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A law is valuable not because it is a law, but because there is right in it.

— Henry Ward Beecher

1985 Farm Bill to preempt farm products exception of Uniform Commercial Code 9-307(1)

Section 1324 of the 1985 Farm Bill (Food Security Act of 1985, Public Law 99-198) is of great importance to agricultural lenders and to buyers of farm products because it will preempt state commercial law regarding the respective rights of those lenders and buyers.

The central thrust of the federal provision is to protect buyers of farm products by providing that they buy farm products free of perfected security interests unless the buyer has received actual notice of the security interest from the lender or seller *within one year* preceding the purchase.

Alternatively, in a state that has adopted a central filing system certified by the Secretary of Agriculture, buyers who register with the Secretary of State will obtain clear title so long as they comply with requirements for release of the security interest.

Under this alternative central filing/registration system, registered buyers would automatically receive financing statement information from the Secretary of State. The federal preemption is to become effective 12 months after the date of enactment of the 1985 Farm Bill.

(continued on next page)

Recapture of special use valuation benefits and acceleration of installment payment of federal estate tax on bankruptcy filing

To date, there is no direct authority in rulings, cases or regulations on the effect of bankruptcy filing (either Chapter 7 or 11) on recapture of special use valuation benefits and acceleration of federal estate tax payment under the 15-year installment provision.

Section 1398(f)(1) of the Internal Revenue Code provides some guidance. That subsection provides as follows:

> "A transfer (other than by sale or exchange) of an asset from the debtor to the estate shall not be treated as a disposition for purposes of any provision *of this title* assigning tax consequences to a disposition, and the estate shall be treated as the debtor would be treated with respect to such asset." (Emphasis added)

The reference to "this title" would seem to refer to the Internal Revenue title, which would encompass federal estate tax (which is in Subtitle B) as well as income tax (which is in Subtitle A).

It would seem, therefore, that the mere transfer of assets to the bankruptcy estate in a Chapter 7 or 11 filing should not trigger recapture of special use valuation benefits or acceleration of payment of federal estate tax under installment payment. The bankruptcy estate would step into the shoes of the debtor. To the extent property is returned to the debtor at the termination of the bankruptcy estate, Section 1398(f)(2) provides, in a mirror image provision, that the transfer to the debtor should not be treated as a disposition.

Therefore, property not disposed of, which is ultimately returned to the debtor, should not encounter recapture of special use valuation benefits or acceleration of federal estate tax being paid under the installment payment rules.

Of course, any disposition by the trustee in bankruptcy or debtor in possession runs the risk of triggering both recapture and acceleration under the usual rules. There is, obviously, a question of whether the bankruptcy estate is considered the same as the debtor in terms of who could be an eligible transferee for purposes of special use valuation recapture (a member of the qualified heir's family). Presumably, eligible transferees would be determined on the basis of whether the individuals were a member of the debtor's family, although that is not clear.

One significant result of this analysis is that the liability for additional tax liability upon asset disposition in bankruptcy (except, possibly, for abandonments) would rest with the bankruptcy estate, and not the debtor.

— Neil E. Harl

FARM PRODUCTS EXCEPTION

CONTINUED FROM PAGE 1

The inclusion of Section 1324 in the 1985 Farm Bill is an obvious response to general dissatisfaction with Section 9-307(1) of the Uniform Commercial Code (UCC) and the perceived confusion resulting from non-uniform variations adopted by more than one-third of the states.

The combined effect of U.C.C. Section 9-307(1) and Section 9-306(2) was to make buyers of farm products guarantors of the farmer's debt because "a person buying farm products from a person engaged in farming operations" would take the goods subject to any perfected security interest created by the farmer in the grain or livestock.

If the farmer defaulted, the holder of the Article 9 security interest could sue the buyer for conversion, and make the buyer pay twice. The buyer's only protection was a diligent search for financing statements — a difficult task given the nature of the grain and livestock industry and the preponderance of local filing.

Many agricultural states adopted non-uniform provisions which: 1) typically exempted auctioners and commission merchants from potential liability in conversion; 2) adopted a central filing system to ease the search burden on buyers; 3) eliminated the search burden by providing that the buyer's sole duty was to inquire from the seller if the products were subject to a security interest; 4) eliminated the buyer's search burden by requiring that holders of Article 9 security interests give actual notice to prospective buyers. This mix of state responses destroyed any semblance of uniformity regarding the conditions under which buyers of farm products would take free of Article 9 security interests.

The impact of the new federal law is significant. Commission merchants and buyers of farm products are clearly benefited because their search burden has been lifted. Lenders and other holders of Article 9 security interests who want their liens to follow the farm products into the hands of purchasers must prepare to send the actual notices.

The law is very specific regarding the nature of these actual notices. The notice must: 1) be organized according to farm products; 2) be an original or reproduced copy of the security interest; 3) contain the name and address of the secured party and the name and address of the debtor; 4) contain the social security number or Internal Revenue Service taxpayer identification number of the debtor; 5) contain any payment obligations imposed on the buyer by the secured party as conditions for waiver or release of the security interest.

Farmers are also directly impacted by the new law because they become subject to a potential fine of at least $5,000. This fine would be imposed: 1) if the lender has required the farmer to provide a list of potential buyers and commission merchants to or through whom the farmer is likely to sell; and 2) if the farmer sells to or through someone not on that list.

The law may also indirectly impact farmers because of the shifting of risk from buyers to lenders. This shift may result in potentially higher interest rates, and/or potentially higher commodity prices.

The issue of whether a state should opt out of the direct actual notice rule by adopting a complex central filing system eligible for certification by the U.S. Department of Agriculture (USDA) must also be considered by buyers, lenders and state officials.

The thrust of the central filing option is to have financing statement information filed centrally with the state, whose responsibility it is to compile master lists of financing statement information organized by commodity. The state must also automatically send these lists to buyers and commission merchants who register and to other persons upon request.

In states opting for central filing, commission merchants and buyers of farm products would take free of perfected security interests only if they complied with conditions for release of the security interests as described in the information provided by the state.

It would be the buyer's responsibility to obtain information regarding the existence of a security interest and conditions for release, either by registering with the state and automatically receiving master lists from the state, or by specifically requesting information from the state as the need arose.

