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Former dairyman wins ASCS/DTP challenge

The U.S. District Court for the District of Columbia has handed a substantial legal victory to former dairyman Joe Lucio of Escondido, California. Mr. Lucio sued the Secretary of Agriculture in 1990 challenging an ASCS penalty adjustment made to his Dairy Termination Program (DTP) cattle base that reduced his program payment by \$189,440. In an August 27, 1992 Memorandum Opinion written by District Judge John Pratt, the court held that ASCS had "failed miserably" in following its own regulations in Mr. Lucio's case and was "slapdash" in its review of his claims; consequently the court had "no problem in finding that the agency's determination is arbitrary and capricious and unsupported by the evidence." The court remanded the case to the agency for further proceedings consistent with the court's opinion.

The background of the case explains the court's strong language. Joe Lucio was a dairyman all of his working life. In 1986, at the age of 73, he decided to consider entering into the DTP and retiring from farming. He attended an informational meeting in Chino, California on February 20, 1986, at which a representative of ASCS met with area farmers to explain the DTP. Several farmers at the meeting asked what they should do if they had sold cattle after January 1, 1986, and the same cattle were not available for repurchase. Mr. Lucio understood the representative to say that they should try to repurchase the same cattle, but if not possible, to repurchase cattle of the *same kind and quality*. On March 3 and 4, 1986, Mr. Lucio purchased 264 cattle to replace heifers he had sold to a cattle broker in January, 1986.

On March 5, 1986, Mr. Lucio submitted his DTP application. Mr. Lucio's application was approved on March 10, 1986. His preliminary base was approved for 12,819,659 pounds at a bid price of \$14.80 per hundred weight. On March 10, 1986, the ASCS Committee met to review the application and documentation. Both the County and State Committees recommended that Mr. Lucio be allowed to include the replacement cattle in his base. On July 1, 1986, Thomas Von Garlem, acting as the Assistant Deputy Administration, State and County Operations (DASCO), approved plaintiff's participation in DTP with respect to the repurchased heifers. However, he credited Mr. Lucio with only 200 heifers.

On July 9, 1986, Mr. Lucio wrote to DASCO explaining that he had actually purchased 264 cattle and not 200; he enclosed documentation of the purchase. On July 28, 1986, Mr. Lucio received a letter from Mr. Von Garlem denying payment for *any* of the 264 cows. The letter indicated that the additional information Mr. Lucio provided raised "additional questions." Mr. Lucio requested a reconsideration and submitted substantial and detailed documentation of his cattle repurchase. On

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Decision issued in migrant agricultural labor case

In *Salinas v. Rodriguez*, 963 F.2d 791 (5th Cir. 1992), the Fifth Circuit Court of Appeals considered the application of the joint employment doctrine to the small-business exemptions of the Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (AWPA). The plaintiffs, migrant workers represented by attorneys with Texas Rural Legal Aid, Inc., brought an action against a farm labor contractor and farmers who contracted to have the migrant labor crews pick and hoe cotton. Under both the FLSA and the AWPA, growers who contract with farm labor contractors for agricultural labor services are generally considered to be joint employers of the agricultural laborers, unless the growers qualify for statutory exemptions from the acts. Both acts have a small-business exemption which provides that the act does not apply to any agricultural employee who works for an employer who did not, during any calendar quarter of the preceding calendar year, use

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September 28, 1986, Mr. Von Garlem repended to Lucio's appeal. He reinstated Lucio's eligibility for payment for 200 of the heifers, but denied it for the other 64. In addition, the letter stated:

Information furnished by you at various times is both inconsistent and questionable. It is highly unlikely that such can be satisfactorily resolved without a formal investigation by the USDA Office of the Inspector General.

Mr. Lucio himself believed an OIG investigation was a good idea. He asked DASCO to request such an investigation, but DASCO refused. On April 27, 1988, Mr. Lucio personally requested an investigation by OIG.

The OIG conducted an investigation and issued a formal report which concluded that Lucio had indeed purchased the 64 additional heifers and that an ASCS employee had altered one of plaintiff's receipts. On February 9, 1989, DASCO told OIG regional director Floyd

Cotton that there was nothing in the OIG report to warrant additional relief. Mr. Cotton responded April 17, 1989, stating his investigation had completely cleared Mr. Lucio and had verified his statements. Mr. Cotton recommended that the agency thoroughly review the matter "to assure that Mr. Lucio is not unfairly penalized due to errors propounded by ASCS." On May 24, 1989, the agency wrote to Mr. Lucio, again denying relief and indicating that there was no significantly new information that would warrant a change in the September 26, 1986 determination.

Mr. Lucio filed suit seeking additional DTP participation in the amount of \$189,440 for the 64 heifers. He sought a declaratory judgment and an order remanding the case to the Secretary with instructions to permit full participation in the program. He also sought damages on a constitutional due process claim.

