VOLUME 18, NUMBER 3, WHOLE NUMBER 208 FEBRUARY 2001

INSIDE

- Second Circuit denies payment of attorney's fees from PACA trust proceeds
- An introduction to federal marketing orders for fruits, vegetables, nuts, and specialty crops
- Gene technology in the land down under

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

IN FUTURE ISSUES

- Banks for Cooperatives are subject to state income taxation

The Producer Protection Act—will It protect producers? A rejoinder

The article, "The Producer Protection Act–Will It Protect Producers?" appearing in the January, 2001, issue of *Agricultural Law Update* is profoundly troubling for those who care deeply about minimizing deceptive practices, ensuring full information and reducing opportunities for economic retaliation in the agricultural marketplace. Unfortunately, the article tends to ignore many of the anticompetitive practices of agribusiness firms which sometimes take advantage of their relatively strong bargaining power in contracting with farmers.

The article fails to recognize the disparity in information, sophistication, and market power between highly concentrated firms (many with regional dominance) on the one hand and family-style growers on the other.[1] It also fails to recognize or inquire into the type of firm behavior which gave rise to the Producer Protection Act proposal. Rather, the article raises one-sided questions based upon unproven "unintended consequences." Yet, the article does not point to any study which concludes that prohibiting these practices has caused harm in other contexts.

The Producer Protection Act

The Producer Protection Act, endorsed by the Attorneys General of seventeen states, would take several minor steps towards providing full information, lien protection and reducing economic retaliation in the processor-producer contract relationships. The proposal includes six parts:

1. Require contracts to be in plain language and disclose material risks;
2. Provide contract producers with a three-day cancellation period to review;
3. Prohibit confidentiality clauses which prevent farmer discussion with advisors;
4. Provide producers a first-priority lien for payments due under the contract;
5. Prevent capricious or retaliatory termination of the contract; and
6. Prevent retaliation against producers who participate in producer organizations.

All the provisions have precedent in other areas of the law, such as consumer

Continued on page 2

New administrative equitable relief authority for USDA conservation contracts

Congress recently amended the Food Security Act of 1985 in creating a new "good faith reliance" statute. This statute, to be codified at 16 U.S.C. § 3830a, applies to the Environmental Conservation Reserve Program (ECARP). ECARP consists of the Conservation Reserve Program (CRP), the Wetland Reserve Program (WRP), and the Environmental Quality Incentives Program (EQIP). In its entirety, the new statute provides as follows:

GOOD FAITH RELIANCE.

(a) IN GENERAL.—Except as provided in subsection (d) and notwithstanding any other provision of this chapter, the Secretary shall provide equitable relief to an owner or operator that has entered into a contract under this chapter, and that is subsequently determined to be in violation of the contract, if the owner or operator in attempting to comply with the terms of the contract and enrollment requirements took actions in good faith reliance on the action or advice of an authorized representative of the Secretary.

Continued on page 2

protection legislation or trade regulation. All the provisions are based on the basic principles of fairness, full information and equity which is common throughout the law. None of the provisions has been shown to cause economic harm in any other context.

Consequences

The article attempts to overshadow the intended consequences of the proposal by raising a series of questions designed to highlight unproven fears of "unintended consequences." The intended consequences are, for example, to allow farmers the ability to understand the contract that they are signing through plain language requirements, and eliminating the practice of some processors which prohibit farmers from consulting their lender or attorney with the contract at hand. Other intended consequences are to prohibit processors from terminating contracts in response to producers organizing into a bargaining unit or in retaliation for producer complaints about the processor.

Yet the article looks away from these known abuses to focus on the unknown. The series of questions posed in the article have no empirical support. Given that the proposal has precedent in many other contexts, one would think that the article would either cite studies that provided support for their fears, or admit that there is no empirical basis for its allegations.

The question is not whether there are consequences but whether those consequences are in the public interest in—(1) enhancing competition; (2) curbing the market power inherent in high and rising concentration; and (3) encouraging a more rational system of resource allocation and income distribution. Given the significant change in the structure of agricultural markets in recent years, much of which is attributable to the increased level of concentration in the agricultural processing sector, an increasing number of producers face a greater likelihood of being tied into vertical production chains managed by highly concentrated firms with the ability to exercise significant market power. From a policy perspective, it certainly is in the public's interest to try to address the problems that result from such relationships.

