.A15 A323

Agricultural Law Update

NAT'L CENTER FOR AG LAW
APR 07 1993
LAW LIBRARY, U. OF ARK.

VOLUME 10, NUMBER 6, WHOLE NUMBER 115 MARCH, 1993

Official publication of the American Agricultural Law Association

INSIDE

- *Federal Register* in brief
- Conference Calendar
- Tenth Circuit rules on Chapter 12 trustee's fee
- Obstacles to recovery in defective seed cases
- State Roundup
- Eleventh Circuit rules on FIFRA remand

IN FUTURE ISSUES

- Lobbying Congress

Courts address Chapter 12 disposable income requirement

As numerous Chapter 12 cases reach the end of their plan period, the courts have been confronted with a variety of requests to interpret whether the debtor is entitled to a discharge, i.e., whether there has been "completion by the debtors of all payments under the plan." 11 U.S.C. § 1228(a). *See In re Grimm*, 145 B.R. 994 (Bankr. D.S.D. 1992); *In re Lewis*, 147 B.R. 37 (Bankr. W.D. Mo. 1992). In particular, several recent decisions analyze whether the debtor has met the requirement to pay all disposable income to unsecured claim holders. *In re Stottlemyre*, 146 B.R. 234 (Bankr. W.D. Mo. 1992); *In re Schmidt*, 145 B.R. 983 (Bankr. D.S.D. 1991); *In re Rowley*, 143 B.R. 547 (Bankr. D.S.D. 1992).

The disposable income requirement is one of the basic requirements for confirmation of a Chapter 12 plan. 11 U.S.C. §1225. Section 1225(b)(1) provides that if either the trustee or a holder of an unsecured claim objects to confirmation of a plan, that plan can only be approved if it meets one of two requirements. 11 U.S.C. § 1225(b)(1). The plan must either provide that the unsecured creditor will be paid the full amount of its claim over the life of the plan or it must provide that "all of the debtor's projected disposable income" during the plan period will be applied to make plan payments. *Id.*

Some Chapter 12 plans have addressed the requirements of section 1225(b)(1) by projecting zero disposable income. *Rowley*, 143 B.R. at 549. Adhering to this projection, no payments are made to the unsecured claim holders during the life of the plan. *Id.* at 551. In this context, the court is asked to determine the effect of the confirmation of a plan with a zero-projection provision. In other cases, specific funds and purchases are at issue. *Stottlemyre*, 146 B.R. at 235-6. In either context, the trustee or a creditor may petition the court to evaluate whether in fact, there has been disposable income that should have been paid to the unsecured claim holders.

This evaluation requires resolution of several fundamental issues. First, whether the debtor remains bound by the disposable income requirement despite confirmation of a plan projecting zero or minimal disposable income. Second, assuming that he or she remains subject to the requirement, when must a creditor object to the non-payment of disposable income, and third, what constitutes disposable income.

The courts have generally agreed that the requirement to pay actual disposable income to unsecured claim holders survives notwithstanding projections in the confirmed plan that suggest zero or minimal disposable income will be available. In *Rowley*, the debtors argued that the amount of disposable income to be paid was a confirmation issue and could not be debated subsequently. *Rowley*, 143 B.R. at 551. The court rejected this argument, following the weight of authority, and held that although the confirmation requirement refers to "projected disposable income," the

Continued on page 2

Fifth Circuit adopts "per se" rule in PACA case

In the recent case of *Faour v. USDA*, No. 92-4852, 1993 WL 41184 (5th Cir. March 8, 1993), the Fifth Circuit was asked to interpret the statutory requirements for finding that a person is "responsibly connected" to a company licensed under the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. §§ 499a - 499s. PACA protects growers/sellers of perishable agricultural commodities, in part, by requiring buyers to adhere to strict prompt payment provisions. 7 U.S.C. § 499b(4). PACA also restricts the activities of persons who are found to be "responsibly connected" to a violating company. 7 U.S.C. § 499h(b)(2).

In *Faour*, the company indirectly involved in the litigation, the Magnolia Fruit & Vegetable Company (Magnolia) was a dealer in perishable agricultural commodities that had been found guilty of numerous PACA violations. *Faour*, at *2. Subsequent to

Continued on page 3

commitment to pay actual disposable income endures throughout the plan period. *Id.* at 555. *See also, Schmidt*, 145 B.R. at 986. Similarly, in *Stottlemyre*, the court held that "disposable income must be computed after the fact, based on actual expenses incurred," rather than on projections. *Stottlemyre*, 146 B.R. at 236, citing *Matter of Schwartz*, 85 B.R. 829, 832 (Bankr. S.D. Iowa 1988).

