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Agricultural legal research on the Internet

The Internet provides legal researchers with an enormous amount of information about agricultural law to sift through. This paper provides a starting point for conducting agricultural law research. The sites listed are current only to the date of this paper (May, 2000). This list is not exhaustive. For example*, The Farmer's Guide to the Internet,* has over 2000 web sites and constantly changes every day.

The Agricultural Law Research and Education Center cannot and will not vouch for the accuracy of the information presented in these sites. After compiling research from the Internet, a researcher must verify the accuracy of the information gathered.

Agricultural employment

USDA Coordinator of Agricultural Labor Affairs

http://www.usda.gov/oce/oce/labor-affairs/

This site provides information about USDA policy and program objectives with respect to agricultural labor. Specific areas of concern include immigration, the H-2A Temporary Agricultural Worker Program, Worker Protection Standards for pesticide use, agricultural labor supply, and farm worker employment.

Agricultural Personnel Management Program

http://are.Berkeley.EDU/APMP/

This site provides information on farm labor management and related issues for practitioners, educators, service providers, students, and researchers.

Agricultural law and policy

American Agricultural Law Association (AALA)

http://www.aglaw-assn.org/

The AALA is the only national professional organization focusing on the legal needs of the agricultural community. This site contains an Agricultural Law Bibliography with forty-eight categories. The entries in the bibliography are primarily law review articles, but the bibliography does contain citations to some books, reports, and articles from journals other than law reviews.

American Farmland Trust (AFT)

http://www.farmlandinfo.org/

The AFT site includes farmland protection fact sheets, full-text literature, laws, maps, statistics and more resources.

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Nebraska Supreme Court rules in Progress Pig case

Article 8 §12 of the Nebraska constitution establishes several requirements for corporations to legally qualify as family farm or ranch corporations. Under one provision, a majority of the family farm or ranch corporation's shareholders must be family members, "at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch." In *Hall v. Progress Pig Inc.*, 259 Neb. 407 (May 12, 2000) (*Progress Pig II*), the Nebraska Supreme Court ruled that where no family member resides on the farm or ranch, a family member must perform daily physical labor on the farm or ranch for the corporation to legally qualify as a family farm or ranch corporation.

Progress Pig Inc. is an Otoe County farrow-to-finish swine operation, with David Zahn the sole shareholder. Zahn, who lives on a farm three miles from the Progress Pig site, handles the operation's finance, management, and marketing and works with production consultants. The Progress Pig production manager and other employees care for the swine. Zahn was physically onsite one to three days per week.

Zahn contended that the article 8 §12 daily labor requirement included production activities in addition to physical labor, such as bookkeeping, marketing, etc. The district court judge concluded that Zahn did provide labor and management for the farming operation, but ruled that Zahn's labor was insufficient to qualify as the *daily*

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INSIDE

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

- Crop share rental arrangements and sample lease
- The Agricultural Risk Protection Act of 2000

Texas Institute of Applied Environmental Research (TIAER)

http://tiaer.tarleton.edu/

TIAER functions as a multi-disciplinary research organization. The Institute's mission is to conduct high quality investigation of environmentally related issues and problems through an open research process. The Institute then works to identify and implement workable solutions and policies which are based upon research findings. Publications are available from the web site.

Council for Agricultural Science and Technology (CAST)

http://www.cast-science.org/

The mission of CAST is to identify food and fiber, environmental, and other agricultural issues and to interpret related scientific research information for legislators, regulators, and the media for use in public policy decision making.

Agricultural law research centers

National Center for Agricultural Law Research Institute (NCALRI)

http://law.uark.edu/arklaw/aglaw/

The NCALRI conducts research and analysis and provides up-to-date information to farmers and agri-businesses, attorneys, community groups, and others confronting agricultural law issues. NCALRI attorneys disseminate information through symposia, publications, television, and radio presentations. The NCALRI maintains an agricultural law library collection and also maintains current bibliographies on specific agricultural law topics.

Penn State Agricultural Law Research and Education Center

http://www.dsl.edu/aglaw/aglaw.html

Penn State's Agricultural Law Research and Education Center is a collaboration between the University's Dickinson School of Law and College of Agricultural Sciences. The Center is funded in part by the Pennsylvania Department of Agriculture. The Center is designed to provide the highest-quality educational programs, information, and materials to those involved or interested in the agricultural industry.

Drake School of Law, Agricultural Law Center

http://www.law.drake.edu/lawCenters/agLawCenter/

Drake's Agricultural Law Center supports an array of courses, publications, conferences, and research initiatives about legal issues involving the full scope of food and agriculture, including marketing and finance; biotechnology; international trade; tax planning; soil and water conservation; land use and environmental issues; food safety; and federal farm programs.

Agricultural Loans

Farm Service Agency (FSA)

http://www.fsa.usda.gov/

FSA is part of the USDA. The FSA administers farm commodity programs; farm ownership, operating and emergency loans; conservation and environmental programs; emergency and disaster assistance; domestic and international food assistance and international export credit programs.

