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USDA Judicial Officer rules on GIPSA complaint against IBP under the Packers and Stockyards Act

In a significant decision under the Packers and Stockyards Act of 1921, 7 U.S.C. §§ 181-229, the USDA Judicial Officer has determined that a right of first refusal granted to the nation's largest packer, IBP, Inc., under its agreement with several Kansas feedlots had the effect or the potential effect of suppressing competition, thus violating section 202 [7 U.S.C. § 192] of the Act. The Judicial Officer, however, also concluded that the USDA's Grain Inspection, Packers and Stockyards Administration (GIPSA) had failed to prove that other elements of the agreement violated the Act. *In re IBP, Inc.*, P & S Docket No. D-95-0049 (July 31, 1998). IBP has sought judicial review of the right of first refusal portion of the decision.

GIPSA, the Secretary's delegate for administratively enforcing the Packers and Stockyards Act, filed its Complaint against IBP in August 1995. The filing generated considerable attention because it followed criticism that the Secretary had been less than zealous in its oversight of potentially anticompetitive practices in the meatpacking industry. *See, e.g.,* U.S. Gen. Accounting Office, *Packers and Stockyards Administration: Oversight of Livestock Market Competitiveness Needs To Be Enhanced* (Pub. No. RCED-92-36, Oct. 1991). To some, including a USDA advisory committee on agricultural concentration formed by Secretary Glickman, the action against IBP was characterized as representing a "commitment" by the current Secretary to enforce the Packers and Stockyards Act. USDA Advisory Committee on Agricultural Concentration, *Concentration in Agriculture* 11 (1996)[hereinafter *Concentration in Agriculture*]; *see also* Robert H. Brown, *USDA Files Complaint Against IBP For Favoritism*, Feedstuffs, Aug. 7, 1995, at 3; Rod Smith, *IBP Argues Marketing Pacts Not Inappropriate*, Feedstuffs, Sept. 4, 1995, at 6.

GIPSA's Complaint was filed against the backdrop of historic high levels of concentration in the meatpacking industry. "For example, the four largest packers accounted for 82 percent of steer and heifer slaughter in 1994, versus only 72 percent in 1990 and 36 percent in 1980." Packers and Stockyards Programs, GIPSA, *Concentration in the Red Meat Packing Industry* 2 (1996). In the broadest sense, it represented a challenge to one aspect of this concentration: so-called "captive

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North Carolina Supreme Court modifies premises liability

In *Nelson v. Freeland*, no. 216A98, 1998 N.C. Lexis 849 (N.C. 1998))decided December 31) a sharply divided North Carolina Supreme Court abolished the long-standing common law distinction between invitees and licensees. The case arose from injuries suffered by plaintiff, Nelson, when he tripped over a stick that defendant, Freeland, had inadvertently left upon his porch. Nelson had come to Freeland's house to pick him up to take him to a meeting. In a comprehensive analysis the Court noted that the modern trend is toward abolishing the common-law trichotomy in favor of a reasonable person standard. It noted that England abolished the trichotomy by statute in 1957, and the U.S. Supreme Court abolished the trichotomy shortly thereafter in admiralty cases. The N.C. Supreme Court counted eleven U.S. jurisdictions that have abolished the trichotomy between invitee, licensee, and trespasser entirely, and fourteen that have abolished the invitee-licensee distinction while maintaining the limited duty rule for trespassers. The Court did the latter, abolishing the invitee-licensee distinction, replacing it with "a standard of reasonable care toward all lawful visitors." It retained the common-law rule for trespass that a trespasser has no basis for claiming protection beyond that the landowner must refrain from doing willful injury. The Court reasoned that to abolish this distinction would place an unfair burden upon the landowner that has

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IN FUTURE ISSUES

- Part II: The agricultural provisions of the 1999 Omnibus Appropriations Bill supply" arrangements by packers.

Captive supply arrangements are a form of vertical integration or "coordination" by packers. They often are structured as forward contracts or marketing agreements. According to the 1996 Report of the USDA Advisory Committee on Agricultural Concentration, "these arrangements have a tendency to thin market price reporting (reduce the volume on which reported prices are based) and shorten the weekly marketing 'window,' which can disadvantage suppliers who do not have a packer arrangement, and distort reported market prices downward." *Concentration in Agriculture*, *supra* at 10.

The Committee also found that "large sellers are far more likely to participate in captive supply arrangements than small sellers." *Id*. Though large feedlots are more likely than smaller suppliers to participate in a captive supply arrangement, returns to participating feedlots may vary depending on the form of the arrangement. For example, the Committee found that cattle obtained under forward contracts brought slightly lower prices than cash market cattle with similar characteristics. This difference, according to the Committee, was attributable to lowered producer risk under the forward contract. *Id*. Marketing agreements, on the other hand, resulted in slightly higher than cash market prices. The Committee noted, however, that "[h]igher prices would be expected if slaughterers use marketing agreements to procure cattle of higher quality or to lower processing costs." *Id*.

At issue in *IBP* was a "captive supply" arrangement in the form of a marketing agreement. Specifically, the issue was whether an exclusive marketing agreement, known as the Beef Marketing Agreement, that IBP had entered into with several Kansas feedlots, known as the Beef Marketing Group, violated section 202(a) and (b), 7 U.S.C. § 192(a), (b), of the Act.