Although the thrust of the central filing option is clear, its detailed implementation is very complex. For example, the master lists compiled by the state are to be organized by commodity, but *within* each commodity, they are to be organized *alphabetically* according to the last name of the debtor, *numerically* according to the social security number or taxpayer identification number of the debtor, *geographically* by county or parish, and by *crop year*.

Certainly, the goal of establishing uniform, workable and fair legislation regarding the respective rights of farm products buyers and holders of Article 9 security interests is laudible.

Whether it was appropriate to pursue this goal through federal preemption of state commercial law, and whether the current attempt is both workable and fair, are both issues that undoubtedly will be debated in the months to come.

Absent further action by Congress, Section 1324 of the 1985 Farm Bill will preempt existing state law in December 1986.

— *Donald L. Uchtmann*

FmHA compliance with Public Law 99-88

Farmers Home Administration (FmHA) district directors and county supervisors have been directed to review all rural housing and farm program loans closed on or after Nov. 12, 1983.

In cases where there was a change to a lower interest rate between loan approval and loan closing, borrowers will be notified in writing that the FmHA will rewrite their loans at the lower interest rate if the loan was not closed at that rate, provided the borrowers so elect.

This action is being taken to bring the FmHA into compliance with Public Law 99-88. 50 Fed. Reg. 48237 (1985).

— *Donald B. Pedersen*

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Disaster programs litigation

The Eighth Circuit Court of Appeals has given new life to the state of Iowa's suit against the Secretary of Agriculture for failure to implement emergency disaster programs for the benefit of drought-stricken Iowa farmers. *State of Iowa Ex Rel. Miller v. Block*, 771 F.2d 347 (8th Cir. 1985).

The District Court had declined to accept subject matter jurisdiction, deciding that the Secretary's refusal was "committed to agency discretion by law," and was within the exception to the grant of judicial review under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2).

The appellate court held this was a narrow exception to the grant of judicial review, available only in those rare instances in which statutes are drawn in such broad terms that in a given case, there is no law to apply. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

The enabling legislation for the Special Disaster Payments Program (SDPP), one of the programs specified in Iowa's complaint, provides that the Secretary *shall* make disaster payments to farmers on farms not covered by the Federal Crop Insurance Act (FCIA) – if a natural disaster prevents planting or reduces a harvest of feed grains.

On farms that are covered by the FCIA, the Secretary *may* make payments if (as a result of a natural disaster) farmers have sustained substantial losses, if other federal programs are insufficient, and if additional assistance must be made available to eliminate an economic emergency. 7 U.S.C. § 1444d(b)(2) (1982).

The appellate court found there was ample law to apply and that the Secretary's failure to implement the SDPP and his failure to develop substantive eligibility standards under the statute was subject to judicial review.

The Court said that its decision in *Allison v. Block*, 723 F.2d 631 (8th Cir. 1983), was analogous. In *Allison*, the Secretary was ordered to implement a deferral relief program for Farmers Home Administration (FmHA) borrowers under 7 U.S.C. § 1981a, and to develop substantial eligibility criteria to guide decision-makers.

Section 1981(a) is a seemingly permissive grant of authority to allow deferrals which provide some broad standards for eligibility. A string of cases, beginning with *Curry v. Block*, 541 F.Supp. 506 (S.D. Ga. 1982), including *Allison*, established that implementation of the deferral program is, in fact, mandatory.

The other two emergency programs specified in the state's complaint, the Livestock Feed Program, 7 U.S.C. § 1427, and the Emergency Feed Program, 7 U.S.C. § 2267, are both administered by the Commodity Credit Corporation (CCC). Because the CCC's enabling legislation precluded the issuance of an injunction against the CCC, the Court only considered the reviewability of failure to implement the SDPP. *See* 7 U.S.C. § 714b(c).

The appellate court upheld the district court's determination that the state lacked standing to challenge the Secretary's inaction, but the individual farmer, plaintiff-intervenors can pursue the case on remand.

The Court also emphasized that if programs are to be implemented, they must be implemented quickly so that eligible farmers can receive assistance at the earliest possible date.

— *Annette Higby*

Bivens action against FmHA officials

Arcoren v. FmHA, 770 F.2d 137 (8th Cir. 1985), is an appeal from dismissal of a direct Fifth Amendment action brought against two Farmers Home Administration (FmHA) officials for unconstitutional conversion. Officials repossessed and sold Arcoren's cattle, based on unverified third party allegations of abandonment.

Plaintiff, who was current in his loan payments, learned of the sale when he received a bill of sale in the mail. Proceeds of the sale were applied to his FmHA debt, and his loan was accelerated. Arcoren's administrative appeal of the agency action was unsuccessful.

The District Court held that a *Bivens*-type action (*Bivens v. Six Unknown Agents*, 403 U.S. 388 (1981)) was precluded by the existence of the FmHA's administrative appeals procedure. The Eighth Circuit reversed and remanded.

To defeat a *Bivens* action, a defendant must show special factors counseling hesitation, and that Congress intended a statutory remedy as an equally effective substitute for a *Bivens* remedy. See *Carlson v. Green*, 446 U.S. 14 (1980).

The appellate court could find no indication that Congress intended the administrative process to substitute, rather than complement, a *Bivens* remedy — particularly because the FmHA appeal regulations did not specifically provide for recovery of damages. Therefore, the appeals remedy was not "equally effective." The possibility of recovery of damages under the Federal Torts Claims Act also did not preclude a *Bivens*-style action.

— *Annette Higby*

FmHA delays mailing notices of intent to take adverse action

In a recent broadcast of the McNeil-Lehrer News Hour, Iowa Gov. Terry T. Branstad and Farmers Home Administration (FmHA) Administrator Vance C. Clark were exchanging comments about the new delinquent borrower regulations that were promulgated on Nov. 1, 1985.

The regulations specifically state that on or about Dec. 31, 1985, the FmHA was to begin to move against delinquent borrowers (those more than $100 in arrears) by mailing out Form FmHA 1924-14 (notice of intent to take adverse action), Form FmHA 1924-26 (borrower acknowledgement of notice of intent to take adverse action), and Form FmHA 1924-25 (notice — farmer program servicing options, including deferrals and borrower responsibilities).