Agricultural search sites

Farmer's Guide to the Internet

http://www.rural.org/favorites.html

This site compiles nearly 2,000 different links to useful sites all around the Internet.

Alternative dispute resolution

Pennsylvania Community Connection

http://www.communityconnectionpa.org/

Community Connection connects citizens, leaders, and other groups in Pennsylvania communities with the information and guidance they need to communicate openly and to work together effectively in their efforts on behalf of their communities.

Udall Center for Studies in Public Policy

http://udallcenter.arizona.edu/

The Udall Center for Studies in Public Policy sponsors policy-relevant, interdisciplinary research and forums that link scholarship and education with decision making. The Center specializes in issues concerning environment, natural resources, and public lands; American Indian governance and economic development; the U.S.-Mexico border; and related topics.

Policy Consensus Initiative

http://www.agree.org/

The Policy Consensus Initiative works with leaders in states to establish and strengthen consensus building and conflict resolution.

Biotechnology

U.S. Biotechnology Regulatory Agencies

http://www.aphis.usda.gov/biotech/OECD/usregs.htm

The agencies primarily responsible for regulating biotechnology in the United States are the US Department of Agriculture (USDA), Environmental Protection Agency (EPA), and the Food and Drug Administration (FDA). Products are regulated according to their intended use, with some products being regulated under more than one agency.

Council For Biotechnology Information

http://www.whybiotech.com/

The Council for Biotechnology Information has been founded by leading biotechnology companies to create a public dialogue and share information about biotechnology that is based on objective scientific research, independent expert opinion and peer-reviewed published reports.

Nature Biotechnology Directory and Buyer's Guide Online

http://guide.nature.com/

This site is a global information resource listing over 9,000 organizations, product and service providers in the biotechnology industry.

Cooperative Extension Service

USDA Cooperative Extension Service

http://www.reeusda.gov/statepartners/usa.htm

This site hosts the directory of land-grant universities which are state partners of the Cooperative State Research, Education, and Extension Service. Also included is the CSREES Online Directory of Professional Workers in Agriculture, the State Extension Service Directors and Administrators Directory as well as links to the web sites of the schools of forestry, higher education, human sciences, veterinary science, and state extension experiment stations.

Journal of Extension (JOE)

http://www.joe.org/

JOE is an all electronic journal available on the Internet. The Journal is the peer reviewed publication of the Cooperative Extension System. It seeks to expand and update the research and knowledge base for Extension professionals and other adult educators to improve their effectiveness.

Farm Bureau

American Farm Bureau (ABF)

http://www.fb.org/

As the national voice of agriculture, AFB's mission is to work cooperatively with the member state farm bureaus to promote the image, political influence, quality of life and profitability of the nation's farm and ranch families. This site contains links to numerous agricultural sites as well as state farm bureaus.

Farmers markets

USDA Agricultural Marketing

http://www.ams.usda.gov

The Agricultural Marketing Service includes six commodity divisions-Cotton, Dairy, Fruit and Vegetable, Livestock and Seed, Poultry, and Tobacco. The divisions employ specialists, who provide standardization, grading and market news services for those commodities. They enforce such Federal laws as the Perishable Agricultural Commodities Act and the Federal Seed Act.

Rooster.com

http://www.rooster.com/

Rooster.com is an independent, online marketplace where producers can market their crops and buy their seed, fertilizer, crop protection products, equipment and other supplies.

Federal environmental

U.S. Environmental Protection Agency

http://www.epa.gov/

EPA National Agriculture Compliance Assistance Center

http://www.epa.gov/oeca/ag

The National Agriculture Compliance Assistance Center is the "first stop" for information about environmental requirements that affect the agricultural community. The EPA with the support of the USDA created the Ag Center.

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EPA TMDL

http://www.epa.gov/owow/tmdl/index.html

The primary mission of the TMDL program is to protect public health and ensure healthy watersheds by assuring that waterbodies are meeting water quality standards. This site provides specific data on the TMDL program.

EPA Animal Feeding Operations (AFO)

http://www.epa.gov/owm/afo.htm

The Office of Wastewater Management has several fact sheets available with information on water quality concerns from AFOs and NPDES regulations concerning horse, beef cattle, dairy cattle, poultry, swine, and sheep feeding operations.

EPA's Enviro Sense

http://es.epa.gov

As part of the U.S. EPA's web site, this site provides a single repository for pollution prevention, compliance assurance, and enforcement information and databases. Our search engine searches multiple web sites (inside and outside the EPA), and offers assistance in preparing a search.

USDA Natural Resources Conservation Service

http://www.nrcs.usda.gov

The Natural Resources Conservation Service is a federal agency that works in partnership with the American people to conserve and sustain our natural resources.

National Association of Conservation Districts (NACD

http://www.nacdnet.org/

NACD develops national conservation policies, influences lawmakers and builds partnerships with other agencies and organizations. NACD also provides services to its districts to help them share ideas in order to better serve their local communities.

