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INSIDE

IN FUTURE ISSUES

The ASCS "90-day rule"

On December 23, 1992 the Agricultural Stabilization and Conservation Service issued its interpretive notice, Notice CP-446, implementing the so-called "90-day rule" initially enacted by Congress two years ago. This rule limits ASCS's right to revisit decisions made by the ASC county and state committees, or reverse decisions made in favor of farmers.

The 90-day rule amounts to a sort of combined statute of limitations and equitable estoppel against ASCS, and is intended to prevent situations in which, after an erroneous ASCS decision that benefits a farmer, ASCS attempts to reverse its bad decision by requiring the innocent farmer to repay payments made based on the error.

Many ASCS determinations against farmers in the past have stemmed from reversals of county committee decisions by higher level officials at USDA. Because the 90-day finality rule amounts to a complete bar to such after-the-fact determinations *and because ASCS intends to have its offices apply the newly-issued notice retroactively to all decisions made on or after November 28, 1990*, rural practitioners should be aware of the possible ramifactions of the implementation of the rule on their farmer clients.

The 90-day rule was enacted as part of the ASCS appeals process reform provisions of the Food, Agriculture, Conservation, and Trade Act of 1990 (the 1990 Farm Bill, Pub. L. No. 101-624, Nov. 28, 1990, § 1132(a), 104 Stat. 1313-1315). Included in the new section 426 of the Agricultural Act of 1949, codified at 7 U.S.C. section 1433e, the new appeals law became effective with respect to the appeal of any adverse determination made by any ASC county or state committee, ASCS personnel, or agents of the CCC on or after the date of enactment of the 1990 Farm Bill. Pub. L. No. 101-624, Nov. 28, 1990, § 1132(b), 104 Stat. 1315, 7 U.S.C. § 1433e note. It covers adverse determinations by the ASCS or the CCC under any Act administered by ASCS.

Subsection (g) of section 426 contains the 90-day rule. It states that decisions made by county and State ASC committees, or employees thereof, made in good faith in the absence of misrepresentation, false statement, fraud, or wilful misconduct, unless otherwise appealed under section 426 shall be final *unless otherwise modified within 90 days*. Subsection (g) also provides an enforcement tool. It states that no action can be taken to recover amounts found to have been disbursed on the basis of the such final decision (which turned out to be in error) unless the farmer had reason to believe that the decision was erroneous.

The Department of Agriculture issued interim regulations on November 25, 1991, to implement the 1990 Farm Bill appeal provisions. 56 Fed. Reg. 59-207-11, codified at 7 C.F.R. part 780. The regulations merely reiterate the statutory language of the farm bill, except for one change in the language, from "decision" in the statute to "program determination" in the regulations, and the addition of language (7 C.F.R. §

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Federal Circuit construes PVPA farmer exemption

In a case of first impression, the Federal Circuit Court of Appeals has interpreted the scope of the Plant Variety Protection Act's farmer exemption. *Asgrow Seed Company v. Winterboer*, No. 92-1048, 1992 WL 379092 (Fed. Cir. Dec. 21, 1992). The PVPA grants patent-like protection to the breeder of any novel variety of sexually reproduced plant. 7 U.S.C. §§ 2321-2582. The crop, or farmer exemption, provides in relevant part:

> it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section: Provided, That without regard to the provisions of section 111(3) [7 U.S.C. § 2541(3)] it shall not infringe any

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780.17(d)), not inconsistent with the statutory language, stating that notwithstanding the 90-day rule, ASCS and CCC may correct errors made in entering data on program contracts, loan agreements, and other program documents and in making computations and calculations pursuant to such contracts or agreements. The regulations continue today — over a year later — to be only interim regulations.

The interpretive notice, CP-446, is intended "to provide instructions and examples for State and county ASCS offices for implementing the 90-day rule." It instructs ASCS county offices on procedures for dealing with 90-day rule cases, defines a couple of key terms, gives ninety-five examples (in a twenty-page exhibit attached to the rule) of how to apply the 90-day rule, and provides a retroactive effective date for when to begin applying the rule.

