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Agricultural Law Update

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INSIDE

- Pest infestations and trade: the recent Medfly experience in Florida
- *Federal Register* in brief

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

IN FUTURE ISSUES

- Timber trespass and theft

Hedge-to-arrive in the courts—Part III

This Part III focuses on the reported Amended Memorandum and Order in *In re Grain Land Coop Cases*, 1997 WL 602548 (D. Minn. Oct. 1, 1997). For background, see Parts I and II at 14 Agric. L. Update 1 (Aug. 1997) and 4 (Sept. 1997) respectively.

Grain Land sued 160 producers who refused to deliver under their HTA contracts, producers removed to federal court, and Grain Land withdrew its motion for remand. The court, in ruling on summary judgment motions, determined that the flex HTAs in question, with exercised roll-over features, were forward contracts within the Commodity Exchange Act (CEA) forward contract exclusion. 7 U.S.C. § 1a(11). This ruled out producer illegal contract or fraud causes of action against Grain Land under CEA. In the same vein, claims against two Grain Land employees for breach of fiduciary duties while allegedly acting as brokers for regulated futures contracts were dismissed. Further, given the Minnesota view that tort claims are barred by the exclusivity of the U.C.C., producer complaints against Grain Land based on common law fraud and misrepresentation were dismissed.

The court first and foremost sees the contracts between Grain Land and producers as contracts requiring deferred delivery of fixed quantities of physical commodities—corn and soybeans. Producers did have the contract right to set the basis at some future date prior to delivery. Price changes occurred as the HTAs were rolled over—“flexible price setting” as the court puts it. p. *1.

The court framed the issues: do the contracts fit with the forward contract exclusion; if not, are the contracts future contracts as the term is used in CEA? The second issue is not reached because the exclusion is held to apply. p. *4.

While the forward contract exclusion is narrow, the court says that its purpose is filled by these contracts which call for physical delivery of grain by producers capable of making such deliveries, and acceptance of deliveries by Grain Land which is in the business of obtaining grain for resale and in need of same. p. *7. The court finds that physical delivery was made on 2,341 Grain Land HTA contracts with only 12 being canceled. The expectation of physical delivery thus permeated these contracts, including those in litigation. The court notes that while futures contracts can result in physical delivery, this is rarely the expectation of persons taking long or short positions on an exchange.

The court in *Grain Land* reviews the exclusion’s legislative history and notes its characterization in *CFTC v. Co Petro Mktg. Group, Inc.*, 689 F.2d 573, 577-78 (9th Cir.

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New tax law could enhance attractiveness of conservation easements

The Internal Revenue Code (“IRC” or “the Code”) treats certain “qualified conservation contributions” as charitable contributions. IRC § 170 (1997). The donor is entitled to take a deduction for income tax purposes. Properly drafted conservation easements qualify for a charitable contribution deduction under the provision.

In addition, encumbering the land with a conservation easement should qualify the land for a reduction in value upon the death of the owner. Finally, the conservation easement should lower the fair market value of the property for real property tax purposes. In the alternative, the conservation easement may qualify the property for special use valuation, also lowering the real estate tax burden. For an overview of conservation easements see, Richardson, Jr., Jesse J., *Maximizing Tax Benefits to Farmers and Ranchers Implementing Conservation and Environmental Plans*, 48 Okla. L. Rev. 449-469 (Summer, 1995).

Section 508 (formerly the American Farm and Ranch Protection Act) of the Taxpayer Relief Act allows the executor of an estate of a decedent dying after December 31, 1997, to exclude from the decedent’s gross estate up to forty percent (40%) of the value of land subject to a qualified conservation easement. IRC §

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1982)("[t]here is no indication that Congress drew this exclusion otherwise than to meet a particular need such as that of a farmer to sell part of next season's harvest at a set-price to a grain elevator or miller. These cash forward contracts guarantee the farmer a buyer for his crop and provide buyer an assured price. Most important, both parties to contracts deal in and contemplate future delivery of the actual grain."); *In re Stovall*, C.F.T.C. No. 75-7, Comm. Fut. L. Rep. (CCH) ¶20,941 (Dec. 6, 1979) ("major difference" between forward and futures is that forward contract "entails not only the legal obligation to perform, but also generally fulfilled expectation that the contract will lead to the exchange of commodities for money." p. 23,778.). *CFTC v. Noble Metal International, Inc.*, 67 F.3d 766 (9th Cir. 1995) is distinguished because "no legitimate expectation that the customers would take actual delivery of the purchased metals." (p. 773). Because the contracts in *Grain Land* were seen as fundamentally for the physical marketing of grain and specific

enough to set a cash price, they were held to be "firmly within the narrow scope of the exclusion." p. *12.