Federal government

U.S. Senate Committee on Agriculture, Nutrition, and Forestry

http://agriculture.senate.gov/

U.S. House Committee on Agriculture

http://agriculture.house.gov/

U.S. Department of Agriculture

http://www.usda.gov

Immigration and Naturalization Service

http://www.ins.usdoj.gov/

U.S. Department of Labor

http://www.dol.gov/

U.S. Food and Drug Administration

http://www.fda.gov/

Internal Revenue Service

http://www.irs.ustreas.gov/

Federal government publications

Legislative Information on the Internet (THOMAS)

http://thomas.loc.gov/home/

Code of Federal Register, and Federal Register

www.access.gpo.gov/nara/index.html

Legal research

American Law Sources on Line (ALSO)

http://www.lawsource.com/also/

ALSO provides a comprehensive, uniform, and useful compilation of links to all on-line sources of American law that are available without charge. This site contains additional links to sources of commentary and practice aids that are available without charge (or available at a reasonable charge from governmental and nonprofit providers).

Hieros Gamos

http://www.hg.org/

Billed as the largest comprehensive legal site with over 54,000 links to US federal and state law, legal organizations and every government in the world. Also includes links in over 200 practice areas, 300+ discussion groups, and 50 doing business guides.

Libraries

Library of Congress

http://www.loc.gov/

Penn State University Library

http://www.libraries.psu.edu/

National Agricultural Library (NAL)

http://www.nalusda.gov

The NAL is one of the world's largest and most accessible agricultural research libraries and plays a vital role in supporting research, education, and applied agriculture.

Livestock

Breeds of Livestock

http://www.ansi.okstate.edu/BREEDS/

This site provides a fascinating overview of the breeds of cattle, house, swine, sheep and other species.

Organic

National Organic Program

http://www.ams.usda.gov/nop/

The mission of the National Organic Program is to develop and implement national standards that govern the marketing of agricultural products as organically produced, to facilitate commerce in fresh and processed food that is organically produced, and to ensure consumers that such products meet consistent standards.

Pennsylvania State Government

State of Pennsylvania Homepage

http://www.state.pa.us/

Pennsylvania Department of Agriculture

http://www.pda.state.pa.us/

Pennsylvania Association of Township Supervisors

http://www.psats.org/

Pennsylvania Association of Conservation Districts

http://www.pacd.org/

Pennsylvania Code Web Site

http://www.pacode.com

Pennsylvania Bulletin Web Site

http://www.pabulletin.com

Pennsylvania Environmental

Pennsylvania Department of Environmental Protection

http://www.dep.state.pa.us

Pennsylvania Department of Conservation and Natural Resources

http://www.dcnr.state.pa.us

Pennsylvania Enviro Help

http://www.pa-envirohelp.org

The ENVIROHELP program was established by the Pennsylvania Department of Environmental Protection to assist small businesses with understanding and complying with local, state and federal environmental regulations.

The Pennsylvania State University

Penn State University Home Page

http://www.psu.edu

Penn State College of Agricultural Sciences

http://www.cas.psu.edu/

Pesticide Information

Extoxnet Pesticide Info Profiles

http://ace.orst.edu/info/extoxnet/pips/ghindex.html

Pesticide Information Profiles (PIPs) are documents which provide specific pesticide information relating to health and environmental effects. PIPs are not based on an exhaustive literature search. The information does not in any way replace or supersede the information on the pesticide product labeling or other regulatory requirements.

American Crop Protection Association

http://www.acpa.org/

ACPA is the not-for-profit trade organization representing the major manufacturers, formulators and distributors of crop protection and pest control products, including biotechnology products with crop production and protection characteristics.

United Nations agriculture

Food and Agricultural Organization of The United Nations

http://www.fao.org/

FAO is active in land and water development, plant and animal production, forestry, and fisheries, economic and social policy, investment, nutrition, food standards and commodities and trade. It also plays a major role in dealing with food and agricultural emergencies.

The purpose of this publication is to help you understand more about agricultural legal research. The material is general and educational in nature. It is not intended to be legal advice. If you need legal advice, contact an agricultural law attorney in your area.

—Jeff Feirick, The Agricultural Law Research and Education Center, The Dickinson School of Law

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Progress Pig/Cont. from p. 1

labor and management required by article 8 §12. Judge Reagan stated:

> It is my opinion that the drafters of this Initiative intended that the words "day to day" be directed to the particular [agricultural] product involved. "Day to day" labor in this context must be seen as respecting the output or product of the farm. When the product is pigs or cattle, the expectation is that one would need to be involved on an everyday basis. If the product were grain, for example, "day to day" [labor] would encompass the various stages of [planting], fertilizing, and harvesting, which might not have to be addressed on an everyday basis.

The supreme court ruled that Zahn's activities were primarily management, and that he provided only minimal physical labor (less than one hour per month). The court ruled that Zahn did not provide the daily labor required for non-resident corporate owners by article 8 §12.