To take the last item first, Notice CP-446 states that the 90-day rule is to apply to all ASCS erroneous decisions or overpayments discovered after November 28, 1990, the date of enactment of the 1990 farm bill. Further, Notice CP-446 specifically authorizes the state and county ASCS offices to *refund* overpayments collected contrary to the rule. *Thus, if a farmer has had to repay ASCS at any time in the last couple of years due to ASCS's mistake in making him eligible for program benefits to begin with, the farmer might well be entitled now to 90-day rule relief.*

The Notice also contains two definitions of terms used in the Notice. The first is a definition of the phrase "not have reason to believe there was an error" as applied to farmers, which is a condition to receiving 90-day rule relief. The heart of this definition are the examples, which focus only on quantitative errors by ASCS: If a farmer is owed an ASCS payment of $2,000 but receives an overpayment of $2,100 he qualifies as not having reason to believe there is an error. However, if the overpayment is $20,000, the farmer fails to meet the definition.

The second definition, of the term "effective date," is important because it is used in each of the ninety-five examples in the exhibit to Notice CP-446. Each example has three parts: first, the situation being described; second, a discussion of whether the rule applies to the situation; and third, the date the 90-day rule goes into effect in that situation, i.e., the effective date.

The definition given in Notice CP-446 is straightforward, but the examples are more problematic. The definition provides that the term means the date to begin counting the ninety calendar days for purpose of the rule. However, the examples of effective dates include, along with the approval date (which is another way of saying the date the decision is made), the date of notification to the producer and the date the CCC-184 (siimply put, form CCC-184 is the CCC check) is issued.

By contrast, the statutory language of the 1990 Farm Bill refers to the 90-day clock starting on the day the county or state ASC committee decision is made, not when the decision is implemented through a check being cut or the producer receiving his notification in the mail. And, as a practical matter, there easily could be a five or ten day gap between the committee action and implementation. Nonetheless, many of the ninety-five examples refer to the date the check is cut as being the effective date for the 90-day rule's applicability.

To be sure, there may be many cases when it is impossible to determine when the ASC committee actually acted on an issue. On the other hand, there also are many cases in which the specific ASC committee decision on a farmer's eligibility is recorded in the committee's minutes or noted elsewhere in the farmer's file. Should not that farmer insist that the 90-day clock start ticking on the day that the decision is made?

Turning now to the ninety-five examples in the exhibit, as a general rule, they tend not to apply the 90-day rule to situations where the farmer is in any way involved in the generation of erroneous information or where the farmer should have known that the facts were in error.

The examples cover ten different program areas, as follows:

- Acreage reduction programs.
- Disaster payment programs.
- Compliance. (The examples include one covering erroneous determinations of farmers' good faith effort to comply. In many cases, "good faith" is a condition to a farmer obtaining relief from ASCS penalties. The example here applies the 90-day rule to good faith determinations.)
- Payment limitation cases. (Although five examples are cited here, the key example, along with a paragraph in the text of the Notice, states that the 90-day rule does not apply to payment limitation cases. Rather, the ASCS Handbook on payment limitation should apply. [ASCS Handbook 1-PL (Revision 1), "Payment Limitations", ¶ 516.E, 1991.] That handbook imposes an even stricter finality rule, that is, that ASCS only has sixty days after a farmer files his farm operating plan to catch and correct an error in the farmer's payment limit determinations. If not caught in sixty days, ASCS must live with the farmer's "person" and "actively engaged" determinations for the remainder of the crop year.
- Highly-erodible land/wetland conversion rules. (The 90-day rule is applied to most of these examples. The one exception points out that the 90-day rule only applies to erroneous ASCS decisions, not to determinations made by other USDA agencies, such as, here, the Soil Conservation Service.)
- Price support operations covering price support loans and loan deficiency payments. (The 90-day rule is not applied when the farmer wrongly certifies his production.)
- Dairy program.
- Livestock feed programs.
- Wool and mohair program.
- Land retirement conservation programs.
- Conservation cost share programs.

On every page of the exhibit, the Notice emphasizes that the situations listed are not exhaustive. The attorney advising a client that has received a repayment demand letter from ASCS should consult both the law itself, as well as the Notice, in analyzing the client's rights. Copies of Notice CP-446 can be obtained from the Information Division of ASCS in Washington, DC; and each county ASCS office should have a copy of Notice CP-446 on hand.

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PVPA FARMER EXEMPTION/cont. from page 1

right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable.

7 U.S.C. § 2543.

Thus, the farmer exemption allows a farmer to save seed he produced from a protected variety and sell that seed to other farmers. Farmer-to-farmer sales of protected varieties in non-descriptive brown bags is known as "brown bagging." An issue of contention is the amount of brown bag protected variety seed that farmers can sell to each other.

