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INSIDE

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IN FUTURE ISSUES

Leaseback/buyback provisions

The Federal Agriculture Improvement and Reform Act of 1996 (FAIRA), Pub. L. No. 104-127, 110 Stat. 888 (1996), signed into law last April 4, 1996 made changes to the loan servicing programs available to farm borrowers with loans from the Farm Service Agency (FSA), previously the Farmers Home Administration (FmHA). One such change was the elimination of the Leaseback/Buyback Program, a preservation loan servicing option previously available to farm borrowers. FAIRA, § 638. According to a recently issued notice, the FSA has changed its interpretation of this provision as it applies to pre-acquisition applications for leaseback/buyback completed and received by FSA before April 4, 1996.

The Leaseback/Buyback Program, as it existed pre-FAIRA, provided that in most cases, farm property that was taken into FmHA inventory could be leased and/or re-purchased by the previous owner or a member of his or her family. 7 U.S.C. § 1985; 7 C.F.R. § 1951.911(a) (1996). Re-purchase or "buyback" of the property was to be at the appraised value of the property. 7 C.F.R. § 1951.911(a)(7)(ii) (1996). "Leaseback" was to be accomplished under a lease for a term of from one to five years, and the lease was to contain an option to purchase the property at appraised value at any time during the lease term. 7 C.F.R. § 1951.911(a)(6) (1996). The program further provided that leaseback/buyback agreements could be reached prior to FmHA acquiring title to the property, under "pre-acquisition" agreements. Thus, farmers in default on their loan obligations could apply for the program, have their lease or re-purchase agreement approved, then voluntarily convey the property to the government subject to the leaseback/buyback agreement. 7 C.F.R. § 1951.911(a)(5) (1996).

Section 638 of FAIRA eliminated the Leaseback/Buyback Program and provided a fast track system for the sale of property taken into inventory by the FSA. With regard to property taken into inventory prior to date of enactment, if the property is under lease, section 638 provides that "not later than 60 days after the lease expires, the Secretary shall offer to sell the property in accordance with" the sale provisions specified in the statute. In the case of property acquired prior to the date of enactment that the Secretary has not leased, "not later than 60 days after the date of enactment of this subparagraph, the Secretary shall offer to sell the property" in accordance with the sale provisions specified in the statute. With one exception applicable only to beginning farmers, "the Secretary may not lease any real property acquired under this title." FAIRA, § 638(2).

Section 663 of FAIRA sets forth the effective dates for all of the amendments contained in Title VI. In general, the amendments were effective as of the date of enactment of the bill, April 4, 1996. FAIRA, § 663(a). The effective date of several specific amendments was delayed for ninety days, but this delay period does not apply to § 638. FAIRA, § 663(b). Section 663(c), however, provided a special "transition provision" for the amendments made by section 638 and 644. It provides that "[t]he

Continued on page 2

Relief from Vermont's rbST statute

In the July 1995 *Agricultural Law Update*, a discussion of state labeling regulations for products derived from milk from cows treated with recombinant bovine somatotropin (rbST) noted that Vermont adopted mandatory labeling legislation. The Vermont statute (Vt. Stat. Ann. tit. 6, section 2752(c)(Supp. 1995)), together with accompanying rules, prescribed that if a processor cannot prove that rbST has not been used to produce milk in dairy products being sold, then the product must be labeled. Any milk that cannot be verified as rbST-free is inferred to have come from cows treated with rbST. If milk or milk products are unlabeled, it is assumed that the milk came from cows that were not treated with rbST.

Vermont's rules set forth a labeling system that allows one of three options. A package or contained label is the first option for compliance. The package label must "clearly and conspicuously" inform the retail customer that the product contains milk from a cow treated with rbST. Setting up at least one sign, using blue shelf labels and

Continued on page 2

amendments made by sections 638 and 644 shall not apply with respect to a complete application to acquire inventory property submitted prior to the date of enactment of this Act." FAIRA, § 663(c).

The FSA initially interpreted the effective date language in § 663(c) very narrowly. Although it acknowledged that it was bound by existing lease terms, with regard to applications submitted for leaseback/buyback that were pending on April 4, 1996, the vast majority were rejected. FSA Notice FC-37 expressly stated that:

> [n]o pending pre-acquisition applications to lease property can be approved. No pending post-acquisition leases can be approved. Pending post-acquisition sales can be closed only if a complete application that contains all the information the Agency needs from the applicant to complete the sale was submitted on or before the enactment date. All other pending offers must be rescinded and pending applications rejected.

