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- Impact of the Agricultural Credit Act of 1987 on real estate titles
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Supreme Court rules on Bankruptcy Code "Lien-Stripping"

On January 15, 1992, the Supreme Court issued its opinion in the case of *Dewsnup v. Timm*, No. 90-741, 1992 WL 3666 (Sup. Ct. Jan. 15, 1992) holding that section 506(d) did not allow the Chapter 7 debtor/petitioner, Dewsnup to reduce or "strip down" respondent's lien to the judicially determined value of the collateral. The 6-2 majority affirmed the decision of the Tenth Circuit, thus rejecting the conflicting position that taken by the Third Circuit in the case of *Gaglia v. First Federal Savings & Loan Assn.*, 889 F. 2d 1304, 1306-1311 (1989).

Under the facts of *Dewsnup*, the petitioner, a Chapter 7 debtor, owed approximately $120,000 to the respondent. This debt was secured by a Deed of Trust lien that attached to two parcels of Utah farmland owned by the petitioner. The bankruptcy court determined the fair market value of the parcels to be $39,000. The petitioner brought an adversary proceeding under section 506 seeking to avoid the undersecured portion of the respondent's lien, thus reducing the lien to $39,000.

Section 506(a) provides in relevant part that

> [a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest... is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property... and is an unsecured claim to the extent that the value of such creditor's interest... is less than the amount of such allowed claim.

11 U.S.C. § 506(a)(1988). The petitioner sought to use this section to define the term "allowed secured claim" and to establish the values of the respondent's allowed secured claim and the value of the remaining unsecured claim.

Section 506(d) then provides that

> [t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless- (1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or (2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

11 U.S.C. § 506(d)(1988). The petitioner sought to use this section to void the unsecured portion of the respondent's claim, arguing that this portion was not an "allowed secured claim" as defined in section 506(a).

The bankruptcy court rejected the petitioner's argument and refused to reduce the lien. *In re Dewsnup*, 87 Bankr. 676 (Bankr. D. Utah 1988). The court made the assumption that the property had been abandoned by the trustee and held that once property was abandoned, it no longer was subject to section 506(a) which applies to

Continued on page 2

Eighth Circuit upholds granting of swampbuster "economic hardship" exemption

In an unpublished, two-page decision that adopted the reasoning of the district court, the Eighth Circuit has affirmed a North Dakota federal district court's rejection of a challenge to the ASCS's decision to exempt a county water resources board from the swampbuster provisions of the Food Security Act of 1985 under the "undue economic hardship" provisions of 7 C.F.R. § 12.5(d)(4), (5) (1991). *National Wildlife Federation v. Agricultural Stabilization and Conservation Service*, No. 91-2073 (8th Cir. filed Dec. 30, 1991). The district court had granted the defendants' motion for summary judgment after concluding that the ASCS's decision was not arbitrary or capricious, and that the ASCS did not violate the National Environmental Policy Act (NEPA) by failing to prepare an environmental impact statement (EIS). *National Wildlife Federation v. Agricultural Stabilization and Conservation Service*, Civ. No. A1-89-067 (D.N.D. filed Apr. 22, 1991).

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"property in which the estate has an interest." Therefore, it was also not covered by section 506(d). The District Court affirmed without opinion. The Tenth Circuit also affirmed, basing its decision as well on the "fundamental premise" of section 506(a) that a claim is subject to reduction in security only when the estate has an interest in the property. *In re Dewsnup*, 908 F.2d 588 (1990). Because the estate had no interest in the abandoned property, section 506(a) did not apply, nor, by implication, did section 506(d). *Id.* at 590-591. The court also noted that a contrary result would be inconsistent with the limited right to redeem certain personal property under section 722 of the Code. *Id.*, at 592, citing 11 U.S.C. §722 (1988).

The Supreme Court affirmed the decision of the Tenth Circuit. It did not, however, discuss the issue of whether the estate has an interest in abandoned property. Rather, it based its decision on the definition of "allowed secured claim," holding that this phrase as used in section 506(d) has a different meaning than the definition set forth in section 506(a). Rather than applying the subsection (a) definition as a term of art, the court applies "term-by-term" interpretation, holding that the lien avoidance authorized in subsection (d) applies to claims which are either not "allowed" (pursuant to section 502) or not "secured." Because in the present case, the respondent's claim was an "allowed claim" under section 502 and the claim was secured by the real property at issue, the lien avoidance provision of section 506(d) was inapplicable. *Dewsnup v. Timm*, 1992 WL 3666 at *4.

The Court bases its somewhat strained statutory construction (which is sharply criticized in a dissent written by Justice Scalia, with Justice Souter joining) upon pre-Bankruptcy Code law. The Court first finds that the language in section 506 is ambiguous, a finding based upon the divergence in interpretations submitted by the parties and their amici (a point also challenged vigorously in the dissent). The Court then notes that, "Were we writing on a clean slate, we might be inclined to agree with petitioner that the words "allowed secured claim" must take the same meaning in section 506(d) as in section 506(a)(footnote omitted). But, given the ambiguity in the text, we are not convinced that Congress intended to depart from the pre-Code rule that liens pass through bankruptcy unaffected." *Dewsnup*, at *4. The Court stated that it is "reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history." *Id.*, at *6, citing *United Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 380 (1988). Finding that there was no such legislative history that indicated that Congress intended to alter the rule that liens pass through bankruptcy unaffected, the Court was unwilling to interpret section 506 in a way that would allow the avoidance of respondent's lien outside of reorganization.

