Agricultural Law Update

VOLUME 9, NUMBER 10, WHOLE NUMBER 107 JULY 1992

Official publication of the American Agricultural Law Association

INSIDE

IN FUTURE ISSUES

- Income tax issues in private timber management

Ninth Circuit finds no "de minimis" exception to the Delaney clause

A panel of the Ninth Circuit Court of Appeals has disallowed the U.S. Environmental Protection Agency's (EPA) most recent interpretation of the Delaney clause of the Federal Rood, Drug, and Cosmetic Act. *Les v. Reilly*, 1992 Westlaw 153883 (9th Cir., July 8, 1992). Under its interpretation, the EPA had permitted the use of pesticides whose residues in processed foods cause a de minimis risk of cancer.

The EPA regulates pesticide residues in food under the Federal Food, Drug, and Cosmetic Act. The Act generally prohibits the use of food additives unless the food additive is deemed to be safe. A provision of section 409 of the Act, known as the Delaney clause, provides that no food additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal, or if it is found, after tests which are appropriate for the evaluation of the safety of food additives, to induce cancer in man or animal. 21 U.S.C. § 348(c)(3).

Under section 408 of the Act, the EPA establishes maximum permissible tolerance levels for pesticide residues on raw agricultural commodities. 21 U.S.C. § 346a. In setting these levels, the EPA considers the benefits of the pesticide use as well as the risks of harm from the use. Pesticide residues on raw agricultural commodities are not regulated as food additives under the Act and, therefore, are not subject to the Delaney clause. Pesticide residues in processed foods are regulated as food additives. Section 402 of the Act, however, provides that if the level of the pesticide residue in a processed agricultural commodity does not exceed the maximum tolerance level for the pesticide residue on the raw agricultural commodity, the pesticide residue in the processed food shall not be considered unsafe. 21 U.S.C. § 342(a)(2)(C). If the level of the pesticide residues exceeds the maximum tolerance levels for the raw agricultural commodity, however, the EPA has considered that the pesticide residue is a food additive subject to the provisions of the Delaney clause.

Before 1988, the EPA had interpreted the Delaney clause strictly and established a zero-risk standard for carcinogenic pesticides which concentrate in processed foods. If the residue level of a cancer causing pesticide in processed food exceeded the level of the pesticide residue on the raw agricultural commodity, the EPA would not authorize the use of the pesticide as a food additive. In 1988, the EPA changed its position and allowed the use of such pesticides under a de minimis interpretation of the Delaney clause. Under its de minimis policy, the EPA allowed the use of cancer causing pesticides, even if the pesticides concentrated in processed foods in excess of

Continued on page 2

Claims Court rejects challenges to payment limitation determinations

In two recent decisions, the United States Claims Court has rejected challenges to ASCS "person" determinations made under the payment limitation rules applicable to the pre-1989 crop years. *Schultz v. United States*, 25 Cl. Ct. 384 (1992); *Bar 9 Farms, Inc. v. United States*, 25 Cl. Ct. 392 (1992). At issue in *Schultz* was the ASCS's application of the "substantive change" rule, 7 C.F.R. § 795.14 (1986), while *Bar 9 Farms* addressed the "financing" rule, 7 C.F.R. § 795.3 (1987).

In *Schultz*, Donald and Beverly Schultz, husband and wife, and Don Schultz Farms, Inc., a Washington state corporation, challenged the ASCS's determination that they were one "person" for the 1986 crop year. Prior to 1986, Don Schultz Farms, Inc. farmed two farms, one owned (the Davenport farm) and the other leased (the Landt farm). Donald and Beverly Schultz owned all of the stock in Don Schultz Farms, Inc. Accordingly, under the majority stockholder rule, 7 C.F.R. § 795.8, the Schultzs and their corporation had been combined as one "person" for the 1985 crop year.

Prior to the April 1, 1986, payment limitation deadline, the Schultzs transferred fifty percent of their interest in the corporation to their two daughters, with each daughter receiving a twenty-five percent share. At the time, both daughters were full-

Continued on page 2

the maximum tolerance levels in raw agricultural commodities, as long as the cancer risk from the use of pesticides was de minimis. Under the de minimis risk approach, cancer causing pesticides whose residues concentrate in processed foods may be used if the EPA determines that the risk of cancer is negligible. The EPA generally considers as negligible an estimated one in one million chance or less of dying from cancer over seventy years of exposure to the pesticide residue. EPA, Regulation of Pesticides in Food: Addressing the Delaney Paradox Policy Statement. 53 Fed. Reg. 41104 (1988).

At issue in *Les v. Reilly*, was the EPA's determination to allow the continued use on specified raw agricultural commodities of four pesticides— benomyl, mancozeb, phosmet, and trifluralin— whose residues in processed foods are in greater concentrations than the maximum tolerance for residues on the raw agricultural commodities. At the time EPA authorized residues from these pesticides as food additives, the pesticides were not known to cause cancer. After its approval of the pesticide use, the EPA determined on the basis of new studies that the pesticides induced cancer in man or animals.

