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The truth sometimes not sought for comes forth to the light.

— Menander

Supreme Court holds firm on FIFRA registration laws

The Supreme Court has held that Article III of the Constitution does not prohibit Congress from selecting binding arbitration with limited judicial review as the mechanism for resolving disputes among participants in the pesticide registration scheme under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). *Thomas v. Union Carbide Agricultural Products Co.*, 105 S. Ct. 3325 (1985).

This is the second opinion by the Court in as many years reviewing FIFRA's comprehensive data consideration provisions. See *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862 (1984), reported on in the December 1984 issue of *Agricultural Law Update*.

FIFRA requires pesticide manufacturers to submit test data for new products. It also authorizes the Environmental Protection Agency (EPA) to use data submitted by one applicant in evaluating the application of a subsequent registrant. These data-sharing provisions are intended to streamline pesticide regulation procedures, avoid duplication of data generation cost, and encourage competition.

Section 3(c)(1)(D)(ii) of FIFRA requires the subsequent registrant to offer reasonable compensation for the use of another applicant's test data. If the parties cannot agree on a sum, either may invoke binding arbitration. The arbitrator's decision is subject to judicial review only for "fraud, misrepresentation, or other misconduct." 7 U.S.C. § 136a(C)(1)(D)(ii).

Several large companies engaged in the development and marketing of pesticides argued that the FIFRA arbitration procedures unlawfully deprive a federal court of its assigned role in ensuring fair compensation to data submitters.

The companies argued that Article III bars Congress from requiring arbitration of disputes among registrants without also affording substantial review in federal courts, where judges enjoy lifetime tenure and salary protection.

(continued on next page)

Rights of creditors and others in federal crop insurance proceeds

The following statement appears in *Crop Insurance: An Overview of Authority, Availability, Expansion and a Variety of Insurance Plans*, p. 4 (USDA, Federal Crop Insurance Corp. Issuance Coordination Staff 8-81):

> As in some other forms of insurance, crop insurance can be used as collateral for loans or credit. This is true because it establishes a cash value on growing crops equal to the amount of insurance protection. Crop insurance contracts contain a provision whereby the insured may make an assignment to a creditor. (This provision of the insurance contract helps many producers improve their credit, and, in some areas, has been a major motivation for many producers to take crop insurance. Creditors who may be given assignments include landlords, lenders and merchants. The assignment must be filed on a special form prior to processing any claim, and will be accepted only if no previous assignment on the crop is on file).

A typical assignment clause appears at the *Soybean Crop Insurance Policy* (Federal Crop Insurance Corp. 83-21):

> 12. ASSIGNMENT OF INDEMNITY. On our prescribed form, and with our approval, you may assign to another party the right to an indemnity for the crop year, and such assignee shall have the right to submit the loss notices and forms required by the contract.

The court in *Buttonwillow Ginning Co. v. Federal Crop Ins. Corp.*, 767 F.2d 612 (9th Cir. 1985), held that the Federal Crop Insurance Corp. (FCIC) is not liable to a secured party where the insured had not assigned rights pursuant to the policy provisions using the prescribed form.

(continued on next page)

FIFRA REGISTRATION LAWS

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Article III, § 1, establishes a broad policy that federal judicial power shall be vested in courts whose judges enjoy such guarantees. The companies asserted that Congress (in FIFRA) violated Article III by allocating to arbitrators the functions of federal judicial officers.

But the Supreme Court held that Congress has the power, under Article I of the Constitution, to authorize an agency that is administering a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program without providing for an Article III ajudication.

The Court stated that the limited judicial review for fraud and misrepresentation under FIFRA preserves the "appropriate exercise of the judicial function." The Court also noted that companies can pursue Tucker Act claims to recover any shortfall between the statutory remedy and just compensation.

The Tucker Act, 28 U.S.C. § 1491, provides a cause of action for federal takings. The Supreme Court had concluded earlier that FIFRA merely requires a claimant to pursue the statutory remedy as a precondition to the Tucker Act claim. See *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2881 (1984).

— *David Myers*

CORRECTION

The November 1985 issue of *Agricultural Law Update* was numbered incorrectly. VOLUME 3, NUMBER 2, WHOLE NUMBER 26 is how the issue should have been numbered.

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CROP INSURANCE

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A farmer entered into a written security agreement (later perfected) granting creditor a continuing security interest in crops "together with all proceeds derived from such crops." The FCIC issued the farmer a crop insurance policy containing the standard provision, which allows the assignment of indemnity using government-approved forms. The farmer made no assignment to the secured party, and the crop was subsequently destroyed by adverse weather.

The secured party made demand upon the FCIC for the amount of the lien, requesting payment out of the insurance proceeds. However, the FCIC paid all insurance proceeds to the farmer. The secured party filed suit, seeking a declaratory judgment setting forth the FCIC's payment obligation.