The phrase "allowed secured claim" is used in numerous other sections of the Bankruptcy Code. The Court specifically stated that it "expressed no opinion as to whether the words 'allowed secured claim' have different meaning in other provisions of the Bankruptcy Code." *Id.*, at *6 n.3. As is pointed out in the dissent, this is likely to produce more litigation on the subject of the meaning of "allowed secured claim."

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Swampbuster exemption/Continued from page 1

The dispute involved the Bottineau County [North Dakota] Water Resources Board's decision to construct the White Spur Drain, a "drainage channel approximately 8 miles long, with a principal lateral drainage channel some 2.4 miles long.... [designed] to provide adjacent land owners the opportunity to construct lateral drains tying into it, if considered desirable by the adjacent land owner." *Id.*, slip op. at 2-3. The administrative record indicated that the completed project would "directly affect 715 acres of wetland in the White Spur watershed," and that an additional "1,162 wetland acres [would] be drained by resident farmers who are expected to build field laterals emptying into the main ditch." Appellants' Brief at 9, *National Wildlife Federation v. Agricultural Stabilization and Conservation Service*, No. 91-2073 (8th Cir. filed Dec. 30, 1991)(hereinafter Appellants' Brief)(citations omitted).

After landowners in the White Spur area petitioned for the creation of a water management facility in 1974, the Water Resource Board began work on the drain in 1975 with the construction of an "emergency drainage channel." In 1979, the Board applied to the State Engineer for drainage permits, and, in 1983, the two-year process of establishing assessment districts for the project was completed. Brief of Appellee Bottineau County Water Resource District at 2-3, National Wildlife Federation v. Agricultural Stabilization and Conservation Service, No. 91-2073 (8th Cir. filed Dec. 30, 1991)(hereinafter District's Brief)(footnotes omitted).

The project was controversial from its inception. After the assessment districts were established, an opponent of the project unsuccessfully challenged the assessment. *Investment Rarities, Inc. v. Bottineau County Water Resource District*, 396 N.W.2d 746 (N.D. 1986). When state permits for the project were issued in 1986, they were unsuccessfully challenged by the North Dakota Wildlife Federation. In *The Matter of the Application for Permits to Drain Related to Stone Creek Channel Improvements and White Spur Drain*, 424 N.W.2d 894 (N.D. 1988).

By the time that the Food Security Act of 1985 became effective on December 23, 1985, the Water Resource Board had spent $62,567.79 in connection with the project, including land acquisition, construction, and legal expenses. District's Brief at 5. Because the Act's "swampbuster" provisions, 16 U.S.C. §§ 3821-3823, denied federal farm program eligibility to persons who produced an agricultural commodity on converted wetland, the Board sought an exemption under 16 U.S.C. § 3822(a)(1) (1988)(currently codified at 16 U.S.C. § 3822(b)(1)(A)). Section 3822 exempts pro-

ducers from ineligibility for planting on a converted wetland if the wetland's conversion was commenced before December 23, 1985. An ASCS's determination that a wetland's conversion was begun prior to December 23, 1985, is known as a "commencement determination."

Although the Board initially applied for a commencement determination in 1986, the exemption was not granted until 1989. As described by the district court, the Board's request "was granted, revoked, granted, limited, revoked and finally granted and granted, with the final action coming from the administrator of the ASCS. . . ." Slip op. at 4.

In granting the exemption, the ASCS partially relied on 7 C.F.R. § 12.5(d)(4) (1991) which essentially provides that a drainage district "is deemed to have been commenced before December 23, 1985, if before such date (i) a detailed drainage plan had been adopted by the district; (ii) the district had begun installation or legally committed substantial funds under contract or by purchasing supplies 'for the primary and direct purpose of converting wetland;' and (iii) the person seeking benefits has incurred a financial liability for the wetland conversion." Brief for Appellee Agricultural Stabilization and Conservation Service at 5-6, *National Wildlife Federation v. Agricultural Stabilization and Conservation Service*, No. 91-2073 (8th Cir. filed Dec. 30, 1991)(hereinafter ASCS's Brief).

As recited in 7 C.F.R. § 12.5(d)(5)(1991), the purpose of the section 12.5(d)(4) exemption "is to implement the legislative intent that those persons who had actually started conversion of wetland or obligated funds for conversion prior to the effective date of the Act . . . would be allowed to complete the conversion so as to avoid unnecessary economic hardship." Section 12.5(d)(5) also provides four additional criteria that must be met for an "economic hardship" exemption, including making application for the commencement determination by September 19, 1988; actively pursuing the commenced activity, but for delays beyond one's control; and completing the conversion activity by January 1, 1995. 7 C.F.R. § 12.5(d)(5)(i)-(iii). The fourth requirement, which became a focal point of the litigation, is that "[o]nly those wetlands for which the construction has begun or to which the contract or purchased supplies and materials relate may qualify for a determination of commencement," or, alternatively, there must be a "showing that undue economic hardship will result because of substantial financial obligations incurred prior to December 23, 1985, for the primary and direct purpose of converting the wetland." 7 C.F.R. § 12.5(d)(5)(iv).

