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Beginning farmers and ranchers bill

On October 28, 1992, President Bush signed the *Agricultural Credit Improvement Act of 1992* (H.R. 6129) (hereinafter "the Act"), Pub. L. No. 102-554, 106 Stat. 4142, 102 Cong. Rec. H11255 - 61 (1992), legislation intended to provide much needed financial assistance to beginning farmers as well as to provide certain limitations on the focus of new Farmers Home Administration financing. Included within this Act are detailed provisions establishing several separate programs, the "Down Payment Loan Program", *Id.*, at § 7, pp. H11256 - 57; the program for "Special Assistance to Certain Qualified Beginning Farmers and Ranchers," *Id.* at § 8, pp. H11257 - 58; and the "Federal-State Beginning Farmer Partnership," *Id.* at § 5, p. H11256. Also included are numerous provisions affecting the operations of the FmHA loan programs, including amendments to the graduation requirements, *Id.* at §§ 9 & 14, pp. H11258 & H11259; strict guidelines for the time within which loan applications must be processed, *Id.* at § 13, p. 11258; a simplified application process for guaranteed loans under $50,000, *Id.* at § 15, p. 11259; procedures for the transfer of Indian lands pledged as collateral for FmHA loans, *Id.* at § 17, p. H11259; revised rules on debt service margin requirements, *Id.* at § 18, p. 11259; rules regarding the targeting of FmHA funds, *Id.* at § 20, p. 11260; and new equal access/gender provisions, *Id.* at § 21, p. 11261. This article provides an overview of the three major new programs established under the Act.

The Act revises the requirements for meeting the definition of "beginning farmer or rancher." *Id.* at § 19, p. H11260. A "beginning farmer or rancher" must be FmHA eligible; must have not operated a farm or ranch for more than ten years; must "materially and substantially participate" in the farming operation; must provide substantial day-to-day labor and management; must agree to participate in loan assessment, borrower training, and financial management programs; and must not own acreage that exceeds fifteen percent of the median acreage of farms or ranches in the county where the operation is located. In addition, the applicant must demonstrate that his or her "available resources" (including any resources of a spouse) are not sufficient to begin or continue farming or ranching on a viable scale.

The Act establishes a "Down Payment Loan Program" for qualifying beginning farmers or ranchers. This program envisions a new coordination of private, commercial, and federal funding for beginning farmers. The beginning farmer is required to pay at least ten percent of purchase price or appraised value of the property (whichever is lower) as part of the down payment. *Id.* at § 7, H11256. FmHA then provides financing for up to thirty percent of the purchase price or appraised value as the remainder of the down payment. *Id.* It is anticipated that the remaining long term financing will be derived from other sources such as a commercial lender or private seller. The FmHA loans under this program are to be for a term of no more than ten years, at an interest rate of four per cent, payable in equal annual installments and secured by a mortgage on the property second only to the long term financier. Restrictions in the Act provide that the down payment loans will not be available for properties with either a purchase price or appraised value of over $250,000. In addition, the down payment loans will not be available if the remaining financing is to be amortized over less than thirty years or has a balloon payment due within ten years.

The Act also establishes a program of "Special Assistance to Certain Qualified Beginning

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7th Circuit rules in soybean trader case

In an opinion by Chief Judge Bauer, the Seventh Circuit Court of Appeals has affirmed in part and reversed in part the convictions and sentences of ten traders and brokers of soybean futures contracts at the Chicago Board of Trade. *United States v. Ashman*, No. 91-2390, 1992 WL 31342 (7th Cir. Oct. 30, 1992).

For approximately two years, an FBI agent posed as a trader in the soybean futures pit at the CBOT, investigating illegal trading practices and surreptitiously recording conversations with other traders. Thereafter, a number of traders were indicted on violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), the Commodity Exchange Act, and the mail and wire fraud statutes. The indictment alleged fraudulent trading practices between December, 1986 and August, 1989.

The defendant traders included locals, who trade on their own accounts, and brokers, who execute buy and sell orders from the general public. Customer orders to buy or sell contracts for soybean futures must be effected by open outcry in the pit. Traders are required to bid (ask to buy)

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BEGINNING FARMERS AND RANCHERS BILL/CONTINUED FROM PAGE 1

Farmers and Ranchers." *Id.* at § 8, p. H11257. Under this program, beginning farmers and ranchers who meet certain special criteria may be eligible for annual operating financing or equipment purchase loans through direct or guaranteed loans, and priority in purchasing equipment in FmHA inventory. Eligibility criteria include requirements that the applicant not have farmed for more than five years, have sufficient education and experience to conduct a successful operation, have possession of the site for the farming operation (by ownership, lease, or commitment to lease), have equipment sufficient to conduct the operation, and agree to participate in borrower training programs as required. Beginning farmers who wish to apply must eomplete a five-year plan detailing the proposed farming operation and cash flow projections.

