

"Producer-handler" status under milk marketing order denied to handler who entered into lease arrangement with producer

In *Stew Leonard's v. Glickman*, 199 F.R.D. 48 (D. Conn. 2001), the court affirmed a decision of the USDA Judicial Officer denying "producer-handler" status to a milk handler who entered into a lease arrangement with a milk producer. Under the lease arrangement, Stew Leonard's Dairy, the operator of a dairy retail store in Connecticut, leased an entire herd of milking cows, together with the barns and related facilities where the cows were located, from a milk producer. A third-party related to the milk producer received payment from Stew Leonard's for silage and management. Thereafter, Stew Leonard's maintained that it had one enterprise that both produced and handled milk. *Id.* at 51. Entities that both produce and handle their own milk are treated as "producer-handlers" under federal milk marketing orders. Stew Leonard's position was that its lease and retail operations made it a producer-handler.

Federal milk marketing orders establish minimum prices that handlers must pay for raw fluid-grade milk within the order region. These prices are based on the class designating the end use to which the milk is put. For example, milk used for drinking is priced as Class I milk.

Individual milk producers do not receive any one of the class prices for their milk. Instead, they receive a uniform, or "blend," price based on a weighted average of all the class prices of the milk marketed within the order region. The average is weighted by the use of milk, by class, within the region. The operation of such a hypothetical price pool, and its associated settlement fund, is described by the court in *Stew Leonard's* in the following manner:

Suppose Handler A purchases 100 units of Class I (fluid) milk from Producer A at the minimum value of \$3.00 per unit. Assume further that Handler B purchases 100 units of Class II (soft milk products) milk from Producer B at the minimum value of \$2.00 per unit, and that Handler C purchases 100 units of Class III (hard

Continued on page 2

GAO questions USDA's integrated pest management implementation claims

A recently issued report of the United States General Accounting Office (GAO) questions the significance of claims made by the USDA that about seventy percent of the nation's crop acreage had implemented some level of integrated pest management (IPM) as of the end of the 2000 crop year. United States Gen. Accounting Office, *Agricultural Pesticides: Management Improvements Needed to Further Promote Integrated Pest Management* (GAO-01-815, Aug. 2001). While the USDA claim of a seventy percent IPM implementation rate suggests that IPM is achieving its goal of reducing chemical usage on the nation's farms, the GAO concluded that the rate is a "misleading indicator" of the progress made toward this goal. *Id.* at 2. The flaw, according to the GAO, is that the USDA's methodology failed to distinguish between IPM practices that had an effect on chemical use and those that had little or no effect. The IPM implementation rate claimed by the USDA therefore reveals little to nothing about actual levels of chemical usage. Notwithstanding the favorable inference that could be drawn from USDA's claims, the GAO pointedly noted that "IPM as implemented to this point has not yielded nationwide reductions in chemical pesticide use." *Id.* To the contrary, "total use of agricultural pesticides, measured in pounds of active ingredient, has actually increased since the

Continued on page 2

INSIDE

- Using a Limited Liability Company to operate a Pennsylvania family farm business
- Mushroom harvester as agricultural employees

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

IN FUTURE ISSUES

- Notes on the Equal Access to Justice Act

beginning of USDA's IPM initiative." *Id.* The GAO also noted that while there has been a decline in the use of the pesticides the EPA has identified as the riskiest, the use of these pesticides still accounts for forty percent of total agricultural pesticide use. *Id.* at 9. The GAO attributed the shortfalls in achieving the goal set for the federal government's IPM initiative to "shortcomings in leadership, coordination, and management," and its recommendations included improvements in all three respects for all federally funded IPM efforts. *Id.* at 2, 17.

—Christopher R. Kelley, Assistant Professor of Law, University of Arkansas, Of Counsel, Vann Law Firm, Camilla, GA

Producer-handler /Cont. from p. 1

milk products) milk from producer C at \$1.00 per unit. Assuming that this constitutes the entire milk market for a regulatory district, during this period the total price paid for milk is \$600.00, making the average price per unit of milk \$2.00. Thus, under the regulatory scheme, Producers A, B, and C all receive \$200.00 for the milk they supplied, irrespective of the use to which it was put. However, Handler A must, in addition to the \$200.00 that it must tender to Producer A, pay \$100.00 into the settlement fund because the value of the milk it purchased exceeded the regulatory average price. Along the same vein, Handler C will receive \$100.00 from the settlement fund because it will pay Producer C more than the milk it received was worth. The pool achieves equality among producers, and uniformity in price paid by handlers. *Id.* at 50.