The National Wildlife Federation (NWF) challenged as arbitrary and capricious the ASCS's determination that the Water Resource District would suffer "undue economic hardship" primarily on the grounds that the "ASCS improperly treated pecuniary loss as if it were the same as financial hardship" by failing to consider who was liable for the nearly $65,000 in expenditures incurred for the drainage project prior to December 23, 1985, and by failing to determine the ability of any of the potentially liable parties to pay those costs. Appellants' Brief at 28-31. The ASCS countered by noting that the administrative record contained testimony reflecting the financial hardship that would be borne by the special assessment district's landowners if the "drainage project is not completed and the landowners nonetheless are obliged to pay for it through the special assessment that has already been levied." ASCS's Brief at 18 (citation omitted).

Quoting conclusory language in the ASCS's decision finding an undue economic hardship, the district court had concluded that the ASCS's decision "appears will [sic] reasoned, thoroughly documented, and a rational interpretation of the underlying statutory scheme." Slip op. at 6. The Eighth Circuit affirmed based on the district court's "well-reasoned opinion." Slip op. at 2 (citing 8th Cir. R. 47(b)).

The NWF also contended that the ASCS had improperly failed to prepare an EIS before granting the exemption. The district court rejected that claim on the grounds that the ASCS's issuance of a "'commenced' determination" was not "'major Federal action' requiring NEPA compliance." Id. at 6-7.

On appeal, the NWF argued that the exemption of "1,877 acres of prairie wetlands from the protection of swampbuster" was "major federal action" within the meaning of NEPA because the ASCS's factual control over the drainage project had a significant effect on the environment. Appellants' Brief at 37-38.

Although the NWF conceded that the ASCS could not legally prohibit the drainage project from proceeding, it argued that the issuance of the exemption was a "major federal action" within the meaning of 42 U.S.C. § 4332(2)(C) because "[t]he government's ability to use subsidies to influence the conservation practices of private parties is precisely the reason swampbuster was passed in the first place. If the ASCS's factual control over wetland drainage was sufficient to justify congressional action, it is surely sufficient to require the agency to comply with the procedural requirements of NEPA." Id. at 42-43. In essence, it contended that the ASCS could prevent the drainage project from proceeding by denying what otherwise would effectively be "a blanket swampbuster exemption to every landowner in a 17-square-mile watershed...." *Id.* at 47.

The ASCS's response was that the agency's involvement in the project was too "attenuated" to be deemed "major Federal action." ASCS's Brief at 25-29 (relying on *Ringsred v. Duluth*, 828 F.2d 1305 (8th Cir. 1987) and *Winnebago Tribe v. Ray*, 621 F.2d 269 (8th Cir.), cert. denied, 449 U.S. 836 (1980)). The ASCS also noted that it had prepared an extensive environmental assessment (EA) when it promulgated its swampbuster regulations, and that the Secretary of Agriculture concluded that "the rules did not constitute a major federal action significantly affecting the quality of the human environment." *Id.* at 30 (citing 52 Fed. Reg. 35,194, 35,194 (1987)). It maintained that it had thus properly made the determination whether an EA or EIS was required "in this case generically, through the extensive EA . . . which was prepared in connection with the implementation of the agency's swampbuster program." *Id.* at 31 (citing *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 100-01 (1983)).

In its brief before the Eighth Circuit, the ASCS argued that the Army Corps of Engineers permit requirement for the drainage of wetlands under section 404 of the Federal Water Pollution Control Act, 33 U.S.C. 1334, "is the proper federal forum for the consideration of the environmental issues arising in connection with the conversion of any wetlands." *Id.* at 30 n.16. Apparently, the Eighth Circuit would agree.

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Kentucky Court of Appeals adopts Overboe *foreclosure defense*

The Kentucky Court of Appeals has recognized an equitable, affirmative defense to foreclosure actions initiated by Farm Credit System lenders based on the lender's failure to abide by the borrowers' rights provisions of the Agricultural Credit Act of 1987, 12 U.S.C. §§ 2202-2202a. *Lilliard v. Farm Credit Services of Mid-America, ACA*, No. 90-CA-1891-MR, 1991 WL 236875 (Ky. Ct. App. filed Nov. 15, 1991). In doing so, the court expressly recognized a defense first articulated by the North Dakota Supreme Court in *Federal Land Bank of St. Paul v. Overboe*, 404 N.W.2d 445 (N.D. 1987).

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Vertical integration in the poultry industry: the contractual relationship

By Clay Fulcher

Introduction

As has been the case with many areas of American agriculture, the poultry industry has been in a state of dynamic change for the past thirty years. Although some observers view these changes as beneficial to the American consumer, others claim that the industrialization of poultry production has deprived many poultry producers of their bargaining power and decision-making opportunities.

