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INSIDE

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Solicitation of articles: All AALA members are invited to submit articles to the Update. Please include copies of decisions and legislation with the article. To avoid duplication of effort, please notify the Editor of your proposed article.

IN FUTURE ISSUES

- Tax exempt financing of agriculture
- Cramdown interest rate determinations after *Till v. SCS Credit Corp.*

The right to farm law in California

The article in the June issue of the *Agricultural Law Update* entitled *Iowa's Right to Farm Law Declared Unconstitutional* questions the constitutionality and enforceability of the right to farm laws across the country. The article cites a law review for the finding that "[w]hen the defendants raised a right to farm as an affirmative defense, plaintiffs prevailed three quarters of the time." Perhaps right to farm laws have been unsuccessful in fulfilling their intent in Iowa and other states, but that is certainly not the case in California.

California has the seventh largest economy in the world, and agriculture is its single largest component. It also endures one of the fastest growing populations in America, with huge swaths of farmland regularly converted into housing. To protect established agricultural enterprises from claims by newcomers who become unhappy with the smells, sounds, and runoffs of farming, the legislature enacted the California right to farm law in 1981, which is set forth in California Civil Code Section 3482.5:

(a) (1) No agricultural activity, operation, or facility, or appurtenances thereof, conducted or maintained for commercial purposes, and in a manner consistent with proper and accepted customs and standards, as established and followed by similar agricultural operations in the same locality, shall be or become a nuisance, private or public, due to any changed condition in or about the locality, after it has been in operation for more than three years if it was not a nuisance at the time it began.

(d) This section shall prevail over any contrary provision of any ordinance or regulation of any city, county, city and county, or other political subdivision of the state. ***

The California courts have not only upheld the right to farm law, they have broadly interpreted and expanded the statute's immunities to protect agriculture. Recent examples of this include *Souza v. Lauppe*, 59 Cal.App.4th 685 (1997), and *Rancho Viejo LLC v. Tres Amigos LLC*, 100 Cal.App.4th 550 (2002). Both cases upheld immunity for farmers and affirmed summary judgment in their favor.

In *Souza*, a farmer who had irrigated rice for nearly 20 years was sued by an adjoining neighbor who claimed that seepage from the rice farm made his property too wet to plant
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Vermont's revised right to farm law

The Vermont General Assembly amended the state's 22-year-old "right to farm" law during the 2004 legislative session.¹ The amendments to Vermont's right to farm law were introduced by members of the House Committee on Agriculture following the Vermont Supreme Court's recent decision in the case of *Trickett v. Ochs*, 2003 Vt. 91, 838 A.2d 66 (2003).

The *Trickett* case involved a nuisance and trespass suit brought against an apple orchard and packing operation by neighbors who lived directly across the road from the orchard and the packing sheds. The neighbors had purchased the house in 1992. The apple orchard had been in existence for many years prior to the neighbors' purchase of the home. The home had at one time in the past been the farmhouse for the apple orchard. When the neighbors bought the farmhouse, the apple operation had little impact on them as most of the apples were shipped to the local apple cooperative for storage and sale. In the mid-1990s the orchard owners began to change their practices and began packing, storing, and shipping many of their apples directly from the farm. The neighbors began to complain that noise, lights, and fumes were resulting from the construction of apple storage bins, the running of refrigeration trucks and the activity of trucks transporting the apples to market.² The relations between the neighbors and the apple farmers began to sour, and in November, 2000, the neighbors sued the orchard for injunctive relief and damages based on legal claims of nuisance and trespass.

The trial court ruled, after hearing, that the provisions of Vermont's then existing right to farm law³ barred the plaintiff's complaint as the orchard operation had pre-existed the
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row crops. The neighbor pled causes of action for negligence, unlawful business practices, and unfair competition in violation of California Business and Professions Code sections 17200, et seq., and argued Civil Code Section 3482.5 was inapplicable because it only provided immunity against causes of action for nuisance. The Court of Appeal rejected this argument, explaining a plaintiff cannot avoid the immunity provided by the statute by simply recharacterizing or relabeling the conduct in the guise of non-nuisance causes of actions to bring it outside the ambit of the statute. *Souza, supra*, 59 Cal.App.4th 865.

In *Rancho Viejo*, a farmer had raised avocado trees on 96 acres on the side of a mountain for 25 years. The trees required extensive weekly irrigation, which flowed downhill to an adjoining 30-year-old orange grove. A residential developer bought the orange grove, cut down its trees, and excavated building pads for a large housing tract. During the excavation, the developer encountered an extensive amount of

irrigation runoff, which required the construction of hundreds of thousands of dollars in drains. The developer sued the avocado farmer, alleging causes of action for trespass, failure to contain irrigation waters, and nuisance. The court of appeal held that the right to farm law provided immunity even though the escaping irrigation waters also constituted a trespass.