The Missouri example

The article uses a misstated and unrelated anecdote to serve as a foundation for its argument that unintended consequences might occur and that such outcomes would be inimical to "a relatively independent agricultural structure." It states that Missouri "in the early 1990s" enacted "tough anti-corporate farming legislation" and that the independent pork industry "declined significantly" thereafter. The actual facts are that the Missouri legislation[2] was enacted in 1975, not "the early 1990s," and it was 18 years later (in 1993),[3] not a "few short years afterward" that the Missouri legislature relaxed the corporate limits on three Northern Missouri counties (ranked among the most economically distressed in the country) and allowed corporate hog producers to operate in those counties.

It is difficult to see the relationship between corporate farming laws and fairness in contracting laws. Even if a rela-

Cont. on p.3

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USDA/Cont. from p. 1

(b) TYPES OF RELIEF.—The Secretary shall—

(1) to the extent the Secretary determines that an owner or operator has been injured by good faith reliance described in subsection (a), allow the owner or operator to do any one or more of the following—

(A) to retain payments received under the contract;

(B) to continue to receive payments under the contract;

C) to keep all or part of the land covered by the contract enrolled in the applicable program under this chapter;

(D) to reenroll all or part of the land covered by the contract in the applicable program under this chapter; or

(E) or any other equitable relief the Secretary deems appropriate; and

(2) require the owner or operator to take such actions as are necessary to remedy any failure to comply with the contract.

(c) RELATION TO OTHER LAW.—The authority to provide relief under this section shall be in addition to any other authority provided in this or any other Act.

(d) EXCEPTION.—This section shall not apply to a pattern of conduct in which an authorized representative of the Secretary takes actions or provides advice with respect to an owner or operator that the representative and the owner or operator know are inconsistent with applicable law (including regulations).

(e) APPLICABILITY OF RELIEF.—Relief under this section shall be available for contracts in effect on January 1, 2000 and for all subsequent contracts.

Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2001, Pub. L. No. 106-387, tit. VII, § 755, 114 Stat. 1549, 1549A-103-1549A-104 (to be codified at 16 U.S.C. § 3830(a)).

Analogous administrative equitable relief authority with respect to price support and other payments was initially granted to the Secretary in the Food and Agriculture Act of 1962. As amended, this authority is currently codified at 7 U.S.C. § 1339a. *See also* 7 C.F.R. §§ 718.7, 718.8 (rules implementing 7 U.S.C. § 1339a). While § 1339a can be read to encompass payments made under the ECARP programs, Congress apparently wanted to erase any doubt as to the Secretary's authority to grant administrative equitable relief with respect to these programs.

Although both the new statute and § 1339a vest the authority to grant equitable relief in the Secretary, the Director of the USDA National Appeals Division (NAD) has the same authority. In authorizing the Secretary to create the USDA

Cont. on page 3

Second Circuit denies payment of attorney's fees from PACA trust proceeds

The Second Circuit has ruled that an attorney who represented a produce purchaser in a suit to collect accounts receivable may not enforce a lien for unpaid attorney's fees against the proceeds of the suit when these proceeds are held in trust for the benefit of the original produce seller under Perishable Agricultural Commodities Act (PACA). *C.H. Robinson Co. v. Alanco Corp.,* No. 00-7148, 2001 WL 91956 (2d Cir. Feb. 2, 2001).

Under PACA, a trust automatically arises on the receipt of a perishable agricultural commodity by a commission merchant, dealer, or broker after the transfer of ownership, possession, or control of the commodity by the seller, supplier, or agent thereof. The trustee is the commission merchant, dealer, or broker. The corpus of the trust consists of all perishable agricultural commodities, all inventory of food or other products derived from perishable agricultural commodities, and any receivables or proceeds arising from sale of such commodities or inventory, which are owned or held by a commission merchant, broker, or dealer. The trust is a floating, nonsegregated trust covering all of the subject assets. Assets may be commingled. If they are commingled, according to general principles of trust law, lien is placed over the entire commingled fund. The beneficiaries of the trust are unpaid suppliers or sellers of perishable agricultural commodities and their agents. Trust beneficiaries who have preserved their claim to share in the trust's assets essentially acquire the right of "first claim." They acquire a claim that is superior to secured creditors, and, in the event of the trustee's bankruptcy, trust assets are not part of the trustee's bankruptcy estate. *See* 7 U.S.C. § 499e(c).

In *C.H. Robinson Co. v. Alanco*, C.H. Robinson sold produce to Alanco, a produce broker. Alanco subsequently ceased operations and was liquidated. When Alanco ceased operations it owed C.H. Robinson more than $200,000 for unpaid produce purchases.