This article focuses on the growth of production contracts in the poultry industry and discusses several typical contract clauses. The article also briefly describes the limited federal and state legislation designed to protect contract poultry producers.

The poultry industry's success is due in large part to vertical integration, which began in the late 1940's. Until that time, poultry was raised mainly by many small independent growers. The various production-to-market facilities, including facilities for breeding, hatching, feed, processing, and marketing were separately owned.[1] The growers sold *their* birds to processors who marketed the product.[2]

In order to better utilize and maximize their resources to meet the increased demand for poultry products after World War II, feed manufacturers and food processors began to develop the means for farmers to produce more poultry without new, large capital investments.[3] The emerging integrators began to acquire all aspects of the production cycle, including the hatcheries, birds, feed, and medicine. Since the farmer no longer owned the birds, he or she was required to provide only the production facility and labor necessary to raise the birds to slaughter weight (or in the case of breeder or laying hens, to care for the birds and gather eggs).

Vertical integration can be defined as the

> coordination of various levels of producing, processing, and distributing under one decision making unit, generally through direct ownership of the different stages or through contract. A completely integrated broiler operation, for example, will consist of breeder flocks, hatcheries, feed milling and delivery, growout (often by contract), assembly, processing plants, further processing, and delivery to buyers. An integrator develops each phase to mesh with the others so that inputs and products are handled as a flow process. Ancillary services such as building and equipment supplies, fuel, and financing are often affiliated with the operation.[4]

Once vertical integration began, the transformation of the poultry industry was rapid. The broiler industry was ninety percent vertically integrated by 1975. As vertical integration rapidly changed the United States poultry industry, the benefits to producers, consumers, and integrators increased.

Producers receive a guaranteed price per pound produced regardless of market prices. Consumers pay less for poultry relative to the price of other meats. Integrators realize lower costs and produce a bird in one half the time required thirty years ago. In spite of the benefits to producers, consumers, and integrators, not all agree that the current state of vertical integration is entirely in the best interests of poultry producers.

The production contract

Central to the integrators' control over the production-to-market cycle is the production contract. The typical contract allows the integrators, directly and indirectly, to control how many birds are grown, slaughtered and marketed; when the birds are grown; what type of feed and medicine are used; and when feed and medicine are used or ordered.

The employment of production contracts by integrators creates the functional equivalent to direct corporate ownership of land and production facilities.[5] Moreover, the contracts provide the same economic advantages to integrators as would ownership, without the attendant capital investment.[6] However, unlike some production contracts which allow sharing of capital contributions, profit and loss, and decision-making,[7] the typical broiler contract confers upon integrators a great amount of control over producers and denies poultry producers benefits they might receive as employees or partners.[8]

In 1987, approximately ninety-two percent of all broilers were produced under contract. The remaining eight percent were raised on farms owned by integrators.[9] Although the typical contract states that the grower is an independent contractor, some growers state that they are no more than serfs on their own land.[10]

A typical contract is likely to contain language stating that

> the grower agrees to accept the number of chicks and type of chicks as determined by the integrator; that the term of this agreement is for that period required to grow and deliver only one flock of broilers.

Although the integrator may make oral representations regarding how many flocks a year the grower will receive, or how much an average grower makes, such oral promises are probably unenforceable. The typical contract will contain a clause stating that the contract supersedes all prior agreements and that no agent or employee of the integrator has authority to make oral agreements.

When growers borrow money to build facilities, they typically utilize the integrator's average grower income and expense figures to determine the loan payment period. If the representations are not accurate—for instance, the grower receives five flocks of birds in a year instead of six—the grower will likely fall behind in his loan payments. A complaining grower may be dropped as a producer, assuming his creditors have not acted first.[11]

The typical contract not only provides that title to and control of the chicks, feed, and medication remain with the integrator, but also that the grower's responsibilities are numerous. For example, a contract may state that

> the grower will provide all labor, utilities, and supplies as well as housing and equipment as required by the company; the producer will cooperate with the integrator in adopting and/or installing new management practices and equipment as required by the company; recommendations on the part of the company are to be considered recommendations only and not requirements.

These typical contract clauses often allow the integrator to control who will be a grower. First, integrators can and sometimes do require that expensive new equipment be added to facilities on short notice.[12] Second, integrators may not uniformly require improvements on all houses of different growers.[13] Finally, a grower who cannot afford new equipment may be dropped as a grower or may not receive another flock until he has purchased and installed the new equipment. It is not uncommon for the integrator to "suggest" or "recommend" that new equipment be installed only for all con-

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cerned to discover that the equipment does not perform as anticipated; it then may be "recommended" to the grower that he or she install different equipment.[14]

The typical contract may also provide that

> the grower will allow the company access at all times to the premises; the grower will not use any feed, medication or pesticides unless supplied or approved in writing by the company.