An interesting feature of the "Special Assistance to Certain Qualified Beginning Farmers and Ranchers" program, and a new emphasis for FmHA is the maximum time period of eligibility. In keeping with the focus on beginning farmers, a borrower will not remain eligible for this program for more than ten years. *Id.* at § 8(e)(1), p. H11257. Within that time period, however, the program is designed to allow qualified borrowers to obtain a "conditional commitment" from FmHA for annual financing, subject to borrower compliance with the requirements of the program. *Id.* Graduation requirements remain applicable.

As its name implies, the "Federal-State Beginning Farmer Partnership" program seeks to coordinate state and federal assistance to beginning farmers. *Id.* at § 5, p. H11256. Under this program, a memorandum of understanding between the federal government and participating states is to be agreed upon whereby the state provides financing to a beginning farmer and the federal government provides either a down payment loan or a guarantee of the state financing or both. *Id.*

In addition to these three new programs, the Act provides for numerous minor and substantive revisions to existing policies and programs. Persons who deal with FmHA are encouraged to carefully review these statutory changes. The Act requires the Secretary of Agriculture to issue interim regulations implementing the Act within 180 days of enactment and final regulations by October 1, 1993.

—Susan A. Schneider, Associate, Arent Fox Kintner Plotkin & Kahn, Washington, D.C.

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SOYBEAN TRADER CASE/continued from page 1

or offer (propose to sell) the customer order in the open market of the pit. Essentially, the broker avoided the "competitive marketplace" of the pit and arranged trades with the local. The arranged trades at selected prices generated profits for the local who then reciprocated in various ways to the broker. Slip op. at 5.

Throughout the trial process, the traders asserted that their conduct involved nothing more than "plain and simple garden variety violations of the Commodity Exchange Act, which the government dressed up, reconfigured as mail and wire fraud, multiplied 700 fold and labelled as RICO." The district court rejected this argument and sentenced the traders to varying combinations of imprisonment, probation, fines, forfeitures, and restitution. *See, United States v. Dempsey*, 768 F. Supp. 1277, 1281 (N.D. Ill. 1991). *See also, United States v. Dempsey*, 768 F. Supp. 1256 (N.D. Ill. 1990)(denying motions to dismiss).

On appeal, the Seventh Circuit had no difficulty concluding that depriving CBOT customers of the open outcry of the pit, and thereby the opportunity to obtain the best price, fell within the purview of the mail and wire fraud statutes. However, the court reversed the fraud counts for arranged trades on those days when the market was limit-up or limit-down in the soybean pit. Since there was no price competition in the market on those days, the customers could not have been deprived of any money. Slip Op. at 11.

—Scott D. Wegner, Lakeville, Minnesota

Federal Register *in brief*

The following is a selection of matters that wer published in the *Federal Register* in the months of September and October, 1992. The editor apologizes for the fact that some of the September and October days were missing. From September, still missing were the 5th through 7th, 12th, 13th, 20th, 29th, and 30th. Missing in October were 5th, 6th, 9th, 12th through 14th, 26th through 30th. Once the law library's remodelling is completed, it is hoped that this situation will improve.

1. EPA; Pesticide programs; risk/benefit information; reporting requirements; proposed rule. 57 Fed. Reg. 44290.

2. ASCS; Administrative review regulations; proposed rule. 57 Fed. Reg. 43937.

3. FmHA; Redelegation of authority to approve debt settlements and releases of liability in connection with voluntary liquidations; final rule; effective date October 1, 1992 - September 30, 1993. 57 Fed. Reg. 43688.

4. USDA; Excessive manufacturing allowance in state marketing orders for milk. 57 Fed. Reg. 43628.

5. USDA; Immigration and Nationality Act; RAWs; Shortage number determination; effective date October 1, 1992 - September 30, 1993. 57 Fed. Reg. 45370.

6. CCC; Dairy export incentive program; effective date October 1, 1992. 57 Fed. Reg. 45262.

7. PSA; Central filing system; state certifica tion; Colorado. 57 Fed. Reg. 45605.

8. CFTC; Arbitration monetary ceiling increase; final rule; effective date November 6, 1992. 57 Fed. Reg. 46090.

9. CFTC; Risk disclosure by futures commission merchants and introducing brokers to customers; bankruptcy disclosure; proposed rule; December 7, 1992. 57 Fed. Reg. 46101.

10. FCA; Assessment and apportionment of administrative expenses; proposed rule. 57 Fed. Reg. 47288.

11. FCIC; Frost/freeze exclusion of nursery growers; effective date October 20, 1992. 57 Fed. Reg. 47835.

12. IRS; Election to include crop insurance proceeds in gross income in the taxable year following the taxable year of destruction or damage; correction. 57 Fed. Reg. 47994.