Alanco later received a settlement in a lawsuit against a terminal market to which it had sold produce that it had brokered for C.H. Robinson. This recovery was Alanco's only asset. C.H. Robinson sued Alanco and its president seeking recovery for the produce for which it had not been paid and damages for dissipation of PACA trust assets. Both defendants settled with C.H. Robinson. Under this settlement, Alanco turned over to C.H. Robinson a portion of the sum it had received from its settlement with the terminal market. The remainder was withheld by the attorney for Alanco who asserted an attorney's lien on the withheld sum for his services in connection with Alanco's suit against the terminal market. C.H. Robinson disputed the attorney's right to retain this sum, claiming that the withheld sum constituted PACA trust assets to which it was entitled.

The attorney, Mark Mandell, claimed that he was entitled to the disputed sum because his services led to the recovery of Alanco's only remaining asset, the account receivable owed by the terminal market to Alanco. He claimed that, under ordinary trust principles, he was entitled to payment out of the trust assets.

The Second Circuit rejected Mr. Mandell's claim. Although it conceded that ordinary trust principles could apply to PACA trusts, it observed that PACA trusts are statutory and thus common law trust principles could not apply if they conflicted with PACA. Based on its examination of PACA and its implementing regulations, the court concluded that PACA trustees have a duty under PACA to pay the full amount of the debt owed to their produce suppliers. Thus, unlike most common law trusts, PACA trusts entitle their beneficiaries to a sum certain.

Since Alanco, the PACA trust trustee in this case, was defunct, the only funds available to it were the funds against which Mr. Mandel asserted his attorney's fees lien. Thus, any fees paid by Alanco to Mr. Mandel out of these funds would diminish the amount of money paid to C.H. Robinson, the PACA trust beneficiary. Mr. Mandel was simply another one of Alanco's creditors. Since PACA trust beneficiaries were entitled to full payment, the court reason, it necessarily follows that they must receive full payment before the PACA trustee may lawfully use trust funds to pay other creditors. The court therefore ruled that "a PACA trustee may not use PACA funds to pay attorney fees incurred in collecting accounts receivable held in trust for a seller of perishable agricultural commodities." *C.H. Robinson Co. v. Alanco*, 2001 WL91956 at *5.

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PRODUCER PROTECTION/*Cont. from p. 2*

tionship existed, there is no empirical support for the allegation that state corporate farming laws have any effect on harming agriculture. Many major agricultural states have corporate farming laws including Iowa, Nebraska, Kansas, South Dakota, and Minnesota. These states remain major pork producing states in the country.

Thus, there is no evidence that the enactment of the legislation in 1975 had the effect assumed by the article authors.

Specific issues

The article targets the proposed provision which would "require contracts to be in plain language and contain disclosure of material risks"[4] by raising irrelevant questions such as whether "...all production contracts [would have to] be vetted by a state Attorney General's staff." The language of the statute does not state, or even imply, that such review would be required.[5]

Continued on p. 6

USDA/*Cont. from p. 2*

NAD, Congress expressly granted the NAD Director authority coextensive with the authority of the Secretary to grant equitable relief under 7 U.S.C. § 1339a and "other laws." 7 U.S.C. § 6998(d). Thus, the NAD statute's reference to "other laws" gives the NAD Director the authority to grant relief under the new statute. The extent to which equitable relief will be forthcoming is less certain. Anecdotal reports indicate that both the Secretary and the NAD Director have been frugal with their equitable relief power. In addition to reinforcing the Secretary's equitable relief authority with respect to the ECARP programs, by enacting the new statute Congress may have been implicitly prodding the Secretary and the NAD Director to exercise their equitable relief authority.

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An introduction to federal marketing ordersfor fruits, vegetables, nuts, and specialty crops

By Christopher R. Kelley

Federal marketing orders for fruits, vegetables, nuts and specialty crops have been broadly characterized in many different ways. For example, consider the following observation: "Scholars have likened marketing orders to industrial cartels. Critics contend that marketing orders allow independent, and normally competing, firms to engage in collective activities that antitrust laws deny firms in other industries." Leon Garoyan, *Marketing Orders*, 23 U.C. Davis L. Rev. 697, 697 (1990) (footnote omitted) [hereinafter Garoyan]. Likening marketing orders to "industrial cartels" is mild compared to the following characterization:

