Agricultural Law Update

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INSIDE

IN FUTURE ISSUES

Supreme Court rules that Interior Secretary exceeded authority in reservoir water contract

Lake Oahe is a large water reservoir located on the Missouri River in South Dakota. In 1982, the ETSI Pipeline Project entered into a contract with the Secretary of the Interior to withdraw up to 20,000 acre-feet of water from Lake Oahe per year for forty years. ETSI planned to use the water in a coal slurry pipeline, an industrial use of water. Soon after the contract was signed, the States of Missouri, Iowa, and Nebraska brought suit in federal district court to enjoin the performance of the contract. The plaintiffs' main contention was that the Interior Secretary lacked statutory authority, under the Flood Control Act of 1944, 58 Stat. 887, to execute a contract to provide water from Lake Oahe for industrial uses without obtaining the approval of the Secretary of the Army. The district court ruled for the plaintiffs. *Missouri v. Andrews*, 586 F. Supp. 1268 (Neb. 1984), a'ffd 787 F.2d 270 (8th Cir. 1986). The U.S. Supreme Court granted certiorari, 480 U.S. ___, 107 S.Ct. 1346, 94 L.Ed. 2d 517 (1987) and affirmed the appeals court on February 23, 1988 or coerced membership infringing plaintiff's rights under 7 U.S.C. Section 2303(A). *ETSI Pipeline Project v. Missouri*, 108 S.Ct. 805 (1988).

The Missouri River Basin is a vast watershed containing an upper and lower basin. The upper part of the Basin includes large sections of Montana, Wyoming, North Dakota, and South Dakota, and is mostly arid or semi-arid. The Missouri River and its tributaries are used for agricultural and industrial purposes in that area and water is sometimes scarce. The lower part of the Basin, which includes territory in Nebraska, Kansas, Iowa, and Missouri, is more humid. In this area,

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State Commodity Commission legislation upheld

The Sixth Circuit has upheld challenged provisions of the Michigan Potato Industry Commission Act (MPICA) in *Newark Gardens, Inc. v. Michigan Potato Industry Commission*, Case No. 87-1351 (6th Cir. 1988). This case is significant because it affirms the ability of state marketing commissions to require checkoffs for commodity promotion programs.

The plaintiff, *Newark Gardens*, filed suit claiming that the mandatory assessments of MPICA used for promotion purposes were in violation of the Agricultural Fair Practices Act (AFPA). Basically, the plaintiff contended that the mandatory assessments were tantamount to coercing Michigan potato handlers into a marketing arrangement in violation of 7 U.S.C. § 2303(C).

Plaintiff relied primarily on the Supreme Court's decision in *Michigan Canners & Freezers Association v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461 (1984), discussed at 3 *Agricultural Law Update 2* (Aug. 1984). In *Michigan Canners & Freezers*, the Supreme Court found that the AFPA preempted certain provisions of the Michigan Agricultural Marketing and Bargaining Act so that state law could not coerce producers to participate in a marketing contract with an association.

In *Newark Gardens*, the question before the circuit court was whether MPICA constituted an obstacle to the accomplishment and execution of the full purposes and objectives of Congress as legislated in AFPA. The state legislation would be valid if not superceded by federal action.

The court found that the payment of fees to a state agency whose members are appointed by the governor is not equivalent to the imposition of mandatory membership dues to an association of producers.

Although the activities of the potato commission could be characterized as falling within an expansive definition of "marketing," it was found that Congress did not

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the Missouri River is used mostly for navigation, and the critical water problem is flooding.

Both the Department of the Interior's Bureau of Reclamation and the Army Corps of Engineers were involved in the Congressional enactment of the Oahe Reservoir project. However, the District Court found that the Secretary of the Army constructed Lake Oahe and that the Army has always operated and maintained the lake. 586 F. Supp., at 1273-74. The stated purposes of Lake Oahe are irrigation, flood control, navigation, the development of hydroelectric power, and other purposes. S. Doc. No. 247, 78th Cong., 2nd Sess., 3 (1944).

The Flood Control Act provides that reservoirs such as Lake Oahe are under the control of the Secretary of the Army. 58 Stat. 887, §§ 4-8. The Secretary of the Interior has some narrowly circumscribed authority under the Act, which may only be exercised with the approval of the Army Secretary. Section 8. The relevant authority of the Interior Secretary is limited to making *recommendations* to the Army Secretary that an Army reservoir "be utilized for *irrigation* purposes." (emphasis added). Section 8.

In the instant case, the Interior Secretary took no action to procure water for irrigation purposes. Rather, he entered into an industrial water use contract without the approval of the Army Secretary.

The Court speculated that the Interior Secretary was correct in his assertion that he could divert water from the reservoir for irrigation use pursuant to section 8, and subsequently assign the water to a different use. 108 S. Ct., at 812-13. However, the District Court found no evidence that the Interior Secretary had ever diverted water from the reservoir for irrigation use, or that any of the water being stored in Oahe Reservoir was being held in reserve for future irrigation use. 586 F.Supp. at 1274, 1277. See 108 S.Ct. at 812. The Court implicitly reasoned that none of the water stored in Lake Oahe had been designated for future irrigation use in the absence of any actual diversion and use of water for that purpose.