Under the marketing order regulations, producer-handlers do not have to participate in the pricing pool. This exemption is premised on the expectation that a typical producer-handler is a small family dairy that produces, bottles, and distributes its own production. *Id.* Because they do not have to participate in the pricing pool, producer-handlers therefore do not have to make payments into the producer settlement fund.

After it leased a herd of milking cows, Stew Leonard's claimed that it was exempt from participating in the pricing pool because it was a producer-handler. The administrator for the marketing order denied the claim. The administrator concluded that Stew Leonard's did not meet the standards to be deemed a producer-handler set forth in the applicable regulation, 7 C.F.R. § 1001.10 (1999). In significant part, the regulation requires a producer-handler to be a "dairy farmer" and a handler. The administrator found that Stew Leonard's was not a "dairy farmer" as contemplated by the regulation and was seeking merely to change its regulatory status. After an administrative appeal culminating in a decision of the USDA Judicial Officer upholding the administrator's decision, Stew Leonard's sought judicial review.

Stew Leonard's principal argument was that the term "dairy farmer" was not defined in the regulations, thus ceding "unlimited arbitrary authority to the administrator." *Id.* at 54 (citation omitted). It also contended that the Secretary's interpretation of the term was contrary to the purposes of the governing statute, the Agricultural Marketing Agreement Act (AMAA). 7 U.S.C. § 608c(5).

The court rejected these contentions. Initially testing the Secretary's interpretation under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). The court concluded that the statute was silent on the producer-handler exception. *Stew Leonard's*, 199 F.R.D. at 54. Thus, under *Chevron*, the remaining question was whether the Secretary's interpretation was a permissible construction of the statute. To this analysis, the court also added the deference owed to agency interpretations of their own regulations, relying on *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994). After concluding that the Secretary had consistently interpreted the requirements for producer-handler status narrowly to encompass only small operations that were personal enterprises, the court deemed this interpretation to be a reasonable one in light of the purposes of the AMAA. *Stew Leonard's*, 199 F.R.D. at 54-56.

The court then considered whether the Secretary's decision that Stew Leonard's was not a producer-handler was supported by substantial evidence. It ruled that it was, for the evidence established to the court's satisfaction that Stew Leonard's "was not a dairy farmer who operated his own enterprise at his own risk." *Id.* at 57. To the contrary, concluded the court, the evidence demonstrated that the day-to-day operations of the dairy did not change under its lease arrangement with Stew Leonard's and that Stew Leonard's did not even know how to operate a dairy farm. *Id.* at 57-58. Moreover, all other cases in which the Secretary had given producer-handler status to a party to a lease arrangement, the court concluded, were distinguishable on multiple grounds, including the insignificance of the effect of those operations on the pricing pool that resulted from their exemption. Here, the evidence demonstrated, giving Stew Leonard's producer-handler status would have "had a cognizable impact upon the pricing pool." *Id.* at 60.

Finally, the court acknowledged the concerns raised by the petitioner over "the gaps left in the text of the regulations regarding the lack of a definition of 'dairy farmer'" and other ambiguous aspects. It concluded, however, that, like Congress, the Secretary could not "construct a legislative solution to every conceivable issue" and that while this reality may be undesirable it is not unlawful. *Id.*

—Christopher R. Kelley, Assistant Professor of Law, University of Arkansas, Of Counsel, Vann Law Firm, Camilla, GA

VOL. 18, NO. 10, WHOLE NO. 215 September 2001

AALA Editor.....Linda Grim McCormick
 Rt. 2, Box 292A, 2816 C.R. 16, Alvin, TX 77511
 Phone: (281) 388-0155
 FAX: (281) 388-0155
 E-mail: lgmccormick@teacher.esc4.com

Contributing Editors: Jeff Feirick, Carlisle, PA;
 Christopher R. Kelley, Fayetteville, AR; John Becker,
 Carlisle, PA.

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

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

This publication is designed to provide accurate and
 authoritative information in regard to the subject matter
 covered. It is sold with the understanding that the
 publisher is not engaged in rendering legal, accounting,
 or other professional service. If legal advice or other
 expert assistance is required, the services of a competent
 professional should be sought.

Views expressed herein are those of the individual
 authors and should not be interpreted as statements of
 policy by the American Agricultural Law Association.

Letters and editorial contributions are welcome and
 should be directed to Linda Grim McCormick, Editor,
 Rt. 2, Box 292A, 2816 C.R. 163, Alvin, TX 77511.

Copyright 2001 by American Agricultural Law
 Association. No part of this newsletter may be
 reproduced or transmitted in any form or by any means,
 electronic or mechanical, including photocopying,
 recording, or by any information storage or retrieval
 system, without permission in writing from the
 publisher.