Section 202(a) prohibits packers from engaging in, or using, "any unfair, unjustly discriminatory, or deceptive trade practice or device." 7 U.S.C. § 192(a). Section 202(b) prohibits packers from making or giving "any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject[ing] any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." *Id*. § 192(b).

In its action against IBP, GIPSA alleged that IBP's use of the Beef Marketing Agreement during the period from February 1994 to the filing of the complaint on August 3, 1995, violated sections 202(a) and (b) of the Act by giving an undue or unreasonable preference to the feedlots who were parties to the Agreement by guaranteeing those feedlots a high price for their cattle. GIPSA also alleged that IBP subjected similarly situated feedlots in IBP's procurement area to an undue or unreasonable prejudice or disadvantage by refusing to purchase livestock of comparable quality from those feedlots under the same terms made available to the Beef Marketing Group. *In re IBP,* slip op. at 1-2.

Before entering into the Beef Marketing Agreement with IBP, the Beef Marketing Group had a marketing agreement with Excel. When that agreement terminated, IBP entered into the Beef Marketing Agreement "under terms essentially proposed by the Beef Marketing Group." *Id*. at 12. Unlike the traditional method in Kansas for live cattle sales in which bids are expressed in dollars per hundredweight, the Beef Marketing Agreement provided that bids would be adjusted based on the quality of the cattle purchased by IBP.

At its inception, the Agreement contemplated that bids would be based on the highest price paid in Kansas for at least 500 cattle in a given week, as reported by the USDA. Cattle that were top quality received this price, known as the "Kansas practical top." Cattle of lesser quality received a discounted bid. *Id*.

Bids were made on Monday and had to be accepted or rejected by Wednesday, thus giving producers the benefit of any increase in market value during the week. IBP committed to bid on every pen of cattle and had until Saturday of the following week to pick up the cattle. IBP also had the right of first refusal for all cattle on which it bid the Kansas practical top. Finally, IBP agreed to share slaughter information with the Beef Marketing Group. *Id*. at 12-13.

Several months after its inception, the Agreement was changed to provide that the basis for bids was the reported Kansas top price for 2,500 cattle or more. The time for accepting or rejecting bids was moved back from Wednesday to Tuesday, and the pick up date was moved back from Saturday to Friday. *Id*. Later, other changes were made, including the addition of a grade and yield option. The right of first refusal was expanded to give IBP that right where IBP had bid on pens when it had bid the Kansas top price minus 50 cents. *Id*. at 14.

Under the right of first refusal, IBP only had to match the previous high bid; it did not have to bid a higher price. Thus, IBP could "enter a bid, await, but not participate in, any additional bidding, and obtain cattle merely by matching any bid that may be higher than [its] bid." *Id*. at 15. This arrangement differed in several respects from the traditional method of selling cattle in Kansas. For example, under the traditional method, the first buyer who arrived at the feedlot was permitted to place the first bid. Other buyers were then given the opportunity to bid. However, the advantage of being the first bidder arose from the fact that if all subsequent bids by other buyers matched the first bid, the first bidder obtained the cattle. For that reason, buyers frequently arrived at the feedlot the night before a sale. *Id*. at 10.

After the inception of the Beef Marketing Agreement, IBP continued to buy cattle, under traditional methods, from Kansas feedlots that were not members of the Beef Marketing Group. Other packers also bought cattle from these feedlots. *Id*. at 14. Also, two members of the Beef Marketing Group, while remaining members of the Group, stopped selling cattle under the terms of the Beef Marketing Agreement. *Id*.

The Judicial Officer found that the feedlots that were not members of the Beef Marketing Group continued to receive competitive prices after the formation of the Beef Marketing Agreement.

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AALA Editor..........................Linda Grim McCormick
Rt. 2, Box 292A, 2816 C.R. 163
Alvin, TX 77511
Phone: (281) 388-0155
FAX: (281) 388-0155
E-mail: lsgmc@flash.net

Contributing Editors: Christopher R. Kelley, University of Arkansas School of Law, Fayetteville, AR; Drew L. Kershen, College of Law, The University of Oklahoma, Norman, OK; Karen R. Krub, FLAG, St. Paul, MN; Theodore Feitshans, North Carolina State University, Raleigh, NC

For AALA membership information, contact William P. Babione, Office of the Executive Director, Robert A. Leflar Law Center, University of Arkansas, Fayetteville, AR 72701.

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—Drew L. Kershen, Professor of Law, The University of Oklahoma, Norman, OK

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Id. at 14-15. The Judicial Officer also held that the testimony of the owners and operators of these feedlots "failed to show that they were harmed by the Beef Marketing Agreement." *Id.* at 15. Several of these feedlots, in fact, expanded in capacity and occupancy during this period. *Id.*

In its Complaint, GIPSA alleged that, through the Beef Marketing Agreement, IBP provided the Beef Marketing Group members with a price preference of $0.43 per hundredweight. This preference, according to GIPSA, was undue and unreasonable because IBP refused to make the same terms available to similarly situated sellers of comparable livestock. *Id.*

The Judicial Officer, however, concluded that GIPSA had failed to prove that $0.43 accurately represented the price difference. Though the evidence indicated that IBP "must have, on average, paid a higher price for cattle purchased under the terms of the Beef Marketing Agreement than it did on other transactions," the amount was "uncertain and unproven." *Id.* at 24.