Gov. Branstad remarked that it was his understanding that a hearing was scheduled for Jan. 22, 1986 in North Dakota on certain matters related to the new regulations.

When Branstad asked Clark whether the FmHA could hold off on mailing the above notices until after the hearing, Clark, to the surprise of most viewers, indicated that the FmHA would indeed wait until Jan. 23, 1986.

Unless there are further developments, it must be assumed that the mailings will commence on that date. Estimates of the number of mailings nationwide run from 80,000 to 90,000.

Meanwhile, two matters are pending before Judge Van Sickle in the *Coleman* case. A motion was made last year to amend the original *Coleman* injunction as it applies to release of income security under Farm and Home Plans.

Certain contempt proceedings against the FmHA revealed that the original *Coleman* order referred only to then-existing Farm and Home Plans — it apparently did not cover farmers once their Farm and Home Plans expired and they were unable to work out new ones with the agency.

In this setting, the FmHA has refused to release income security. The motion to expand the original *Coleman* order to give additional protection to farmer/borrowers was argued in October 1985. At this writing, there is no decision from the court.

In a second development, an application has been filed in *Coleman* to file a supplemental complaint. The supplemental complaint, as drafted, raises a laundry list of concerns about the new Nov. 1, 1985 FmHA regulations. A hearing on the application for permission to file the supplemental complaint was requested for Jan. 22, 1986 before Judge Van Sickle.

— *Donald B. Pedersen*

Commodity provisions of the Food Security Act of 1985

by R. Charles Culver

With surprising speed, Congress completed its work on the 1985 Farm Bill once the Senate concluded debate on S.1714 and allowed a House/Senate Conference to be convened.

However, in its haste to pass a bill before the Christmas break, Congress has given farmers a five-year farm bill that leaves even the major negotiators and drafters unsure what all is included. Food Security Act of 1985, Public Law 99-198. Conference Report on H.R. 2100, Food Security Act of 1985, appears at 131 Cong. Rec H12249 (Dec. 17, 1985). The final language as enacted into law is included in the Conference Report, although with some typographical errors.

At a $52 billion price tag over three years, the Food Security Act of 1985 will prove to be the most costly farm legislation in American history. Nevertheless, most experts believe that net farm income during the life of the Act will, at best, hold steady.

The Act continues a 15-year trend in farm legislation toward greater market orientation in price supports over the short term. Of course, with the recent passage of Gramm-Rudman, it is doubtful that the provisions of this bill will escape unaltered following the 1986 crop year. See Public Law 99-177.

This discussion will concentrate on the major commodity provisions of the Food Security Act of 1985. Provisions concerning conservation, research and credit will be discussed in other articles in this and future issues of *Agricultural Law Update*.

Wheat

The target price for wheat proved to be the most critical issue of debate throughout the legislative battle. The compromise reached in conference provided for a freeze in target prices for 1986 and 1987 at $4.38 per bushel.

For 1988, the target price will be reduced 2%, 3% in 1989, and 4% in 1990 — for a total drop of 9% below the 1987 target price level. In no event may the target price, in any year, fall below $4 per bushel. If Payment-in-Kind (PIK) commodities are available, the 2% reduction in 1988 will be reimbursed to farmers in the form of PIK payments.

R. Charles Culver is a member of the American Agricultural Law Association and reports on congressional activity to the Agricultural Law Update. He holds a J.D. and is a candidate for the LL.M. in agricultural law at that institution. Culver works as a legislative aide for Sen. Dale Bumpers.

The price support loan level for wheat will be $3 per bushel for 1986. For 1987 and beyond, the formula loan level will be between 75% and 85% of the average market price for the preceding five years (throwing out the high and low years). However, in no year may it be reduced more than 5% below the level of the preceding year.

In an attempt to invigorate slumping export sales of wheat, the Secretary of Agriculture is given discretionary authority to implement two market enhancement programs.

One option is the so-called "Findley Amendment," whereby the Secretary can reduce the loan up to 20% in any year, with any increase in deficiency payments not counted against the $50,000 payment limitation. For 1986, the Secretary is mandated to implement at least a 10% Findley loan reduction.

The Secretary's second option is the discretionary authority to implement a marketing loan. If implemented, producers may repay a Commodity Credit Corporation (CCC) loan at the prevailing world market price or the loan price — whichever is lower. A floor of 30% below the loan level is established.

Also, the Secretary is given additional discretionary authority to implement a tiering program intended to target wheat deficiency payments to true family farmers, as well as to implement a target option program whereby target levels are increased as set-aside land is increased.

The Secretary has also been given discretionary authority to institute a mandatory production control program. Interestingly enough, the Secretary is required to hold a referendum on whether or not farmers prefer mandatory production controls. The referendum will serve strictly in an advisory capacity.

The acreage limitation program for wheat, as well as for other commodities, may prove to be controversial. In 1986 the Secretary can require up to a 25% acreage reduction if carryover wheat stocks exceed one billion bushels. The measure states that 2.5% must be in a paid diversion.

The minimum requirement is 15% for 1986 and 20% for 1987 through 1990 if carryover levels *exceed* one billion bushels. If carryover levels fall *below* one billion bushels, the acreage reduction shall be no more than 15% for 1986 and 20% for the 1987 through 1990 crop years.

The two most interesting provisions in the wheat [illegible] deficiency [illegible] and the [illegible] announcement [illegible] 1986 wheat program.

The first provision [illegible] 1986) producers will be assured maximum deficiency payments — regardless of what the five-month marketing average is calculated to be.

The other provision will give producers of 1986 wheat who planted before the announcement of the wheat program the opportunity to idle 10% of their acreage base in return for PIK payments.

Feed Grains

In form, the feed grains title is very similar to the wheat title, except that fewer program options are given to the Secretary.

The target price for corn will be frozen at $3.03 per bushel for 1986 and 1987, then reduced 2% in 1988 ($2.97), 3% in 1989 ($2.88), and 4% in 1990 ($2.75) — for a total reduction of 9% from the 1987 target price.