Under article 8 §12, Zahn will have to begin providing daily physical labor at the swine facility, sell the corporation

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New Generation farmer cooperatives

By Christopher R. Kelley

Farmer cooperatives have long been a part of the agricultural economy. As mutual self-help enterprises, farmer cooperatives provide economic benefits to their farmer-members. Most are organized as corporations, but they operate differently from ordinary business corporations. Cooperatives operate "at cost" in the sense that their net earnings are distributed to their members on a patronage basis.[1] Instead of receiving returns based on their investment in the enterprise, as is the case with ordinary business corporations, members of a cooperative benefit from their use of the cooperative. Also, cooperatives are democratically controlled; most operate on a one-member, one-vote basis. Voting power is not determined by the number of voting shares owned, as is the case with ordinary corporations. Finally, most cooperatives are primarily member-financed. Unlike ordinary business corporations, the members of a cooperative provide most of the cooperative's equity, not outside investors.

Farmer cooperatives are often categorized by the functions they perform. Supply cooperatives provide the inputs farmers need, such as seed, chemicals, and fuel. Marketing cooperatives sell the products of their members. Service cooperatives provide various services, ranging from custom chemical application to financial planning. Bargaining cooperatives bargain on behalf of their members for the sale of their products. Increasingly, individual cooperatives have become "multiple-service" cooperatives by providing several of these functions.

The cooperative elevator or gin that stands as a predominant landmark in many farm communities is often viewed as emblematic of the "traditional" marketing cooperative. Though some traditional marketing cooperatives process raw agricultural products into a higher valued product, most do not. Instead, they market the raw agricultural products of their members. Except for the cleaning or conditioning that may be required to place the raw product on the market, these cooperatives market the product in essentially the same form in which it was delivered. Any subsequent processing or conversion of the product into a higher-valued product, such as into food, is done by a subsequent purchaser, not the marketing cooperative.

Traditional marketing cooperatives continue to provide valuable benefits to their members. Nevertheless, they are not generating the interest or enthusiasm that a "new wave" of cooperatives is producing. Instead, the so-called "New Generation" cooperatives are the cooperatives that are producing "co-op fever" among farmers and rural development advocates in some parts of the country.[2]

Although it may be a close relative to the traditional marketing cooperative, the New Generation cooperative is markedly different in several respects. This article is intended to provide an introduction to the New Generation cooperative, including the features that distinguish it from the traditional farmer marketing cooperative. As an introduction, this article does not address the myriad legal issues that the organization and operation of a New Generation cooperative can present. Some of these issues, such as whether stock in a New Generation cooperative is a "security" under the federal securities laws, have yet to be resolved definitively. In keeping with its modest goal, this article will confine itself to the framework of a type of cooperative that may, over time, significantly alter the economic and legal landscape of farmer cooperatives.

"New Generation" is a name that has been given collectively to a number of farmer cooperatives formed in the last decade or so, mostly in the Upper Midwest. As the term "New Generation" is used in this article, a New Generation farmer cooperative is a "value-added" cooperative that processes or otherwise converts the raw agricultural products of its members into one or more higher-valued products. For example, one of the early and best known New Generation cooperatives is the Dakota Growers Pasta Company based in Carrington, North Dakota. The Dakota Growers Pasta Company converts durum wheat into pasta products, including products bearing its own label. Formed in 1991, it had become the second largest pasta maker in the United States by 1998.[3]

Though many of the New Generation farmer cooperatives process field crops, such as wheat, soybeans, or corn, into higher-valued products, some handle livestock. For example, another North Dakota New Generation cooperative, the North American Bison Cooperative, processes and markets bison meat. Formed in 1992, its members raised $1.6 million to construct a new processing plant in New Rockford, North Dakota. "Live bison go in one side of the plant, and white packages of neatly trimmed buffalo meat come out the other."[4] In Minnesota and elsewhere, corn farmers have formed cooperatives that raise and market hogs, with the hogs consuming corn produced by the cooperatives' members.[5]

The basic premise for the formation of New Generation cooperatives is that farmers should position themselves to "capture" or realize the increases in value that occur in converting a raw agricultural product into a further processed product.[6] In other words, their formation is motivated by "the desire to develop new value-added products and to gain access to an increased share of the consumers' food dollar."[7] To the extent that they are successful, therefore, these cooperatives can increase the wealth of their members. They also have the potential for adding wealth to the communities in which they are located by creating new employment opportunities in their facilities. In sum, New Generation cooperatives are commonly viewed as instrumental in rural development.[8]

Numerous New Generation cooperatives are operating or are in the planning stage.[9] In North Dakota, for example, where a substantial number of New Generation cooperatives are located, sixty-seven cooperatives were formed from 1990 through 1997. This averages to 8.3 cooperatives per year. Though not all of these cooperatives were "value-added" cooperatives, twenty-six of the sixty-seven new cooperatives add value to raw agricultural products.[10]

William Patrie, an economic development specialist, has been a leader in the formation of New Generation cooperatives in North Dakota. Patrie's work with farmer "value-added" cooperatives earned him the title of "the man who helped spark co-op fever in the Northern Plains."[11]

Patrie has identified several features that distinguish New Generation farmer cooperatives from traditional farmer cooperatives, such as supply and marketing cooperatives. The first of these features is that New Generation cooperatives effectively limit the number of persons who may become members in the cooperative. This feature has resulted in New Generation cooperatives being described as "closed cooperatives" as distinguished from "open cooperatives."