Pennsylvania Supreme Court rules on whether mushroom harvesters are agricultural employees

In *Comite de Trabajadores de Campbell Fresh*, 2001 Pa. LEXIS 1598 (the "Union") filed a representation petition with the Pennsylvania Labor Relations Board (the "PLRB"), seeking to represent full and part-time employees involved in mushroom production and harvesting at Vlastic Farms, Inc. ("Employer"). The Union's petition was filed pursuant to the Pennsylvania Labor Relations Act, 43 P.S. §§ 211.1-211.13 (the "PLRA"). The Union requested the PLRB to conduct a representation election within 20 days, which it did, even though Employer objected to the composition of the unit. In that election, 104 of the proposed unit members voted against representation, while 101 members voted for it, and twenty votes were challenged.

The Union thereafter filed an unfair labor practice charge against Employer, contending that Employer had threatened to close the mushroom production facility if the Union acquired representation status and had promised employees that it would establish an in-house grievance committee if the representation petition were withdrawn. Employer challenged the PLRB's jurisdiction to entertain the charge based upon the contention that mushroom workers are agricultural laborers and, therefore, excluded from the provisions of the PLRA. Section 3(d) of the PLRA, which guarantees to employees the right to join labor organizations and bargain collectively, specifically excludes from the definition of an employee "any individual employed as an agricultural laborer." 43 P.S. § 211.3(d). The act does not define an agricultural laborer. The PLRB hearing examiner issued a proposed decision and order, reasoning that the PLRB, in exercising its administrative discretion, has consistently distinguished mushroom workers from agricultural laborers. Accordingly, the hearing examiner determined that the former are within the agency's jurisdiction under the PLRA. The hearing examiner proceeded to hold that Employer had engaged in several unfair labor practices, set aside the results of the representation election, and ordered Employer to cease and desist from the unfair labor practices, post a copy of the decision, and submit a list of all employees eligible to vote in an upcoming representation election.

Employer filed exceptions with the PLRB, contending that the hearing examiner erred in excluding mushroom workers from the definition of agricultural laborers and in concluding that Employer had engaged in unfair labor practices. The PLRB dismissed Em-

ployer's exceptions, finalizing the hearing examiner's proposed decision and order. Employer thereafter filed an appeal to the Commonwealth Court, arguing only that the PLRB erred in exercising jurisdiction over the mushroom workers. The Commonwealth Court deemed its decision in *Blue Mountain Mushroom Co. v. PLRB*, 735 A.2d 742 (Pa. Cmwth. 1999), to be controlling.

The Commonwealth Court first considered the version of the National Labor Relations Act (the "NLRA") that existed prior to 1947, the model for the PLRA, under which mushroom workers were not considered to be agricultural laborers because mushroom production was classified as a horticultural activity. See *Great Western Mushroom Co. v. NLRB*, 27 N.L.R.B. 352 (1940). In 1947 Congress expanded the NLRA's definition of agricultural laborers to include mushroom workers, by directing the National Labor Relations Board (the "NLRB") to use the definition of agriculture found in the Fair Labor Standards Act (the "FLSA"). See 29 U.S.C. § 152(3). The FLSA defines "agriculture" as "the production, and cultivation, growing and harvesting of any agricultural or horticultural commodities." 29 U.S.C. § 203(f).

Commonwealth Court observed that the Pennsylvania Legislature has not enacted a similar mandate for the PLRA. Indeed, the court explained, the General Assembly had unsuccessfully attempted to modify the PLRA in 1969 with House Bill 389, which would have included mushroom workers within the definition of agricultural laborers. *Blue Mountain* also considered and approved the PLRB's rationale for classifying mushroom production as horticultural, namely, that "mushrooms are artificially produced year round inside buildings where the light and temperature are controlled. The mushrooms are not grown in soil but in man-made compost, where the temperature and composition [are] monitored and controlled." *Blue Mountain*, 735 A.2d at 748; see also *Id.* at 749 (stating that mushrooms, which are grown in wooden trays under special conditions of temperature and light, and which are not grown outdoors, are subject to a process not significantly different from the cultivation of flowers in a greenhouse) (quoting *Butler County Mushroom Farm v. Department of Envtl. Resources*, 61 Pa. Commw. 48, 55, 432 A.2d 1135, 1138-39 (1981), reversed on other grounds, 499 Pa. 509, 454 A.2d 1 (1982)).