> Marketing orders are the clearest relic of the Mussolini school of agricultural economics. Federal marketing orders are essentially federal prohibitions against some farmers selling part of their harvest. They were hatched in the same batch of federal programs as the National Industrial Recovery Act, and were based on the idea that prosperity can be assured if government gives each separate industry the power to regulate and control itself so to guarantee its own profits....With marketing orders, the government destroys harvests in order to prevent farmers from committing suicide.... Marketing order controls are based on the idea that farmers are inevitably victimized by a free market and cannot make a profit unless the USDA intervenes to knock both farmers and consumers on the head.... 'If oranges were condoms, [there] would be no problem with selling them. If government tried to restrict the number of condoms like it tries to restrict the number of oranges, judges would go berserk in minutes.' But agriculture is different.

James Bovard, *The Farm Fiasco* 179-80, 203, 207 (1991) (footnote omitted).

More benign descriptions are likely to run in the following vein: "Federal marketing orders are producer-operated programs aimed at raising grower prices and incomes by regulating product marketing." Glenn Zipp & Nicholas Powers, *Fruits and Vegetable Marketing Orders*, Nat'l Food Rev., Jan.-Mar. 1990 at 72 [hereinafter Zipp & Powers]. "The marketing agreement and marketing order programs...are designed to raise and stabilize prices of certain products in a way that protects both the interest of the consumer and the purchasing power of the farmer." Julian C. Juergensmeyer & James B. Wadley, *Agricultural Law* § 10.1 (1982).

The legislation authorizing federal marketing orders, the Agricultural Marketing Agreement Act of 1937, offers the following justification for their existence:

> It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

7 U.S.C. § 601.

What then are federal marketing orders for fruits, vegetables, nuts, and specialty crops? And why do they warrant attention? To answer the latter question first, federal marketing orders for fruits, vegetables, nuts, and specialty crops deserve attention for at least three reasons. First, the crops subject to such order often are high-value crops and, accordingly, are important to the nation's agricultural economy. Second, many of the crops, particularly the citrus crops, are enjoyed by most American consumers, and the marketing orders covering those crops have a direct impact on the cost and availability of those crops. Third, marketing orders are a form of federal farm policy that many Americans, including farmers and their lawyers, are unfamiliar with. This article, therefore, will provide an introduction to them.

What are marketing orders?

The Agricultural Marketing Agreement Act of 1937 (AMAA) authorizes both marketing agreements and marketing orders. 7 U.S.C. § 608c. The AMAA was a response to depressed commodity prices in the 1930s and to lobbying for legislation that would "enable eligible commodity groups to establish industry-wide marketing programs." Garoyan, *supra*, at 698.

Controversial from the enactment of the AMAA, marketing orders have been criticized by consumer advocates for reducing consumer choices and raising consumer prices. Some commodity interests also oppose marketing orders. "For instance, some producers claim that the California-Arizona citrus orders fail to enhance their incomes and create inequities among growers by being less restrictive for those who sell in export markets." Zinn & Powers, *supra,* at 72 (referring to an order that is now defunct). Nonetheless, marketing orders are generally supported by most farmers whose commodities are covered by an order. *Id*.

Identifying the winners and losers under marketing orders and the extent of their respective gains and losses is neither certain nor easy to determine:

> Those who support marketing orders find few economic studies to support their positions. They support their views on the basis of producer welfare, economic theory, and experience. They rely on the political process to maintain existing programs. Industries have not supported economic studies, which has resulted in few measures that describe economic benefits resulting from marketing orders. Also lacking are studies of marketing order impacts on consumer welfare. The scarcity of studies partly results from the complexity and difficulty of this type of research and from the lack of agreement as to performance criteria.

Garoyan, *supra*, at 705-06 (footnote omitted). One clear "winner," however, is Congress, for it can make growers who want marketing orders happy without tapping the federal budget for anything more than administrative expenses. In this sense, marketing programs are the "`farm programs you don't see.'" Zipp & Powers, *supra*, at 72.

Defined broadly, a *marketing order* is an order issued by the Secretary binding all parties identified in the order to comply with its terms. As explained below, the terms of the order may restrict the marketing of the commodity by volume and quality and require contributions for research and market promotion programs. Stated somewhat more completely:

> A marketing order provides for the regulation of the quantity, price, and/or timing of the product marketed. It is a legal instrument which sets the limits within which an agricultural industry can operate a program of self-regulation. It defines the terms of trade for handler and producer, the commodity to be regulated, and the area to be covered by the order. Its regulations are incumbent on all producers *and* on all handlers in the industry once approved by two thirds of the producers in the specified area.

