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Judgments for willful seed patent infringement deemed non-dischargeable

In an important case for growers and holders of agricultural patents, an appellate bankruptcy panel recently concluded that a damage award against a grower for deliberately infringing on a seed technology patent is not dischargeable in bankruptcy. *In re Trantham (Monsanto Co. v. William Farris Trantham)*, 2004 FED App. 0001P (6th Cir. BAP 2004). Reversing a prior ruling of a bankruptcy court, *In re Trantham (Monsanto Co. v. William Farris Trantham)*, 286 B.R. 650 (Bankr. W.D. Tenn. 2002). the Bankruptcy Appellate Panel for the Sixth Circuit, which hears bankruptcy appeals in Kentucky, Michigan, Ohio, and Tennessee, ruled that a soybean and cotton grower could not escape liability to Monsanto Company for a nearly $600,000 willful patent infringement judgment simply by filing bankruptcy.

The case stems from Monsanto's Roundup Ready®, Bollgard®, and Bollgard with Roundup Ready® seeds for cotton and soybean production. The seeds contain Monsanto's patented gene technology, which makes them resistant to certain insecticides and herbicides, and therefore enormously beneficial and popular.

In order to legally use these seeds, a grower must be properly licensed. Under the standard licensing agreement, a grower is allowed to use the technology in only one growing season, and is prohibited from saving for later planting any of the seed produced from plants grown using the purchased seed.

In 1999 and 2000, despite never obtaining a license and being well aware of the prohibitions against the unauthorized use of Monsanto seed, William Farris Trantham obtained and planted cottonseed and soybean seed with Roundup Ready® and Bollgard® gene technology. Although he attempted to conceal his unauthorized use, Monsanto learned of the patent violation and filed a federal lawsuit against him in the United States District Court for the Western District of Tennessee. Monsanto subsequently obtained a court order to enter Mr. Trantham's land to collect and test samples of the cotton and soybean crops, which confirmed the crops were indeed planted with seeds containing Monsanto's patented gene technology. *See Monsanto Company v. Trantham*, 156 F. Supp. 2d 855 (W.D. Tenn. 2001).

In September 2001, a federal jury unanimously found that Mr. Trantham had willfully infringed upon Monsanto's patents, a violation of 35 U.S.C. § 271. After the trial, the

Cont. on p. 2

INSIDE

- Ch. 12 sunsets
- Arbitration agreement lacks mutuality of obligation
- Insurance coverage for agricultural environmental claims

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

- Drafting conservation easements for agriculture

Country of origin labeling: update and overview

The inclusions of Country of Origin Labeling (COOL) in the 2002 Farm Security and Rural Investment Act, the proposed USDA rule, and the bitter disputes over both have come to a pause with the recently passed moratorium on COOL. The Senate passed the omnibus appropriations bill, which contained the two-year moratorium, by a 65-28 vote. COOL supporters led by Senate Minority Leader Tom Daschle seek to introduce a bill to repeal the motion. On the House side, H.R. 3732 has been introduced by Representatives Rehberg and Peterson to repeal the moratorium. COOL opponents vow to promote a voluntary program that works for industry and consumers. The moratorium does not extend to wild-caught salmon and other seafood.

The intent of COOL is to provide consumers with additional information on which to base their purchasing decisions. It is not a food safety or animal health measure.[1] Supporters, such as the non-profit group Americans for Labeling, believe that consumers desire the information to feel secure in their food choices. According to a 2002 produce survey, 86% of surveyed consumers support COOL on meat products.[2]

However, opponents of COOL contend that it acts as a hidden tax that places the implementation cost burden on packers and retailers. In his Agriculture Marketing Service (AMS) listening testimony American Meat Institute Senior Vice President Mark Dopp stated, "the fallacy of the food safety argument is demonstrated when one considers that the labeling of meat from three animals–each born in Mexico, Canada, and

Cont. on p. 2

federal court ruled that Monsanto had sustained $106,000 in compensatory damages. Because the infringement was deemed willful, however, the court increased the award to nearly $600,000, including treble damages, attorneys' fees, and costs. *See* 35 U.S.C. §§ 284 – 85.

Shortly after the judgment was rendered, Mr. Trantham filed for bankruptcy protection under Chapter 7 of the Bankruptcy Code. Unwilling to allow Mr. Trantham to escape liability, Monsanto sought to have its willful infringement judgment deemed non-dischargeable. Monsanto argued that the judgment was non-dischargeable under section 523(a)(6) of the Bankruptcy Code because it was based on a "willful and malicious injury." *See* 11 U.S.C. § 523(a)(6). Pursuant to the doctrine of collateral estoppel, Monsanto urged the bankruptcy court to adopt the judgment of the district court without a separate trial.