A number of individuals and groups, including the Natural Resources Defense Council, Public Citizen, and the AFL-CIO petitioned the EPA to revoke the uses of the pesticides as food additives because the uses violated the zero-risk standard of the Delaney clause. The EPA refused, finding that cancer risks from the use of the pesticides did not exceed negligible risk levels under the de minimis risk policy. The petitioners filed suit, challenging EPA's interpretation of the Delaney clause. The Grocery Manufacturers of America and the National Agricultural Chemical Association intervened on the side of the EPA.

In its argument, the EPA acknowledged that the language of the Delaney clause on its face appears to require a zero-risk standard. The EPA, however, urged the court to look beyond the language of the Delaney clause to the overall intent of the Act and its legislative history. The EPA argued that Congress did not intend to regulate pesticide residues on raw foods and processed foods under different risk standards. The court, however, found exactly such an intent in Section 402 of the Act, which harmonizes the regulation of residues in raw agricultural commodities with regulation of residues in processed foods.

In examining the legislative history of the Delaney clause, the court found that the Delaney clause was first introduced in Congress as a response to EPA's decision to allow the use of a pesticide as a food additive. Therefore, the Delaney clause clearly encompasses pesticide residues in processed foods. The court also found that Congress intended that the Delaney clause establish a zero-risk standard for carcinogenic food additives.

Although the court recognized significant criticism of the Delaney clause, it concluded that Congress, not the EPA no. the federal courts, must determine whether to change the legislative framework governing pesticide residues as food additives. The court noted that there are bills pending in the House and Senate which would amend the Act to allow EPA to adopt de minimis risk standards for carcinogenic food additives, including pesticide residues. In sum, the court held that the EPA's interpretation of the Delaney clause was contrary to Congressional intent.

The court granted plaintiffs' request to set aside the EPA's administrative order in which the agency refused to revoke regulations permitting uses of the four carcinogenic pesticides whose residues concentrate in processed foods.

The EPA has until August 21, 1992 to appeal the decision. The EPA is currently preparing a list of pesticides affected by the ruling. The agency estimates that at least thirty-five carcinogenic pesticides and a large number of uses of those pesticides will be affected by the Ninth Circuit's ruling. 16 Chem. Reg. Rep. 699 (July 10, 1992).

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

This material is based upon work supported by the U.S. Department of Agriculture, National Agricultural Library, under Agreement No. 89-32-U4-8-13. Any opinions, findings, conclusions, or recommendations expressed in the publication are those of the author and do not necessarily reflect the view of the USDA or the NCALRI.

Agricultural Law Update

VOL. 9, NO. 10, WHOLE NO 107 Jul 1992

AALA Editor..... Linda Grim McCormick
195 Dollywood Dr., Toney, AL 35773

Contributing Editors: Martha L. Noble, National Center for Agricultural Law Research and Information, Fayetteville, AR, Christopher R Kelley, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D C , John C. Becker, Associate Professor, The Pennsylvania State University; Susan A Schneider, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C , David C. Barrett, Jr., National Grain and Feed Association, Washington, D.C., Eric Strating, Attorney at Law, The Netherlands, Linda Grim McCormick, Toney, AL

For AALA membership information, contact William P Babione, Office of the Executive Director, Robert A Leflar Law Center, University of Arkansas, Fayetteville, AR 72701.

Agricultural Law Update is published by the American Agricultural Law Association. Publication office: Maynard Printing, Inc., 219 New York Ave., Des Moines, IA 50313. All rights reserved. First class postage paid at Des Moines, IA 50313

Claims Court / continued from page 1

time college students.

After the transfer, Mr. and Mrs. Schultz leased, as individuals, the farm that had been leased by the corporation in 1985. They leased the equipment needed for their individual operations from the corporation. The corporation continued to operate the farm it owned.

Based on the transfer of the corporate interests to the daughters, the Schultzs requested the ASCS for an increase in the number of "persons" from one to four for the 1986 crop year. Although the county committee initially approved the request, it subsequently combined the Schultzs and the corporation into one "person" on the grounds that there was "no substantive change in the operation, [sic] it is the same individuals farming the same land with the same equipment as last year (1985 crop year)." *Schultz*, 25 Cl. Ct. at 387-88 (citation omitted). On administrative appeal, the county committee's determination was upheld by the ASCS Deputy Administrator for State and County Operations (DASCO).

The then applicable regulations permitted program participants to increase the number of "persons" eligible for separate payment limits through changes in the farming operation if the change was "bona fide and substantive." 7 C.F.R. § 795.14(a). The regulations provided, however, that "any document representing a ... transfer ... [of property] which is fictitious or not legally binding as between the parties thereto shall be considered to be for the purpose of evading the payment limitation and shall be disregarded for the purpose of applying the payment limitation." *Id. See also* 7 C.F.R. § 795.14(b)(setting forth noninclusive examples of "substantive" changes).

In making its determination, the ASCS relied on portions of its internal instructional manuals, 5-PA and 5-CM of the ASCS Handbook for State and County Operations, neither of which was promul-

gated under the federal Administrative Procedure Act (APA). As amended in 1985, 5-PA stated that "'[c]hanges [in farming operations] that are not substantive include 'paper' changes in which the same individuals or other entities continue to farm the same land, with the same equipment.'" *Schultz*, 25 Cl. Ct. at 386 (quoting ASCS Handbook, 5-PA, at ¶ 399(D)).