The Judicial Officer also concluded that IBP received benefits under the Beef Marketing Agreement for the higher price it paid for cattle. Specifically, the Judicial Officer found that IBP acquired the right of first refusal and the right to delay its pick up of the cattle by as many as three extra days.

Each of these non-price conditions of sale were valuable to IBP, according to the Judicial Officer. The right of first refusal helped IBP maintain a steady supply of cattle; it allowed IBP's cattle buyers to be the first bidder at Beef Marketing Group feedlots without having to be the first to arrive; and "it eliminate[d] repeated telephone calls and trips to the feedlots during the negotiating process." *Id.* at 25-28. Similarly, the extra days for picking up the cattle benefited IBP "by allowing greater flexibility in scheduling delivery of cattle for slaughter." *Id.* at 29.

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The agriculture provisions of the 1999 Omnibus Appropriations Bill

By Karen R. Krub

On October 19, 1998, Congress passed H.R. 4328, "Making Omnibus Consolidated and Emergency Supplemental Appropriations for Fiscal Year 1999." President Clinton signed this bill into law on October 21, 1998.[1] Regulations implementing the changes have not yet been adopted by USDA, but the Secretary of Agriculture is directed to issue the necessary regulations "as soon as practicable."[2] In this article, the bill will be referred to as the "1999 Omnibus Bill." This article will be presented in two succeeding issues of the *Agricultural Law Update.*

This article summarizes some of the major agricultural provisions of the bill—including (1) Agricultural Credit; (2) Disaster Relief; (3) Chapter 12 Bankruptcy; (4) Conservation Programs; (5) Livestock Pricing and Trade Provisions; (6) Dairy Pricing; (7) Discrimination at USDA; (8) Crop Insurance Provisions; (9) Miscellaneous Ag Provisions; and, (10) Tax—but readers should be aware that there are other agricultural provisions which are not discussed here. Further, many non-agricultural sections of the new law may affect farmers and ranchers.

Agricultural credit

The 1999 Omnibus Bill contains a number of significant amendments to laws controlling the Farm Service Agency (FSA) farm loan programs.[3]

Some loosening of eligibility restrictions where borrower had prior "debt forgiveness"

The 1999 Omnibus Bill makes some changes to the restrictions on FSA loan eligibility where the borrower has had debt forgiveness. The changes affect the general eligibility rules for FSA guaranteed loans and emergency (EM) loans. The changes also affect the special exception for direct and guaranteed operating (OL) loans.

• New guaranteed loans available if no more than three occasions of debt forgiveness before April 4, 1996

Under provisions coming out of the 1996 FAIR Act,[4] any borrower who had received "debt forgiveness"[5] on a direct or guaranteed USDA Farm Program loan was ineligible for any type of new direct or guaranteed Farm Program loan.[6] Under the 1999 Omnibus Bill, the general rule is made much less restrictive for new FSA guaranteed loans.[7] The new general rule for guaranteed loans is summarized as follows:

> A guaranteed loan cannot be made to a farmer who received debt forgiveness on a Farm Program loan *after* April 4, 1996, or to a farmer who received debt forgiveness on *more than three* occasions before April 5, 1996.

Thus, a farmer could have received debt forgiveness on as many as three occasions before April 5, 1996, and still be eligible for a new loan guaranteed by FSA.[8]

• New emergency (EM) loans available where not more than one debt forgiveness before April 5, 1996

The 1999 Omnibus Bill provides that an FSA emergency (EM) loan can be granted to a borrower who has received "not more than one debt forgiveness" before April 5, 1996, and who has not received debt forgiveness after April 4, 1996.[9] Thus, borrowers who received debt forgiveness only once prior to April 5, 1996—and not at all after April 4, 1996—can still be considered for emergency (EM) loans.[10]

• New operating credit available if prior debt forgiveness came through write-down *or* a confirmed bankruptcy plan

Under the 1996 FAIR Act provisions, there was only one exception to the ineligibility of borrowers with prior debt forgiveness. This exception provided that borrowers who had received their debt forgiveness as a result of a write-down through the administrative debt restructuring process could still be considered for direct or guaranteed *operating* (OL) loans to pay their annual expenses.[11]

The 1999 Omnibus Bill expands this exception to allow new direct and guaranteed operating (OL) loans for borrowers who are current on payments under a confirmed bankruptcy reorganization plan under Chapters 11, 12, or 13 of the Bankruptcy Code.[12] Thus, farmers who have received debt forgiveness as a result of the administrative debt restructuring process *or* who are current on payments under a confirmed bankruptcy reorganization plan can be considered for either a direct or guaranteed operating (OL) loan for payment of their annual expenses.[13]

• Other debt forgiveness restrictions remain unchanged

The other general "debt forgiveness" eligibility restrictions imposed by the 1996 Farm Bill were not changed by the 1999 Omnibus Bill. For example: A direct FSA loan still cannot be made to a farmer who has received any past debt forgiveness unless the farmer falls within one of the exceptions discussed above.[14] Farm borrowers are still limited to one administrative "debt forgiveness" on a direct FSA loan.[15]

The prohibition on making or guaranteeing loans to delinquent borrowers remains the same.[16]

Changes to emergency (EM) loan security requirements

The 1999 Omnibus Bill makes some limited changes to the basic security requirements for FSA emergency (EM) loan eligibility. The Secretary of Agriculture is allowed some further flexibility in evaluating the collateral necessary to support the loan. Although the general rule that there must be adequate security for the loan remains the same, the amendment adds the following new language:[17]

> the Secretary shall not deny a loan... to a borrower by reason of the fact that the borrower lacks a particular amount of collateral for the loan if the Secretary is reasonably certain that the borrower will be able to repay the loan.