—Linda Grim McCormick, Toney, AL

CONFERENCE CALENDAR

Eminent Domain and Land Valuation Litigation

January 7-9, 1993, Le Meridien Hotel, New Orleans, LA.

Topics include: Recent developments in the law of inverse condemnation; valuing the contaminated property; valuation of minerals and water rights.

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If you desire a copy of any article or further information, please contact the Law School Library nearest your office.

—Drew Kershen, Univ. of Okla., Norman, OK

Who gained and who lost from the '87 Farm Credit System bailout

By Charles J. Sullivan

According to the District of Columbia Circuit Court of Appeals, the provision of the federal Agricultural Credit Act of 1987 that forced selected Farm Credit System institutions to shoulder some of the burden of the system bailout does not offend Fifth Amendment due process or takings principles. In *Colorado Springs Production Credit Association v. Farm Credit Administration*, 967 F.2d 648 (D.C. Cir. 1992), the court rejected a claim brought by twenty Production Credit Associations (PCAs) challenging the constitutionality of a portion of the 1987 act that required PCAs and Land Bank Associations to surrender all of their unallocated retained earnings in excess of thirteen percent of their assets to a newly-created Financial Assistance Corporation (FAC). *Id.* at 651-2.

Background

The modern Farm Credit System traces its origin to the Federal Farm Loan Act of 1916, which created twelve Federal Land Banks (FLBs) in separate districts nationwide. These cooperative banks provided mortgage credit to farmers during a period in which long-term credit from commercial banks was practically unavailable to them. *See* Ben Sunbury, *The Fall of the Farm Credit Empire* 4 (1990). FLBs soon became the leading providers of long-term farm credit. Because of the success of the FLBs, Congress turned to the Farm Credit System during the Depression when farmers were unable to secure seasonal credit to plant their crops. The Farm Credit Act of 1933 added PCAs and Banks for Cooperatives (BCs) in each of the twelve districts. The PCAs acted as local conduits of short-term credit from each district's Federal Intermediate Credit Bank (FICB), just as the Federal Land Bank Associations (FLBAs) had functioned for the FLBs. The BCs provided a broad array of lending services expressly for farmer cooperatives, and have historically held about sixty-five percent of all agricultural cooperative debt.

From 1933 until 1987, the system was essentially organized on three horizontal tiers: (1) a Farm Credit Administration, which had general regulatory and supervisory authority over the entire system; (2) twelve individual districts, each with one FLB, one FICB, and one BC; and (3) multiple FLBAs and PCAs within each district. Although members of the system were very interdependent, the institutions did not comprise one bank, but instead made up a loose federation of separate member-owned cooperative banks.

Consolidations mandated by the 1987 act reduced the number of system institutions significantly by (1) combining each district's FLB and FICB into a "Farm Credit Bank;" and (2) combining the twelve district BCs.

Thc backbone of the system has always been its funding mechanism. Although each of the system institutions are privately owned, each obtains its funds from the public sale of Farm Credit Systcm securities by a joint fiscal agent located on Wall Street: the Federal Farm Credit Banks Funding Corporation. The agent sells debt securities for the system, which in turn channels the proceeds to the individual system lenders. A common misperception that made systcm securities appealing to investors was the belief that the securities were backed by a government guarantee. *Colorado Springs PCA*, 967 F.2d at 651. Until 1987, however, the Farm Credit Banks alone were jointly liable for the System's securities.

The Farm Credit crisis

In 1985, the prolonged financial downswing in agriculture of the 1980s caught up with the Farm Credit System. Declining farm income and asset values made it impossible for many farmers to repay their debts, which resulted in skyrocketing default rates for System loans. From 1985 to 1987, the System lost nearly $5 billion, causing investors to lose the great confidence they once had in System securities. It became clear that "outside financial assistance would be necessary at some point to keep the system viable." H.R. Rep. No. 100-295(I), 100th Cong., 1st Sess. 55, 58 *reprinted in* 1987 U.S.C.C.A.N. 2723, 2729.

Congress responded with a series of measures aimed at providing some immediate relief to the System banks. The Farm Credit Amendments Act of 1985 (Pub. L. No. 99-205, 99 Stat. 1680 (1985)) called for a series of compulsory transfers from the financially sound to the weaker institutions in the system. This legislation was successfully challenged in the federal courts by several PCAs. *See Central Kentucky PCA v. U.S.*, 846 F.2 1460 (D.C. Cir. 1988). Congress, realizing that immediate action was necessary, passed a provisional relief measure in the Farm Credit Amendments Act of 1986. Pub. L. No. 99-509, 100 Stat. 1877. The 1986 act allowed Farm Credit Banks to amortize current losses under regulatory accounting principles that made deferred recognition of certain losses possible.