The United States District Court (E.D. Cal.) granted the secured party's motion for summary judgment, but the 9th Circuit reversed, stating that the holder of a perfected security interest in crops (and proceeds thereof) has no right to an indemnity under an FCIC policy unless an assignment has been made by the insured, and approved pursuant to the provisions of the insurance contract. 7 C.F.R. § 402.4 provides:

> An interest of a person in an insured crop existing by virtue of a lien, mortgage, garnishment, levy, execution, bankruptcy, or an involuntary transfer, shall not entitle the holder of the interest to any benefit under the contract, except as provided in the policy.

The 9th Circuit Court pointed out that its decision is in conformity with *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947), where the Supreme Court held that crop insurance regulations are binding — regardless of whether the parties have actual knowledge of their content, and in spite of any hardship resulting from innocent ignorance.

Attorneys and other interested persons should be aware that the application for assignment of indemnity must be submitted on Form FCI-20 (Rev. 3-84). The FCIC Service Office Manual (SECTION 4 FCI-20 ASSIGNMENT OF INDEMNITY) provides instructions for filling out the form, and sets forth the standards applied by the FCIC in approving the assignment.

The assignment of indemnity will be in effect for only the crop(s) and crop year designated. The assignment will not be approved if another assignment is outstanding for the crop(s), if the accompanying application for a new contract has been rejected, or if the crop insurance contract was cancelled.

A procedure for releasing an assignment is also set forth. Form FCI-20 (Rev. 3-84) indicates that if there is an effective assignment, payment will be made by a check payable to the lender *and* the insured if the lender is the Farmers Home Administration (FmHA), and to the lender *only* if the lender is not the FmHA.

The lesson of the *Buttonwillow* case is clear. Preparation and perfection of a security interest in crops, even if it specifically refers to proceeds of federal crop insurance as collateral, will provide absolutely no protection to the secured party. Nevertheless, the security agreement could, at least, require the farmer/debtor to apply each crop year for an assignment of crop insurance proceeds to the secured party.

Supplementary note. If an interest in a farm is transferred together with a growing crop, the transferee should insist upon a transfer of rights to indemnity if there is an outstanding crop insurance policy. Consider the following representative provision in the *Soybean Crop Insurance Policy* (Federal Crop Insurance Corp. 83-21):

> 11. TRANSFER OF RIGHTS TO INDEMNITY ON INSURED SHARE. If you transfer any part of your share during the crop year, you may transfer the right to an indemnity on an approved form. We may collect the premium from either you or your transferee, or both. The transferee shall have the same rights and responsibilities provided by the contract.

There is a distinct form that must be used for transfer of right to an indemnity. FCI-21 (1-81). Again, there are pertinent provisions in the FCIC Service Office Man-

Involuntary servitude

The convictions of a Michigan farmer and his wife and son, for holding two farmworkers in a state of slavery have been affirmed. *United States v. Kominski*, 771 F.2d 125 (6th Cir. 1985).

The convictions were based on the civil rights provisions at 18 U.S.C. § 241 and the involuntary servitude provisions at 18 U.S.C. § 1584.

Both workers had low IQs and could not read or write. They were required to work long hours — frequently from 3 a.m. until 8:30 p.m., no salary was paid, no vacations given, and housing was in a dilapidated trailer with no bathroom, no heat and no running water.

There was evidence of physical abuse, medical treatment was refused, farm visitors were instructed not to speak with the workers, the workers were instructed not to speak with the visitors, and efforts by the workers to eseape resulted in their being returned to the farm. Psychological testimony about the "captivity syndrome" was deemed to be admissible.

Subsequently, on Oct. 3, 1985, the Eleventh Circuit affirmed convictions of four persons who operated migrant labor camps and supplied field workers to farmers in Florida and North Carolina. *United States v. Warren*, 772 F.2d 1827 (11th Cir. 1985).

It was charged that the four had unlawfully conspired under 18 U.S.C. § 371, enticed persons to a place while intending that the persons would then be held as slaves (contrary to 18 U.S.C. § 1583), and held persons in involuntary servitude in violation of 18 U.S.C. § 1584.

There was considerable evidence that "individuals were picked up under false pretenses, delivered to a labor camp to work long hours for little or no pay, and kept in the fields by poverty, alcohol, threats and acts of violence." *Id.* at 832.

The Eleventh Circuit found that the evidence was sufficient to allow a reasonable jury to convict the four defendants on all counts charged. *Id.* at 834.

— *Donald B. Pedersen*

Grain warehouse insolvencies

A recent report by the U.S. General Accounting Office entitled, *"Federal Insurance Program for Grain Warehouse Depositors — Issues and Information,"* points out that "grain warehouse insolvencies can result in financial losses to farmers and other customers — losses that can adversely affect the individuals and local communities involved."

The study was carried out by the General Accounting Office at the suggestion of the House Agriculture Committee's ad hoc subcommittee on grain elevator bankruptcy. The study considers patterning a grain deposit insurance program after the Federal Deposit Insurance Corp. program. In that context, the study summarizes the principal issues that various parties have raised, describes the proposed program and estimates costs.