Since the facts showed that the ETSI contract was to deliver water that was diverted from the lake for the initial purpose of industrial use, the Interior Secretary had exceeded his authority.

– Julia R. Wilder

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STATE COMMODITY COMMISSION LEGISLATION UPHELD / CONTINUED FROM PAGE 1

intend that AFPA should prohibit state marketing boards having a limited purpose of promoting agricultural products grown within their states. State promotional acts preceded AFPA, and AFPA specifically provided that "[t]he provisions of this chapter shall not be construed to change or modify existing State law. . . ." 7 U.S.C. § 2305(d).

Moreover, when AFPA is viewed in the context of federal agricultural legislation, it becomes clear that Congress did not intend to prevent state agencies from imposing mandatory assessments to finance generic commodity promotions. Federal law explicitly permits mandatory agricultural assessments under federal marketing orders. Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.* Thus, the mandatory fees under MPICA do not contravene the intent and purposes of AFPA and, accordingly, are not preempted by federal law.

– Terence J. Centner

USDA revises horse protection rules

The USDA announced new interim rules, effective August 1, 1988, restricting the use of pads and other devices that may cause soring in show horses.

The new rules, according to USDA, would permit the use of pads that are no higher than 50 percent of the length of a horse's natural foot.

The new regulations replace an earlier interim rule announced April 22 that would have phased in a maximum pad height of one inch. Under the previous rules, the second phase – reducing the height of pads to two inches – was scheduled to begin August 1.

The revised rules on pad use were based on comments submitted jointly by the American Horse Council, which represents a large majority of the major horse industry organizations in the country, and the American Horse Protection Association.

The new rules also prohibit placing objects or materials between pad and hoof, except for certain approved packing materials, and clarifies restrictions on the use of weights on horses. However, provisions of a May 2 interim rule removing the 16-ounce horseshoe weight limit for horses other than yearlings would be retained.

On March 21, 1988, in a suit brought against USDA by the American Horse Protection Association, the US District Court for the District of Columbia invalidated certain sections of USDA's horse protection regulations. In this order, and in a clarifying order issued April 13 in response to a USDA request, the court directed USDA to initiate rulemaking to eliminate devices that could reasonably be expected to cause soring. The court in its ruling specifically referred to pads and chains that are used on the front feet and legs of horses to alter their natural gait.

The new interim rules are published at 53 Fed. Reg. 28366. Written comments must be sent by October 31, 1988.

– USDA news release

Liability for damages to dairy cattle from neutral-to-earth voltage

The Ohio Supreme Court has found that strict liability in tort for damages caused by neutral-to-earth voltage was not a cause of action that could be successfully asserted against a public utility in *Otte v. Dayton Power & Light Co.*, 37 Ohio St. 2d 33 (May 25, 1988).

In *Otte*, farmers suffered losses in milk production caused by the effects of neutral-to-earth voltage on their dairy cattle. The problem was corrected with the installation of an isolation transformer by the Ottes, which removed the neutral-to-earth voltage from the Ottes' power lines.

The Ottes sued the utility company under several causes of action: breach of contract, negligence, failure to warn of potential dangers, strict liability in tort, and other strict liability claims, and violation of a statutory duty.

The trial court dismissed the statutory claim for lack of jurisdiction, granted the defendant summary judgment on the strict liability count, merged the failure to warn count with the negligence claim, and entered a directed verdict for the defendant on the issue of breach of contract. The jury found the defendant utility to be fifty-one percent negligent, and a verdict was rendered for plaintiffs.

On a motion to certify the record, the Ohio Supreme Court considered the issue of whether a strict liability cause of action should be permitted against an utility. The court found three alternative rationales for rejecting such a cause of action.

First, the court found that the public utility was selling a service rather than a product, so that Section 402A of the Restatement of the Law 2d, Torts (1965) was not applicable. Consumers pay for each kilowatt hour provided, or the length of time electricity flows through their electrical systems. Thus, consumers pay for the privilege of using the utility's service.

The court also found that public policy reasons justifying strict liability were not viable with respect to a highly regulated public utility, and that stare decisis in Ohio supported the rejection of strict liability, given the facts of the case.

– *Terence J. Centner*

Editor's note: See 5 *Agric. L. Update* 3 (Dec., 1987) for a general article on stray voltage.

Federal Register *in brief*

The following is a selection of matters that have been published in the *Federal Register* in the past few weeks.

1. USDA; Setoffs and withholdings against debt; proposed rule. "Intent of proposed rule is to extend the regulatory period of time allowed for setoff and withholding to ten years." 53 Fed. Reg. 26443.

2. USDA; IRCA; SAWs program; proposed rule. "This notice proposes to redefine the term "vegetables" and reexamines whether . . . sugar cane meets the definition of "other perishable commodities". . . in light of . . . *Northwest Forest Workers Assoc. v. Lyng*, Civ. No. 87-1487 (D.D.C. Apr. 25, 1988)." 53 Fed. Reg. 26076.

