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Equal rights for all, special privileges for none.

— Thomas Jefferson

New hope for farmers in Chapter 11?

In what is one of the most significant developments in the law of bankruptcy and farm finance in recent years, the Eighth Circuit has decided that conventional applications of Chapter 11 of the Bankruptcy Code do not correctly value farmer contributions, and thus, lead to miscalculations of the chances for successful reorganizations.

Ahlers v. Norwest Bank of Worthington and Federal Land Bank, No. 85-5396, slip op. (8th Cir. July 2, 1986), held that the bankruptcy court may grant a stay of proceedings by creditors against debtors if the debtor provides adequate protection to the secured creditors to protect those creditors against further losses.

Because of the highly particularized facts in every proposed farm reorganization, the court held that what constitutes adequate protection must be decided on a case-by-case basis according to guidelines concerning timing of the necessary protection, valuation of collateral, treatment of crops as a basis for adequate protection, and provision for monthly payments to be made after harvest.

In order to reach its result, the court had to confront the absolute priority rule. The court determined that "under a plan of reorganization, secured creditors become unsecured to the extent that their allowed claim exceeds the value of their interest in the collateral. We hold, however, that neither these nor other unsecured creditors can prevent the plan from being approved on the basis of the absolute priority rule if the plan meets the requirements outlined herein and if the debtor agrees to contribute his experience, knowledge and labor to the successful implementation of the plan." Slip op. at 3.

Until now, farmer contributions of labor, expertise and management had not been treated as a material contribution, yet the court correctly notes that "a farmer's efforts in operating and managing his farm is essential to any successful farm reorganization, and this yearly contribution is measurable in money or money's worth.

Moreover, the reorganization value of the Ahlers' farm exceeds its liquidation value — if the plan is rejected, the unsecured creditors will get nothing, whereas they will receive annual payments if the plan is approved and is successful. The Ahlers' farm operation and management skills are something of a value which would disappear if their farm was liquidated.

Because that value cannot be captured for creditors in the event of liquidation, fairness is not violated if their Chapter 11 plan leaves that value in their hands. This view also recognizes the broad rehabilitative purposes of the Bankruptcy Act [sic] — to give a debtor with a reasonable chance of success an opportunity for a fresh start. Any other view would deny to most farmers the opportunity to take advantage of the reorganization provisions of the Bankruptcy Act [sic]." Slip op. at 28-29.

With this opinion, the Eighth Circuit endeavors to conform Chapter 11 to the general purposes of the Bankruptcy Code, and breathes new life into the hopes farmers have held for using the reorganization provisions of the Bankruptcy Code. The final chapter on this case has not been written, however. A motion for rehearing *en banc* has been granted.

— Gerald Torres

Special use valuation and the future interest test

Two recent Tax Court cases, *Estate of David Davis IV*, 86 T.C. No. 67 (1986), and *Estate of Carita M. Clinard*, 86 T.C. No. 68 (1986), have cast a long shadow across the efforts by the Internal Revenue Service (IRS) to assert a "present interest" test for purposes of special use valuation of land for federal estate tax purposes.

The present interest test traces its origin, not to the statute, but to a passage in the 1976 committee report declaring that each qualified heir must have a present interest in property to be eligible for special use valuation. Until publication of the final regulations on July 31, 1980, the committee report language was generally thought to preclude a remainder interest from being eligible for special use valuation where a present interest was not being specially valued.

The proposed regulations, issued on July 19, 1978, did not contain a present inter-

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SPECIAL USE VALUATION
CONTINUED FROM PAGE 1

est test. The final regulations (July 31, 1980) included a sentence on the present interest requirement, however.

> "However, real property is considered to be qualified real property only if a qualified heir receives or acquires a present interest in the property (determined under section 2503) from the decedent."

The highly restrictive language, specifying application of the Internal Revenue Code's Section 2503 definition of a present interest, set off a storm of protest from practitioners. A flood of letters rulings followed, confirming the IRS' intent to apply the federal gift tax rules to the special use valuation present interest test.

Two branches of the present interest test emerged:

- The first branch of the test (that there could be no discretion in distributing income to the holder of a present interest) was eased in 1981 by a statutory amendment which made interests in a "discretionary trust" present interests if all beneficiaries were qualified heirs.
- Under the second branch of the test, if successive interests were created in property by the decedent, all of the interests had to vest in qualified heirs and all of the interests had to be specially valued if any part was valued under special use valuation. Under a series of rulings, special use valuation was precluded if any interest passed — or could have passed — to non-family members.

In *Estate of Davis, supra*, the decedent was survived by his widow and their two children, in addition to one child by a previous marriage. One of the two trusts involved was to terminate at the death of the last of the decedent's three children, with the corpus passing to the children's surviving descendants. If there were no descendants, the corpus was to pass to three institutions.