Specifically, Mr. Lucio claimed that the Secretary violated ASCS procedures for conducting appeals. He claimed that DASCO failed to order an investigation by OIG even though DASCO itself indicated that the dispute could not be satisfactorily resolved without a formal investigation. He argued that ASCS did not prepare a written record containing a clear, concise statement of material facts as required by 7 C.F.R. § 780.8(b). Mr. Lucio claimed that DASCO failed to allow him to correct errors in forms although such correction is permitted by the DTP handbook. Finally, Mr. Lucio alleged that the Secretary of Agriculture violated the Fifth Amendment by denying his right to due process.

The Secretary argued that the case was unreviewable by the district court because the agency's actions were equitable and were committed to its discretion under law.

In its opinion, the District Court first addressed the procedural failures alleged by Mr. Lucio:

It is clear that the agency failed miserably in following its procedural appeal requirements. Specifically, the agency failed to employ the means "most likely to obtain the facts relevant to the matter at issue." DASCO indicated that the facts could not "satisfactorily be resolved without a formal investigation by the USDA Office of Inspector General" and yet the agency did not request one, even after plaintiff himself requested it. Further, DASCO neither prepared a formal statement of issues, nor a written record containing a clear, concise statement of material facts as required by 7 C.F.R. 780.9(d).

Mem. Op. at 10.

The Secretary argued that the entire matter was unreviewable because his

decision to grant credit for twenty cows purchased after January 1, 1986, was equitable in nature, and was committed to agency discretion by law. The court squarely rejected this argument:

Although the contours of the program were left to the agency to determine, it cannot be that the agency was given unfettered discretion to arbitrarily choose an amount of compensation after the contract was signed. This is not what discretionary means.... DASCO is not free to grant any relief it wants based purely on the whim and caprice of the agent. If it decides to permit the repurchase of cows due to the farmer's misunderstanding of the regulation, it must then take into account the cows that were actually repurchased.

Mem. Op. at 11.

The court went on to say that, while the agency did have equitable powers under its regulations in circumstances warranting special consideration, it had no authority to disregard its own regulations "or to dispense money at whim." Once the agency agreed to permit Mr. Lucio to purchase replacement heifers, the court held it was bound to be consistent and compensate him for all of the cows which he actually purchased. Instead, the agency had disregarded Mr. Lucio's evidence, and accused him of fraud. To this the court stated:

The agency here was slapdash in its review of plaintiff's claims and disregarded findings by the OIG. It is not clear that there ever was a serious examination of plaintiff's claims nor a statement of facts. Defendants cannot now hide behind an argument that any relief was completely discretionary.

Mem. Op. at 15.

Although Mr. Lucio had sought a clear declaration of his full DTP entitlement in the federal court action, the court remanded the case to the agency for a new determination in accord with the court's opinion. Since, as the court noted, the OIG investigation concluded that Mr. Lucio had purchased the additional heifers, the court concluded that "DASCO should have little trouble in granting plaintiff participation for his full complement of cows." Mem. Op. at 17. The court dismissed Mr. Lucio's constitutional claims brought against two DASCO officials for alleged due process violations.

—James T. Massey, counsel for Mr. Lucio, Sisters, OR

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more than five hundred man-days of agricultural labor. FLSA, 29 U.S.C. § 213(a)(6)(A); AWP, 29 U.S.C. § 1803(a)(2).

The parties agreed that most of the individual farmer defendants would qualify for the small-business exemption if they were the sole employers of the migrant workers. The plaintiffs, however, contended that if the farm labor contractor did not qualify for the exemption then the individual farmers, as joint employers, did not qualify for the exemption. Relying on language in Department of Labor interpretative bulletins, the plaintiffs sought to have all the man-days of agricultural labor attributed to the farm labor contractor imputed to all the contracting growers. The jury in the district court trial apparently rejected this method of computation and computed the man-days of agricultural labor for each farmer on an individual basis. As a result, only four of the farmers and the farm labor contractor were held liable for violations of the acts. The jury decided that the other farmer defendants were exempt from the acts.

On appeal, the Fifth Circuit affirmed the judgment. The court first noted that interpretative bulletins do not have the force of law and cannot provide the basis for a result contrary to statutes or regulations. The court determined that both the acts and their regulations require that only those man-days of labor expended for a particular farmer are counted towards that farmer's total number of man-days for purposes of the small business exemption. The court also examined the language of the bulletins and determined that the bulletins could reasonably be construed to provide that the man-days of agricultural labor imputed to a farmer are only those for which the farmer is the employer. When the farmer is not using the agricultural worker's labor, the farmer is not the worker's joint employer. Therefore, the court determined the bulletins are consistent with the statutes and the regulations on the issue of assessing the man-days of agricultural labor for the small-business exemption.

—Martha L. Noble, Staff Attorney, National Center for Agricultural Law Research and Information, Fayetteville, AR

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Debt restructuring: FmHA procedures in bankruptcy

The Eighth Circuit recently addressed some of the issues that arise when a Farmers Home Administration (FmHA) borrower files for relief in bankruptcy under Chapter 7 of the Bankruptcy Code. *U.S. v. Nelson*, 969 F.2d 626 (8th Cir. 1992). The court first reviewed the restructuring notice that FmHA sends soon after the bankruptcy is filed. *Id.* at 629. This notice is sent to the debtor's attorney and advises him or her of the borrower's right to apply for restructuring.