In May, 1986, 5-PA was replaced with 5-CM. As amended in August, 1986, after Donald and Beverly Schultz had transferred fifty percent of the corporate interests to their daughters, 5-CM provided that a "substantive" change included "'[o]wnership of equipment changing from the existing individual or entity to the new individual or entity by gift or sale, with no arrangement to owe the original ownership for the equipment.'" *Id.* at 387 (quoting ASCS Handbook, 5-CM, at ¶ 81(C)(4)).

As characterized by the Claims Court, the dispute "center[ed] around the 'same people' and the 'same equipment' determinations." *Id.* at 389. The Schultzs argued that, because "different persons" were farming the two farms in the 1985 and 1986 crop years, "it was arbitrary and capricious for the DASCO to conclude otherwise." *Id.* They also contended that, because they had no prior notice that the equipment leasing agreement they had made with the corporation would be proscribed in the subsequently issued ASCS Handbook 5-CM, they were not given notice that the arrangement would not be considered a "substantive" change. They maintained that the absence of notice violated their constitutional right to due process and the APA. *Id.*

In upholding the ASCS's "same person" determination, the Claims Court reasoned that "[a] change is substantive when a meaningful break from the past has occurred." *Id.* at 389. It concluded that the change in the corporation's stockholders was not a "meaningful break from the past:"

> A corporation ... is an entity separate from its stockholders. Were it otherwise, every time a corporation bought or sold its own stock, a new entity would be formed. A corporation ... functions independently of who its stockholders may be, and such is the case here. In 1985, any observer of the Davenport and Landt farms would conclude that two individuals, Donald and Beverly Schultz, and one corporation, Don Schultz Farms, Inc., were the parties in control of the farming operations at those two farms. In 1986, that same observer would conclude that those same two people and one corporation were again running the same two farms.

Id. at 390.

The Claims Court also upheld the ASCS's "same equipment" determination, rejecting the Schultzs' argument that they did not have prior notice that the ASCS would deem their leasing of equipment from the corporation to not be a "substantive" change. First, the court reasoned that the regulation placed the Schultzs on notice that a "substantive" change was required. *Id.* at 391. Second, the court found that the "same equipment" provision in ASCS Handbook 5-PA gave sufficient notice, notwithstanding the more specific proscription in the subsequently issued Handbook 5-CM. *Id.* at 391-392. Finally, the court found that the provisions of 5-CM were sufficiently similar to the comparable provisions in 5-PA to negate a conclusion that they were sufficiently new or substantive to require promulgation as a legislative rule under the APA. *Id.* at 392.

The plaintiffs in *Bar 9 Farms* were Bar 9 Farms, Inc., F. Barry Moore Trust, Robert B. Moore Trust, David C. Moore Trust, Anna Patricia Moore Trust, F. Barry Moore, Robert B. Moore, and David C. Moore. Each of the individuals were adult siblings who were the sole beneficiaries of the respective trusts bearing their name.

In 1986, Barry, Robert, and David Moore formed the Bar 9 Farms corporation, with each owning a one-third share. In addition, Barry, Robert, and David Moore and the trusts were members of a partnership known as Pied Piper Farms. Barry and Robert Moore also were partners in a partnership known as Moore Brothers. Prior to 1987, the ASCS had determined that the three brothers and the Anna Patricia Moore Trust were four separate "persons" for payment limitation purposes.

In 1987, Pied Piper Farms; Bar 9 Farms, Inc.; the Anna Patricia Moore Trust; the David C. Moore Trust; and Barry, Robert, and David Moore participated in federal farm price and income support programs. Between February and May, 1987, the Moore Brothers partnership paid some of the Bar 9 Farms corporation's labor costs. Also, in January, 1987, Barry, Robert, and David Moore delivered equipment to Bar 9 Farms, Inc. The corporation wrote a check for the equipment's value in June, 1987, but the check was not cashed until December, 1987.

In 1988, the county and state ASCS committees determined that the plaintiffs were only two "persons" for payment limitation purposes. The determination combined Bar 9 Farms, Inc.; Barry, Robert, and David Moore; and their respective trusts as one "person" and recognized the Anna Patricia Moore Trust as the other "person." It was based on the grounds that no substantive change in the farming operation had occurred, and that the three Moore brothers had effectively financed the Bar 9 corporation's operations when they paid for Bar 9 Farm's labor and accepted deferred payment for the equipment. *Bar 9 Farms*, 25 Cl. Ct. at 395-97. On appeal, DASCO affirmed the state committee's determination.

The Claims Court rejected each of the plaintiffs' challenges to the ASCS's decision. First, the court rejected the plaintiffs' argument that the "financing" rule embodied in 7 C.F.R. § 795.3 was inapplicable to them as partners in the Pied Piper Partnership, and that the rules applying to partnerships, 7 C.F.R. § 795.7, should apply. Section 795.3 required that a "person" for payment limitation purposes must "[b]e responsible for the cost of farming related to [the "person's" interest in the crop or land] from a fund or account separate from that of any other individual or entity." Under the partnership rules, members of a partnership could be "persons" for payment limitation purposes, but a partnership was not considered a "person" and was not subject to the same financing constraints as individuals and other entities. *Id.* at 397. *See Stegall v. United States*, 19 Cl. Ct. 765 (1990).