Quite clearly, the arrangement was in violation of the IRS' position (as laid out in the regulations and rulings). The Tax Court held Treas. Reg. § 20.2032A-8(a)(2) to be invalid, stating that nothing in the statute or legislative history required that all successive beneficiaries had to be qualified heirs.

The court noted that the chance the property would pass to non-qualified heirs was "exceedingly remote." The court declined to draw a line between the *Davis* facts and a situation in which the probability of passage of property to non-qualified heirs was less remote and hence, would preclude a special use valuation election.

In *Estate of Clinard, supra*, the decedent's interests in farmland passed in trust, with each of the decedent's two children and their spouses receiving successive life income interests. The grandchildren each received a life income interest and a special power of appointment over the property interest.

The IRS denied a special use valuation election on the grounds that: 1) the special power of appointment enabled the grandchildren to pass the property to non-qualified heirs; and 2) failure to exercise the special power (or death of the grandchildren without descendants) could result in the property passing to non-qualified heirs.

The Tax Court held Treas. Reg. § 20.2032A-8(a)(2) invalid to the extent that the regulation precluded a special use valuation election when a qualified heir possessed a life estate and a special power of appointment.

The Tax Court was badly divided in the cases (nine to six). It is not known whether the cases will be appealed or be acquiesced in by the IRS.

— Neil E. Harl

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Cooperative director—conflict of interest issue

An Illinois appellate court has considered a conflict of interest issue involving a cooperative director who simultaneously served as trustee for a trust doing business with the cooperative. *Durdle, Executor of the Estate of Clarence G. Miller v. Durdle, Executor of the Estate of Lawrence F. Miller*, No. 4-85-0308, slip op. (4th Dist. Ill. Feb. 18, 1986).

A trust beneficiary sought to deny the trustee any fees and to remove him as a trustee. A major allegation stated that the trustee failed to "shop around" for the lowest prices, but rather purchased supplies for the trust from the cooperative.

The court noted that the trust's membership in the cooperative had netted dividend income, and that there was no evidence suggesting that the trustee's position as director of the cooperative was enhanced by the trust belonging to the cooperative. The court found no conflict of interest, and therefore, declined to remove the trustee.

— Terence J. Centner

Migrant housing

In *Howard v. Malcolm*, 629 F. Supp. 952 (E.D.N.C. 1986), David Godwin, the owner of a migrant labor camp, rented his housing facility to Frank Blanding, a farm labor contractor. The latter used the facility to house plaintiff migrant agricultural workers who were employed by farmers other than David Godwin.

Godwin claimed that no employer-employee relationship existed with plaintiffs. While this was true, the court predictably held that Godwin was *not*, therefore free of the reach of the regulatory scheme of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA or AWPA).

In addition to regulating agricultural empolyers, agricultural associations and farm labor contractors, the MSPA regulates each person "who owns or controls" housing provided to one or more migrant agricultural workers. 29 U.S.C. § 1822(a).

According to the court, this conclusion is consistent with the clear language of the statute, regulations and legislative history. 29 C.F.R. § 500.130(b), (c).

Here it is alleged that the housing failed to meet applicable substantive standards and that the appropriate certificate showing a satisfactory inspection had not been obtained and posted prior to occupancy by plaintiff migrant workers. 29 U.S.C. § 1822(a), (b).

The decision in *Howard* is consistent with that in *Haywood v. Barnes*, 109 F.R.D. 568 (E.D.N.C. 1986). See also 2 *Agricultural Law* § 6.84M (Davidson ed. 1981 and 1985 Supp.).

— Donald B. Pedersen

Bank's duty to FmHA under loan guarantee contract

A bank or other lender that applies to the Farmers Home Administration (FmHA) for a guarantee of a farm loan is required to execute a contract in which it states that there is "no fraud or misrepresentation of which Lender had actual knowledge at the time it became such Lender, or which Lender participates in, or condones."

Interpretation of a bank's duty to the FmHA to disclose pertinent credit information is the subject of *Everman National Bank v. United States*, 756 F.2d 865 (Fed. Cir. 1985), *affirming* 5 Cl. Ct. 118.

A dairyman applied for an operating loan and the lender, Everman National Bank, in turn applied to the FmHA for a guarantee of the loan. In valuing the dairyman's estate, the bank operated on the assumption that Grade A milk would be produced. Before the loan proceeds were disbursed, however, the bank learned that the dairyman's Grade A milk permit had been suspended by health inspectors, and that there was reason to believe that it would not be reinstated. Loss of Grade A status cuts the value of milk produced by nearly half.

When the dairyman subsequently declared bankruptcy, the United States refused to indemnify the bank, claiming that the contract of guarantee had been breached. The Court of Claims sustained the government's position.