Both the *Souza* and *Rancho Viejo* courts went to great lengths to expressly hold that the right to farm law should be broadly interpreted. *Souza* extended immunities to farmers from claims by other farmers. *Rancho Viejo* extended immunity to farmers who bought their property from other farmers. In each instance the court rejected any argument that would frustrate the intent of the statute. This was based on public policy as expressed by the legislative intent that prompted the right to farm law. As explained in *Rancho Viejo*:

[The Right to Farm Law] is an important step toward eliminating suits by individuals who have moved to a new housing development 'in the country' and find the long-established farm bordering their back fence offends their senses. Suits against agricultural operations for dust, wind machine or tractor noise, livestock or poultry smells and other things commonly associated with the operation of an agricultural enterprise are becoming more prevalent as urban development reaches out to meet agricultural areas. [The Right to Farm Law] will stop this dangerous cycle by allowing agriculture to operate without undue pressure from urbanization. Keeping agricultural land in agricultural use is the goal.

Rancho Viejo, at 563, 564.

Quoting the statute, the court in *Rancho Viejo* explained that the California right to farm law provided immunity for virtually any activity incident to agriculture:

Section 3482.5 broadly defines an agricultural activity, operation, or facility, or appurtenances thereof as used in subdivision (a)(1). Such matters "shall include, but not be limited to, the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural commodity including timber, viticulture, apiculture, or horticulture, the raising of livestock, fur bearing animals, fish, or poultry, and any practices performed by a farmer or on a farm as incident to or in conjunction with those farming operations, including preparation for market, delivery to storage or to market, or delivery to carriers for transportation to market." (§3482.5, subd. (e), emphasis added.) [FN4] By its plain language, section 3482.5 was intended to immunize farmers from nuisance liability for "any practices performed by a farmer or on a farm incident to ... farming operations," (§ 3482.5, subd. (e), em-

phasis original by Court) as long as the other conditions of the statute are met *Rancho Viejo*, at 559, 560.

The California right to farm law contrasts with the one found unconstitutional in Iowa because California Civil Code Section 3482.5 only protects established agricultural operations (a three year operation that was not a nuisance when it began) from the claims of newcomers who change the status quo. Indeed, this is the stated rationale for right to farm statutes in the first place.

Perhaps the right to farm laws are losing their teeth in various states. In California, the nation's most populous state, the right to farm law is alive and well. The courts in the Golden State are quite willing to invoke the statute to protect California's biggest industry, agriculture.

—Stephen V. Lopardo, Fallbrook, California, was attorney of record for the avocado farmers in *Rancho Viejo v. Tres Amigos*

Dairy checkoff

The Bush administration has blocked a law that would have required dairy importers to pay fees to support dairy promotions such as "Got Milk?". The administration concluded that the legislation could subject the United States to international trade challenges. Because the U.S. dairy promotion program assesses fees only on dairy farmers in the 48 contiguous United States, charging those same fees to all imports could create the appearance of favorable treatment for the domestic industry, the Department of Agriculture says. The Department acted on guidance provided by the U.S. Trade Representative's office, and both agencies propose that Congress rewrite the law so farmers in all 50 states (as well as the territories) pay the assessment. Rep. Tammy Baldwin, D-Wisconsin, plans to introduce legislation to do that this year.

—The Associated Press, reprinted with permission from the *Agricultural Law Digest*, Volume 15, No. 17, August 27, 2004.

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³ 12 V.S.A. §5753

⁴ *Trickett* at 5-6.

⁵ *Id.* at 15-16.

⁶ See 12 V.S.A. §5751

⁷ Vermont law at 1 V.S.A. §213 provides that legislative changes shall not affect pending suits.

⁸ *Borman v. Board of Supervisors*, 584 N.W.2d 309 (Iowa 1989)

⁹ See, *Powell on Real Property*, Ch.9 §64.05

¹⁰ *Coty v. Ramsey*, 149 Vt. 451, 457 (1988).

¹¹ Robert Frost "The Need of Being Versed in Country Things", Washington Square Press, 1971

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Agricultural law bibliography: second quarter 2004

Aquaculture

Note, *Aquaculture and Pollutants Under the Clean Water Act: A Case for Regulation*, 89 Iowa L. Rev. 1011-1049 (2004).

Biotechnology

McEowen, *Legal Issues Related to the Use and Ownership of Genetically Modified Organisms*, 43 Washburn L. J. 611-659 (2004).

Wadley, *Understanding a Context for the Conflict: A Response to Roger McEowen*, 43 Washburn L. J. 661-667 (2004).

Corporate farming (restrictions on corporate farming/family farm preservation)

Case Note, *Buying the Farm: The Eight Circuit Declares South Dakota's Anti-Corporate Farming Amendment Violates the Dormant Commerce Clause (South Dakota Farm Bureau v. Hazeltine)*, 340 F.3d 583, 8th Cir. 2003), 11 Mo. Env'tl. L. & Pol'y Rev. 184-196 (2004).

McEowen & Harl, *South Dakota Amendment E Ruled Unconstitutional—Is There a Future for Legislative Involvement in Shaping the Structure of Agriculture?* 37 Creighton L. Rev. 285-303 (2004).

Environmental issues

Case Note, *The Expanding Definition of a Point Source under the Clean Water Act (Community Ass'n Restoration v. Henry Bosma Dairy)*, 65 F. Supp. 2d 1129, E.D. Wash. 1999), 8 Great Plains Nat. Resources J. 56-63 (2003).