3. USDA; Rural labor; IRCA; cotton; definition; final rule; effective date 7/29/88. 53 Fed. Reg. 28628.

4. APHIS; Brucellosis and tuberculosis regulations that require or allow hot-iron branding of animals on the jaw; advance notice of proposed rulemaking and request for comments; comments due 9/12/88. 53 Fed. Reg. 26262.

5. APHIS; Horse protection regulations; interim rule and request for comments; effective date 8/1/88; comments due 10/31/88. See related USDA news release in this issue. 53 Fed. Reg. 28366.

6. FmHA; Methodology and formulas for allocation of loan and grant program funds; final rule; effective date 7/12/88. 53 Fed. Reg. 26228.

7. FmHA; Program regulations; appeals procedures; national appeals staff establishment; final rule; effective date 7/12/88. 53 Fed. Reg. 26400.

8. FmHA; Implementation of Concentration Banking System; final rule; effective date 7/14/88. 53 Fed. Reg. 26587.

9. FmHA; Credit reports on individuals; proposed rule; comments due 10/3/88. 53 Fed. Reg. 29341.

10. PSA; Poultry regulations and policy statements; notice of proposed rulemaking; comments due 9/9/88. "Proposes to amend.. regulations to conform to Poultry Producers Financial Protection Act of 1987." 53 Fed. Reg. 26082.

11. PSA; Antibiotic and sulfa residues in slaughter animals; economic responsibility for violative residues in slaughter animals; economic responsibility for violative residues from packer to producer; comments due 9/23/88. 53 Fed. Reg. 27174.

12. CCC; Setoff, withholding, and stop payment policies; proposed rule. "Intent of proposed rule is to extend the regulatory period of time allowed for setoff and withholding to ten years." 53 Fed. Reg. 26081. Correction at 53 Fed. Reg. 29307.

13. CCC; Proposed determinations with regard to the 1989 feed grains program and farmer-owned reserve program provisions. 53 Fed. Reg. 25518.

14. CCC; Peanut warehouse storage loans and handler operations for the 1986 through 1990 crops; final rule; effective date 8/2/88. 53 Fed. Reg. 28997.

15. CCC; ASCS; Payment limitation and determination of eligibility of foreign individuals or entities to receive program payments; final rule; effective date 8/1/88. 53 Fed. Reg. 29552.

16. EPA; Worker protection standards for agricultural pesticides; proposed rule; written comments due 10/6/88. "Expand[s] the scope of the standards to include . . . workers in forests, nurseries, and greenhouses, and workers who handle . . . pesticides in these locations. . . . EPA also proposes to revise its labeling regulations to require statements pertaining to general worker protection, reentry intervals, personal protective equipment, and posting of treated areas." 53 Fed. Reg. 25970.

17. EPA; Hazardous waste; farmer exemptions; technical corrections; effective date 7/19/88. 53 Fed. Reg. 27164.

18. FCA; Enforcement of nondiscrimination on basis of handicap in programs or activities conducted by Farm Credit Administration; effective date 7/6/88. 53 Fed. Reg. 25481.

19. FCA; Examinations and investigations; final rule. 53 Fed. Reg. 27155.

20. FCA; Funding and fiscal affairs, loan policies, and operations, and funding operations; reaffirmation of final rule and technical change; effective date 7/19/88. 53 Fed. Reg. 27156.

21. FCA; Rules of practice and procedure; practice before the Farm Credit Administration; final rule. 53 Fed. Reg. 27284.

22. FCA; Policy regarding the assessment of civil money penalties; effective date 7/19/88. 53 Fed. Reg. 27286.

23. INS; SAWs; interim rule with request for comments. 53 Fed. Reg. 27335.

24. ASCS; CCC; Payment limitation and determination of eligibility of foreign individuals or entities to receive program payments; final rule; effective date 8/1/88. 53 Fed. Reg. 29552.

– *Linda Grim McCormick*

Chapter 12: a selective review of recent court decisions©

by David M. Powlen and David T. Thuma

During the first twenty months that Chapter 12 of the United States Bankruptcy Code (11 U.S.C. § 1201 *et seq.*) has been available for reorganizations of "family farmers," over 250 court opinions have been published, putting flesh on Chapter 12's statutory bones. This article reviews recent decisions on a selection of topics, including valuation of property, adequate protection, plan feasibility, and payment of trustee fees.

Valuation

While most of the published Chapter 12 decisions concerning valuation are indistinguishable from other bankruptcy cases, one recent case is worthy of mention. In *In re Snider Farms, Inc.*, 79 Bankr. 801, 817 (Bankr. N.D. Ind. 1987), the bankruptcy court, after hearing appraisal testimony concerning the value of real estate mortgaged to an undersecured creditor, ruled that a valuation perhaps lower than "true" market value was appropriate because the debtor proposed to retain the property and the land should therefore be valued "as actually used by the debtor" and "when actually used as farmland rather than for other purposes. . . ." In addition, see *In re Anderson*, No. 87-60452, slip op. at pp. 22-28 (Bankr. N.D. Ind. April 15, 1988) (reaffirming the approach adopted in *Snider Farms*). This *Snider Farms* ruling seems contrary to the general rule, in Chapter 12 cases and otherwise, that the correct standard for valuing a secured creditor's interest in property is what the creditor could receive if the property were sold, *i.e.*, actual fair market value. *See, e.g., In re Claeys*, 81 Bankr. 985 (Bankr. D.N.D. 1987); *In re Cool*, 81 Bankr. 614 (Bankr. D. Mont. 1987).