M.C. Hallberg, *Policy for American Agriculture* 175 (1992).

Also defined broadly, a *marketing agree-*

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ment is a voluntary, formal agreement between the Secretary and handlers of a particular commodity. Unlike marketing orders, marketing agreements are binding only on signatory handlers. The terms "marketing order" and "marketing agreement" are often used interchangeably because marketing orders are usually accompanied by marketing agreements. Henceforth, these notes will refer to both as "marketing orders."

In a sense, marketing orders are simply the vehicle through which the Secretary issues regulations under the AMAA. In recent years, federal marketing orders consumed three volumes of the Code of Federal Regulations.

To whom are marketing orders directed?

Marketing orders are directed at "handlers" of the particular commodity subject to the order. To the extent defined in 7 U.S.C. § 608c(1), a "handler" is a processor, an association of producers, or another engaged in "handling" an agricultural commodity identified in section 608c(2). By the negative inference of section 608(9), an "association of producers" excludes "cooperative associations of producers who are not engaged in processsing, distributing, or shipping the commodity of product thereof covered by [an] order." Except for retailers of milk and milk products, retailers are not subject to marketing orders. 7 U.S.C. § 608c(13)(A). Producers acting in their capacity as producers are also exempted. *Id.* § 608c(13)(B).

Although the Act does not define "handler," the various marketing orders do. For example, the order regulating the handling of oranges, grapefruits, tangerines, and tangelos grown in Florida, defines "handler" as follows: "*Handler* is synonymous with *shipper* and means any person (except a common carrier or contract carrier transporting fruit for another person) who, as owner, agent, or otherwise, handles fruit in fresh form, or causes fruit to be handled." 7 C.F.R. § 905.7. The same order defines "handle or ship" to mean:

(a) To sell, consign, deliver, or transport fruit, or in any way to place fruit in the current of commerce between the production area and any point outside thereof in the 48 contiguous States and the District of Columbia of the United States; and

(b) To export fruit from any point in the 48 contiguous States and the District of Columbia of the United States to any destination.

Id. § 905.9. The order also defines "producer" as "synonymous with *grower* and means any person who is engaged in the production for market of fruit in the production area and who has a proprietary interest in the fruit so produced." *Id.* § 905.6.

The commodities for which marketing orders can be issued are listed in 7 U.S.C. § 608c(2). Historically, the crops most extensively covered by marketing orders (over 90% of the corresponding annual farm value of the domestic crop and imports) have been California-Arizona lemons, cranberries, California kiwifruit, California nectarines, California prunes, California raisins, California almonds, and California walnuts. The next most extensively covered (more than 75% but less than 90%) are Florida limes, California-Arizona navel oranges, California-Arizona Valencia oranges, Hawaiian papayas, California dates, and spearmint oil. Marketing orders covering 33% to 75% of this value are Florida citrus, Washington sweet cherries, Pacific Coast winter pears, Florida tomatoes, and Oregon-Washington hazelnuts. Nicholas J. Powers, *Federal Marketing Orders for Fruits, Vegetables, Nuts, and Specialty Crops* (USDA, Econ. Research Serv., Agric. Econ. Rep. No. 629, Mar. 1990) at 14 [hereinafter Powers]. Some of these orders are no longer in effect, however.

Under 7 U.S.C. § 608c(11)(B), marketing orders for commodities other than milk must "be limited in their application to the smallest regional production area or regional marketing area, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out [the declared policy of the AMAA]."

What can marketing orders do?

Marketing orders permit three categories of marketing activity:

1. Volume management;
2. Quality regulations; and
3. Market support activities.

See Garoyan, *supra*, at 700; 7 U.S.C. § 608c(6).

Volume management activities include:

1. *Shipping holidays*: "Shipping holidays prohibit handlers from sending produce to the market during brief periods, such as a few days or a week. These holidays are intended to prevent sharp declines in farm prices when there is a temporary oversupply.... Shipping holidays allow[] time for the market to realign a temporary market supply and demand imbalance." Powers, *supra,* at 23.