The study also describes existing federal, state and private programs, including state bonding requirements; the state grain warehouse indemnity programs of Illinois, Kentucky, New York, Ohio, Oklahoma and South Carolina; and available private insurance protection. Persons interested in the study should ask for it by name and number (GAO/RCED 85-39, March 1, 1985). Requests should be sent to: U.S. General Accounting Office Document Handling and Information Services Facility, P.O. Box 6015, Gaithersburg, MD 20760; (202) 275-6241.

— *Donald B. Pedersen*

Farmer acquitted in conversion case

On Oct. 29, 1985, a St. Louis jury (U.S. District Court, E.D. Mo.) acquitted a Missouri farmer on all four counts of an indictment for felony conversion of hogs mortgaged to the Farmers Home Administration (FmHA).

Bernard "Butch" Menne, of Silex, Mo., who had borrowed FmHA money to finance a large feeder pig operation, was charged with selling hogs on four separate occasions and converting the proceeds to his own use. The criminal charges were instigated by the FmHA, and were investigated and developed by the Office of Inspector General, U.S. Department of Agriculture (USDA).

Menne sold the hogs in question for $18,432. Approximately $11,000 of the proceeds was in checks made payable jointly to Menne and the Lincoln County Farm Bureau Service Co-op (which supplied the hog feed), with the balance going to Menne, who deposited the same in his checking account.

Menne did not report the sales to the FmHA, nor obtain release from its first priority security interest. He did, however, use all of the proceeds from the sales to pay for feed, other farm operating expenses, $1,000 to retain a lawyer to battle impending liquidation by the FmHA, with a small amount used for family living expenses.

The government argued that Menne's failure to report sales to the FmHA, his failure to obtain a lien release, and his act of depositing sale proceeds in his checking account constituted a conversion to his own use.

The defendant argued that since the proceeds were spent pursuant to a current Farm and Home Plan, and since the FmHA had authorized continuation of the feeder pig cycles by permitting the use of funds from a supervised bank account to purchase pigs and to order and pay for some feed, there was no conversion and no intent to convert sales proceeds to his own use.

After six days of trial, the jury took slightly more than two hours to find Menne not guilty on all counts.

— *Donald B. Pedersen*

ual. An FCI-21 must be prepared for each crop transferred. Both the transferor and the transferee must sign the document.

A person who buys a farm with a growing crop, or otherwise acquires an interest in a growing crop, will obtain absolutely no interest in existing crop insurance unless Form FCI-21 is properly prepared, submitted to the FCIC, and approved.

— *Kemp P. Burpeau*

FmHA implements IRS offset

By interim rule, effective Nov. 5, 1985, the Farmers Home Administration (FmHA) announces implementation of Internal Revenue Service (IRS) offset pursuant to IRS regulations and 31 U.S.C. § 3720A.

This procedure allows the IRS to reduce a taxpayer's overpayment of tax by the amount of any legally enforceable debt owed to the FmHA and which is at least three months overdue.

The decision to use offset authority is not appealable under amended FmHA appeal procedure. 50 Fed. Reg. 45906 (1985) (to be codified at 7 C.F.R. § 1900.53(a)(16)). The rule is subject to revision following the comment period, which ends Jan. 6, 1986.

— *Donald B. Pedersen*

Hazards in the workplace — agriculture's treatment under disclosure statutes and standards

by John C. Becker

Introduction

In 1984, the names Bhopal, India and Union Carbide were etched into our consciousness. This disaster raised the world's level of awareness of the hazards of modern manufacturing processes and the risk of serious harm to people who live in the vicinity of these sites.

The extent of human suffering caused by the Bhopal accident was overwhelming. Understandably, the incident sparked a tremendous amount of interest in preventing the same type of occurrence in this country. In 1985, developments in Institute, W. Va., demonstrated that we in the United States are not immune.

Attention has centered on the need to establish a system to inform people about hazards in the workplace and associated risks. At the time of the Bhopal incident, the Occupational Safety and Health Administration (OSHA) and a number of state legislatures had addressed the question of hazard disclosure.

This article considers the agricultural implications of a number of state right-to-know statutes, the OSHA hazard communication standard, and pertinent recent litigation. In agricultural employment, hazardous materials could include certain pesticides, fertilizers, herbicides and cleaning solvents used and handled by employees. The scope of this article is limited, and no attempt is made to compare right-to-know statutes on all points and issues.

Purpose of the Standard or Statute — Who is Protected By It?

Nearly all of the statutes and standards considered in this study are designed to protect employees and their families from hazardous materials found in the workplace. State governments, as the protectors of public health and safety, seek to improve the health and safety of their people, Del. Code Ann., tit. 16, § 2402, or to provide workers with a safe working environment, Wash. Rev. Code Ann. § 49.17.010.

The OSHA hazard communication standard has, as one of its purposes, the insurance that the hazards of all chemicals produced or imported are evaluated. 29 C.F.R. § 1910.1200(a).