This clause allows employees and agents of the integrator access to the production facilities twenty-four hours a day. Fieldmen or field supervisors employed by the integrator are the most common visitors to the grower's production facility. These fieldmen, in practice, run the operation and the grower follows the "recommendations" of the fieldmen. The fieldmen order feed and determine when and what type of medication will be used.[15]

The integrator's control over these two production inputs concerns many growers. First, although growers must notify the integrator when the feed supply is low, they may be told not to order feed since "that is the fieldman's job."[16] If a grower runs out of feed, his or her chickens suffer and income is decreased. Second, the feed is the integrator's feed and comes from the integrator's mill on the integrator's trucks. However, oversight by state agencies to assure that growers are not shorted is almost nonexistent.[17] A grower who installs scales at his farm may lose his contract.[18] Since the grower is paid according to feed conversion, accuracy on feed delivered is critical.[19]

Growers have to buy from the integrator the medicine "recommended" by the fieldman. Medicines identical to that "recommended" can often be purchased from local coops at considerably lower prices, but the growers are not generally allowed this option.[20]

It is not unusual for a contract to state that

> the grower agrees that the company excludes all warranties on property delivered or recommended by the integrator to the producer; the company does not warrant or guarantee such recommendations as a term of the Agreement and grower holds company harmless from any loss to grower resulting from adoption of those recommendations and guidelines.

These typical disclaimer clauses purport to give the integrator blanket protection not only for the practices and equipment "recommended" by the fieldmen, but also for critical inputs such as chicks, feed, and medicine. If the chicks placed are sick, the grower suffers. If bad feed is received or the fieldman misdiagnoses an illness, the grower has no recourse according to the contract.[21] Although the integrator may also suffer, its losses are spread over many millions of birds while that grower does not have the same opportunity to spread the risk of a loss.[22]

Many contracts provide that

> the grower agrees that the company has the right to use the producer's facilities without cost.

Upon default, or breach by the grower, the integrator can immediately cancel the grow-out agreement by giving written notice to the grower. After notice, this clause purports to allow the integrator to take possession of the grower's facilities, without legal process and at no cost, to finish raising the current flock of broilers.[23]

Finally, some contracts even declare that

> the grower agrees that he or she will be considered in default of the contract upon the happening of any event, which in the opinion of the company, endangers or impairs the company's property.

Together with the language allowing the integrator to immediately cancel the grow-out agreement by written notice, this clause purports to provide at-will termination authority. If a grower fails to follow any "suggestion" or complains too often, the integrator can cancel the agreement without cause.[24]

The use of contracts for broiler and egg production, at least as they are now typically written, denies poultry producers true independent contractor status. Producers have had virtually no success in negotiating contracts with the integrators nor have producers been successful in arguing that such contracts are unconscionable.[25]

In the past, many growers could choose among several integrators in their area. However, the number of poultry processors has diminished, and by 1985 the ten largest firms accounted for a total of seventy percent of broiler production with the three largest controlling forty percent of broiler production.[26] When there is no competition in an area, the integrator has little incentive to increase the price paid to growers and growers lose what little leverage they might have had since they cannot switch integrators.[27]

Federal and state legislation

The Packers and Stockyards Act was enacted in 1921 to remedy, among other undesirable conditions, unfair or unjustly discriminatory practices by packers and live poultry dealers.[28] Although the Packers and Stockyards Act was important legislation that ended many abuses in the meat packing industry, its effect on discrimination against poultry growers has been almost non-existent for two reasons.

First, the legal significance of the poultry industry's rapid growth and vertical integration after World War II was not recognized by Congress until amendments to the Packers and Stockyards Act were enacted in 1987. Until that time, only poultry dealers who sold live poultry were covered by the Packers and Stockyards Act. Integrators typically do not sell live poultry, and thus, escaped coverage by the Packers and Stockyards Act. *See United States v. Perdue*, 680 F.2d 277, 279 (2nd Cir. 1982); *Bunting v. Perdue*, 611 F. Supp. 682 (E.D.N.C. 1985). The 1987 amendments to the Packers and Stockyards Act amended the definition of a live poultry dealer to include those "obtaining live poultry by purchase or under a poultry growing agreement." Pub. L. No. 100-173, § 2, 101 Stat. 917, Nov. 23, 1987 (codified at 7 U.S.C. § 182(10) (1988).

The second reason the Packers and Stockyards Act has failed to protect contract poultry growers is that the Secretary of Agriculture, while possessing administrative authority over packers, cannot proceed administratively against live poultry dealers. *See Arkansas Valley Industries Inc. v. Freeman*, 415 F.2d 713 (8th Cir. 1969); *Davis v. United States*, 427 F.2d 261 (5th Cir. 1970). The Secretary can only proceed against live poultry dealers in federal district court.

The Agricultural Fair Practices Act of 1968[29] (AFPA) was enacted to protect the agricultural producer's right to decide, free from improper pressures, whether or not to join a bargaining or marketing association. The AFPA covers poultry integrators who contract with producers to "grow out" birds; makes it unlawful to coerce, discriminate against, or refuse to deal with a producer exercising a right to belong to an association; and provides several civil remedies for violations. However, the AFPA has been of limited value to contract poultry producers because of two major weaknesses.

First, the AFPA lacks any requirement that processors (including integrators) bargain in good faith with producer associations. Second, and most significant, the AFPA contains a disclaimer section which states that processors are not prevented from selecting their suppliers for any reason other than a producer's membership in an association. Thus, the disclaimer section provides any processor grounds to refuse to deal with an association member.