2. *Prorates*: "Prorates regulate shipments to the market over longer periods than shipping holidays.... Prorates set an upper limit on weekly shipments to a market, or markets, that handlers can ship on behalf of the contracted growers. Prorates seldom, in practice, completely prevent handlers from sending produce to a market as do shipping holidays. Prorates usually regulate weekly shipments to the higher-priced fresh-use market. Each handler's share of the industry prorate is proportional to the share of the industry production controlled by the handler." *Id.*

3. *Market allocations*: "Market allocations place a maximum on the quantity of produce that handlers may ship into regulated markets during a marketing season.... While prorates regulate within season shipment flows, market allocations regulate annual shipment flows. Production in excess of the market allocation can be sold in nonregulated markets or stored and sold in a future period." *Id.* at 26.

4. *Reserve pools*: "Reserve pools prohibit handlers from selling a minimum share of the current season's production.... This share of the harvested crop is place in storage or commonly called the reserve pool and it is shipped to commercial markets when grower prices have strengthened, which usually occurs during a short crop year, or is diverted to processing when there is a chronic buildup of inventory." *Id.* at 27.

5. *Marketing allotments*: "Marketing allotments require handlers to market only produce for which they the grower possesses a marketing quota.... Growers can sell only up to their allotted quantities. Marketing allotments indirectly control the maximum output, since growers not possessing allotments would not produce a commodity that cannot be sold.... Marketing allotments are the most controversial of the marketing order regulations because they potentially have the greatest market power. Growers can cooperatively act as a monopoly if the marketing order completely covers production of the crop.... Growers seldom can act as a monopoly, in practice, since marketing orders authorizing allotments usually cover only a part of the crop's potential growing area and entry by new growers and expansion by existing growers is permitted." *Id.* at 29-30.

Quality regulations include grade and size standards. "Grade requirements (regulations) prohibit handlers from shipping substandard-quality produce while size requirements typically prohibit handlers from shipping small-sized produce... Grade and size requirements are controversial because they can sometimes restrict sales of fresh-quality produce to the regulated market (such as fresh use) and divert shipments to nonregulated markets (such as processing).... Restricting sales to the regulated market tends to limit consumer choices." *Id.* at 22-23.

Market support activities include generic advertising and promotion; production, marketing, and product research; and container and package standards. *Id.* at 18-22.

Marketing orders may also prohibit

Continued on p. 6

MARKETING ORDERS/*Cont. from p. 5*
"unfair methods of competition and unfair trade practices in the handling" of the commodity subject to the order. 7 U.S.C. § 608c(7)(A).

How are marketing orders promulgated?

Marketing orders may be proposed by the Secretary or any other person. 7 C.F.R. § 900.3(a). If a person other than the Secretary proposes an order, the Administrator of the Agricultural Marketing Service investigates the necessity for such an order. *Id*. If the Administrator determines that the proposed order "will tend to effectuate the declared policy of the [AMAA], or if the Secretary desires to propose a marketing agreement or order," the Administrator serves notice of a hearing on the order. *Id*. § 900.3(b); *see also* 7 U.S.C. § 608c(3), (4) (requiring, among other things, that the Secretary determine that the issuance of an order will "tend to effectuate the declared policy" of the AMAA).

The regulations found at 7 C.F.R. Part 900 provide for "formal rulemaking." These regulations also apply to the amending of a marketing order by virtue of the definition of "marketing order" in section 900.2. *See also* 7 U.S.C. § 608c(17). Once an order is adopted, however, it is implemented through regulations promulgated under the "notice and comment" provisions of section 553 of the Administrative Procedure Act, 5 U.S.C. § 553.

Under 7 U.S.C. § 608c(8), at least 50 percent of the *handlers* (80 percent for California citrus fruits) of the particular commodity in the defined marketing area must have signed an agreement before a marketing order can be issued. In addition, the Secretary must determine that the issuance of the order is approved by either:

(a) two-thirds of the *producers* (three-quarters for California citrus fruits) of the particular commodity who either produced the commodity in the marketing area or produced the commodity for sale in the marketing area during a representative period or;

(b) the *producers* who produced for market or sold at least two-thirds of the particular commodity produced for market or sold in the marketing area during a representative period.

7 U.S.C. § 608c(8) (emphasis added). Stated somewhat more simply, at least one-half (80 percent for California citrus fruits) of the handlers and either (a) two-thirds (three-quarters for California citrus fruits) of the producers or (b) those producers who produced for market or sold at least two-thirds of the commodity must have signed a marketing agreement.

The Secretary, however, can avoid the requirement of a marketing agreement signed by at least 50 percent of the handlers (80 percent for California citrus fruits) if:

1. the failure of the requisite percentage of handlers to sign an agreement "tends to prevent the effectuation of the declared policy" of the AMAA; and
2. "the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy"; and
3. the order is approved or favored by at least two-thirds of the producers (three-fourths for California citrus fruits) who grow or sell the commodity in the defined market area or who have produced for market or sold at least two-thirds of the volume of such commodity in the defined market area during the representative period.