Addressing the timing of objections based on the disposable income requirement, frequently challenges are raised at the plan confirmation hearing. *See, e.g., In re Rott*, 94 B.R. 163 (Bankr. D. N.D. 1988). However, the recent cases all support the proposition that challenges can be raised at the end of the plan period as objections to the debtor's discharge. *Rowley*, 143 B.R. at 549; *Stottlemyre*, 146 B.R. at 235; *Grimm*, 145 B.R. at 998; *Schmidt*, 145 B.R. at 986-87. *See also, Lewis*, 147 B.R. at 38. *Schmidt* further held that once the objecting creditor has met the burden of proving the merits of the objection, the "ultimate burden of persuasion" to establish that all disposable income payments have been made falls upon the debtor. *Schmidt*, 145 B.R. at 986.

More difficult to assess is the analysis of what constitutes disposable income. Section 1225(b)(2) defines "disposable income" as income "which is not reasonably necessary to be expended — (A) for the maintenance or support of the debtor or a dependent of the debtor; or (B) for the payment of expenditures necessary for the continuation, preservation, and operation of the debtor's business. 11 U.S.C. § 1225(b)(2). The courts have differed, however in their application of this definition to the facts.

In *Schmidt*, the court held that a disposable income analysis called for an accounting of all income and unmarketed commodities received during the plan period and an accounting of all "necessary expenses" incurred during that period. *Schmidt*, 145 B.R. at 987. The potential amount of disposable income is obtained by subtracting the total expenses from the total receipts. *Id.* at 987-90. The debtors then have the burden of showing that any remaining funds are necessary for the future farming operations. *Id.* On the facts of *Schmidt*, the court found that a substantial sum should have been available for disposable income and further found that the debtors had not met their burden of showing that any remaining income was necessary to the operation. *Id.* at 990-91. The court denied the debtors' motion for discharge. *Id.* at 991.

In *Stottlemyre*, the creditor and the trustee raised three specific objections at the end of the debtors' plan period. *Stottlemyre*, 146 B.R. at 235-36. They alleged that the money in the debtors' checking account was "disposable income," that the debtors' church donations were so excessive as to constitute "disposable income," and that the increase in the debtors' herd was an unnecessary expansion of the operation that should be attributed to "disposable income." *Id.*

Rather than taking the overall approach followed by *Schmidt*, the court in *Stottlemyre* analyzed the specific objections individually. With regard to the money in the debtors' checking account, the court noted that the definition of disposable income allowed for a deduction for "income necessary to be expended ... for the payment of expenditures necessary for the *continuation* ... of the debtor's business," (emphasis added). On this basis, the court found it acceptable for the debtors to retain funds for the continuation of the farming operation after the plan period. *Id.* at 236-37. The court noted, however, because of the industry-wide prevalence of annual operating financing, it might not be appropriate for the debtors to emerge from the Chapter 12 with enough cash to finance the next year's operation. *Id.*, citing *In re Bowlby*, 113 B.R. 983, 988 (Bankr. S.D. Ill. 1990). *See also, Schmidt*, 145 B.R. at 990.

The court found the church donations "more troubling." *Id.*, citing *In re Fleshman*, 123 B.R. 842 (Bankr. W.D. Mo. 1990) (finding a Chapter 12 debtor's contribution to be excessive and categorizing a portion of it as disposable income). The *Stottlemyre* court, however, found that the contributions were not excessive in that they totalled less than three percent of the debtors' gross income (a figure suggested by the court in *In re Reynolds*, 83 B.R. 684, 685 (Bankr. W.D. Mo. 1988)) and because they were paid from approved annual living expenditures. As the court stated, "If the debtors chose to restrict their personal expenses for food, clothing, travel and recreation in order to increase the amount of money they contribute to their church, I will leave that to their discretion." *Stottlemyre*, 146 B.R. at 237.

As to the debtors' increase in livestock, the court found that the increase of four cows and two bulls, with an estimated value of $3800 did not constitute an unnecessary increase in the business operation. *Id.* at 237-38.

Thus, although the courts differ in their analysis, and the results are clearly fact specific, Chapter 12 debtors are cautioned that discharge at the conclusion of the plan period is likely to involve a reexamination of their performance during the plan. The obligation to pay disposable income to unsecured claim holders is clearly subject to review and enforcement.