In *Asgrow Seed Company v. Winterboer*, 795 F. Supp. 915, 22 U.S.P.Q.2d 1937 (N.D. Iowa 1991), the district court quantitatively limited the amount of protected variety seed farmers could save to the amount needed to plant a crop the next year. "The exemption allows a farmer to save, at a maximum, an amount of seed necessary to plant his soybean acreage for the subsequent crop year." 797 F. Supp. at 918-919. Under the district court's construction, farmer-to-farmer sales are possible only if planting requirements change. The district court granted the plaintiff's motion for summary judgment and their request for a permanent injunction.

Finding that the district court misinterpreted the farmer exemption, the Federal Circuit reversed and remanded. Characterizing the farmer exemption provision as "lengthy" and "complex," the court proceeded to analyze the statute cause by clause. Initially, the court determined that the exemption does not limit the amount of seed a farmer can save.

The court then focused on the clause which provides that a person whose primary farming occupation is the growing of crops for sale as food, feed or other non-reproductive purposes may sell saved seed to other farmers. According to the court, as used in this statute "'primary' carries its customary meaning of 'first in importance; chief; principal; main.'" Slip op. at 7 (quoting *Webster's New World Dictionary*). The court agreed with the Winterboers that they qualify for the farmer exemption if more than half of their crop grown from a protected variety is sold for food or feed. The remainder may be sold to other farmers as brown bag seed, regardless of the number of bushels involved. To determine the application of the exemption, a court must determine, as to each protected variety, the amount of crop grown for each purpose.

Nevertheless, the court did identify certain exceptions to the farmer exemption. A farmer who purchases protected brown bag seed from another farmer cannot himself save any seed produced from that protected variety. The court found such a limitation because purchasers of brown bag seed do not obtain the seed "by authority of the owner of the variety." Slip op. at 6. 7 U.S.C. § 2543. It is hard to imagine how this limitation will be enforced.

The court also discussed the marketing exception to the farmer exemption. Section 2541(3) provides that a farmer infringes upon a protected variety if he multiplies the variety as a step in marketing the variety. The court defined marketing as "extensive or coordinated selling activities, such as advertising, using an intervening sales representative, or similar extended merchandising or retail activities." Slip op. at 12. This exception to the farmer exemption is significant and should limit farmer-to-farmer sales to local or over-the-fence sales.

— Scott D. Wegner, Lakeville, Minnesota

Surety on Packers and Stockyards Act bond prevails in wrongful termination action

The Tenth Circuit recently affirmed a summary judgment in favor of a surety on bonds issued to a livestock sales commission company and its owner who alleged that the bonds had been wrongfully terminated. The Tenth Circuit also affirmed summary judgment in favor of United States on a claim that the Packers and Stockyards Administration had been negligent in investigating and responding to the events leading to the bonds' termination. *Cooper v. American Automobile Ins. Co.*, 978 F.2d 602 (10th Cir. 1992).

The Packer and Stockyards Act requires livestock market agencies, packers, and dealers to maintain approved surety bonds to protect livestock sellers from losses from sales to insolvent or defaulting buyers. *See* 7 U.S.C. § 204 (1988). Cooper Livestock Marketing Agents, Inc. and Dale Cooper (Cooper) were parties to three surety bonds issued by American Automobile Insurance Company (AAIC). While the bonds were in effect, an individual who was not connected to Cooper issued checks totalling approximately $400,000 to several sellers of livestock. The checks were returned for insufficient funds. When the sellers made claims on the bonds issued by AAIC, AAIC terminated the bonds.

Cooper alleged that AAIC had wrongfully terminated the surety bonds, and that, among other consequences, the bonds' termination had destroyed the Cooper business operations. AAIC countered that the termination was permissible under the terms of the bonds, which, in relevant part, provided as follows:

> This bond may be terminated by either party hereto delivering written notice of termination to the other party and the Packers and Stockyards Administration at least thirty (30) days prior to the effective date of such termination. . . . Immediately upon filing a claim for recovery on this bond, unless the Surety believes that such claim is frivolous, the Surety shall cause termination of this bond in accordance with this paragraph.