7 U.S.C. § 608c(9).

For most commodities, when using either section 608c(8) or section 608c(9) the Secretary must conduct a referendum to determine producer approval, except when an amendatory order is at issue. *Id*. § 608c(19). Producer marketing cooperatives are permitted to "block vote" on behalf of their members. *Id*. § 608c(12). As a practical matter, does this mean that one or two cooperatives can determine a referendum's outcome? Consider this statement from *United States v. Sunny Cove Citrus Ass'n*, 854 F. Supp. 669 (E.D. Calif. 1994): "As a result of a large bloc vote by Sunkist, a producer cooperative, which accounted for 80% of the navel industry voting and 85% of the Valencia orange industry voting, both the marketing orders were continued by a large margin."

How are marketing orders enforced?

The Secretary enforces marketing orders by levying penalties against violators. 7 U.S.C. § 608c(14). Penalties may be assessed only after notice and an opportunity for an agency hearing. Judicial review of the Secretary's order (actually, the order will be issued by the USDA's Judicial Officer) is in federal district court. "The validity of such order may not be reviewed in an action to collect such civil penalty." *Id*. § 608c(14)(B).

Administrative committees consisting of members of the regulated industry and, sometimes, consumers assist the Secretary by recommending regulations. *See id.* §§ 608c(7)(C), 610. The composition, duties, and powers of the administrative committee for a marketing order are set forth in the marketing order. *Id*. § 608c(7)(C).

How are marketing orders modified or terminated?

Handlers may petition for a modification of a marketing order or an exemption from it. 7 U.S.C. § 608c(15)(A). The handler is given an opportunity for a hearing. Judicial review of the Secretary's decision (actually, the decision made by the USDA's Judicial Officer) is reviewable in federal district court. *Id*. § 608c(15)(B). The action must be filed within twenty days. Such actions are sometimes referred to as "15(B) actions."

The Secretary must terminate or suspend a marketing order if he finds that it "obstructs or does not effectuate the declared policy of [the AMAA]." *Id*. § 608c(16)(A). In addition, the Secretary must terminate a marketing order when a majority of the *producers* (not handlers) who have produced for market, during a representative period, more than 50 percent of the volume of the commodity produced for market within the production area or who have produced more than 50 percent of the volume of the commodity sold in the specified marketing area. Such a termination will only be effective if it is announced on or before a date specified in the marketing order. *Id*. § 608c(16)(C). Finally, although most marketing orders have an indeterminate duration, a marketing order theoretically could expire by its terms.

For more on federal marketing for fruits, vegetables, nuts, and specialty crops, see Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under The Agricultural Marketing Agreement Act of 1937*, 5 San Joaquin Agric. L. Rev. 3 (1995). A current listing of these orders can be found at the website of the USDA Agricultural Marketing Service, specifically, www.usda.gov/fv/mosummary.htm.

Producer protection/Cont. from p.3

One element of perfect competition, which is widely viewed as the most desirable state both in economic theory and in practice, is perfect knowledge. Full information is the hallmark of the Securities and Exchange Acts of the 1930s which requires the full disclosure of tremendous amounts of financial information by publicly traded firms. The success of the U.S. equities markets is largely attributed to the certainty and transparency which has resulted.

The article's statements about the provisions prohibiting confidentiality are on their face inconsistent and cannot be supported as being in the best interests of either producers or consumers. The article notes that market knowledge allows participants in a given market to make the best decisions possible on the use of their assets. In fact, American agriculture has historically been cited as

Cont. on p.7

Producer protection/Cont. from p.6

a bastion of the efficiencies created by the application of free market competition. However, the article then states that packers should not be required to participate in a market where producers and their competitors have access to market knowledge since, absent a higher than perfect market level of return, packers will take their ball and go home. To the contrary, it seems more likely that free market forces, including full market knowledge, would provide a strong incentive for packers to constantly pursue innovation and to produce at the lowest equilibrium cost possible.

The proposed legislation includes a requirement that contracts use plain language and disclose material risks because of the clear differences in the power positions of the contracting parties. This requirement is based on the notion that a competitive market assumes that the players have roughly equal bargaining positions.