—Susan Schneider, Associate, Arent Fox Kintner Plotkin & Kahn, Washington, DC

Tenth Circuit/continued from page 3

specific issue arising in many of those cases, that is, the effect of making payments to creditors outside the plan. In fact, although the court cites the case of *In re Erickson Partnership*, 77 B.R. 738, 750 n. 13 as "disapproving, in dicta, of judicial review of fees," *Schollett*, 980 F.2d at 645, n. 7., the *Erickson* case actually upheld the confirmation of a Chapter 12 plan that provided for direct payments to creditors as a means of avoiding the percentage trustee's fees. *In re Erickson Partnership*, 83 B.R. 725 (D.S.D. 1988), affirming 77 B.R. 738 (Bankr. D.S.D. 1987). Thus, although the decision in *Schollett* seriously narrows any Chapter 12 debtor's chances of avoiding the ten percent trustee's fee, questions remain.

—Susan A. Schneider, Associate, Arent Fox Kintner Plotkin & Kahn, Washington, DC

Agricultural Law Update

VOL. 10, NO. 6, WHOLE NO. 115 Mar. 1993

AALA Editor..........................Linda Grim McCormick
195 Dollywood Dr., Toney, AL 35773

Contributing Editors: Christopher R. Kelley, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C.; Susan Schneider, Associate, Arent, Fox, Kintner, Plotkin & Kahn, Washington, DC; J.W. Looney, University of Arkansas School of Law, Fayetteville, AR; Linda Grim McCormick, Toney, AL.

State Roundup: Neil D. Hamilton, Drake University Law School, Des Moines, IA.

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

Agricultural Law Update is published by the American Agricultural Law Association, Publication office: Maynard Printing, Inc., 219 New York Ave., Des Moines, IA 50313. All rights reserved. First class postage paid at Des Moines, IA 50313.

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional service. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

Views expressed herein are those of the individual authors and should not be interpreted as statements of policy by the American Agricultural Law Association.

Letters and editorial contributions are welcome and should be directed to Linda Grim McCormick, Editor, 195 Dollywood Dr., Toney, AL 35773.

Copyright 1993 by American Agricultural Law Association. No part of this newsletter may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage or retrieval system, without permission in writing from the publisher.

this determination, the USDA further determined that the petitioner, Gary Faour was "responsibly connected" to Magnolia. *Id.* Faour appealed within the agency and eventually to the Fifth Circuit. *Id.*

Section 499a(b)(9) defines "responsibly connected" as affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 percent of the outstanding stock of a corporation or association. 7 U.S.C. § 499a(b)(9). The *Faour* court found this language to be "unambiguous" and "explicit." *Faour*, at *3. With regard to the requisite connections to a corporation set forth in subsection (B), the court stated that "[i]f a person falls into one of the three enumerated categories, he is responsibly connected." *Id.* at *3.

Faour argued, however, that his contact with Magnolia was so "nominal" that he should not be found to be "responsibly connected." *Id.* In previous cases interpreting the requirements for finding that a person is "responsibly connected" under PACA, the District of Columbia Circuit Court has held that the statutory language creates a rebuttable presumption of a connection. *Id.* (citing *Quinn v. Butz*, 510 F.2d 743, 751 (D.C. Cir. 1975); *Minotto v. USDA*, 711 F.2d 406, 409 (D.C. Cir. 1983)). In these cases, the D.C. court looked to the actual management and participation of the officer or director and held that in order to be responsibly connected, there must be "evidence of an actual, significant nexus with the violating company." *Id.* (quoting *Minotto*, 711 F.2d at 409).

In analyzing the D.C. "rebuttable presumption" approach, the *Faour* court noted that other circuit courts have rejected the rebuttable presumption approach and have adopted a "per se rule." *Id.* at *4 (citing *Birkenfield v. U.S.*, 369 F.2d 491 (3rd Cir. 1966); *Pupillo v. U.S.*, 755 F.2d 638, 643 (8th Cir. 1985)). Adhering to the reasoning set forth in these cases, and relying upon the plain language of the statute, the *Faour* court rejected the rebuttable presumption approach and adopted the per se rule. *Id.* The court held that it need not look beyond the "unambiguous language of the statute" and that any person who falls within any of the three categories applicable to corporate connections is "responsibly connected" for purposes of PACA restrictions. *Id.*

Applying this to the facts in *Faour*, the court found that Mr. Faour was an officer and a director of Magnolia during the time that at least four of the PACA violations occurred. *Id.* at *5. Although the USDA also argued, and Mr. Faour denied, that he owned more than ten percent of Magnolia's outstanding stock during the time of the violations, the court ruled that it did not need to resolve this issue. The court held that under section 499a(b)(9), Faour need only fall into one of the three listed categories: an officer, director, or owner of more than ten percent of the stock in the corporation, in order to be found "responsibly connected." As he already was found to be both an officer and director, no further inquiry need be made. *Id.* On this basis, the court affirmed the USDA determination.