The debtor in *Nelson* argued that the notice sent to the debtor's attorney violated the automatic stay in that it requires the debtor to respond or forfeit his or her restructuring rights. The court disagreed, holding that the letter did not violate the automatic stay. *Nelson*, 969 F.2d at 631.

The court also addressed the "preservation rights" (the right to buy or lease back the property) that FmHA must furnish to former borrowers. *Id.* at 631. The debtor argued that he had been illegally denied these rights because of an agreement between FmHA and the bankruptcy trustee. According to this agreement, the trustee planned to sell the mortgaged property, paying FmHA for its interest in the prop-

erty, with FmHA never taking title. The court upheld the validity of this arrangement, holding that a debtor's preservation rights attach only when FmHA takes the property into inventory. Property that passes from the debtor to the bankruptcy estate (before it is foreclosed and taken into FmHA inventory) can be sold by the trustee without regard to the preservation loan servicing rights. *Id.*

Finally, the court held that the debtor could not claim the preservation rights as exempt under the homestead exemption because the exemption applies only to property occupied by the debtor. In contrast, preservation rights apply only after the debtor has lost possession of the property. *Id.* The court concluded by noting that FmHA's rights in bankruptcy should not be inferior to other creditors "merely because it offers extraordinary assistance to its borrowers in bankruptcy". *Id.* at 632. Given the history of FmHA-borrower relations, there is no doubt that many FmHA borrowers would disagree heartily with this characterization.

—Susan A. Schneider, Associate, Arent, Fox, Kintner, Plotkin and Kahn, Washington, DC

Federal Register in brief

The following is a selection of matters that were published in the Federal Register in the month of September, 1992. The editor apologizes for the fact that the library had an incomplete set of the Federal Register for the month of September. The following days were researched: September 1-4, 8, 14-18. Check this column in the November *Ag Law Update* for the conclusion of the month of September, as well as the month of October.

1. EPA; Pesticide programs: worker protection standards for agricultural pesticides; final rule. 57 Fed. Reg. 42472.

2. Packers and Stockyards Administration; Review of existing regulations and statements of general policy; request for

comments; comments due November, 16, 1992. 57 Fed. Reg. 42515.

3. FmHA; Processing of debt settlement cases; final rule; effective date 9/16/92. 57 Fed. Reg. 42691.

—Linda Grim McCormick, Toney, AL

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Agriculture and the Common Market: the different commodity markets

By Eric Strating

The Common Agricultural Policy (CAP) of the EC has five broad objectives:¹

(a) to increase agricultural productivity;

(b) to ensure a fair standard of living for the agricultural community;

(c) to stabilize markets;

(d) to assure the availability of supplies; and

(e) to ensure that supplies reach consumers at reasonable prices.

To achieve the goals of the CAP the EC created a common organization of agricultural markets.² This organization consists of several different arrangements which are specific to each sector of agricultural production. The extent of Community intervention in the market varies by commodity. The diversity and complexity of the measures the CAP employs to implement the different forms of organization are immense.³ Some of these measures are similar for all sectors, others are common to several sectors, while still others apply to one sector only. The common organization of the market in grains may be taken as the basic model of a fully developed Community-market organization.

The common market in grains

Because grain (wheat and coarse grains) is an important cash crop on a large number of farms in Europe,⁴ the common organization of the market in grains was the first CAP support system to be adopted and worked-out in depth. The arrangements that were adopted served as a model for other products for which full support regimes were to be used.⁵

In addition, because grain is a major cost component for the livestock industries, the common organization of the markets in pigmeat, poultrymeat, and eggs are treated as auxiliary to the market in grains.⁶ Although dairying and beef

production are mainly grass based in Europe, grain is also a major cost item in these sectors.⁷ Finally, grain is easy to store and transport and thus plays an important role in agricultural trade.⁸ Grain has traditionally been the sector in which the U.S. and EC agricultural policies have been furthest apart. Therefore, grain plays an important role in the current trade liberalization talks of the GATT Uruguay Round.

The price regime of the common organization of the market in grains

The Council of Ministers of the EC, composed of the Agricultural Ministers from the member states as far as the CAP is concerned, sets a *target price* for each variety of grain at the beginning of each marketing year. This price is the outcome of a process of political negotiations and is usually set way above world market price levels. The target price is the price producers are supposed to obtain, but is not always in itself available to farmers.⁹

The *intervention price*, on the other hand, is the price guaranteed to the producer. It is the price at which national intervention agencies will purchase grains from the producers to raise prices to target price levels; hence, it represents the guaranteed minimum price for farmers.¹⁰ Purchased grain is initially stored and eventually put back into the market by the intervention bodies under conditions which avoid market deterioration,¹¹ or are disposed of on the world market at knock-down prices.¹² The target price is set at Duisburg (Germany), which represents the point of maximum deficit for grains in the Community. The intervention price is set at Ormes (France), the area of maximum grain surplus in the Community. Both target and intervention prices are set by the Council in response to political pressures. The difference between the target price and the intervention price reflects, first, the transport costs between Ormes and Duisburg, and second, a certain marketing margin.¹³