Cooper maintained that the language of the bonds' termination clause was conflicting, and that the clause's final sentence required the surety to investigate all claims filed on the bonds before terminating. AAIC argued, and the Tenth Circuit agreed, that the termination clause gave AAIC the right to terminate the bonds "for any reason or for no reason at all." *Id.*, 978 F.2d at 610. As construed by the Tenth Circuit, the final sentence "does not prohibit the surety from terminating the bond even if frivolous claims are filed against the bond. It simply mandates termination if non-frivolous claims are filed." *Id.* In essence, the Tenth Circuit found that Cooper's proposed construction of the termination clause was unreasonable because it failed to recognize that "the surety should be able to terminate the bond if claims that turn out to be frivolous are filed, because the fact that even frivolous claims are being filed against a bond may indicate to the surety that the bond is at more risk than previously assumed." *Id.*

In addition to its claim against AAIC, Cooper alleged that the Packers and Stockyards Administration, having been put on notice that the buyer who issued the checks was not complying with the Packers and Stockyards Act, had failed to act. Cooper also contended that the agency was negligent in investigating Cooper after the buyer's checks to the livestock sellers had been returned. The Tenth Circuit rejected those claims on the grounds that Cooper had failed to show that the Packers and Stockyards owed him a duty to conduct its investigations non-negligently. *Id.*, 978 F.2d at 611. The Tenth Circuit also held that the agency's duty to investigate was discretionary, and, accordingly, Cooper's claim was barred by the discretionary function exception of the Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1988). *Id.*, 978 F.2d at 612.

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

State regulation of contract feeding and packer integration in the swine industry

By Neil D. Hamilton and Greg Andrews

The Agricultural Law Center at Drake University was asked by the Iowa Pork Producers Association to conduct a survey of state laws in the Midwest and other selected states involved in pork production, to determine the extent to which states have enacted laws and regulations relating to contract production of swine and vertical integration of packers into swine production.

Survey overview

A general survey was conducted of all fifty state laws and a special review made for twenty five states in the target area. The research indicates only one state, Minnesota, has enacted legislation designed to directly regulate contract production of agricultural commodities. The law includes a number of mandatory requirements for contract relations, including notice of termination, repayment of investments on contract termination, and dispute resolution. Legislation to regulate the practice of contract production has also been considered in other states, including Iowa, Florida, and South Dakota, but has not yet been enacted. Iowa has enacted a law requiring reports from contract feeders and South Dakota requires packers to file an annual report concerning their contracting. Two states, Iowa and Kansas, have enacted prohibitions on packer involvement in swine production, either directly or through contracting. Such legislation has been considered in other states, including Indiana and South Dakota. A Minnesota law requires packers to file all contracts for livestock production with the commissioner of agriculture and requires use of a separate trust account for payment of contract producers. Nine midwestern states, South Dakota, North Dakota, Minnesota, Wisconsin, Nebraska, Iowa, Missouri, Kansas, and Oklahoma, have enacted a form of corporate farming law. While the language of each law differs, arguments can be made that many of the laws prohibit contract production of livestock either as "indirectly" engaging in farming or as the control of agricultural land. The Oklahoma law was recently amended to specifically allow contract production of livestock and packer integration.

Legal options for states to regulate contract feeding and packer integration

Direct regulation of contract production

Obviously, the most direct way to address contract production of livestock is to expressly regulate the practice. There are at least four different approaches which can be considered.

1. *Direct prohibitions* — This approach, which has not been enacted in any state, with the exception of restrictions on packer feeding, would attempt to ban the use of contract production.

2. *Regulation of contracting methods* — This approach would establish minimum requirements for parties who engage in contracting or would require the inclusion of certain terms if contracts are used. There are several approaches that can be followed:

a. STANDARDIZED CONTRACT — This approach would establish a standardized form for contracts used in the state. The 1990 Iowa proposal concerning development of a model contract, reflects this approach. Minnesota by regulation requires contractors to submit sample copies of each contract offered to producers in the state.

b. REGULATING THE CONTRACT RELATION — Another approach is to establish legislative requirements for contract production relations. Minnesota is the only state which has enacted legislation setting out mandatory terms for inclusion in or the interpretation of production contracts. Minnesota law deals with matters such as:

i. establishing a grower's lien for payment;

ii. requiring contractors to maintain a separate trust fund for payment;

iii. incorporating a good faith performance provision for each party to the contract, which allows courts to award damages, attorney fees, and costs if the contract is breached;

iv. inclusion of an arbitration or mediation requirement;

v. requiring advance notice for termination of a contract with reasons and an opportunity for the grower to cure the breach; and

vi. damages to growers for required investments if the contract is terminated for other than a material breach.

c. MANDATORY DISPUTE RESOLUTION — For example, while Iowa does not directly regulate the terms of production contracts, the law was amended in 1990 to require all legal disputes involving contract feeding be submitted to mediation prior to filing a court action.

3. *Contract reporting requirements* — Two states, Iowa and South Dakota, require annual reports by contractors in an attempt to gather more information about the extent of contract feeding in the state.

4. *Registration of contractors* — Another possible approach to regulating the use of contract feeding would be a system to register or certify entities engaged in the practice.