The price support for corn will be $2.40 per bushel in 1986, down from the $2.55 price in 1985. For the years 1987 through 1990 the formula loan will be set at 75% to 85% of the preceding five-year market average (throwing out the high and low years). However, the annual reduction may not exceed 5% of the previous year's loan rate.

If corn stocks exceed two billion bushels coming into 1986, the Secretary may require up to a 20% acreage reduction with 2.5% of that to be in a PIK paid diversion.

For the 1987 through 1990 crop years the Secretary may require up to a 20% acreage reduction with a minimum of 12.5% if carryover levels exceed two billion bushels. If the carryover levels fall below two billion bushels in any year then a 12.5% acreage reduction [illegible]

As with wheat, the Secretary [illegible] the Findley [illegible] exports [illegible] will be a [illegible] for 1986 only.

Also, as in the wheat title, the corn title has a provision that seems to insure maximum deficiency payments in 1986 [illegible] regardless [illegible] month [illegible] establish [illegible] programs for other feed grains in an equitable relation to corn.

Cotton

Both the cotton and rice titles break from the [illegible] established [illegible] feed grains title.

The target price for cotton will be frozen at the 1985 level of 81 cents per pound for 1986 and [illegible] the target [illegible] total reduction of 10% from the 1986 target price.

Price support loans will be frozen at 55 cents per pound for 1986, then for 1987 through the life of the farm bill, the support rate shall be the smaller of 85% of a selected U.S. spot market price, or 90% of a formula price using comparisons of Northern European or U.S. spot market prices.

As in other titles, the Secretary may not reduce the loan rate more than 5% annually, nor below a floor of 50 cents per pound.

The Secretary has two options for implementing a mandatory export enhancement program if the prevailing world market price is below the loan rate. Plan A gives the Secretary the option of implementing up to a 20% Findley loan reduction program. Plan B allows the Secretary to implement a marketing loan program.

In a curious move, the conferees, intentionally or unintentionally, appear to have given cotton an unlimited marketing loan program, with no established floor.

S.1714, the Senate farm bill, which was the only bill that had a marketing loan for cotton, gave cotton an unlimited marketing loan for 1986, but established a 20% below-loan floor for 1987 through 1989.

In furtherance of the strong export provision, the cotton title also provides for issuance of export certificates to participating exporters if the price of cotton (under either Plan A or Plan B) is still above the world market price.

Export certificates will be for amounts equal to the loan rate less the prevailing world price and will be redeemable in commodities (or cash if the commodities are not available).

However, as written under Plan B, the loan redemption price will never be above the world market price. All loans taken out by cotton producers may be held for up to 18 months.

The Secretary is given discretionary authority to implement up to a 25% acreage reduction program for any year. Paid diversions are strictly discretionary.

Rice

In a similar pattern as that for cotton, the rice target price will be frozen for 1986 at $11.90 per hundredweight. Starting in 1987, the target will be reduced 2% ($11.66 per hundredweight), 3% in 1988 ($11.30), 3% in 1989 ($10.95), and 2% in 1990 ($10.71) - for a total reduction of 10% from the 1986 target price.

The price support loan will be dropped to $7.20 per hundredweight from the $8 per hundredweight level in 1985. For the 1987 through 1990 crop years, the loan rate will be 85% of a five year marketing average (throwing out the high and low years), but in no event may the formula loan drop more than 5% annually, nor below $6.50 per hundredweight.

A mandatory marketing loan is offered for the 1985 rice crop, as well as for crops raised in 1986 through 1990. Note that the 1985 rice program is amended in Public Law 99-198. Under the amended program, there will be no floor on loan redemption for the 1985 rice crop.

For 1987 and 1988, a 50% under-loan floor is established, which will be scaled up to 40% in 1989 and 30% in 1990. Up to 50% of any loan deficiency payment can be made in PIK payments. The 1985 marketing loan will only be offered to producers who have not sold their rice before April 15, 1986.

Also, as with cotton, rice exporters will be offered an export certificate program in 1986 through 1990 — if the world market price for rice falls below the marketing loan rate. The Secretary has the authority to require a 35% acreage reduction. Paid diversions will be strictly discretionary.

Soybeans

During debate on S.1714, the Senate included in the soybean program an unprecedented, one-time payment on 1985 production to soybean producers of $35 per acre, or $1 per bushel — whichever was higher. The intent of the program was to discourage producers from forfeiting up to 300 million bushels then sitting in government loan.

However, the House did not have a similar provision, and the Reagan Administration changed sides on the issue. The conferees eventually dropped the payment plan. What remained was essentially the same authority as contained in the 1981 farm bill.

For 1986 and 1987, the formula loan will remain at $5.02 per bushel, while for 1988 through 1990, the loan will be 75% of the simple average market price. However, in no year may the Secretary reduce the loan by more than 5%, nor below a floor of $4.50 per bushel.

The one exception is the Findley loan reduction option, which will allow the Secretary to reduce the loan 5% in any year to help spur exports. The Secretary also has the discretion to allow a marketing loan program.

Dairy

In an expected move, the conferees melded major provisions of the Senate and House dairy programs, only dropping the House-approved diversion program. The Act includes a whole-herd buy-out plan

Until Jan. 1, 1987, the support rate for milk will be frozen at $11.60 per hundredweight. On Jan. 1, 1987, the Secretary is required to reduce the price support level by 25 cents per hundredweight, and he must reduce it another 25 cents per hundredweight on Oct. 1, 1987.

From 1988 through 1990, the Secretary is required to reduce the support rate by 50 cents per hundredweight if government purchases are projected to exceed five billion pounds. If CCC purchases are projected to be less than 2.5 billion pounds for any of those years, the Secretary must raise the support rate by 50 cents per hundredweight.

Beginning April 1, 1986, the Secretary must offer producers an opportunity to bid into an 18-month, whole-herd buy-out program.

Producers must have been producing milk prior to Jan. 1, 1985, must be successful bidders, and must be willing to sell their entire herd for slaughter or for export.

In addition, they must agree to refrain from re-entering the business over a three-, four-, or five-year period as specified by the Secretary. The historical marketing base on which to base the buy-out payments will be determined by the Secretary.