How the different national currencies of the EC member states affect the common prices

Although to date there is no single European currency in all the member states, the common agricultural prices are initially set in European Currency Units (ECU).¹⁴ The common prices are then converted into the national currencies of the 12 member states by using *green rates*. The green rate of exchange was estab-

lished to ensure uniformity of farm prices throughout the EC despite the devaluation or revaluation of individual currencies. When a member state devalues or revalues its currency, the previous rate of exchange may be maintained for agricultural products and adjusted only gradually to the official market rate, so that national farm prices do not fluctuate too radically.¹⁵

Then, a complicated system of *monetary compensatory amounts* (MCAs) was created to compensate for currency fluctuations, so that speculation would not affect intra-community trade. For a member state whose green rate is below the market rate of exchange, the MCA applies as a levy or tax on imports and a subsidy on exports; for a member state whose green rate is above the market rate, the MCAs have the opposite effect. This agrimonetary system is considered incompatible with the overall goal and the completion of the common market of "Europe 1992." The anticipated elimination of the system by Jan. 1, 1993 will be a formidable assignment.¹⁶

Measures operating at the Community frontiers

To protect the internal Community market, a *threshold price* is applied at the borders of the Community, as the minimum import price. The threshold price is calculated so that the selling price for imported grain on the Duisburg market (the market of maximal deficit) is the same as the target price for Community produced grain.¹⁷ It ensures that the EC target price cannot be undercut by cheaper imports from third countries.¹⁸ Therefore, threshold prices are derived from target prices by allowing for transport costs from the Community frontier to Duisburg.¹⁹ Threshold prices are fixed for Rotterdam (The Netherlands), the EC's main grain import harbor. In the case of imports, a *variable import levy* is charged, which covers the full difference between world prices (c.i.f. Rotterdam) and EC threshold prices.²⁰ Consequently, the levy has the effect of raising the world market price of grain to the threshold price level.

In the case of exports of Community grain, which is usually priced above world market price levels, *export restitutions* or *refunds* are granted to enable EC-produced grain to compete on the world market. The export restitution represents the difference between the average world price and the actual high internal Community price.²¹ Most of the time, however, the refund awarded to an EC exporter en-

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ables him to undercut other exporters in third country markets.²² Therefore, it has been the system of export refunds that has given rise to the greatest number of complaints from the EC's trading partners. The United States, in particular, established its Export Enhancement Program (EEP) to counter the effects of this EC export subsidy.²³

Other mechanisms at work in the market for grains

In its original form, the common organization of the grain market created an open-ended commitment of the intervention agencies to buy whatever was produced.²⁴ This encouraged serious overproduction and caused the build-up of large grain stocks.²⁵ Attempting to prevent serious surplus production, the EC introduced agricultural stabilizers. Stabilizers cover a range of mechanisms designed both to stabilize agricultural markets and to bring budget expenditure under control.²⁶ A first step was set in 1986 by introducing a so-called basic co-responsibility levy, a tax on off-farm grain sales of 3%.²⁷ In addition, since 1988 a system of *Maximum Guaranteed Quantities* (MGQ) was introduced, which established a production ceiling beyond which automatic price cuts come into effect. If EC grain production exceeds 160 million tons a year,²⁸ the intervention price will be automatically lowered by 3%. At the same time, an additional co-responsibility levy of 3% has been introduced, which will have to be paid from the beginning of the next grain marketing year only if the MGQ was exceeded in the previous year.

All imports into the Community or exports therefrom are subject to the issuance of either an import or an export license. The license contains both an authorization and an obligation to carry out the transaction. Although the licenses are issued by the national authorities, they are Community licenses. A deposit is used to ensure that the transaction is performed during the period of validity of the license.²⁹

Reforms of the 1991/92 price package

The 1991/92 price package of the EC Council increased the basic co-responsibility levy of 1986 from 3 to 5%. Because the 1990 grain harvest was below the MGQ, the additional co-responsibility levy will not be triggered. Farmers who participate in an existing 5-year set-aside program, in which land under grains and other selected crops is taken out of production, will be reimbursed for the 2% increase in the basic co-responsibility levy. In the price package, a new 1-year set-aside program, which supplements the existing 5-year program, was introduced. Under the new set-aside scheme, produc-

ers who sign up will be required to set aside at least 15% of their eligible area, including at least 15% of acreage planted to grains. Participating farmers will receive a per-hectare payment for the land they remove from production, will be reimbursed for the 5% co-responsibility levy, and may receive additional payments by national governments.³⁰ Participants must maintain idled land with a suitable vegetative cover or other means.³¹

Reforms of the MacSharry Proposal

In July 1991, the EC Commission (the Community's executive) presented a proposal to the EC Council of Ministers, designed by the Irish Commissioner for Agriculture Ray MacSharry.³² In the proposal the Commission expressed its deep concern about the surplus production and excessive stocks, and emphasized the need for fundamental reform. First, it proposed a 35% cut in support prices for grains by 1996.³³ The existing stabilizer arrangements, including the co-responsibility levies and the MGQ's would subsequently be withdrawn.³⁴ Furthermore, it introduced direct income payments (more or less decoupled payments)³⁵ to compensate farmers for this decrease in support prices.³⁶ In addition, grain farmers would have to comply with new set-aside provisions. Farms larger than 20 hectares would have to set aside 15% of their arable crop land to be eligible for the decoupled payments. Farms smaller than 20 hectares would not have to set aside any land.³⁷ These proposals amount to the most fundamental reform to date of the mechanisms of the CAP.