Finding no authority to compel the PLRB to "blindly" follow federal precedent, and deferring to the PLRB's expertise in this area of the law, the Commonwealth Court affirmed the PLRB's exer-

cise of jurisdiction over mushroom workers. Relying upon the rationale of *Blue Mountain*, and again deferring to the PLRB's expertise in interpreting the governing statute, the Commonwealth Court held in the present case that mushroom production, being similar to other horticultural activities, did not constitute agriculture.

The court further rejected Employer's attempt to rely upon other statutory enactments not expressly considered in *Blue Mountain*, such as the Seasonal Farm Labor Act, 43 P.S. §§ 1301.101-1301.606, which have been interpreted to include mushroom workers within the definition of agricultural labor, observing that those statutes, unlike the PLRA, expressly incorporate horticulture within the definition of agriculture.

The Court allowed Employer's appeal concerning the jurisdictional issue. In relation to the issue of whether mushroom harvesters are agricultural laborers and, as such, excluded from coverage under the Pennsylvania Labor Relations Act for collective bargaining purposes, Employer argues that the common and approved usage of the term "agriculture" includes mushroom growing and cites to several statutory and regulatory provisions, as well as prior case law, to that effect. e.g., 1 Pa.C.S. § 1991 (including mushrooms within the definition of a "Farm Product" for purposes of a general definition for statutory enactments); 3 P.S. § 32 (listing mushrooms as a farm product for purposes of establishing standards for grading and receptacles); 43 P.S. § 753(I)(4)(1)(d) (defining agricultural labor as including horticultural activities for purposes of unemployment compensation); 43 P.S. § 1301.303 (including horticulture within the definition of agriculture under the Seasonal Farm Labor Act); 7 Pa. Code § 136.1 (including mushrooms as a farm product for purposes of a sewer and water line assessment exemption); 22 Pa. Code § 121.301 (listing mushrooms as an agricultural product for purposes of the Agriculture Education Loan Forgiveness Program). *Gaspari v. Board of Adjustment*, 392 Pa. 7, 12, 139 A.2d 544, 547 (1958) (holding that production of synthetic mushroom spawn is agriculture for purposes of a local zoning ordinance); *El Concelio de los Trabajadores v. Department of Envtl. Resources*, 86 Pa. Commw. 219, 225, 484 A.2d 817, 819-20 (1984) (holding that mushroom workers are seasonal farm laborers under the Seasonal Farm Labor Act). Employer argues that such usage eliminates any ambiguity in the PLRA and renders erroneous the Commonwealth Court's deference to the PLRB's misplaced inter-

Cont. on p.7

Using a Limited Liability Company to operate a Pennsylvania familyfarm business

By Jeff Feirick

Recently, Pennsylvania approved a new way to structure a business called a Limited Liability Company (LLC). An LLC combines many of the best features of all types of business organizations. An LLC can provide protection from lawsuits and is much easier to form and operate than a corporation.

The purpose of this paper is to provide farmers in general, and Pennsylvania farmers in particular, with information to consider in deciding whether it would be wise to form a farm LLC. This paper will address the following questions: (i) what is an LLC? (ii) what are the advantages of using a farm LLC? and (iii) what are some limitations when using a farm LLC? The answers to these questions suggest that the recently adopted Pennsylvania LLC business form lends itself well to the special needs of today's family farmer.

What is a limited liability company?

An LLC is a separate legal entity, like a corporation in many respects, that is liable for its own debts and has the capacity to act as a legal person. For example, an LLC can buy, hold and sell property. The best thing about an LLC is its ability to bring together in a single business organization some of the best features of other business forms.

Purpose

A limited liability company is designed to promote business by offering farmers and other business owners protection from personal liability for business obligations combined with a business structure that is simple and easy to operate.

Forming an LLC

In Pennsylvania two documents are needed to form an LLC.

1. Certificate of organization: Filing a certificate of organization with the Pennsylvania Department of State forms an LLC. The certificate of organization is a short, formal, legal document that brings the LLC into existence. The certificate of organization must contain certain items, such as the names and addresses of all

organizers, and failing to provide the required information may have adverse legal consequences.

2. Operating agreement: An operating agreement is a document containing the internal business operating rules for the LLC. Pennsylvania law does not require the preparation or filing of a written operating agreement, but as a matter of good business practice, a written operating agreement should be prepared. An LLC operating agreement allows the business members to organize and conduct their business as they see fit. If the operating agreement fails to address a particular issue, the Pennsylvania LLC statute will control the outcome.

In most areas, LLC members may structure their business differently than the model set out in the Pennsylvania statute. For example, the LLC statute requires a unanimous vote to amend the certificate of organization. The operating agreement can change the number of members required to amend the certificate to any number the members agree upon. This flexibility allows for an LLC to reflect exactly what the members want. A few legal requirements may not be changed by contrary terms in the operating agreement. For example, the LLC statute forbids changing the requirement that a member who promises to contribute property to the LLC must do so in writing.