The U.S. Court of Appeals for the Federal Circuit affirmed, holding that the contract of guarantee created a duty on the part of the bank to exercise reasonable care in making financial disclosure to the FmHA. It noted in its opinion that a contract of guarantee "...invokes the peculiar confidence of a fiduciary relation..." out of which the duty to disclose arises.

This duty exists when a party learns of information that affects its previous representation. Also, the FmHA is justified in relying on the factual representations made by another party to a guarantee transaction.

In a given case, the question whether a particular set of facts ought to have been disclosed is governed by a standard of materiality, i.e., whether a prudent and reasonable banker would have reason to know that the FmHA would regard as important the facts of which the banker had become aware.

— John H. Davidson

Montana first state to submit "clear title" proposal to USDA

Montana is the first state to submit a proposal for implementing provisions of the 1985 Food Security Act that allow purchasers to take clear title to farm products unless they are notified of an existing lien, according to a U.S. Department of Agriculture (USDA) official.

B.H. (Bill) Jones, head of the USDA's Packers and Stockyards Administration, said the USDA is now reviewing the proposal to determine if it meets the criteria for certification established by Congress. The clear title provisions of the Act go into effect Dec. 24, 1986.

Montana plans to distribute its master list of farm products under lien to subscribers on a monthly basis, with 12 categories listed: cattle and calves, sheep and lambs, hogs, wheat, barley, sugar beets, hay, potatoes, wool, eggs, other livestock and other crops. Montana's proposed plan would go into effect Dec. 24, 1986.

A lender would pay $7 to list a lien initially, then $5 for each change. The state proposes a $150 yearly fee for distribution of the master list to subscribers by microfiche. The yearly fee for paper distribution is $600.

Interested parties may review Montana's application for certification in the USDA's Washington offices during normal business hours.

The state plan may also be reviewed in the offices of Secretary of State Jim Waltermire in the State Capital in Helena, Mont. during normal business hours.

Each state may decide for itself whether to establish a notification system. Unless states develop a central notification system, or lenders develop their own system to notify potential buyers of liens on farm products, buyers would take clear title to farm products even though a lien exists — just as with other products under provisions of the Uniform Commercial Code.

Any questions may be directed to the Office of the Administrator, Room 3039, South Building, Packers and Stockyards Administration-USDA, Washington, D.C. 20250. Queries may also be sent electronically via Dialcom to DAG540, or via Telemail to BHJones. For additional information, call 202/447-7063.

— USDA News Release

Intervention by cooperative in marketing order action

A federal district court has found that a dairy cooperative, comprised of milk producer members, has standing to intervene as a party defendant in an action concerning a milk marketing order. *County Line Cheese Inc. v. Block*, Case No. 85 C 1811 (E.D. Ill. Jan. 28, 1986).

The plaintiffs had objected to the cooperative's intervention, claiming that 7 U.S.C. § 608c(15) (1982) expressly permits regulated handlers to seek judicial review of marketing orders — impliedly meaning that producers do not have standing. The court disagreed, noting that both handlers and producers are entitled (under the statutory marketing order scheme) to participate in the adoption or retention of marketing orders. 7 U.S.C. § 608c(8), (9), (16)(B) (1982).

The court also noted that the cooperative and the Secretary of Agriculture would have different objectives. By law, the Secretary is required to maintain orderly marketing conditions for agricultural commodities and to protect the interests of consumers. 7 U.S.C. § 602(1) (1982). The cooperative's objective would be to advance and protect its private economic interests.

This case may be distinguished from *Pescosolido v. Block*, 765 F.2d 827 (9th Cir. 1985), reported at 3 *Agricultural Law Update* 3 (March 1986). In *Pescosolido*, the producers had initiated a mandamus action outside the administrative procedures available under the Agricultural Marketing Act of 1937. The court found that plaintiffs lacked jurisdiction for such an action.

In *County Line Cheese*, the cooperative was granted permission to intervene in a proceeding already initiated by handlers, and thus, was pursuant to 7 U.S.C. § 608c(15).

— Terence J. Centner

Biotech coordinating committee established

The President's Office of Science and Technology Policy has chartered a Biotechnology Science Coordinating Committee, which is charged with the general duty of coordinating the consideration of scientific questions raised by applications for biotechnology research support from federal agencies.

The committee's primary role will be to facilitate interagency information sharing and coordination. 50 Fed. Reg. 47174 -47195 (Nov. 14, 1985).

— John H. Davidson

Veterinarians and the law

by Harold W. Hannah

When I was approached by the editorial liaison of *Agricultural Law Update* about the possibility of a piece on veterinary law, he said, "I think that a primer on that subject would be welcomed by many members of the Association."

With that suggestion in mind, three areas have been discussed. These are: regulation of the profession; the veterinarian/client/patient relationship; and some laws that affect the economics of the profession — especially veterinarians in large animal practice when the livestock industry is depressed.