Initially, the Council of Agricultural Ministers indicated that it would not accept the MacSharry Proposal in its current form.³⁸ However, in May 1992, the Community's farm ministers agreed to a far-reaching reform package. The centerpiece of the reform is that in the grain sector support prices will be cut by 29% over a three year period ending in 1996. The grain co-responsibility levy will be abolished. Bigger farmers have to set 15% of their grain acreage aside, in order to be compensated for the losses resulting from the reduction in support prices.³⁹ However, this direct form of income subsidy will not be completely decoupled from production: payments will be linked not to output itself, but both to the area of land under grains and to a regional measure of yield. The cut in EC support prices will decrease the gap between the EC target price and the world market. Consequently, export subsidies are expected to fall significantly by 1997.⁴⁰

The market in pigmeat, poultrymeat, and eggs

Since pigmeat, poultrymeat and eggs

are considered "processed grain," their support regimes may be described together. The support mechanisms for these sectors are relatively lightly structured because of the cyclical nature of production, the self-correcting nature of the market mechanism and the fear of large surpluses.⁴¹ An important role is played by the *sluice-gate price*, a minimum import price based on the level of production costs in non-member states. This price is fixed by calculating the cost of the feed grain required at world market prices and adding an amount for other feed costs, overheads and marketing costs.⁴²

The pigmeat sector has price support measures, but no fixed price guarantee. The only institutional price set is the *basic price*, which is calculated by taking the sluice-gate price and a levy on third country imports into account. The *import levy* represents the difference in cost between producing pigmeat in the EC and in third countries. In its concept, the basic price is equivalent to the target price in the grain regime. In this sector, however, intervention buying is not mandatory, and may occur only when Community prices are below 103% of the basic price.⁴³

For eggs and poultry meat, a similar system is used to calculate sluice-gate prices and levies, but there is no internal price support. *Export refunds* are introduced in the pigmeat as well as the poultry sector to remove price-depressing surplus production from the Community market.⁴⁴

The milk market

The basic organization of the milk market closely resembles the grain market, setting target prices, intervention prices and threshold prices, charging import levies, and granting export refunds. Also, surplus production has given rise to drastic remedies.⁴⁵

A *co-responsibility levy* was introduced in 1977 requiring farmers to pay up to 2.5% of the target price of milk as a measure to stabilize markets. In addition, the principle of a *guarantee threshold* was adopted in 1983, setting a limit for the annual increase in milk production which could be accepted without consequences for the prices.⁴⁶ Finally, *quotas* for production were introduced for milk in 1984, and their levels were reduced in subsequent years. In the quota system, a reference quantity was allocated at either the farm level or at the level of the milk purchaser. If this quota is exceeded, the farm or purchaser is subject to a *superlevy* equal to 115% of the target price.⁴⁷ This levy effectively prohibits production above the quota. The proceeds of the levy are allocated to the financing of EC expenditures in the milk and milk-products sec-

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tors.⁴⁸

The beef market

The target price in the beef sector is called the *guide price*. This market price objective is supported by an *intervention price*, calculated as a percentage of the guide price. As in the grain and dairy sectors, the original system has been altered to reduce production and surplus stocks.⁴⁹ The alarming increase in beef stocks was due to the slaughtering of dairy cows as a result of the milk quotas, and the fall in grain prices that created relatively cheaper pork and chicken. Intervention purchases are no longer permanent and unconditional, but are limited to certain categories of meat. They are also subject to other conditions intended to discourage the build-up of stocks.⁵⁰ To ease the transition, provision was made for the payment of a special *premium* to beef producers, except for the United Kingdom. There, a system of premiums (functioning more or less as *deficiency payments*)⁵¹ has been authorized as the standard system of price support.

The sheepmeat market

In determining the organization of the sheepmeat (mutton and lamb) market, the EC had to recognize that the United Kingdom and France accounted for more than 75% of total production. These two member countries had quite different approaches to market support. In the UK, a *deficiency payment* system was operated, keeping consumer prices down and allowing for large imports from New Zealand. France, operated a more EC-like system, based on high prices to both the producer and consumer.⁵²

The common organization of the sheepmeat market, allows each member state a choice between an *intervention* system with an annual subsidy for ewes, or a variable slaughter *subsidy*, also together with the subsidy for ewes. France opted for the first and the UK for the latter. Other member countries apply only the subsidy for ewes.⁵³

The sugar market

Although basically modelled on the grain regime, the common sugar market (mainly beet sugar) has a number of special features. First, sugar has been subject to production *quotas* ever since the common market was created. Quotas are allocated among member states, which in turn allocate them to the sugar refineries. The refineries then contract with producers. Production outside the maximum quota is not to be disposed of on the internal market and is subject to a levy.⁵⁴