—*Christopher R. Kelley, Arent Fox Kintner Plotkin & Kahn, Washington, DC*

Tenth Circuit rules on Chapter 12 trustee's fee

In the recent case of *Schollett v. Schollett*, 980 F.2d 639 (10th Cir. 1992), the Tenth Circuit Court of Appeals addressed the trustee's fee assessed on payments made to creditors under Chapter 12 of the Bankruptcy Code. Under the facts in *Schollett*, the debtors' plan provided that they were to make five annual payments of $30,000 to the trustee for disbursement to their creditors. *Id.* at 640. When the debtors made their first payment, they failed to include the additional ten percent trustee's fee, and the trustee refused to make the disbursements. As a result, the present action was brought by the debtors, requesting judicial review of the reasonableness of the trustees compensation. The debtors stated that the trustee would be paid $15,000 over the term of the plan for writing seven checks to their creditors, and argued that this compensation was unreasonable and should be reduced. *Id.*

The bankruptcy court issued an order confirming the debtors' obligation to pay the trustee's fee of ten percent for each payment owed under the plan. On appeal, the district court held that the fixed fee of ten percent was excessive as applied to the facts in the case and reduced it to five percent. The trustee appealed to the Tenth Circuit. *Id.*

On review, the Tenth Circuit found in favor of the trustee, holding that the court did not have the authority to review the ten percent fee. It based this holding on several factors.

First, it analyzed the statutory scheme under which the standing trustee is compensated, briefly reviewing the history of the trustee system. Within certain guidelines, 28 U.S.C. section 586(e) gives the United States Attorney General, after consultation with the appointing U.S. Trustee, the authority to determine trustee compensation. Reviewing this granting of authority, the court stated that "[t]he clear and convincing language committing the setting of fees to the Attorney General does not suggest an oversight function for the courts." *Id.* at 643.

As further support for the disallowance of judicial review, the court noted that the Bankruptcy Code explicitly provides for a judicial determination of trustees fees in Chapter 7 and 11 bankruptcies, and specifically establishes a reasonableness standard. 11 U.S.C. § 330(a)(1). The court stated that "[w]e can only assume then that the statute's silence on the question of judicial review of the reasonableness of Chapter 12 percentage fees reflects Congress' intent that such review not occur." *Id.* at 644.

The court also found that the argument for judicial review was "undermined by the fee structure of the statute." *Id.* Under this fee structure, there is a general cap of ten percent. The statute further requires that the Attorney General base the fixed fee on the "actual, necessary expenses" incurred by the trustee. *Id.*

Moreover, the court noted that the Chapter 12 trustee's fee structure does not call for a flat fee, but rather, the fee is dependent on the size of the payments provided in the Chapter 12 plan. The court stated that this "ensures some degree of reasonableness of the fee as applied to individual cases."*Id.* As such, the court noted that the fee will "vary on a case by case basis, to some degree to reflect the expected effort" required of the trustee. *Id.*

The court further found that the requirement of a fixed fee in itself indicated the inappropriateness of judicial review. The court observed that the standing trustee is committed to accept supervision and administration of cases in his or her district without regard to the number, frequency, or complexity of those cases. The fixed fee is established to provide fair compensation based on the average effort required. The court held that it would be "inequitable to allow debtors to reduce a trustee's fees in remunerative cases while still requiring her to serve in those cases in which there is no hope of favorable compensation. *Id.* at 645.