Notice FC-37, United States Department of Agriculture, Farm Service Agency, *Implementation of Farm Bill provisions Affecting Loan Servicing and Inventory Property*, April 5, 1996. Essentially, the FSA interpreted the "transition provision" as only applicable to completed applications to immediately purchase the property, not applications to lease the property.

Many farmers and farm advocates viewed this interpretation as unnecessarily harsh, particularly in light of the fact that many applications had been "pending" at local FSA offices for a long period of time prior to the passage of FAIRA. For example, Lynn A. Hayes, an attorney at the Farmers' Legal Action Group, Inc. wrote to Secretary Glickman on behalf of the National Family Farm Coalition arguing for the processing of pending applications. In addition to making persuasive legal arguments for a broader interpretation of the transition provision, she stressed equitable reasons for the processing of pending applications. She argued that many family farmers had applied for leaseback/buyback "several years before the enactment of the Act" and noted that "[i]n many of these cases, the transactions were not completed prior to enactment due to unreasonable delays by FSA in processing the applications or in implementing appeal decisions that reversed previous denials." Letter from Lynn A. Hayes, Attorney at Law, Farmers' Legal Action Group, Inc. to Secretary Dan Glickman, United States Department of Agriculture (June 27, 1996) (on file with the author).

On August 8, 1996, the FSA issued Notice FC-66, specifically addressing pre-acquisition leaseback/buyback applications that were pending on April 4, 1996. Notice FC-66, United States Department of Agriculture, Farm Service Agency, *Processing Pre-acquisition Leaseback/Buyback Requests*, August 8, 1996. According to this notice, such applications can now be processed and pre-acquisition leases can be entered into. In order to be considered under this notice, the leaseback/buyback application must have been completed and received by the FSA before April 4, 1996. The FSA must either not yet hold title to the property or have acquired the property on or after April 4, 1996. While this notice does not indicate that it is a reversal of its previous interpretation, it clearly is. Farmers who were initially denied consideration pursuant to Notice FC-37 should contact their local FSA office to determine whether FC-66 is applicable to their application.

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Relief from Vermont's rbST statute/continued from page 1

affixing a blue sticker to each package of rbST-derived milk is the second label option. The third label option involves using a separate refrigerator or freezer case for the milk products that use milk from cows that were or may have been treated with rbST.

Due to the interstate marketing problems caused by mandatory labeling for milk products sold in Vermont, the Vermont statute was challenged by dairy manufacturers. *Int'l Dairy Foods Ass'n v. Amestoy*, No. 95-7819 (2d Cir. Aug. 8, 1996)(1996 U.S. App. LEXIS 1989), *rev'g* 898 F. Supp. at 247 (D. Vt. 1995). The *IDFA* plaintiffs sought declaratory and injunctive relief so that they would not have to label their products as required by the Vermont statute. Plaintiffs' major claims were based on violations of the Commerce Clause and the First Amendment of the federal Constitution.

The district court's denial of injunctive relief to plaintiff dairy manufacturers has been reversed by the Second Circuit and the case remanded for entry of an appropriate injunction. The circuit court found that to qualify for injunctive relief, the *IDFA* plaintiffs needed to show irreparable harm and likelihood of success on the merits. Under a First Amendment argument, plaintiffs maintained that the Vermont statute forced them to communicate information when they preferred not to speak. Plaintiffs were compelled to place what they considered disparaging label information on their products derived from milk from cows treated with rbST. The circuit court agreed: "compelled speech contravenes core First Amendment values" thereby satisfying the irreparable harm requirement for a First Amendment violation.

In addition to irreparable harm, the *IDFA* plaintiffs needed to show the likelihood of success on the merits to qualify for injunctive relief. As the issue under consideration involved a statutory restriction on commercial speech, success on the merits was dependent upon whether Vermont could justify the restriction by a substantial government interest.

A divided circuit court concluded the State had not adopted a substantial government interest. The majority interpreted two statements of the district court to find that the State of Vermont did not adopt any of the enumerated concerns of the consumers, rather the State only "adopted that the consumers are concerned." By denying that Vermont adopted the consumer concerns enumerated by the district court, the majority concluded that simple consumer interest for information did not constitute sufficient justification for the infringement of the *IDFA* plaintiffs' right not to speak.