Second, the sugar regime is set up as an arrangement that ensures self-financing of its marketing system. Producers in the EC pay contributions to the budget sufficient for the costs of all exports. Finally,

EC imports from certain developing countries enter the Community free of charge and enjoy the benefit of the internal price supports, despite the Community's own surplus production.⁵⁵

Common organization of the oilseeds sector

The oilseeds sector is characterized by a long-running dispute between the U.S. and the EC. In 1962, the U.S. managed to secure a "zero-duty-binding" for oilseeds and other feed substitutes from the EC during the GATT Dillon Round. Therefore, U.S. exports enter the EC duty-free. Since then, the EC's basic method of support for the oilseed sector has been through deficiency payment subsidies to farmers whenever the EC target price is higher than the world-market price, which is usually the case. However, a GATT panel has found that the level of these subsidies undermines the U.S.'s right to duty-free access in the EC. The Community so far has refused to comply with the report of the GATT panel. Meanwhile, the U.S. threatens to retaliate against the EC by raising tariffs on \$1 billion in EC imports.⁵⁶ The oilseed conflict has been pulled into the trade talks of the GATT Uruguay Round and now seems to be the main obstacle for reaching an agreement between the U.S. and EC on agricultural trade liberalization.⁵⁷

Special features of other organizations

The market in fruits and vegetables is characterized by the important role played by producers' organizations and common quality standards. Producers may organize the withdrawal of products from the market and may even extend their marketing rules in certain circumstances to producers who are not members of the organization, provided they are compatible with EC law. Provision is also made for "classic" intervention by national intervention bureaux.⁵⁸

EC-produced tobacco is of a variety for which demand is limited. The tobacco regime mainly provides for a system of premiums for purchasers, paid to the buyers of EC-produced raw tobacco, designed to bring its price down to world levels and thus to provide an incentive to take all the Community's production. *Ad valorem* import duties apply to imports from third countries.⁵⁹ However, most imports come in at nil or preferential duties.⁶⁰ The main support measures for wine producers involve aids for storage and distillation.⁶¹

The recent reform package for the non-grain sectors

The May 1992 reform package on grains opens the way to price cuts for other products. Beef intervention prices will be cut by 15% and government purchases will be further limited. This price cut will

be partly achieved through reductions in the cost of grain used to feed livestock, which will also have a knock-down effect on the price of oilseeds (another animal feed). Sheep subsidies will be reduced by limiting the flocks eligible for the full annual subsidies for ewes. The milk quotas will be trimmed by 1% annually for the next three years starting in 1993. Support prices for butter will be cut by 7.5%. EC farm spending (currently almost two-thirds of the budget) will have to be limited to not more than half of the total EC budget.⁶² The complete reform package is hailed by the EC as "the most important development in the 30-year history of the CAP."⁶³

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¹ Treaty Establishing the European Economic Community (EEC Treaty) art. 39(1).
² EEC Treaty art. 40(2)(c).
³ Simon Harns, Alan Swinbank & Guy Wilkinson, *The Food and Farm Policies of the European Community* 44 (1983).
⁴ Ian R. Bowler, *Agriculture Under the Common Agricultural Policy: A Geography* 112 (1985).
⁵ Harris, Swinbank & Wildinson, *supra* note 3, at 61-2.
⁶ J.A. Usher, *Legal Aspects of Agriculture in the European Community* 53 (1988).
⁷ Harris, Swinbank & Wildinson, *supra* note 3, at 61.
⁸ Allan E. Buckwell, David R. Harvey, Kenneth J. Thomson & Kevin A. Parton, *The Cost of the Common Agricultural Policy* 101 (1982).
⁹ Usher, *supra* note 6, at 54, 59.
¹⁰ *Id.*
¹¹ Giancarlo Olmi, *Common Organisation of Agricultural Markets at the Stage of the Single Market*, 5 *Common Mkt. L. Rev.* 373 (1967-68).
¹² Rosemary Fennell, *The Common Agricultural Policy of the European Community: Its Institutional and Administrative Organization* 108 (1979).
¹³ Harris, Swinbank & Wilkinson, *supra* note 3, at 66.
¹⁴ The ECU is a weighted average of the EC member states, and is currently used for internal EC accounting purposes. Plans to create an Economic and Monetary Union (EMU) in Europe including a European central bank and the ECU as its single currency became uncertain after the Danish voters rejected the Maastricht Treaty which would have established such an EMU by no later than 1999.
¹⁵ *Agriculture*, available in LEXIS, Europe Library, European News File, at 16 (Feb. 13, 1992).
¹⁶ See Timothy E. Josling & Walter H. Gardiner, *Dismantling the EC's Agrimonetary System: Effects on European Agriculture*, in EC 1992: Implications for World Food and Agricultural Trade 7-20 (U.S. Dept' of Agriculture Staff Rep. No. AGES 9133, 1991).
¹⁷ Usher, *supra* note 6, at 55.
¹⁸ Fennell, *supra* note 13, at 109.
¹⁹ Harns, Swinbank & Wilkinson, *supra* note 3, at 66.
²⁰ *Id.*
²¹ Fennell, *supra* note 12, at 110.
²² Harris, Swinbank & Wilkinson, *supra* note 3, at 67. It is also possible that world prices exceed Community prices, which actually happened during the world commodity boom in the years 1973-75. As a result, EC exports were charged with an *export levy*. P.J.G. Kapteyn & P. VerLoren van

Themaat, Inleiding tot het recht van de Europese Gemeenschappen (Introduction to the Law of the European Communities) 413 (3rd ed. 1980).