The Claims Court concluded that the rules governing corporations, not partnerships, applied to the status of Bar 9 Farms, Inc. It held that because the then applicable rules governing corporations, 7 C.F.R. section 795.8, expressly required satisfaction of section 795.3, the court found that Bar 9 Farms' shareholders, the Moore brothers, were subject to the financing restraints and that the ASCS's determination that they had violated them was not arbitrary or capricious.

The Claims Court also rejected the plaintiffs' contention that the "family member exception" to financing applied. That exception provided that, for the 1987 through 1990 crop years, a "person" determination could not be denied solely on the grounds that "'[a] family member co-signs for, or makes a loan to, such individual and leases, loans or gives equipment, land or labor to such an individual. ...'" *Id.* at 397-98 (quoting 7 C.F.R. § 795.4 (1988)).

The plaintiffs asserted that when the Moore Brothers partnership paid Bar 9 Farms' labor costs and accepted deferred payment for the equipment they "were simply making a family loan under section 795.4." *Id.* at 398. The Claims Court, however, reasoned that a "loan to a corporation is not the same as a loan to the corporation's shareholders," and held that the loan at issue was not a loan to family members. *Id.*

Finally, the court rejected the plaintiffs's arguments that Bar 9 Farms' purchase of additional farm land was a substantive change warranting its being determined to be a "person" and held that the more restrictive "financing" rule still applied. It also held that the corporation's compliance with the Internal Revenue Service's Subchapter S corporation regulations was irrelevant because those regulations did not "modify or control" the payment limitation regulations. *Id.* at 399.

—Christopher R. Kelley, Of Counsel, Arent, Fox, Kintner, Plotkin & Kahn

Are packing shed workers agricultural employees under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Workers Protection Act?

By John C. Becker

Introduction

In the search for a profitable operation, many agricultural producers blend production and marketing activities into their overall operation. In some cases, direct retail sales of agricultural commodities are incorporated into the operation. Producers who pursue a range of activities may have employees involved in either production or marketing activities, or a combination of both over a period of time. In the fruit and vegetable segment of the agricultural economy, packing house employees prepare and package commodities for shipment to wholesale or retail buyers.

In some instances, federal law treats agricultural employees in several ways. In deciding whether special treatment is applicable, an examination of the employment circumstances will be made before a conclusion is drawn. To agricultural employers, the implication of some employees being entitled to special treatment while others are not is the specter of a dual system for record keeping, employment conditions, and wage calculation purposes. Failing to comply with requirements applicable to specific employees may result in significant fines and penalties paid by an employer.

This discussion will examine federal laws and regulations dealing with minimum wage, overtime, and protective provisions applicable to migrant and seasonal agricultural workers. It will highlight factors that influence the conclusion whether packing house employees are classified as agricultural workers under such rules and regulations. From this discussion, employers can draw several important conclusions concerning classification of their employees.

Fair Labor Standards Act

Under the Fair Labor Standards Act, 29 U.S.C.A. section 200 et seq. (the Act), and its regulations, 29 C.F.R. part 780 (FLSA regulations) neither the minimum wage nor the overtime wage provisions apply to an employee:

(A) who is employed in agriculture if the employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than 500 man days of agricultural labor,

(B) who is the parent, spouse, child, or other member of this employer's immediate family,

(C) who is (i) employed as a hand-harvest laborer and is paid on a piece rate basis in an operation which has been; and is customarily recognized as having paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he or she is employed, and (iii) has been employed in agriculture less than 13 weeks during the preceding calendar year,

(D) if the employee (i) is 16 years of age or under and is employed as a hand-harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his or her parent or person standing in the place of the parent, and (iii) is paid at the same rate as employees over age 16 are paid on the same farm, or

(E) if such employee is principally engaged in the range production of livestock. (29 U.S.C.A. § 213(a)(6)).

"Agriculture" defined

Further, under the act, the term "agriculture" is defined to mean farming in all its branches, including the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, fur-bearing animals, or poultry, *and any practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.* (29 U.S.C.A. § 203(f)).

Two branch test

As this definition is interpreted in the regulations, the point is made that it has two branches (20 C.F.R. § 780.105(a)). One branch relates to the primary meaning given the term "agriculture," which includes farming in all its branches (*Id.* § 780.105(b)). The second branch of the definition is a broader, secondary meaning. It includes operations, other than those which fall into the primary meaning of the term. It includes any practices, whether or not they are themselves farming practices, which are performed either by a farmer or on a farm as an incident to or in conjunction with such "farming" operations (*Id.* § 780.105(c)). Employees who are not employed in farming, or by a farmer, or on a farm are not employed in agriculture (*Id.* §105(d)).

Under this definition and the regulations that interpret it, "harvesting" is part of the primary definition and includes all operations customarily performed in connection with the removal of crops by the farmer from their growing position (*Id.* § 780. 118(a)). Packing shed operations would not fall into this definition, as they would be post-harvest activities. Packing shed activities, therefore, fall into the secondary definition of agriculture.