The article comments critically as to the three-day right to review and cancel. This concept has been deeply imbedded in consumer law for decades. To argue that such a right would harm giant agribusiness firms "in terms of revealing strategically important information relative to their competition" calls to mind the argument, discredited by virtue of enactment of the Sherman Antitrust Act of 1890,[6] that huge, concentrated firms are free to ride roughshod over weaker players with impunity merely because it would be to the economic advantage of the huge firm to do so. To our knowledge, there has never been a showing that the fairness inherent in the three-day right to review has any adverse economic result for any party.

As for assuring producers a first priority lien for payments due the producer if the purchasing firm goes out of business, that outcome has been assured to sellers of livestock since enactment of the 1976 amendment to the Packers and Stockyards Act.[7] There has been no demonstrated adverse impact from that legislation. Indeed, consideration is being given to extending that protection to grain sellers in the current session of the Congress. Of course, to a lender there is no such thing as too much collateral. Lenders, like everyone else, prefer to drive their risks to zero and will do so if that is possible. In the policy arena there is no compelling reason why that type of strategy needs to be facilitated.

The article also criticizes the provision that provides a modicum of protection in the event of capricious action in terminating contracts where the producer has made "a sizeable capital investment required by the contracts." Surely observers are aware of the way broiler producers have been repeatedly whipsawed with this very tactic.[8] We do not believe that this type of behavior is defensible. Indeed, the potential for non-production reasons to serve as the basis for contract termination is very real. For example, quality compliance provisions subject to determination solely by the processor have long been alleged to provide the processor the pretext for terminating a contract when the true reason was to punish a producer for speaking out against the interests of the processor or for joining a producer bargaining organization. There is no economic or public policy reason to allow such contract terminations.

Finally, the article questions the proposed prohibition of provisions whereby "grower compensation is determined in part by performance compared to other growers." However, the tournament ranking system has been found to be yet another basis for terminating poultry producer contracts when the real basis was participating in a producer organization and petitioning the legislature for producer-friendly legislation.[9] Compounding this problem is that the integrator controls many of the variables that determine the grower's ranking, including the quality of the animals, the feed and medication.

The authors' arguments that such enactments could drive production offshore have been made repeatedly against every effort to raise wage levels, insure worker safety and to protect the environment. Yet the article does not cite any evidence that such modest efforts in contracting as are contemplated in the proposed legislation would encourage production to go elsewhere.

Targeting the most indefensible business practices in contract agriculture is a laudable goal with no proven downside. The effort is hardly worthy of the implied criticism in the article.

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[1] See Harl, "The Age of Contract Agriculture," 18 *J. of Agribusiness* 115 (2000); Organization for Competitive Markets, "The Structural Transformation of the Agricultural Section," in A Food and Agricultural Policy for the 21st Century, 48-55 (2000).

[2] Mo. Ann. Stat. ch. 350.

[3] Mo. Ann. Stat. Sec. 350.016.

[4] See *Segers v. Pioneer Hi-Bred International, Inc.*, 997 F. Supp. 1124 (N.D. Ind. 1998) (plaintiff grew seed corn for defendant under contract and crop failed due to failure of herbicide (Accent) to control grass; plaintiff liable for reduced yield under contract provision making farmer responsible for damages caused by herbicide even though choice of herbicide subject to defendant's approval).

[5] The party drafting the contract predictably writes it in their own best interest. When the disparity in bargaining power is factored in, the potential for abuse is very real. Many farmers do not feel they can afford to hire an attorney to review every prospective contract before signing.

[6] 15 U.S.C. §§ 1-7.

[7] 7 U.S.C. §§ 181 et seq. See, e.g. Cal. Agric. Code § 56701; Minn. Stat. Ann. § 27.138 (trust funds established to insure payment).

[8] See *Minnesota Dept. of Agriculture v. Campbell Soup Co.* (chicken plant closed in Worthington, Minnesota, leaving 36 contract farmers holding debt on barns built solely for broilers; fine levied by Minnesota Dept. of Agriculture). Similarly, in 1998 Murphy Farms cancelled hog contracts of 12 farmers because of low hog prices. In 1997, the largest manure-caused fish kill in Minnesota occurred. The farmer running the operation received jail time and a fine but the company for which the farmer raised the hogs under contract (Christenson Farms and Feedlots) was not penalized and remained one of the nation's larger hog producers.

[9] *Larry McKnight, et al v. Lady Forest Farms, Inc.*, No. 3:98 CV 227BN, (S. D. Miss., May 1999) (jury verdict).