The bankruptcy court agreed that a separate trial was unnecessary, but found that Mr. Trantham's infringement had not satisfied the maliciousness prong of the section 523(a)(6) test for non-dischargeability. *In re Trantham (Monsanto Co. v. William Farris Trantham)*, 286 B.R. at 664. It concluded that although Mr. Trantham's actions constituted "reckless, careless, negligent, and even aggravated disregard for Monsanto and its patent rights," his behavior failed to constitute the type of malicious conduct required by section 523(a)(6). It stressed that Mr. Trantham never intended to injure Monsanto, and that his intentions were merely to produce an efficient and profitable crop.

On appeal, the Bankruptcy Appellate Panel for the Sixth Circuit reversed the decision, and found that Monsanto's entire judgment for willful patent infringement was non-dischargeable. *In re Trantham (Monsanto Co. v. William Farris Trantham)*, 2004 FED App. 0001P at 13. In its reasons, the panel analyzed and ultimately rejected the bankruptcy court's narrow interpretation of section 523(a)(6)'s malice requirement.

Specifically, the panel found the bankruptcy court had overemphasized the fact that Mr. Trantham was not specifically motivated to harm Monsanto. Noting that even bank robbers usually have no ill will toward the banks they are robbing—they are generally motivated only by a desire to enrich themselves—the panel concluded that the key question is not the debtor's opinion of his victim, but whether the debtor acted "in conscious disregard of one's duties or without just cause or excuse."

Upon a review of the district court's findings, it was evident that Mr. Trantham had "deliberately" infringed on Monsanto's patent for the sole purpose of avoiding payment of the license fee, and then compounded matters by attempting to conceal his actions. Those findings, according to the panel, were tantamount to a "willful and malicious" determination under section 523(a)(6). Thus, the willful patent infringement judgment was deemed non-dischargeable.

Mr. Trantham has asked the panel to reconsider its decision, and he may appeal the decision to the United States Court of Appeal for the Sixth Circuit. Assuming the ruling is maintained and adopted by other circuits, however, the decision imposes serious consequences on growers who choose to infringe on seed technology patents. As evidenced by the example of Mr. Trantham, growers who knowingly use protected seed without a proper license can be held liable for compensatory damages, treble damages, attorneys' fees, and costs. And because willful patent infringement has been deemed to cause "willful and malicious injury," these judgments are not dischargeable in bankruptcy. In conclusion, growers should think twice before engaging in acts of seed piracy, as the safety net of bankruptcy is potentially no longer available.

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Editor's note: Michael Pinkerton is an attorney with the firm that represented and continues to represent Monsanto Company in the Trantham litigation.

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Country of origin labeling/Cont. from page 1

the U.S.–will have to be different–even though all three animals were slaughtered at the same U.S. plant, under the supervision of the same USDA inspector and using the same food safety criteria."

COOL requires the labeling of covered commodities to identify the country or countries where the food was grown and/or processed. The law defines "covered commodity" as muscle cuts of beef (including veal), pork, lamb; ground beef, ground lamb, and ground pork; farm-raised fish and shellfish; wild fish and shellfish; perishable agricultural commodities (fresh and frozen fruits and vegetables); and peanuts. Poultry is excluded from this definition. Processed versions of these products are also excluded as "processed food items" although there is no definition given specifically in the country of origin labeling law for what constitutes "processed." As it stands, the rule for processed foods would include foods that have some of these "covered commodities" included in their ingredients but are processed according to proper FDA regulations.

The Perishable Agriculture Commodities Act defines "retailer" as one who is "engaged in the business of selling any perishable agricultural commodity solely at retail when the invoice cost of all purchases or products exceeds $230,000 during a calendar year."[3] This definition excludes butcher shops, fish markets, and small grocery stores. However, the law does state that any persons in the business of supplying the covered commodities may be required by the Secretary of Agriculture to keep records or an audit trail.

The law states that the country of origin declaration may be provided to consumers by means of a label, stamp, mark, placard, or other clear and visible sign on the covered commodity or on the package, display, holding unit, or bin containing the commodity at the final point of sale to consumers. Under the proposed rule, abbreviations would be allowed for naming the country because of the packaging concerns expressed to the AMS.

AMS recognized that several states have implemented mandatory programs for country of origin labeling and that some of the guidelines used in those various states have been suggested to the agency. How-

Continued on page 6

Chapter 12 sunsets, caught in political battle

With a long history of short-term extensions and promises of eventual permanency, Chapter 12 again expired on January 1, 2004. Its most recent six-month extension provided temporary authorization only through December 31, 2003. Pub. L. No. 108-73, 117 Stat. 891 (2003).

Just prior to the expiration, both Houses of Congress considered Chapter 12 extensions. The Senate passed a six-month extension by unanimous consent on November 25, 2003. S. 1920, 108th Cong. (2003). On December 8, 2003, the Senate bill was referred to the House Committee on the Judiciary, and then on to the Subcommittee on Commercial and Administrative Law. *See, Thomas: Legislative Information on the Internet* http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SN01920:@@@S. Although two different bills were proposed in the House, neither passed before the end of the year. H.R. 3540, 108th Cong. (2003)(providing for a one-year extension); H.R. 3542, 108th Cong. (2003)(providing a six-month extension).