Case Note, *The State's 303(d) List Is Not a "Rule": Good for Missouri's Waters, Good for Agriculture, or Not Good at All? (Missouri Soybean Association v. The Missouri Clean Water Commission)*, 102 S.W.3d 10, Mo. 2003, en banc), 11 Mo. Env'tl. L. & Pol'y Rev. 171-183 (2004).

Comment, *Will the Takings Clause Eclipse Idaho's Right-to-Burn Act?*, 40 Idaho L. Rev. 723-756 (2004).

Jerger, *EPA's New CAFO Land Application Requirements: An Exercise in Unsupervised Self-Monitoring*, 23 Stan. Env'tl. L.J. 91-128 (2004).

Note, *Pesticides and Permits: Clean Water Act v. Federal Insecticide, Fungicide, and Rodenticide Act*, 8 Great Plains Nat. Resources J. 35-43 (2003).

Ruppert, *Water Quality Trading and Agricultural Nonpoint Source Pollution: An Analysis of the Effectiveness and Fairness of EPA's Policy on Water Quality Trading*, 15 Vill. Env'tl. L.J. 1-39 (2004).

Equine law

Howland, *Let's Not "Spit the Bit" in Defense of "the Law of the Horse": The Historical and Legal Development of American Thoroughbred Racing*, 14 Marq. Sports L. Rev. 473-507 (2004).

Food and drug law

Compton, *Applying World Trade Organi-*

zation Rules to the Labeling of Genetically Modified Foods, 15 Pace Int'l L. Rev. 359-409 (2003).

Note, *Food for the Twenty-First Century: An Analysis of Regulations for Genetically Engineered Food in the United States, Canada, and the European Union*, 14 Ind. Int'l & Comp. L. Rev. 375-407 (2003).

Sigman, *Kosher Without Law: The Role of Nonlegal Sanctions in Overcoming Fraud Within the Kosher Food Industry*, 31 Fla. St. U. L. Rev. 509-601 (2004).

Student Article, *The National School Lunch Program and USDA Dietary Guidelines: Is There Room for Reconciliation?*, 33 J. L. & Educ. 181-212 (2004).

Student Article, *The Birth Place of Food Products: Do You Know Where Your Food Comes From?*, 16 Loy. Consumer L. Rev. 285-294 (2004).

Forestry

Comment, *Crisis in the Forest: The Environmental Impact of Illegal Logging under the New Russian Economy*, 15 Colo. J. Int'l Env'tl. L. & Pol'y 245-269 (2004).

Hunger & food issues

Student Article, *The Meaning and Relevance of Food Security in the Context of Current Globalization Trends*, 19 J. Land Use & Env'tl. L. 435-450 (2004).

Hunting, recreation & wildlife

Case Note, *The Catch of the Day is a Violation of Your Fourth Amendment Protections Against Unreasonable Searches and Seizures (State v. Larsen)*, 650 N.W.2d 144, Minn. 2002), 8 Great Plains Nat. Resources J. 78-88 (2003).

Note, *It's Good to Be the Game Warden: State v. Boyer and the Erosion of Privacy Protection for Montana Sportsmen (State v. Boyer)*, 2002 MT 33, 308 Mont. 276, 42 P.3d 771, 65 Mont. L. Rev. 187-216 (2004).

International trade

Comment, *The European Union's Efforts to Sidestep the WTO through its Ban on GMOs: A Response to Sarah Lively's Paper, "The ABCs and NTBs of GMOs"*, 24 Nw. J. Int'l L. & Bus. 173-198 (2003).

Comment, *Catfish Wars: Vietnam's Fight for Free Trade in the U.S. Court of International Trade*, 13 Pac. Rim L. & Pol'y J. 471-502 (2004).

Development, *Tension Between the Cartagena Protocol and the WTO: The Significance of Recent WTO Developments in an Ongoing Debate*, 5 Chi. J. Int'l L. 369-378 (2004).

Mansour & Key, *From Farm to Fork: the Impact on Global Commerce of the New European Union Biotechnology Regulatory Scheme*, 38 Int'l Law. 55-69 (2004).

Note, *Waiting on the River: The United States and the European Union, Heads Up and High Stakes in the WTO—Genetically Modi-*

fied Organisms in International Trade, 43 Washburn L. J. 681-723 (2004).

Recent Development, *Classic Protectionism—Thin Ham Provides Thick Protection for Member State Domestic Goods at the Expense of the European Common Market (Case C-108/01, Consorzio del Prosciutto di Parma & Salumificio S. Rita SpA v. Asda Stores Ltd. & Hygrade Foods Ltd.)*, [2003] 2 C.M.L.R. 369, 2003), 12 Tul. J. Int'l & Comp. L. 545-564 (2004).

Stewart & Schenewerk, *The Conflict Between Facilitating International Trade and Protecting U.S. Agriculture from Invasive Species: APHIS, the U.S. Plant Protection Laws, and the Argentine Citrus Dispute*, 13 J. Transnat'l L. & Pol'y 305-346 (2004).

Student article, *The European Commission's Regulations for Genetically Modified Organisms and the Current WTO Dispute—Human Health or Environmental Measures? Why the Deliberate Release Directive Is More Appropriately Adjudicated in the WTO under the TBT Agreement*, 15 Colo. J. Int'l Env'tl. L. & Pol'y 209-244 (2004).