Federal legislation has been given contract poultry producers little protection

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to date. But see *Baldree v. Cargill, Inc.*, 758 F. Supp. 704 (M.D. Fla. 1990), aff'd 925 F.2d 1474 (11th Cir. 1991), where the federal circuit affirmed an injunction by the district court ordering Cargill to continue its contractual relations with producer association members who had sued the company for false weighing. Although state legislatures have acted to protect producers and producer associations, the effect of this legislation on the majority of contract poultry growers has been minimal.

As integrated agribusiness continued to develop, eight states in the Great Plains enacted legislation (the so-called family farm acts) to protect family farmers.[30] Some of these legislative acts prohibit corporate involvement in farming; others prohibit corporate ownership of agricultural land; and most seek to do both.

Although these family farm acts were enacted to protect family farms and are indeed effective to a limited extent, they have had no appreciable effect on poultry growers for several reasons. First, several of the family farm acts specifically exempt poultry production and therefore, corporate ownership or, or control over, poultry facilities is not restricted. Second, the state acts that restrict corporate ownership, but do not restrict production contracts, provide no bargaining benefits for poultry growers under contract to an integrator. Finally, state acts that restrict or do not allow production contracts usually result in the integrator's decision to locate facilities in non-restrictive states or to not expand existing facilities and investment in the restrictive state.

Some states have been successful in providing protection for farmer producer organizations. In 1987, Maine amended its Agricultural Marketing and Bargaining Act to require good faith bargaining.[31] In 1989, Washington enacted legislation requiring processors of sweet corn and potatoes to bargain with accredited producer associations.[32] However, Minnesota is the only state that has enacted legislation which specifically addresses contract production and provides a significant protection for contract producers.

The Minnesota legislation, which became effective on August 2, 1990, prohibits a contractor, except under certain circumstances, from terminating or cancelling a contract that requires a producer of agricultural commodities to make a capital investment in buildings or equipment that costs $100,000 or more and which has a useful life of five or more years. [33] The contractor can cancel the contract only if the producer has been given written notice at least 180 days before termination and the producer has been reimbursed for damages incurred by his or her investment made for the purpose of meeting minimum requirements of the contract.

The legislation also requires that any contract for an agricultural commodity between a contractor and a producer must contain language providing for resolution of contract disputes by either mediation or arbitration. Finally, the legislation provides that there is an implied promise of good faith in all agricultural contracts and allows a party to recover damages, court costs, and attorney's fees if the court finds that the opposite party has breached the contract in bad faith.

Conclusion

The Packers and Stockyards Act and the Agricultural Fair Practices Act have been of limited value to contract producers. Some states have enacted legislation to protect family farmers, producer associations, and contract producers, but there is virtually no such protection in the southern United States where the majority of contract production is occurring.

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[1] E. Roy, *Contract Farming and Economic Integration* 112 (1972).

[2] Packers and Stockyard Administration, U.S.D.A., P. & S.A. No. 1, *The Broiler Industry; An Economic Study of Structure, Practices and Problems* 1 (1967).

[3] *Id. See also*, U.S. Dept. of Agric., *The U.S. Poultry Industry*, U.S.D.A. Economic Research Serv., 7, 18, 20 (Rept. No. 502, 1983).

[4] U.S. Dept. of Agric., *The U.S. Broiler Industry*, U.S.D.A. Economic Research Serv., p. vi (Rept. No. 591, 1988).

[5] Billings, *The Family Farm: Regulating Farm Act Avoidance Techniques Through Restrictions on Vertical Integration and Production Contracting, 16 Val. U.L. Rev. 277 (1981).*

[6] *Id.*

[7] L. Schrader, *Egg Production Contracts* 4 (1975).

[8] *Billions of Chickens: The Business of the South*, Southern Exposure, Nov/Dec, 1983, at 76.

[9] Report 591, *supra* note 4, at 17.

[10] *The Broiler Business Consolidates and That Is Bad News to Farmers*, Wall Street J., Jan. 4, 1990, at 1, quoting a disgruntled North Carolina grower [hereinafter Journal].

[11] Interview with Board of Directors, Contract Poultry Growers Association of Nashville, Arkansas (Feb. 11, 1991) (hereinafter CPGA interview).

[12] Interview with Murfreesboro, Arkansas Poultry Grower who was dropped as a grower (Feb. 18, 1991). This grower was consistently ranked (by feed efficiency) in the top half of his group, but was dropped on short notice because of the age of his equipment and facility.

[13] *Id.* The grower alleges that growers with similar equipment and facilities were not terminated.

[14] CPGA interview, *supra* note 11.

[15] *Id.*

[16] *Id.*

[17] 9 C.F.R. §201.106-1 to .108-1 (1990) provide regulations regarding weighing live poultry.

[18] Interview with Pope County, Arkansas, poultry grower (Oct. 30, 1990). The grower states he was told his contract would be terminated if he installed scales under his feed bins.

[19] CPGA Interview, *supra* note 11.