In addressing concern for workers' safety, a number of the statutes identify the inherent right of workers to know the hazards faced in employment. Disclosure puts employees in the position to decide if the risks of particular employment outweigh its benefits.

Consistent with the general trend of right-to-know statutes, the Pennsylvania and New Jersey statutes go beyond concern for employees, stating that the general public also has an inherent right to know the risks of living next to or in close proximity to an entity that has hazardous materials on its premises.

Who is Covered by the Statute or Standard?

The OSHA hazard communication standard covers employers engaged in a business within Standard Industrial Classification (SIC) Codes 20-39 (most manufacturing industries, including food and tobacco) in which chemicals are used or produced. Production agriculture and agricultural services are not included in these groups, and are exempt from the OSHA standard.

State right-to-know statutes are not consistent in the treatment of agricultural employers. In a number of jurisdictions, agricultural employers are required to disclose hazard information to agricultural employees, while in other states, an exemption frees them from this obligation.

In addressing coverage questions, statutory definitions of key terms such as "employer" and "agricultural employee" must be considered. Such examination reveals treatment favorable to agricultural employees in Alaska, California, Kentucky, Massachusetts, Michigan, Minnesota, Pennsylvania, Rhode Island, Washington and Wisconsin, with some potential for protective coverage in certain other states.

The New Jersey statute covers a broader group of employees than those encompassed in SIC Codes 20-39, but does not extend coverage to production agriculture or agricultural services. N.J. Stat. Ann. § 34:5A-3.

The Delaware statute also covers employers who are not covered by the OSHA standard, but exempts chemicals in an agricultural workplace if the Delaware Secretary of Agriculture certifies that the chemicals are covered by other state or federal regulations. Del. Code Ann., tit. 16, § 2407.

The Maine statute exempts employers who are regulated by the Maine Department of Agriculture, Food and Rural Resources. Me. Rev. Stat. Ann. tit. 26, § 1709.

West Virginia exempts agricultural and horticultural activities from its definition of "employer." W. Va. Code § 21-3-18.

Florida's definition of "employer" does not include bona fide farmers or associations of farmers who employ less than 13 agricultural employees on a farm or on-site packing facility, nor those who employ less than 25 seasonal or occasional agricultural employees. Fla. Stat. Ann. § 442.102(B).

The Maryland statute excludes farmers using hazardous chemicals from the definition of "employee" if the farmers comply with the Federal Insecticide, Fungicide and Rodenticide Act. Md. Ann. Code Art. 89, § 32A.

A number of states define an "employer" (subject to the right-to-know law) as one who employs a specific number of people, i.e., one or more employees (Alaska, Connecticut, California, New York, Michigan, Minnesota, Rhode Island, Washington and Wisconsin), three or more employees (Florida), 10 or more employees (West Virginia), 20 or more employees, or five full-time employees (Illinois).

The Pennsylvania statute specifically provides that an employer who has no employees is exempt from certain provisions that require disclosure of information to employees. Pa. Stat. Ann. tit. 35, § 7302 (Purdon). Nevertheless, a business without employees must make pertinent information available, upon request, to members of the public.

Protections Afforded Employees

Right-to-know statutes require employers to disclose hazardous substance information to employees. Employees are also given the right to request information from employers. If the employer does not provide the requested information within a given period of time, the employee may have a right to refuse to work with the substance. *See, e.g.*, Pa. Stat. Ann. tit. 35, § 7305(d); N.J. Stat. Ann. § 34:5A-17.

The employer's obligation to provide the information can be as short as 72 hours after the request, excluding holidays and weekends, N.Y. Labor Law, § 880.6 (McKinney), or as long as 15 days after the request, Alaska Stat. § 318.60.067.

Typically, an employee is given the right to request information when assigned to a job that involves exposure to a hazardous material. Information about the material will originate with the manufacturer or supplier. This information may be found on a Material Safety Data Sheet (MSDS) or a Hazardous Substance Fact Sheet (HSFS) prepared by a state agency. It may be made

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available to employers and, in some cases, to the general public.

Some statutes require employers to conduct educational programs to inform employees of the hazards associated with certain substances, safe handling procedures, use of protective equipment, as well as first aid for emergency exposure. *See, e.g.,* Pa. Stat. Ann. tit. 35, § 7308(b). As new information is developed, it is to be made available to employees and others who may encounter the materials. *Id.* §§ 7308(b), 7308(a).

Generally, the statutes provide that an employer may not discharge, discipline or discriminate against an employee who exercises rights afforded by the statutes. *See, e.g.,* Conn. Gen. Stat. Ann. § 31-40; R.I. Gen. Laws § 28-21-8.

Michigan, New York and Florida provide that an employee is not to suffer a loss of pay, benefits, or security by exercising such rights. Mich. Comp. Laws Ann. § 408.1029(10) (West); Fla. Stat. Ann. § 442.116; N.Y. Law § 880.3, (McKinney). If an employer takes unlawful action against an employee, the statutes afford a variety of remedial measures.