Adequate protection

Like other chapters of the Bankruptcy Code, Chapter 12 provides that in certain situations, secured creditors must be given some form of "adequate protection" for their collateral. However, Chapter 12 is unique in specifically stating in 11 U.S.C. § 1205(b)(3) that one type of adequate protection associated with a debtor's use of farmland may be to require the debtor to pay "reasonable rent customary in the community."

Bankruptcy courts have in some cases ordered the debtor to pay an undersecured creditor the reasonable rental value of farmland as adequate protection. *See, e.g. In re Snider Farms, Inc.*, 79 Bankr. 801 (Bankr. N.D. Ind. 1987). An interesting question is whether, pursuant to 11 U.S.C. § 1205(b)(3), an undersecured creditor holding a lien on farmland is entitled in *all* cases to receive the "reasonable rent customary in the community" as adequate protection for its interest in the land. Two recent cases have ruled that undersecured mortgagees are not necessarily entitled to receive rent as adequate protection. In *In re Turner*, 82 Bankr. 465 (Bankr. W.D. Tenn. 1988), the bankruptcy court held that, because of the "fast track" of Chapter 12 cases and the Supreme Court's holding in *United States Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. ____, 108 S. Ct. 626, 98 L.Ed. 2d 740 (1988), which disallowed lost opportunity costs as a component of adequate protection in Chapter 11 cases, an undersecured mortgagee in a Chapter 12 case is not entitled to recover rent under section 1205(b)(3) automatically, but must demonstrate a decline in the value of the mortgaged property. The *Turner* ruling was followed in *In re Anderson*, No. 87-60452, slip op. at 29-37 (Bankr. N.D. Ind. April 15, 1988).

Ruling on a related issue, the bankruptcy court in *In re Kocher*, 78 Bankr. 844 (Bankr. S.D. Ohio 1987), held that receipt of fair rental value is the only adequate protection an undersecured mortgagee can extract from the debtor, even if the mortgagee can demonstrate that the decline in land value exceeds the amount of rent.

Other recent cases involving familiar adequate protection concepts are summarized below. In *In re Stacy Farms*, 78 Bankr. 494 (Bankr. S.D. Ohio 1987), the hankruptcy court denied the debtor's motion to grant a crop lender a section 364(d) "superpriority" lien because the imposition of that lien would displace an existing creditor's lien and the existing creditor was not given adequate protection for the loss of its lien. In *Stacy Farms*, the debtor was unable to offer the existing secured creditor any other collateral to replace the lien that would be reduced by the superpriority lien. 78 Bankr. at 497-98. In *In re Westcamp*, 78 Bankr. 834 (Bankr. S.D. Ohio 1987), the bankruptcy court allowed a debtor to use cash collateral to pay for expenses of planting a crop. The court ruled that the creditor was adequately protected by being given a first lien on the crop to be planted, and noted that crop insurance obtained by the debtor, among other factors, sufficiently reduced the risk of crop failure that the creditor's interests were not threatened. 78 Bankr. at 839.

Finally, in *In re Milleson*, 83 Bankr. 696 (Bankr. D. Neb. 1988), the court ruled that a Chapter 12 plan could not allow debtors to sell encumbered assets free and clear of liens without providing adequate protection for the creditor's interest therein. The creditor in question held a security interest in collateral (cattle) worth 130% of its claim against the debtor. The plan of reorganization allowed the debtor to sell part of the collateral, so long as collateral worth at least 110% of the outstanding claim was retained. The court stated that a Chapter 12 plan "cannot deprive a secured creditor of its lien in the 'equity cushion' (130% compared to 110%) unless the creditor is provided adequate protection of its interest in the property proposed to be sold." 83 Bankr. at 701.

Feasibility

Chapter 12 plans cannot be confirmed unless the court makes an independent determination, in accordance with 11 U.S.C. §1225(a)(6), that "the debtor will be able to make all payments under the plan and to comply with the plan." Often this "feasibility" requirement is an issue in Chapter 12 cases because most debtors will be attempting to operate and pay creditors with a capital structure nearly 100% leveraged. Indeed, some experts are of the opinion that most farmers cannot successfully reorganize without a substantial amount of equity in their capital structure. Of the eight published Chapter 12 cases found that ruled on feasibility, five denied confirmation of a plan of reorganization because of lack of feasibility.