Land use regulation

Land use planning and farmland preservation techniques

Student article, *Misconstrued Entitlement: The Extent of Local Power in Regulating the Land Application of Biosolids in Virginia*, 2 Appalachian J.L. 37-59 (2003).

Livestock and Packers & Stockyards

Case note, *Constitutional Law—First Amendment Review of Beef Checkoff Assessments; Beef May Be for Dinner, but May Producers Be Compelled to Say So? (Livestock Marketing Association v. United States Department of Agriculture)*, 335 F.3d 711, 8th Cir. 2003) 4 Wyo. L. Rev. 397-438 (2004).

Walker & Lawrence, *American Meat: A Threat to Your Health and to the Environment*, (Reviewing Donald D. Stull and Michael J. Broadway, *Slaughterhouse Blues: The Meat and Poultry Industry in North America*), 4 Yale J. Health Pol'y L. & Ethics 173-182 (2004).

Patents, trademarks & trade secrets

Epp, *Four-Wheeling Through the Soybean Fields of Intellectual Property Law: A Practitioner's Perspective*, 43 Washburn L. J. 669-679 (2004).

Kershen, *Of Straying Crops and Patent Rights*, 43 Washburn L. J. 575-610 (2004).

Roberts, *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.: Its Meaning and Significance for the Agricultural Community*, 28 S. Ill. U. L. J. 91-129 (2003).

Shim, *Intellectual Property Protection of Biotechnology and Sustainable Development in International Law*, 29 N.C. J. Int'l L. & Com. Reg. 157-247 (2003).

Siebrasse, *A Remedial Benefit-Based Approach to the Innocent User Problem in the*

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The problem of buyer-power (monopsony) in agricultural markets

By Roger A. McEowen

Farmers and ranchers have long faced the persistent problem of the power of buyers of agricultural commodities. When a market is characterized by a limited number of buyers and many sellers, there is a great potential for strategic conduct by buyers to manipulate prices paid to sellers. In an agricultural context, the basic manipulation involves buyers of agricultural products utilizing various means to reduce the price paid for agricultural products below that which would have prevailed if the market had operated in a fair, open, and transparent manner.¹

In some instances, the results of price manipulation in a market characterized by few buyers would readily be recognized by antitrust law as harmful to competition. In other instances, however, the antitrust analysis might classify the harms as being injurious to individual market participants but not necessarily harmful to the competitive process. Traditional antitrust analysis is typically limited to harms to competition. That has been understood generally as the process of competition focused on the overall output and price in the market. However, in situations where buyer-power results in the price of the input being depressed in discriminatory ways without necessarily affecting the price in the downstream markets, conventional antitrust is likely to label the resulting harms as losses to individuals, but not harms to competition.

Case law on monopsony

While the focus of antitrust regulators and courts has usually centered on harms to competition, some courts have recognized potential abuses by powerful buyers. For example, in the 1940s, California sugar beet farmers sued three sugar refiners for fixing the price paid for sugar beets.² The court specifically noted that the Sherman Act protects sellers (when there is no other trade regulation law applicable to the matter), and highlighted the market dominance of the refiners.³ Similarly, the Federal Trade Commission (FTC) brought a cease-and-desist order against manufacturers of spaghetti and macaroni who were fixing prices for durum wheat, semolina, and durum flour.⁴ The FTC concluded that by fixing the composition of their most important raw material, macaroni manufacturers substantially affected the price of durum wheat, a

conclusion with which the appellate court agreed.⁵ In another case, the court struck down an agreement among pulp companies to depress the prices paid to loggers in Alaska.⁶ The pulp companies had created a network of captive loggers heavily indebted to the defendants. Unilaterally, the defendants could cut off a logger's financing, force the logger out of business, and acquire the company or its assets. The defendants also used their control of timber supplies to prevent the entry of new pulp mills into the market. More recently, the United States Court of Appeals for the Second Circuit determined that buying power practices of oil companies in the labor market may have unlawfully depressed salaries for employees in the industry.⁷

The relevance of market power in monopsony cases

Antitrust legal opinions have long recognized two methods for proving market power. The more common approach is to infer power as an indirect inference from the share of an appropriately defined market.⁸ The logic is that if a firm has a substantial share of such a market and if there are barriers to entry, then the firm is likely to have power in that market to affect both price and output. This method is used to determine the probable market power of firms in merger, monopoly, and restraint of trade cases. But, the case law recognizes that this method is problematic because it seeks to infer power from structural conditions.