When the House recently considered S. 1920, House Republicans orchestrated efforts to switch the legislative focus back to the overall bankruptcy reform bill, The Bankruptcy Abuse and Consumer Protection Act. This legislation has been debated in Congress for a number of years and has passed both Houses, in slightly different versions. It came close to becoming law in November, 2002, but was derailed over language agreed to by the Conference Committee that disallowed the discharge of certain abortion protest damages. *Bankruptcy Abuse Prevention and Consumer Protection Act of 2001*, H.R. 333, 148 Cong. Rec. D-1154-55 (November 14, 2002). Although the bankruptcy reform bill as a whole has been controversial, all major versions of the bill have included provisions that would make Chapter 12 a permanent chapter of the bankruptcy code, and these provisions have been largely unopposed.

On January 28, 2004, in an unusual procedural move, House Judiciary Chairman James Sensenbrenner (R-Wis) substituted the entire text of The Bankruptcy Abuse and Consumer Protection Act of 2003 (H.R. 975) for the Chapter 12 extension language in S. 1920. This bill, with the substituted language, passed the House on a roll call vote of 265-99. House leadership announced that the bill was now ready for conference with the Senate, and House conferees were appointed. See, *Thomas: Legislative Information on the Internet*, available at http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SN01920:@@@S

As of this writing, it is not clear whether the House procedural tactic will in fact force the Senate into conference on the reform bill. However, Chapter 12 is once again caught up in the debate over reform and remains unavailable to family farmers.

—Susan A. Schneider, Associate Professor and Director Graduate Program in Agricultural Law, University of Arkansas School of Law, Fayetteville, AR

Arbitration agreement lacks mutuality of obligation

In *Tyson Foods, Inc. v. Archer*, No. 03-649, 2004 WL 308127 (Ark. Feb. 19, 2004), the Arkansas Supreme Court held that an arbitration agreement contained in contracts entered into by Tyson Foods, Inc. (Tyson) and several hog farmers was unenforceable because it lacked mutuality of obligation.

Tyson contracted with several farmers to raise live hogs for Tyson. *See Tyson Foods*, 2004 WL 308127. Paragraph eleven of the contracts provided that "[a]ny dispute or controversy between the parties hereto arising out of or relating to this Contract…shall be submitted to arbitration…." *Id.* Paragraph sixteen of the contracts provided the following:

> Upon default of breach of any of the Producer's obligations under this Contract the Company may immediately cancel this Contract by giving notice in writing, and the Company may, without further notice, delay or legal process, take possession of swine, feed or other property owned by the Company. The Company shall have the right to utilize, the Producer's swine facilities until the swine reaches marketable weight. The Company may also pursue any other remedies at law or equity.

Id.

In August of 2002 Tyson informed the farmers that it intended to cancel their contracts. *See id.* Shortly thereafter the farmers brought an action in circuit court alleging fraud, deceit, and promissory estoppel, and seeking compensatory and punitive damages. *See id.* Tyson filed a motion to stay the proceedings and a motion to compel arbitration. *See id.* The circuit court rejected Tyson's motions, ruling that the arbitration agreement was not enforceable because it lacked mutuality of obligation. *See id.* Tyson appealed the circuit court's decision to the Arkansas Supreme Court. *See id.*

Tyson's principle argument was that the arbitration agreement is mutual because it requires both parties to submit disputes to arbitration. *See id.* The farmers argued that there was a lack of mutuality since their only option under the contract was to submit a dispute to arbitration, while Tyson retained the right to "'pursue any other remedies at law or equity'" in the event a farmer defaulted on his contract obligations. *See id.*

The court explained that arbitration "is simply a matter of contract between the parties" and that a valid contract under Arkansas law requires competent parties, subject matter, legal consideration, mutual agreement, and mutual obligations. *Id.* (citations omitted). Recognizing that the only element at issue was whether the parties had mutual obligations under the contract, the court explained that "mutuality of contract means that an obligation must rest on each party to do or permit to be done something in consideration of the act or promise of the other; thus, neither party is bound unless both are bound." *Id.* (citation omitted). It further explained that a contract "that leaves it entirely optional with one of the parties as to whether or not he will perform his promise would not be binding on the other." *Id.* (citations omitted).

The court held that there was a lack of mutuality because under the contracts the farmers agreed "to forgo their rights to pursue judicial actions, while…[Tyson] retained their ability to pursue an action through the judicial process." *Id.* It added that:

> it is clear from our cases discussing mutuality that one party cannot limit another party to the exclusive remedy of arbitration, while retaining the ability to pursue other judicial remedies for themselves. We have repeatedly stated that there is no mutuality where one party uses an arbitration agreement to shield itself from litigation, while at the same time reserving its own ability to pursue relief through the court system. In sum, Arkansas precedent on mutuality requires that the terms of the agreement must fix a real liability upon both parties.