A vigorous dissent argued that Vermont had based its statute on more than

Continued on page 7

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Research facilities and dealers under the Animal Welfare Act

By Christopher R. Kelley

If the Animal Welfare Act [AWA], 7 U.S.C. §§ 2131-2159 (1994), is an obscure statute to some, it is not to Julian and Anita Toney. For nearly a decade, the Toneys dealt in research and hunting dogs they acquired from various sources in Iowa, Missouri, and Nebraska. They sold dogs to research institutions, including the University of Iowa and the University of Minnesota. In December, 1995, the USDA's Judicial Officer assessed a $200,000.00 civil penalty against the Toneys and permanently revoked their license under the AWA for hundreds of AWA violations. *In re Julian J. Toney and Anita L. Toney*, AWA Docket Nos. 92-14, 94-12 (Dec. 5, 1995). Their appeal to the United States Court of Appeals for the Eighth Circuit is now pending.

The civil penalties assessed against the Toneys were the highest ever assessed under the AWA. In recent years, however, other severe sanctions have been issued under the AWA. In 1994, Delta Air Lines, Inc., was assessed $1,000.00 for each of the 108 dogs and cats transported in an oxygen-deprived environment on a single flight and an additional $1,000.00 for each of the thirty-two puppies that died on the flight—a total of $140,000.00. *In re Delta Air Lines, Inc.*, 53 Agric. Dec. 1076 (1994) ($80,000.00 of that penalty was held in abeyance for one year, conditioned on proof of Delta's development of written animal handling guidelines). *See also In re Ron Morrow*, 53 Agric. Dec. 144 (1994), *aff'd per curiam*, 65 F.3d 168 (6th Cir. 1995) (assessing a civil penalty of $50,000.00); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (barring respondent from obtaining a license for ten years and assessing a civil penalty of $10,000.00); *In re James W. Hickey*, 47 Agric. Dec. 840 (1988), *aff'd*, 878 F.2d 385 (9th Cir. 1989) (suspending respondent's license for twenty-five years and assessing a civil penalty of $40,000.00).

Administered by the USDA's Animal and Plant Health Inspection Service [APHIS], the AWA has three broad purposes:

> (1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;
> (2) to assure the humane treatment of animals during transportation in commerce; and
> (3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

7 U.S.C. § 2131 (1994). *See generally* Thomas E. Bundy, *Animal Welfare Act in* 11 Agricultural Law ch. 87 (N. Harl, ed. 1990) (discussing the purposes and provisions of the AWA). The AWA also prohibits animal fighting ventures. 7 U.S.C. § 2156 (1994).

The AWA seeks to accomplish its purposes by regulating certain activities of research facilities, dealers, exhibitors,[1] operators of auction sales,[2] carriers,[3] and intermediate handlers.[4] Of these categories of regulated persons, two categories—research facilities and dealers—warrant special attention for they and their activities are the focus of the AWA's principal purposes.

This article briefly examines who must register as a "research facility" and who must be licensed as a "dealer" under the AWA. If a facility must register as a "research facility," it is subject to a host of animal care, recordkeeping, and reporting requirements. *E.g.*, 7 U.S.C. §§ 2142, 2143, 2140 (1994); 9 C.F.R. §§ 2.30-.38 (1996). Dealers are subject to similar and additional requirements. For example, dealers may not sell or otherwise dispose of any dog or cat within five days after acquiring the animal. 7 U.S.C. § 2135 (1994). *See also id.* § 2158 (imposing certain certification requirements on dealers regarding compliance with the holding period for dogs and cats).

"Research facilities" under the AWA

The AWA was originally enacted "to insure that certain animals intended for use in research facilities are provided humane care and treatment." Federal Laboratory Animal Welfare Act, Pub. L. No. 89-544, § 1, 80 Stat. 350 (1966), *reprinted in* 1966 U.S.C.C.A.N. 400, 400. While the AWA's scope has since been expanded, the humane care and treatment of animals intended for use in research facilities continues to be one of the AWA's primary purposes. *See* 7 U.S.C. § 2131 (1994).

The congressional hearings leading to the AWA's enactment in 1966 focused on "those who sell, transport, or handle animals intended for use in medical research." S. Rep. No. 1281, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 2635, 2636. *See also Haviland v. Butz*, 543 F.2d 169, 172 (D.C. Cir.) ("Congress enacted the Federal Laboratory Animal Welfare Act 'to deal with the abuses that have developed as a result of the Nation's vast program of medical research,' particularly research involving experimentation with animals." (footnotes omitted)), *cert. denied*, 429 U.S. 832 (1976). The AWA's definition of "research facility," however, is not expressly limited to medical research facilities.