In 1987, Congress again acted to prevent the demise of the System. The Agricultural Credit Act of 1987 (Pub. L. No. 100-233, 101 Stat. 1568 (1988)) dismantled what remained of the 1985 regulatory scheme and created a new system to infuse capital into the failing institutions. Two government entities were created to administer the system: (1) the Farm Credit System Assistance Board, which is responsible for channelling funds to the proper institutions, and (2) the Financial Assistance Corporation (FAC), which raises capital for the Assistance Board. *See* 12 U.S.C. §§ 2278a, 2278b (1988).

FAC was authorized to issue up to $4 billion worth of bonds that were guaranteed by the United States Treasury. The proceeds from bond sales were used to purchase stock in the failing System institutions. The 1987 act also established a "trust fund" that was to be funded solely from the retained earnings of the System's healthy institutions. PCAs and FLBAs that had unallocated retained earnings exceeding thirteen percent of the value of their assets were forced to use this money to purchase FAC stock. 12 U.S.C. § 2278b-9. Because this "stock" had no market value and did not pay dividends, it was merely a means of shifting part of the burden of the bailout to the System institutions. *Colorado Springs PCA*, 967 F.2d at 652.

The trust fund was created as a reserve from which the Government could draw if a System institution defaulted on a guaranteed bond and the Treasury was called upon to give effect to its guarantee. The proponents of the 1987 act included the trust fund scheme as part of the legislation because it provided a means to shift approximately five percent of the cost of the government's liability as guarantor back to the System, which was politically advantageous because it allowed Congress to treat the entire plan off-budget. *Id* at 651.

Because the PCAs had not been affected as dramatically by the farm financial crisis as the Land Banks had, they had greater capital reserves and were disproportionately burdened by this scheme. The Plaintiffs in *Colorado Springs PCA* are twenty PCAs that were foreed to contribute $48 million of the total $177 million held in the trust fund.

The case

The Plaintiff PCAs brought suit against the Farm Credit Administration in Federal District Court for the District of Columbia (*Colorado Springs PCA v. Farm Credit Administration* 758 F. Supp. 6 (D.D.C. 1991) [hereinafter Dist. Ct. opinion]), which has exclusive jurisdiction to hear challenges to the 1987 amendments. 12 U.S.C. § 2278b-9(e). The PCAs asserted that the forced stock purchase violated substantive due process and amounted to a taking of their property without just compensation. *See* Dist. Ct. opinion at 7. The district court rejected both challenges by granting the Defendant's motion for summary judgement. *Id.* at 17. The PCAs appealed to the D.C. Circuit Court of Appeals, which affirmed the district court's decision.

Applying the "rational relation" test to the Plaintiffs' substantive due process claim, the district court noted that with respect to economic regulation like that involved in the present case, the challenger bears a heavy burden in showing

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that the legislation is not rationally related to some legitimate government purpose. Dist. Ct. opinion at 9. The court concluded that the PCAs had not met this burden, and went on to consider the takings claim.

The district court approached the Plaintiffs' takings claim as a regulatory taking, and applied the framework set forth in *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986). In doing so, it rejected the Plaintiffs' argument that the forced stock purchase fell within the category of *per se* takings and opted for the ad hoc factual inquiry used in *Connolly*. Under *Connolly*, three factors in particular must be examined to determine if a regulation works a taking: (1) the economic impact of the regulation on the claimants; (2) the extent to which the regulation has interfered with plaintiffs' distinct investment-backed expectations; and (3) the character of the governmental action. *Id.* at 225.

Connolly test

Turning to the first of the *Connolly* factors, the district court conceded that the forced stock purchase had significantly reduced the Plaintiffs' earnings, but found that there were a substantial number of factors that moderated or mitigated the impact of the economic regulation. Dist. Ct. opinion at 13. The court accepted the Defendant's argument that given the continued viability of the Plaintiffs' operations, the negative impact of the forced stock purchase could not have been as severe as the Plaintiffs claim. Both the district court's and court of appeals' opinions relied heavily upon the benefits accruing to all System institutions to justify the burden placed upon the Plaintiffs by the forced stock purchases. The district court found that the continued availability of funds from the sale of System securities and the renewed viability of the Farm Credit System sufficiently mitigated the disproportionate burden placed upon the healthy institutions even though the benefit ran to all System institutions. Dist. Ct. opinion at 14.

For the district court, the second Connolly factor turned upon the PCAs' involvement in a heavily regulated industry. *Id.* at 15. Citing *Connolly*, the court reasoned that the forced stock purchase did not interfere with an investment-backed expectation because the claimants were subject to extensive regulation prior to the 1987 act and therefore were on notice that additional regulation may have been imposed. The court of appeals did not specifically address the question of whether the forced stock purchase interfered with an investment-backed expectation. The court merely indicated in a footnote that it was "unsure how much weight to put upon governmental supervision and regulation in takings analysis," (*Colorado Springs PCA*, 967 F.2d at 655) and chose not to criticize the district court for this line of reasoning.