One court ruling in favor of feasibility stated that "a plan should be approved 'if it appears reasonably probable that the farmer can pay the restructured secured debt, over a reasonable period of time, in light of farm prices and farm programs as of the date of confirmation.'" *In re Hansen*, 77 Bankr. 722, 726 (Bankr. D.N.D. 1987), quoting *In re Ahlers*, 794 F.2d 388, 392 (8th Cir. 1986), *reversed on other grounds* ____ U.S. ____,

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David M. Powlen, partner in the Indianapolis law firm of Barnes and Thornburg, and David T. Thuma, associate in the same firm.

108 S. Ct. 963, 99 L.Ed. 2d 169 (1988). The *Hanson* court also stated that in Chapter 12 cases, the benefit of the doubt should be given to farmers. *Id.* at 727. Another court finding in favor of feasibility recognized that projecting future income "cannot be an exact science." *In re Fowler*, 83 Bankr. 39, 43 (Bankr. D. Mont. 1987). Finally, in *In re Big Hook Land & Cattle Co.*, 81 Bankr. 1001 (Bankr. D. Mont. 1988), the court stated that "guaranteed success is not the test or standard" when reviewing feasibility, and that, as stated in *Hanson*, the debtor must receive the benefit of the doubt. 81 Bankr. at 1007.

Courts denying confirmation because of a lack of feasibility have done so because the debtor's cash flow projections were based upon heightened, projected yields or other "visionary" schemes, or because the projected cash flow left no margin for error. Thus, in *In re Crowley*, No. 87-C-893-S, slip op., 1988 U.S. Dist. Lexis 3313 (W.D. Wis. Mar. 11, 1988), the district court stated that:

> it is entirely inappropriate to legally bind a bankruptcy court to future projections regardless of past behavior. "The plan must, to the extent possible, be based on known inputs, including yields, farm prices, and programs as presently existing". . . .

Id., quoting *In re Konzak*, 78 Bankr. 990, 994 (Bankr. D.N.D. 1987). Similarly, in the *Konzak* case, the court stated that "a debtor should not premise future plan cash flows upon heightened yield or market data for successive plan years unless there is some objective base for such data. . . . This is particularly true where, as here, there is absolutely no margin of error built in for even minimal unforeseen expenses or reduced yields." 78 Bankr. at 994. In addition, see *In re Snider Farms*, 83 Bankr. 1003 (Bankr. N.D. Ind. 1988) (after reviewing pertinent rules on determining feasibility, the court denied confirmation because the plan provided no margin or cushion for unexpected expenses and because the debtor did not carry its burden of proving that it had reasonable prospects for performing as required under the plan); *In re Reitz*, 79 Bankr. 934 (Bankr. D. Kan. 1987) (the court found that the plan was based upon "visionary schemes"); *In re Big Hook Land & Cattle Co.*, 77 Bankr. 793 (Bankr. D. Mont. 1987) (feasibility denied because plan was based upon "visionary" scheme of borrowing $46,000, yet debtor could not demonstrate a source for such borrowing); *In re Dittmer*, 82 Bankr. 1019 (Bankr. D.N.D. 1988) (court denied motion for post-confirmation modification of Chapter 12 plan, holding that proposed modification was not feasible because it was based upon projected income far in excess of the income received in the past five years).

Trustee fees

A split has developed among bankruptcy courts about whether Chapter 12 debtors can propose to make payments to secured and unsecured creditors "outside the plan," thus bypassing the trustee and his fees. Based upon case law that developed under Chapter 13 of the Code, several early decisions on this issue held that Chapter 12 debtors could make payments outside the plan only to secured creditors whose claims were unmodified by the plan and were to be repaid over a number of years. *In re Lenz*, 74 Bankr. 413, 415 (Bankr. C.D. Ill. 1987); *In re Mikkelsen Farms, Inc.*, 74 Bankr. 280 (Bankr. D. Or. 1987); *In re Hagensick*, 73 Bankr. 710 (Bankr. N.D. Iowa 1987). Indeed, a recent district court decision on this issue specifically adopted the rule that all payments to creditors under a Chapter 12 plan are subject to the trustee's fee "with the possible exception of unaltered contractual payments on long-term debts. . . ." *In re Greseth*, 78 Bankr. 936, 940 (D. Minn. 1987).

Two recent cases disagreed with this rule, however, and held that payments to secured creditors can be made outside a Chapter 12 plan of reorganization even if the creditor's claims are modified by the plan. In *In re Erickson Partnership*, 83 Bankr. 725 (Bankr. D.S.D. 1988), affirming *In re Erickson Partnership*, 77 Bankr. 738 (Bankr. D.S.D. 1987), the district court noted that, unlike the analogous provision in Chapter 13, 11 U.S.C. § 1225(a)(5)(ii) provides that property may be distributed "by the trustee *or the debtors*." 83 Bankr. at 727 (emphasis in original). The court also noted that, because of a recent amendment, 28 U.S.C. § 586(e)(2), the section dealing with collection of trustee fees by the United States trustee or his designee, now states that the trustee may collect a fee only with respect to payments "received by such individual. . . ." *Id.* In view of these differences between current Chapter 12 statutory provisions and the Chapter 13 provisions that were in force when the rulings were made about payments outside the plan, the district court in *Erickson* ruled that the Chapter 13 case law (and the Chapter 12 case law that adopted the Chapter 13 precedents) did not control and that a Chapter 12 debtor could make payments "outside the plan" to secured creditors whose claims were modified. While the court acknowledged that its ruling may reduce the amount of fees collected by Chapter 12 trustees, it suggested that a remedy for that problem be sought in Congress, rather than the courts. Similarly, see *In re Land*, 82 Bankr. 572 (Bankr. D. Colo. 1988) (to the same effect as *Erickson*).