²³ The EEP is an export program initiated in May 1985 to help U.S. exporters meet competitors' prices in subsidized third markets. Under the EEP, exporters are awarded generic commodity certificates which are redeemable for CCC-owned commodities, enabling them to sell certain commodities to specified countries at prices below those of the U.S. domestic market. Lipton, *supra* note 14, at 15.

²⁴ Usher, *supra* note 6, at 56.

²⁵ By the close of the 1990/91 marketing year, EC grain intervention stocks had climbed to a record 18.8 million tons. The reunification of Germany is placing additional pressure on the EC intervention system for grains. The Commission estimates that despite the stabilizer system stocks could increase to an all-time record level of 29 million tons by the end of the 1991/92 marketing year. Michael T. Herlihy, *EC Intervention Stocks of Grain Reach Record High, in Western Europe: Agriculture and Trade Report (Western Europe) 60-2* (U.S. Dep't of Agriculture Situation and Outlook Series, 1991).

²⁶ Graham Avery, *Agricultural Policy: The Conclusions of the European Council*, 25 Common Mkt. L. Rev. 525 (1988).

²⁷ See Herlihy, *Grains, in Western Europe*, *supra* note 25, at 21.

²⁸ Production in former East Germany, which was reunified with West Germany and thus suddenly became part of the EC on October 3, 1990, does not yet count towards the MGQ. *Id.*

²⁹ Usher, *supra* note 6, at 66-7.

³⁰ Herlihy, *supra* note 27, at 22. France, the largest EC grain producer, has announced that it will provide an additional premium of 800 francs per hectare (currently around \$365 per acre) to encourage participation in the new program. *Id.*

³¹ Michael T. Herlihy, *New EC Reforms in the Wings, Agricultural Outlook*, Nov. 1991, at 19.

³² Commission of the European Communities, *The Development and Future of the Common Agricultural Policy: Proposals of the Commission [MacSharry Proposal]* (1991).

³³ The price cuts are not limited to the grain sector. Other sectors will be faced with a 5-15% price cut. See *infra* notes 62-63 and accompanying text.

³⁴ MacSharry Proposal, *supra* note 32, at 9.

³⁵ De-coupled payments are income support in the form of direct payments to the farmer unrelated to the level of production. They represent a radical departure from the EC's traditional commodity-based support policy. Obviously, there is a welfare stigma associated with direct payments. David Harvey, *The Production Entitlement Guarantee (PEG) Option, in The Common Agricultural Policy and the World Economy: Essays in Honour of John Ashton 314* (Christopher Ritson & David Harvey eds., 1991).

³⁶ MacSharry Proposal, *supra* note 32, at 9-10.

³⁷ *Id.* at 12-3.

³⁸ See Anthony Phelps, *EC Meeting on CAP Reform Falters on Lack of Direction*, *Feedstuffs*, March 16, 1992, at 5.

³⁹ *European Community OKs Farm Budget Cuts: Long-awaited Reform Paves the Way for GATT [European Community OKs Farm Budget Cuts]*, *Agweek*, May 25, 1992, at 2.

⁴⁰ *EC Farm Policy: Getting Better [EC Farm Policy]*, *Economist*, May 23, 1992, at 55-6.

⁴¹ Harris, Swinbank & Wilkinson, *supra* note 3, at 83-4.

⁴² Organisation for Economic Co-Operation and Development, *National Policies and Agricultural Trade: Study on the European Economic Community*, 75-6 (1987).

⁴³ Harris, Swinbank & Wilkinson, *supra* note 3, at 87.

⁴⁴ Usher, *supra* note 6, at 87.

⁴⁵ See *id.* at 72-4.

⁴⁶ Organisation for Economic Co-Operation and Development, *supra* note 42, at 73-4.

⁴⁷ P.J. Teunissen, *European Cooperation and Integration: The Reshaping of a Continent 13.6* (Publication of the Fund for International Studies, Groningen, The Netherlands, 1990).

⁴⁸ Usher, *supra* note 6, at 80.

⁴⁹ *Id.* at 82.

State Roundup

IOWA. Coop's liability in pesticide damages suit affirmed by majority of damages reversed. In *Kosmacel v. Farm Service Co-op of Persia*, 485 N.W.2d 99 (1992), the Iowa Court of Appeals has issued the long awaited decision in the first Iowa case involving an allegation of damages, including toxic tort claims, relating to the use and disposal of agricultural pesticides. The Iowa District Court for Harrison County had granted the plaintiffs over \$88,000 in damages in 1990. The case involved a family living next to the defendant's pesticide loading facility who claimed the co-op and its customers had been negligent in the manner in which pesticides were mixed and in disposing of containers, with the result that their property was contaminated. The court agreed that the evidence showed the co-op had violated its duty under Iowa law to handle pesticides so as not to cause injury and that damages had occurred. Damages were awarded for injury to the vegetation on the property, for injury to the real property, for medical expenses, and for pain and suffering for future illness, as well as punitive damages.