Who performs it? Where is it done?

To come within this secondary meaning, a practice must be performed either by a farmer or on a farm. It must be performed either in connection with the farmer's own farming operations or in connection with farming operations conducted on the farm where the practice is performed. In addition, the practice must be performed "as an incident to or in conjunction with" the farming operations (*Id.* § 780.129). No matter how closely related it may be to farming operations, a practice performed neither by a farmer nor on a farm is not within the scope of the secondary meaning of the term agriculture (*Id.*).

In attempting to provide various examples of situations, the regulations state that *employees of a fruit-grower who dry or pack fruit that is not grown by their employer are not preforming activities defined as "agriculture". Likewise, storage operations conducted by a farmer in connection with products grown by someone other than the farmer are not "agriculture."* (*Id.* § 780.138).

If a farmer rents space in a packing house located off the farm and the farmer's own employees engage in handling or packing only his own products for market, such operations are considered "agriculture" if performed as an incident to or in conjunction with his farming operation. (*Id.*).

The fact that a packing shed is conducted by a family partnership, packing

John C. Becker is Associate Professor of Agricultural Economics, The Pennsylvania State University.

products exclusively grown on lands owned and operated by individuals constituting the partnership, does not alter the status of the packing activity. Therefore, if an individual farmer is engaged in agriculture, a family partnership that performs the same operation will also be engaged in agriculture (*Id.*). However, an incorporated association of farmers that does not itself engage in farming operations is not engaged in agriculture though it processes at its packing shed produce grown exclusively by the farmer members of the association (*Id.*).

Who owns the commodity?

The performance on a farm of any practice, such as packing or storing, which may be incidental to farming operations cannot constitute a basis for considering the employees engaged in agriculture if the practice is performed upon any commodities that have been produced elsewhere than on such farm (*Id.* § 780.141). The line between practices that are and those that are not performed "as an incident to or in conjunction with" such farming operations is not susceptible of precise definition. Generally, a practice performed in connection with farming operations is within the statutory language only if it constitutes an established part of agriculture, is subordinate to the faring operations involved, and does not amount to an independent business. Industrial operations and processes that are more akin to manufacturing than to agriculture are not included, even if the on-farm practice is performed by a farmer (*Id.*).

Preparing items for market is a term that is found in the definition of agriculture. This term includes operations performed on farm commodities to prepare them for the farmer's market. The farmer's market normally means the wholesaler, processor, or distributing agency to which the farmer delivers his products. Preparation for market involves activities that precede delivery to market (*Id.* § 780.148). Included within the term "preparation" would be the assembly, ripening, cleaning, grading, sorting, drying, preserving, packing, and storing of the grown commodity (*Id.* § 780.151).

Another example of a practice that may qualify as "agriculture" under the secondary meaning of agriculture when done on a farm, by a farmer as it relates only to the operations of that farmer, is the packing of apples by portable packing machines that are moved from farm to farm packing only apples grown on the particular farm where the packing is being performed (*Id.* § 780.158(b)). It should be emphasized that with respect to all practices performed on products for which exemption is claimed, the practices must be performed only on the products produced or raised by the particular farmer or on the particular farm (*Id.* § 780.158(c)).

Different activities — same workweek

Where an employee in the same workweek performs work that is exempt under one section of the act and also engaged in work to which the act applies, but is not exempt under some other section of the Act, the employee is *not exempt* that week and the wage and hour requirements of the Act are applicable (*Id.* § 780.11). Hence the importance of looking at the employee's total workweek for that employer. If an employee performs exempt activities for part of a week and then performs other exempt activities for the rest of the week, the combination of the exempt activities is permitted (*Id.* § 780.12).

Burden of proof — exemptions

These comments are drawn from the regulations that are found at title 29, Code of Federal Regulations, sections 780.1 to 780.322. These regulations provide interpretations and indicate the construction of the law that the Secretary of Labor believes to be correct (*Id.* § 780.5). The interpretations provide a practical guide to employers and employees as to how the office that represents their interests will seek to apply it (*Id.* § 780.7).

An employer who claims an exemption under the Act has the burden of showing that it applies (*Id.* § 780.2). Exemptions are to be narrowly construed against the employer who seeks to assert them (*Id.*).

Migrant and Seasonal Workers Protection Act

Under the Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C.A. § 1800 et seq. (MSPA) and its regulations, 20 C.F.R. part 500 (MSPA regulations), the terms "migrant" and "seasonal" agricultural workers require that these individuals be employed in "agricultural employment" (MSPA, 29 U.S.C.A. section 1802(8) and (10)). This term is then defined as an activity or service that meets the definition of agricultural employment under the Fair Labor Standards Act *and* the handling, drying, packing, packaging, processing, or grading prior to delivery to storage of an agricultural commodity in its unman-ufactured state (*Id.* § 1802(3)).

The definition of migrant agricultural worker does not refer to packinghouse activities, but the definition of seasonal agricultural worker does make this reference. To qualify as a seasonal agricultural worker, a worker who is not required to be away overnight from his permanent place of residence satisfies the definition if the employee performs field work related to planting, cultivating, or harvesting operations or when employed in packing operations and is transported to the place of employment by means of a day-haul operations (*Id.* § 1802(1)). MSPA regulations repeat these references, but do not expand the concepts.