Finally, the court stated that an overall purpose of the Bankruptcy Reform Act of 1978, Pub.L. No. 95-598, 92 Stat. 2549 (1978) was to separate the administrative and judicial functions in bankruptcy cases. In light of this purpose, the limitation of judicial control over the compensation of the Chapter 12 trustee is appropriate. *Id.*

The court noted that other courts have divided on the issue of the fixed percentage fee in Chapter 12, with the minority reaching "a contrary conclusion." *Id.* The court did not, however, address the more

Continued on page 2

Obstacles to recovery in defective seed cases

J. W. Looney

Farmers with complaints concerning defective seeds have encountered a variety of obstacles in using warranty and strict liability approaches in obtaining compensation from seed suppliers. One such obstacle is illustrated by the 1992 Indiana case, *Martin Rispens & Son v. Hall Farms, Inc.*,[1] in which one defendant was relieved of liability for implied warranties because of an industry practice to disclaim implied warranties and to limit liability to the cost of the seed. This limitation by "usage of trade" was held to apply even though the buyer-farmer had no knowledge of the industry practice. A second obstacle has been the reluctance of courts to extend strict liability concepts to economic losses resulting from defective seeds. This reluctance stems, in part, from the requirement that the product not only be defective but that it also be "unreasonably dangerous" and cause harm to other property of the buyers. And, some courts have had difficulty in treating living things as "products" within the meaning of Restatement (Second) of Torts, Section 402A. A third obstacle is illustrated by 1991 Arkansas legislation that mandates presuit nonbinding arbitration before the buyer can sue the seed dealer. This legislation[2] requires notification to a state agency, the Arkansas State Plant Board, following which an arbitration committee will attempt to determine the facts and recommend money damages.

Trade usage

Farmers have encountered a range of arguments in efforts to defeat claims for defective seed but have had some success in developing a body of case law supportive of such claims and, in particular, avoiding limitations on damages. For example, efforts to limit recovery to the purchase price of the seed was held to be unconscionable where the company, by negligence, sent the wrong seed in *Dessert v. Drew Farmers Supply, Inc.*[3] The same result attained in *Klien v. Asgrow Seed Co.*,[4] and in *Agricultural Services Association v. Ferry-Morse Seed Co.*[5] In the latter two cases, statements of limitation were held ineffective because of violations of a statute regarding labeling of seeds. In addition to the public policy argument for unconscionability, attempts to disclaim or limit liability for express warranties are often found to be inconsistent with the warranties themselves and, therefore, invalid.

Attempts to disclaim or limit liability for implied warranties have been more successful so long as the disclaimer or limitation complies in all respects with UCC section 2-316 (disclaimer) or UCC section 2719 (limitation). For example, under section 2-316 the disclaimer must be conspicuous and must mention merchantability if it is to be effective as to the implied warranty of merchantability. To disclaim the warranty of fitness for particular purpose the disclaimer must also be in writing. Under section 2-719 consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable.

Remedies for breach of implied warranty can be excluded or modified in less formal ways under UCC section 2-316(3)(c) by "course of dealing," "course of performance," or "usage of trade." Course of dealing (previous conduct) establishes a "common basis of understanding" and course of performance (prior dealings under the particular contract in question) establishes acquiescence to a particular meaning to a term of the contract. Both imply some previous contact between the parties and are more powerful than usage of trade.

"Usage of trade" under UCC section 1-205 is defined as:

> A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question.

Further, UCC section 1-205(3) refers to a usage of trade "of which they are or should be aware" as giving particular meaning to and to supplement the terms of the agreement.

The Official Comment to UCC section 1-205 suggests that trade usages are recognized, even if not universal, so long as they are reasonable. The fact that a usage has been commercially accepted makes a *prima facie* case that it is reasonable but with one caution:

> But the anciently established policing of usage by the courts is continued to the extent necessary to cope with the situation arising if an unconscionable or dishonest practice should become standard.

In fact, the Comment cross references the concept of unconscionability with regard to explicit contract provisions and indicates that it is likewise applicable to *implicit* clauses.[6] In addition, the Official Comment refers to the mention of usages of which the parties "are or should be aware" as reinforcing the "regularity of observance" as contrasted to universality of the practice or method.[7]

Some courts have been willing to find limitation of liability clauses to be unconscionable where there was absence of evidence that the provision was commercially reasonable or should reasonably have been anticipated. For example, in *Lutz Farms v. Asgrow Seed Company*,[8] the court found that genetic defects in onions were the "natural and proximate" consequences of the seller's breach and that the buyer would not have known of any disclaimer on the basis of prior dealings with the seller. And, the South Dakota court in *Schmaltz v. Nissen*[9] used the UCC section 2-302 test for unconscionability of disclaimers and limitations and found such provisions to be unconscionable since the farmer was in no position to bargain for more favorable terms nor able to test the seeds. Interestingly, the South Dakota legislature reacted to a predecessor to this case, which used the same concept, by enacting legislation "abrogating" the decision.[10] This decision may be contrasted to that of the Minnesota court in *Hapka v. Paquin Farms*[11] in which the relative position of the parties was more nearly equal and the court suggested that in commercial transactions the parties were expected to be "knowledgeable and of relatively equal bargaining power so that warranties can be negotiated to the parties' mutual advantage."[12] Likewise, the Washington court in *American Nursery Products v. Indian Wells Orchards*[13] found a provision limiting incidental and consequential damages to be *prima facie* conscionable in commercial transactions. The court stated:

> The party defending the clause may provide the clause is conscionable regardless of the surrounding circumstances if the general commercial setting indicates a prior course of dealing as reasonable usage of trade as to the exclusionary clause.[14]

An examination of the Indiana court's opinion in *Rispens* reveals that the court relieved one defendant of liability for implied warranty on the basis that an "established industry practice" disclaimed and limited liability to the cost of replacing the seeds and that this limitation was

J. W. Looney is Professor of Law at the University of Arkansas, Fayetteville, AR

effective even though the purchaser had no knowledge of the practice. According to the court:

> Once Rispens established the existence of the seed industry's trade usage of disclaiming warranties, it necessarily established a justifiable expectation that the practice would be observed by all doing business with the industry.[15]

The court allowed a disclaimer to be given effect on the basis of trade usage. The actual language of an attempted disclaimer was so general as to not comply with section 2-316. It merely stated that Rispens "gives no warranties, express or implied, as to the productiveness of any seeds or bulbs it sells...." The court accepted the trade usage as a disclaimer and limitation of the warranty to the purchase price of the seed. The court emphasized that it is the degree to which the practice is recognized, not the degree to which a particular party is informed about the practice, that determines whether a usage is recognized.

The court also evaluated the question of whether an attempted limitation on damages is unconscionable by referring to the Official Comment to UCC section 2-302 and concentrating on the two branches of unconscionability: substantive and procedural. They found no substantive unconscionability in this transaction because the limitation was not "oppressively harsh and one-sided." Farming was seen as inherently risky, and since the industry practice was to limit the risk that the seller was willing to assume in case of crop failure it was not seen as unconscionable to shift that risk to the purchaser. As to procedural unconscionability the court found nothing in the bargaining process that would lead to a conclusion of unconscionability.

The greatest obstacle that the Indiana approach imposes is to make trade usage an *implicit* part of the agreement. This may serve to eliminate one of the most effective arguments regarding attempts to disclaim or limit warranties, that is, that they were not part of the original bargain between the parties because they only appeared in documents made available to the purchaser after the contract was concluded (e.g., delivery receipts). For example, in *GoldKist, Inc. v. Citizens & Southern National Bank*,[16] a limitation clause appearing on seed tags was found to be ineffective because it was not brought to the buyer's attention at the time the contract was entered into.

The court's decision in *Rispens* is somewhat confusing in that it, like many courts, mixes the concepts of "disclaimer" and of "limitation" of implied warranties. The apparent conclusion of the court is that the practice in the seed industry is to both exclude implied warranties altogether and to limit recovery (presumably on express warranty or negligence grounds) to the purchase price of the seed. In this case the trade usage apparently accomplished both.

However, it is one thing to find trade usage effective to exclude or limit implied warranties; it is quite another to find that trade usage limits recovery for breach of express warranty or for tort recovery. UCC section 2-719 allows the limitation (or exclusion) of consequential damages unless the limitation or exclusion is unconscionable. The point of the line of cases where recovery has been successful is that attempts to exclude or limit recovery for breach of express warranty or for tort may be unconscionable in some circumstances. Public policy does not favor limitations of remedy (a point which the *Rispens* court recognized).

In the prior cases, it was the supplier's efforts to disclaim or limit liability for express warranty that some courts have found to be unconscionable, in part, because the language of UCC section 2-316(1) requires that "words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed whenever reasonable as consistent with each other. " For example, in *Lutz Farms v. Asgrow Seed Company*,[17] an express warranty found in promotional literature would have been negated by or was inconsistent with the attempted disclaimer. In *Rispens* the court found that one defendant had used language that might create an express warranty but, at the same time, found the specific limitation language was effective to limit any recovery to the recoupment of the seed's purchase price.