This language affirms authority already provided by the statute for the Secretary to take less than full security for emergency (EM) loans if there is reasonable assurance of the borrower's repayment ability.[18] However, by providing for no additional limitations beyond the reasonable certainty of repayment, the new language removes statutory authority for such restrictions imposed by FSA regulations.

FSA has interpreted the amendment to require that it drop its requirement that the portion of an emergency (EM) loan secured by repayment ability be repaid within three years.[19] That change is certainly warranted by the new statutory language. However, because the new language makes no mention of limits on the *reason* for the borrower's lack of security, the agency's continuing enforcement of a requirement that the borrower's lack of collateral be due to disaster-related depreciation appears to be similarly without statutory support.[20]

The 1999 Omnibus Bill also allows the Secretary to deny or cancel an emergency (EM) loan if the borrower refuses to pledge available collateral when requested by the agency.[21]

Karen R. Krub is an attorney with Farmers' Legal Action Group, Inc., St. Paul, MN.

Elimination of multiple benefits restriction on CAT or NAP benefits and emergency (EM) loans

Under restrictions imposed by the 1996 FAIR Act, farmers entitled to receive crop insurance benefits under "catastrophic risk protection" (CAT) coverage who are also eligible for other USDA assistance related to the crop loss have to choose which assistance to receive—they cannot receive both.[22] Similarly, under the Non-Insured Disaster Assistance Program (NAP), farmers who are eligible for NAP benefits as well as other USDA assistance related to the crop loss also have to choose which benefit to receive.[23] FSA has treated emergency loans as loss benefits under these provisions, so in case of crop disaster, farmers have had to choose between receiving CAT or NAP benefits and obtaining an FSA emergency (EM) loan.[24]

The 1999 Omnibus Bill changes the law governing CAT insurance coverage and NAP to specifically allow farmers to receive *both* the available benefits from CAT or NAP and an FSA emergency (EM) loan for the same crop disaster.[25]

New notice requirement for 5-year limit on direct loan eligibility

The 1996 Farm Bill imposed a "transition rule" on eligibility for direct FSA real estate loans. The rule puts limits on how many years a borrower may obtain a direct farm ownership (FO) loan, thereby requiring farmers to "graduate" from the subsidized federal loan program to either private or guaranteed farm financing arrangements.[26]

The 1999 Omnibus Bill does not change this restriction, but it requires the Secretary of Agriculture to notify borrowers that they will become ineligible for additional direct farm ownership (FO) loans due to this restriction at least 12 months before they become ineligible.[27]

Changes in guaranteed loan eligibility requirements regarding training or experience

For almost 40 years, general eligibility requirements for direct and guaranteed farm program loans have provided that the borrower must "have either training or farming experience that the Secretary determines is sufficient to assure reasonable prospects of success in the proposed farming operations."[28] The Secretary is authorized by federal statute to provide needed training programs for borrowers.[29]

The 1999 Omnibus Bill exempts all guaranteed loans—both for real estate purchases and operating expenses—from FSA's "training or experience" requirement.[30] This requirement now applies only to the direct loan programs. The 1999 Omnibus Bill also eliminates the specific statutory authority for the agency to conduct and contract for training programs for guaranteed loan borrowers.[31] FSA will continue to consider a guaranteed loan borrower's training, education, and experience as they are reflected in the projected production levels, income, and expenses in the farm business plan.[32]

Changes in guaranteed loan limits

Before the 1999 Omnibus Bill was enacted, federal statute provided that no guaranteed farm ownership (FO) loan could be made that would cause the unpaid balance of the borrower's total direct and guaranteed farm ownership (FO) debt to exceed $300,000.[33] Similarly, no guaranteed operating (OL) loan could be made that would cause the unpaid balance of the borrower's total direct and guaranteed operating debt to exceed $400,000.[34]

The 1999 Omnibus Bill combines these loan limit amounts, thus making the total maximum unpaid indebtedness $700,000 for guaranteed farm ownership and/or operating debt in any combination.[35] The amendment provides for an indexing of this maximum amount, allowing it to increase to reflect inflation.[36]

In addition to combining the loan limits, however, the amendment language also slightly altered how the loan limits are to be calculated.[37] Under the 1999 Omnibus Bill language, when calculating limits for a new guaranteed real estate loan you would start with $700,000 and subtract all outstanding real estate loans—direct and guaranteed—and all *guaranteed* operating loans. The farmer could have up to an additional $200,000 in direct operating loans that would not be included in the limit. Similarly, for new guaranteed operating loans you would start with $700,000 and subtract all outstanding operating loans—direct and guaranteed—and all *guaranteed* real estate loans. The farmer could have up to an additional $200,000 in direct real estate loans which would not be included in the limit.

New notice requirement for shared appreciation mortgages

The 1999 Omnibus Bill adds a new provision explicitly requiring the Secretary of Agriculture to notify borrowers at least 12 months before the end of the term of a Shared Appreciation Agreement.[38] However, borrowers should be aware that this notice requirement does not take effect until fiscal year 2000—which begins October 1, 1999.

