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FARM YEAR TO YEAR LEASE—LEASE TERMINATION DATE MATTERS

By L.Leon Geyer

At common law and by statute, a written lease for one year becomes a month to month tenancy. A one month termination notice thereafter can be given by either the landlord or the tenant. Farm leases are often the subject of statutory termination requirements due to the nature of farming and the growing season. Agricultural leases are generally for a year or at least from time of planting to time of harvest. The latter can vary by crop growing length, state law, or local practice. Because of agricultural "growing seasons," month-to-month tenancy down on the farm is irrational. To protect the landlord and tenant, many state statutes require an "x" months' notice of termination by either the landlord or the tenant.[1]

In a recent Arkansas case,[2] Seidenstricker Farms had leased and farmed the land at issue since 1972. A written lease for January 1, 1993 to January 1, 1994, was executed between Seidenstricker Farms and John Auersperg providing for the rental and farming of Auersperg's land. The lease contained the following condition:

> "TO HAVE AND TO HOLD unto said TENANT from the date of January 1, 1993, until the first of January 1994, provided it satisfactory with both parties. After one party has given the other a 90 day notice in writing before the expiration of this lease which is accepted by the other party, the term of said lease shall be renewed or extended for another year under the same terms and conditions."

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**Professor, Virginia Tech. University, Blacksburg, VA*

DISTRICT COURT FINDS USDA VIOLATED NEPA IN ADMINISTERING CRITICAL FEED USE INITIATIVE BUT ALLOWS LIMITED USE OF CRP ACREAGE

By Anne Hazlett*

On July 24, 2008, a federal district court for the Western District of Washington found that the U.S. Department of Agriculture (USDA) violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq*., in administering a Critical Feed Use (CFU) initiative within the Conservation Reserve Program (CRP).[1] Announced by USDA in May, the CFU allowed for landowners to modify their CRP contracts to conduct managed haying and grazing after the 2008 primary nesting season in response to critical feed demands. In its order, the district court issued a permanent injunction that suspended the CFU program but allowed for certain producers meeting specific criteria to use their CRP acreage for this purpose.[2] Within days of the court's decision, legislation was introduced in both chambers of Congress that would require USDA to implement the CFU initiative as unveiled in May.[3]

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**Minority Counsel, U.S. Senate Agriculture Committee (the opinions expressed in this article are those of the author and do not necessarily reflect the opinions of the U.S. Senate Agriculture Committee).*

Auersperg died in July 1993, and Seidenstricker Farms was informed that the farm was transferred to the Dosses.

Seidenstricker Farms continued to farm the land until 2001 under an oral agreement. At the end of each harvest, the two parties met to discuss the crop yield and other issues related to the farm. The parties never discussed whether Seidenstricker Farms was going to continue to farm the land, and both parties just continued on as they had the previous year. Specifically, Seidenstricker Farms continued to occupy and farm the land, and the Dosses continued to receive and accept annual rental payments.

On September 24, 2001, the Dosses called Seidenstricker Farms to inform it that the lease would terminate at the end of 2001. Arkansas law at the time required a notice by the landlord or tenant be provided by June 30 of the year before the termination period. Seidenstricker Farms filed suit alleging that the Dosses had improperly terminated the lease. Following a bench trial, the circuit court dismissed the case. Finding that the conditions of the 1993 lease continued during the parties' relationship, the court held that the provision for ninety days' notice prior to expiration continued to apply and that the lease relationship was properly terminated.

Seidenstricker Farms appealed the lower court's finding that the lease with the Dosses was properly terminated. Seidenstricker Farms argued this was an error of law and a clearly erroneous decision because written notice was required on or before June 30 for termination of a pursuant to Arkansas Code Ann. Section 18-16-105.[3] Seidenstricker Farms claimed that it leased the farmland under an oral lease, or, alternatively, was a year-to-year agricultural tenant. The Dosses argued that the written language of the lease and the practice and conduct of the parties meant that the notice-of-termination requirements of Arkansas Code Ann. Section 18-16-105 did not control.

Previously, the Arkansas court has recognized that a tenancy from year to year may be created by holding over after the end of the originally agreed upon term without any new agreement, by paying rent according to the terms of the lease, and by the landlord accepting the payment. Acceptance is considered a renewal of the prior lease for a like period and upon like terms. Where a lease contract stipulates that a party shall give notice of the intent to renew the lease within a certain length of time or prior to the termination of the lease, the giving of such notice is a condition precedent, and upon the nonperformance of the condition, the right to renew is forfeited. *See Bluthenthal v. Atkinson,* 93 Ark. 252, 124 S.W. 510 (1910). However, the court said that when a lease contains a condition precedent of notice of renewal, and no notice is given but the parties continue as though the lease has been renewed, there is a waiver of the notice provision and the terms of the original lease apply.

