-8256.

Eighth Annual Farm, Ranch, and Agri-Business Bankruptcy Institute
October 8-11, 1992, Lubbock Plaza Hotel, Lubbock, TX
Sponsored by: West Texas Bankruptcy Bar Association; Texas Tech University School of Law; Association of Chapter 12 Trustees.
For more information, call 1-806-762-0214.

Eighteenth Annual Seminar on Bankruptcy Law and Rules
April 9-11, 1992, Marriott Marquis Hotel, Atlanta, GA
Topics include: environmental issues in bankruptcy; strategies for financing the debtor-in-possession; and amendments to bankruptcy rules.
Sponsored by: Southeastern Bankruptcy Law Institute.
For more information, call 1-404-457-5951.

Assessing Private Lands: Legal Issues
April 10-11, 1992, Holiday Inn—Lane Avenue, Columbus, OH
Topics include: recreational access and property rights; wetlands management; animal rights.
Sponsored by: National Center for Agricultural Law Research and Information; University of Florida; Pennsylvania State University; The Ohio State University; West Virginia University; USDA.
For more information, call 1-614-292-0315.

deed the Constitution or a statute calls for compensation — a question on which we express no view — then setting aside the regulation is the wrong remedy. Compensation is the right one." 1992 U.S. App. LEXIS 1623 at * 9.

The court also rejected the notion that the district court was justified in invalidating the regulations because it did not have jurisdiction under the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491(a)(1), to award compensation. "That a district court cannot order payment is irrelevant; the question is whether the United States will supply 'just compensation.' Through the Claims Court it will (if any is due), so there is no justification for interference with the taking." *Id.* at * 10 (citations omitted).

Finally, the Seventh Circuit disagreed with the district court's conclusion that a monitoring provision in the regulations, 56 Fed. Reg. 3,742-43 (1991)(to be codified at 9 C.F.R. § 82.38), was arbitrary. The monitoring provision permits testing of all poultry houses on a farm if any poultry house on the farm is infected even though by maintaining "biosecurity" between poultry houses the producer is free to sell table eggs from the uninfected houses. The district court found that "this repetitious testing" was arbitrary, but the court of appeals, treating the monitoring as the equivalent of random testing and deferring to the expertise of the Secretary, found it to be "appropriate." *Id.* at * 20-21.

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

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Agricultural Law Update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Nominating Committee

As chair of the Nominating Committee, I would welcome nominations for President-Elect and member of the Board of Directors. Please send your suggestions to:

Peggy Grossman
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University of Illinois
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905 South Goodwin Avenue
Urbana, IL 61801

Or call:
Phone 217-333-1829
FAX 217-244-5933

Thanks for your help.
Margaret R. Grossman, Past President AALA