[20] *Id.*

[21] Since the integrator neither sells nor leases any property to the producer, the warranty rules of UCC Articles 2 and 2A presumably do not apply.

[22] Report 591, *supra* note 4, at 20.

[23] The author does not know of an actual instance in which an integrator used a producer's facility to finish raising a flock of birds.

[24] Journal, *supra* note 10.

[25] *Smith v. Central Soya of Athens, Inc.*, 804 F. Supp. 518 (E.D. N.C. 1985). In *Smith*, the plaintiffs argued that their contract with an egg processor was unconscionable and the merger clause in the contract, precluding any other agreements between the parties, was unreasonably favorable to the processor. The court disagreed, stating that the plaintiffs did not have to enter into the contracts.

[26] Fryar Jr., Edward O., *An Historical Perspective of the Broiler Industry and Vertical Integration*, University of Arkansas Staff Paper, presently being considered for publication in the Animal Science Journal, p. 1.

[27] Interview with Ozark, Arkansas turkey grower (Apr. 11, 1991), who stated that growers in his area had received minimal price raises for the last several years and only one integrator placed birds in his area. He stated, however, that growers for the same integrator in the Fayetteville area received significantly better prices since there were several competing firms in the area.

[28] Aug. 15, 1921, c. 64, § 202, 42 Stat. 161.

[29] Pub. L. No. 90-288. §§ 2 - 6, 82 Stat. 93 (1968)(codified at 7 U.S.C. §§ 230001 - 6 (1988).

[30] Billings, *supra* note 7, at 277, citing Iowa Code Ann. §§ 1720.1 to .15 (West Supp. 1981)(enacted in 1975); Kan. Stat. Ann. §§ 17-5901, 5902 (1974)(enacted in 1973); Minn. Stat. Ann. § 500.24 (West Supp. 1981)(enacted in 1973); Mo. Ann. Stat. §§ 350.010 to .030 (Vernon Supp.)(enacted in 1971); S.D. Codified Laws Ann. §§ 47-9A-1 to 23 (Supp. 1981)(enacted in 1974); Wis. Stat. § 182.001 (West Supp. 1981)(enacted in 1974).

[31] Me. Rev. Stat. Ann. tit. 13, §§ 1953-1965 (West 1981 and Supp. 1989).

[32] Agricultural Marketing and Fair Practices Act, ch. 355, 1989 Wash. Legis. Serv. 1268 (West).

[33] 1990 Minn. Laws Chapter No. 517, S.F. NO. 1779, to be codified in Minn. Stat. Chapters 17 and 514.

State Roundup

NORTH DAKOTA. *Livestock lease agreement.* In *Tweeten v. Miller*, No. 910061, 1991 N.D. LEXIS 212 (N.D. Nov. 20, 1991), the North Dakota Supreme Court affirmed a district court judgment concerning a livestock lease agreement necessitated by the state's prolonged drought.

In 1987 and 1988 a drought severely affected Miller's cattle operation. Consequently, on November 22, 1988, Miller entered into a lease agreement with Tweeten. The agreement required that Tweeten supply the pasture, feed and other essentials for the cattle's care. Miller supplied Tweeten with 75 Registered Angus and crossbred commercial cows plus one bull, while reserving the right to inspect the cattle. The proceeds from the calf production were to be divided, 45% to Miller and 55% to Tweeten. Significantly, death loss of cows was to be Miller's responsibility *unless* such death was due to Tweeten's total negligence.

In the fall of 1989, fifty-six calves were sold, bringing $19,253.19. However, when Miller refused to pay Tweeten his 55%, Tweeten brought an action on the lease agreement. Miller counterclaimed for damages allegedly suffered because of Tweeten's negligent care of the cattle. Under Tweeten's care, nine cows died and nineteen calves were lost. While recognizing that the death losses were higher than normal, the trial court found no evidence that Tweeten was negligent in the care of the cattle and calves. In addition, the district court determined that Miller should have checked on the cattle and monitored their care. Accordingly, the trial court granted Tweeten his 55% share.

On appeal, Miller, citing a Utah case, argued that Tweeten had been negligent. *Baker v. Hansen*, 666 P.2d 315, 320-321 (Utah 1983) (when cattle are delivered to a bailee in good condition, a presumption of negligence arises when cattle are lost). Ultimately, the court did not decide whether to adopt the Baker presumption, but instead distinguished the case on the facts.

The agreement specified that death loss of cattle would be the responsibility of Miller, unless it was due to Tweeten's "total negligence". The evidence showed that Miller delivered some "gummers" (toothless cows) and that 20 of the cattle seemed to be very old, while only about 25 of the cattle were in good shape. Also, Tweeten offered substantial evidence as to his management practices and the adequacy of the care of the cattle. In contrast, the cattle delivered in Baker were in good condition and the bailee failed to account for the subsequent death losses.

Miller also invoked the doctrine of *res ipsa loquitur*, arguing that Tweeten had the burden to prove that the loss of the cattle was not caused by Tweeten's negligent. *See Wood v. Gable*, 656 S.W.2d 623, 625 (Tex. App. 1983). The court rejected that contention.