The HTA contract terms are not set out in detail in *Grain Land*. However, producers argued in essence that each farmer had a set price at the outset, realizable if delivery was made without roll-over. When the farmer first rolled-over, the price for commodities changed—and changed dramatically with successive roll-overs given movements in the relevant futures market. The court notes: "[i]f the Producer chooses to roll the delivery date to a later month, then a corresponding change occurs in the reference price which includes the attribution of any positive or negative difference between the old and new reference prices and a fee charge of two cents per bushel." p. *9.

Obscured in this language is the reality that the price adjustment upon roll-over—elevating or lowering the commodity price to producer—ends up passing on to producers gains or losses of the grain dealer in related futures transactions which were necessarily closed out without parallel physical transactions. The contracts in *Grain Land* state: "Buyer [Grain Land] confirms the following futures transaction was made for Seller [Producer] today on the Chicago Board of Trade." p. *11. Upon roll-over, the "hedge" originally entered by the grain dealer must be closed out by an off-setting buy transaction on the exchange under circumstances where the grain dealer does not acquire physical commodities. Viewed in isolation, losses or gains in such futures transactions are speculative. For example, if under a particular HTA there are two roll-overs and then physical delivery by the producer, the first two sells or "short" positions of the grain dealer on the exchange end up having no parallel physical transactions—but the third sell or "short" position does. Thus the argument is—contrary to *Grain Land* at p. *11—that when each roll-over occurs the grain dealer is not satisfying "the old hedge," but instead is closing out a speculative transaction.

An essential characteristic of HTA contracts is that despite losses or gains in futures transactions, the grain dealer is not at ultimate risk and is assured its basis, plus roll-over fees—if the farmer eventually makes physical delivery at the final adjusted contract price. But, in the typical cash forward contract, the hedge is entered by the grain dealer to protect its economic position and is not made for

the benefit or detriment of the producer seller, the latter having had his price fixed in the forward contract—subject to selection of a narrowed basis if the contract permits. When HTA contracts are structured so that a producer, through a reduced grain price, indirectly makes the grain dealer whole for margin calls it has met, the question is whether such contract has deviated so far that it is outside the "narrow" intent of the CEA forward contract exclusion. The judge in *Grain Land* did not think so because no benefit or detriment results to producer from gains or losses in futures transactions until there is physical delivery to the grain dealer.

The trial judge was correct in refusing to rely upon the CFTC's May 1996 Guidance Statement. p. *12. However, one of the issues raised therein—HTA contracts that roll-over into future crop years—is not somehow foreclosed. Producers could argue that contracts that do not require physical delivery of a harvest within normal marketing cycles test the bounds of the "narrow" forward contract exclusion because ensuing roll-overs have more to do with futures than physical markets.

A lingering question after *Grain Land* is whether all HTA contracts that contemplate eventual physical delivery necessarily fall within the forward contract exclusion. Only time and more court opinions will tell.

Turning to state law, the Minnesota "economic loss doctrine" makes the U.C.C. the exclusive source of remedies as to damages arising from commercial transactions, other than personal injury. This contemplates, says the *Grain Land* court, that parties to the sale be merchants and "[p]roducers here are undoubtedly merchants for purposes of the U.C.C." p. *15. While the Minnesota Supreme Court has not directly applied the exclusive remedy rule to claims of fraud and misrepresentation, this court suggests it is likely to do so. Producers argued unsuccessfully that allegations of fraud or negligence in the inducement of contracts are not proscribed.

If the district court opinion in *Grain Land* stands and the cases go to trial, producers—pressing allegations not outlined in this short report—will seek rescission and damages for breach of contract under Minnesota law.

—Donald B. Pedersen, University of Arkansas, Fayetteville, AR

Conservation easements/Cont. from p. 1
2031(c)(1998). The new provisions seek to target the most endangered open spaces, on the urban-rural fringe. Environmentalists and land trust officials speculate that the new tax provisions will prompt a

significantly higher number of donations of conservation easements. See, e.g., Bowman, Rex, *New Tax Laws Could Aid Land Trusts*, Richmond Times Dispatch, pp. B1, B4 (September 9, 1997). This article

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Conservation easements/Cont. from p. 1

provides a brief overview of the new provisions.

Qualifying land

IRC § 2031(c) applies to land subject to a qualified conservation easement located:

- (1) In or within twenty-five (25) miles of a metropolitan area as defined by the Office of Management and Budget;
- (2) In or within twenty-five (25) miles of a national park or wilderness area, unless the Secretary of the Treasury ("Secretary") determines that such land is not under significant development pressure; or,
- (3) In or within ten (10) miles of an Urban National Forest as designated by the Forest Service of the U.S. Department of Agriculture.

Additionally, the land must have been owned by the decedent or a member of the decedent's family at all times during the three (3) year period ending on the date of the decedent's death. The definition of "member of the family" contained in IRC § 2032A(e)(2) applies.