LLC name

The name of a limited liability company is subject to some specific, mandatory requirements. The name must include the term "company," "limited" or "limited liability company," or abbreviations to that effect, such as "LLC." The purpose of this requirement is to ensure that the name of the company will put the public on notice that the company has limited liability. After a farmer forms an LLC, he should use the complete company name on every document sent out on behalf of the LLC or risk losing the limited liability protection of the LLC business form. If the company is named Red Oak Farms, LLC., it is not enough to refer to the LLC as "Red Oak Farms." The LLC designator must be attached so that third parties will realize that the farmer is not personally liable for obligations of the business.

LLC management

Management of an LLC can be either

"member managed" or "manager managed." As described below, the two differ as to who controls the day-to-day management of the LLC's business.

1. Member-managed LLC: All of the members (owners of the LLC business) manage the LLC by making the day-to-day business decisions, subject to the terms of the operating agreement.

2. Manager-managed LLC: The members may appoint one or more managers to manage the LLC. The manager may be, and often is, a member, but Pennsylvania law does not require that the manager be a member. In other words, the LLC can hire a professional manager if the members wish to do so. The manager will have the authority to set policy and run the day-to-day operations of the LLC. However, a manager receives only the authority given to him in the certificate of organization and operating agreement. For example, a farmer might form an LLC with other family members or business associates. Their agreement might appoint the farmer as manager and give him the authority to set company policy and run the day-to-day business of the LLC.

Members

A Pennsylvania LLC can be comprised of one or more members. This point is significant because in Pennsylvania, unlike some other states, a single individual can form an LLC. Thus, a farmer who is the sole owner and manager of his farm can form a one-member LLC that will operate the farm. This will have the same legal effect as forming a corporation-protecting the farmer (and his personal assets) from liability for claims against the farm business. Alternatively, family members can be added as non-manager members and later elevated to managing member status by the farmer if he wishes to share control with the other family members. In either case, membership in an LLC gives the farmer and his family protection from personal liability for the debts, acts, or liability of the LLC, or for the acts or omissions of any other member or employee of the company.

Membership rights

A farmer who forms an LLC has the following rights:

Ownership rights

A farmer may define the ownership

Jeff Feirick, Under the Direction and Supervision of Professor Lance Cole, The Agricultural Law Research and Education Center, Carlisle, PA

rights of LLC property. The general rule, unless changed by the operating agreement, is that property transferred to or otherwise acquired by an LLC becomes property of the company and is no longer the personal property of the members who contributed it to the LLC. (The members own the LLC property collectively and indirectly through their ownership of the LLC, much like the stockholders in a corporation.) It is important to understand that an LLC member has no interest in specific property of an LLC. For example, contributions to the LLC such as money, equipment, and real estate become LLC property and are no longer the farmer's personal property. The controlling members must consent before anyone uses LLC property for personal reasons. Real estate may be acquired, held, and conveyed in the name of the LLC. The real estate property title will vest in the LLC itself, rather than in the members individually. The ownership interest of property placed in the LLC is indirect by virtue of the farmer's ownership interest in the LLC, which is defined by the operating agreement. Also, a family farm LLC qualifies for the Pennsylvania Realty Transfer tax exemption.

Management rights

The farmer who is the managing member has the right to participate and manage the business.

Economic rights

Any member has economic rights in the LLC business as specified in the operating agreement. Economic rights allow the member to receive the profits or deduct losses from the business. This is often called "pass through" tax treatment and is discussed in more detail below.

What are the advantages of using a farm LLC?

Decreased farmer liability

Businesses are constantly at risk of being sued. A properly organized LLC provides protection in the event of an otherwise uncontrollable event. If an LLC is sued, only the assets of the LLC are subject to legal liability—the personal assets of the members who own the LLC cannot be reached. In addition, the LLC can reimburse an employee or member for costs of a lawsuit arising out of a work-related incident. This protection does not include protection for an employee or member who is guilty of willful misconduct (deliberately violating the rules) or recklessness (disregard of consequences involving danger to life or the safety of others).

Liability for an act of the LLC: Acci-

dents happen. To name one "worst case" possibility, if an LLC employee injures another driver in an automobile accident while conducting business for the LLC farm, the injured person may sue the LLC for the damages. If the LLC does not have enough assets to cover the damages, the farmer member does not have to pay for the damages out of his personal assets because of the LLC liability protection.