Id. (citations omitted).

The concurring opinion explained that ambiguities in the provisions of a contract are to be "construed strictly against the drafter of the contract" and that an ambiguity exists when a contract provision has more than one reasonable interpretation. *Id.* It concluded that:

> [b]ecause the language is susceptible to more than one interpretation, it is necessarily ambiguous; because it is ambiguous, it must be construed strictly against Tyson, the drafter of the contract…. [I]t is…apparent that the agreement lacks mutuality, because the…[farmers] are bound to arbitration, while Tyson may seek redress through a court of law. Such a lack of mutuality renders the arbitra-

Cont. on p.6

Insurance coverage for agricultural environmental claims

By Todd J. Janzen

A recent agricultural case highlighted the importance of agricultural counsel having a working knowledge of insurance coverage law. After apparently receiving a complaint from a neighbor, a dairy farm was served with a temporary restraining order prohibiting its operation from applying manure. The potential impact on the dairy's day-to-day operations was disastrous. Even worse, a long, drawn-out legal battle while the case was pending would be financially crippling, regardless of the ultimate outcome. The dairy farm turned to his insurance carrier to defend its interests. Instead, the dairy's insurance agent responded that there was no coverage because the claim arose out of "pollution." The dairy's insurance policy, like many others, contained a "pollution exclusion." If the dairy had accepted its agent's interpretation, this is where the story would have ended.

Fortunately, the dairy was willing to challenge its insurer's determination. Through a series of exchanges between its attorneys and the insurance carrier, the dairy farm's law firm was able to persuade the insurer that the "pollution exclusion" did not apply. The result: the insurance carrier reversed its initial denial of coverage and agreed to pay for the dairy's defense. The dairy now can afford to challenge the temporary restraining order.

This story teaches a very important lesson: if you are not willing to stand your ground with insurers, many of your client's claims will go unpaid. This article provides insurance coverage advice to attorneys who consider pursuing insurance coverage.

Insurance policy basics

When an agricultural client, whether a farmer, rancher, livestock producer, or different agri-business, comes to you with an environmental problem, a first step should be to take inventory of his insurance policies. Insurance professionals generally speak of policies as responding to two types of losses: first party and third party. A first party loss results when the policyholder suffers property damage, for instance, when a fire destroys a policyholder's barn. In contrast, a third party loss results when people other than the policyholder make a claim that the policyholder is liable. For example, if the policyholder's barn burns while it is storing a neighbor's hay crop, that hay crop would be a third party loss. Insurance companies often sell insurance packages that cover both first and third party losses.

Most traditional liability policies are "occurrence" based. They cover liability for property damage or bodily injury that occurs within the policy period, even if the third party makes the claim years later. Although this concept seems simple enough, the results of pursuing such coverage can be quite spectacular. Imagine a fertilizer spill that, ten years after it occurs, is discovered to have migrated into a local water supply. Users of this water supply then bring a claim against the person that caused the spill, who in turn, tenders a claim to his insurance company. The insured can look not only to his current policy, but each policy dating back to the date of the spill, because property damage "occurred" during each of these ten years. The end result is that he has not one year of coverage to respond to the loss, but ten. His policy limits have, in effect, multiplied tenfold. Even more spectacular, many insurance policies promise to pay for "all sums" for which the policyholder becomes liable as a result of an "occurrence." A number of state courts have interpreted this "all sums" language to mean that the policyholder can choose which year of all those triggered should respond to the occurrence. *See e.g., Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049, 1057-58 (Ind. 2001). For instance, in the ten-year example set out above, the policyholder could select the policy in effect during year three to respond to the spill. This is extremely valuable when insurers become insolvent, potentially leaving a policyholder with a reduced or no remedy.

Depending on the size of your agricultural client, you may find that he or she comes to you with a number of different policies. One typical policy is homeowner's insurance, providing first and third party coverage. Although a homeowner's policy usually will seek to exclude coverage for the business pursuits of the policyholder, a farmer's homeowner's policy may be different, or contain endorsements that extend coverage into farming-related activities. On the other hand, a larger corporate farmer will likely have business policies, including those that go above and beyond first and third party primary policies. Insurance that covers risks "above" the primary policies are described as "excess" coverage. These policies take effect after the primary policy limits are exhausted. Policies that go "beyond" primary first and third party coverage come in a variety of forms. One common form is "umbrella" coverage, which, as the name indicates, provides greater coverage for more perils. Other policies include worker's compensation, inland marine, which may be useful if the loss involves property in transit, livestock protection, income protection, or crop, to name a few. In the case in this example, the dairy farm had purchased a specialized "pollution liability" policy to protect himself from liability in the event his operation caused some form of "pollution."