Other rulings

Section 1111(b)-type protection

One of the substantial differences between Chapter 11 and Chapter 12 is that an undersecured creditor in a Chapter 11 case may elect to have its entire claim treated as if it were secured by the creditor's collateral. 11 U.S.C. § 1111(b). One effect of the section 1111(b) election is that if the debtor ever defaults under the plan of reorganization and the creditor forecloses on the collateral, the creditor is entitled to any appreciation in the collateral's value that accrued after confirmation, up to the full balance of the creditor's claim. In the case of real property, such appreciation could be substantial.

A Chapter 12 undersecured creditor with a lien on farmland faces the real possibility that (i) the court will confirm a plan that "writes down" the creditor's secured claim to the current fair market value of the farmland, (ii) the debtor defaults under the plan after several years, (iii) the land has appreciated in value in the meantime, but (iv) the creditor is unable to apply the appreciation to the unsecured portion of its claim.

Despite the absence of the section 1111(b) election, one bankruptcy court gave the secured creditor what was in fact partial section 1111(b)-type protection when ruling on confirmation of a proposed Chapter 12 plan. In *In re O'Farrell*, 74 Bankr. 421 (Bankr. N.D. Fla. 1987), the court conditioned its finding of feasibility on the proviso that if the debtors defaulted under the plan or sold the mortgaged property within seven years of the date of confirmation, the secured creditor's mortgage on the subject property would secure the creditor's entire claim, including the unsecured portion of the claim. To date, no other court appears to have published a similar ruling.

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Stretchout

One common dispute between the debtor and its creditors is the number of years over which the debtor must repay secured claims. While creditors usually insist that their claims be paid as quickly as possible, debtors often attempt to "stretch out" repayment as long as they can. Courts addressing stretchout proposals in Chapter 12 plans have generally limited stretchouts to the normal repayment terms for the type of security in question. Thus, in *In re Foster*, 79 Bankr. 906, 911 (Bankr. D. Mont. 1987), the court rejected the debtor's attempt to stretch out payments on a contract for deed over thirty years, ruling that such contracts were "never" longer than ten or fifteen years. The court was unmoved by the debtor's argument that the plan was not feasible if the repayment period were shorter than thirty years. Similarly, in *In re Indreland*, 77 Bankr. 268, 274 (Bankr. D. Mont. 1987), the court ruled that the debtor's proposal to repay a debt secured by a mortgage over thirty years would not be allowed because "the term of 30 years is not the prevailing market term of commercial lenders for the type of loan and risk involved in this case." 77 Bankr. at 274. In addition, see *In re Smith*, 78 Bankr. 491, 494 (Bankr. N.D. Texas 1987) (court refused to allow debtor's proposed forty-year payout on mortgage, holding that a thirty-year amortization, with a balloon payment after twenty years, gave the debtors sufficient time to reorganize; *In re O'Farrell*, 74 Bankr. 421, 424 (Bankr. N.D. Fla. 1987) (held that thirty- year repayment of mortgage debt is reasonable).

Adherence to time limits

The extent to which debtors must adhere to the expedited time requirements of Chapter 12 remains unclear. If the debtor repeatedly or substantially misses filing deadlines, courts have granted motions to dismiss the debtor's reorganization case. *See, In re Offield*, 77 Bankr. 222 (Bankr. W.D. Mo. 1987) (court dismissed the case when no plan had been filed 110 days after the petition date, debtor filed a motion for extension of time to file a plan nine days after the plan was due, and the motion for extension of time did not specify when the plan would be filed); *In re Rivera Sanchez*, 80 Bankr. 6 (Bankr. D.P.R. 1987) (court dismissed case pursuant to 11 U.S.C. §1208(c) for unreasonable delay because of debtor's late filing of schedules, plan, and plan modification and because debtor failed to provide a valuation of collateral); *In re Colclasure*, No. 87-509M, slip op., 1987 Bankr. Lexis 1755 (Bankr. E.D. Ark., Sept. 9, 1987) (case was dismissed under 11 U.S.C. §1208 for repeated delays prejudicial to creditors as well as failure to file a plan within the required ninety day limit; the plan was filed approximately 165 days after the petition date); *In re Tezak*, No. 86-20737, slip op., 1987 Bankr. Lexis 591 (Bankr. D. Mont. May 1, 1987) (the court dismissed the case because the plan was not filed on time and no motion for enlargement was filed before the deadline expired); *In re Lubbers*, 73 Bankr. 440 (Bankr. D. Kans. 1987) (similar to the holding in *Tezak*).