The whole-herd buy-out program will be producer-financed. All producers will be assessed 40 cents per hundredweight on milk marketed between April 1, 1986 and Dec. 31, 1986. The Secretary will then cut the assessment to 25 cents per hundredweight to be paid until Sept. 30, 1987, when the program will be phased out.

Miscellaneous

1. The $50,000 payment limitation was maintained.

2. Cross compliance may be required for wheat and feed grains, but is discretionary for rice and cotton. The interpretation of these sections is still cloudy. Offsetting compliance is excluded for rice and cotton.

3. Advance deficiency payments of up to 50% will be required for the 1986 crops of wheat, feed grains, cotton and rice.

4. The Secretary is given the discretion to make up to 5% of all deficiency payments in PIK.

5. Producers who plant at least 50% of their permitted base acres (base minus any applicable acreage limitation) will be eligible for 92% of their deficiency payments for that base crop. That portion not planted in the base crop may be put into a non-program crop.

6. If a marketing loan program is announced, the Secretary may allow producers who forego loan protection to receive loan deficiency payments in exchange

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1985 FOOD SECURITY ACT
CONTINUED FROM PAGE 5

for reducing at least one-half the announced acreage reduction.

The participating producer will receive a payment (combination of PIK and cash) equal to the announced world price less the formula loan price. This will help prevent the CCC from becoming an instrument in every marketing transaction, as well as helping protect growers who may be too large for the program, but who can't afford to sell at world market prices.

7. Beginning in 1987, the Secretary shall establish new farm acreage bases. The bases will be the sum of all program bases, plus soybean acres and those acres devoted to conservation uses. The bases will include 1986 data. The Secretary may allow shifting of up to 10% of one base to another within a farm.

8. Yield calculations on which deficiency payments for 1986 and 1987 are based will be the average program yields for the years 1981 through 1985 (throwing out the high and low years).

In any year in which there was no yield, area averages may be substituted. In 1988, the Secretary may begin using a five-year rolling average, while phasing in actual yield figures.

9. Acreage bases for 1986 through 1990 shall be the average of the acreage bases of the preceding five years. In the case of rice and cotton, if no crop was planted or considered planted in up to three of the preceding five years, the average shall include those years in which a crop was planted, except that the new base cannot exceed the average base of the past two years.

For all crops, the sum of all the farm bases cannot exceed the total farm acreage base — except for those who have double-cropped in three out of the last five years.

The Secretary did announce the provisions of the 1986 price and income support programs for upland cotton, feed grains, rice and wheat on Jan. 13, 1986. Information on the dairy whole-herd buy-out was also announced. Additional program details should be available by the end of January.

Is milk a product of a cow?

In the case of a dairy farmer, it would clearly be helpful if the debtor, after filing a Chapter 11 bankruptcy petition, could avoid any prepetition liens on milk produced after the date the Chapter 11 petition was filed. The courts appear to be hopelessly split on this issue. Compare *Matter of Johnson*, 47 BR 204 (Bkry. W. D. Wis. 1985), and *In Re Lawrence*, 41 BR 36 (Bkry. Minn. 1984).

Perhaps the most explicit division of opinion in this regard was recently evidenced in *In Re Pigeon*, 49 BR 657 (Bkry. N.D. 1985).

The Bankruptcy Court in North Dakota specifically held that milk produced by a debtor subsequent to the filing for bankruptcy relief was "newly acquired property" — distinct from the creditor's interest in livestock — and therefore, was free of any interest a creditor may claim based upon prepetition security agreements.

This position was taken even in light of *In Re Nielsen*, 48 BR 274 (D.N.D. 1984), which held that a valid prepetition security interest continued postpetition under 11 U.S.C. § 552(b).

The Bankruptcy Court in *Pigeon*, however, concluded that the *Nielsen* District Court had failed to properly analyze the legislative history supporting 11 U.S.C. § 552(b), and, therefore, found *Nielsen* inapplicable.

More recently, a Bankruptcy Court in Michigan in *In Re Vanas*, 50 BR 988 (Bkry. E.D. Mich. 1985) held that, based upon the equities involved in a particular case, a prepetition security interest did not extend to postpetition milk.

In so holding, however, the court was careful to note that, since 11 U.S.C. § 552(b) requires a careful analysis of the facts of each case, it necessarily precludes the formulation of a strict rule of law. According to the court, § 552(b) requires a balancing of the equities in each case.

Citing *In Re Lawrence*, the Court found that it must evaluate the expenditures of time, labor and funds relative to the postpetition milk, the relative position of the secured party, and the overall rehabilitative theme of bankruptcy law.

In *Vanas*, the court looked to the secured creditor's prepetition conduct, other collateral and the "fresh start" policy of the Bankruptcy Code to conclude that to allow the secured creditor a security interest in the postpetition milk would have been inequitable.

The opinion of the court in *Vanas* does little to provide guidance for counsel for either creditors or debtors, but should be carefully reviewed by both should such an issue be presented.

— *Phillip L. Kunkel*

Federal peanut regulations upheld

Eight Georgia peanut farmers have been unsuccessful in enjoining the federal government from implementing the 1984 peanut regulations, 7 C.F.R. Part 729. *Callaway v. Block*, 763 F.2d 1283 (11th Cir. 1985).

The farmer plaintiffs, recipients of allotments of our national peanut quota, claimed that the 1984 regulations conflicted with the Agriculture and Food Act of 1981 (95 Stat. 1213, Title VII) and violated their Fifth Amendment due process rights because the regulations took away quota allotments without adequate notice.

The 1984 regulations directed that quota reductions be effected category by category, starting with Category I farms (allotted quota not produced because of inadequate tillable land), followed by Category II farms (allotted quota not produced for previous two years, unless natural disaster), Category III farms (quota produced by another operator on a farm to which the quota was transferred by lease by two of previous three years), and finally, Category IV farms (all other peanut farms).

As Category III farmers, the plaintiffs faced a drastic reduction in or elimination of their quota allotments. The court found that plaintiffs were not entitled to any relief because the quota reductions under the 1984 regulations were consistent with the 1981 Act, and did not deny plaintiffs of any protected right.