If an employer requests that an employee waive statutory rights, or requires their waiver as a condition of employment, the employer may be in violation of the statute, and any obtained waiver may be void. *See, e.g.,* Del. Code Ann. tit. 16, § 2415.

Protection Afforded the Public

Under the Pennsylvania statute, any person who lives or works in Pennsylvania and who is not a competitor, may request a copy of any lists or forms (MSDS, HSFS) prepared by an employer for a particular workplace. Pa. Stat. Ann. tit. 35, § 7305(g).

The request is made to the Department of Labor and Industry, which forwards it to the employer. The name and address of the person requesting the information is kept confidential. Under this provision, a neighbor can request that a farmer provide a copy of the hazardous substance survey list for a farm.

The Pennsylvania Department of Labor and Industry is to develop an outreach program to inform employees and the general public of their rights under the statute and to educate all people about hazardous substances, their dangers, proper handling and disposal, and emergency treatment. Pa. Stat. Ann. tit. 35, § 7310(a).

Pennsylvania is a populous state that borders six other states. As the rights are granted to all who live *or work* in Pennsylvania, they are extended to an undetermined number of people. A person requesting information need not show any relationship to or geographical proximity to a particular employer.

Any aggrieved person may bring a civil action against an employer for violations of the Pennsylvania statute or file a suit against the Commonwealth for failing to enforce the statute or any rule promulgated under it. Pa. Stat. Ann. tit. 35, § 7315(b).

Courts that hear such actions have injunctive relief authority, but are specifically prohibited from awarding compensatory or liquidated damages, costs and expenses of litigation, expert witness' fees or attorneys' fees.

The New Jersey statute also gives the public the right to request copies of environmental surveys, workplace surveys and HSFS information. N.J. Stat. Ann. § 34:5A-10d 9d. Pursuant to the statute, copies of workplace surveys are sent to local health, police and fire departments. N.J. Stat. Ann. § 34:5A-7. County health department workplace and environmental survey records are open to the public, but police and fire department records are not. *Id.* § 34:5A-22.

Which Statute or Standard Applies?

Section 18 of the Occupational Health and Safety Act provides that states and state agencies may assert jurisdiction over any occupational safety and health issue with respect to which no standard is in effect under the OSH Act. 29 U.S.C. § 667(a). The OSHA hazard communication standard states that its intent is to address these issues comprehensively and to preempt any state law pertaining to the subject. 29 C.F.R. § 1910.1200(a)(2). Are all state hazard disclosure statutes therefore preempted?

In *New Jersey State Chamber of Commerce vs. Hughey*, 774 F.2d 587 (3rd. Cir. 1985), the court affirmed (in part) and reversed (in part) the district court decision reported at 600 F.Supp. 606 (D.N.J. 1985).

The district court had held, *inter alia*, that the New Jersey right-to-know statute, which extends to employers (in addition to those in the manufacturing sector) and recognizes the public's interest in such matters, was preempted by the OSHA manufacturing sector standards and that state provisions that might apply to the non-manufacturing sectors were unseverable under New Jersey law. The practical effect was a total preemption.

In *Hughey*, the Third Circuit held that preemption did occur as to those provisions in the New Jersey statute aimed at workplace hazards in the manufacturing sector, but not as to environmental hazards in the manufacturing sector.

Further, the Third Circuit determined that the effect of federal preemption is narrow, and that New Jersey workplace hazard disclosure provisions applicable to non-manufacturing sectors, as well as those environmental provisions that remain applicable to the manufacturing sector, are severable and remain viable.

While the New Jersey right-to-know statute is not designed to reach agricultural employment, the implications of the *Hughey* decision are significant for agriculture in certain other jurisdictions. Clearly, the OSHA hazard communication standard does not preempt state right-to-know provisions applicable to the agricultural production and service sectors.

Of course, the severence issue decided in *Hughey* will have to be resolved on a state-by-state basis.

Hughey also involved a trade secret issue centered on a provision in the New Jersey right-to-know statute that prevents a manufacturer from claiming trade secret protection for substances found on a special health hazard list. N.J. Stat. Ann. § 34:5A-5(b).

For substances not on the list, it is possible to claim that disclosure of required information would divulge a trade secret. Under the OSHA standard, all substances may be the subject of a trade secret. *But see*, 50 Fed. Reg. 48750 (1985).

The Third Circuit upheld the district court's determination that these provisions in the New Jersey right-to-know statute are neither preempted, nor work a taking without due process. *Id.* at 598. *Ruckelshaus v. Monsanto Co.*, ____ U.S. ____, 104 S. Ct. 2862, 81 L. Ed.2d 815 (1984), is cited as controlling. See discussion of *Ruckelshaus* in the December 1984 issue of *Agricultural Law Update*.

It should be remembered that if a state wishes to take over enforcement of hazard communication standards in the manufacturing sector, it can do so by seeking and obtaining approval from OSHA of a general occupational safety and health state plan — with standards at least as stringent as those promulgated by OSHA. 29 U.S.C. § 667.

Should the OSHA Standard Have Broader Application?