Regulation of the Profession

Veterinary medicine is a licensed profession in every state. By the turn of the century, most states had a veterinary medicine and surgery practice act. These acts do several things of importance for the profession and for the public. They specify the education essential for licensure and require that a state board examination be taken to determine if the applicant can be admitted to the profession. There is now a national board examination utilized by most states.

Important to the profession and to the public is the definition of "practice" contained in these acts. Though there is variation in the way the term is defined, all acts specify that diagnosis, surgery and treatment for disease or deformity constitute practice. Some acts specify treatment for a mental condition as also constituting practice.

Almost as important as the definition of practice are the exemptions which have been made in various state laws, many of which are a bow to agricultural interests that exerted pressure to see that lay persons would not be penalized for performing activities defined as "practice."

There is wide variation in state laws on exemption. Some contain very few, while some in important livestock states have exempted castration, spaying, emasculation, dehorning and artificial insemination. New procedures are constantly raising questions about the meaning of "practice."

The American Veterinary Medical Association has declared, in its opinion, that embryo transfer is "practice." It is generally felt that dentistry is the practice of veterinary medicine, and an early Pennsylvania court so held. *Commonwealth v. Heller*, 277 Pa. 539, 121 A. 558 (1923).

Though opinions vary about acupuncture, the general view is that it also constitutes practice. In at least one state which exempts castration and spaying, the exemption has, in recent years, been limited to food animals. Ill. Rev. Stat. 1985 Ch. 111 par. 7004 (6).

All practice acts exempt the owner of an animal from the strictures on practice. Also exempted are federal and state government employees and teachers and research workers in educational institutions — as long as they are engaged in their employment. If any such intend to moonlight, a license is required.

All acts contain a statement of causes for revocation or suspension of a license, or for the imposing of other kinds of discipline. Some of these are stated in general terms, others with great specificity. Common to all, regardless of how stated, are gross malpractice, chronic inebriety or drug addiction, and violation of the practice act or regulations promulgated under it.

Since one of the concerns of a veterinarian is how to legally dispose of an unclaimed animal, practice acts usually contain a legal formula for such. Also, many practice acts contain what may be called an "Animal Good Samaritan Law," which excuses the veterinarian from anything but gross negligence when treating animals at the scene of an accident or in an emergency — situations when no contractual relation between the owner and the veterinarian has been created.

The Veterinarian/Client/Patient Relationship

The relationship between a veterinarian and a client/animal owner is contractual. It arises by agreement between two parties under circumstances which impose upon the veterinarian a duty to treat the animal and a duty on the part of the owner to pay the fee and reclaim the animal in case it is in the custody of the veterinarian.

Such a contract may be created in many ways — over the telephone, through an authorized agent (the manager of a dairy farm or a horse barn, for example), or by physical acceptance of an animal for treatment.

Once this contractual relationship is created, the veterinarian can terminate it only upon completion of the services implied, or by giving his client adequate notice that he intends to terminate service. The latter must be done under conditions which will not endanger the welfare of the animal, and which will give the owner reasonable time to find another veterinarian.

The client, on the other hand, is free to terminate the relationship at any time — being responsible only to pay for services rendered prior to that time.

Important to this relationship is the understanding created between the veterinarian and the client. In veterinary medicine, as well as in human medicine, the principle of "informed consent" looms large. Many malpractice suits in both professions are based not on the inefficiency of the physician or veterinarian, but on the client's claim that he or she didn't request the particular treatment, and didn't know that it was going to be rendered.

Small animal practitioners may gain some partial protection through admission forms which contain waivers. A general waiver, however, provides dubious protection, and if there is a more specific waiver, it is likely to mean that there has been communication between the veterinarian and the client so that informed consent might be proved without the waiver.

Large animal practitioners calling at their clients' farms are not in a position to engage in this bookwork. The relationship which generally exists between a veterinarian and a farmer/client, however, is such that more understanding exists, and there is less likelihood that a malpractice action might ensue.

Especially important to both large and small animal practitioners is their ability to prove that when they euthanized an animal, it was at the request of the owner or an authorized agent. Also, in cases where a valuable animal is euthanized, insurance may be involved, and there is even more reason to have a signed statement that such an act was requested.

The bodies of animals that die or are euthanized in a veterinarian's clinic are the property of the owner, and must be disposed of in accordance with his or her wishes. If the animal died of a transmissible disease, however, and there are laws and regulations prohibiting movement of the carcass, the veterinarian is bound to abide by these.

As in human medicine, the malpractice case against a veterinarian (unless it is based on lack of informed consent) must be based on an allegation that the veterinarian failed to meet the requisite standard of skill and care.

At one time, a "locality rule" prevailed, so that if a veterinarian was deemed to have met the standard of other veterinarians in his community, he had an adequate defense. Court after court, however, has

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abandoned the locality rule in favor of a more general rule so that it now can fairly be said the standard is that of most all veterinarians.