Further, the qualified conservation easement encumbering the land must have been granted by the decedent or a member of the decedent's family. A post-mortem conservation easement on the property qualifies, provided the easement is donated no later than the date of the election. The election is irrevocable and is made on the estate tax return.

Exclusion amount

The amount excluded from the value of the decedent's gross estate ("exclusion amount") is the lesser of the "applicable percentage" or the "exclusion limitation." The exclusion limitation equals \$100,000 in 1998, \$200,000 in 1999, \$300,000 in 2000, \$400,000 in 2001, and \$500,000 in 2002 and thereafter.

The "applicable percentage" means 40% reduced (but not below zero) by two percentage points for each percentage point (or fraction thereof) by which the value of the qualified conservation easement is less than 30% of the value of the land. For purposes of calculating the applicable percentage, the value of the land is determined without regard to the value of the easement, and is reduced by the value of any retained development rights. The Code defines development rights as "any rights retained to use the land for any commercial purpose that is not subordinate to and directly supportive of the land as a farm or for farming purposes within the meaning of Internal Revenue Code § 2032A(e)(5)." IRC § 2031(c)(5)(D). Therefore if the value of the easement is 10% of the value of the land without the easement, less the value of any retained devel-

opment rights, the applicable percentage equals zero. The exclusion amount is reduced further by the amount of any charitable deduction claimed by the estate for estate tax purposes under IRC § 2055(f) with respect to land subject to the easement.

The executor calculates the exclusion amount based on the value of the property after the conservation easement has been placed on the property. The applicable percentage multiplied by the value of the land as encumbered by the easement equals the exclusion amount (but the exclusion amount may be no greater than the exclusion limitation).

An agreement may extinguish permanently some or all of the development rights retained by the donor. If every person in being who has an interest in the land executes the agreement on or before the estate tax return due date, the estate tax may be reduced accordingly. However, if the heirs fail to implement the agreement by the earlier of the date which is two year after the decedent's date or the date of the sale of the land, an additional tax is imposed. The additional tax equals the amount of tax that would have been due on the retained development rights that were subject to the agreement. The value of retained development rights remains subject to the estate tax. IRC § 2031(c)(5)(A).

Carry-over basis

To the extent that the value of land is excluded from the taxable estate, the basis of the land acquired at death is a carry-over basis. IRC § 1041(a)(4)(1998). There is no step up of basis for that portion of the value of the real estate.

Interaction between § 2032A (or § 2033A) and conservation easements

Earlier Internal Revenue Service authority indicated that the granting of a conservation easement could constitute a disposition triggering additional tax under IRC § 2032A. See, e.g., Richardson, *supra*, pp. 463-64. The new statute resolves this doubt and provides that the granting of a conservation easement does not affect specially valued property under IRC § 2032A. IRC § 2032A(c)(8). Therefore the granting of the easement will not trigger the additional estate tax. The new tax bill provides explicitly similar provisions under new alternative valuation § 2033A. IRC § 2033A(f)(1)(B).

Doubt also existed as to whether IRC § 2032A and the conservation easement provisions could be coupled to gain enhanced reduction in value for the gross estate. The Senate Committee Report provides that the existence of a qualified conservation easement does not prevent

the property from subsequently qualifying for special use valuation under IRC § 2032A.

Historic easements not benefited

For the purposes of the exclusion, the preservation of a historically important land area or historic structure does not qualify as a conservation purpose. IRC § 2031(c)(6)(B). Therefore, the exclusion is not allowed for historic easements. The provision does not address whether previously granted historic easements, which otherwise qualify, may be amended to derive the benefit of the exclusion.

Commercial recreational activities

The easement must prohibit commercial recreational activities. IRC § 2031(c)(6)(B). However, *ad minimus* commercial recreational activity consistent with the conservation purpose, such as the granting of hunting or fishing licenses, does not cause the property to fail to qualify for the exclusion. IRC § 2031(c)(6)(B), and Conference Committee Report. The Secretary shall provide guidance regarding the definition of *de minimus* activities.

Retained mineral interest

The law also provides that the contribution of a permanent conservation easement qualifies for a charitable deduction for estate and income tax purposes even when a mineral interest has been retained and surface mining is possible. However, the probability of any surface mining occurring must be so remote as to be negligible. The prior law allowed a charitable deduction as to such contribution only if the mineral interest was separated from the land prior to June 13, 1976.

Debt financed property

"Debt financed property" means property with respect to which there is an acquisition indebtedness on the date of the decedent's death. Acquisition indebtedness includes:

- (1) indebtedness incurred by the donor in acquiring the property,
- (2) indebtedness incurred before the acquisition of the property if such indebtedness would not have been incurred but for such acquisition,
- (3) indebtedness incurred after the acquisition of the property if such indebtedness would not have been incurred but for such acquisition, and the incurrence of the indebtedness was reasonably foreseeable, and
- (4) the extension or renewal of the financing of an acquisition indebtedness.