The district court also resolved the third *Connolly* factor, the character of the governmental action, in favor of the government. The court found that a central consideration of this factor was whether the government took the Plaintiff's property for its "own use," or had acted to safeguard the interests of the participants in the Farm Credit System. Dist. Ct. opinion at 16. The court determined that the latter characterization more accurately described the forced stock purchase because the proceeds from the purchase were to be used for payment of the System's obligations. The court rejected the PCAs' argument that because the purpose of the purchase was to reduce the risk to the treasury on its guarantee of the FAC bonds, the forced purchase was for the government's "own use." *Id.* The court stated that it did not find support "for the notion that the assessment is for the government's 'own use' simply because the government could have chosen to pay for the entire program itself." *Id.* The circuit court's opinion implicitly supported the district court's conclusion about the character of the governmental action by stressing that the forced purchase was for the benefit of the individual PCAs.

Primary issues before D.C. Circuit

The PCAs argued again before the court of appeals that the forced stock purchase amounted to a *per se* taking that would be invalid without respect to the *Connolly* factors, or alternatively that the district court misapplied the *Connolly* factors.

The court of appeals agreed with the district court's determination that the facts of this case did not fit within the class of takings that require compensation "without a detailed inquiry into the government's purposes, the extent of harm suffered by the property owner, or the social benefits that accompany the seizure." *Colorado Springs PCA*, 967 F.2d at 656. The court narrowly construed the scope of *per se* takings to include only permanent physical occupation of real property. *Id* at 656-7. It refused to apply the shorthand *per se* inquiry to a regulation that requires the owner of money to permanently and totally surrender his funds to the government. *Id.*

Although the court of appeals affirmed the district court's use of the *Connolly* analytical framework, it did not expressly review the lower court's application of the *Connolly* factors. Instead, the court compressed the inquiry into one general question: whether the burden placed upon the Plaintiffs was justified by the benefits they received from the legislation.

The court stated that:

> [t]he bedrock principle of the takings clause [is that it is] "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Id. at 654 (quoting *Armstrong v. United States*, 364 U.S. 40 (1960)). However, the court stressed that a burden does not belong to the public as a whole if its correlative benefit does not flow to the public as a whole. *Id.* Therefore, the court reasoned that if the forced stock purchase conferred a significant, concrete, and disproportionate benefit on the PCAs, it was not an unconstitutional taking. Relying upon testimony before the Subcommittee on Conservation, Credit, and Rural Development of the House Agricultural Committee, the court found that had Congress not assisted the Farm Credit System, the System would have collapsed. Without the strength of the System behind them, the individual PCAs would likely fail. *Id.* at 653-4. Therefore, the court held that the forced stock purchase was not a taking. The court conceded that because of the structure of the forced stock purchase arrangement, not all System institutions bore an equal burden in the bailout, even though the benefits were shared among all institutions. However, the court reasoned that because the Supreme Court will not declare a regulation to be a taking if burdened parties receive reciprocal benefits that are a "fair approximation" of the value of the property they have given up, the disparate treatment of the System institutions does not render the forced stock purchase constitutionally infirm. *Id.* at 656.

Unresolved questions

Several aspects of the *Colorado Springs PCA* decisions warrant further consideration, but two are of particular significance. The first is the rather startling proposition enunciated by the district court that government regulation may not amount to a taking if it impairs the property of one involved in an already heavily-regulated industry. The second concerns whether, in light of a recent pronouncement of the Supreme Court, either *Colorado Springs PCA* court was justified in finding that the forced stock purchase was not a *per se* taking.

Regulated industries

For the district court, the second *Connolly* factor, the extent to which the regulation has interfered with an investment-backed expectation, was resolved in favor of the government solely because the PCAs had been subject to comprehensive regulatory control before Congress amended the Agricultural Credit Act in 1987. Dist. Ct. opinion at 15-16. Relying solely upon *Connolly*, the court found that the regulatory control exercised by the federal government over the Farm Credit System put the PCAs on notice that the government could appropriate its retained earnings. *Id.*

In *Connolly*, the Supreme Court upheld a provision of the 1980 amendments to the Employee Retirement Income Security Act of 1974 (ERISA) that required an employer who withdraws from a multiemployer pension plan to pay his share of the plan's unfunded vested benefits. *Connolly*, 475 U.S. at 211-12. Because ERISA failed to address employer withdrawal liability prior to the amendment, multiemployer plans frequently defaulted because of withdrawing employers who eroded the plan's contribution base and shifted the burden of funding their past service liability to the remaining employers. *Id* at 215-16. The purpose of the amendment was to foreclose the opportunity for withdrawing employers to avoid one of their primary responsibilities under the original act: to make contributions to a chosen plan which were commensurate with the burden to be placed upon the plan by their retiring employees. The 1980 amendment was enacted to require a withdrawing employer "to pay whatever share of the plan's unfunded liabilities [that are] attributable to that

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employer's participation." *Id.* at 215 (quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.* 467 U.S. 717, 723 (1984)).