Patrie places traditional supply and marketing cooperatives in the category of "open cooperatives," a reference to the willingness of most farmer supply and marketing cooperatives to admit any qualified person to membership without imposing a limit on the total number of members.[12] New Generation farmer cooperatives, on the other hand, typically effectively limit the number of members who may join the cooperative. As more

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fully explained below, they do this by tying membership to the right to deliver to the cooperative the commodity processed by the cooperative. Since the cooperative's processing facilities have a capacity limit, delivery rights are limited. Once sufficient quantities of the commodity are "lined-up" by the cooperative through the allocation of delivery rights, no more delivery rights are available. The result is a limit on the number of members who may join the cooperative. It is this limit that causes New Generation farmer cooperatives to be characterized as "closed cooperatives."

In addition to being "closed cooperatives," New Generation cooperatives, according to Patrie, are distinguished by the following features:

- Equity investment is required prior to establishing delivery rights.
- Producer agreements between the cooperative and the producer link delivery of products to equity units purchased. Total delivery rights make equal processing capacity for sale.
- Purchase of commodities is authorized by the cooperative for undelivered contracts.
- The transferability of equity feature means that shares can be sold to other eligible producers at prices agreed to by the buyers and sellers. Equity shares appreciate or depreciate in value based on the earnings potential they represent. Although the cooperative's board of directors doesn't set prices, they must approve all stock transfers so that shares do not get into the hands of ineligible persons.
- High levels of cash patronage refunds are issued annually to the producer. Since equity is achieved in advance of business startup, a majority of the net can be returned annually to producers in cash.[13]

An examination of each of these distinguishing features as identified by Patrie reveals how New Generation farmer cooperatives are typically organized and operated.

Equity investment

Though most cooperatives rely on member equity for most of their capital needs, the distinctive feature identified by Patrie–the requirement of an equity investment prior to establishing delivery rights–is largely driven by the substantial costs of establishing a value-added cooperative. Specifically, the primary purpose of requiring prospective members to make an equity investment before granting them delivery rights is to provide the cooperative with the necessary membership "start-up" capital early in the organizational process. This requirement also serves the secondary purpose of providing a measure of prospective member interest in the cooperative, for subscriptions to delivery rights are the most meaningful indication of interest in the cooperative from persons eligible to join it.

Any cooperative requires capital for its establishment and operation, and New Generation cooperatives are no exception. In fact, the capital needs of a New Generation cooperative can be substantial. Much of the cost of establishing a New Generation cooperative is attributable to the cost of leasing, purchasing, or constructing a processing facility and outfitting it with the necessary equipment.

Even the process of organizing a New Generation cooperative can entail substantial expenditures. A cooperative that intends to process raw agricultural products into value-added consumer products will likely face competition from businesses already established in the contemplated market. For this reason, engaging the services of consultants for the preparation of a feasibility study is usually necessary. This study and the business plan that emanates from it add to the organizational costs that are ordinarily incident to the formation of a cooperative. The organizational budget for the Dakota Growers Pasta Company, for example, was $300,000.[14]

The more substantial costs, however, are the capital expenditures required for the construction, purchase, or lease of a processing facility. Again using Dakota Growers as an example, its organizers contemplated a state-of-the-art facility,[15] and they set an equity goal for the capitalization of its pasta plant at $12.5 million.[16]

The feature of requiring an equity investment prior to establishing delivery rights is distinctive because traditional farmer supply and marketing cooperatives usually do not sell the right to patronize the cooperative in units. A traditional marketing cooperative, for example, typically permits a farmer to market his agricultural products through the cooperative for the payment of a membership fee or the acquisition of one share of membership stock. In most instances, the amount of this fee or the price of the share of membership stock is nominal. Once a farmer pays the fee or buys the share, he or she can market through the cooperative any amount of his or her products without making any other "up-front" investment. While other investments may be made, they usually will take the form of retained patronage refunds or per-unit retains.[17]

New Generation cooperatives, on the other hand, essentially sell the right to patronize the cooperative in units at a price that represents an "up-front" investment in the cooperative. These units are "delivery rights." Since delivery rights are usually measured in terms of units of production, such as bushels or acres, each delivery right represents the right to patronize the cooperative to the extent of that unit. Therefore, to use a shorthand phrase, delivery rights constitute "units of participation" in the cooperative. A member of a New Generation cooperative can only patronize the cooperative by holding one or more units of participation and then only to the extent of the number of units of participation which the member holds.

A common method used by New Generation cooperatives to establish delivery rights is to link them to a class of stock in the cooperative. For example, a cooperative might establish two classes of common stock, Class A and Class B. Class A common stock is deemed to be membership stock. Each qualified person who desires to be a cooperative member is required to purchase one share of Class A stock. No delivery rights are attached to Class A stock, however. Instead, delivery rights are attached to Class B stock.