When originally enacted in 1966, the AWA defined the term "research facility" to mean:

> any school, institution, organization, or person that uses or intends to use dogs or cats in research, tests, or experiments, and that (1) purchases or transports dogs or cats in commerce, or (2) receives funds under a grant, award, loan, or contract from a department, agency, or instrumentality of the United States for the purpose of carrying out research, tests, or experiments....

Federal Laboratory Animal Welfare Act, Pub. L. No. 89-544, § 2(f), 80 Stat. 350 (1966), *reprinted in* 1966 U.S.C.C.A.N. 400, 401. The original version of the AWA defined the terms "dog" and "cat," as well as the term "animal," to mean only live species. *Id.* § 2(d), (e), (h). A research facility that used live dogs and cats had to comply with the standards applicable to other protected live animals. *Id.* § 13, *reprinted in* 1966 U.S.C.C.A.N. at 402. *See also* S. Rep. No. 1281, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 2635, 2638 ("[I]f an institution meets the definition of 'research facility,' it is subject to regulations in regard to all animals defined in subsection 2(h).")

In 1970, the AWA's scope was expanded to cover the exhibition of animals and their sale as pets. At the same time, the definition of the term "research facility" was amended to cover facilities using any live animal, not just dogs and cats, and to authorize the Secretary to exempt facilities that do not use or intend to use dogs and cats. Animal Welfare Act of 1970, Pub. L. No. 91-579, § 3, 84 Stat. 1560, *reprinted in* 1970 U.S.C.C.A.N. 1814, 1815 (codified at 7 U.S.C. § 2132(e)). The definition of the term "animal" also was expanded to include dead animals. *Id.* (codified at 7 U.S.C. § 2132(g)).

As currently defined by the 1970 amendment, "research facility" means:

> any school (except an elementary or secondary school), institution, or organization, or person that uses or intends to use live animals in research, tests, or experiments, and that (1) purchases or transports live animals in commerce, or (2) receives funds under a grant, award, loan, or contract from a department, agency, or instrumentality of the United States for the purpose of carrying out research, tests, or experiments: *Provided*, That the Secretary may exempt, by regulation, any such school, institution, organization, or person that

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does not use or intend to use live dogs or cats, except those schools, institutions, organizations, or persons, which use substantial numbers (as determined by the Secretary) of live animals the principal function of which schools, institutions, organizations, or persons is biomedical research or testing, when in the judgment of the Secretary, any such exemption does not vitiate the purpose of this chapter.

7 U.S.C. § 2132(e) (1994).[5] Except for the substitution of "Administrator" for "Secretary," the current regulations implementing the AWA define the term "research facility" in the same manner as does the statute. 9 C.F.R. § 1.1 (1996) (defining "research facility"). *See also* 54 Fed. Reg. 10,822, 10,829 (1989) (preamble to proposed rules to be codified at 9 C.F.R. § 1.1) (stating that "we have decided to adopt the Act's definition of 'research facility' and use it in our regulations... [to] avoid confusion and ensure that our regulations accomplish the intent of the Act.").

Under both the statute and the regulations, therefore, the definition of the term "research facility" has three principal elements:

1. The school, institution, organization, or person [hereinafter facility] must use or intend to use live animals;

2. The use or intended use must be for (a) research, (b) tests, or (c) experiments; and

3. The facility must either (a) purchase or transport live animals in commerce or (b) receive federal funds for the purpose of carrying out research, tests, or experiments.

The discussion that follows addresses each of these elements in their listed order.

Element one: use or intended use of live animals

The first element—that the facility must use or intend to use *live* animals—excludes any facility that only uses or intends to use dead animals. The definition of the term "research facility" is therefore narrower in scope than otherwise would be permitted under the AWA's definition of the term "animal" because the term "animal" is defined to include both *live* and *dead* animals. Not all animals are protected by the AWA. The regulatory definition of "animal" is limited to warm-blooded animals used or intended to be used for research, exhibition, or as a pet, and it excludes:

> Birds, rats of the genus *Rattus* and mice of the genus *Mus* bred for use in research, and horses not used for research purposes and other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use in improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber....