The employers in *Connolly* argued that their monetary obligations to the plans were defined in their collective bargaining agreements and pension plan trust instruments. Because these instruments provided for no liability after withdrawal from a plan, they contested the 1980 amendment on the grounds that it upset their reasonable investment-backed expectations. *Connolly*, 475 U.S. at 226.

The *Connolly* court rejected this argument, however, because it found that pension plans:

> were the objects of legislative concern long before the passage of ERISA in 1974, and surely as of that time, it was clear that ... employers who had contributed to [a plan] were liable for their proportionate share of the plan's contribution

Id. at 226-27. Furthermore, the court held that the prior law had imposed withdrawal liability to "ensure that employees would receive the benefits promised them." *Id.* at 227. "When it became evident that ERISA fell short of achieving this end, Congress adopted the 1980 amendment." *Id.*

The *Colorado Springs PCA* district court was not, however, examining a statute aimed at "patching a hole" in a legislative framework as the *Connolly* court had. The district court stretched the language in *Connolly* to find that "[t]he Supreme Court has suggested that one factor relevant to a determination that plaintiffs were on notice is whether the industry of which they are a part is regulated." Dist. Ct. opinion at 15. The court did not determine that prior legislation had articulated Congress's intent to affect a particular property interest, as in *Connolly*, but instead argued that a comprehensive scheme of regulation may, in and of itself, put a property owner on notice that the government may appropriate his property. *Id.* The court, quoting *Connolly*, stated that "those who do business in a regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Id.* (quoting *Connolly*, 475 U.S. at 227.) In *Connolly*, the rather narrow "end" of holding employers responsible for their commensurate contribution had been articulated in the prior legislation. In *Colorado Springs PCA*, however, the district court gleaned Congress's "end" from the fact that it had pervasively regulated the area of farm credit, and defined that "end" broadly as the preservation of the Farm Credit System. *See* Dist. Ct. opinion at 15. In essence, the court determined that whenever an appropriation of private property occasioned by increased regulation serves the ultimate purpose of a legislative scheme (however broadly defined), that ends-means link militates against a finding that the government action is a taking.

The court of appeals, although not criticizing the lower court's rationale, noted the danger of the district court's reasoning:

> In this era of pervasive regulation, this factor might prove far too much: almost any entity could be said to have a reasonable expectation of governmental intrusion.

Colorado Springs PCA, 967 F.2d at 655.

The district court, apparently recognizing the distance between the *Connolly* rationale and its own opinion, pointed to the Farm Credit Amendments Act of 1985 to lend support to the idea that Congress had given prior notice of its intent to appropriate the Plaintiffs' property. Dist. Ct. opinion at 15. However, because the 1985 Act was a prior response to the same crisis that brought about the 1987 Act, and because the 1987 Act was necessary because of shortcomings in the 1985 legislation, the court does little more than suggest that the 1987 Act justifies itself.

Per se takings

Under certain circumstances, the Supreme Court has been willing to abandon its ad hoc approach to takings analysis. An area where the Court has attempted to articulate a bright-line rule is where the government's action amounts to a physical invasion of a person's land. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1980), the Court found that a "permanent physical occupation" of an owner's property was a *per se* taking. The Court held that governmental intrusions of this nature are so egregious that compensation is required "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 434-35. Therefore, a reviewing court applying the *per se* approach must examine the government's action, but not the government's justification for the aetion.

In *Colorado Springs PCA*, the PCAs argued that the forced stock purchase was a *per se* taking, and that the district court therefore erred by granting consideration to "the government's purpose, the extent of the harm suffered by the property owner, and the social benefits that accompany the seizure." *Colorado Springs PCA*, 967 F.2d at 656. The PCAs argued for an expansive interpretation of *Loretto* so that the category of *per se* takings would include "any seizure of property that (1) permanently and totally deprives the owner of its use, and (2) involves required acquiescence." *Id.*

The court of appeals disagreed with the PCAs' position. It concluded that because (1) "the Supreme Court has several times analyzed [permanent and total deprivations of money] as other than *per se* takings," and (2) that the Supreme Court may have limited, "if only implicitly, the category of *per se* takings to 'unwanted physical occupation[s]' of ... property," (*Id.* at 657 (quoting *Yee v. City of Escondido*, 122 S.Ct. 1522, 1531 (1992)) the forced stock purchase did not fall within the subset of *per se* takings.