Debt financed property remains eligible for the exclusion to the extent of the net equity in the property.

Pest infestations and international trade: the recent Medfly experience in Florida[©]

By Terence P. Stewart and David S. Johanson

Pest infestations occur regularly throughout the world. They vary in intensity and can range from the permanent presence of a plant pest in a region to periodic outbreaks of a pest. Importers of agricultural products from countries where certain pests are present are justifiably concerned about the possibility of these pests being transported into their territories. However, despite the continuous occurrence of infestations, the international trade of agricultural products continues to grow, even from countries which harbor some of the world's most destructive agricultural pests.

This trade is made possible as countries are able to take measures to eliminate risks associated with importing products from areas where pests are, or have been, present. For example, a country may be able to eliminate risks by eradicating a pest outright. If eradication is not possible, authorities can limit the presence of a pest in certain areas, regularly monitor the presence of the pests, and declare other regions within their territories pest-free. Exporters can take steps to kill any pests that may remain in exported products through measures such as fumigations or cold treatments. In addition, exported agricultural products can be inspected to assure that they carry no harmful pests.

Such measures explain how a country like Chile, despite the permanent presence of the Mediterranean fruit fly (Medfly) within certain regions of its territory, is one of the world's major exporters of fruit. While agricultural importers are aware of the Medfly problem in Chile, they recognize that Chile has an excellent plant protection system, which is capable of keeping the threat of this plant pest under control. Consequently, the United States accepts imports of fruit from Chilean designated pest-free zones without treatment for the Medfly. For fruit from

the regions in Chile where the Medfly is endemic, the United States permits imports if certain conditions are met, such as if the fruit is treated to eliminate the pests.

This article examines a recent major plant pest infestation that occurred in the United States. The detection of a Medfly in a trap near Tampa, Florida, on May 28, 1997, resulted in a major eradication program. State and federal officials have successfully controlled the presence of the Medfly, and they are convinced that the pest will be eradicated by mid-September, if not sooner. Due to the success of the control program, the efforts of state and federal officials to keep foreign governments informed of the Medfly situation in Florida, and the occurrence of the outbreak during a low production period, none of Florida's international trading partners have indicated that the infestation will cause them to close their markets to Florida's agricultural exports.

This article begins with background information on the Medfly, then examines the aggressive response taken in Florida to eradicate this pest, and concludes with a discussion of the policies that countries might adopt in response to future pest outbreaks in light of the World Trade Organization's Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).

The Mediterranean fruit fly

The Mediterranean fruit fly (*Ceratitis capitata*) is one of the world's most harmful agricultural pests. The Medfly is capable of infesting approximately 250 different types of fruits, vegetables, and nuts; its preferred hosts are certain fruits, including apples, apricots, citrus, peaches, pears, and plums. Medflies are capable of reducing the crop yields of host commodities by up to 25 to 90 percent in an infested region.

The Medfly life cycle begins when a female punctures the skin of a ripe fruit and lays several eggs directly beneath the surface. After about two days, the eggs hatch into larvae, which feed on the fruit pulp. This feeding causes the interior of the fruit to rot, and the fruit subsequently falls to the ground. The larvae then emerge from the rotted fruit and burrow into the soil where they become pupae. After metamorphosing from pupae to flies, Medflies emerge from the soil. As adults, these flies are slightly smaller than the common housefly.

It takes approximately one to two weeks for larvae to develop into flies. Depending upon the climate, the complete life cycle

for a Medfly is one to three months. A female Medfly lays approximately 300 eggs during her lifetime.

The Medfly differs significantly from the common fruit fly (*Drosophila melanogaster*), which, in most cases, poses no threat to plant health. The common fruit fly eats fruit only *after* it has begun to rot. In contrast, the Medfly actually *causes* a ripening fruit to rot.

Distribution of the Medfly

The Medfly most likely originated on the northwest coast of Africa. From there, it spread to other regions of Africa and then to the Iberian Peninsula. The Medfly eventually reached other parts of Mediterranean Europe and regions of the Middle East. From the Iberian Peninsula, it was transported to South America by trading ships carrying fruit and eventually made its way to Central America. The Medfly later reached Hawaii and Western Australia. Entomologists believe that the movement of infested fruit by humans is responsible for the wide presence of the Medfly throughout the world.

Today, the Medfly is endemic in portions of the Americas, Africa, the Middle East, Europe, Western Australia, and Hawaii.

The illegal transport of fruit is the likely cause of most recent outbreaks of the Medfly. As infested fruit is transported by humans, Medfly outbreaks often occur in the places where the majority of people live, metropolitan areas. As such, the initial finds in an infestation, at least in the United States, are usually in backyard trees on residential properties, not in commercial orchards.