Indirect regulation of contract production

Another approach to regulating the use of contract feeding is to establish indirect methods of controlling its use or protecting the interests of producers who enter into contracts.

1. *Cooperative voting requirement* — The recent Iowa proposal to require a vote of a cooperative's members prior to the cooperative engaging in contracting is an example of an indirect form of regulation, in this case by letting the producers who may be affected by the action decide.

2. *Producer bargaining protections* — With the increased use of contract production, as in the broiler industry, one issue that has developed concerns the ability of contract producers to organize in an effort to bargain for more favorable contract terms. The issue of grower organizing and concerns over the potential for retaliatory contract termination by integrated producers has become an issue in several southern states. It resulted in successful litigation by Florida poultry growers whose contracts were terminated in response to their efforts to organize gowers. Several states, including Maine and Washington, have enacted state "Agricultural Marketing and Fair Practices" acts to protect the interests of producers

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who form associations to bargain for better contract terms. [See, Washington: Wash. Rev. Code Ann. §§ 15.83,005 - ,905; and Maine: Me. Rev. Stat. Ann. tit. 13 § 1953 et seq.]

In a recent article, "Agricultural Industrialization: It's Inevitable," Thomas Urban, president of Pioneer Hi-Bred International, Inc., said this about the potential need for farmers to organize in light of contracting:

> We may even see farmers organize with like members of a system, or systems, as labor did at the turn of the century, to protect their interests in the face of contracts perceived to be unfair. They will certainly ask for, and receive, legislative protection at the state and federal levels as labor has done in the past [See, *Choices*, 4th Quarter, 1991, p. 5].

3. *Using Contracts to Impose Environmental Requirements* — In recent months the state of Arkansas has considered proposed regulations on the disposal of waste from poultry houses. As part of the discussion, a proposal was made to have the integrators include in their production contracts a requirement that growers comply with all state environmental rules. The provision was widely criticized by growers who perceived it as a way for integrators to claim compliance with state environmental rules while shifting responsibility and costs for compliance to the growers. A similar controversy has arisen in Oklahoma.

Regulation of contract feeding through corporate farming laws

Nine states in the upper Midwest and Great Plains have enacted some form of corporate farming law, either through legislation or constitutional amendment. The states are South Dakota, North Dakota, Minnesota, Wisconsin, Nebraska, Iowa, Missouri, Kansas, and Oklahoma. The corporate farming laws are of two types, either focusing on corporate involvement in "farming" or corporate ownership of agricultural land. While each law contains a variety of exceptions, such as for family farm corporations or authorized corporations, there are certain business entities, generally large publicly traded corporations, whose farming or land owning activities are restricted.

Both forms of corporate farming law are important when considering legislative restrictions on contract feeding. First, laws such as Missouri's, which provides, "no corporation not already engaged in farming shall engage in farming; nor shall any corporation, directly or indirectly, acquire, or otherwise obtain an interest, whether legal, beneficial or otherwise, in any title to agricultural land ..." can be interpreted as prohibiting contract feeding by corporations. The argument is the ownership of the livestock subject to the feeding contract is engaging in agriculture. Second, laws such as Iowa's, which provides, "No corporation ... shall, either directly or indirectly, acquire or otherwise obtain or lease any agricultural land in this state" can be interpreted as prohibiting contracting by restricted corporations. The argument is the contract feeding of livestock allows the corporation to "indirectly ... acquire ... agricultural land." It must be noted this argument has never been used in an Iowa court proceeding and could be ruled ineffective.

Arguments may be made the corporate farming laws do not specifically apply to contract feeding; however, state officials may attempt to enforce the laws in this manner. In some caess corporate farming laws, such as in Kansas and Oklahoma, provide specific exemptions to allow corporate ownership of livestock feedlots and confinement facilities. The unique provisions of each state corporate farming laws are discussed in the next section.

Indirect regulation of contract production through local initiatives

Another form of indirect regulation of contract feeding comes in the form of local initiatives, such as county zoning laws. In recent years local controversies have erupted in a number of states concerning planned construction of large livestock feeding facilities. In some cases, for example in Renville County, Minnesota, and Marshall County, Iowa, part of the controversy has focused on the fact the proposed operation will be a contract feeding venture. In several situations local government officials have responded by enacting restrictions on the construction or operation of the livestock facility in question. For example a number of Minnesota townships have enacted distance separation requirements for locating new facilities, the effect of which has been to block construction of several large operations. In April 1991, the Bladen County Commission, in North Carolina, enacted a 30-day moratorium on construction of new hog operations, due to environmental concerns of local residents. While in both cases the local regulations concerned the environmental aspects of the proposed facilities, it is apparent the environmental concerns were in part a proxy for other social and economic concerns, including the use of contract feeding. These examples illustrate that local officials as well state lawmakers may be able to identify legal mechanisms to control the use of livestock contracting.