Conclusions

In conclusion, the question of how packing shed employees are treated for these laws is complex and confusing. For example, under the Fair Labor Standards Act, the owner of the commodity being packed is a relevant consideration in determining if the minimum wage and overtime wage provisions apply. As the MSPA definitions refer to the FLSA definition, it would seem if an employee is not engaged in agricultural employment for FLSA purposes, that employee would not be a covered employee for MSPA purposes. However, seasonal agricultural workers performing packing activities are specifically included in the definition of such workers for MSPA purposes if they are transported to the job by a day-haul operation.

Does the owner of the commodity matter for MSPA purposes? As the definitions of migrant agricultural worker and seasonal agricultural worker both refer to the term agricultural employment, clearly it would. For some seasonal agricultural workers, however, it would not. Which conclusion is correct, or can either be correct? Employers who struggle with questions of what wages to pay, disclosures to make, or records to keep need better guidance than that. Given the confusion and the consequences of a wrong guess, it would seem that the conservative approach would be to treat all questionable cases as if MSPA coverage applies to such employees.

FmHA policy found not to discriminate against bankrupt debtors

A United States District Court for the District of Wisconsin recently reversed a bankruptcy court holding that ordered Farmers Home Administration (FmHA) to consider the debtors application for the debt restructuring program mandated by the Agricultural Credit Act of 1987. *In re Cleasby*, 139 B.R. 897 (W.D. Wis. 1992). The district court held that the FmHA policy of refusing to consider the restructuring of post-discharge mortgage debt was not a violation of section 525, the anti-discrimination provision of the Bankruptcy Code. 11 U.S.C. § 525 (1988). *Cleasby*, 139 B.R. at 900.

The debtors, James and Delores Cleasby filed for relief in bankruptcy under Chapter 7 of the Bankruptcy Code in 1983 and received their discharge later that year. They retained title to farm real estate subject to a mortgage to FmHA and subsequently sought to restructure this mortgage debt under the newly enacted debt restructuring program. FmHA refused to consider the Cleasbys' request for restructuring, arguing that restructuring was only available to "borrowers" and that because of their Chapter 7 discharge, the Cleasby's were no longer "borrowers." Accordingly, FmHA initiated foreclosure proceedings in district court. The court accepted FmHA's interpretation, holding that because the Cleasbys were not personally liable to FmHA, they were not "borrowers" eligible for the debt restructuring program. *United States v. Cleasby*, 745 F. Supp. 546 (W.D. Wis. 1990). A foreclosure sale was scheduled.

Prior to the scheduled sale, the Cleasbys filed for relief under Chapter 11 of the Bankruptcy Code in an attempt to reorganize the mortgage debt. *See Johnson v. Home State Bank*, 11 S. Ct. 2150 (1991) (holding that post-discharge mortgage debt is a "claim" for purposes of bankruptcy reorganization). For their reorganization plan, the Cleasbys proposed a net recovery buy-out, a form of FmHA's debt restructuring program under which the debtor purchases FmHA's interest in the property for an amount calculated to be equal to that FmHA would receive in the event of foreclosure. FmHA objected to the plan, again arguing that the Cleasbys were ineligible for debt restructuring. The bankruptcy court denied confirmation of the Cleasbys' plan, but held that FmHA's refusal to consider them for debt restructuring was a violation of section 525, the anti-discrimination provision of the Bankruptcy Code. 11 U.S.C. § 525 (1988). *Cleasby*, 1339 B.R. at 899.

Section 525 provides in relevant part that "a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant ... solely because" a person has been a debtor in bankruptcy. 11 U.S.C. § 525(a) (1988). The bankruptcy court held that this provision applied to FmHA's blanket refusal to consider the debt restructuring applications of farmers who had received a discharge of their debt. *Cleasby*, 139 B.R. at 899.

On review to the same district court that had ruled in the foreclosure action, the court reversed. Analyzing the items enumerated in section 525, the court found that eligibility for debt restructuring was not analogous. Rather, the court likened the debt restructuring program to the granting of credit, an item rejected as not within the scope of section 525 by the second circuit in *In re Goldrich*, 771 F.2d 28, 30 (2nd Cir. 1985). *But see, In re Exquisito Services, Inc.* 823 F.2d 151 (5th Cir. 1987) (holding that renewals of government contracts are covered by § 525). *Cleasby*, 139 B.R. at 900.

In addition, the court held that even if restructuring did fit into the section 525 enumeration, FmHA's policy was not a violation in that it was based on the debtors' status as "borrowers," not on the bankruptcy. *Cleasby*, 139 B.R. at 901. While this latter reasoning may be somewhat strained in that it is the bankruptcy discharge that changes the status from borrower to non-borrower, the court's refusal to read section 525 as including debt restructuring consideration may well be persuasive if other courts are asked to rule on this issue.