The Medfly eradication program in Florida

On May 28, 1997, a Medfly was discovered near Tampa in Hillsborough County, Florida. With an agricultural industry that generates cash receipts of almost \$6 billion annually, Florida had a major incentive to eradicate the Medfly promptly. Perhaps most at risk was the state's \$1.5 billion annual citrus crop, much of which is exported. The Medfly, if it were to become established in Florida, could disrupt the export of citrus and other agricultural products.

The U.S. Department of Agriculture (USDA) and the Florida Department of Agriculture reacted immediately to this detection by implementing a major eradication program. By May 1998, approximately \$26 million will have been spent in an effort to rid the Tampa area of this pest.

This article first appeared in the August 1997 edition of the Agricultural Sanitary & Phytosanitary and Standards Report, a publication of the law offices of Stewart and Stewart.

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State and federal officials succeeded in containing the infestation, but before this occurred, the Medfly had spread to five counties in the Tampa region. By late August, some 746 Medflies had been trapped in Florida, the vast majority in Hillsborough County.

Outline of Florida's eradication program

Fortunately, experience has demonstrated that it is possible to eradicate the Medfly. The USDA has eradicated past outbreaks in California, Texas, and Florida. In addition, the Medfly has been eradicated in several regions of Mexico.

From lessons learned through past infestations, officials at the USDA and the Florida Department of Agriculture already had a basic eradication strategy at hand at the first signs of infestation. The steps involved in this strategy required delineating the area in which the Medfly was present, implementing a quarantine to prevent the movement of possibly infested fruit from this area, and eradicating the Medflies within the quarantine area through the application of the pesticide malathion. This pesticide usage would be followed by the release of millions of sterile Medflies, which would break the pest's reproductive cycle.

Delineation of the affected area

The delineation of the area in which the Medfly was present was accomplished without great difficulty. The USDA and the Florida Department of Agriculture permanently maintain approximately 13,000 pest traps throughout the state to monitor the presence of plant pests such as the Medfly; special efforts are made to place traps in metropolitan and suburban areas close to international airports and ocean ports as Medflies can be transported from abroad in host materials carried by passengers. It was in one of these traps that the first Medfly of the outbreak was detected. Subsequently, other traps revealed the presence of the Medfly in other parts of the Tampa area. Through these detections, officials were able to delineate the region in which this pest was present.

Quarantine

To prevent the movement of infested host materials from the Tampa region into unaffected areas, the USDA and the Florida Department of Agriculture imposed a quarantine on the region in which the first Medfly was found. When more Medflies were discovered outside the original quarantine area, the quarantine was enlarged to include these new areas.

Inspectors from the USDA randomly searched the luggage of passengers at airports and ocean ports to prevent any infested fruit from leaving the quaran-

antine area. As of June 30, over 2000 pounds of host materials had been confiscated by officials at the Tampa International Airport.

Steps were also taken to prevent the spread of the Medfly through sales by fruit and vegetable vendors. All host products sold within the regulated area were required to be grown and packed in Medfly free regions. Fruit stand operators had to sign compliance agreements with Medfly eradication program officials, which mandated that vendors keep all produce covered to prevent further infestation; this measure reduced the possibility of the transport of infested produce outside the quarantine area. Any vendors found in violation of these rules could have their products confiscated.

Pesticide application

The most effective means of eradicating the Medfly is through the repeated application of pesticide over an infested area followed by the release of sterile Medflies. On June 5, the aerial application of the pesticide malathion began in the Tampa area. The malathion was mixed with a bail composed mainly of corn gluten to form droplets, which attracted the Medflies to the insecticide. The pests then ingested the malathion and died. Officials released this malathion-treated bait in infested areas at intervals of seven to ten days. The applications were scheduled to last for 30 days, the life cycle of Medflies in Florida's climate.

Malathion is a common household and garden insecticide which public health officials generally agree poses no significant health risks to humans. It has been used for decades for mosquito abatement at higher doses than that used for eradicating Medflies.

While malathion is effective in combating Medflies, its use is also controversial. Few people welcome having pesticides dropped on their neighborhoods from the air. To further complicate matters, as is common in most Medfly infestations in the United States, the Florida outbreak occurred in a metropolitan area. Urban dwellers in Florida in most cases were not directly threatened economically by the Medfly, and thus were not pleased by the possible exposure to the aerial spraying and the unknown potential health risks posed by it.

In an effort to allay the concerns of citizens, officials went to great lengths to notify the public of the safety of the application of this pesticide. State and federal officials warned that if efforts to eradicate the pest failed, more pesticides, and possibly even stronger ones, might be used in the future to control the Medfly. The public was also made aware of the negative effects that the permanent es-

tablishment of the Medfly would have on the state's economy.