Attaching delivery rights to stock, Class B stock in this example, is commonly accomplished by the cooperative's articles or bylaws, often supplemented by a "members' agreement," specifying that each share of the stock entitles its holder to deliver to the cooperative a specified amount of commodity to the cooperative which will generate a large sum for the cooperative, particularly if the number of members is effectively limited by a minimum Class B "delivery rights" stock purchase requirement.

The purchase price of Class B "delivery rights" stock, on the other hand, is usually set at a sum large enough so that sale of a pre-established amount of stock will generate at least the minimum amount needed to satisfy the early capital needs of the cooperative. In other words, "[t]he initial price of each share is generally determined by taking the total amount of capital the cooperative wishes to raise for start up and dividing it by the number of units of farm product that can be absorbed by the processing facility."[18] Under this formula, it is the sale of Class B stock that provides the bulk of the member-contributed equity.[19] Class B stock or its equivalent, therefore, is sometimes denominated by the cooperative as "equity stock."

By requiring an equity investment before granting delivery rights, the goal of the cooperative is to raise the large amount of capital that is usually required to begin operation.[20] If enough farmers with sufficient financial resources to make the investment believe that the investment will be sound, the goal is usually met. At the same time, the cooperative seeks to ensure that at least some, if not most, of the capitalization of the cooperative is provided by those who

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will use the cooperative. This goal is a reflection of the "user-financing" cooperative principle. Moreover, this method aligns investment with anticipated patronage. Once the cooperative begins operation it is "an example of a very strict base capital plan in that a member's patronage and a member's equity are always equal."[21]

Producer agreements

The next item in Patrie's listing of the distinguishing features of New Generation cooperatives is that "[p]roducer agreements between the cooperative and the producer link delivery of products to equity units purchased."[22] In other words, the linkage between the right to deliver and equity is created by agreements between the members and the cooperative. These agreements, however, typically do more than create this linkage. Perhaps most significant, they also tie the right to deliver the product to the obligation to deliver the product according to a schedule established by the cooperative. In addition, they may also specify the price or the formula for calculating the price that the member will receive for the product when it is delivered.

Delivery rights are used by the cooperative to "line up," on an annual basis, a sufficient amount of the commodity that the cooperative processes. The cooperative also needs to ensure that the commodity will be available when it is needed. Accordingly, New Generation cooperatives usually require their members to sign uniform "producer agreements" or "members' agreements" that obligate each member to deliver the commodity covered by their respective shares of "delivery rights" stock.

Most New Generation cooperatives do not own, lease, or otherwise have access to sufficient space to store the total amount of the commodity harvested by its members. Therefore, these uniform producer or member agreements typically provide that deliveries are to be made in accordance with a delivery schedule established by the cooperative. Usually these schedules require each member to make delivery in one or more installments.

The producer or member agreements of many New Generation cooperatives provide that the members will receive a payment upon delivery of the commodity to the cooperative. This payment is often based on a percentage of the current local market price for the commodity, although some cooperatives pay the current market price at the time of the delivery.[23]

These agreements are usually for a term of years. Accordingly, they represent long-term commitments by both parties. While it is not unprecedented for a traditional marketing cooperative to obligate its members to patronize the cooperative, the agreements used by New Generation cooperatives typically bind the members to a greater degree than is the case with traditional marketing cooperatives, an attribute that largely flows from the delivery rights feature.

Purchase of commodities not delivered

Patrie also notes as a distinguishing attribute of New Generation cooperatives their right to purchase commodities "for undelivered contracts."[24] This attribute reflects the fact that the producers or members agreements usually provide that the cooperative has the option of purchasing any amount of the commodity that a member fails to deliver under the agreement. The member who fails to make the delivery is responsible for reimbursing the cooperative for its purchases on behalf of the defaulting member.

Producer or member agreements also commonly provide that if a member is unable to deliver the commodity because of a crop failure, the member is obligated to purchase a sufficient amount of the commodity to satisfy his or her delivery obligation. The intent of such provisions is to limit the burden on the cooperative that would result if the cooperative had to make the substitution arrangements.[25]

Transferability of equity

As his fourth distinguishing feature of New Generation cooperatives, Patrie lists the transferability of equity. "Equity," in this context, means the stock to which delivery rights are attached. In this regard, New Generation cooperatives typically permit shares of their equity stock to be transferred to other eligible farmers, subject to the approval of the board of directors. As Patrie notes, the prerequisite of the board's approval is intended to prevent equity stock from being held by persons not eligible for cooperative membership.[26] Eligibility is ordinarily limited to producers of the product processed by the cooperative.