Three days after the D.C. Circuit issued its opinion in *Colorado Springs PCA*, the Supreme Court redefined the scope of *per se* takings analysis and cast serious doubt upon the *Colorado Springs PCA* court's reasoning. In *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992), the Supreme Court held that the South Carolina Beachfront Management Act, which prohibited development beyond the historic coastal high water mark, fell within a "discrete category of regulatory deprivations that require compensation without the usual case-specific inquiry into the public interest advanced in support of the restraint." *Id.*, at 2888.

In discussing which analytical framework it would apply in *Lucas*, the Supreme Court noted that the normal approach for takings analysis is to "engage in ... essentially ad hoc, factual inquiries." *Id.* at 2893 (quoting *Penn. Central Transportation v. New York City*, 438 U.S. 104, 124 (1978)). The Court went on to state that:

> [w]e have, however, described at least two discrete categories of regulatory action as compensable without a case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property.... The second situation ... is where regulation denies all economically beneficial or productive use of land.

Lucas, 112 S.Ct. at 2893.

Although the Court drew the second category from its prior holdings, *Lucas* was the first opinion to identify such regulation as a categorical exception to the ad hoc takings approach. The Court suggested that the justification for the second category was merely "that total deprivation of beneficial use is, from the landowner's point of view, the *equivalent* of a physical appropriation." *Id.* at 2894 (emphasis added).

Although *Lucas* addressed government regulation of real property, as *Loretto* had, it clearly stated that categorical *per se* takings inelude much more than physical invasion of real property as the *Colorado Springs PCA* court claimed. Because the forced stock purchase denied the PCAs of all economically beneficial use of their accumulated earnings, *Lucas* may invalidate the approach taken by the *Colorado Springs PCA* court. Furthermore, the *Lucas* Court's coneept of making *per se* analysis applicable to a governmental intrusion which is, from the property owner's perspective, the "equivalent" of a physical invasion, lends support to the PCAs' position.

Conclusion

It is apparent that neither of the *Colorado Springs PCA* courts adequately resolved the takings issues raised by the Agricultural Credit Act of 1987. They are certain to become the focal points of future takings litigation. However, it is important to note that the overall bailout scheme devised by the Agricultural Credit Aet of 1987 has been largely successful. Had Congress not acted quickly to restore investor eonfidence in the System's institutions, the result to the Farm Credit System and its farmer members may have been disastrous.

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D.C. Circuit resolves controversy over H-2 program wage rate

In *Frederick County Fruit Growers Ass'n v Martin*, 968 F.2d 1265 (D.C. Circuit, July 7, 1992), the D.C. Circuit Court of Appeals affirmed a lower court ruling on the minimum wage requirements of the H-2 migrant worker program. The H-2 program was provided for in the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii). [The program was subsequently amended and renamed the H-2A program by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1101(a)(15)(H)(ii)(a)]. Under the H-2 program, a U.S. employer must submit to the Secretary of Labor a job clearance order in which the employer agrees to pay at least the "adverse effect wage rate" (AEWR) before hiring nonimmigrant alien agricultural workers for seasonal or temporary work. The Secretary sets the AEWR at an amount intended to ensure that the H-2 program does not adversely affect the wage rate of similarly employed U.S. workers. See 20 C.F.R. section 655.200(c). The AEWR functions as a minimum wage requirement for H-2 program foreign agricultural workers.

The AEWR is set on an hourly wage rate basis. Employers who pay wages based on piece rates, i.e. bushels of apples picked, must ensure that a worker of average productivity will earn the AEWR. The *Frederick County Fruit Growers* case resolves a controversey over meeting the AEWR requirement. When the Department of Labor increases the AEWR, an employer could ensure that a piece-rate worker of average productivity achieves the AEWR by either: (1) raising the piece rate without raising average worker productivity; or (2) requiring an increase in the average productivity of the work force without raising the piece rate. Under the second method, individual workers must pick more per hour to achieve the wage earned before the rise in the AEWR.

In 1978, the Secretary of Labor promulgated regulations which required that in any year in which the AEWR is increased, employers shall adjust their piece rates upward rather than requiring that their workers increase productivity to achieve the AEWR. 43 Fed. Reg. 10306, 10317 (1978) codified at 20 C.F.R. § 655.208(c). In 1981, the Secretary interpreted this rule to mean that when the AEWR is raised, an employer is required to increase its piece rate only if, based upon the previous year's productivity and piece rate, the employer's average worker would not otherwise earn the new AEWR. Agricultural workers challenged this "average worker" interpretation. A federal district court ordered the Secretary to adopt a "proportional increase interpretation" of the 1978 regulation under which employers were to raise their piece rates by the same proportion whenever the Secretary raised the AEWR. See *NAACP v. Donovan*, 558 F.Supp. 218 (D.D.C. 1982)(*NAACP I*); *NAACP v. Donovan*, 566 F. Supp. 1202 (D.D.C. 1983)(*NAACP II*).