The alternative method for determining whether a firm has market power is to examine its actual market conduct. When a firm can raise or lower prices at will without significantly affecting the quantity that it buys and sells or engages in other acts that are consistent only with the presence of market power, such as price discrimination or economically unjustified refusals to deal, courts will draw the inference of market power without asking for market definition.⁹ As a matter of both legal and economic logic, this alternative method is to be preferred whenever available because it represents direct proof of the issue rather than creating a debatable inference.¹⁰ Indeed, in *United States v. Microsoft Corp.*,¹¹ the court stated that: "...a firm is a monopolist if it can profitably raise prices substantially above the competitive level.¹² Where evidence indicates that a firm has in fact profitably done so, the existence of monopoly power is clear."¹³ The *Microsoft* court also stated that, "Microsoft cites no case, nor are we aware of one, requiring

direct evidence to show monopoly power in any market. We decline to adopt such a rule now."¹⁴ While *Microsoft*¹⁵ addresses the problem of seller-power, the control of an output market, the case is very instructive on the converse problem of buyer-power (monopsony). Whereas monopoly represents control of an output market, monopsony represents the ability to control or affect price paid for inputs. Thus, under the *Microsoft*¹⁶ rationale, once it is shown that the defendant has profited from lowering prices for products it purchases below the competitive level, the existence of monopsony power is clear, and no further direct evidence of monopsony power is necessary.¹⁷

The relevance of market share in monopsony cases

It is important to also note that buyer-power can arise from a much lower market share than is required in seller-power (monopoly) cases. Effective market power is a function of the market context. In an antitrust context, firms with modest market shares under conventional criteria are able to exercise seriously anticompetitive market power. For instance, cheese represents approximately one-third of total milk use in the dairy industry. Nevertheless, in *Knevelbaard Dairies v. Kraft Foods, Inc.*,¹⁸ Kraft purchased approximately one-third of all cheese sold in the United States and found it to be in its economic self-interest to manipulate the market for cheese prices to drive down the public price in order to get lower contract prices for the bulk of its purchases. The result was a negative effect on the price of milk nationally that harmed all dairy farmers. Because the harm Kraft inflicted on dairy farmers was indirect, the farmers had antitrust claims only in those states that gave standing to indirect purchasers.¹⁹ In upholding the resulting antitrust claim under California law, the U.S. Court of Appeals for the Ninth Circuit pointed out that Kraft's market position was such that it was able to inflict harm on the market for milk.²⁰

Similarly, in *Toys "R" Us, Inc. v. Federal Trade Commission*,²¹ the plaintiff sold about 20 percent of all toys sold in the United States, but this position gave it substantial power over its suppliers. The plaintiff used that power to compel its suppliers to refuse to sell popular toys to the plaintiff's low-price competitors. The court found that the manipulative conduct of the plaintiff was sufficient evidence of market power despite the relatively small market share.

These cases provide strong support for the proposition that buyer-power must be

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measured in terms of the potential for buyers to affect the market. This is particularly true when a market is characterized by few buyers and many sellers who face significant costs in switching their production to other markets.²²

Conclusion

Continued concentration among firms that purchase agricultural commodities increases the potential for the exercise of manipulative buying practices by those firms. Antitrust law has a significant role in ensuring that the markets into which farmers and ranchers sell their products remain competitive. Perhaps future antitrust analysis will demonstrate that "buyer power" can be just as offensive (in the antitrust sense) as "seller power."

¹ See, e.g., *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979 (9th Cir. 2000) (dominant cheese buyer manipulated the price of cheese to lower its overall prices and thereby injured milk producers whose milk prices were directly determined by the price of cheese). For a thorough discussion of the problem, see Peter C. Carstensen, "The Content of the Hollow Core of Antitrust: The Chicago Board of Trade Case and the Meaning of the 'Rule of Reason' in Restraint of Trade Analysis," 15 *Research in Law and Economics* 1-88 (1992).

² *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

³ *Id.*

⁴ *National Macaroni Manufacturers Association v. Federal Trade Commission*, 345 F.2d 421 (7th Cir. 1965).

⁵ *Id.*

⁶ *Reid Brothers Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292 (9th Cir. 1983).

⁷ *Todd v. Exxon Corporation et al.*, 275 F.3d 191 (2d Cir. 2001).

⁸ See *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

⁹ Indeed, this latter approach has been utilized in both monopoly and restraint of trade cases. See *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (monopoly case); *Toys "R" Us, Inc. v. Federal Trade Commission*, 221 F.3d 928 (7th Cir. 2000) (restraint of trade case).

¹⁰ See, e.g., *Metronet Communication Services v. U.S. West Communications*, 329 F.3d 983 (9th Cir. 2003) (market power provable by either direct or circumstantial evidence).

¹¹ 253 F.3d 34 (D.C. Cir. 2001).

¹² *Id.* at p. 51, citing 2A Phillip E. Areeda, et al., *Antitrust Law*, ¶501 at 85 (1995), and *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325, 1335 (7th Cir. 1986).

¹³ *Id.* at p. 51, citing *FTC v. Indiana Federa-*

tion of Dentists, 476 U.S. 447, 460-461 (1986).

¹⁴ *Id.* at p. 57.

¹⁵ 253 F.3d 34 (D.C. Cir. 2001).