9 C.F.R. § 1.1 (1996) (defining "Animal"). The exclusion of birds, rats, and mice from the regulatory definition was held to be arbitrary and capricious in 1992 by the United States District Court for the District of Columbia but that decision was vacated on appeal on the grounds that the plaintiffs lacked standing. *Animal Legal Defense Fund v. Madigan*, 781 F. Supp. 797, 804 (D.D.C. 1992), *vacated*, 23 F.3d 496 (D.C. Cir. 1994).

Although it is clear that a "research facility" is a facility that uses or intends to use *live* animals, neither the AWA nor its implementing regulations define the terms "use" or "intend to use." The regulations, however, provide that "words undefined.... [in the regulatory definitions] shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary." 9 C.F.R. § 1.1 (1996).

The term "use" generally means "[t]o bring or put into service" or "employ for some purpose." American Heritage Dictionary 1410 (1969). Thus, conducting research, testing, or experimentation on a live animal clearly would be within the first (and second) elements of the definition of the term "research facility." The regulations, however, implicitly reflect a broader interpretation of the definition of the term "research facility." For example, in specifying the circumstances in which a facility registered as a research facility may be placed on inactive status, the regulations refer to a "research facility which has not *used, handled, or transported* animals for a period of at least 2 years...." 9 C.F.R. § 2.30(c)(2) (1996) (emphasis added). While the references to "use" and "transported" are supported by the definition of the statutory term "research facility," the reference to "handled" is not. The mere "handling" of animals does not make a facility a "research facility" as is implied by the regulatory description of the circumstances in which inactive status may be granted.

On the other hand, while the mere "handling" of animals does not make a facility a "research facility," once a facility is properly deemed to be a "research facility" the Animal and Plant Health Inspection Service [APHIS] may regulate the facility's handling of animals. Congress expressly intended for handling to be regulated:

> The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, *handling*, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

7 U.S.C. § 2131 (1994) (emphasis added). Congress also authorized the Secretary to promulgate regulations pertaining to the handling of animals by research facilities and others. *Id.* §§ 2142, 2143. *See also id.* § 2151 (authorizing the Secretary "to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of [the AWA]"). However, Congress expressly disclaimed any intention to disrupt or interfere with research, testing, or experimentation. H.R. Rep. No. 91-1651, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 5103, 5104 ("The bill in no manner authorizes the disruption or interference with scientific research or experimentation.").

Element two: research, tests, or experiments

By the express terms of the statutory definition of "research facility" the *live* animals must be used, or be intended to be used, for one of three purposes—(a) research, (b) tests, or (c) experiments. Neither the AWA nor its implementing regulations define the terms "research," "tests," or "experiments."

Because these terms are not expressly defined by the AWA or its implementing regulations, a threshold question is whether "tests" or "experiments" are intended to be subsets of "research" or must otherwise be related to research activities before the AWA's jurisdiction attaches. Stated conversely, the issue is whether "tests" or "experiments" that have no relationship to a program of scientific inquiry or study, i.e., that are unrelated to "research," trigger the AWA's jurisdiction.

The AWA's legislative history suggests, but does not provide conclusive support for, the proposition that the ordering of "research, tests, and experiments" was deliberate, with "tests" and "experiments" intended as subsets of "research." In this regard, the Senate Report accompanying the Federal Laboratory Animal Welfare Act of 1966, which later became known as the AWA, begins its description of the Act's purposes as follows:

> This bill recognizes the need for Federal legislation to deal with the abuses that have developed as a result of the Nation's vast program of medical research. *Much of this medical research involves experiments and tests with animals.*

S. Rep. No. 1281, 89th Cong., 2d Sess., *reprinted in* 1966 U.S.C.C.A.N. 2635, 2636

Continued on page 6

(emphasis added). That testing and experimentation are intended as subsets of "research" is also suggested elsewhere in the Senate Report:

> [N]othing in the legislation is to be construed as authorizing the Secretary to regulate the handling, care, treatment, or inspection of animals which are undergoing actual research or experimentation. The determination of when *research* begins and ends is to be made by the research facility. It is the intent of this committee that such a determination must be made in good faith. Actual research and experimentation also include the use of animals as a teaching aid in educational institutions.

Id. 1966 U.S.C.C.A.N. at 2640 (emphasis added).