Elimination of cash flow margin in debt restructuring calculation

The 1996 Farm Bill changed the cash flow margin requirements for FSA's debt restructuring and loan servicing process from 105 percent to 110 percent.[39] Before the 1999 Omnibus Bill was enacted, the Secretary could assume that the borrower would need up to 110 percent of the amount estimated for payment of farm operating expenses, debt service obligations, and family living expenses. This provided a 10 percent cushion for unanticipated or larger than expected expenses.[40]

The 1999 Omnibus Bill changes the cash flow margin from 110 percent to 100 percent.[41]

Disaster relief

The 1999 Omnibus Bill provides a significant amount of financial assistance for agricultural producers affected by natural disasters and low commodity prices in 1998. Much of the disaster funding is provided with the Secretary having "broad authority" to create programs for assistance. Distribution of other disaster funding must comply with program terms set out by Congress.

Crop loss assistance

In the 1999 Omnibus Bill Congress appropriated more than $2.5 billion for crop loss assistance.

• Disaster assistance for 1998 crop year and multiyear losses

The 1999 Omnibus Bill provides $1.5 billion in emergency assistance for producers who "incurred losses in the 1998 crop year due to disasters."[42] The 1999 Omnibus Bill provides $875 million as assistance to producers who have incurred multiyear losses in the 1998 and preceding crop years due to disasters.[43] Finally, the 1999 Omnibus Bill provides $200 million for livestock feed assistance to producers affected by disasters during calendar year 1998.[44]

• Secretary will determine how to distribute assistance

The Secretary is given "broad authority to create and implement a crop loss assistance program with the funds made available" by the 1999 Omnibus Bill.[45] The Secretary may establish loss thresholds, payment rates, and eligibility criteria.[46] Nonetheless, Congress did set some standards for the "fair and equitable" distribution of the funds.[47]

•• Payment limitations not triggered by many other USDA payments

The Secretary is authorized to establish payment limitations for the disaster assistance provided by the 1999 Omnibus Bill. However, in calculating the limitations, the Secretary may not include payments received through other crop loss or market loss programs under the 1999 Omnibus Bill, Production Flexibil-

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ity Contract Payments, USDA marketing loans, NAP benefits, crop insurance indemnities for the 1998 crop year, or emergency (EM) loans made available for the 1998 crop.[48]

•• Assistance available for 1998 losses or multiyear losses—not both

Producers may receive assistance under the 1999 Omnibus Bill for 1998 crop losses or multiyear losses, but not both.[49]

•• Qualifying losses and crops

Disaster assistance provided by the 1999 Omnibus Bill may be used for crop losses that are due to quantity losses, quality losses, or "severe economic losses due to damaging weather or related condition."[50] Losses for all crops are eligible for the disaster assistance provided by the 1999 Omnibus Bill, including losses of "trees from which a crop is harvested."[51] The specific determinations as to loss qualification are left to the Secretary.

• Crop insurance coverage and crop loss assistance

The 1999 Omnibus Bill prohibits the Secretary from "discriminat[ing] against or penaliz[ing]" producers who have purchased crop insurance.[52] This generally means that crop insurance coverage should not be taken into consideration when determining eligibility for program benefits.

In order to receive disaster benefits under the 1999 Omnibus Bill, producers who did not purchase crop insurance for the 1998 crop year must sign a contract agreeing to purchase crop insurance for the 1999 and 2000 crop years.[53] The contract will provide for liquidated damages—as determined by the Secretary—should the producer fail to purchase the crop insurance required by the contract.[54] A press announcement released December 12, 1998, indicated USDA's intent to use some $400 million of the crop loss funding to provide incentive payments for farmers to purchase higher "buy up" levels of crop insurance for their 1999 crops.[55] This use of the crop loss assistance appropriation does not appear to be authorized by the statutory language which refers only to "premium refunds and other assistance ... for [the] 1998 insured crops, or [the] preceding (including 1998) insured crops."[56]

Market loss assistance

The 1999 Omnibus Bill provides $3.057 billion in assistance as partial compensation for loss of markets for 1998 commodity crops.[57]

• $2.857 billion for production flexibility contract holders

The great majority of the market loss assistance under the 1999 Omnibus Bill is available to farm owners and producers who are eligible for 1998 Production Flexibility Contract (PFC) payments. The benefits are to be proportional to PFC payments made in 1998 and are to be paid out "as soon as practicable."[58] The conference report accompanying the law makes it clear that although the funding is proportional to PFC payments, market loss assistance payments are not to be treated as PFC payments for purposes of payment limitations.[59] The Committee also directs the Secretary not to require producers to file new contracts or redesignate shares in order to receive market loss payments.[60]

• $200 million for dairy farmers

Out of the funding set aside for market loss assistance under the 1999 Omnibus Bill, $200 million is specifically targeted to dairy producers.[61] The Secretary is to determine how this funding will be made available.

• Other disaster assistance provisions of the 1999 Omnibus Bill

The 1999 Omnibus Bill provides an additional $3 million to the Dairy Production Disaster Assistance Program.[62] This program provides assistance for dairy farmers who suffer production losses due to natural disasters.