The Secretary did not appeal this ruling but chose instead to adopt the "average worker" formulation as a new regulation. The Secretary issued the new regulation on September 2, 1983, before the harvest began. Agricultural workers immediately challenged the rule and on September 8, 1992, a federal district court in *NAACP II*, preliminarily enjoined enforcement of the new regulation. Throughout the harvest season of 1983, with the exception of September 2 to September 8, the Secretary of Labor was under a court order requiring that growers pay their H-2 workers the piece rate calculated under the "proportional increase" interpretation of the 1978 regulation. The grower plaintiffs in the *Frederick County Fruit Growers* case, however, actually paid the lower piece rate established by the 1983 "average worker" regulations.

The D.C. Circuit Court of Appeals vacated the preliminary injunction before the 1984 harvest but did not reach the merits of the case until 1985. During the 1984 harvest, the growers continued paying their workers on the basis of the "average worker" calculation. In July, 1985, the D.C. Circuit Court of Appeals set aside the 1983 regulation because the Secretary did not adequately explain the reasons for its promulgation. That decision reinstated the 1978 "proportional increase" piece rate. The Secretary refused to accept job clearance orders in which the growers purported to reserve their right to challenge the calculation of the piece rate. The growers filed job orders with the promise to pay the higher rate but actually paid the lower rate provided by the "average worker" calculation.

In 1985, the *Frederick County Fruit Growers* litigation commenced when grower associations filed a challenge in federal district court to the court-ordered "proportional increase" interpretation of the 1978 regulation. Agricultural workers intervened and counterclaimed for the difference in wages they were actually paid by the growers using the calculation of the invalid 1983 regulations and what they claimed they were owed using the 1978 regulations "proportional increase" method of wage calculation.

The district court precluded the growers from relitigating the intcrpretation of the 1978 regulation, an issue which had been decided in *NAACP II*. The district court granted the agricultural workers' request for backpay in the 1983 harvest, except for the period from September 2 to September 8; denied the workers claims for backpay for the 1984 harvest, finding that the growers had rcasonably relied upon the validity of the 1983 regulations; and granted the workers claims for the 1985 harvest as a matter of contract law based on the growers promise to pay the higher wage in the job clearance orders. *Frederick County Fruit Growers Ass'n v. McLaughlin*, 703 F. Supp. 1021 (D.D.C. 1989). The district court subsequently added prejudgment interest to the workers' backpay awards, 709 F. Supp. 242 (D.D.C. 1989), and held that the challenge to the regulations was moot in light of repeal of the 1978 regulation and adoption of a new piece rate regulation [codified at 20 C.F.R. § 655.102(b)(9)(ii)], 758 F. Supp. 17 (D.D.C. 1991).

The growers appealed the award of backpay for the 1983 and 1985 harvests and the calculation of prejudgment interest on the awards. The workers did not appeal the denial of their backpay claim for 1984. On appeal, the D.C. Circuit Court of Appeals agreed with the district court that the inclusion in the 1985 job clearance orders of a grower's promise to pay the higher wage rate created a contractual obligation running from the grower to each of its workers. The growers argued that if they had not been precluded from challenging the *NAACP II* ruling, they may have prevailed on their challenge and been discharged from their promise to pay the higher wage. The Court of Appeals ruled that even if the growers had successfully challenged the ruling they would not be discharged from their promise to pay the higher wage. The court found that the growers made no claims of duress, nor did they condition the performance of their promise upon losing a challenge to the *NAACP II* ruling, or otherwise preserve a right to challenge in court an obligation freely undertaken.

The court of appeals then addressed the challenges to the lower court's award of backpay for the 1983 harvest season. Thc lower court had ruled that the workers were entitled to the backpay based on principles of equitable restitution because the 1983 regulation, upon which the growers based a lower pay rate, was declared invalid by the *NAACP II* court. The court of appeals approved the application of restitution principles to the facts. The court noted, however, that application of quasi-contract principles appeared more appropriate. The court reasoned that the wage term in the 1983 contract between growers and workers was unenforceable because it was based on an invalidated regulation and that under quasi-contract theory, the court must then supply a reasonable wage term. The court concluded that a minimum wage validly established by the Secretary of Labor under the "proportional increase" interpretation of the 1978 regulation was a reasonable wage term to apply to the contract.

The court of appcals denied growers' challenges to the formulations for calculating prejudgment interest. The court of appeals affirmed that interest accrued from the date on which wages to which the workers were entitled were first withheld, because the growers had reason to believe that they were underpaying their workers.

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