The board does not set the transfer price. Instead, the price is set by the parties to the transaction, and the value of the stock is likely to reflect its earning potential. As to this value,

> [t]he share prices during the operation phase reflect the returns members expect to receive from the cooperative over time. In valuing the returns, members can be expected to examine the difference between the cost of producing the farm product and the revenue generated from processing this product and selling it to a further downstream market.[27]

The ability of New Generation cooperative equity stock values to appreciate or depreciate is illustrated by the experience of several of these cooperatives. Equity shares in the Dakota Growers Pasta Company were initially offered at \$3.85 each. By the end of 1998 they were selling for \$10.00 a share. When adjusted for an earlier three-for-two stock split, that price is equivalent to \$15.00 per share.[28] On the other hand, shares in Snowflake, a Minnesota cooperative, became worthless when the cooperative closed in 1998, two years after it raised \$500,000 from sixty-eight farmer members.[29] Less drastic reductions in equity stock prices occurred for several other New Generation cooperatives in the Upper Midwest.[30]

The transferability of equity stock essentially gives members a third economic benefit, though it may only be a potential benefit. The first economic benefit is the price paid for the commodity on delivery. The second is the right to receive a patronage refund. The third benefit, the benefit created by the transferability of equity stock, is the possibility of realizing a gain through the transfer of appreciated equity stock.

The transferability of equity also offers the potential for benefits to the cooperative. Specifically, the potential or the reality of appreciation in the value of equity stock "may provide an incentive for producers to not only become involved in the initial formation of the cooperative, but to also further the success of the cooperative beyond the initial expectations."[31]

This feature is a distinguishing one because the stock issued by traditional farmer supply and marketing cooperatives either is not transferable or, if it is transferable, no market exists for it because it is readily available for purchase at its par value from the cooperative. Therefore, the economic benefits flowing from such cooperatives do not include gains from the appreciation in stock value.[32]

High levels of cash patronage refunds

The final distinguishing feature of New Generation cooperatives listed by Patrie is the ability of these cooperatives to pay high levels of cash patronage refunds. This ability, according to Patrie, is attributable to the fact that New Generation cooperatives typically have established their needed equity in advance of beginning operations through the sale of equity stock.[33] Therefore, because most of their equity needs have been met, they do not have to retain significant portions of the patronage refunds paid to the members to build equity. This contrasts with the practices of most traditional farmer supply and marketing cooperatives, which rely on retained patronage refunds as their source of member equity.

The distinguishing features of New Generation cooperatives offered by Patrie are not common to all New Generation cooperatives. Nevertheless, these features illustrate the basic architecture of a New Generation cooperative. Over time, this architecture may change as New Generation cooperatives learn from their experiences and respond to external changes.

For many observers of the agricultural economy, New Generation cooperatives offer considerable promise. Some New Generation cooperative advocates see the New Generation cooperative movement as evidence that "'[f]armers are getting up off the ground'" and "'are moving up the food chain so they aren't totally dependent on commodity prices for their income.'"[34] If that vision is correct and if its implicit promise of an improved agricultural economy is realized, then attorneys who assist farmers in developing and operating New Generation cooperatives will have made a valuable contribution to rural America.

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[1] For example, if a member did 10 percent of the business done with the cooperative, that member's patronage refund would be 10 percent of the net earnings available for distribution. Subchapter T of the Internal Revenue Code, I.R.C. §§ 1381-1388, permits cooperatives to achieve single-taxation on their taxable income at either the cooperative or patron level.

[2] *See, e.g.,* Dan Campbell, *Temperature Rising: Co-op Fever is Still Sizzling Across North Dakota; But Will the First Failure Cause It To Dissipate?*, Farmer Cooperatives, Aug. 1995, at 12 [hereinafter Campbell].

[3] Des Keller & Jim Patrico, *The Boom in Value-Added Co-ops*, Progressive Farmer, Sept. 1998, at 1.

[4] Campbell, *supra* note 2, at 12.

[5] John Reilly & Bruce Reynold, *Furrow to Farrow: New Hog Technology Helps Local Cooperatives Add Value to Corn*, Farmer Cooperatives, Apr. 1994, at 4.

[6] *See, e.g.,* Dan Looker, *Unite for Success: Value-added Co-ops Help Families Capture Greater Margin in the Food Chain*, Successful Farming (Special Issue 1999) at 16.

[7] Andrea Harris et al., *New Generation Cooperatives and Cooperative Theory*, 11 J. of Cooperatives 15, 15 (1996) [hereinafter Harris et al.].

[8] *See generally* Lee Egerstrom, Make No Small Plans: A Cooperative Revival for Rural America 217-43 (1994) [hereinafter Egerstrom]..

[9] A directory of New Generation cooperatives is available at the Web site of the Illinois Institute for Rural Affairs, http://www.iira.org.

[10] William Patrie, *Creating 'Co-op Fever': A Rural Developer's Guide To Forming Cooperatives* (USDA, Rural Bus.-Coop. Serv., Serv. Rept. No. 54, July 1998) at 5 [hereinafter Patrie].

[11] William Patrie, *Fever Pitch: A First-Hand Report from the Man Who Helped Spark Co-op Fever in the Northern Plains*, Rural Cooperatives, July-Aug. 1998, at 18.

[12] *See* Patrie, *supra* note 10, at 1-2.

[13] *Id.* at 2.

[14] *Id.* at 3.

[15] Kim Zueli et al., Dakota Growers Pasta Company and the City of Carrington, North Dakota: A Case Study 14 (Mar. 1998) (unpublished manuscript, on file with the author).