In the present case, Seidenstricker Farms executed a lease with Auersperg in March 1993. After Auersperg's death in July 1993, Seidenstricker Farms was informed of a transfer of ownership of the land. The 1993 lease was never explicitly renewed, and a new lease or agreement was never executed with either of the subsequent owners, including the Dosses. Seidenstricker Farms continued to occupy and farm the land, and the Dosses received and accepted rental payments, in the same manner as set forth in the 1993 lease, from 1994 through 2001. The court found the actions to be a classic case of a tenancy from year to year. Seidenstricker Farms held over at the end of the lease, and the Dosses continued to accept payments of rent in accordance with the lease. Therefore, a tenancy from year to year was created, and the terms and conditions of the 1993 lease apply. Because the court held that a year-to-year tenancy existed, the court did not address the oral lease issue.

At common law, a tenant from year to year was entitled to six months' notice to vacate, and, by supplying the date in section 18-16-105,[4] the General Assembly had given landlords and tenants a "clear, simple and codified" method of giving six months' notice as applied to tenancies from year to year. The court found that Seidenstricker Farms was a year-to-year tenant. Under Arkansas law, the Dosses were required to give notice of termination, written or otherwise, on or before June 30, 2001. They did not do this. Therefore, the lease was not properly terminated.

In the case, the 1993 lease gave an explicit period of time for which the lease was to govern. Specifically, it stated: "TO HAVE AND TO HOLD unto said TENANT from the date of January 1, 1993, until the first of January 1994, provided it satisfactory with both parties." There is nothing within this provision that indicates that the parties contemplated the continuation of the lease for more than one year if the arrangement remained mutually satisfactory to the parties. Rather, the "satisfactory" language used in the 1993 lease related solely to the one-year lease term.

The court concluded that even though typically when holdovers result in annual period tenancies, the terms of the original lease apply, the "at will" provision of the original lease did not apply here since it expressly was included in the statement of a term lease for the first term only. Therefore the statute applied and required that the terminating party give six months notice before terminating the lease.

The 1993 lease gave an explicit period of time for which the lease was to govern (one year), and nothing in the contract contemplated a continuation of the lease if conditions remained satisfactory. The renewal provision "was essentially waived by the parties' conduct since the expiration of the original 1993 lease term."

The statue requiring a 6 month notice has been repealed, but "grandfathered" to these facts. From the reading of the case and a reading of the new landlord tenant rules in Arkansas, it is unclear as to the amount of notice required to terminate a farm lease in Arkansas absent agreement. If a farm lease termination is treated like a house lease, hardship could be created. While a grain lease terminated one month before January 1 may not be onerous, a one month termination for a livestock dairy lease for pasturing or animal housing lease might create great hardship. Likewise, in areas of winter vegetable production, a 3 month notice of termination of a farm lease might be appropriate and necessary. This case reiterates the importance of knowing lease termination under state common law or statute rules and the importance of setting the termination date by tenant and landlord in writing with appropriate time termination according to the type of agricultural lease.

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Geyer—FARM YEAR TO YEAR LEASE (cont. from p. 2)

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Endnotes

[1] For example, see VA Code Ann. §55-222.

[2] Seidenstricker Farms v. Doss, __ S.W.3d __, 372 Ark. 72, 2008 Westlaw 95773 (Ark. 1/10/08).

[3] Arkansas Code Ann. § 18-16-105 has since been repealed. A new land lord tenant act has been adopted. However, Arkansas. Code Ann. § 18-17-202 excludes rental agreements covering premises primarily used for agricultural purposes.

[4] The owner of farmlands which are leased under an oral agreement may elect not to renew the oral rental or lease agreement for the following calendar year by giving written notice by certified registered mail to the renter or lessee, on or before June 30, that the lease or rental agreement will not be renewed for the following calendar year. Arkansas Code Ann. § 18-16-105.

A stubborn horse walks behind you, an impatient horse walks in front of you, but a noble companion walks beside you.

Hazlett—DISTRICT COURT FINDS USDA VIOLATED NEPA (cont. from p. 1)

Conservation Reserve Program

Created in the 1985 Farm Bill, the CRP is a voluntary conservation program through which agricultural landowners can receive an annual rental payment to take environmentally sensitive land out of production. In addition to rental payments, participants can also receive cost-share assistance to help cover their costs of establishing conservation practices on enrolled land such as planting a resource-conserving cover crop. Land may be enrolled in the CRP in ten to fifteen-year contracts. The CRP is administered within USDA by the Farm Service Agency (FSA).