How can a supplier make an express warranty on the one hand (often incorporated into statutorily required labels) and on the other hand limit that same warranty by sweeping language in a disclaimer or limitation clause? An interpretation that allows broad limitations on express warranties, when coupled with the argument that trade usage excludes or limits implied warranties, makes recovery for defective seed problematic at best.

Strict Liability

Sellers of defective products unreasonably dangerous to the person or property of the consumer may be subject to liability for harm caused by the defective product under the strict liability concept outlined in Section 402A of the Restatement (Second) of Torts. The difficulty of extending the concept to natural products is exemplified by *Two Rivers Company v. Curtis Breeding Service*[18] which involved bull semen that carried a recessive genetic trait. The difficulty is, in part, because the product is not manufactured in the traditional sense; and, in part, because the concept may not extend to mere economic loss resulting from a product with defective workmanship or materials. Section 402A applies generally to physical harm to a person or his other property. Injury to the defective product itself is an economic loss governed by the UCC and not by section 402A. A hybrid loss (one involving both physical harm to the plaintiff's other property as well as to the product itself) may be recovered under either the UCC or under strict liability. The *Two Rivers* court cited seed cases as authority for the proposition that commercial law, not strict liability, is the appropriate governing law. For example, *Pioneer Hi-bred International, Inc. v. Talley*[19] was cited for the proposition that a causative defect in seed corn results in a failure of the product with respect to its own value and does not damage or injure other property of the user thus the loss suffered is economic loss only.

In a more recent decision the District Court for the Eastern District of Pennsylvania found, in a case involving seed potatoes, that planted seed potatoes were not distinct from the above ground plants or the underground tubers. Since the damage was not to other property, it should be treated as purely an economic loss governed by the UCC in accordamce with the majority view as first set out in *Seely v. WhiteMotor Co.* [20]

The final chapter has not been written as to the application of strict liability concepts to the sale of seeds. Product liability statutes frequently make the sellers of "unreasonably dangerous defective products" strictly liable for harm caused to property of the consumer. Usually, the damage must be to "other property" of the consumer (other than the product itself). Whether crops grown from seed qualify as "other property" has not been fully determined.[21] Some courts have refused to ap-

Continued on page 6

ply strict liability concepts to natural products, such as seed, on the basis that they do not have a "fixed" nature at the time they enter the stream of commerce. In *Anderson v. Farmers Hybred Companies. Inc.*,[22] the court, dealing with live animals, concluded that living things were not "products" under Section 402A. The court stated:

> While a "product" may be unchanged from its natural state, viable, and not the result of manufacturing processes, it must also be of a fixed nature at the time it leaves the seller's control.[23]

The purpose of strict liability, according to the court, would be defeated if the concept was applied to products "whose character is easily susceptible to changes wrought by agencies and events outside the control of the seller.[24]

Statutory impediments

A third obstacle to recovery is illustrated by the 1991 Arkansas legislation[25] that requires a buyer who alleges failure of agricultural seed to produce or perform as represented by the label to file a complaint against the dealer (along with a $100 filing fee) with the Arkansas State Plant Board. This filing must occur within ten days after the alleged defect becomes apparent. A copy must be sent to the dealer who has ten days to answer. This filing is a prerequisite to maintaining a legal action against the dealer.[26] Apparently, a seed dealer may request an investigation if a suit is brought by paying a similar $100 fee.[27]

The State Plant Board is to refer the matter to a five-member "arbitration committee," which is to include a representative of the Arkansas Seed Growers Association, the Arkansas Seed Dealers Association, and the Arkansas Farm Bureau Federation.[28] The purpose of the arbitration committee is to assist in "determining the facts" and to "recommend money damages" in seed failure cases.[29]

This recommendation is binding upon the parties only if they have so agreed in the contract governing the sale of the seed.[30] If it is not binding, the arbitration report may, nonetheless, be introduced as evidence in any litigation and the court "may give such weight to the committee's findings and conclusions of law and recommendations as to damages and costs, as the court may see fit based upon all the evidence before the court.[31]

A purchaser is not required to comply with this procedure unless a "Notice of Mandatory Arbitration" is included on the seed package, analysis label, or invoice covering bulk seed shipments.[32] Aside from the major drafting defects in this legislation, it does impose a major obstacle to litigation of claims for seed failure. To date no other state has adopted similar legislation and it is yet unclear as to what extent seed dealers in Arkansas have included the mandatory notices on seed containers, labels or invoices. And, it is even less clear to what extent seed dealers have attempted to negotiate predispute arbitration agreements with purchasers to make the arbitration procedure binding.