Another Third Circuit case decided

(continued on next page)

earlier in 1985 raised distinct issues. *United Steel Workers of America v. Auchter*, 763 F.2d 728 (3rd Cir. 1985), challenged the jurisdiction of the court to determine the validity of the OSHA hazard communication rule.

The jurisdictional question involved the distinction between a standard, 29 U.S.C. § 655(f), and a regulation, 29 U.S.C. § 657. If the OSHA rule is not a standard, then any review must be conducted by a district court rather than by the court of appeals, which will only review a regulation on appeal from a district court determination. 28 U.S.C. § 1631.

The question is whether the challenged rule reasonably purports to correct a particular "significant risk" (a standard), or instead, is merely an enforcement or detection procedure generally designed to further the goals of the OSH Act (a regulation). *Id.* at 735, *citing Louisiana Chemical Association v. Bingham*, 657 F.2d 777, 782-83 (5th Cir. 1981).

Petitioners argued that the OSHA hazard communication rule cannot be classed as a standard since it does not reduce risk through reduced exposure or improved protection. The Secretary of Labor argued that employees who have been warned are in the best position to assure that dangerous substances are handled safely. The court concluded that the OSHA rule is a standard. *Id.* at 735.

The fact that the OSHA rule is a standard raises the possibility of preemptive effect as explored more fully in *Hughey, supra*. Had the OSHA rule been characterized as a regulation, preemption of state right-to-know statutes would not have been an issue. 29 U.S.C. § 667(a).

Petitioners in *Auchter* challenged the validity of the OSHA hazard communication standard in regard to the limited extent of its coverage. The court noted the Secretary's justification for providing coverage only to employers in the manufacturing sector (SIC Codes 20-39) — a sector which accounts for more than 50% of the reported cases of illness, while it includes only 32% of total employment.

The Secretary also considered coverage for agricultural employment, but discounted an incidence rate higher than that of the manufacturing sector after noting that 80% of the reported chemical source cases among agricultural workers involved skin illnesses from handling plants (activity that would not be regulated by the hazard communication standard). *Id.* at 737. The court noted that the Environmental Protection Agency (EPA) has exercised jurisdiction to regulate field use of pesticides. *Id.*

Petitioners in *Auchter* contended that the Secretary's decision to limit coverage to the manufacturing sector is not supported by reasons that are consistent with the purposes of the statute. The Secretary argued that the decision to limit coverage was an exercise of discretion to regulate those industries with the greatest demonstrated need and, as such, was not reviewable under 29 U.S.C. § 655(g). *Id.* p. 738.

The court rejected the Secretary's contention by reading § 655(g) in conjunction with 29 U.S.C. § 655(f), which provides for judicial review of standards.

In the court's view, the Secretary also failed to explain why coverage of workers outside of the manufacturing sector would seriously impede the rule-making process. On this basis, the court directed the Secretary to reconsider the application of the standard to employers in other sectors, and to order its application to other sectors unless infeasibility can be shown. *Id.* at 739.

The first step in this process has now been taken with the issuance by OSHA on Nov. 27, 1985 of advanced notice of proposed rule-making to expand the scope of industries covered. 50 Fed. Reg. 48794 (1985). Comments are due on or before Feb. 25, 1986.

If the Secretary extends coverage of the OSHA standard to agriculture, a number of issues will be raised. Certainly, such an extension would bring coverage to agricultural employees in those states where right-to-know laws do not extend to agriculture.

The preemption issue would be raised as to state right-to-know statutes that now extend to agricultural employment. Finally, jurisdictional battles between OSHA and the EPA might have to be litigated a la *Organized Migrants in Community Action Inc. v. Brennan*, 520 F.2d 1161 (D.C. Cir. 1975).

Summary

Public awareness of hazards in the workplace and surrounding areas has been aroused. While employers may argue about the regulatory burdens being imposed, it is fair to point out that most people are interested in knowing the risks associated with particular products, ways to handle them safely, as well as steps to take if the product causes injury or disease. Sharing the information with employees and the general public is not an unreasonable burden.

Agricultural employers are treated differently from state to state, and under the existing OSHA standard. An agricultural employer located in a state that has passed a right-to-know statute should carefully review the act to determine whether compliance is required.

As to the OSHA standard, the *Auchter* opinion and the very recent advance notice of proposed rule making raise the possibility of a revised classification that would dramatically alter the regulatory scheme as to agriculture. This is a fluid area, and many questions remain to be answered. Persons who wish to participate in the early stages of the OSHA rule-making process have the opportunity to submit comments at this time.