Direct regulation of packer integration into feeding and contracting

The other subject that is the focus of this study concerns the involvement of packers and integrated processors of livestock products in the contract feeding of swine. The survey reveals there are a number of methods for addressing this concern:

1. *Prohibitions and restrictions on packer feeding* — The states of Iowa and Kansas are the only two in the nation to have enacted legislative prohibitions on packer feeding. The Iowa law, enacted in 1975, prohibits packers from direct feeding of beef and swine and prohibits packers from contract feeding of swine. The Kansas law was enacted in 1988 and prohibits packers from contracting for the feeding of swine, or from owning hogs directly. In 1990 a bill to prohibit packers with annual sales of over $10 million from "owning livestock for contract feeding purposes" failed to pass in South Dakota. In 1992 a bill was introduced in the Indiana legislature to prohibit packers with annual sales greater than $4 million from owning livestock or "contract for or purchase more than ten percent (10%) of the packer's annual livestock purchases from one (1) person." The bill was not enacted.

2. *Packer reports on contract feeding* — A method for obtaining information on the extent to which packers are involved in contract feeding is to require annual reports. In 1991, the South Dakota legislature enacted a law requiring any packer with gross annual sales of more than $100 million to:

> annually report or submit a list of all livestock producers with whom the packer has entered into livestock contracts or amended existing livestock contracts during the reporting year, copies of standard contracts used by the packer in South Dakota during the re-

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porting year, and information by plant location on the type of livestock contracted or purchased in this state, including method of purchase, price, distance transported, weight, sex, species, other characteristics, grade and yield discounts, prices paid to producers, and other discounts and premiums.

3. *Filing of contract feeding agreements* — Another method of obtaining information about the use of contract feeding in a state is to require parties using contracts to file copies of them with the state. In 1990 Minnesota became the first state to do this, when a provision was added to the Minnesota packers and stockyards act, which requires a packer to file with the commissioner of agriculture:

> a copy of each contract a packer has entered into with a livestock producer and each agreement that will become part of the contract that a packer has with a livestock producer for the purchase or contracting of livestock.

A bill introduced in Indiana in 1992 included this provision on packer reporting of contracts:

> Each packer shall file annually with commissioner a copy of each contract or agreement between a packer and livestock producer.

4. *Packer trust fund requirements for paying producers* — One issue accompanying the use of contract feeding is insuring growers get paid for the livestock delivered to the contractor. The 1990 amendments to th Minnesota packers and stockyards act attempt to protect growers who enter into contract feeding arrangements. A section of the law requires processors of livestock and "grain and feed businesses" with gross annual sales more than $ 10 million:

> to conduct all financial transactions relating to contract feeding of hogs, cattle, sheep, or dairy cows through a separate and exclusive bank account. The separate account is subject to audit and inspection at any reasonable time by the commissioner.

5. *Regulation of packer/contractor relations* — One issue that has developed in connection with the use of contracting concerns the potential linkages between large contractors and packers, and possible price premium available to large contractors not offered to individual producers. This is especially a consideration where packers may be prohibited from feeding livestock. The only state law which relates to this subject is the South Dakota provision noted above which requires packers to report information on the prices and premiums paid to contract producers. The Indiana legislation introduced in 1992 also includes a provision limiting a packer to buying no more than ten percent of annual purchases from one person.

Possible application of federal law

While the study focuses primarily on the legislative activities of the states, there is a question concerning the possibility of federal action on the issue of contract production of livestock. As a starting point it should be recognized the movement of livestock in interstate commerce clearly provides a basis for federal legislative action on livestock contracting if Congress should desire to consider such measures. No proposed federal legislation regulating the use or terms of livestock feeding contracts has been introduced; however, proposals to prohibit packers from slaughtering animals that they have owned for more than twenty days, either directly or "indirectly by contract" has been introduced by Congressman Neal Smith (see H.R. 228, 102nd Congress, 1st Sess.)

There are two existing sources of federal protection for livestock producers who feel the actions of contractors has affected the prices they receive or their ability to enter into contract relations.