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

Justice Department says CBOT directors subject to antitrust scrutiny

The American Agriculture Movement (AAM) found an ally recently in the U.S. Justice Department in its quest to collect several hundred million dollars in damages against the directors of the Chicago Board of Trade because of its July 11, 1989 action which ordered the liquidation of July 1989 soybean futures contracts. The Justice Department, in a brief filed on May 29, 1992, with the U.S. Court of Appeals for the Seventh Circuit, said that the "Commodity Exchange Act does not impliedly repeal the Sherman (Antitrust) Act with respect to bad faith actions taken by regulated contract markers." Consequently, the Justice Department urged the court to reverse a district court's judgment which had dismissed AAM's lawsuit on the grounds that the antitrust laws are impliedly repealed on the facts of the case. Should the court of appeals agree with the Justice Department, the AAM's lawsuit would be reinstituted and it could ultimately proceed to trial against CBOT directors on its allegations that the directors acted in "bad faith" in imposing the emergency order, thereby violating the antitrust laws.

The CBOT's July 11, 1989 emergency order was issued on the recommendation of its Business Conduct Committee (and after consultation with the CFTC Chairman and staff) and required any person or group controlling gross long or short positions in excess of three million bushels in such contracts to begin liquidating them the following day by at least twenty percent daily. Additionally, no one was to own more than three million bushels by July 18, or more than one million bushels by July 20, the last trading day for July contracts. The CBOT said the order was related to potential market manipulation by certain companies, major soybean traders and users who held a large "long" position in soybean futures. The AAM claims the order caused both cash and futures prices of soybeans to plummet. Among other things, AAM contends that the CBOT directors acted in bad faith by issuing the order because they, their firms, and their customers could profit from price reductions.

The federal district court judge, in dismissing the AAM's claims, had found that the Commodity Exchange Act insulated CBOT directors from antitrust claims when acting in their official capacities in compliance with the Commodity Exchange Act. The CFTC supported the CBOT's action and has filed a brief with the court of appeals urging it to affirm the decision of the district court and disagreeing with the Justice Department's analysis of the law.

—David C. Barrett, Jr., National Grain and Feed Association, Washington, D.C.

Subscriptions available

Free subscriptions to the University of California's publication, *Labor Management Decisions*, are being offered to members of the AALA.

To get on the mailing list, please send the following information to Agricultural Personnel Management Program, 319 Giannini Hall, University of California, Berkeley, CA 94720: principal occupation, name, address.

Federal Register *in brief*

The following is a selection of items published in the *Federal Register* in the month of June, 1992.

1. FCIC; Request for comments on the insurability of acreage which is destroyed or put to another use to comply with other USDA programs; comments due 8/31/92. 57 Fed. Reg. 23375.

2. FCA; Organization; funding and fiscal affairs, loan policies and operations, and funding operations; Title V conservators and receivers; proposed rule. 57 Fed. Reg. 23348.

3. FCA; Service corporations; certified agricultural mortgage marketing facilities; final rule. 57 Fed. Reg. 26991.

4. Farm Credit System Assistance Board; Administrative Dispute Resolution Policy and Program. 57 Fed. Reg. 23490.

5. Foreign Agricultural Service; Sharing of U.S. agricultural expertise with emerging democracies. 57 Fed. Reg. 23374.

6. IRS; Limitation on passive activity losses and credits; definition of activity; public hearing, 9/3/92. 57 Fed. Reg. 23356.

7. IRS; Adjustments to basis of stock and indebtedness to shareholders of S corporations and treatment of distributions by S corporations to shareholders; hearing 9/14/92 and notice of proposed rulemaking. 57 Fed. Reg. 22426; correction 57 Fed. Reg. 28470.

8. ASCS; Wetlands Reserve Program; final rule; effective date 6/1/92. 57 Fed. Reg. 23908.

9. APHIS; Accreditation of veterinarians; proposed rule. 57 Fed. Reg. 23540; correction 57 Fed. Reg. 27845.

10. APHIS; National Poultry Improvement Plan; proposed rule. 57 Fed. Reg. 29044.

11. CFTC; Application and closing out of offsetting long and short positions; exception; petition for rulemaking; comments due 8/17/92. 57 Fed. Reg. 26801.

12. CFTC; Reporting requirements; large trader reports; cash position reports on grains and cotton; proposed rule. 57 Fed. Reg. 27713.

13. CFTC; Contract market rules; review procedures; final rule; effective date 7/23/92. 57 Fed. Reg. 27921.

14. CFTC; Restrictions on exempt commodity options; final rule; effective date 6/23/92. 57 Fed. Reg. 27925.

15. EPA; Proposed rule for the Clean Water Act regulatory programs of the Army Corps of Engineers and the EPA; proposed rule. Comments due 8/17/92. 57 Fed. Reg. 26894.

16. USDA; Excessive manufacturing allowances in state marketing orders for milk; proposed rule. 57 Fed. Reg. 27371.

17. ASCS; Issuance of warehouse receipts under the U.S. Warehouse Act; proposed rule; comments due 8/24/92. 57 Fed. Reg. 28133.

18. CCC; Agricultural Resources Conservation Program; proposed rule. "...to allow small farmed wetlands to be enrolled in the CRP. 57 Fed. Reg. 28468.