Specialists are judged by the standards of specialists. So if a veterinary ophthalmologist is sued for malpractice, the standard of skill and care against which he would be measured is that of others practicing his specialty.

Ordinarily, expert testimony is required to establish this standard, but if the case against the veterinarian is based upon obvious error or neglect (something which a lay person would understand without additional proof), the "res ipsa loquitor" doctrine may apply, and expert testimony will not be required.

Though the laws controlling the activities of physicians and veterinarians are distinct, the courts are sometimes called upon to determine if particular legislation is applicable to only one or to both. Statutes of limitations for a tort action afford an example.

The Ohio Legislature, in an effort to reduce the number of malpractice claims against physicians, established a one-year statute of limitations for such actions. In *Southhall v. Gabel*, 28 Ohio App.2d 295, 277 N.E.2d 230 (1971), a veterinarian argued that this statutory period applied to a malpractice action against him. The court held differently, saying that the Legislature intended that it apply only to medical doctors.

Some Features of the Veterinary Firm

Traditionally, veterinarians have practiced alone or in partnership. But with the coming of state legislation permitting professionals to incorporate, and the move away from lone practice, more veterinarians are incorporating.

The pertinent legislation imposes two conditions which are unique to the professional corporation, or "professional association," as some states denominate them. These conditions are that only licensed professionals of a particular profession can be members of the corporation. In addition, the veterinarian/client relationship is preserved so that any veterinarian member of the corporation who treats a client's animals is subject to a malpractice action.

The corporation, however, does insulate non-involved veterinarians from a suing animal owner. Only the veterinarian or veterinarians actually involved and the corporation itself may be sued. Thus, the professional corporation does provide this usual insulation.

Special problems exist in the hiring of lay and professional personnel by veterinary corporations, partnerships and lone practitioners. Two issues which receive much discussion within the profession are the validity of covenants not to compete when a veterinarian is hired, taken in as a partner, or sells a practice; and the extent to which animal technicians and other lay personnel can engage in the various activities of the practice without violating the strictures of the practice act.

Covenants not to compete are, in some states, held by the courts to be against public policy, and as a result, are unenforceable. Courts see covenants as a denial of a fundamental right if one cannot engage in a profession of his choice in a place of his choice. It is also said that the public is injured by the denial of these services.

Most courts will still enforce such agreements if they are "reasonable" (with respect to the duration of the prohibition and the geographical area in which practice is prohibited). Courts are generally more inclined to enforce such covenants when a practice is sold than they are to enforce them when an employee or a junior partner leaves the practice.

In *Madson v. Johnson*, 164 Wis. 612, 160 N.W. 1085 (1917), the court upheld the following covenant contained in a bill of sale of a veterinary practice: "...I will not practice veterinary medicine or surgery in Appleton, or vicinity, unless it would be in partnership with said Dr. William Madson, or to buy out...Dr. William Madson."

In *Brecher v. Brown*, 235 Ia. 627, 17 N.W.2d 377 (1945), a provision in a contract of employment stated that upon termination of the employment by the employer, the employee would "...not engage in the practice of veterinary medicine or surgery...in Storm Lake, Iowa, or a territory within a radius of 25 miles..."

The court found that a radius of 25 miles reserved an area much greater than the facts showed was necessary to protect the employer, and as a result, interfered with the interests of the public in having adequate veterinary service. The covenant was held unenforceable. Some courts will modify the restriction, then rule for the covenantee.

In employing lay personnel (whether or not they are certified animal technicians), veterinarians must abide by laws, regulations and court decisions defining the activity limits of such paraprofessional employees. Some state veterinary practice acts expressly prohibit animal health technicians from performing surgery or making diagnoses. Most of them state or infer that the technician is to work under the direct control and supervision of the veterinarian.

Thus, much discussion arises in veterinary circles about how much use can be made of an animal health technician or of other lay personnel.

There are two legal aspects to this issue: 1) liability to a client through the doctrine of respondeat superior; and 2) the possibility of license revocation or suspension for practicing with an unlicensed person (and possibly for violating the limitations imposed in the practice act, or in regulations developed under it).

The two most common violations occur when a veterinarian relies on a technician to make tests and supply the information for a health certificate, and when the veterinarian absents himself from the practice for a period of time and turns it over to a technician.

In the absence of specific statutory or regulatory guidelines, one can generalize that the use of certified technicians or other experienced lay help is proper when they do not make diagnoses, make changes in the treatment of an animal, perform surgery hold themselves as a licensed veterinarian, or in instances where the veterinarian has assured himself that they are competent to do the things they are asked to do.

Malpractice

The one question that almost everyone asks the writer when he has occasion to tell them that he is involved as a lawyer with veterinarians is, "Are veterinarians like medical doctors — victims of the current malpractice 'crisis'?"