¹⁶ *Id.*

¹⁷ In *Pickett, et al. v. Tyson Fresh Meats, Inc.*, No. 96-A-1103-N (M.D. Ala., certified as class action on Dec. 26, 2001), the jury returned a verdict of \$1.28 billion against the defendant on a claim of price manipulation in violation of the Packers and Stockyards Act by acquiring feeder cattle through the use of captive-supply cattle rather than the cash market. The plaintiffs established at trial that the economic effect of the defendant's use of captive supplies was a reduction in the cash market price for fed cattle of 5.62 cents per cwt live weight per 1,000 head of captive supply for a given week. The PSA prohibits buying practices that have the effect of manipulating price. See 7 U.S.C. §192(d). In essence, the PSA was structured by the Congress as a monopsony statute, designed, in part, to address the pernicious buying practices of the major meatpackers that existing antitrust law did not address adequately. In accord with *Microsoft*, once price manipulation is found to have occurred, no further inquiry into market power is required. Importantly, under the PSA, price manipulation is prohibited without any requirement that the defendant possess a requisite level of market power. However, utilizing a Sherman Act "rule of reason" analysis, the trial court judge in *Pickett*, on April 23, 2004, nullified the jury's verdict by granting the defendant's motion for judgment as a matter of law. While the judge did not dispute the jury's finding of \$1.28 billion in damage to the cash market for fed cattle, the judge held that the defendant had legitimate business reasons for utilizing captive supplies for acquiring fed cattle. The court referenced the defendant's need to "meet competition" and obtain a reliable and consistent supply of fed cattle. *Pickett, et al. v. Tyson Fresh Meats, Inc.*, 315 F. Supp. 2d 1172 (M.D. Ala. 2004). The "legitimate business reason" test of the trial court, however, is the standard for monopoly cases tried under the Sherman Act's rule of reason. Such a standard appears to be inappropriate in a monopsony case brought under the PSA. The *Pickett* case is presently on appeal to the United States Court of Appeals for the Eleventh Circuit.

¹⁸ 232 F.3d 979 (9th Cir. 2000).

¹⁹ This is the rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), in which the Court established a direct purchaser limitation on standing to sue. Several states have amended their state antitrust statutes explicitly to grant antitrust actions to direct purchasers.

²⁰ 232 F.3d 979 (9th Cir. 2000).

²¹ 221 F.3d 928 (7th Cir. 2000).

²² That is certainly the case in the market for fed cattle. As a result, the major meatpackers have very substantial power to affect price. Relatedly, in the economic sense, the sale of fed cattle is very inelastic in terms of quality. A seller of fed cattle does not have the option of withholding cattle from the market for any extended length of time in the hopes of higher prices in the future. This makes the market for fed cattle particularly susceptible to manipulation by a market characterized by a few major buyers or, in some regions, a single buyer.

Position announcement

FLAG's Executive Director position is available. FLAG (Farmers' Legal Action Group, Inc.) is a public interest law firm dedicated to providing legal services to family farmers and their rural communities in order to help keep family farmers on the land.

Qualifications: Applicants should have (1) a law degree or substantive knowledge of agriculture issues; (2) a demonstrated fund-raising ability; (3) a demonstrated commitment to public interest/social justice work; (4) experience running a non-profit organization; and (5) good listening skills and ability to coordinate work of dedicated and talented staff. Experience with agricultural law and/or legal services is a plus.

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neighbors' purchase of the home.⁴ The trial court granted the orchard's motion to dismiss the neighbors' case.

The neighbors appealed the dismissal to the Vermont Supreme Court. The Vermont Supreme Court reversed the trial court and remanded the matter for further consideration. In its case of first impression the Vermont Supreme Court held that the right-to-farm law did not apply to the circumstances of this case.⁵ The court ruled that the complained of activities at the orchard commenced after the plaintiffs had bought their home, that the plaintiffs' home had always been used as a residence, that the case did not involve the problem of "urbanization" which was a then stated legislative intent of the right to farm law,⁶ and that the "prior" protected farm activity did not include the expanded orchard operation. The case was remanded for trial on the plaintiff-neighbors' common law nuisance and trespass claims without the benefit to the orchard of any of the statutory protections of the right to farm law.

Although questions were raised by policymakers regarding whether the result in the *Trickett* case was the proper one under the facts and circumstances of that particular case, the larger concern was what effect the court's decision would have on any future nuisance suits against Vermont farms.

During the course of the legislative debate on the implications of the Vermont Supreme Court's *Trickett* decision for future cases involving the right to farm law,⁷ a number of concerns were expressed. These concerns included, among other things: did the right to farm law need to be amended in response to the *Trickett* decision; did the decision "freeze" a farming operation in time so that any expansion or change of a farm would fall outside the right to farm law; did the decision effect the parameters of the "coming to the nuisance" doctrine expressed in the statute; should a right to farm law apply only in suits brought by non-farmers; how far, in light of the Iowa Supreme Court's decision in *Borman*⁸, can a state right to farm law go before running afoul of the Takings Clause; and to what extent would any changes to Vermont's right to farm law encourage or protect "factory" farming to the detriment of "family farms"? Ultimately, the question at the center of the legislative debate was how can typical Vermont farms be allowed to reasonably change their operations, be offered some protection by a right to farm law from suits by neighbors who may not be accustomed to normal farming activities, yet balance the rights and interest of neighboring property owners including those who have recently moved to an area where farming activity is occurring?

The amendments to Vermont right to farm law were reviewed at various stages of the 2004 legislative process by the House

Agriculture Committee, the House Judiciary Committee, the House of Representatives, the Senate Agriculture Committee, the Senate Judiciary Committee, the Senate, and by a House and Senate Conference Committee. The Governor signed the bill into law on June 3, 2004.