Statutes and Standards Reviewed

OSHA Hazard Communication Standard, 29 C.F.R. § 1910.1200 et seq.; Alaska Stat. § 18.60.00 (1981); Calif. Labor Code § 6408 (West 1985); Conn. Gen. Stat. Ann. § 31-40c et seq. (West 1985); Del. Code Ann. tit. 16, § 2401 et seq. (1984); Fla. Stat. Ann. § 442.101 et seq. (West 1985); Ill. Ann. Stat., ch. 48, § 1401 et seq. (Smith-Hurd 1985); Me. Rev. Stat. Ann. tit. 26, § 1701 et seq. (1985); Md. Ann. Code art. 89, § 32A et seq. (1985); Mass. Gen. Laws Ann. ch. 149, § 142A et seq. (West 1982); Mich. Comp. Laws Ann. § 408.1001 et seq. (West 1985); Minn. Stat. Ann. § 182.65 (West 1985); N.J. Rev. Stat. Ann. § 34:5A-1 et seq. (West 1985); N.Y. Labor Law § 875 et seq. (McKinney 1984); Penn. Stat. Ann. tit. 35, § 7301 et seq. (Purdon 1985); R.I. Gen. Laws § 28-21-1 et seq. (1984); Wash. Rev. Code Ann. § 49.17.00 et seq. (1985); W. Va. Code § 21-3-18 (1985); Wis. Stat. Ann. § 101.58 et seq. (West 1985).

FmHA update

In the November 1985 issue of *Agricultural Law Update*, we discussed the Farmers Home Administration (FmHA) delinquent borrower regulations that were published in the Federal Register on Nov. 1, 1985. See 50 Fed. Reg. 45740-45803 (1985) (to be codified in various parts of 7 C.F.R.).

At this writing, there is no indication that the FmHA plans to approach any of the pertinent federal courts with motions to lift existing injunctions or to seek declaratory judgments to the effect that court-imposed requirements now have been complied with.

It seems likely that the FmHA is assuming that it has complied with the various court orders and that, without further ado, it will begin to move against delinquent borrowers (those that are more than $100 in default) on or about Dec. 31, 1985.

— *Donald B. Pedersen*

State Roundup

ARKANSAS. *Criminalization of Crop Financing.* Arkansas continues to have the farm products rule as set forth in the 1972 version of the Uniform Commercial Code, strengthened from the lender's standpoint by an amendment that provides that authorization to sell free of the security interest will *not* result from a prior course of dealing. Ark. Stat. Ann. §§ 85-9-307(1), 85-9-306(2).

In 1985, the Arkansas Legislature enacted Senate Bill 691 and House Bill 1054 (compiled together as Ark. Stat. Ann. §§ 41-2304.1 and .2). The statute provides that a person who buys soybeans, corn, wheat, rice or milo from one engaged in farming (or who acts as commission agent for such seller) and who "knowingly" fails to issue a two-party check when the name of the secured party has been disclosed, may be found guilty of a felony.

Further, a person engaged in farming operations who sells the indicated commodities and (before accepting payment) "knowingly" fails to disclose the name of a person having a security interest may be found guilty of a felony.

Finally, failure of a debtor who sells (or otherwise disposes of) the above commodities promptly to pay proceeds to a secured party may result in a felony charge. Failure to pay proceeds within 10 days of sale or other disposition is prima facie evidence of a "knowing" failure to pay.

— *Kimberly W. Tucker*

COLORADO. *Novel "Products" Liability.* In *Kaplan v. C. Lazy U Ranch*, 615 F.Supp. 234 (D.C. Colo. 1985), a guest at defendant ranch sued for damages attributable to alleged negligent saddling of a horse on, among other grounds, *res ipsa loquitur*, strict liability for a dangerous animal, strict products liability and strict liability for failure to warn and/or instruct as to a dangerous product.

On defendant's motion for summary judgment, the U.S. District Court, District of Colorado, Kane J. held that *res ipsa loquitur* is a rule of evidence, and does not constitute a substantive claim for relief; that strict liability for dangerous animals did not apply because "horses are regarded as domestic animals virtually everywhere" and the horse's tendency to expand its chest while being saddled "while it might be. . .fractious, is not a 'dangerous propensity' within the scope of this doctrine of liability," and that a theory of products liability did not apply to horses because "[c]learly, no person ever designed, assembled, fabricated (except the Greeks at Troy), produced, constructed or otherwise, prepared a horse."

— *Bruce McMillen*

PENNSYLVANIA. *Worker's Compensation — Occupational Disease Presumed Ocular Histoplasmosis.* In this appeal from a dismissal of a claim for worker's compensation benefits, the employee serviced and installed poultry equipment in chicken houses during a three-year period in the early 1970s.

While still employed at this job, the employee was diagnosed as suffering from presumed ocular histoplasmosis, which is an allergic reaction to the presence of histoplasmosis organisms in the bloodstream. These organisms are fungus which grows in some soils and is believed to be fertilized by fowl droppings.

Upon learning these facts from his treating ophthalmologist, the employee quit the job. At the time, he had a small blind spot in the visual field of one eye, but retained peripheral vision in that eye.

Under the Worker's Compensation Act, Pa. Stat. Ann. tit. 77, § 27.1 (Purdon 1985), for an occupational disease to be compensable, the claimant must prove exposure to the disease in employment, that the disease was causally related to the employment, and that the incidence of the disease is substantially greater in the occupation than in the general population. Claimant's expert witness provided sufficient proof of all elements.