The answer (in typical lawyer fashion) is yes and no. Yes, veterinarians are increasingly subject to malpractice suits, but no, it has not reached crisis proportions, and doesn't compare in numbers of cases and amounts recovered with the medical profession.

Without citing specific cases, the writer's exposure to the profession from several angles warrants the following generalizations.

Many of the claims made against veterinarians stem from lack of communication. This is true in other professions as well, and it simply bespeaks a difference in attitude and approach that different professionals take toward their clients. A friendly, informative approach causes a client to forgive mistakes which he otherwise might not.

Many of the claims against veterinarians are small in comparison with the claims made in human medicine, and are settled by the veterinarian's liability insurer. As a result, these claims do not reach the courts where malpractice law is made.

The kinds of cases most likely to find their way into the courtroom are either

(continued on next page)

those involving alleged negligence in the treatment of a valuable animal (horses rate high on this list), or cases in which the owner of a companion animal feels so strongly about the way his or her pet was treated that they go to court more to make the veterinarian suffer than to recover compensation.

In this connection, it is noteworthy that some courts will allow punitive damages when there is proof of gross or malicious conduct. *Knowles Animal Hospital v. Wills*, 360 S.2d 37 (Fla. App. 1978).

Though the factual situations under which a veterinarian might be accused of malpractice are virtually limitless, the following are illustrative:

- Computing the wrong dosage for an animal;
- Preparing a mange dip which results in death of the dog being treated;
- Inexpert drenching of sheep, causing the loss of large numbers;
- Negligence of casting a horse with resulting injury;
- Failure to return to examine an animal which had been treated when further surveillance was implied;
- Failure to provide proper feed, water and cages for animals in the veterinarian's custody;
- Not getting proper blood samples and making accurate records when testing under the brucellosis, tuberculosis, or other animal disease programs; and
- Undertaking surgery or treatment which he knows to be beyond his skill.

Some Laws That Affect the Economics of the Profession

Should veterinarians have a lien giving them priority over all other creditors of a livestock owner? This question, which has seen farmers' creditors jockeying for position, has arisen more than once in recent years. Only a few states provide a specific statutory lien for veterinarians — Minnesota and Iowa being early examples.

But there are lien possibilities for veterinarians in states which do not provide a specific lien. Many states have an agisters lien law — which basically provides that one who keeps, yards, feeds and cares for the animals of another person under contract can retain possession of the animals until the bill is paid.

Though this might be of some value to small animal practitioners that have custody of animals, it is of no help to the large animal practitioner unless the particular state law will allow the preservation of the lien by filing.

Another possibility is the counterpart of the mechanics lien law — the lien provided by statute for service to and storage of chattels. State laws generally provide that these liens can be perfected by filing and the security interest realized through a foreclosure proceeding. Animals are chattels, and though these laws were written specifically for garage men, their language, unless specifically restricted, would appear to allow for the filing of a lien by a veterinarian.

Another possibility is filing under the Uniform Commercial Code. But this has three disadvantages: 1) possible impairment of the veterinarian/client relationship because of the filing; 2) the time involved in executing and filing the security agreement; and 3) the probability that other creditors have prior security agreements. Veterinarians who have herd contracts, or otherwise give continuing service to large-scale food animal or horse operations, may find such practicable, however.

A combination of factors have made veterinarians look to the marketing of veterinary products as a source of income. Contributing factors to this trend have been the reduction in large animal numbers, especially of some species; a weakened livestock economy; the widespread availability of livestock remedies from lay sources; and competition from within the profession.

This trend toward marketing has raised both ethical and legal issues. Legal issues have centered on the right of a veterinarian to make a non-label use of drugs and on limitations which exist in the sale of prescription veterinary products.

Large animal practitioners, backed by the American Veterinary Medical Association, have maintained that in his professional capacity, a veterinarian should be privileged to make decisions about the use of drugs, and, as long as there is no counter warning on the product, administer it for other than its labeled use.

The Food and Drug Administration is inclined toward the opposite position — that is, unless a product is labeled for a particular use, it not be so used. This controversy continues.

Of increasing importance to veterinarians, especially to large animal practitioners, are legal issues involved in their sale of veterinary prescription items. The principle is well settled and supported by veterinary associations and the Food and Drug Administration that these restricted items should be prescribed only when there is a bona fide veterinarian/client/patient relationship.

Thus, the nature of this relationship, how it is created, as well as how tenuous it can be and still qualify have come in for much discussion. In theory, the veterinarian should know enough about the animal for which the product is dispensed to feel that it is appropriate. The pressure to sell and thereby increase income, however, has caused some veterinarians to all but disregard the necessity for creating a bona fide veterinarian/client/patient relationship.

This brief discussion of veterinary liens and issues involved in marketing veterinary products was not intended to explore either topic in-depth, but simply to show that there are some substantial legal issues besetting the profession.