In addition to using malathion, officials drenched the soil beneath larvae infested fruit trees with the pesticide diazinon.

Release of sterile medflies

Due to opposition to the use of pesticides, the public was more receptive to the next step taken to eradicate the Medfly, the release of sterile Medflies in the infested area. The steriles mate with fertile Medflies, no offspring are produced, and the Medflies eventually die off. The repeated applications of malathion preceding this action knock the number of Medflies down to a level where the use of sterile Medflies will be effective.

Since 1977, in what is known as the Moscamed Program, the governments of Guatemala, Mexico, and the United States have worked together to eradicate the Medfly in southern Mexico and Guatemala and to stem its possible migration northward. As part of this effort, the Moscamed Program operates facilities for producing sterile Medflies in Guatemala and Mexico in regions where the Medfly is already present. At these facilities, Medflies are sterilized through irradiation. The USDA also operates a facility for sterilizing Medflies in Hawaii. Florida obtained sterile Medflies through the Moscamed's Guatemala facility.

Florida released its first batch of sterile Medflies on July 25, and millions were later released.

The eradication program's conclusion

It appears that Florida will soon be able to declare victory against the Medfly. The last Medfly find in Hillsborough County, where the vast majority of these pests were trapped, occurred on July 17, and aerial spraying ended there on August 11. While spraying is continuing in other counties in response to sporadic detections, officials are convinced that the Medfly will be eradicated in the state by mid-September, if not sooner. The eradication program will be followed by extensive surveillance to monitor any possible future outbreaks.

Assuming no new Medflies are found, quarantine restrictions for most areas could be lifted in early October. Citrus production begins in the middle of October for some of the regions that have been under quarantine. If the quarantines are ended, restrictions on the shipment of commodities grown in these areas would no longer be in effect.

A quarantine will most likely remain in place for an area near Highland City, Florida, until December due to recent Medfly detections there. Even with the quarantine in effect, however, growers

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will be able to ship their products from the quarantine area if certain conditions are met, such as if their commodities are fumigated following harvest. Officials intend to continue malathion spraying in the Highland City area until at least mid-September.

Possible source of the Medfly

Officials are attempting to discover the source of the Medfly infestation. Experience has shown that Medfly outbreaks are commonly caused by infested fruit brought into the country by travelers who have been abroad, fruit mailed from regions where the Medfly is endemic, and fruit vendors selling products brought into the country that, in contravention of U.S. laws, were not inspected by Customs officials and treated for possible plant pests.

Authorities are interviewing people living near the sites where the first Medflies were found to see if they are aware of any host materials that might have been transported into the state from abroad.

Due to the relatively wide area in which Medflies were trapped, some authorities believe that it is unlikely that the infestation was caused by several infested host products brought into Florida by travelers or by randomly mailed fruit. Instead, a more likely theory being investigated is the possibility that an entire truckload of contraband fruit infested with larvae, perhaps transshipped through a third country, was brought into the United States without being certified as pest-free and without being declared to Customs officials at the border.

The Medfly outbreak and Florida's exports

While some countries that import Florida agricultural products have expressed concerns about the Medfly infestation, at present it appears that none of Florida's trading partners will close their markets to that state's exports due to the outbreak. They are convinced that efforts in Florida to contain and eradicate the Medfly will make it safe to import from that state. In addition, the outbreak occurred during a low production period in Florida when few products are exported.

Some countries have sent delegations to observe steps being taken to assure the safety of exported products, but such delegations commonly visit the state even during years when no infestations occur.

The confidence of importers in the ability of state and federal officials to control and eventually eradicate the Medfly can be attributed in part to efforts of US officials to keep foreign governments informed of the Medfly situation. Officials of the USDA and the Florida Department of Agriculture have been open about the outbreak since it was first detected, and they have gone to great lengths to keep

importers abreast of developments in the effort to eradicate the Medfly.

In addition, foreign governments have observed past eradication efforts of the USDA during infestations in California, and they are satisfied that the steps taken in Florida to control and eradicate the Medfly are adequate as well.

Furthermore, some countries already have protocols in place with regard to possible Medfly infestations. For example, even before the outbreak, Japan required that all citrus exported from the United States be accompanied by phytosanitary certificates stating that the citrus has been inspected and is free of quarantine pests.

Pest infestations and WTO obligations

The USDA and officials of foreign governments worked together during the Medfly infestation in Florida to resolve any differences that might have arisen out of the outbreak. The success of these bilateral discussions, as well as the occurrence of the outbreak during a low production period, obviated the need for parties to resort to trade restricting actions or to challenge such actions under the SPS Agreement of the World Trade Organization (WTO).

Nevertheless, an examination of the multilateral rules regarding a nation's rights and obligations to trading partners experiencing infestations may be useful.