Regardless of the type of policy and the extent of coverage, one of the most important insurance coverage rules is to *advise your client to locate and save all of his insurance policies.* Understandably, policies are the best evidence of the policy terms. Contrary to common thought, insurers do not save a copy of your client's policies. If you do not have them, countless hours can be spent arguing, proving, and in the worst case, litigating, what you believe the policies covered. If policies are lost or gone, locate and save secondary evidence, such as declaration pages, premium notices, cancelled checks, invoices, renewal notices, etc.

Making a claim

By the time he or she comes to you, your client may have already notified their insurance agent or broker of a potential claim. *Never accept the agent's or broker's determination that there is no coverage for your client's loss.* The agent or broker is typically not an attorney, not familiar with how courts interpret policy terms, and may not be anxious to dispute matters with an insurer. After all, an agent or broker derives its income from selling policies, not securing coverage once the loss occurs.

The first step to procuring insurance coverage is to provide prompt "notice" to the insurer. Specific notice provisions may vary from policy to policy, so check your policy to determine what "notice" is required. At a minimum, notice should contain the policyholder's name, a statement that you represent the policyholder, a general description of the loss, and a request for defense and indemnity. Besides informing the insurer of the claim, notice enables the insurer to make an investigation into the claim. If the loss spans multiple policy periods or types of policies, all insurers potentially on the claim should be notified. Err on the side of over-inclusiveness. There is no penalty for incorrectly notifying an insurer of a claim provided you have a reasonable belief that there may be coverage, but there is a potential defense to coverage if you do not.

When providing notice to the insurer, promptness is important. A policy will usually provide that notice of claim be tendered within a certain time. Such provi-

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sions may be specific, for example sixty days, but more likely will require that notice be given "immediately," "as soon as practicable," "promptly," "within a reasonable time," or other subjective time frame.

If the policyholder delays in providing notice, an insurer may assert "late notice" as a defense to coverage. When asserting late notice, an insurer will claim that it would have handled and settled the matter differently, but it lost this chance when the policyholder failed to timely notify it of the claim. States' courts vary in the weight they give to the late notice defense. Policyholder-friendly states are reluctant to relieve an insurer of its policy obligations simply because the policyholder did not provide prompt notice. For example, the Alaska Supreme Court recently held that "absent prejudice, regardless of the reasons for the delayed notice, there is no justification for excusing the insurer from its obligations under the policy." *Tush v. Pharr*, 68 P.3d 1239, 1250 (Alaska 2003). The court held that when asserting late notice, the *insurer* must prove that it was actually prejudiced. Other states allow a lack of prejudice to overcome late notice, but require the *policyholder* to prove it. *See, e.g., PSI Energy v. Home Ins. Co.*, 801 N.E.2d 705, 716 (Ind. Ct. App. 2004). At the other end, some state courts have found the presence or absence of prejudice to be immaterial. Late notice alone may be a bar to coverage. *See Marez v. Dairyland Ins. Co.*, 638 P.2d 286 (Colo. 1981). But in all states, prompt notice is important. It allows you to avoid this issue altogether.

After receiving notice of the claim, the insurer will issue a response. Most likely this response will come in the form of a "reservation of rights" letter. A reservation of rights letter sets out all of the coverage defenses the insurer may potentially assert and states that it is investigating the claim. Pay close attention to this letter; defenses to coverage that are not asserted may be waived if the insurer tries to assert them later. After investigation, the insurer will either deny the claim, pay the claim, or continue to defend under a reservation of rights. This last course is common for a good reason. *The duty to defend is broader than the duty to indemnify. See, e.g., Seymour Mfg. Co., Inc. v. Commercial Union Ins. Co.*, 655 N.E.2d 891, 892 (Ind. 1996). Thus, there may not be enough facts known at the time of the claim to determine indemnity obligations, but there probably are enough to determine whether defense obligations have been triggered.

It is important to work with the insurer during its investigation of the claim. Most policies have a "duty to cooperate." Furnish information in a timely manner, but keep a record of what you do. This may be important later. Failure to cooperate can lead to a denial of coverage.

Construing the policy terms

Insurance coverage is a specialized field of law. The manner in which courts interpret policies varies greatly from state to state—some are very policyholder-friendly, others are insurance industry-friendly. Insurance coverage law itself is dynamic. Insurers draft the policies. Policyholders argue the policy language should be read broadly. When enough policyholders convince courts that the broad interpretation is correct, the insurance industry sometimes redrafts certain policy language, and the cycle begins again. This cycle will never end, because a policy can never anticipate every conceivable type of loss. If it could, there would be no need for insurance. Insurance coverage law is a constantly evolving landscape. It pays to have competent insurance coverage counsel. Nevertheless, even if it is not your area of expertise, there are certain universal coverage rules to remember when representing your agricultural client's interest to the insurer.