—Linda Grim McCormick

Law as a Resource in Agrarian Struggles– *A Book Review*

The heart of the study of agricultural law in the Netherlands is at the Agricultural University Wageningen. Although the Agricultural University has no law school or law faculty like most other Dutch universities, the study of agricultural law takes place in the University's Department of Agrarian Law. "Agrarian law is the totality of law relevant for social practices in agriculture and rural development." (page 18). The task of the Department is "to make law visible to students and colleagues with no formal training in law and to show its relevance for understanding the social, economic and technological problems with which we are all concerned." (page viii). This year, in celebration of its tenth anniversary, the Department has published a book: *Law as a Resource in Agrarian Struggles* (F. von Benda-Beckmann & M. van der Velde, eds.).

Eighteen different authors contributed fourteen different essays, offering a fascinating and sweeping overview of agricultural law issues around the globe from a, generally speaking, non-legal perspective. A wide range of topics is covered: forms of organized cooperation through international development agencies; trade associations in Sierra Leone; land and water resource rights in Indonesia, the Netherlands, Portugal, and Sri-Lanka; positions in political and rule making authority in Indonesia, Sri-Lanka and the European Communities (EC); spheres of public policy making in the EC and its member states; and finally, manure legislation, tenancy law, and environmental management contracts in the Netherlands. According to one of the editors, agricultural law research must draw on "social-scientific approaches to law in addition to what can be learned from conventional legal science."(page 18). Accordingly, most of the authors in the disciplines other than law are Ph.D. students at the Wageningen University. The various contributions reflect the diversity in their backgrounds. The book strongly supports the notion that the best way to learn your own legal system is to learn about other legal systems.

—Eric Strating. Attorney at Law, The Netherrlands

AG LAW CONFERENCE CALENDAR

Eighth Annual Farm, Ranch and Agri-Business Bankruptcy Institute
October 8-10, 1992, Lubbock Plaza Hotel, Lubbock, TX
Topics include: disposable income; perfecting and protecting security interests in ag collateral; mediation role and practice.
Sponsored by: West Texas Bankruptcy Bar Association, Texas Tech U. School of Law, Association of Chapter 12 Trustees.
For more information, call (806)765-8851.

Land Use Institute
August 19-21, 1992, Sheraton Palace Hotel, San Francisco, CA
Topics include: wetlands regulations; endangered species; hazardous materials and wastes.
Sponsored by ALI-ABA.
For more information, call (800) CLE-NEWS.

Wetlands Regulation Conference
September 9-10, 1992, Hyatt Regency, Atlanta, Ga; November 12-13, 1992, Sheraton Carlton Hotel, Washington, DC
Sponsored by: Executive Enterprises, Inc.
For more information, call (800) 831-8333.

Hazardous Wastes, Superfund, and Toxic Substances
October 29-31, 1992, Washington, DC
Topics include: forcing EPA to look for other responsible parties; insurance; obtaining early settlements.
Sponsored by: ALI-ABA.
For more information, call (800) CLE-NEWS.

Nonpoint Source Water Pollution: Causes, Consequences, and Cures
October 30-31, 1992, Center for Continuing Education, Fayetteville, AR
Topics: Nature and consequences of nonpoint source runoff from agricultural operations, forestry activity, and urban areas; current federal and state regulation of NPS; potential methods for controlling NPS including best management practices; watershed management; and voluntary v. mandatory controls.
Sponsored by: NCALRI, Arkansas Water Resources Research Center.
For more information, call (501) 575-7646.

ADDRESS
CORRECTION REQUESTED

219 New York Avenue
Des Moines, Iowa 50313

agricultural law update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

"Chicago's Got It"

You will soon receive a brochure and registration form for this year's annual meeting and educational conference. PLEASE REGISTER EARLY. In addition to an outstanding program, Chicago lays claim to some of the country's favorite entertainment and cultural attractions. **The Chicago Art Institute** houses one of the finest and most comprehensive art collections in the world, the **Symphony and Lyric Opera House** offers an impressive schedule of musical and theatrical events, and there are also several world-class museums including the **Field Museum of Natural History** along with the **John G. Shedd Aquarium** and the **Adler Planetarium**.

The **Holiday Inn Chicago City Centre**, meeting headquarters, is north of the Chicago river near the famed section of Michigan Avenue dubbed the Magnificent Mile— the Rodeo Drive of the Midwest. North of the river is also home to the improvisation group **Second City TV** and boasts some of the best blues music that Chicago has to offer. Sports fans may enjoy the friendly confines of the Wrigleyville neighborhood (location of **Wrigley Field**), where old-time German restaurants and bars stuffed with sports memorabilia provide entertainment.

Chicago's **O'Hare International** is located 18 miles west of downtown approximately 45 minutes by taxi. Taxi fare runs about $18 to $22, depending on the time of day. An airport bus service, **Continental Air Transport**, charges $12.

The Convention Bureau's Executive Transportation and Accommodation Service (1-800-723-2000) offers a toll-free service to make airline, hotel, car rental, and restaurant reservations, should you require assistance.

(Information about the city was extracted from an article by LYNN WADSWORTH, in the JUNE 1992 issue of *SUCCESSFUL MEETINGS.)*

—Bill Babione, Director, AALA