Because land in the CRP must be planted in vegetative cover, this acreage has become an important resource for wildlife populations in many areas of the country. In recognition of this important link, participants are generally prohibited from conducting any harvesting or grazing of vegetation unless such activity is done under conditions that are consistent with the program goal of conserving soil, water quality and wildlife habitat resources.[4]

Critical Feed Use Initiative

On May 27, 2008, USDA announced its intent to allow certain acreage enrolled in the CRP to be available for hay and forage after the primary nesting season ends later this year.[5] In its announcement, USDA explained that the initiative was intended to assist farmers and ranchers in coping with record high feed prices. Specifically, USDA made more than 24 million acres eligible for the CFU program and estimated that this would make available approximately 18 million tons of forage.

In order to preserve the CRP's environmental benefits, USDA implemented several restrictions on the CFU initiative including requirements that eligible land not be used until after the primary nesting season, some of the eligible land or forage of that land be reserved for wildlife, and land being used under the CFU authority have a conservation plan. In addition, the Department stated that the most environmentally-sensitive land enrolled in the CRP would not be eligible. Lastly, it made all land in the CFU initiative subject to a site inspection to ensure compliance with the required conservation plan.

Sign-up for the CFU program began on June 2, 2008. All forage use was required to be completed by November 10, 2008.

National Wildlife Federation lawsuit

On June 30, 2008, the National Wildlife Federation (NWF) and six state affiliates filed suit against USDA arguing that the Department had failed to look at the environmental impacts of the CFU initiative as required by NEPA.[6] On July 8, 2008, the district court issued a temporary restraining order to prevent USDA from processing or approving any additional CRP contract modifications under the CFU program as well as to enjoin the implementation of any contract modifications already granted.[7]

Following issuance of the temporary restraining order, several agriculture interest organizations filed an amicus brief with the court including the American Farm Bureau Federation (AFBF), National Cattlemen's Beef Association (NCBA), and the National Pork Producers Council (NPPC). In the brief, advocates detailed the stories of farmers and ranchers who had already spent money to prepare their land for haying and grazing in reliance on participation in the CFU initiative. In a July 16, 2008 press release, AFBF President Bob Stallman stated: "Farm Bureau is extremely concerned about the severe economic hardship this injunction imposes on farmers and ranchers. More than 4,000 livestock producers relied on USDA's announcement about the new program and have already begun using their precious financial resources to prepare the land for haying and grazing."[8]

The court heard oral argument on NWF's motion for a preliminary injunction on July 17, 2008. There, NWF urged the court to require USDA to suspend all haying and grazing under the CFU authority until they complete an environmental assessment.[9] The court ordered the parties to attempt to reach agreement on a modified preliminary injunction and suggested they consider limiting the total acreage that can be hayed or grazed under the CFU initiative to the amount that USDA had predicted would be the total number of acres actually affected, a provision that would forbid USDA from reviving the program without first conducting an environmental impact statement, or a limit that would forbid participation if the land has been hayed or grazed within a certain number of years.[10]

On July 24, 2008, the court issued a permanent injunction. There, with little to no explanation, it found that USDA had violated NEPA by acting arbitrarily, capriciously, and unreasonably when it used an internal "environmental evaluation" to determine that the CFU initiative would have no significant adverse environmental consequences and concluded that an environmental assessment or environmental impact statement was not necessary.[11] The court then suspended all haying and grazing pursuant to the CFU program except for a certain number of participants.[12]

The court's ruling will enable CRP

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participants who received approval for the CFU initiative before July 8th to participate in the program as it was originally announced through the November 10th end date. It will also allow applicants who have applied for the CFU but not yet been approved to participate under modified deadlines. If they are subsequently approved, they may hay through September 30th and graze through October 15th. Lastly, the court's ruling allows any applicant who is approved for the CFU to participate if they can demonstrate that they relied on the CFU program by expending $4500 or more in preparation. However, they too must end any activity by September 30th or October 15th as described above.[13]

Reactions to decision

Interestingly, both sides of this conflict have claimed victory in the court's ruling. On one hand, agriculture interests claim a win in the decision to allow certain producers to go forward with conditional haying and grazing on CRP acreage. In a July 25, 2008 press release, NPPC President Byran Black stated: "We applaud USDA for initiating the CFU and are pleased with this decision by the court to allow the program to move forward.... The judge's statements reaffirm for us just how important CRP acres can and will be to help meet the need today for additional grain and feed acres."[14] Similarly, NCBA President Andy Groseta stated: "This was the right decision for America's cattle producers. We're pleased that the court listened to NCBA's arguments and agreed that reversing USDA's decision would place undue hardship on our ranchers."[15]