Veterinary Jurisprudence Courses

To end this fragmentary essay on veterinary law, as well as to assist any readers who might be induced to teach a course on the subject in a veterinary college, reference is made to one of the author's "Legal Briefs" appearing in 183 Am. Veterinary Med. Ass'n J. 753 (Oct. 1983), where a survey of such courses appears together with suggestions for course structure.

Implied warranty of seed

Webb v. Dessert Seed Co. Inc., 718 P.2d 1057 (Colo. 1986), extended Colorado's doctrine of implied warranty of fitness in such cases to conform with other jurisdictions.

In this case, there being a nationwide shortage of seed for Spanish Yellow Onions, Dessert, by agreement, supplied Webb with Giant Yellow Zittau seed. Webb was a grower of seedlings for sale to onion farmers.

Webb, although Dessert had properly labeled the seed with which it supplied him, represented the seedlings to the growers as Yellow Spanish.

Unfortunately, Giant and Yellow Zittau will not bulb in Colorado, and may not bulb *anywhere* in the continental United States, according to one expert.

Dessert argued that it owed no duty to the growers, but the Colorado Supreme Court found that the use of the seedlings was within the scope of forseeable harm to the users. In reliance upon cases decided in Washington, Oregon, Michigan and Florida, the court found that the seed importer had a duty to exercise reasonable care beyond more proper labeling — rejecting the argument that proper labeling was the distributor's sole duty.

Not surprisingly, Webb lost all arguments that he should be compensated by Dessert, principally because the court found that Dessert and Webb were not joint tortfeasors.

— Bruce McMillen

STATE ROUNDUP

GEORGIA. *Rural Access*. Where the condemnor establishes that the only access to his property is by way of navigable waters, he has established a prima facie case that he has no reasonable means of access under Ga. Code Ann. § 44-9-40(b).

As a result, the trial court improperly denied condemnor's petition for a private way. *International Paper Realty Corp. v. Miller*, 255 Ga. 676, 341 S.E.2d 445 (1986).

— Daniel M. Roper

MINNESOTA. *Mandatory Mediation Act Challenged*. In *Federal Land Bank of St. Paul v. Hubert Humphrey III, et al*, (Civ. File No. 3-86-605, U.S. Dist. Ct., MN, 3rd Division), the Federal Land Bank has challenged the constitutionality of the recently passed Mandatory Mediation Act, which is discussed at 3 *Agricultural Law Update* 3 (June 1986).

The Federal Land Bank makes three claims: that the Act impairs pre-existing contracts; that the retroactive application of the Act destroys pre-existing property interests of the Federal Land Bank; and that the Act is pre-empted by the Bankruptcy Code and by the Federal Farm Credit Act. The complaint was filed on July 1, 1986.

— Gerald Torres

MINNESOTA. On July 22, 1986, the Minnesota Court of Appeals decided that the Mandatory Mediation Act applies to all collection proceedings against agricultural property, including those which were initiated prior to the effective date of the Act. In addition, the court decided that this does not create an unconstitutional impairment of contract. *Laue v. Production Credit Association of Blooming Prairie*, #CX-86-617 and *Kelly v. Federal Land Bank of St. Paul*, #C1-86-652, (Ct. App. Mn. 1986).

The Production Credit Association of Blooming Prairie sought a money judgment against Laue for unpaid loans, also seeking to recover secured collateral.

The Kellys were involved in a protracted negotiation with the Federal Land Bank after their attempt at bankruptcy reorganization was determined to be infeasible. When negotiations came to naught, foreclosure proceedings were instituted.

Virtually contemporaneously with the initiation of these proceedings, Minnesota passed the Mandatory Mediation Act. Neither Laue nor the Kellys received mediation notices as provided under the Act. Laue requested mediation, and at the claim and delivery hearing, argued that further proceedings should be stayed pending mediation. The Kellys sought a stay of their foreclosure sale pending mediation.

Both Laue and Kelly sought a writ of mandamus compelling the trial court to stay the proceedings pending mediation. It was those actions which precipitated the opinion by the Court of Appeals.

Does this mandatory mediation provision of the Farm Act apply to proceedings begun before the effective date of the Act? There is a presumption against retroactivity unless the legislature manifests a clear intent to the contrary. By reading the statute as a whole, the court determined that the legislature did not seek to limit the application of the mediation provision to cases arising after the effective date of the statute in the way that it did other sections.

When the failure to limit the applicability of the section is taken in the context of the general intent to aid farmers who are *currently* suffering the effects of the farm financial crisis, the court determined that it was the legislature's intent to make the mediation provision applicable to farmers in the situation of Laue and Kelly.

In essence, the court concluded that the application of the statute to those cases was not retroactive.

In holding that the Act does not work an unconstitutional impairment of contract, the court relied on reasoning similar to that in *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934), which upheld the Minnesota Mortgage Moratorium Law of 1933. The court held that the Mediation Act, like the Moratorium Act, did not actually impair the creditor's contract rights on the debt itself — it merely changed the available remedy within the standards established by *Blaisdell*.