The 2004 amendments to Vermont's right to farm law 2004 enacted the following provisions in order to address some of the concerns noted above: the law was amended to remove from the list of legislative findings the potential of lawsuits because of "urbanization" in light of Vermont's traditional land settlement patterns; it included a legislative finding that farms will likely change, adopt new technologies, diversify, and increase in size in order to survive; it kept codified the doctrine of "coming to the nuisance" and included a provision that the doctrine will apply to agricultural activities that have "not significantly changed" since the commencement of the nonagricultural activity; and it continued to require that the agricultural activity be conducted in conformity with applicable laws and good agricultural practices in order to receive the benefit of the law.

One important aspect of Vermont's original right to farm law was the extent to which it codified the doctrine of "coming to the nuisance". The Vermont Supreme Court has not had occasion to rule on the applicability of this doctrine in a nuisance case. And although the "coming to the nuisance" doctrine has been accepted to differing degrees by many courts, it has not been accepted universally and the extent of its application as a defense varies as well.⁹

Unlike the right to farm laws in some states, the Vermont right to farm law does not create an immunity from nuisance lawsuits for farmers. Most importantly from a legal and procedural point of view, the law continued to provide that the right to farm law created a "rebuttable presumption" that the agricultural activity did not constitute a nuisance.

During the course of the legislative debate there was also considerable discussion of the role that the Vermont Agency of Agriculture should play in the implementation of the right to farm law. Some legislators proposed that the agency should act as a mediator between farmers and neighbors when there were "nuisance" concerns, and others proposed that the agency should investigate "nuisance" complaints and make determinations as to the validity of those complaints. One concern about these approaches was whether they would create an "exhaustion of administrative remedies" requirement. In the end the legislature determined that the right to farm law should not be a regulatory scheme but that the law should only provide general guidance to the trial courts in what are purely private lawsuits whose facts will significantly differ on a case-by-case basis.

There was also considerable debate on what standard of proof should be required in order for a plaintiff-neighbor to rebut the presumption that the agricultural activity did not constitute a nuisance. In Vermont a common law nuisance is established when a plaintiff can prove that the defendant's activity is creating a substantial and unreasonable interference with the use and enjoyment of the plaintiff's property.¹⁰ Under the 2004 amendments to the right to farm law, the Vermont legislature changed the standard of proof in right to farm nuisance cases from requiring a showing that the activity has a "substantial adverse effect on the public health and safety" to a showing that the activity has a "substantial adverse effect on health, safety or welfare, or has a noxious and significant interference with the use and enjoyment of the neighboring property." Once the right to farm law rebuttable presumption attaches, the law requires a neighboring plaintiff to make a showing that is higher than is required in a standard common law nuisance case.

The Vermont right to farm law creates a rebuttable presumption that agricultural activities that are conducted in conformance with applicable laws and regulations, and are consistent with good agricultural practices, and that were established prior to surrounding non-agricultural activities and which have not significantly changed since the commencement of the surrounding non-agricultural activities, are not a nuisance. However, the presumption that the farming activity is not a nuisance may be rebutted by a showing that the farming activity has a substantial adverse effect on health, safety or welfare, or has a noxious and significant interference with the neighbor's use and enjoyment of their property.

The Vermont right to farm law has provided Vermont farmers with a degree of protection from nuisance lawsuits brought by neighbors who may not be versed in country things.¹¹ The new law codifies the doctrine of "coming to the nuisance," allows that protection to also include reasonable changes in farming practices, creates a presumption that good farming is not a nuisance, but allows a plaintiff neighbor to rebut the presumption by a showing that is not so burdensome that it runs afoul of the Takings Clause. The Vermont Legislature has attempted to strike a workable balance between the rights and needs of farmers and their neighbors.

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¹ Act No. 149, 2004 (H.778)

² *Trickett v. Ochs*, slip op. at 2-3.

Cooperative member not allowed to defer value-added payments

In *Scherbart v. C.I.R.*, No. 3345-00, 2004 WL 1354120 (U.S. Tax Ct. June 17, 2004), the United States Tax Court held that a member of an agricultural cooperative was not entitled to defer the year-end value-added payments issued to him by the cooperative.

Petitioner Keith Scherbart was a member of the Minnesota Corn Processors (MCP), an agricultural cooperative owned by corn producers for the purpose of marketing and processing corn. *See id.* In his marketing agreement with the MCP, Scherbart designated MCP as his agent for selling his corn. *See id.*

MCP's processing added value to the corn delivered by its members, and as a result, it issued "value-added" payments to its members. *See id.* On August 30, 1995, Scherbart received a letter from MCP stating that "the yearend value-added payment for 1995 would 'be determined after MCP's annual audit and paid out by mid-November'" and that Scherbart could defer his 1995 yearend value-added payment until January of 1996. *See id.* Scherbart exercised his option to defer payment until January of 1996. *See id.* In the previous year, Scherbart deferred his 1994 value added payment until 1995. *See id.* The Commissioner of Internal Revenue determined deficiencies of \$3,791 and \$2,582 in the Scherbart's 1994 and 1995 Federal income taxes, respectively. *See id.* Scherbart challenged the Commissioner's determination, arguing that he was entitled to defer the income. *See id.*

The court stated that there was a "direct parallel" between this case and *Warren v. United States*, 613 F.2d 591 (5th Cir. 1980). *See id.* In *Warren*, the Fifth Circuit held that

cotton gins were the sellers' agents for the sale of cotton where the sellers could authorize the gins to defer sale proceeds to the next year. *See id.* The Fifth Circuit also held that "[t]he sellers decision 'to have the gins hold the sales proceeds until the following year was a self-imposed limitation. . . . Such a . . . limitation does not serve to change the general rule that receipt by an agent is receipt by the principal.'" *Id.* (citation omitted).