On the other hand, NWF asserts that the judge's decision to enjoin the CFU initiative sends a message to USDA that it must follow the law when evaluating the environmental impacts of a new policy. In a July 24, 2008 press release, NWF staff member Julie Sibbing stated: "Judge Coughenour's opinion guarantees that conservation remains the top priority and purpose of the Conservation Reserve Program, while taking into account the financial needs of the landowners already invested in opening their lands to increased haying and grazing. We hope in the future USDA will follow the law and conduct a proper environmental assessment before it implements new policies regarding Conservation Reserve Program lands."[16]

Beyond the parties involved, several Members of Congress have responded to the court's decision with legislation that would override its order. On July 17, 2008, Congressman Jerry Moran (R-KS) introduced H.R. 6533 which directs USDA to carry out the CFU program pursuant to the terms and conditions laid out in its May notice announcing the program. In so doing, Congressman Moran stated: "Critical Feed Use was authorized to address rising feed costs after reasonable planning by USDA to address conservation concerns. This legal action is short-sighted and harmful to Kansas producers, many of whom had already made stocking decisions. These producers expended time and money to fence and prepare CRP acres for grazing and haying. During this time of high feed prices, our livestock producers do not need one more thing to worry about."[17]

Identical legislation has also been introduced in the U.S. Senate by Senators Pat Roberts (R-KS), Sam Brownback (R-KS), and James Inhofe (R-OK). Filing S.3337 one day after the court's ruling, Senator Roberts stated: "While I am pleased those who were able to sign up originally are going to be able to proceed, others should not be unfairly disadvantaged by a court's decision to micromanage the program."[18]

Looking ahead

Regardless of the ultimate outcome of such legislative efforts, this litigation is significant in that it signals another instance in which advocates are attempting to use environmental law to shape farm policy. In 2004, NWF filed an earlier lawsuit in the Western District of Washington asserting that FSA had violated NEPA by failing to evaluate the impact of haying and grazing CRP acres on nesting birds.[19] The dispute was later settled.

Because the court in the case at hand did not provide much explanation in its finding that USDA violated NEPA in administering the CFU program, it is difficult to know the extent to which current USDA procedures may be vulnerable to future challenge in the context of another similar law or benefit program. However, this issue bears watching in that the threat of future litigation may add yet another layer of agency procedure in implementation of new programs or changes to existing programs. It also provides an important glimpse into a new avenue through which outside interests may attempt to influence the direction of American agriculture.

Endnotes

[1] National Wildlife Federation v. Schafer, No. CV08-1004-JCC (W.D. Wash. July 24, 2008) (order entering permanent injunction).

[2] *Id.* at 2.

[3] *See* H.R. 6533, 110th Cong. (2008); S. 3337 110th Cong. (2008).

[4] 16 U.S.C. § 3832(a) (2007).

[5] U.S. Dept. of Agriculture, "USDA Announces CRP Permitted Use For Livestock Feed Needs," May 27, 2008, http://www.fsa.usda.gov/FSA/printapp?fileName=nr_20080527_rel_0137.html&newsType=newsrel.

[6] NEPA requires federal agencies to follow certain environmental review procedures on agency actions. Section 102(2) of the law first requires that all federal agencies "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment." 42 U.S.C. § 4332(2)(A) (2007). It then requires agencies to prepare a detailed environmental review for any major action that will "significantly affect the quality of the human environment" which includes: "the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, alternatives to the proposed action, the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." 42 U.S.C. § 4332(2)(C) (2007).

[7] National Wildlife Federation v. Schafer, No. CV08-1004-JCC (W.D. Wash. July 8, 2008) (order granting temporary restraining order).

[8] American Farm Bureau Federation, "AFBF Files Amicus Brief in CRP Critical Feed Use Lawsuit," July 16, 2008, http://www.fb.org/index.php?fuseaction=newsroom.newsfocus&year=2008&file=nr0716.html.

[9] The NEPA regulations establish three levels of environmental review. *See* 40

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C.F.R. part 6 (2008). The amount of review required turns on the extent to which the agency action will impact the environment. At one end of the spectrum there are agency actions that are categorically excluded from NEPA analysis because they do not have a significant effect on the environment either individually or cumulatively. In the middle are agency actions that require an environmental assessment or "EA" because the significance of their impact on the environment is uncertain and must be determined. Lastly, agency actions that are known to have a significant environmental impact require an environmental impact statement or "EIS."

[10] National Wildlife Federation v. Schafer, No. CV08-1004-JCC (W.D. Wash. July 17, 2008) (order), page 2.

[11] National Wildlife Federation v. Schafer, No. CV08-1004-JCC (W.D. Wash. July 24, 2008) (order entering permanent injunction), page 2.

[12] *Id.*

[13] *Id.* at 2-3.