Despite the suggestion in the AWA's legislative history that "tests" and "experiments" are intended to designate specific "research" activities, the ordinary meaning of each of these terms does not compel such a relationship. Moreover, if the terms "tests" and "experiments" were construed to encompass only tests or experiments that are part of a program of "research," they would be redundant to that extent—only the term "research" would have an independent operative effect. Accordingly, such a construction would be contrary to the well-established rule that "a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, 112 S. Ct. 1101, 1015 (1992).

Assuming then that the terms "research," "tests," and "experiments" must each have an operative effect, any one of these activities performed on a live animal purchased or transported in interstate commerce would trigger the AWA's jurisdiction. This leaves the issue of whether the activities encompassed by these terms *must* be performed on the live animal itself. In other words, is an activity performed on a product extracted from the animal sufficient to bring the activity within the AWA's jurisdiction? This issue was answered in the affirmative in the administrative adjudication of *In re Lee Roach and Roach Laboratories*, 51 Agric. Dec. 252 (1992).

In *Roach*, the APHIS alleged that the respondents, Lee Roach and Roach Laboratories [Roach], had improperly failed to register as a "research facility." Roach countered by arguing that he was not a "research facility."

Roach's activities and contentions were described by the administrative law judge [ALJ] as follows:

> Roach produces antiserum for medical diagnostic tests. The antiserum is produced by injecting rabbits and other live animals with antigens and then extracting their blood. Roach argues that the statutory definition looks to the testing of live animals whereas it tests animal products. In support of this proposed distinction, Roach stresses that its tests are made after the blood is extracted from the animals and that the blood is pooled before being tested.

Id. at 258 (also noting that "[t]he final step in a typical diagnostic test involves analyzing the interaction between onE of Roach's products and a sample of human blood or tissue").

The ALJ rejected Roach's position, characterizing it as based on a "too-narrow reading of the statute." *Id.* The ALJ reasoned that the AWA "applies to those who use animals in research, tests, or experiments. Research, tests, and experiments, therefore, *need not be performed on live animals; it is enough that live animals are being dedicated to such a purpose*." *Id.* (emphasis added).

The ALJ concluded that Roach conducted "tests" within the meaning of the AWA's definition of "research facility" in two instances. First, Roach's "preparatory procedures" performed on the animals, i.e., "injections, extractions, and tests," were "tests" within the meaning of the AWA's definition of "research facility." *Id.* Second, "[a]nother 'test' occur[red] when the antiserum produced from animal blood is combined with human blood or tissue." *Id.*

The ALJ then concluded:

> Roach has shown nothing in the legislative history or the language of the Act to indicate that Congress intended to differentiate between using live animals for tests conducted wholly within the animal and using them to obtain their blood to conduct tests. Similarly, there is no legislative intent expressed that would support exempting Roach Laboratories from registration as a research facility because it tests "pooled" blood extracted from animals rather than individual samples taken from the same animals.

Id. at 259. The ALJ also reasoned that the AWA's "prohibition against the Secretary's interfering with the design, conduct, or performance of actual research or experimentation strongly suggests that exact methodology is to be left to the researcher and therefore has no bearing on the Act's jurisdictional requirements." *Id.* (citing 7 U.S.C. § 2143(6)(A)).

Roach, therefore, supports the proposition that the AWA's reach extends to two distinct categories of activities. First, it extends to research, tests, and experiments performed "wholly within the animal." Second, it extends to research, tests, and experiments performed on fluids derived from live animals used for the purpose of extracting such fluids. By its logic, *Roach* would also extend to tissue extracted from a live animal acquired for that purpose.

Although the reasoning and result in *Roach* provides support for a broad interpretation of the terms "research facility" and "dealer," the ALJ's decision was not appealed to the USDA's Judicial Officer as is permitted under the USDA's rules for formal administrative adjudications under the AWA and certain other statutes. *See generally* 7 C.F.R. §§ 1.130-.203 (1996). An unappealed ALJ ruling is not precedential and does not control subsequent cases before the Judicial Officer. *E.g., In re Unique Nursery & Garden Center* (Decision as to Valkering U.S.A., Inc.), 53 Agric. Dec. 377, 425 (1994), *aff'd*, 48 F.3d 305 (8th Cir. 1995). Nonetheless, *Roach* illustrates the potential reach of the AWA as construed by the APHIS and at least one ALJ.