Liability for a debt of the LLC: Neither the controlling members of an LLC nor the non-controlling members of an LLC are liable for the debts of the LLC solely by reason of being a member. An LLC has the same power and capacity as a corporation to act as a separate legal person and assume responsibility for its debts. When a business loan is needed to purchase an additional piece of land or a new piece of machinery, the LLC itself can borrow money from the bank and even give a security interest in the land or equipment to secure the loan. The bank can make the loan directly to the LLC, and its members need not be personally liable for the loan, so long as the bank is willing to make a loan on those terms. Banks should be willing to loan money to an LLC when the LLC proves to be a good business risk. The LLC must show a history of sound business management, yearly profits, and the ability to repay the loan. If the LLC has been adequately capitalized, with land, equipment, or other assets, and the history of the LLC shows a money-making business, then in most instances the LLC should be able to obtain credit and loans without the LLC member/owners assuming personal liability for the debt.

Simplicity of operation

Ease of operation: An LLC is a fairly simple way to operate a business. As noted above, the law allows the members of the LLC to set the rules for the company around the specific farm needs. As the circumstances on the farm change, the controlling members may change the ownership and management of the LLC. A farmer has the flexibility to identify a potential business problem and institute changes with a simple vote of the controlling members. Planning for potential changes and providing an easy way to accomplish them—without disagreements or, worse yet, litigation among members—is an important part of the initial planning for the LLC. Some considerations relating to this kind of planning are listed below.

Business accounting: An LLC can use either the cash or accrual method of accounting. The cash method is by far the easier method because income is rec-

ognized when money is paid, not when the services are rendered. For example, if an LLC farmer plows snow from his neighbor's lane for \$20, he has income when he receives the \$20 payment. Under the accrual method of accounting, the farmer has \$20 income on the day he plowed the snow, even though the neighbor may wait months before he pays the farmer. An LLC allows farmers to use the easier cash method of accounting.

No corporate formalities: Corporate formalities are the procedures a corporation must follow to retain the liability protection of the corporate form of doing business. Corporate formalities include the election of a board of directors, holding annual board of directors and shareholder meetings, and maintaining corporate books and records of shareholder and board of directors meetings. A farmer can draft an LLC operating agreement to avoid the necessity of the kind of formal meetings and records required of corporations.

Planning for family situations:

a. Different classes of members:

The ability of an LLC to provide for different classes of members may be useful for today's family farm situation. Many farm-raised children leave the farm and find employment elsewhere. One or more children may remain on the farm to help with the farm work and eventually continue the farm business after their parents are deceased. The LLC can spell out an equitable way to give non-farm children a share in the farm business and still fairly compensate the farm children for their greater contribution to the family farm. Non-farm children can be compensated through distributions of farm business profits without necessarily sharing in management or control of the farm business.

b. Resolving family arguments:

Disagreements occur and can cause significant disruption to the operation of a family farm business. After disagreements arise, each side may be unwilling to accommodate the interests of the other side. To prevent this from happening, the LLC operating agreement can specify a process for resolving family disputes through arbitration paid for by the LLC. The resolution process set out in the operating agreement can even contain penalties for members who refuse to cooperate. This may be an effective way to avoid expensive lawsuits that might consume the assets of the farm business.

c. Impact of lifetime events

(birth, death, marriage, divorce): If not planned for in advance, the sudden impact of the unexpected death of a managing member can tear a family farm apart. The LLC operating agreement may pro-

Continued on p. 6

vide guidance for dealing with this situation. A farmer who single-handedly runs the farm should provide instructions concerning who should take over the management of the farm in the event of his death. The farmer may even provide suggestions of what to do if none of the children are available to assume control.

The operating agreement may provide for the birth of a child by automatically placing a newborn into the membership class. For example, if a farmer forms an LLC with his spouse and children, he can give himself the majority of control and create a class of members that includes his children. The farmer may identify a future class of members in the operating agreement that includes his future grandchildren.

Marriage and divorce provide a special dilemma for a family farm LLC. With a fifty percent likelihood that any marriage will end in divorce, farmers must prepare for the unpleasant results of divorce. The operating agreement should provide a compensation plan with a clause providing that upon divorce, the ex-spouse of a family farm member receives a cash payout, on an agreed-upon basis specified in the operating agreement, instead of a membership interest in the LLC.

LLC protection of farm assets in an economic downturn

During times of economic downturn, an LLC offers more protection to the owner/member of an LLC than operation as a sole proprietorship or partnership. In a bankruptcy proceeding, a bankruptcy trustee collects all of the available assets of the bankrupt person or entity (i.e., land, homes, cars, equipment, crops, and animals) and disperses them to creditors in accordance with bankruptcy law. Certain items are exempt from inclusion in bankruptcy proceedings. The debtor must choose either the federal exemption or a state exemption. From the debtor's perspective, the federal exemptions are more generous than the Pennsylvania exemptions.