[14] National Pork Producers Council, "Producers Win on Release of CRP Acres," July 25, 2008, http://www.nppc.org/News/PressRelease.aspx?DocumentID=23394.

[15] National Cattlemen's Beef Association, "Cattlemen Praise Court Decision on Release of Conservation Reserve Program Acres," July 24, 2008, http://www.beefusa.org/NEWSCattlemenPraiseCourtDecisiononReleaseofConservationReserveProgramAcres36317.aspx.

[16] National Wildlife Federation, "Judge Issues Permanent Injunction to Stop Widespread Haying and Grazing on Conservation Reserve Program Lands," July 24, 2008,http://www.nwf.org/news/story.cfm?pageId=567D532F-F1F6-7B10-33420B8F2F9CA682.

[17] U.S. Congressman Jerry Moran, "Moran Works to Provide Additional Feed Options for Kansas Ranchers," July 17, 2008, http://www.jerrymoran.house.gov/index.php?option=com_content&task=view&id=1043&Itemid=107.

[18] U.S. Senator Pat Roberts, "Senator Roberts Introduces Bill on Critical Feed Use of CRP," July 25, 2008, http://roberts.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=5c012372-802a-23ad-4988-beb4c06038a9&Region_id=&Issue_id=.

[19] National Wildlife Federation v. Veneman, No. C04-2169 (W.D. Wash. 2006).

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REINVENTING THE WHEELER: HOW THE FIFTH CIRCUIT CHANGED THE LAW ON THE PACKERS AND STOCKYARDS ACT BY SIMPLY READING THE STATUTE

By Christopher M. Bass*

In recent years the meat packing industry has become more and more integrated.[1] This integration has led to consolidation and a decreasing number of companies.[2] With this, comes an increased fear that farmers and growers may be subject to unfair or unreasonable practices from the major meat packers and stockyards.[3] At the same time, decisions at both the circuit and Supreme Court levels have seemed to present similar trends in both agriculture and antitrust related cases: make them harder to bring and more difficult to prove.[4]

Nowhere in the agricultural law field did the trend seem more evident than in cases involving the Packers and Stockyards Act ("PSA").[5] Several courts not only disregarded the clear statutory language requiring only that an act be "unfair" to prevail on a claim under the PSA, but also added an additional requirement that the plaintiff prove that the action had an adverse impact on competition in order to recover under the PSA.[6] However, in July 2008, the Fifth Circuit rejected that activist approach with its decision in *Wheeler v. Pilgrim's Pride, Inc*.[7]

Instead of relying on the ambiguous "legislative history," "antitrust ancestry" of the PSA, and "policy considerations," as the *London*, *Been*, and *Pickett* courts did, the *Wheeler* court followed the instruction of the Supreme Court and looked simply at the clear language of the statute itself.[8] In taking this Supreme Court mandated approach, the court noted that neither *London*, *Been*, nor *Pickett* offered an alternative reading of the statute and that they were therefore required to "refrain from reading additional terms, such as those that would require an adverse effect on competition."[9] Ultimately, the Fifth Circuit consciously created a circuit split and squarely held that "the language of sections 192(a)-(b) is plain, clear, and unambiguous, and that it does not require [plaintiffs] to prove an adverse effect on competition."

This simple approach not only finds support in both the law of the Supreme Court and law of the Fifth Circuit, but all Circuits agree the language of the statute itself is any court's starting point. This simply was not followed in *London*, *Been* and *Pickett*. "The starting point in ***every case*** involving construction of a statute is the language itself."[10] Indeed, "[t]he best evidence of this intent is the language of the statute."[11] Courts should turn first to the canon of construction that the Supreme Court describes as the "one, cardinal canon before all others" – that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there."[12] "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"[13]

The plain language of Sections 202(a) and (b) of the PSA does not require an adverse impact on competition. This contrasts with Sections 202(c), (d), and (e), which expressly require an adverse effect on competition.[14] The prohibitions listed in subsections (a) and (b) are stated as absolute bans, unlike the prohibitions listed in subsections (c) through (e), which bar certain conduct only if it adversely affects competition. Had Congress intended Section 202(a) or (b) to require proof of injury to competition, it could have included in that subsection the very type of language it used in subsections (c) through (e). Congress's decision not to do so must be presumed intentional.[15] Indeed, Section 202(b) prohibits unreasonable preferences and prejudice "in any respect whatsoever" – expressly refuting the contention that a competitive injury is required. If Congress had intended for the

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courts to read "restraining commerce" into every section of the PSA, including 202 (a) and (b), then there would have been no reason for Congress to have included the express "restraining commerce" provisions found only in sections 192(c)-(e).[16]