Element three: purchase or transportation of live animals in commerce

By definition, a "research facility" must purchase or transport live animals in commerce. Neither the AWA nor its implementing regulations define the terms "purchase" or "transport." When these terms are given their ordinary meaning, the act of transporting a live animal could precede the act of purchasing the animal. Moreover, the "transporting" of the animal might be construed to include any movement of a live animal. The regulations, however, define the term "transporting vehicle" to mean "any truck, car, trailer, airplane, ship, or railroad car used for transporting animals." 7 C.F.R. § 1.1 (1996) (defining "Transporting vehicle"). In light of this definition, "transport" appears to mean more than simply moving a container containing a live animal from the back of a truck to a receiving area and should be construed accordingly.

As to the meaning of the term "purchase," that term has been defined for private law purposes in the Uniform Commercial Code [U.C.C.], which has been adopted with modifications in all fifty states. Accordingly, the U.C.C. is a potential source for guidance as to the meaning of the term "purchase" in the AWA. The U.C.C. broadly defines "purchase" to include "taking by sale... or any other voluntary transaction creating an interest in property. U.C.C. § 1-201(32). While this definition refers to the creation of an "interest" in property, not the passage of "title," the U.C.C. provides that, "[u]nless otherwise explicitly agreed[,] title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods...." U.C.C. § 2-401(2).

The regulations implementing the AWA implicitly appear to take a broad interpretation of the term "purchase," one that compares to the U.C.C.'s reference to the acquisition of an "interest" in property.

The regulatory recordkeeping requirements for research facilities, for example, broadly apply to "each live dog or cat *purchased or otherwise acquired, owned, held, or otherwise in their possession or under their control, transported, euthanized, sold, or otherwise disposed of by the research facility*. 9 C.F.R. § 2.35(b) (1996) (emphasis added). The scope of this regulation suggests that the APHIS may construe the term "purchase" broadly so as to encompass any right to possess or control the live animal, irrespective of when title to the animal passes to the research facility.

"Dealers" under the AWA

The AWA defines the term "dealer" to mean:

> any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—
>
> (i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or
>
> (ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year....

7 U.S.C. § 2132(f) (1994). The regulations implementing the AWA expand this definition by including in clause (1) the parenthetical "(unborn animals, organs, limbs, blood, serum, or other parts)" of alive or dead animals and by including "testing" and "experimentation" in the listing of the purposes for which the animals are delivered, bought, or sold. 9 C.F.R. § 1.1 (1996) (defining "Dealer").[6] *See also id.* § 2.1(a)(3) (listing categories of persons exempt from licensing as a dealer). The regulations also categorize dealers for licensing purposes as "Class A licensees"—persons who are breeders—and "Class B licensees"—persons who are purchasers and resellers. *Id.* (defining "Class A licensee" and "Class B licensee").

In the administrative decision of *In re Roach and Roach Laboratories* discussed above, the ALJ held that Roach's sale of blood and antiserum derived from rabbits made Roach a "dealer" under the AWA and its implementing regulations. *Roach*, 51 Agric. Dec. at 259-62. In doing so, the ALJ concluded that antiserum was "simply a specialized type of serum." *Id.* at 259. The ALJ also ruled that Roach had purchased the rabbits in commerce, and the regulation's inclusion of "testing" in the listing of the purposes for which the animals are delivered, bought, or sold was lawful. *Id.* at 260-61.

In *Roach*, Roach's purchase of rabbits in commerce, his subsequent extraction of blood from those rabbits, and his testing of that blood was held to require him to be licensed as a dealer and registered as a research facility. In reaching this result, the ALJ did not expressly address the issue of whether AWA intended for essentially the same activities to require licensing as a dealer and registration as a research facility. Nonetheless, the net effect of *Roach* and the regulations on which the decision was based is that research facilities that sell animal serum and animal parts for further research, testing, and experimentation must also be licensed as dealers.

Conclusion

A person who fails to register as a research facility or to be licensed as a dealer when required to do so under the AWA is subject to civil penalties. 7 U.S.C. § 2149(b) (1994). The Secretary is also authorized to obtain cease and desist orders against persons who violate the AWA. *Id.* Perhaps of greater consequence, persons who violate the AWA, including persons who fail to register or to become licensed when required to do so, may be denied the opportunity to register or to become licensed. *Id.* § 2149(a). Thus, persons who engage in activities that might be subject to regulation under the AWA are well advised to determine whether their activities are, in fact, within the AWA's scope. Moreover, once registered or licensed, failure to comply with the AWA's requirements can have enormous financial consequences as is evident from the USDA Judicial Officer's decision in *In re Julien J. Toney and Anita L. Toney*.