Operating a family farm as an LLC may provide significant benefits in the event of bankruptcy. When an LLC is formed, members contribute farm assets such as animals, buildings, equipment, land, and their services to the LLC in exchange for an ownership interest in the LLC. A farmer who owns a farm can choose to place farmland in the LLC, while excluding his farmhouse and non-farm real estate, or can retain ownership of the land and allow the LLC to use his farmland in return for paying rent.

An LLC has the ability to run the business and borrow funds as needed from a bank or other lender. This can be accomplished without any personal guar-

antees from the LLC members. In the event of a worst-case business reversal, only the assets placed into the LLC would be taken to pay off creditors. For example, farmland that is rented to the LLC is not LLC property and therefore is not subject to being seized by the bank (assuming it has not been pledged to the bank to secure a loan). Furthermore, if the farmer placed the farm into the LLC but excluded his farmhouse, the bank could repossess the farmland but not the farmer's farmhouse property. In this way the formation of an LLC can protect a farmer's house, land, and personal non-LLC property.

Income tax advantage

Federal taxation: Under the federal income tax regulations, LLC's can elect their federal tax classification (i.e., as a corporation, or as a partnership).

Double taxation: The owners of an LLC that elects to be classified as a partnership are not subjected to "double taxation" in the same way as shareholders of a corporation, which first pays corporate taxes before dividends are distributed and then individual shareholders pay personal income taxes on the dividends they receive. An LLC that elects to be taxed like a partnership is subject to "pass-through" partnership taxation. A pass-through entity passes through distributions to each member, who pays taxes at his individual rate. The Small Corporation or "S-corp" is a form of business entity that follows the business structure of a corporation, but is taxed like a partnership. The S-corp is limited to 35 shareholders or less and involves more legal requirements and formalities than an LLC.

Pennsylvania state taxation: The Pennsylvania State tax rate is determined by the way the LLC elects to be taxed at the federal level. The members of an LLC that elects to be taxed as a partnership are subject to the same income tax treatment that would apply if they ran their business as individuals, without forming an LLC.

LLCs are subject to the Pennsylvania Capital Stock Tax. The Capital Stock Tax is imposed on the LLC's capital stock value, as derived by the application of a formula. The courts have construed this tax to be a property tax. The minimum Capital Stock Tax is \$200.00 annually. Further, LLC's in Pennsylvania are subject to local taxes such as a school district property assessment tax on property the LLC owns.

Dissolving an LLC

In a general partnership, the death of a partner often requires a division of partnership assets. This sudden, un-

planned event often disrupts the business, requiring the remaining partner to sell off the business to pay the estate of the deceased partner. With careful planning, the sudden division of assets need not happen in an LLC. An LLC offers the distinct advantage of allowing a farmer to plan for the dissolution of the LLC. The farmer specifies in the operating agreement which events will terminate the LLC. If the dissolution of the LLC is not specified in the operating agreement, an LLC may be dissolved by a court order; the occurrence of an event specified in the certificate of organization or operating agreement; or the bankruptcy, retirement, death, resignation, or expulsion of a member. The LLC dissolution provision adds the distinct advantage of planning ahead of time for unexpected events.

LLC members can pledge or sell their ownership interests in the LLC

An LLC member may sell or assign his membership interest in the LLC without the permission of the other members. The member who transfers his membership interest still retains the right to vote and manage the company business, but he no longer gets any of the profits or takes the deductions for the losses. The creditor holding the membership interest is entitled to receive only the profits that members of that class would otherwise be entitled to recover. The creditor cannot force the remaining members to pay a dividend if the remaining members choose to reinvest profits.

The LLC may solicit additional member contributions and bank loans

The LLC may solicit additional member contributions to the LLC in exchange for an increased share of distribution or the assignment of LLC property, with an option for the LLC to buy the property back. The LLC may also secure additional bank loans after obtaining additional assets in this manner to collateralize the loans.

The LLC can assume the risk of new business ventures

The simplicity of operating an LLC may justify starting a separate LLC for riskier business ventures. For example, after a farmer forms an LLC for his farming operation, he may decide to branch out into the risky area of raising exotic animals. Rather than risk losing his successful farm LLC business if the exotic animal business fails, he could form a second LLC. The second LLC provides protection from a sudden downturn in the exotic animal market.

What are some limitations when using a farm LLC?