Basic rights and obligations

First, it is important to note that under Article 2 of the SPS Agreement countries maintain their rights to implement SPS measures to protect plant health within their territories. Any such measures, however, must be based upon science and may not operate as disguised barriers to trade.

Therefore, under certain circumstances, a government can justifiably restrict trade with a country in which a pest infestation occurs. However, the government imposing trade restricting measures must base such restrictions upon "good science," and these measures must be necessary to protect plant health. If the country with the pest problem succeeds in eradicating the pest or is able to take steps to eliminate risks, such as fumigating products before export, then restrictions on imports of its products are scientifically unfounded and would be in contravention of the SPS Agreement if applied to a WTO member.

Whether a pest is endemic in an importing country might limit the options of that country in reacting to an infestation abroad. According to Article 2 of the SPS Agreement, the SPS measures of a country may not "unjustifiably discriminate between Members where identical or similar conditions prevail" in each member's territory. For example, if a pest such as the Medfly is permanently present in a

country, that country might be in violation of its WTO obligations if it imposes a complete ban on the importation of possible host materials from another member state in which the Medfly is also endemic.

Countries are encouraged in Article 3 to base their SPS standards on international norms where they exist. However, members of the WTO are permitted to maintain higher standards than international norms if such standards are scientifically justified and are based upon risk assessments as described in Article 5.

Risk assessments

Article 5 of the SPS Agreement provides rules that members of the WTO must follow when conducting risk assessments. Of particular importance during or after a pest infestation, a member must take into consideration inspection methods, pest-free areas, quarantines, and other treatments in assessing the risks of importing from another country. Such measures can reduce or eliminate the risks of importing from another country where a pest is present. In addition, when determining acceptable levels of risk, countries should minimize the negative effects that their chosen policies might have on trade, and SPS measures should not be more trade restrictive than necessary to accomplish a desired level of protection.

For example, if an intensive inspection program of host products from an infested area combined with a cold treatment to kill pests provides the same level of protection as would a complete ban on the importation of all such products from an infested area, a government would be obligated to choose the former option to conform with the SPS Agreement's obligations.

Pest-free zones

Article 6 of the SPS Agreement states that WTO members must adapt their measures to the appropriate regions of a country. In assessing the SPS situation in a region, members must consider "the existence of eradication or control programmes" to control pests. In particular, members should recognize the pest-free zones of their trading partners. Annex A of the SPS Agreement goes on to state that in some cases pest-free regions may even be surrounded by areas that have pests but are "subject to regional control measures."

Article 6 requires that a country claiming to have pest-free zones must be willing and able to prove that a certain pest is indeed not present in such zones.

In the past, some governments have prohibited imports of all fruit products from another country due to the presence of a plant pest in a limited area of that country, so products grown thousands of

miles away from quarantine areas were banned from importation. The WTO rules are intended to prevent this form of trade barrier while providing countries legitimate protection from foreign plant pests.

Control, inspection, and approval procedures

Control, inspection, and approval procedures can greatly reduce the possibility that products imported from infested areas will be transported into new regions. Annex C of the SPS Agreement sets guidelines for such measures, including the requirement that these procedures must be reasonable and necessary.

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Control, inspection, and approval procedures must not discriminate against imports. Such measures must be conducted in no less a "favourable manner for imported products than for like domestic products." Any fees imposed for such procedures must not be higher than those for procedures for similar domestic products.

Conclusion

The international trade of agricultural products has grown substantially in recent years despite the regular occurrence of pest infestations in various parts of the world. This trade has been possible as countries are able to eradicate pests or adopt measures that eliminate or greatly reduce the chance that plant pests will be introduced into new areas.

The recent Medfly outbreak in Florida demonstrates how pest infestations do not necessarily result in disruptions of international trade. Officials of the USDA and the Florida Department of Agriculture reacted immediately to the first Med-

fly detections by implementing a major eradication program. This program successfully controlled the presence of the Medfly, and it appears that this pest will soon be eradicated in Florida.

None of Florida's trading partners have indicated that they will close their markets to that state's agricultural products despite the outbreak. The uninterrupted export of fruits and vegetables from Florida can be attributed to the success of the Medfly control program, the efforts of federal and state officials to keep governments informed of the Medfly situation, and the occurrence of the outbreak during a low production period.

Due to the success of bilateral discussions, it was unnecessary for the United States and other countries during the Florida outbreak to discuss their respective obligations under the SPS Agreement of the WTO. Nevertheless, the SPS Agreement creates rules for countries to follow during pest infestations, and countries should be aware of these obligations. During and following future infestations, the SPS Agreement could provide guidelines that will permit the continued trade of agricultural products while providing safeguards to ensure that plant pests will not be spread to new regions.