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[1] *An "exhibitor" is: any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and county fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary.... 7 U.S.C. § 2132(h) (1994). See also 9 C.F.R. § 1.1 (1996) (defining "Exhibitor").*

[2] *An "operator of an auction sale" is "any person who is engaged in operating an auction at which animals are purchased or sold in commerce." 9 C.F.R. § 1.1 (1996) (defining "Operator of an auction sale").*

[3] *A "carrier" is "the operator of any airline, railroad, motor carrier, shipping line, or other enterprise, which is engaged in the business of transporting any animals for hire...." 7 U.S.C. § 2132(j) (1994). See also 9 C.F.R. § 1.1 (1996) (defining "Carrier").*

[4] *An "intermediate handler" is "any person including a department, agency, or instrumentality of the United States or of any State or local government (other than a dealer, research facility, exhibitor, any person excluded from the definition of a dealer, research facility, or exhibitor, an operator of an auction sale, or a carrier) who is engaged in any business in which he receives custody of animals in connection with their transportation in commerce." 7 U.S.C. § 2132(i) (1994). See also 9 C.F.R. § 1.1 (1996) (defining "Intermediate handler").*

[5] *As enacted, "Act" appeared in lieu of "chapter" in the final clause. Animal Welfare Act of 1970, Pub. L. No. 91-549, § 3, 84 Stat. 1560, reprinted in 1970 U.S.C.C.A.N. 1814, 1815.*

[6] *"Testing" and "experimentation" are included in the statutory definition of the term "animal." 7 U.S.C. § 2132(g) (1994).*

Federal Register

The following is a selection of matters that were published in the Federal Register from July 15 through August 13, 1996.

1. Farm Service Agency; CCC; Implementation of the Farm Program Provisions of the 1996 Farm Bill; final rule; effective date 7/12/96. 61 Fed. Reg. 37544.

2. Farm Service Agency; Post bankruptcy loan servicing notices; proposed rule. 61 Fed. Reg. 37405.

3. Farm Credit Administration; Policy statement on disaster relief efforts by Farm Credit institutions; effective date 6/13/96. 61 Fed. Reg. 37471.

4. Farm Credit Administration; Capital adequacy and customer eligibility; proposed rule; effective date 9/12/96. 61 Fed. Reg. 42092.

5. FCIC; Crop insurance coverage for production of agricultural commodity on highly erodible land or converted wetland; interim rule; comments due 9/20/96. 61 Fed. Reg. 38057; 61 Fed. Reg. 39048.

6. FCIC; Board of Contract Appeals; reinsurance agreements; approval standards; final rule; effective date 7/29/96. 61 Fed. Reg. 39268; 61 Fed. Reg. 40952.

7. Farm Credit System Insurance Corporation; Policy statement concerning adjustments to the insurance premiums; effective date 7/11/96. 61 Fed. Reg. 39453.

—Linda Grim McCormick, Alvin, TX

Vermont's rbST statute/Continued from page 2

consumer interests. Given the "evidence or findings regarding the people of Vermont's concerns about human health, cow health, biotechnology, and the survival of small dairy farms...," the dissenting judge maintained that it could not be concluded that the Vermont statute was based simply on consumer curiosity.

Although the Second Circuit has suggested that the *IDFA* plaintiffs are entitled to an injunciton on First Amendment grounds, the finding may be limited due to the underlying premise that the statute was not based on a substantial government interest. Upon petition *en banc* or on trial on the merits, sufficient evidence could show the Vermont statute as being based on one or more substantial government interests. Thus, it is too early to tell whether a state can require manufacturers to tell consumers which products were derived from milk from cows treated with rbST.

—Terence J. Centner & Kyle W. Lathrop, The University of Georgia

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Agricultural Law Update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

AALA upcoming conference

By now you should have received your brochure detailing the October 3-5 17th Annual Educational Conference in Seattle, Washington. If you have not, feel free to contact the AALA Director's office at the University of Arkansas. They will be happy to fax you a copy of the brochure. In addition, if you have colleagues who you think might be interested in attending the conference, forward their address or fax number to Bill Babione at 501-575-7646.

Looking forward to seeing many of you.
Linda Grim McCormick
Editor, *Agricultural Law Update*

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