Begin by construing policy terms with their plain and ordinary meaning. Read the policies. Do not assume that the insurer, agent, or broker's interpretation of policy language is correct. Courts often begin their interpretation of insurance policies with a recitation of "general rules of contract construction." *Valmont Steel, Inc. v. Commercial Union Ins. Co.*, 2004 WL 238344 (5th Cir. 2004). Thus, a court will attempt to effectuate the intent of the parties. It will consider the policy as a whole, and will try to give each provision effect and meaning. Finally, it will give those unambiguous policy terms their plain, ordinary, and popular meaning.

However, this law school contract interpretation approach is limited in its usefulness. Insurance policies are often not the product of an arms-length transaction. Policies are form documents that are modified with various endorsements and exclusions, but the overriding language is the same for policyholder A, B, or C. As one court explained, "the insurer drafts the policy and foists its terms upon the customer. The insurance companies write the policies; we buy their forms or we do not buy insurance." *American Econ. Ins. Co. v. Liggett*, 426 N.E.2d 136, 142 (Ind. Ct. App. 1981).

When the plain meaning is not clear, ambiguities exist in the policy terms. "Ambiguity" is a term of art used in insurance policy construction. Generally, if a term in a policy is subject to more than one reasonable interpretation, it is "ambiguous" as a matter of law. *See, e.g., Bosecker v. Westfield Ins. Co.*, 724 N.E.2d 241, 244 (Ind. 2000). Courts in different states, however, use different methods for resolving these ambiguities. Some states allow parties to submit extrinsic evidence as proof of the parties' intent. *See, e.g., Beale v. American Nat. Laywers Ins. Reciprocal*, 2004 WL 306092 (Md. 2004). Such extrinsic evidence may be custom or usage as understood by the insurance industry.

Other states take a more policyholder-friendly approach. In these states, if there are two reasonable interpretations, the interpretation that favors coverage prevails. *See, e.g., American States Ins. Co. v. Kiger*, 622 N.E.2d 945, 947 (Ind. 1996). Stated simply, ambiguous terms in policies should be construed in favor of coverage. This rule builds upon the common law contract doctrine of *contra proferentem*, which means "against the offeror." It follows the theory that contracts should be construed against the party that drafted them because it had the upper hand when negotiating. In no situation is this more true than in insurance policies. This *contra proferentem* treatment is applied with particular force to policy exclusions. In these states, if the insurer wants to exclude coverage, it must do so explicitly. *See, e.g,. Kiger*, 622 N.E.2d at 949 (holding that "gasoline" was not an excluded "pollutant" under a filling station policy).

This issue arose in a dairy farm case. The client was sued by the state environmental agency for alleged manure run-off into state waters. The claim was tendered to his insurer under his first and third party liability policy. His insurer initially denied coverage pursuant to a policy provision that excluded coverage for losses "arising out of the actual, alleged or threatened discharge, seepage, migration, dispersal, release or escape of 'pollutants'" (a so-called "pollution exclusion"). "Pollutants" was a policy-defined term: "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned, or reclaimed." In short, the claim was denied because "manure" was considered a "pollutant," and the policy excluded coverage for pollution causing losses. Lawyers for the dairy farm argued that whether "pollutants" included "manure" was ambiguous. It was not obvious from the plain and ordinary meaning, as "manure" was not a listed pollutant. Although one could argue that manure is a "gaseous irritant," or "waste," or that its constituents are "chemicals," one could equally argue that manure is not waste, but a natural beneficial sub-

Cont. on page 6

Insurance/Cont. from page 5
stance, a fertilizer. Indeed, many agricultural crop producers likely view manure in this positive way. The policy also contained a separate exclusion for the losses arising from the application "liquid fertilizer," if done for hire. This exclusion would be surplusage if the general "pollution exclusion" already applied to manure. Thus, whether "pollutants" included "manure" was subject to more than one reasonable interpretation. In Indiana, under which this policy's terms were construed, the construction that favors coverage governs. Moreover, because the definition of "pollutants" is so broad, encompassing nearly any substance, it is overbroad and unenforceable, since applied literally it would provide no coverage at all *Kiger*, 622 N.E.2d at 948.

If there is no state court opinion interpreting the policy provisions at issue, *use other jurisdictions for guidance.* Insurance is generally a state law matter, but your state court will likely not have interpreted every policy term you encounter. Insurance policies are similar across state boundaries because of standardization. Many policies follow the Insurance Service Office's (ISO) standard form policies. Thus, a commercial general liability policy from Alpha Insurance Company of Arkansas may be *identical* to one from Kappa Insurance Company of Kansas. If there is a split in authority in other jurisdictions, that can be evidence that that term is ambiguous. After all, courts are generally thought of as reasonable persons. *See Hartford Accident & Indemnity Co., et al. v. Dana Corporation*, 690 N.E.2d 285, 295 (Ind. App. 1997).