1. *Application of Packer and Stockyards Act* — The Packers and Stockyards Act of 1921, 7 U.S.C. § 192, lists a number of "unlawful practices" for any packer or live poultry dealer or handler, including:

> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or ....
>
> (e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or
>
> (f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business or (2) to apportion purchases or sales of any article or (3) to manipulate or control prices;

For these provisions to have any effect in connection with the use of contract feeding, federal officials would have to determine use of the practice by a packer had somehow caused a violation of the Act. Such a determination could either come in a specific complaint, or if the concerns about the practice were widespread, the USDA could undertake rulemaking on the subject.

On the issue of packer integration, the Packers and Stockyards Administration took action a number of years ago. In 1974 the agency enacted a rule prohibiting packer involvement with livestock feeding, [see 39 Fed. Reg. 2104-06 (1974), 9 CFR § 201.70(a), and discussion in Rosenburg, 7 Tol. L. Rev. 935 (1976)]; however, the rule was subsequently repealed and the agency does not specifically prohibit such actions now.

2. *Agricultural Fair Practices Act (AFPA)* — In 1968 Congress passed the AFPA to protect the right of farmers and ranchers to join with other growers to form associations to bargain for better prices and terms with handlers and processors. [See 7 U.S.C. §§ 2300.01 et seq.] The Act sets out a number of prohibited practices for handlers, defined to include persons engaged in "contracting ... with... producers ... with respect to production or marketing of any agricultural product...." The act focuses on prohibiting handlers from discriminating against or intimidating producers because of their membership in or exercise of their right to organize associations of growers. The act has been relied on by the federal courts in a suit by Florida poultry producers agains Cargill, which had terminated poultry contracts, allegedly in response to efforts to organize other growers. [See *Baldree v. Cargill Inc.*, 925 F. 2d. 1474 (11th Cir. 1991) affm, 758 F. Supp. 704 (M.D. Fla. 1990).]

Author's note: For more information on contracting in the poultry industry, see Clay Fulcher, *Vertical integration in the poultry industry: the contractual relationship*, Agricultural Law Update, Jan. 1992, p. 4.

Federal Register *in brief*

The following is a selection of matters that were published in the *Federal Register* during the month of December, 1992 (minus Dec.17).

1. APHIS; Poultry improvement; participating flocks, examination and testing; new procedures; final rule; effective date 1/4/93. 57 Fed. Reg. 57338. Correction 57 Fed. Reg. 58552.

2. ASCS; Issuance of warehouse receipts under the U.S. Warehouse Act; final rule; effective date 1/6/93. 57 Fed. Reg. 57647.

3. Farm Credit Administration; accounting and reporting requirements; comments due 2/12/93. 57 Fed. Reg. 58997.

4. Farm Credit Administration; Application for award of fees and other expenses under the Equal Access to Justice Act; final rule. 57 Fed. Reg. 60108.

5. FmHA; Liquidation of loans secured by real estate and acquisition of real and chattel property; final rule; effective date 12/18/92. 57 Fed. Reg. 60084.

6. IRS; Election to expense certain depreciable assets; final rule; effective date 1/25/93. 57 Fed. Reg. 61313.

7 IRS; Income from discharge of indebtedness -- acquisition of indebtedness by person related to the debtor; final rule; effective date 12/28/92.

—Linda Grim McCormick, Toney, AL

Recent General Accounting Office Reports

The United States General Accounting Office (GAO) frequently issues reports on agricultural matters. The titles listed below are some of the GAO's recently issued reports of interest to those in agriculture.

GAO reports are available to the public, and the first copy of each report requested is provided free of charge. Additional copies are available for $2.00 each. Orders should be sent by mail to the United States General Accounting Office, P.O. Box 6015, Gaithersburg, Maryland 20877; by fax to 301- 258- 4066; by phone, 202-275-6241.

Changes in USDA Structure and Organization

Several recent GAO documents discuss potential changes in USDA operations. Restructuring Will Impact Farm Service Agencies' Automated Plans and Programs *(T-IMTEC-92-21, June 3, 1992) discusses the impact of USDA restructuring proposals to the technology modernization plans of the agencies. Focusing on ASCS, SCS, FCIC, and FmHA, the report concludes that changes in USDA field structure may require a complete reevaluation of the field offices technology needs.*

Opportunities to Improve USDA's Farms Costs and Returns Survey *(RCED-92-175, July 1992) analyzes the USDA's reliance on and the potential inaccuracy of the Farm Costs and Returns Survey (FCRS).*