Due to "disastrously low prices," the 1999 Omnibus Bill authorizes the Secretary to make recourse loans to honey producers for the 1998 crop.[63]

The 1999 Omnibus Bill requires the Secretary to make NAP payments in fiscal year 1999 to raisin producers who had catastrophic (CAT) insurance coverage but who were unable to comply with the insurance policy requirements due to adverse weather conditions.[64]

The 1999 Omnibus Bill authorizes the Secretary to use funds for the Tree Assistance Program to assist producers suffering losses due to disasters that occurred from May 1, 1998, to August 1, 1998, even if the harm caused did not become evident until after August 1, 1998.[65] Producers have until May 31, 1999, to demonstrate loss due to fire blight infestation caused by an eligible disaster.

[1] The legislation is known as Public Law 105-277. Statute-at-Large designations have not yet been made. The text of the bill can be found in the Congressional Record for October 19, 1998.

[2] 1999 Omnibus Bill, Div. A, Agriculture, Title XI, § 1133.

[3] 1999 Omnibus Bill, Div. A, Agriculture, Title VIII, §§ 801-808. These changes are temporarily being implemented by the agency under FSA Notice FLP-10, "Statutory Changes Because of FY 1999 Appropriations Legislation" (Dec. 4, 1998) (set to expire Oct. 1, 1999).

[4] Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 100 Stat. 888-1197 (Apr. 4, 1996) ("1996 FAIR Act").

[5] "Debt forgiveness" is defined in the 1996 FAIR Act as follows:

"(12) Debt Forgiveness. –"(A) In General. – Except as provided in subparagraph (B), the term 'debt forgiveness' means reducing or terminating a farmer program loan made or guaranteed under this title, in a manner that results in a loss to the Secretary, through –

"(i) writing down or writing off a loan under section 2001 of this title;

"(ii) compromising, adjusting, reducing, or charging-off a debt or claim under section 1981 of this title;

"(iii) paying a loss on a guaranteed loan under section 2005 of this title; or

"(iv) discharging a debt as a result of bankruptcy.

"(B) Loan Restructuring.—The term 'debt forgiveness' does not include consolidation, rescheduling, reamortization, or deferral."

1996 FAIR Act, § 640(2) (codified at 7 U.S.C. § 1991(a)(12)).

Note that if the debt action did not result in a loss to the Secretary it is not considered "debt forgiveness" for these purposes.

[6] 1996 FAIR Act, § 648(b) (codified at 7 U.S.C. § 2008h(b)).

[7] 1999 Omnibus Bill, Div. A, Agriculture, Title VIII, § 801 (to be codified as 7 U.S.C. § 2008h(b)(1)(B)).

[8] See FSA Notice FLP-10, "Statutory Changes Because of FY 1999 Appropriations Legislation" par. 2.E (Dec. 4, 1998) (set to expire Oct. 1, 1999).

[9] 1999 Omnibus Bill, Div. A, Agriculture, Title VIII, § 801 (to be codified as 7 U.S.C. § 2008h(b)(2)(B)).

[10] See FSA Notice FLP-10, "Statutory Changes Because of FY 1999 Appropriations Legislation" par. 2.E (Dec. 4, 1998) (set to expire Oct. 1, 1999).

[11] 1996 FAIR Act, § 648(b) (codified at 7 U.S.C. § 2008h(b)(2)).

[12] 1999 Omnibus Bill, Div. A, Agriculture, Title VIII, § 801 (to be codified at 7 U.S.C. § 2008h(b)(2)(A)(ii)).

[13] See FSA Notice FLP-10, "Statutory Changes Because of FY 1999 Appropriations Legislation" par. 2.E (Dec. 4, 1998) (set to expire Oct. 1, 1999).

[14] 1999 Omnibus Bill, Div. A, Agriculture, Title VIII, § 801 (to be codified at 7 U.S.C. § 2008h(b)(1)(A)).

[15] 7 U.S.C. § 2008h(c).

[16] 7 U.S.C. § 2008h(a); 31 U.S.C. § 3720B; 7 C.F.R. §§ 1941.12(a)(11), (b)(12), 1943.12(a)(11), (b)(12), 1980.175(b), 1980.180(b) (1998).

[17] 1999 Omnibus Bill, Div. A, Agriculture, Title VIII, § 802 (adding 7 U.S.C. § 1964(d)(2)(A)).

[18] See 7 U.S.C. § 1964(d).

[19] FSA Notice FLP-10, "Statutory Changes Because of FY 1999 Appropriations Legislation" par. 2.I (Dec. 4, 1998) (set to expire Oct. 1, 1999).

[20] See 7 C.F.R. § 1945.169(g)(1) (1998) for current requirements linking lack of sufficient collateral to disaster.

[21] 1999 Omnibus Bill, Div. A, Agriculture, Title VIII, § 802 (adding 7 U.S.C. § 1964(d)(2)(B)).

[22] 1996 FAIR Act, § 194(f) (codified at 7 U.S.C. § 1508(n)). This restriction does not apply to additional crop insurance coverage purchased by the farmer over the CAT level.

[23] 1996 FAIR Act, § 196(i)(3) (codified at 7 U.S.C. § 7333(i)(3)).

[24] See, FSA Notice FC-207, "Multiple Benefits on Emergency (EM) Loans" (Aug. 19, 1998) (rescinded December 4, 1998).

[25] 1999 Omnibus Bill, Div. A, Agriculture, Title VIII, § 803 (amending 7 U.S.C. §§ 1508(n), 7333(i)(3)).