Hold insurers to their duty of good faith. Most states have recognized, whether judicially or by statute, that insurers owe their policyholders a duty of good faith. *See Erie Ins. Co. v. Hickman*, 622 N.E.2d 525, 519 (Ind. 1993). In these states, a breach of this duty gives rise to an independent cause of action, referred to as "bad faith." Such a breach may occur if the insurer makes an unfounded refusal to pay policy proceeds, causes an unfounded delay in making payment, deceives the policyholder, or exercises an unfair advantage to pressure the insured into a settlement. In short, your client's interests are entitled to consideration.

Do not forget public policy arguments. Judges are human, in many cases elected, and they purchase insurance too. Check to see how much your client spent on premiums. The fact that your client paid $10,000 in annual policy premiums and has never had a claim in ten years makes a compelling argument. Was it reasonable for your client to expect that his loss would be covered? In the case of the dairy farmer, surprisingly his "Pollution Liability" policy did not cover alleged claims arising from manure. If not manure, what other "pollution" would a dairy farmer be concerned with? In the *Kiger* case illustrated above, the insurer argued that environmental claims arising from the accidental leakage of gasoline were not covered under a gas station's "garage policy." The Indiana Supreme stated: "That an insurance company would sell a 'garage policy' to a gas station when that policy specifically excluded the major source of potential liability is, to say the least, strange.... We are particularly troubled by the interpretation advanced by [the insurer], as it makes it appear that the [policyholder] was sold a policy that provided no coverage for a large segment of the gas station's business operations." *Kiger*, 622 N.E.2d at 948-49. This type of "illusory coverage" can be a persuasive argument in favor of coverage.

Finally, *be prepared to litigate.* Your efforts to persuade your client's insurer may ultimately be unsuccessful. Learn the law, and if it is on your side, be ready to file a declaratory judgment action. Issues of coverage are typically matters of policy construction, and thus purely legal issues. They can be settled on summary judgment without an exhaustive and expensive discovery period.

Conclusion

Finding insurance coverage for a client can make or break the farm. This is especially true for agricultural businesses, where high cost inputs are used to generate profits on very tight margins. At a settlement meeting between the dairy farmer and state officials, one of the state's attorneys commented to counsel for the dairy farmer after the meeting: "We know your client needs to resolve this matter because we understand that the tight margins involved in farming make it hard for your farmer to continue to litigate." He was right. A typical farmer probably can not afford to fairly litigate against a state agency. But he was also wrong. He was forgetting, or perhaps overlooking, that one protection the client purchased to protect his interests—insurance. Your job is to help you client utilize his coverage to its utmost.

Country of origin labeling/Cont. from page 2
ever, AMS has determined that, in general, the programs do not provide a suitable model on which to base federal regulation.[4]

Agriculture Secretary Ann Veneman backs the delay in order to give additional time and information for addressing the concerns of Congress with the legislation. Trade associations that fought COOL will promote a voluntary program that they believe will benefit consumers, producers, and processors who desire to participate. Groups supporting COOL such as the National Farmer's Union continue their fight to show Congress that consumers want this information and that U.S. farmers will benefit from the consumers' preference for U.S. labeled foods.

With all that has happened in the U.S. food industry over the past few months, the debate over COOL has been overshadowed by concerns about BSE, avian flu, and funding for the prevention of bioterrorism and detection of disease. The decision to delay indicates that opponents have effectively convinced Congress that the cost burdens that come with COOL are not welcome in a currently suffering industry without a more in-depth look at the effectiveness and efficiency of this law.

[1] 7 C.F.R. 61945 (2003).

[2] Produce Survey: 2002 Fresh Trends, Vance Publishing Meats Survey (1999) Worthlin Worldwide.

[3] 7 U.S.C §499.

[4] 7 C.F.R. 61950 (2003).

— Phyllis J. Marquitz, Dickinson School of Law of the Pennsylvania State University, Carlisle, PA

Arbitration/continued from page 3
tion agreement unenforceable.
Id. (citation omitted).

The dissent reached the conclusion that the language contained in paragraph eleven does not violate the requirement of mutuality of obligation. *See id.* Noting that the majority misunderstood the nature of the contract at issue, the dissent explained that "Tyson is not only worried about whether the producer will carry out his or her duties as agreed under the contract, which might well give rise to a disagreement submitted to arbitration, but Tyson is also rightly concerned about its investment in the hogs while claims subject to arbitration are resolved." *Id.* The dissent stated that the language of paragraph eleven is designed to permit Tyson "to protect its property by injunction or such other court action as may be necessary, and which would be outside the realm of an arbitrator's power." *Id.*

—Harrison M. Pittman, Staff Attorney, National AgLaw Center

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Jury verdict in favor of cattle ranchers

On February 17, 2004, a federal jury in Alabama reached its decision in the case of *Picket v. Tyson Fresh Meats*, No. 96-A-1103-N (D. Ala. Jury verdict filed Feb. 17, 2004) finding that Tyson's cattle procurement methods manipulated cash prices downward between February 1, 1994 and October 31, 2002. The jury calculated that the plaintiffs should receive $1.28 billion in damages. At issue in this class action lawsuit was whether the use of captive supply cattle contracts illegally depressed cattle prices in violation of the Packers and Stockyard Act, 7 U.S.C. §§ 181-229. The lawsuit was originally filed in 1996 against IBP, Inc., then the country's largest meatpacker. Tyson acquired IBP in 2001.