Although the *Wheeler* court is the most recent circuit court to merely apply the language of the PSA, it certainly was not the first court to do so. As early as 1961, the Seventh Circuit recognized that "the language in section [202(a)] of the Act does not specify that a 'competitive injury' or a 'lessening of competition' or a 'tendency to create a monopoly' be proved in order to show a violation of the statutory language."[17] More recently, two district courts within the Eighth Circuit recognized that the language of §202(a) does not limit the PSA to only those activities that adversely affect competition.[18]

The clear and concise decision by the Fifth Circuit undoubtedly follows the established precedent in looking simply at the unambiguous language of the statute. However, even had the court looked beyond the plain language of the statute, it would have come to the same conclusion. Even the legislative history cited by *London*, *Been* and *Pickett* shows that the PSA was not intended solely to prohibit monopolistic or predatory conduct. These cases rely on a House report which states: "the primary purpose of [the PSA] is to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry," and they rely on the first Supreme Court case interpreting the PSA, *Stafford v. Wallace*, which observed that the "chief evil" Congress feared in passing the PSA was the monopoly of meat industry packers.[19] As the *Wheeler* court noted, that may have been the "primary" purpose of the PSA and the "chief" evil that the PSA was intended to prevent; however, that does not mean that was the *only* purpose or the *only* evil sought to be prevented.[20] This was also recognized in *Stafford* which went on to discuss other evils the PSA sought to remedy.[21] As the Supreme Court recognized long ago, "[t]he primary purpose of the PSA was thus two-fold – 'to assure fair competition ***and*** fair trade practices in livestock marketing and in the meatpacking industry.'"[22] In fact, The PSA is one of the most far-sweeping remedial laws ever passed.[23] The purpose of the PSA was to protect farmers and "to comprehensively regulate packers, stockyards, marketing agents and dealers."[24] Courts that have compared the PSA and antitrust laws have uniformly concluded that it grants broader authority to regulate business practices than previous legislation including the antitrust laws.[25]

There are several other considerations for interpreting the PSA in addition to those considered in *Wheeler*. For instance, it is important to note that the USDA 'has consistently taken the position that in order to prove that any practice is 'unfair' under [§ 202] it is not necessary to prove predatory intent, competitive injury, or likelihood of injury."[26] Courts generally give considerable weight to an executive department's construction of a statute it is entrusted to administer.[27] This is especially true for PSA cases because the longstanding view of an agency is entitled to more respect than an ad hoc litigating position.[28]

Lastly, though not considered in *Wheeler*, the court's ruling is consistent with the long-held interpretation of the similarly worded FTC Act.[29] Comparison of the PSA to the FTC Act is warranted because the PSA is an offspring of the FTC Act.[30] In *FTC v. Sperry & Hutchinson Co*., the U.S. Supreme Court rejected the argument that a similarly worded provision of the FTC Act required proof of an anticompetitive effect.[31] The original language in Section 202(a) of the PSA made it unlawful to "[e]ngage in or use any unfair, unjustly discriminatory, or deceptive practice or device in commerce." The language "unfair ... practice ... in commerce" is the very language construed by the Supreme Court in *Sperry & Hutchinson* as not requiring an "effect on competition."[32] Given that courts agree that the PSA grants broader authority to regulate than previously enacted statutes, including the FTC Act, it follows that if the same language under the FTC Act does not require an adverse impact on competition, then it should not be construed differently under the PSA.

Given the plain language of the statue and the clear direction from the Supreme Court in *Stafford* and *Sperry & Hutchinson*, it is not difficult to determine how the *Wheeler* court reached its conclusion. This is especially true given the remedial nature of the act and the USDA's consistent interpretation. What is difficult is to explain how *Been, London* and *Pickett* reached the opposite conclusion. Perhaps this question will remain unresolved until the Supreme Court squarely addresses it. With the deadlines for an appeal fast approaching in *Wheeler*, perhaps this will be the case.

Endnotes

[1] Jon Lauck, *Concentration Concerns in the American Livestock Sector: Another Look at the Packers and Stockyards Act*, National Agricultural Law Center (Oct. 2004) pp. 3-8, available at: http://www.nationalaglawcenter.org/assets/articles/lauck_livestock.pdf (last viewed April 25, 2007); Steve W. Martinez, *Vertical Coordination in the Pork and Broiler Industries: Implications for Pork and Chicken Products*; Food and Rural Economics Division, Economic Research Service, U.S. Department of Agriculture. Agricultural Economic Report No. 777; *See also* Clement Ward, *Beef, Pork, and Poultry Industry Coordination*, Oklahoma Cooperative Extension Service, Fact Sheet F-552. For a more complete analysis of the Packers and Stockyards Act please see: "More Than a Mirror: The Packers and Stockyards Act, Antitrust Laws, and the Injury to Competition Requirement," *Drake Journal of Agricultural Law*, Volume 12, No. 3, Page 423 (Fall 2007).