[26] 1996 FAIR Act, § 601 (codified at 7 U.S.C. § 1922(b)(3)). See FSA Notice FLP-10, "Statutory Changes Because of FY 1999 Appropriations Legislation" par. 2.D (Dec. 4, 1998) (set to expire Oct. 1, 1999) (rescinding FSA Notice FC-207, "Multiple Benefits on Emergency (EM) Loans."

[27] 1999 Omnibus Bill, Div. A, Agriculture, Title VIII, § 804 (adding 7 U.S.C. § 1922(b)(3(D)). See FSA Notice FLP-10, "Statutory Changes Because of FY 1999 Appropriations Legislation" par. 2.C (Dec. 4, 1998) (set to expire Oct. 1, 1999).

[28] 7 U.S.C. § 1922(a)(2) (applicable to direct and guaranteed operating loans); 7 U.S.C. § 1941(a)(2) (applicable to direct and guaranteed real estate loans).

[29] 7 U.S.C. § 2006a.

[30] 1999 Omnibus Bill, Div. A, Agriculture, Title VIII, § 805 (amending 7 U.S.C. §§ 1922(a)(2), 1941(a)(2)). See FSA Notice FLP-10, "Statutory Changes Because of FY 1999 Appropriations Legislation" par. 2.G, H (Dec. 4, 1998) (set to expire Oct. 1, 1999).

[31] 1999 Omnibus Bill, Div. A, Agriculture, Title VIII, § 805 (amending 7 U.S.C. § 2006a(a), (c)).

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[32] FSA Notice FLP-10, "Statutory Changes Because of FY 1999 Appropriations Legislation" par. 2.H (Dec. 4, 1998) (set to expire Oct. 1, 1999)

[33] 7 U.S.C. § 1925.

[34] 7 U.S.C. § 1943.

[35] 1999 Omnibus Bill, Div. A, Agriculture, Title VIII, § 806 (amending 7 U.S.C. §§ 1925, 1943).

[36] 1999 Omnibus Bill, Div. A, Agriculture, Title VIII, § 806 (amending 7 U.S.C. §§ 1925, 1943). The inflation factor used will be the Prices Paid by Farmers Index compiled by the National Agricultural Statistics Service of USDA. The inflation increases will begin with fiscal year 2000, which starts October 1, 1999.

[37] 1999 Omnibus Bill, Div. A, Agriculture, Title VIII, § 806 (amending 7 U.S.C. §§ 1925, 1943). See FSA Notice FLP-10, "Statutory Changes Because of FY 1999 Appropriations Legislation" par. 2.F (Dec. 4, 1998) (set to expire Oct. 1, 1999).

[38] 1999 Omnibus Bill, Div. A, Agriculture, Title VIII, § 807 (adding 7 U.S.C. § 2001(e)(6)). See FSA Notice FLP-10, "Statutory Changes Because of FY 1999 Appropriations Legislation" par. 2.B (Dec. 4, 1998) (set to expire Oct. 1, 1999).

[39] 1996 FAIR Act, § 645(l)(A) (codified at 7 U.S.C. § 2001(c)(3)(C)).

[40] See the definition of a "feasible plan" at 7 C.F.R. § 1951.906 (1998).

[41] 1999 Omnibus Bill, Div. A, Agriculture, Title VIII, § 808 (amending 7 U.S.C. § 2001(c)(3)(C)). See FSA Notice FLP-10, "Statutory Changes Because of FY 1999 Appropriations Legislation" par. 2.A (Dec. 4, 1998) (set to expire Oct. 1, 1999). On December 4, 1998, FSA directed local offices to immediately stop approving administrative write-downs based on cash flow margins exceeding 100 percent.

[42] 1999 Omnibus Bill, Div. A, Agriculture, Title XI, § 1102(b).

[43] 1999 Omnibus Bill, Div. A, Agriculture, Title XI, § 1102(c). The Secretary is given the authority to define "multiyear losses" for the purposes of distributing these benefits, however the law specifically includes "diseases such as scab" as eligible disasters.

[44] 1999 Omnibus Bill, Div. A, Agriculture, Title XI, § 1103.

[45] Joint Statement of the Committee of Conference, H.R. 4328, Congressional Record for Oct. 19, 1998, (hereinafter "Conference Report") at H11302.

[46] 1999 Omnibus Bill, Div. A, Agriculture, Title XI, § 1101(b).

[47] 1999 Omnibus Bill, Div. A, Agriculture, Title XI, § 1101(a).

[48] 1999 Omnibus Bill, Div. A, Agriculture, Title XI, § 1101(b)(3).

[49] 1999 Omnibus Bill, Div. A, Agriculture, Title XI, § 1102(d).

[50] 1999 Omnibus Bill, § 1102(e). Alfatoxin is specifically mentioned as a possible source of quality loss.

[51] 1999 Omnibus Bill, Div. A, Agriculture, Title XI, § 1102(f).

[52] 1999 Omnibus Bill, Div. A, Agriculture, Title XI, § 1102(g)(1).

[53] 1999 Omnibus Bill, Div. A, Agriculture, Title XI, § 1102(g)(3).

[54] 1999 Omnibus Bill, Div. A, Agriculture, Title XI, § 1102(g)(4).

[55] "President Clinton Announces Emergency Aid to Farmers," White House Press Briefing (Dec. 12, 1998).