On the other hand, courts have overlooked minor deadline transgressions. *See In re Ivy*, 76 Bankr. 147, 148 (Bankr. W.D. Mo. 1987) (failure to conduct Chapter 12 confirmation hearing within forty-five days of plan filing did not deprive the court of jurisdiction); *In re Raylyn A.G., Inc.*, 72 Bankr. 523 (Bankr. S.D. Iowa 1987) (a plan filed on the ninety-second day may be confirmed despite creditor's argument that failure to meet the ninety-day deadline requires automatic dismissal).

California court supports upland irrigators

In a significant updating of California water law, the California Court of Appeals for the Fifth District upheld certain irrigation rights of upland owners of farmland. The court held (in a partially published opinion) that the upland owners could discharge reasonable and noninjurious amounts of irrigation water through improved natural channels onto the lower owner's property, and that the lower owner had a co-equal burden to receive the water. *Martinson v. Hughey*, 244 Cal. Rptr. 795, 801 (Cal. Ct. App. 5 Dist. 1988). This ruling is significant because it upholds the right of the upper owners to utilize artificial drainage systems to facilitate the natural drainage flow. The court held that this is permissible as long as the drainage system merely increases the velocity, but not the volume, of water discharge. *Id.*

In *Martinson*, all of the parties were owners of citrus groves at the lower end of a 1700-acre watershed near Porterville. Martinson and a co-plaintiff, Pokelwaldt, were the upper owners. Their properties contained both natural drainage courses and separate ditches, which the court found to be "'improved' natural drainage courses." 244 Cal. Rptr., at 797. Each of these ditches conveyed water onto the land of Hughey, the lower owner. In 1979, Hughey began to deposit debris into the ditch on his land that received the water conveyed through the ditches on the plaintiffs' lands. Eventually, portions of the plaintiffs' groves were injured by surface water that could not flow off their property because of the ditch obstruction caused by the debris. 244 Cal. Rptr., at 798. Defendant Hughey tried to justify the obstruction by claiming that the waters coming off the plaintiffs' lands were "unnatural, excessive, and accelerated" and that he had no duty to accept them. *Id.*

The applicable civil law "in its pure form" provides a servitude or easement for natural drainage which requires a lower owner to accept the surface water that drains onto his or her land. The law does not, however, authorize the upper owner to "alter the natural system of drainage so as to increase the burden" on the lower owner. 244 Cal. Rptr., at 799. In *Keys v. Romley*, 50 Cal. Rptr. 273 (1966), the California Supreme Court stated that the civil law doctrine can not be rigidly applied. The *Keys* court adopted the doctrine of reasonable use, which imposes a duty of reasonable care upon both the upper and lower landowners. *Id.* at 281.

The principle of reasonable use in California water law "is based more upon concepts of tort liability than upon traditional concepts of property law." 244 Cal. Rptr., at 800. The issue of reasonableness is a question of fact, which depends upon such factors as the amount of the harm, the foreseeability of the harm, the purpose or motive with which the possessor [of water] acted . . . and whether the utility of the possessor's use of his land outweighs the gravity of the harm which results from his alteration of the flow of surface waters." 244 Cal. Rptr., at 800, quoting 50 Cal. Rptr., at 281.

According to *Keys*, if the actions of both the upper and lower landowners are reasonable, then liability must be assessed against the upper landowner who has changed a natural system of drainage. 50 Cal. Rptr., at 281. However, the facts in *Keys* involved an urban setting.

Noting that Californians "depend greatly on irrigation," the *Martinson* court stated that "it has long been recognized that it is desirable to level and improve land to make it fit for cultivation including the construction of artificial systems to irrigate and drain the land." 244 Cal. Rptr., at 800.

– Julia R. Wilder

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AG LAW CONFERENCE CALENDAR

Ninth Annual American Agricultural Law Association Conference and Annual Meeting.

Oct. 13-14, 1988. Westin Crown Center, Kansas City, MO.

Topics to include: UCC current developments affecting agriculture; ag coops – recent litigation; groundwater quality regulation; farmland preservation law; regulating agricultural research; National Center for Agricultural Law Research; international agricultural trade – the US, Canadian, European Community viewpoints; legal issues in ag trade agreements; payment limitations – ASCS appeals and sodbuster regulations; conservation reserve program and ASCS appeals; farm program administration and appeals; agriculture and the environment; fine tuning the conservation programs; using the tax code to encourage ag resource conservation; groundwater protection – the impact of ag price policy; understanding the environmental consequences of federal marketing orders and commodity payments; where have all the tax shelters gone; impact of passive loss rules on transfer tax planning; section 2032A; the future of ag credit; borrower's rights under the Ag Credit Act of 1987.

Plan to attend.

Penn State October Federal and State Income Tax Workshops.

Oct. 11-12, Lancaster, PA.
Oct. 13-14, Williamsport, PA.
Oct. 17-18, Souderton, PA.
Oct. 20-21, Bedford, PA.
Oct. 25-26, Pittsburgh, PA.
Oct. 27-28, Meadville, PA.

Topics include: individual tax update; farm return issues; and computerized tax filing.

Sponsored by Penn State.