— *Terence J. Centner*

STATE ROUNDUP

COLORADO. *A Road is a Road is a Road.* In *Lovvorn v. Salisbury*, 701 P.2d 142 (Colo. App. 1985), the Colorado Court of Appeals reversed the trial court, which had found that the use of a well-defined path by cattlemen for cattle drives over a period of 20 years or more had established Goldblossom Road as a public road. Nevertheless, the trial court denied the cattlemen the right to trail thereon.

The Court of Appeals held that since Goldblossom Road had become a public road, the fact that the cattlemen had not acquired a private prescriptive easement could not preclude them from trailing livestock along the road.

The Court stated: "We conclude that once a road has been declared to be public, all uses that are permissible to the public under the laws of this state are permissible uses." *Id.* at 144.

— *Bruce McMillen*

ILLINOIS. *Legislature Appropriates $[illegible]50,000 to Bar Association for Low Cost Legal Assistance to Farmers.* Starting Feb. 7, 1986, the Illinois Farm Legal Assistance Foundation, authorized by P.A. 84-1106, is providing finance-related legal assistance to Illinois farmers.

To qualify, the Illinois farmer must have a debt-to-asset ratio of 50% or more, receive at least 60% of gross income from farming and have pending or anticipated legal problems as a result of financial situations. Qualifying farmers can select their own Illinois licensed attorneys, or be referred through the Lawyer Referral Service of the Illinois State Bar Association.

The Foundation will fund a maximum of seven hours of legal assistance to a farmer at $4[illegible] per hour; the farmer pays an additional $[illegible] per hour for all but the first hour.

Attorneys interested in participating should contact the Illinois Bar Center, Springfield, IL, 217/52[illegible]-1[illegible]60.

— *Donald L. Uchtmann*

MONTANA. *1985 [illegible] Legislature Centralized Filing of Farm [illegible] Statements.* A 1985 amendment to Montana's Uniform Commercial Code established a central agricultural [illegible] computer filing system.

All financing and continuation statements covering farm products must now be filed with the Secretary of State. A [illegible] statement previously filed with a county clerk and recorder lapses July 1, 1986, [illegible] certified [illegible] financing statement and all related [illegible] filed with the Secretary of State. [illegible] retains its perfection [illegible] upon being centrally filed. Mont. Code Ann. §§ 30-9-401-423 (1985).

Noxious Weed Management Trust Fund. Montana has established a trust fund to provide funding for eligible noxious weed management projects. The trust is supported by a surcharge of one cent per dollar of the retail value of all registered herbicides sold for consumer use in Montana.

The legislation provides that except if a new and potentially harmful, noxious weed is discovered growing in the state, the principal of the trust is to remain inviolate at a level of $2,500,000. All principal and interest above this level is available for expenditure for a variety of eligible projects. Mont. Code Ann. §§ 80-7-801-821 (1985).

— *Donald D. MacIntyre*

PENNSYLVANIA. *Family Farm Corporation Exemption From Capital Stock Tax.* Two recent cases provide the first interpretations of the family farm corporation exemption at Pa. Stat. Ann. tit. 72, § 7602.2(a) (Purdon 1985).

The exemption extends to a Pennsylvania corporation that has at least 75% of its assets devoted to the business of agriculture (as defined in the exemption), and that has at least 75% of its stock owned by members of the same family.

In the first case, a corporation owned by parents and children (lessor corporation) leased its fruit farms, farm machinery and equipment to another corporation (lessee corporation) that was wholly owned by the children. The lessee corporation used the leased assets in its active farm operation. The lessor corporation sought the exemption, but was denied.

On appeal, the Commonwealth Court found that the requirement that 75% of the corporation's assets be devoted to the business of agriculture was intended to apply only to those corporations *actually engaged* in the business of agriculture. The court found that the legislative intent behind the exemption is to preserve farmland through the alleviation of a tax burden that could force its sale.

To grant the exemption here would pave the way for corporations that do not own farmland to receive its benefits, such as corporations holding only farm machinery and equipment. The lessee's entitlement to an exemption was not at issue. *The Peter's Orchard Co. v. Commonwealth*, 496 A.2d 1313 (Pa. Commonwealth Ct. 1985).

In the second case, the corporation paid the capital stock tax, petitioned for a refund, then appealed the denial of sa[illegible]. The corporation produces and prepares hybrid farm seed for sale to farmers, distributors and retailers. The corporation does not own any farmland, but engages farmers to raise seed from seed provided by the corporation.

The court held that for there to be a family farm corporation, there must be a family farm. As the corporation did not own a farm, the corporation could not be a family farm corporation — even though it had production contracts with farmers.

The denial of the refund was affirmed. In a footnote, the court stated that its decision is consistent with the exemption's intent to save the family farm. *Hoffman Seeds Inc. v. Commonwealth*, 497 A.2d 668 (Pa. Commonwealth Ct. 1985).

— *John C. Becker*

TEXAS. *Agriculture Use: Ad Valorem Taxation.* In *Bower v. Edwards County Appraisal District*, No. 4-84-00479-CV (Tex. App. — San Antonio 10/2/85), a landowner was denied the lower agricultural use value in calculating the ad valorem tax on his land.

The owner leased out the acreage to deer hunters for $600 per year. While the owner did not "raise" deer, it was also true that the owner did not fence, cut brush, graze domestic animals, or carry out other acts that might interfere with use by the natural deer population.

However, the court noted that the owner did not carry on "a business venture for profit, which business is the primary occupation and source of income of the owner." In particular, it was noted that the owner had some $10,000 in other income each year, including Social Security payments.

Also, under Texas Tax Board Guidelines, deer are not included as livestock, and thus, the land was not eligible for agricultural use valuation where hunting was the principal use.

1985 Legislative Action on Farm Financing Central Filing. As of Sept. 1, 1985, the proper place in Texas to file financing statements that cover farm-related collateral is the office of the Secretary of State. Also, as of Sept. 1, 1985, continuation statements must be filed in that office.