[2] *See* note 1 *supra*; *see e.g,* Pilgrim's Pride Corporation press release entitled *Pilgrim's Pride Completes Acquisition of Gold Kist* (Jan. 9, 2007) available at: http://phx.corporate-ir.net/phoenix.zhtml?c=68228&p=irol-newsArticle&ID=948851&highlight= (last viewed April 26, 2007).

[3] *See, e.g.,* Swift & Company v. Freeman, 393 F.2d 247 (7th Cir. 1968); Mann, *Getting Plucked: Texas Chicken Farmers Become Modern Day Sharecroppers*, The Texas Observer, Vol. 97, No. 6 (March 18, 2005).

[4] *See* Twombly v. Bell Atlantic Corp, 127 S.Ct. 1955 (2007); Leegin vs. PSKS, 127 S.Ct. 2705 (2007); London v. Fieldale Farms *Corp*., 410 F.3d 1295 (11th Cir.).

[5] 7 U.S.C. § 192 (2006). The PSA is now codified in 7 U.S.C. § 181 et seq. Section 192 provides that "[i]t shall be unlawful ... for any live poultry dealer with respect to live poultry, to: (a) Engage in or use any

(cont. on page 7)

unfair, unjustly discriminatory, or deceptive practice or device; or (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

[6] Been v. O.K. Indus., Inc., 495 F.3d 1217 (10th Cir. 2007), Pickett v. Tyson Fresh Meats, Inc., 420 F.3d 1272 (11th Cir. 2005), and London, 410 F.3d 1295.

[7] ____ F.3d ____, 2008 WL 2789319, No. 07-40651 (5th Cir. July 21, 2008).

[8] *Id*. at *3, *5 (*citing Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004)) ("By resting our decision on the PSA's plain text, we follow the better path: 'prefer[ring] the plain meaning since that approach respects the words of Congress.' In this manner we, unlike our sister Circuits, 'avoid the pitfalls that plague too quick a turn to the more controversial realm of legislative history.'").

[9] *Id*.

[10] Watt v. Alaska, 451 U.S. 259, 266 (1981) (emphasis added).

[11] Dial One of the Mid-South, Inc. v. Bellsouth Tel., Inc., 269 F.3d 523, 525 (5th Cir. 2001).

[12] Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992)).

[13] *Id*.. at 254.

[14] Wheeler, 2008 WL 2789319, at *4.

[15] Russello v. U.S., 464 U.S. 16, 23 (l983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

[16] *Id*.

[17] Wilson & Co. v. Benson, 286 F.2d 891, 895 (7th Cir. 1961). Other early cases with a similar holding include: Swift & Co. v. United States, 393 F.2d 247, 253 (7th Cir. 1968); Gerace v. Utica Veal Co., 580 F. Supp. 1465, 1469-70 (N.D.N.Y. 1984); *In re* Western Cattle Co., 47 Agric. Dec. 992, 1052 (1988); and In re Corn State Meat Co., 45 Agric. Dec. 995, 1025 (1986).

[18] Schumacher v. Tyson Fresh Meats, Inc., 434 F.Supp.2d 748, 750-55 (D.S.D.2006); Kinkaid v. John Morrell & Co., 321 F.Supp.2d 1090, 1103 (N.D. Iowa 2004) ("[T]his court finds that only a strained reading of the statute could require that practices that are 'unfair' or 'deceptive' within the meaning of § 192(a) must also be 'monopolistic' or 'anticompetitive' to be prohibited."); see also Been, 495 F.3d at 1238 (Hartz, J., concurring/dissenting).

[19] Wheeler, 2008 WL 2789319, at *5.

[20] *Id*. at *5-6 (The court noted that the PSA was also "intended to 'protect consumers from unfair business practices,' to protect members of the livestock marketing and meat industries from 'unfair, deceptive, and unjustly discriminatory' practices, and to prohibit meatpackers, more generally, from 'engaging in any unfair, deceptive, or unjustly discriminatory practice or device in the conduct of their business.'").

[21] 258 U.S. at 515

[22] Schumacher, 434 F.Supp.2d at 751.

[23] Been, 495 F.3d at 1242 (Hartz, J., concurring/dissenting).

[24] Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co., 498 F.2d 925, 927 (10th Cir. 1974).

[25] Swift, 393 F.2d at 253; Swift & Co. v. United States, 308 F.2d 849, 853 (7th Cir. 1962); In re Western Cattle Co., 47 Agric. Dec. at 1052.