The Court noted that the term "presumed" (when used in this scientific application) has the meaning "to accept as true in the absence of positive scientific proof," and not a meaning which might be synonymous with the word "assumed," which would not be sufficient medical testimony as to causation. The Court reversed the order dismissing the claim. *Landis v. Workmen's Compensation Appeal Board*, 496 A.2d 1324 (Pa. Commonwealth Ct. 1985).

— *John C. Becker*

SOUTH DAKOTA. *"Fines" in Cattle Feed.* A judgment of $166,363 on defendant's counterclaim for breach of warranty and negligent manufacture of cattle feed has been upheld. *Cargill v. Elliot Farms Inc.*, 363 N.W.2d 212 (S.D. 1984). Industry standards allow 55% "fines" component in feeds. "Fines" are materials that will pass through a screen, the openings of which are immediately smaller than the specified minimum size. The court noted:

> Fines can be dangerous in cattle feeding in that they separate the feed components. As a result, the cattle may eat too much of the feed component or potentially toxic substances such as urea or rumensin, and as a result, can develop acidosis or suffer rumen system damage. *Id.* at 214.

— *Annette Higby*

Reclamation districts

Some 160 farmers — members of irrigation districts under the Yakima Project — sued the United States Bureau of Reclamation (Bureau) for damages, alleging breach of contractual obligations to make accurate forecasts of the amount of water available for irrigation. *H.F. Allen Orchards v. United States*, 4 Ct. Cl. 601 (1984), *affirmed*, 749 F.2d 1571 (Fed. Cir. 1984).

There are six reservoirs in the Yakima Project and they are the source of irrigation water for some 500,000 acres of land. The Bureau delivers the water to a number of irrigation districts which, in turn, distribute it to member-farmers. Priority of rights among the various users was established by prior judicial decree, according to state law. The decree was based upon recognition that the Bureau could not deliver more water than was available, and that in some years, there would be shortages.

In 1977, landowners were concerned that there would be water shortages and requested the Bureau to provide early estimates of water supplies for the year. Such an estimate was the first stage in the established process for allocating water in years of short supply. The Bureau's early estimates were low, and farmers reacted by planting less water-intensive crops, allowing lands to lie fallow, selling off livestock prematurely, and so forth.

As it turned out, there was more water than had been predicted, but it could not be used because farmers had acted in reliance on the lower estimates. The landowner's claim for damages was based upon the contention that contracts between the Bureau and the various irrigation districts obligate the Bureau to make accurate forecasts. The Court of Claims found no sueh obligation, either express or implied, and dismissed the action. The United States Court of Appeals for the Federal Circuit affirmed.

— *John H. Davidson*

Address Correction Requested

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Skokie, IL 60077

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

CALL FOR PAPERS: EURO-AMERICAN AGRICULTURAL LAW SYMPOSIUM. The American Agricultural Law Association (AALA) and the Comite European de Droit Rural (European Agricultural Law Committee) are co-sponsoring a symposium to be held in Plymouth, England, Sept. 8-12, 1986. Selected participants from North America and Europe will present papers on "Agriculture and Forestry as Creators and as Victims of Pollution" and "Legal Implications: Limiting Agricultural Production." Persons interested in presenting a paper on either topic should contact the appropriate coordinator **prior to the Dec. 24, 1985 extended deadline,** to express such interest and to seek further instructions for submitting a formal proposal.

Contact either: Donald L. Uchtmann, 151 Bevier Hall, 905 S. Goodwin, Urbana, IL 61801 (Environmental topic); or Neil E. Harl, 478 Heady Hall, Iowa State University, Ames, IA 50011 (Limiting agricultural production topic).

The conference will be the first of its kind, and promises to be an exciting new development for agricultural law. Participants, including those presenting papers, will be expected to arrange for their own financial support. Selection of speakers will occur in early 1986, so don't delay if you have an interest in presenting a paper.

STUDENT WRITING COMPETITION WINNERS. The winner of the second annual AALA student writing competition is Brian Keedy, University of Missouri-Kansas City School of Law, who submitted a paper entitled, "Determining the Tort Liability of Commission Merchants Selling Farm Products Mortgaged to Federal Agency Lenders: Should the Government Be Allowed to Play the Game Using its Own Rules?"

Second prize was awarded to Susan Schneider, University of Minnesota School of Law, for her paper entitled, "The Ownership of Growing Crops: The Continuing Struggle Between Property Law and the Uniform Commercial Code."

Honorable mention went to Wayne Richard Wilson, Texas A & M College of Agriculture, for his paper entitled, "Tax-Sheltered Investments in Cattle Embryo Transfer and Feeding."

QUESTIONNAIRE COMING. A special index issue of *Agricultural Law Update* is in preparation and will be mailed soon. Included in the mailing will be a questionnaire inquiring about your preference for topics for the 1986 annual meeting and educational conference. Watch for the questionnaire, fill it out, and return it promptly.