The court determined that the Act did not impose a substantial impairment of existing rights, that a legitimate public purpose for the Act was growing out of the exigencies of the farm crisis, and that the Act was reasonable in light of this public purpose.

Judge Foley (concurring in part and dissenting in part) argued against what he viewed as the retroactive application of the Act, and suggested the Minnesota Supreme Court review the cases. Observers also wonder about the impact of this decision on the pending constitutional challenge to the Mediation Act being brought by the Federal Land Bank.

— Gerald Torres

WASHINGTON. *Brucellosis Program*. *Honcoop v. State*, 716 P.2d 963 (Wash. App. 1986), involves a suit by several farmers against the state of Washington for negligence in the administration of the state's brucellosis vaccination program. The farmers claimed that they relied on the state to enforce the brucellosis testing program, thereby eradicating the disease.

The court held that — except as to two of the farmers — the plaintiffs could not show the required privity to give rise to a duty on the part of the state (as required by the "special relationship exception" to the public duty doctrine).

Arguments that the state owed the farmers a duty to control a "dangerous animal" (*i.e.*, an animal with brucellosis) — analogous to the state's duty to confine a dangerous mental patient — failed. The court noted that "the recognition of the State's duty to an individual (based on the State's relationship to the tortfeasor)has, to date, been narrowly limited to medical and/or custodial circumstances." *Id.* at 972.

— Linda Grim McCormick

AG LAW CONFERENCE CALENDAR

Representing Your Farm Client: 8th Annual Wisconsin Agricultural CLE Conference.
Video replays of Aug. 7, 1986 conference are scheduled for Aug. 21, 1986 in Eau Claire (715/835-2211); Green Bay (414/432-4555); La Crosse (608/784-6680); and Madison (608/257-3888).

1986 Annual Meeting: American Agricultural Law Association.
Oct. 23-24, 1986, Worthington Hotel, Fort Worth, TX.

Sessions will discuss the Current State of Agriculture, Agricultural Policy, the Role of the Bar, the Farmers Home Administration, the Farm Credit System, Innovative Financing, Creditor Responsibilities, Educational Directions, Farm Bankruptcies, the 1985 Farm Bill, Agricultural Labor, Tax "Reform" and U.C.C. § 9-307(1).

Prevention of Groundwater Contamination
Sept. 26-27, 1986, University of Kansas School of Law, Lawrence, KS.

Sponsored by: University of Kansas School of Law, Washburn University School of Law, University of Kansas Division of Continuing Education. For further information, contact Sharon Graham at 913/864-3284.

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

1986 ANNUAL MEETING. The American Agricultural Law Association (AALA) will hold its seventh annual educational conference Oct. 23-24, 1986 at the Worthington Hotel, Fort Worth, TX. This year, the theme of the conference will be "Agriculture in a Time of Challenge." The program is co-sponsored by Texas Tech University College of Agricultural Sciences and the Agricultural Law Committee of the State Bar of Texas.

Professor Stephen F. Matthews will open the conference, addressing the topic "Current Status of Agriculture — How are the Farmer and Rancher Really Doing?" Other talks include: Dale S. Stansbury on "Government and Agriculture — An Analysis and Critique of Agricultural Policy and Factors Affecting It"; Martha Miller on "The Farmers Home Administration — Current Matters"; Marvin Duncan on "The Farm Credit System — Current Matters"; and John F. Schumann on "Financing Techniques and Business Structures for the Farm and Ranch."

In addition, Paul L. Wright will speak on "Fiduciary and Contractual Responsibilities of a Creditor"; Harry Dixon will address the issue of "Handling Farm Bankruptcy and Foreclosure — A Banker's View"; Mary Davies Scott will talk on "Handling Farm Bankruptcy and Foreclosure — A Debtor's View"; Ronald Knutson will speak on "The Farm Bill — A Review and Analysis"; Donald B. Pedersen will talk on "Agricultural Labor Laws"; Clark S. Willingham will speak on" 'Tax Reform' on Agriculture"; and David W. Dewey will address the issue of "U.C.C. § 9-307."

Two panel discussions will be featured — one on the role of the bar in troubled agricultural times and the other on educational directions in agricultural law.

For more information, contact Martha Hise, Program Coordinator, Division of Continuing Education, Box 4110, Texas Tech University, Lubbock, TX 79409-4110; 806/742-2352.

JOB FAIR. The AALA's second job fair will be held concurrently with the 1986 annual meeting. Notices of available positions will be sent to law school placement offices for dissemination. Resumes received from job seekers will be forwarded to interested firms and organizations, and interviews will be scheduled during the conference whenever indicated.

Please contact Gail Peshel, Director of Career Services, Valparaiso University School of Law (219/464-5498) for additional information.