Because the continuation statement must contain the information contained in the original financing statement (in addition to the information usually required in a continuation statement), the Texas Secretary of State has advised:

> As a precautionary measure, the secured party should include a copy of the original financing statement filed in your [county] office, and any prior continuation statements which

(continued on next page)

STATE ROUNDUP
CONTINUED FROM PAGE 7

indicate the file date and times subscribed by your [county] office.

The priority of a security interest is not affected by the fact that a continuation statement is now filed at a different place than the original financing statement. House Bill 1741 §§ 3 and 4 as enrolled.

Farm Products Rule Changed. The Texas Legislature has amended U.C.C. 9-307 to add the following requirement:

> A secured party, including a secured party under a security interest covered by Section 9-312(b) of this code, may not enforce a security interest in farm products against a person who has purchased the farm products from a person engaged in farming operations unless the secured party gives notice of the security interest to the buyer by certified mail, return receipt requested, not later than the 90th day after the date of purchase. The notice must state the terms of the security interest and the amount claimed to be owed to the secured party.

This provision became effective Sept. 1, 1985. House Bill 1741 §§ 1 and 2 as enrolled.

Criminal Penalties. Section 32.33(f) of the Texas Penal Code has been amended to make it a criminal act for a debtor (under a security agreement) who does not have the right to sell or dispose of collateral to fail to account to the secured party for proceeds upon sale or other disposition.

"A person is presumed to have intended to appropriate proceeds if the person does not deliver the proceeds to the secured party or account to the secured party for the proceeds before the 11th day after the day that the secured party makes a lawful demand for the proceeds or account." *Id* as amended.

If the amount involved is less than $10,000, the offense is a Class A misdemeanor. If the amount is $10,000 or more, it is a felony of the third degree. These new criminal provisions apply to sales or dispositions on or after Sept. 1, 1985. House Bill 1741 § 5 as enrolled.

— *Marvin Martin*

Agency liability

An action brought under the Federal Tort Claims Act (FTCA) for wrongful termination of Social Security disability benefits, asserting intentional infliction of emotional distress, as well as a breach of defendant's duty to deal fairly and in good faith, has survived a government motion to dismiss in *Pierce v. United States*, Civ. 83-5150 (W.D.S.D. July 14, 1984). The case should be of considerable interest to persons pursuing FTCA claims against the Farmers Home Administration (FmHA).

The government claimed that the decision to terminate the benefits was a discretionary function excepted from the FTCA's waiver of sovereign immunity. The court relied on guidelines in *Madison v. U.S.*, 679 F.2d 736 (8th Cir. 1982), which define a discretionary function, and which distinguish between decisions made on a planning level, and those decisions made on an operational level.

Planning or policy level decisions were considered to be within the discretionary function exception, while the decisions relating to the day-to-day operations of the government were not. The decision to review and modify state agency disability determinations, the court said, was a policy decision protected by the exception.

The decision to terminate plaintiff's benefits, however, was an operational decision, and was not within the exception. The court added that "..although the employees were performing a duty delegated to them by the Secretary, they had regulations to guide them in making their determinations. Therefore, there is a standard by which their actions can be judged, and thus, their actions do not come within the discretionary function exception."

The government has renewed its motion to dismiss based on *United States v. Varig Airlines*, 104 S. Ct. 2755 (1984), a decision which holds that the discretionary function exception is intended to encompass the acts of government acting in its role as regulator of the conduct of private individuals (regulatory agencies).

— *John H. Davidson*

Patronage-based earnings

In the December 1984 issue of *Agricultural Law Update*, we discussed an opinion by the U.S. Court of Claims concerning the deduction of a cooperative's patronage dividends under Subchapter T of the Internal Revenue Code (IRC).

The Federal Circuit Court of Appeals has vacated and remanded this decision in *Cotter and Co. v. United States*, 765 F.2d 1102 (Fed. Cir. 1985). The court considered the issue of whether interest income from short-term investments and rental income from excess warehouse space could qualify as earnings from "business done with or for patrons."

The court concluded that both sources of income were produced from activities integrally intertwined with the cooperative's functions, and therefore, were patronage sourced. Earnings from these sources, which were passed through to cooperative members, thereby could qualify for a deduction under Subchapter T.

— *Terence J. Centner*

IRS issues disturbing revenue ruling for pickle growers

Once again, the status of the vegetable migrant work force has been called into question by the Internal Revenue Service (IRS). At issue is whether the grower must withhold FICA taxes from the workers' wages. A grower is not required to withhold the FICA tax, nor contribute the additional excise tax on payments to individuals classified as share farmers. See I.R.C. § 3121(b)(16).

To be viewed as a share farmer, the individual must undertake to produce agricultural commodities to be divided between the picker and the grower, with the picker's share dependent upon the amount of the commodity produced. I.R.C. § 3121(b)(16).

The IRS has declined to follow the ruling in *Sachs v. United States*, 422 F. Supp. 1092 (N.D. Ohio 1976), that classified pickle pickers as independent contractors. The IRS contends that in order to meet the requirement of "undertaking to produce," the share farmer must participate in the initial planning of the operation and must incur out-of-pocket expenses.

If these requirements are not met, the ruling states that the grower must withhold FICA taxes from the workers' wages. Rev. Rul. 85-85, IRB 1985-25.

Growers are being advised to reactivate the escrow account system previously used in such situations, or to comply with the withholding requirements of Rev. Rul. 85-85. The escrow account would consist of the money that would otherwise be withheld from the pickers' wages.

If the IRS does not pursue the matter within three years, or the court sustains the *Sachs* ruling, then the amount held in escrow would be returned, with interest, to the pickers.

— *Paul J. Wright*

Migrant and seasonal farmworker programs

Beginning with fiscal year 1984, migrant and seasonal farmworker programs have been authorized and funded under Title IV, § 402 of the Job Training Partnership Act (JTPA), Public Law No. 97-300 (codified at 29 U.S.C. § 1501 et. seq.). Pertinent regulations appear at 20 C.F.R. pt. 633 (1984).

Eligible applicants for § 402 funding are public agencies and private non-profit organizations authorized by their charters (or articles of incorporation) to provide employment, training or such other services as are contemplated by the regulations. Programs for eligible farmworkers and farmworker family members may include classroom and occupational training, on-the-job training, work experience, job development, job placement, reallocation assistance, education assistance, health services, housing and other support services.