[26] In re Ozark County Cattle Co., 49 Agric. Dec. 336, 365 (1990).

[27] United States v. Mead Corp., 533 U.S. 218, 227-28 (2001); Bowman v. USDA, 363 F.2d 81, 84-85 (5th Cir. 1966) (construing the PSA).

[28] Cf. INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987).

[29] Armour & Co. v. United States, 402 F.2d 712 (7th Cir. 1968). ("Section 202(a) should be read liberally enough to take care of the types of anti-competitive practices properly deemed 'unfair' by the Federal Trade Commission and to also reach any of the special mischiefs and injuries inherent in livestock and poultry traffic.").

[30] Been, 495 F.3d at 1241 (Hartz, J., concurring/dissenting).

[31] 405 U.S. 233, 239-40 (1972).

[32] *Id*.

* * * * *

SEEKING LITIGATION EXPERTS

I am defending a farmer in a personal injury lawsuit where one of his workers fell from a tractor into the 3 point hitch and tow bar area, and was injured by the engaged PTO shaft which was operating an auger in a grain buggy. The worker received multiple face injuries, including skull/face fractures and the loss of an eye, broken arm and wrist, and ribs. The allegations include negligent supervision and training and entrustment of the tractor to a 14 year old boy who was driving the tractor at the time and allegedly "popped the clutch" causing the tractor to lurch and the front end to go up in the air, and the injured worker to lose his balance and fall. I need litigation experts in general farm operations safety and management and also, perhaps, tractor design and engineering. I am also interested in a referral in another case for an expert in the field of tractor design/engineering. The fact pattern involves a backwards wheelie-like flip onto the operator of the tractor, who was crushed in the incident.

Monte L. Barton Jr. , Copeland, Cook, Taylor & Bush, P.A., 600 Concourse, Suite 100, 1076 Highland Colony Parkway, Ridgeland, MS 39157 ph. 601-856-7200; fax 601-856-7626; e-mail: mbarton@cctb.com

DEAN OF COLLEGE OF AGRICULTURAL SCIENCES - PENN STATE

The Pennsylvania State University is seeking candidates for the position of Dean of the College of Agricultural Sciences. The Dean serves as the principal academic and administrative officer of the College and reports directly to the Executive Vice President and Provost of the University. The Dean is also a member of the Academic Leadership Council and the University Park Council of Academic Deans.

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SEEKING—LAWYERS WITH CLAIMS BEFORE USDA

Some farmers are eligible for awards of attorney fees under the Equal Access to Justice Act (EAJA) when they prevail in administrative cases before the United States Department of Agriculture (USDA), including cases before the USDA's National Appeals Division and a host of other USDA adjudicators.

At present, EAJA attorney fee rates are limited to only $125 per hour. EAJA authorizes USDA to issue a regulation that would allow the $125 per hour rate to be raised to take into account increases in the cost of living. But USDA has failed to issue that regulation.

Public Citizen Litigation Group (PCLG) — a Washington public-interest law firm — has petitioned USDA to issue a regulation authorizing EAJA cost-of-living adjustments. If granted, EAJA's fee limit would increase immediately to $175 per hour. PCLG's petition was filed on behalf of Illinois family farmers and their attorney who have a fee application pending before USDA. But we are looking for more help.

If you or any of your clients has (or will in the future have) administrative cases before USDA that may be eligible for EAJA fees, and you are interested in joining in this important effort, please contact PCLG's Director, Brian Wolfman, at brian@citizen.org or 202 588 7730.

When you see three cowboys riding in a pickup truck, you can always tell which cowboy is the smartest . . . The one in the middle. He never drives and he never has to get out to get the gate!

From the Executive Director:

October 24-25, 2008 – AALA 29th Annual Agricultural Law Symposium at the City Center Marriott in downtown Minneapolis, MN. If you have not received a brochure, please let me know. RobertA@aglaw-assn.org The current program and an online registration form is available at www.aglaw-assn.org. The conference-rate guest room block expired on September 30, 2008. Rooms may still be available at the regular retail rate. If you do book a room at the Mariott, please tell them you are attending the conference so we can get credit for your room.

Conference Sponsorships. Each year the AALA receives sponsorships for assistance with the various costs of the annual conference. Several member firms have already come forward with generous sponsorships of the Friday evening reception, breakfasts, student travel sponsorships and others. Sponsorships start at $500 and all sponsors are acknowledged at the conference in the handbook and at the sponsored event. If your firm is interested in showing its support for the AALA through a conference sponsorship, please contact me (RobertA@aglaw-assn.org or 541-466-5444) as soon as possible so I can mention your sponsorship in the conference handbook.

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Robert P. Achenbach, Jr., AALA Executive Director