[16] Patrie, *supra* note 10, at 4.

[17] Retained patronage refunds are returns to a cooperative's members from the cooperative's net earnings from business done with or for the cooperative's members that are added to the members' equity in the cooperative by the cooperative. Per-unit retains are additions to member equity in a cooperative based on the volume or value of business done with the cooperative by each member. For example, a corn marketing cooperative might deduct 10 cents per bushel from corn marketings as per-unit retain additions to capital. Unlike patronage refunds, per-unit retains are not dependent on the cooperative's net earnings.

[18] Harris et al., *supra* note 7, at 17.

[19] "In general, the [New Generation cooperatives] have followed recommendations to raise between 30 and 50 percent of their total capital requirements through the sale of delivery right shares. Remaining capital requirements are met through debt or the issue of preferred shares." *Id*. at 16.

[20] The advantages of this "up-front" approach to raising capital are several:

The generation of significant up-front equity contributions from members facilitates the involvement of [New Generation cooperatives] in capital-intensive, value-added processing activities. Up-front equity provides a significant equity base that allows the weathering of business cycles. The acquisition of debt financing is also made easier because banks are given a solid indication of producers' commitment for the project.

Id. at 19.

[21] *Id*. at 16. A "base capital plan" is an equity redemption plan that seeks to keep each member's equity in the cooperative in proportion with his or her respective patronage of the cooperative.

[22] Patrie, *supra* note 10, at 2.

[23] *See* Randall E. Torgerson et al., *Evolution of Cooperative Thought, Theory, and Purpose,* 13 J. Cooperatives 1, 13 (1998) (noting that "a few new generation cooperatives have recently learned expensive lessons by paying market prices to members on delivery to the pool, only to find that they could not afford to pay these prices based on income received from product sales").

[24] Patrie, *supra* note 10, at 2.

[25] These provisions can pose difficulties for a cooperative that seeks to qualify as tax-exempt under I.R.C. § 521 because of the limitations this section imposes on the marketing of products of non-producers. Products that are purchased after harvest do not constitute "producer products." *See generally* John E. Noakes, *Taxation of Agricultural Cooperatives in* 14 Neil E. Harl, Agricultural Law § 135.02 (1998).

[26] Patrie, *supra* note 10, at 2.

[27] Harris et al., *supra* note 7, at 17.

[28] Lon Tonneson, *Are We Rich Yet? Farmers Ride the Value-Added Investment "Roller Coaster,"* The Farmer, Jan. 1999, at 8.

[29] *Id.* at 9.

[30] *Id.* at 9-11.

[31] Harris et al., *supra* note 7, at 20.

[32] Membership stock in traditional supply and marketing cooperatives generally has not been considered to be a "security" under federal securities laws. *See, e.g.,* Jon K. Lauck & Edward S. Adams, *Farmer Cooperatives and the Federal Securities Laws: The Case for Non-Application*, 45 S.D. L. Rev. 62 (2000). Whether the same will hold for stock in New Generation cooperatives is uncertain. The SEC has declined to issue a "no action" letter pertaining to the issuance of delivery rights stock by at least one New Generation cooperative, American Crystal Sugar. *See* Kathy T. Wales, 1994 Report of the LTA Reporting Subcommittee on Capital Formation and Financial Structures of Cooperatives Including Use of Written Notices of Allocation (Nov. 15, 1994) at 12-13 (unpublished manuscript, copy on file with the author).

[33] Patrie, *supra* note 10, at 2.

[34] Egerstrom, *supra* note 8, at 220 (quoting a Minnesota cooperative general manager and president).

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within two years, or restructure the operation as a sole proprietorship or general partnership. If Zahn could prove that he had previously met the daily labor and management requirement and therefore qualified for family farm corporation status, Zahn might now qualify for the fifty-year requalification provision under article 8 §12 so long as his family retained a majority interest in the corporation.

The district court judge noted that daily labor requirements would vary depending on whether the farm were a crop operation or a livestock operation. Livestock would require daily care, while crop operations might require physical labor only seasonally (e.g., at planting or harvesting). This issue was not addressed by the Supreme Court. However, future litigation seems inevitable regarding whether a non-resident corporate owner has provided sufficient daily physical labor to qualify for family farm corporation status, particularly, for example, where an older farmer is phasing out his or her physical labor contribution to the operation.

Progress Pig II was an important victory for family farm proponents. The lawsuit was originally filed in 1993, and plaintiffs (who include leaders of Nebraska populist farm organizations) won an important procedural victory when the Nebraska Supreme Court ruled in *Hall v. Progress Pig Inc.*, 254 Neb. 150, 575 N.W.2d 369 (1998) (*Progress Pig I*) that the farmer-plaintiffs could enforce article 8 §12 under its citizen suit provision even after the county attorney had declined to bring suit. Nebraska Attorney General Stenberg earlier disqualified his office in the case as he had prepared incorporation documents for Progress Pig Inc. while in private practice prior to his election.

Progress Pig II has important implications particularly for swine production in Nebraska, where family farm corporate owners providing management and non-family employees providing the physical labor is common.

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