In the past, ranchers primarily sold their cattle on the open market, and slaughterhouses bought them as needed. In recent years, however, the increasingly concentrated meat packing industry has turned to the use of contracts with large-scale ranchers and major feedlots in order to gain control of the supply of cattle that it will need for future slaughter. From the meat packers perspective, these "captive supply contracts" guarantee a steady supply of cattle that are consistent in quality. Some producers have favored this contracting arrangement as a way to assure a market for their cattle at a more or less fixed price. Critics, however, question its overall impact on pricing and argue that it disadvantages smaller-scale independent producers. In the *Picket* case, the plaintiffs successfully argued that the extensive use of such a contracting system depresses the open market and gives meat packers an unfair advantage in setting prices.

In reaching its verdict, the jury unanimously found that the plaintiffs established each of the following statements by a preponderance of the evidence:

1) That there is a nationwide market for fed cattle;

2) That the defendant's use of captive supply had an anticompetitve effect on the cash market for fed cattle;

3) That the defendant lacked a legitimate business reason or competitive justification for using captive supply;

4) That the defendant's use of captive supply proximately caused the cash market price to be lower than it otherwise would have been; and,

5) That the defendant's use of captive supply injured each and every member of plaintiff's class.

Picket v. Tyson Fresh Meats, No. 96-A-1103-N (D. Ala. Jury verdict filed Feb. 17, 2004).

Tyson has asked the trial judge to overturn the decision and expressed confidence that an appeals court will reverse the verdict if that effort fails. Tyson Press Release, available at http://www.tysonfoodsinc.com/corporate/news/viewNews.asp?article=1389

Meanwhile, the second half of the *Picket* case to determine limits on packer behavior in purchasing cattle will be argued later this year. Two other class action suits filed in Alabama by ranchers against two of the other large meat packers, Excel and Swift are pending.

Additional information about the Picket case can be found on the official court website at http://endcaptivesupply.lawoffice.com/courtpapers.html

Information about the Packers and Stockyards Act can be found in the Packers and Stockyards Act "Reading Room" on the website of the National Center for Agricultural Law Research and Information, at http://nationalaglawcenter.org/readingrooms/packersandstockyards/

—Susan A. Schneider, Associate Professor and Director Graduate Program in Agricultural Law, University of Arkansas School of Law

Association News and Announcements

Membership Recruitment

Special thanks to our AALA Membership Committee. They have launched an impressive membership recruitment drive and hope to have a new AALA membership brochure available later this Spring. We are all grateful for their hard work, enthusiasm, and excellent recruiting ideas. Maureen Kelly Moseman serves as Chair of this Committee. Members are Peggy Hall, Jeff Feirick, Mark Thornburg, Charley Sullivan, Michael Roberts, and Jon Lauck. Larry Gearhardt serves as Board Liaison, and Anne Hazlett provides helpful consultation. Membership is the heart of the AALA, and this committee reflects the true dedication of our members.
Thanks.

New member benefit

Recently the "Members Only" section was activated on the AALA Web site (http://www.aglaw-assn.org/). Members visiting this section can access past issues of the *Agricultural Law Update* and can search the new membership directory by last name, state of residency, state where a member has a license, and specialties identified by each member. Contact information, including an e-mail address, is available for most members.

The "Members Only" section can be accessed by clicking on the "members only" button at the top of the home page. You will be asked to identify your user name and password. Your user name is your last name. Your password is the identification number assigned to your membership. This number should be found on the letter you received from the AALA acknowledging your 2005 membership payment. If you renewed at the conference, before the new system was set up, you may not have received this information. Please contact our administrative office to find out your membership identification number. Call 515-956-4255 or email gretchen@aaea.org.

—Susan A. Schneider, Associate Professor and Director, Graduate Program in Agricultural Law, sschneid@comp.uark.edu

Accepting Applications for Admissions / Fellowships

The Graduate Program in Agricultural Law at the University of Arkansas School of Law is now accepting applications for admission and fellowship opportunities. This program offers the nation's only advanced LL.M. degree in agricultural law through a nine month course of study. For more information about the Graduate Program in Agricultural Law, visit the website at http://law.uark.edu/llm/, e-mail us for information at llm@uark.edu or call 479-575-3706.

AALA Conference Reminder

The 2004 AALA Annual Educational Symposium will be held at the Hotel Fort Des Moines, in Des Moines, Iowa, October 1-2, 2004. President-elect Bill Bridgforth is putting together an excellent program that will highlight the critical information needed by attorneys who practice agricultural law. Please reserve these dates and help us to spread the word about this excellent continuing legal education opportunity.