The defendants appealed claiming the evidence did not support the award of various compensatory damages or punitive damages. The Iowa Court of Appeals, after considering the evidence supporting each portion of the damage award affirmed in part and reversed in part. Specifically, the court upheld \$2,850 in damages to vegetation, \$2,564 in medical bills, and \$10,000 in punitive damages; however the court reversed the award of \$28,500 in property damage and \$45,000 in mental anguish for future illness.

The issue on appeal that concerned the most significant legal development raised by the case was the question of damages for mental anguish over the prospect of future illness — otherwise known as a toxic tort syndrome. On appeal, the court noted "Iowa has not yet addressed the issue of whether fear of a future illness is sufficient to support damages for mental anguish." The defendants claimed there was insufficient evidence to establish any

reasonable fear of illness likely to result from exposure to the chemicals involved here. On the other hand, the plaintiffs claimed they were worried about the possibility of future injury and the trial court concluded the fears of future illness were reasonable and prudent.

The appeals court considered Iowa law on the issue of when damages may be awarded and the arguments of the parties as to what evidence was necessary to support a claim for future harm. The court concluded it was not sufficient for the plaintiffs merely to say they are worried that the defendants' conduct made them more susceptible to cancer. Instead, the court ruled the plaintiffs must show "reliable data linking the particular herbicide the plaintiffs were exposed to an increased future risk of development of cancer or other substantial harm."

The court noted "courts have not generally required proof or expert testimony concerning causation in toxic tort cases to be supported by epidemiological studies establishing a cause-effect relationship." But at the same time, the court said the "mere possibility of future harm is not sufficient." Instead the Iowa Court of Appeals ruled "[T]here has to be a threshold regarding the likelihood of development of the feared disease." The court concluded the plaintiff's evidence did not meet this threshold, meaning the \$45,000 damages for future illness was reversed.

The case is important because it illustrates the possible liability associated with negligent use and storage of pesticides. In this case the nature of the defendant's conduct supported a claim for punitive damages. However, the case also shows that the traditional rules concerning the showing required to establish damages to real property must still be satisfied. The case is also an important first statement on the issue of toxic torts and what linkage is required between the reasonable likelihood of some future illness and the damages claimed.

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⁵⁰ Avery, *supra* note 26, at 528-9.

⁵¹ Premiums or deficiency payments are direct government payments, per head of slaughtered cattle not purchased by the EC intervention bodies, based on the difference between the guide- or target price and not the actual EC market price.

⁵² Harris, Swinbank & Wilkinson, *supra* note 3, at 115-6.

⁵³ Organisation for Economic Co-Operation and Development, *supra* note 42, at 75.

⁵⁴ *Id.* at 69-70.

⁵⁵ Avery, *supra* note 26, at 528.

⁵⁶ See U.S. *informs GATT It Intends to Raise Tariffs on \$1 Billion in EC Imports*, 9 Int'l Trade Rep. (BNA) 785 (May 6, 1992).

⁵⁷ *Economist*, October 24, 1992, at 66, 70.

⁵⁸ Organisation of Economic Co-Operation and Development, *supra* note 42, at 78-9.

⁵⁹ *Ad valorem* tariffs (as opposed to the EC's traditional variable levy) are expressed as a fixed percentage of the value of an import.

⁶⁰ Harris, Swinbank & Wilkinson, *supra* note 3, at 163-4.

⁶¹ Usher, *supra* note 6, at 89.

⁶² See *European Community OKs Farm Budget Cuts, supra* note 39; *EC Farm Policy, supra* note 40.

⁶³ *EC Council Approves CAP Reform Plan, Feedstuffs*, May 25, 1992, at 1 (quoting EC Agricultural Commissioner Ray MacSharry).

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Report of Legislative Support Committee: Pilot Project on Production Contracts

The increasing use of production contracts in agriculture, i.e., contracts in which the farmer is under contract to grow or raise another's commodity, poultry or livestock, has generated interest in the agricultural law community. As has been reported in previous issues of the *Update*, this interest led to the selection of this topic as a pilot project for the AALA's Legislative Support Committee. At the recent AALA conference in Chicago, a listing of the materials collected was presented. This listing is in the written materials from that conference and, for members unable to attend, it can be obtained by contacting Susan A. Schneider at 202-857-8908. It catalogs the materials collected, providing as much information as to the source as was available. We are in the process of developing a method for making the materials easily available to AALA members through a central clearinghouse. Further information will be available on this in the near future.

Appreciation is extended to everyone who assisted with this project, particularly those who sent in citations and materials.

Susan A. Schneider,
Chair, Legislative Support Committee
Associate, Arent Fox Kintner Plotkin & Kahn, Washington, DC