Regulations promulgated under § 402 set standards for individual eligibility. See 20 C.F.R. § 633.107 (1984) and the definitions of seasonal farmworker and migrant farmworker at 20 C.F.R. § 633.104 (1984).

The enactment of the JTPA brought a congressionally-mandated change in the data base used to allocate § 402 funds among the states.

Under the prior statute, the Comprehensive Employment and Training Act, 1977 Social Security industrial data was used. JTPA requires that "[a]ll data relating to economically disadvantaged and low income persons shall be based on 1980 U.S. Census or later data." 29 U.S.C. § 1572(a).

The new formula was used in the October 1983 through June 1984 transitional period, and in subsequent program years. As a result, California's percentage share was reduced from 21.69 to 8.80; Florida's from 7.68 to 4.83; New York's from 2.68 to 2.47; and Utah's decreased from 0.47 to 0.38.

In contrast, South Dakota's percentage share increased from 0.47 to 2.48; Kentucky's from 1.16 to 3.26; and Iowa's went up from 1.86 to 4.12. To soften the blow, a hold harmless provision in the regulation limits to 25% any reduction in a state's allotment from the prior year. 20 C.F.R. § 633.105(b)(3).

Nevertheless, certain grantees of farmworker program funds under JTPA contested the new distribution among the states, arguing that the new formula results in allocations inconsistent with the proportion of eligible migrant and seasonal farmworkers in each state. However, the court in *California Human Development Corp. v. Brock,* No. 84-5321 (D.C. Cir. May 28, 1985), affirmed a district court decision upholding the formula.

— *Donald B. Pedersen*

Cooperative director liability

A Louisiana circuit court has found that cooperative directors may be liable for losses resulting from the payment of unauthorized dividends. *American Grain Association v. Canfield*, 471 So.2d 1125 (La. App. 1985).

The cooperative had initiated action in contract and tort for damages against the certified public accounting firm it had employed to prepare certified financial statements. The accounting firm brought a third party action against three of the cooperative's directors for contribution premised upon the allegation that the directors were responsible for the losses sustained by the cooperative.

The circuit court found that under the Louisiana common law doctrine of solidary, each obligor is responsible for damages sustained by an obligee. The contribution requirement of this doctrine, however, could be excepted by statute.

The directors argued that the state cooperative statute's provision excepting directors from liability when they rely in good faith on financial statements stated in a written report by a certified public accountant constituted an exception.

The appellate court found that in the absence of any evidence before the trial court on good faith, the third party complaint against the directors could not be dismissed. The case was remanded for further proceedings.

Editor's note: For a general discussion of director liability, see Fee and Hoberg, *Potential Liability of Directors of Agricultural Cooperatives*, 37 Ark. L. Rev. 60 (1983).

— *Terence J. Centner*

Privileged or confidential business information

The policy of the Animal and Plant Health Inspection Service for protecting certain privileged or confidential business information has been announced at 50 Fed. Reg. 38561 (1985).

The policy statement concerns the disclosure of confidential business information concerning biotechnology and the Veterinary Biologics Program. Information that would be protected from disclosure under section (b)(4) of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), will be classified as confidential business information. This includes trade secrets and commercial or financial information found to be confidential.

— *Donald B. Pedersen*

Florida cooperative appeals for pari-mutuel racing permit

A district court in Florida has ruled that the Division of Pari-Mutuel Wagering, Department of Business Regulation, erred in denying a cooperative's application for a permit to conduct quarter horse races. *Ocala Breeder Sales Co. v. Division of Pari-Mutuel Wagering,* Case No. AU-422 (Fla. 1st D.C.A. Feb. 27, 1985).

The Division had denied the cooperative's application on the basis of an opinion by the state attorney general, which argued that the agricultural cooperative was not empowered by its enabling legislation to operate a pari-mutuel horse racing facility.

The district court found that the expansive language of Chapter 618, Florida Statutes, concerning the powers of cooperative organizations, enabled these organizations to engage in activities conducive to their objectives and purposes.

The activity of quarter horse racing was found to be suitable for the cooperative's purpose of breeding and marketing quarter horses. The cooperative-enabling statute also granted cooperatives the rights, power and privileges granted by state law to profit corporations (except as inconsistent with express provisions of the cooperative statute).

Thus, the cooperative statute could not be interpreted as precluding a cooperative from operating a pari-mutuel racing facility.

— *Terence J. Centner*

Non-member, non-exempt, interstate transport by cooperatives

One of the federal exemptions for agricultural cooperatives concerns motor vehicle transportation codified in 49 U.S.C.A. § 10526(a)(5) (Supp. 1984).

Qualifying cooperatives are permitted to engage in interstate transportation without a permit from the Interstate Commerce Commission (ICC), but they must file notice (From BOP 102) with the ICC within 30 days of their annual meetings each year.

Subsequent changes concerning officers, directors, as well as location of transportation records also need to be filed in a supplemental notice within 30 days of such change. *See* 50 Fed. Reg. 23, 365 (1985).

— *Terence J. Centner*

Address Correction Requested

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

1986 AALA MEMBERSHIP RENEWAL. Membership dues for 1986 will soon be payable. Even though we have expanded the *Agricultural Law Update*, dues have not been increased for 1986. Regular membership dues are $30; foreign membership, $45; student membership, $10; regular sustaining membership, $50; and institutional membership, $100.

Within the next few days, an application form will be sent to all American Agricultural Law Association (AALA) members. Please fill out this form and return it with your check when renewing your membership. The form will give the AALA the information that it needs to accurately prepare the 1986 Membership Directory. Please send the completed form and your check to: Terence J. Centner, AALA Secretary-Treasurer, 315 Conner Hall, University of Georgia, Athens, GA 30602.

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AALA QUESTIONNAIRE REMINDER. A few days ago, all AALA members received a questionnaire inquiring about preferences for format and topics for the 1986 annual meeting and educational conference scheduled for Oct. 23-24, 1986, in Fort Worth, Texas. The questionnaire was included as an insert in the index issue of *Agricultural Law Update*. If you have not already done so, please complete and return the questionnaire.