Update on the Florida Medfly situation

It appears that the Medfly, which was first detected in the Tampa area in May, has been successfully eradicated in Florida. The last detection of this plant pest occurred in the state in late August.

In addition, the USDA on October 15 withdrew all or portions of five counties in Florida from the Medfly quarantine area. See 62 Fed. Reg. 54571 (1997). The quarantine remains in effect in only two counties, Hillsborough and Polk Counties.

Conservation easements/Cont. from page 3 Examples

Example (1). Taxpayer dies owning land subject to a qualified conservation easement on January 2, 1998. He did not retain any development rights in the property. The fair market value of the real property on the date of death was \$1,000,000.00 without the conservation easement and \$800,000.00 with the easement. The value of the conservation easement equals \$200,000.00 (\$1,000,000.00 - \$800,000.00), or 20% of the value of the real property without the easement. The applicable percentage is 20% (40% - (2 x (30% - 20%))). The exclusion amount is \$100,000.00 (the lesser of the applicable percentage (\$160,000.00) (20% of \$800,000.00) and the exclusion limitation (\$100,000)).

Example (2). Taxpayer dies owning land subject to a qualified conservation easement on January 2, 2002. She retained development rights on the property valued at \$100,000. The fair market value of the real property on the date of death was \$500,000 without the conservation easement and \$400,000 with the easement. The value of the conservation easement is \$100,000, or 25% of the value of the real property without the easement, as reduced of the value of any retained development rights (\$100,000 ÷ (\$500,000 - \$100,000)). The applicable percentage multiplier for the estate equals 25%. Therefore the exclusion amount is \$75,000 (25% of \$300,000).

Example (3). Taxpayer dies owning land subject to a qualified conservation easement on January 2, 2002. She did not retain any development rights in the property. The fair market value of the real property on the date of death was \$1,000,000 without the conservation easement and \$900,000 with the easement. Thus, the value of the conservation easement is \$100,000 or 10% of the value of the real property without the easement. The applicable percentage for the estate is 0% (40% reduced by twice the difference between 30% and 10%). Therefore the exclusion amount is zero.

Conclusion

Section 508 seeks to target preservation of land subject to intense development through estate tax benefits. This article merely described the provisions. Many questions remain as to the provisions' meaning and effectiveness.

—Jesse J. Richardson, Jr., B.S. M.S.,
J.D., Winchester, VA

Federal Register in brief

The following is a selection of items that were published in the *Federal Register* from October 17 to November 14, 1997.

1. CCC; Noninsured Crop Disaster Assistance Program; aquacultural species, interim rule; effective date 10/17/97. 62 Fed. Reg. 53929.

2. CCC; Amendment to production flexibility contract regulations; interim rule. 62 Fed. Reg. 55150.

3. APHIS; Mediterranean fruit fly; removal of quarantined area; interim rule with request for comments; comments due 12/22/97. 62 Fed. Reg. 54571.

4. APHIS; Importation of animals and animal products; region recognition procedures; permission to export based on

regions' disease status, etc.; final rule; effective date 11/28/97. 62 Fed. Reg. 56000.

5. APHIS; Exportation and importation of animals and animal products; regionalization and risk analysis; policy statement. 62 Fed. Reg. 56027.

6. CFTC; Traded options on the enumerated agricultural commodities; proposed rule. 62 Fed. Reg. 59624.

7. USDA; Administrative offset; final rule; effective date 11/10/97. 62 Fed. Reg. 60451.

8. Agricultural Marketing System; PACA; electronic transmissions as ordinary and usual billing or invoice statements; final rule; effective date 12/15/97. 62 Fed. Reg. 60998.

—Linda Grim McCormick, Alvin, TX

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

1998 Membership Renewal Notice

Membership dues for 1998 will be due in January. For those of you who would prefer to pay your dues in this calendar year, the Board of Directors has approved the following rates for 1998.

Regular membership—\$75	Sustaining membership—\$150	Institutional (up to 3 members)—\$200
Student membership—\$25	Overseas—\$95	

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1997 Sustaining Members

The AALA would like to express its appreciation to the following persons who were sustaining members for 1997:

Greg Andrews, Walt Armbruster, Bill Babione, John Baldrige, Bill Bridgforth, Terry Centner, Mike Cone, Pat Conover, Renee Coppock, Richard Dees, Mary Scrim Dyer, Peggy Grossman, Neil Hamilton, Chris Kelley, Drew Kersten, Phil Kunkel, Tom Lawler, David Myers, Don Pedersen, Mark Pennow, Deborah Peterson, Alex Pires, Henry Rodegerdts, Bill Schwer, Elvis Vaughn, Mason Wiggins and Paul Wright.

Seasons Greetings

On behalf of Linda McCormick, Martha Presley, the Officers and Directors, I extend our holiday greetings and wishes for a wonderful 1998.

Bill Babione