Miller next argued that the district court erred in considering his failure to complain about the cattle's treatment. The Supreme Court disagreed, noting that in a breach of a lease agreement, the nonbreaching party has a duty to minimize damages. Here, if Miller believed that Tweeten breached the agreement by improper care of the cattle, he should have taken steps to minimize any damages.

—Scott D. Wegner, Federal Judicial Law Clerk, Bismarck, ND

NORTH DAKOTA. *Refiling of UCC Financing Statements Required.* Companies doing business in North Dakota or buying agricultural products from North Dakota producers need to be alert to changes made recently to that state's law regarding UCC financing statements. Every secured party relying on a UCC financing statement previously filed in North Dakota **must refile** such statements in the filing office where originally filed between January 1 and June 30, 1992. Any UCC financing statement not refiled during such time will lapse at midnight on June 30.

The North Dakota refiling requirement is part of a host of changes to North Dakota law enacted during 1990 governing UCC financing statements and federal farm product central notice filings. The new system being implemented is called "UCC/CNS Central Indexing System." More information including a free brochure (Bulletin #1) outlining the requirements of the new law can be obtained by calling the North Dakota Secretary of State's office at (701) 224-3662.

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

FLORIDA. *SBA seeks small business exemption on toxic release reports.* The Small Business Administration (SBA) has requested the federal Environmental Protection Agency (EPA) to exempt small quantity generators from the industrial generators who are required to report toxic release inventory data under the Emergency Planning and Community Right to Know Act. The SBA filed a petition on August 8, 1991 requesting the exemption. The EPA issued a final rule in 1990 requiring NPDES permits for stormwater discharges from point sources.

—Sid Ansbacher, Brant, Moore, Sapp, MacDonald & Wells, Jacksonville, FL.

AG LAW CONFERENCE CALENDAR

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Federal Register *in brief*

The following is a selection of matters that were published in the *Federal Register* in the month of December, 1991.

1. USDA; FAS; Regulations governing the financing of commodity sales of agricultural commodities; final rule; effective date 12/13/91. 56 Fed. Reg. 64939
2. FCA; Management of investments; liquidity; interest rate risk; eligible investments; proposed rule; comments due 2/18/92. 56 Fed. Reg. 65691.
3. FCA; Financing of basic processing and marketing activities; authorized insurance services; final rule. 56 Fed. Reg. 65986.
4. EPA; USDA; Wetland identification and delineation rule; proposed rule. 56 Fed. Reg. 65964.
5. IRS; Treatment of partnership liabilities; final regulations; 12/28/91. 56 Fed. Reg. 66348.
6. IRS; Allocations attributable to partnership nonrecourse liabilities; final rule; 12/28/91. 56 Fed. Reg. 66978.
7. CCC; Debt settlement policies and procedures; final rule; effective date 12/27/91. 56 Fed. Reg. 66954.
8. FmHA; Real estate title clearance and loan closing; final rule; effective date 1/30/92.
9. FCIC; Appeal procedure; proposed rule. 56 Fed. Reg. 67228.
10. FCIC; Termination of Standard Reinsurance Agreement. 56 Fed. Reg. 67271.

—Linda Grim McCormick

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Legislative Support Project: Request for Information, From Susan Schneider

As was introduced at the AALA conference in Atlanta, Georgia, and as was announced in the November issue of *The Agricultural Law Update,* the Board has authorized the Ad-hoc Legislative Support Committee to proceed with the pilot project topic choice of agricultural production contracts. It is our hope that during the next year we will be able to assemble a significant amount of practical information on this topic.

Because of the special nature of this topic and the interest expressed by AALA members, we will deviate slightly from the process as initially planned. Rather than forming a small sub-committee, it appears more productive to form a larger task force composed of as many AALA members as are interested. This will broaden our perspectives and spread the work around as well. Although a number of members have already signed up for this task force, anyone else who is interested is welcome.

In addition to the formation of a task force, however, we are putting out a request to all members. Our goal is to gather as much infornation on agricultural production contracts as possible, collecting materials from members around the country. Hopefully these materials will include sample contracts, articles, anecdotes, analysis, sample pleadings from litigation involving farm contracts, and copies of state statutes dealing with farm contracting. Once these materials are assembled, we will decide on the most appropriate format for analyzing and organizing them. Our objective is to produce some type of working file and/or publication based on the materials gathered.

On this basis, please consider sending us copies of any materials that you think may be relevant to this topic. Although I suspect that poultry and swine contracts will be of particular interest, other agricultural contracts such as those with seed companies should also be addressed. This is likely to be one of those projects that defines itself as it goes along, so feel free to use your creativity. In addition to items that you may have in your files, consider contacting your area extension office or other farm organizations to see if they provide farmers with any information on this topic. If you send anything that may be copyrighted, please provide us with the source so that we can contact them if we seek permission to reprint it. Similarly, please black out any confidential information on pleadings or anecdotes. If anyone wishes to submit information or materials anonymously, we will, of course, honor that request.

Materials should be sent to Susan A. Schneider, 1510 1st Avenue North, Grand Forks, ND 58203. If you have any questions or comments, please call 701-746-4309.