For more information, call 814-865-7656

Fourth Annual Farm, Ranch, and Agri-Business Bankruptcy Institute.

Oct. 6, 7, and 9, 1988. Lubbock, TX.

Topics include: the Agricultural Credit Act of 1987; UCC related issues; tax consideration in Chapters 7, 11, and 12; "life after *Ahlers*".

Sponsored by the Texas Tech University School of Law and the West Texas Bankruptcy Bar Association.

For more information, call Robert A. Doty, 806-765-7491.

STATE ROUNDUP

GEORGIA. *No accord and satisfaction.* In *Hall v. Bank South, Washington County,* 186 Ga. App. 860, 368 S.E.2d 810 (1988), the bank brought a complaint to recover a deficiency remaining after it had foreclosed upon and sold the defendant's collateral real property. In opposition to the plaintiff's motion for summary judgment, the defendant submitted an affidavit alleging that he had a conversation with plaintiff's agent who promised that the foreclosure sale would be taken as a business loss. The trial court granted the plaintiff's motion for summary judgment. This was affirmed by the Georgia Court of Appeals, which held that there was no new consideration and thus, as a matter of law, no accord and satisfaction. – *Daniel M. Roper*

OKLAHOMA. *State laws and the Agricultural Credit Act of 1987.* Sections 610(b)(10) and 614(g) of the federal Agricultural Credit Act (Pub. L. No. 100-233) provide that in the event of conflict between the federal law and state law, the state law prevails. In Oklahoma, unlike several other states, debtors do not have any rights of first refusal to lease, repurchase, or partially redeem the land or homestead that has been used as collateral for a loan. Thus in Oklahoma, the cited sections allowing state law to control nullify the protections created by the Agricultural Credit Act of 1987 for FmHA borrowers.

In order to remedy this conflict, the Oklahoma legislature added a subsection B. to Okla. Stat. tit. 42, § 18, which reads as follows:

> Neither this section nor any existing or future order or regulation of any entity of state government or case law or common law shall be construed as limiting or diminishing any federally guaranteed "right of first refusal" granted by the Agricultural Credit Act of 1987.

The law became effective on April 1, 1988. – *Drew L. Kershen*

IOWA. *Real property related legislation.* In 1987, the legislature amended Chapter 172C to limit land holdings of authorized farm corporations and trusts. In 1988, the legislature adopted further restrictions on the subject of corporate farming, including:

1. application of the 1500 acre land ownership cap to limited partnerships.
2. reinstitution of a reporting requirement for many forms of corporate farm businesses.
3. limitations on the contract feeding of swine by processors.

In the most significant change in the legislation, after July 1, 1988 a limited partnership, except a family farm limited partnership (as defined in the act), can not "directly or indirectly, acquire or otherwise obtain or lease agricultural land" if that would make the total so owned or leased exceed 1500 acres. The exceptions for land acquired but leased to the immediate prior owner and land acquired for natural resource preservation purposes are continued. In addition, the law provides that a party who is a shareholder in an authorized farm corporation, the beneficiary of an authorized trust, or a limited partner in a limited partnership that owns or leases agricultural land can not obtain a similar status in another restricted entity after July 1, 1988.

In other words, an investor has one opportunity to invest in agricultural land holdings through one of the restricted business vehicles and can not, for example, be involved in one of each. The bill amended the penalty section 172C.5(3), to provide that the courts shall have the authority to determine the method for implementing the divestiture of interest component of the penalty provision.

The second main provision of the bill concerns newly imposed restrictions on the contract feeding of swine by meat processors. When Chapter 172C was first enacted in the mid-70's it prohibited meat processors from owning feedlots in the state. Now an additional restriction applies: "In addition, a processor shall not directly or indirectly control the manufacturing, processing, or preparation for sale of pork products derived from swine if the processor contracted for the care and feeding of the swine in the state." An exception is provided for cooperatively owned businesses that contract with member producers.

The third major change is the reinstitution of a reporting requirement for certain forms of businesses holding agricultural land. "Reporting entities" are subject to a general reporting requirement. "Reporting entity", a new classification, is defined to cover the presidents of corporations owning farm land, the general partners of limited partnerships owning farmland, and persons who are in a fiduciary capacity for a trust that is authorized to own farmland. Each of these categories of reporting includes an exemption for family farm related business associations.

Additional sections deal 1) with reports by contract feeders designed to help implement the restrictions on corporate feeding of livestock and the contract production of swine by processors; and 2) with duties of the Secretary of State concerning confidentiality of the reports. – *Neil D. Hamilton*

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

AALA Annual Meeting registration information

Brochures detailing registration information concerning the Ninth Annual AALA Conference and Annual Meeting will be mailed in the near future.

In the meantime persons desiring to make advanced arrangements may call a toll-free number for room reservations; Weston Crown Center Hotel, 1-800-228-3000. A block of rooms has been reserved until September 28th at these rates: $75.00/night for single and $85.00/night for double occupancy.

To register for the conference, call UMKC at 816-276-1848. The registration fee is $195.00. Law students may attend for $75.00.

Questions concerning the conference should be directed to UMKC/CLE 816-276-1848.