Overhauling the Agencies' Field Structure, *(T-RCED-92-87, July 30, 1992) discusses the need for changes in the structure and organization of USDA, ideas for streamlining USDA operations, the implications of streamlining, and presents a summary of USDA's ongoing efforts to respond to GAO recommendations.*

Grazing and Rangeland Management

Profile of the Bureau of Land Management's Grazing Allotments and Permits *RCED-92-213FS, June 1992) provides an analysis of livestock grazing on public rangeland managed by the BLM. This analysis includes information on the number, average acreage, average stocking rates, and the average animal unit months (AUMs) covered by grazing permits.*

Environmental Law: Drinking Water

Two recent GAO reports focus on drinking water quality concerns. Drinking Water: Consumers Often Not Well-informed of Potentially Serious Violations *(RCED-92-135, June 1992) discusses noncompliance with the public notification requirement of the Safe Drinking Water Act for drinking water that contains potential health risks.*

Widening Gap Between Needs and Available Resources Threatens Vital EPA Program *(RCED-92-184, July 1992) discusses problems with the EPA's drinking water program, focusing on funding shortages at the federal, state and water system level.*

Food Safety and Regulation

Uniform, Risk-based Inspection System Needed to Ensure Safe Food Supply *(PEMD-92-26) criticizes the present system for food inspection and regulation. Noting that 35 different laws and 12 federal agencies are involved, the report characterizes the system as fragmented, inconsistent and inefficient. Major changes are recommended to improve the system.*

FDA Approval Should be Denied Until the Mastitis Issue is Resolved *(PEMD-92-26, August 1992) addresses the bovine growth hormone issue and concludes that the FDA has failed to adequately consider the indirect human food safety concerns presented by the increased incidence of mastitis in animals treated with the drug. This concern focuses on anticipated treatment of the mastitis with antibiotics and the resultant increase in antibiotic levels in milk and beef.*

Adulterated Imported Foods Are Reaching U.S. Grocery Shelves *(GAO/RCED-92-205, Sept. 1992) reports on the present system of testing imported foods for prohibited pesticides. The report concludes that the current legal deterrents do not keep importers from distributing adulterated imported food. One particular problem discussed is the distribution of adulterated food even after it has been recognized as adulterated by the Food & Drug Administration. The report also discusses legal deterrents and concludes that strict burden of proof requirements, low priority given to enforcement by the Justice Department, and small monetary penalties are ineffective.*

International Trade Issues: The Export-Import Bank

The GAO recently finished its review of the Export-Import Bank's (Eximbank) compliance with its obligations to provide export assistance to small businesses. This review is published in The Bank Provides Direct and Indirect Assistance to Small Businesses *(GGD-92-105, August 1992). The report concludes that Eximbank is making greater efforts to assist small businesses. Its data regarding present assistance, however, is sometimes not verified and may be based on estimates.*

Sustainable Agriculture

Sustainable Agriculture: Program Management, Accomplishments, and Opportunities *(GAO/RCED-92-233, Sept. 16, 1992) reviews the USDA's programs to encourage the use of sustainable agricultural farming methods. The report concludes that responsibility for these programs is fragmented, program goals sometimes are conflicting, and that the overall approach lacks direction and coordination.*

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

Conference Calendar

Environmental Law
February 11-13, 1993, Hyatt Regency, Washington, DC.
Topics include: Eminent domain and "takings" developments; Clean Water Act and wetland developments.
Sponsored by ALI-ABA.
For more information, call 1-800-CLE-NEWS.

The Next Generation of U.S. Agricultural Conservation Policy
March 14-16, 1993, Westin Crown Center, Kansas City, MO.
Topics include: How current agricultural conservation policies are working and what new approaches might be appropriate for the future.
Sponsored by: Economic Research Service, Extension Service, Soil Conservation Service, Fish and Wildlife Service, EPA, The Joyce Foundation, Deere & Co., Monsanto, Pioneer Hi-Bred International, and AALA.
For more information, call 1-800-THE SOIL.

Nineteenth Annual Seminar on Bankruptcy Law and Rules
March 25-27, 1993, Marriott Marquis Hotel, Atlanta, GA.
Topics include: Interest rate issues; ethics.
Sponsored by: Southeastern Bankruptcy Law Institute.
For more information, call 1-404-457-5951.

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agricultural law update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

1993 American Agricultural Law Association membership renewal notice

Members dues for 1993 are currently due. For the 1993 calendar year, dues are as follows:

regular membership - $50
student membership - $20
sustaining membership - $75
institutional membership (3 members) - $125
foreign membership (outside U.S. and Canada) - $65

Dues should be sent to:

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