The court stated that, in accordance with the terms of the marketing agreement between Scherbart and the MCP, MCP was the agent of Scherbart for the sale of his corn. *See id.* It added that because MCP was Scherbart's agent "for making the sales and receiving the sales income, the only limitations placed on . . . [Scherbart's] receipt of that income were self-imposed and therefore ineffective to achieve a deferral for tax purposes." *Id.* The court thus concluded that Scherbart "constructively received the yearend value-added payments during the respective taxable years in issue" and, as such, the payments were not deferrable. *Id.* *See also id.* (quoting 26 C.F.R. §§ 1.451-2(a)) (stating, in relevant part, that "income although not actually reduced to a taxpayer's possession is constructively received by him . . . so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of the intention to withdraw had been given.").

—Gaby R. Jabbour, National AgLaw Center Research Assistant

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Federal farm loans

The FSA has adopted as final regulations revising the regulations governing the guaranteed farm loan program to allow guaranteed loans to be rescheduled with a balloon payment under certain circumstances. The regulations also (1) allow low-risk subordinations to be approved by the appropriate agency personnel at the field level rather than the national office, (2) allow lenders to make debt installation payments in accordance with lien priorities, payment due dates, and cash flow projections, (3) clarify that packager and consultant fees for servicing of guaranteed loans are not covered by the guarantee, and (4) clarify the amount a lender can bid at a foreclosure sale. 69 Fed. Reg. 44576 (July 27, 2004).

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Bibliography/Cont. from page 3

Patenting of Higher Lifer Forms, 20 Canadian Intell. Prop. Rev. 79-134 (2003).

Siebrasse, *The Innocent Bystander Problem in the Patenting of Higher Life Forms*, 49 McGill L. J. 349-392 (2004).

Public lands

Blumm, *The Bush Administration's Sweetheart Settlement Policy: A Trojan Horse Strategy for Advancing Commodity Production on Public Lands*, 34 *Envtl. L. Rep. News & Analysis* 10397-10420 (2004).

Feller, *The BLM's Proposed New Grazing Regulations: Serving the Most Special Interest*, 24 *J. Land, Res. & Envtl. L.* 241-248 (2004).

Note, *The Once and Future Federal Grazing Lands*, 45 *Wm. & Mary L. Rev.* 1803-1838 (2004).

Rasband, *Buying Back the West*, 24 *J. Land, Res. & Envtl. L.* 179-186 (2004).

Rural development

Craig-Taylor, *African-American Farmers and the Fight for Survival: The Continuing*

Examination for Insights into the Historical Genesis of this Dilemma, 26 *N.C. Cent. L.J.* 21-37 (2003).

Sustainable & organic farming

Student article, *Shade-Grown Coffee Plantations in Northern Latin America: A Refuge for More than just Birds & Biodiversity*, 22 *UCLA J. Envtl. L. & Pol'y* 131-153 (2003).

Torts and insurance

Glenn, *Footloose: Civil Responsibility for GMO Gene Wandering in Canada*, 43 *Washburn L. J.* 547-573 (2004).

Mayerson, *Insurance Recovery for Losses from Contaminated or Genetically Modified Foods*, 39 *Tort Trial & Ins. Prac. L.J.* 837-868 (2004).

Note, *A Liability and Redress Regime for Genetically Modified Organisms under the Cartagena Protocol*, 36 *Geo. Wash. Int'l Rev.* 173-201 (2004).

Rogers, *Iowa's Right to Farm Law Declared Unconstitutional*, 21 *Agric. L. Update* 4-5 6- (2004).

Veterinary law

Huss, *Valuation in Veterinary Malpractice*, 35 *Loy. U. Chi. L.J.* 479-553 (2004).

Water rights: Agriculturally related

Peck, *Protecting the Ogallala Aquifer in Kansas from Depletion: The Teaching Perspective*, 24 *J. Land, Res. & Envtl. L.* 349-354 (2004).

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

The 25th Annual Educational Symposium of the American Agricultural Law Association is quickly approaching on October 1 and 2, 2004 in Des Moines, Iowa. Guest rooms are still available at the conference hotel. Registration brochures have been mailed and you should have already received one. If you have not received a conference brochure, please contact me by phone, fax or e-mail and I will get one to you immediately. Registration materials are also available online at www.aglaw-assn.org. Click on the 2004 conference link on the home page. The registration form may be filled out on your computer if you have Adobe Acrobat Reader. A special dinner for students attending the conference has been planned for the evening of Oct. 1, 2004 sponsored by the Drake Ag. Law Student Ass'n.

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