Liability for personal acts and omissions not protected by an LLC

The members of an LLC are not liable, solely by reason of being a member of the LLC for a debt, obligation, or liability of the LLC of any kind or for the acts or omissions of any other member, agent, or employee of the LLC. However, an LLC member will be personally liable for any LLC debts that he personally guaranteed and for his own personal acts or omissions. For example, a farmer who is an LLC member and causes an accident while driving the LLC tractor on LLC business may be personally sued along with the LLC for the damages caused by the accident, just as an employee of a corporation could be sued personally in the same situation.

Banks may not always loan an LLC money without personal guarantees

An LLC is a separate legal entity that is responsible for its own debts, and LLC members are not personally liable for the debts of the LLC. When the bank makes a loan, however, it may require one or all of the members to personally guarantee an LLC loan. In that case, if the LLC does not pay back the loan, the guarantor is responsible for the loan, but the reason is the personal guarantee and not the membership in the LLC.

Conclusion

The Pennsylvania Limited Liability Company entity may provide advantages for farm business persons by allowing a family farm to operate its business with the same protection from personal liability as shareholders in a corporation, yet retain the advantages of a partnership. Operating a business presents many risks (i.e., legal, financial, environmental), and the LLC may not be the best form for any specific business. The choice requires careful consideration and research of all business entities and the advice of a local agricultural law attorney.

The purpose of this publication is to help readers know and understand more about the Pennsylvania Limited Liability Company. The material is general and educational in nature. It is not intended to be legal advice. If legal advice is needed, readers are encouraged to seek the aid of a competent professional.

pretation of the enactment and its resort to other tools of statutory construction, such as consideration of the legislative history or the purported legislative acquiescence in the PLRB's application of the statute.

The PLRB counters that its construction of the agricultural labor exclusion is correct for the reasons enunciated in *Blue Mountain*.

Upon consideration of the competing arguments surrounding the classification of mushroom workers for purposes of the PLRA, the Supreme Court endorsed the rationale applied by the Commonwealth Court in its comprehensive opinion in *Blue Mountain*. While certainly the legislative and regulatory provisions cited by Employer manifest an intent to treat mushroom production as agricultural activity in some contexts, the Court noted that the General Assembly simply has not extended such interpretation to the PLRA. *Blue Mountain* appropriately highlights the unsuccessful effort to secure such extension in the Commonwealth via statutory amendment, and contrasts the experience at the federal level in light of the successful passage of a Congressional mandate expanding the definition of agricultural activity in the NLRA context. Finally, the Commonwealth Court's interpretation affords proper deference to the PLRB's own reasonable and long-standing construction of the statute.

In summary, the pertinent provisions of the PLRA were styled after a federal enactment pursuant to which mushroom workers were not considered agricultural laborers. The Pennsylvania General Assembly, unlike Congress, has not acted to modify such workers' status, and the PLRB maintains a consistent and reasonable interpretation of the prevailing statute. It is therefore appropriate for the courts to also enforce a consistent interpretation unless and until the General Assembly alters course. The Court held that for purposes of the Pennsylvania Labor Relations Act, mushroom harvesters are not agricultural employees. Such employees are entitled to seek collective bargaining under the Act.

— John C. Becker, Penn State University

Fifteenth Edition of Farm Estate and Business Planning by Harl

Dr. Neil Harl's fifteenth edition of *Farm Estate and Business Planning* will be released this fall according to its publisher Doane Agricultural Services. The book updates relevant legislation and state law and describes key estate planning tools. It emphasizes the basic alternatives available to the estate planner and family farm. Key coverage of this complex subject includes:

- Federal and state taxation,
- Trusts and wills,
- Insurance and
- Business organization.

"Identification and weighting of objectives continue to be major problems in estate planning," explains Harl. Harl is co-author of more than 375 publications in legal and economic journals and bulletins and more than 850 in various farm and financial publications. He has spoken widely on income tax, estate planning, and debtor-creditor relations.

To order, call 800-535-2342, or visit the Doane Agricultural Services Company website at www.Books@doane.com.

Legal Specialist positions

Non-traditional opportunity for an attorney, law school graduate, or other qualified individual. USDA's Packers and Stockyards Programs enforces the Packers and Stockyards Act, 1921, as amended (7 U.S.C. sections 181-229). Legal Specialists in three regional offices serve as members of investigative teams and offer guidance on investigation planning, evidence collection, and investigation file preparation.

The positions are in Denver, Colorado and Des Moines, Iowa.

For full vacancy announcements and application requirements, see: <http://www.usajobs.opm.gov/wfjic/jobs/BZ0532.HTM> and <http://www.usajobs.opm.gov/wfjic/jobs/BZ0531.HTM>.

—Brett Offutt, Washington, D.C.