[56] 1999 Omnibus Bill, Div. A, Agriculture, Title XI, § 1102(g)(2).

[57] 1999 Omnibus Bill, Div. A, Agriculture, Title XI, § 1111.

[58] 1999 Omnibus Bill, Div. A, Agriculture, Title XI, § 1111(b), (c).

[59] Conference Report at H11302.

[60] Conference Report at H11302.

[61] 1999 Omnibus Bill, Div. A, Agriculture, Title XI, § 1111(d).

[62] 1999 Omnibus Bill, Div. A, Agriculture, Title XIII.

[63] 1999 Omnibus Bill, Div. A, Agriculture, Title XI, § 1122.

[64] 1999 Omnibus Bill, Div. A, Agriculture, Title XI, § 1123.

[65] 1999 Omnibus Bill, Div. A, Agriculture, Title XI, § 757.

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In addition, the Judicial Officer concluded that GIPSA had failed to prove that IBP give the Beef Marketing Group an "undue" or "unreasonable" preference as required under the Packers and Stockyards Act. As the Judicial Officer acknowledged, the Packers and Stockyards Act does not define "undue" and "unreasonable," and those terms must be defined according to the facts of each case. Considering the facts surrounding the Beef Marketing Agreement and assuming GIPSA had proven a $0.43 per hundredweight price advantage, the Judicial Officer noted that sum "represented only about one-half of one percent of the purchase price of a typical animal." *Id*. at 32. Also noting that "the cost of gain at feedlots can vary as much as $15 to $30 per hundredweight," the Judicial Officer observed that "it is questionable whether a difference of $0.43 per hundredweight would significantly affect either [producer] profits or placement of cattle by producers." *Id*. at 33.

As to GIPSA's allegation that IBP's failure to offer the terms of the Beef Marketing Agreement to all feedlots in Kansas violated the Packers and Stockyards Act, the Judicial Officer first invoked *Armour & Co. v. United States*, 402 F.2d 712, 720 (7th Cir. 1968), for the proposition that, under the Act, "price differences are not illegal, absent anticompetitive intent...." *Id*. at 35. Noting that "courts have disagreed on whether there is a requirement that there be an injury to competition, or whether injury to competitors is enough," the Judicial Officer found "that harm to competition can be proven by showing harm to competitors ...." *Id*. at 36. In this regard, the Judicial Officer concluded "that the Packers and Stockyards Act does not require that the person harmed be a direct competitor of the person causing the harm, *viz*., it would be a violation of the Packers and Stockyards Act if it were shown that a packer caused harm, which the Packers and Stockyards Act is designed to prevent, to a feedlot or a livestock producer." *Id*.

Here, however, the Judicial Officer determined that GIPSA failed to prove injury to either cattle producers or to feedlots that were not members of the Beef Marketing Group. The Judicial Officer found that the evidence demonstrated that a feedlot's membership in the Beef Marketing Group "was not of particular concern to [producers] in making cattle placement decisions," and feedlots that were not members of the Group continued to receive competitive prices. *Id*. at 37-38.

The Judicial Officer took a different view of the right of first refusal, however. Since the right of first refusal only required IBP to match, not exceed, the previous high bid, the Judicial Officer found that the right of first refusal "has the potential of discouraging others from bidding on cattle and necessarily restricts competition because [IBP's] right of first refusal obviates [IBP's] need to compete for cattle place at Beef Marketing Group feedlots in order to obtain those cattle." *Id*. at 74. Instead of competing, IBP needed only to make a bid and then, without participating in any further bidding, obtain the cattle by matching any bid higher than IBP's bid. The net effect, or potential effect, was the suppression of the bidding process. The Judicial Officer concluded that this right violated section 202 of the Act "because it has the effect or potential effect of reducing competition." *Id*. at 74-75 (citing *Swift & Co. v. United States*, 308 F.2d 849, 853 (7th Cir. 1962); *In re San Jose Valley Veal, Inc.*, 34 Agric. Dec. 966, 985 (1975)).

—Christopher R. Kelley, University of Arkansas, Fayetteville, AR.

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no reason to expect the trespasser's presence. Although not addressed in the opinion, there is an implication that an expected trespasser might be subject to a different standard.

The Court noted that there are some arguments in favor of retaining the common-law rule. Juries are more likely to be composed of land entrants than landowners; therefore, the common-law rule serves as a check on the power of juries. The Court noted that there is no empirical support for this view and that modern jurors are more likely to be landowners than in the feudal period that gave rise to the rule. The excessive cost of adequate insurance is another argument favoring the common-law rule. The Court rejected this reason too based upon its conclusion that the rule that it adopted does not require the landowner be an absolute insurer against all injuries that occur on the land. The landowner is only required to avoid being negligent. The last argument that the Court cited is that the trichotomy promotes predictability in the law. The Court also rejected this argument stating that the negligence standard of reasonableness provides greater predictability than the trichotomy. In support of its position the Court cited numerous decisions from other jurisdictions supporting the proposition that the trichotomy is a relic of a rural, feudal era. Of greater importance to its conclusion the Court observed that the trichotomy has created "a complex, confusing, and unpredictable state of law." Finally the Court concluded that the rule, as applied, was arbitrary, unjust and unfair.

—Theodore A. Feitshans, North Carolina State Univ., Raleigh, NC.