Conclusion

In spite of these obstacles, seed purchasers are not without remedies altogether. First, as mentioned above, some courts are willing to find attempted disclaimers of express warranties inconsistent with express warranty language. Second, if the problem with the seed results from negligence of the dealer, including negligence *per se* in the violation of statutory labeling requirements, a number of courts find attempts to disclaim or limit liability to be unconscionable. Some are willing to find such clauses to be unconscionable in other circumstances as well. Third, it is often the case that attempts to disclaim or limit warranties appear in documents that were not a part of the original transaction (e.g., delivery receipts). As to express warranties or stated attempts to limit recovery, this may raise the argument that the disclaimer or limitation was never part of the contract. Ultimately, if courts adopt the *Rispens* "trade usage" concept, this defense is no longer relevant since trade usage may be an *implicit* part of the agreement itself unless an argument can succeed that the usage is itself unconscionable because it is unreasonable. Last, the evolving concept of strict liability may offer some potential for recovery, especially if the defective seeds can be shown to be unreasonably dangerous "products" and if they cause harm to *other* property of the consumer.

---

[1] 601 N.E.2d 429 (Ind. Ct. App. 1992).
[2] Ark. Code Ann. § 2-23-101 to -110.
[3] 248 Ark. 858, 454 S.W.2d 307 (1970).
[4] 246 Cal. App. 2d 87, 54 Cal. Rptr. 609 (3rd Dist. 1966).
[5] 551 F.2d 1057 (6th Cir. 1977).
[6] Official Comment Point 6.
[7] Official Comment Point 7.
[8] 948 F.2d 638 (10th Cir. 1991).
[9] 431 N.W.2d 657 (S.D. 1988).
[10] 1988 Session Laws, Ch. 410, S.D.
[11] 458 N.W.2d 683 (Minn. 1990).
[12] *Id.* at 688.
[13] 797 P.2d 477 (Wash. 1990).
[14] *Id.* at 481.
[15] 601 N.E.2d at 438.
[16] 333 S.E.2d 67 (S.C. App. 1985).
[17] 948 F.2d 638 (10th Cir. 1991).
[18] 642 F.2d 1242 (5th Cir. 1980).
[19] 493 S.W.2d 602 (Tex. Civ. App. 1973).
[20] *Ringer v. Agway, Inc.*, 1990 U.S. Dist. LEXIS 10122, 13 U.L.L.R. Serv. 2d (Callaghan) 114 (E.D. Pa. 1990) citing *Seely v. White Motor Co.*, 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 1145 (1965).
[21] The Indiana court in *Rispens* remanded the case discussed above as to one defendant for a factual determination of whether the loss met the definition required by the Indiana Products Liability Act.
[22] 408 N.E.2d 1194 (Ill. App. 1980).
[23] *Id.* at 1199.
[24] *Id.* at 1199.
[25] Act 1024 of 1991; Ark. Code Ann. § 2-23-101 to -110.
[26] Ark. Code Ann. § 2-23-102.
[27] Ark. Code Ann. § 2-23-103.
[28] Ark. Code Ann. § 2-23-104.
[29] Ark. Code Ann. § 2-23-105.
[30] Ark. Code Ann. § 2-23-107.
[31] Ark. Code Ann. § 2-23-107(b).
[32] Ark. Code Ann. § 2-23-102(d).

Position announcement

Extension Specialist, Agricultural Law and Policy, Assistant Professor. Full-time, 12 month, tenure track, extension position. Available: June 18, 1993. Required: J.D. degree from an accredited law school and Bar certified. Also M.S. degree in agricultural economics or economics. Demonstrated ability to communicate effectively with lay audiences. Preferred: Extension and/or teaching experience at the university level. Experience in the professional practice of law. Salary: Commensurate with qualifications and experience. Specific responsibilities include: 1) Develop and conduct an extension education program in agricultural law and policy. b) Offer law and policy expertise to multidisciplinary extension teams. c) Teach an upper division course in agricultural law. d) Develop the curriculum and instructional program for the Kansas Income Tax Institute and participate as an instructor.

Applications: Applicants must submit a letter of application, resume, transcripts of all college and university work, sample publications, and names and addresses of three references to: Dr. Orlan H. Buller, Head, Dept. of Agricultural Economics, Waters Hall, Room 342, Kansas State University, Manhattan, KS 66506-1104. Tel: 913-532-4493, FAX 532-6925. Deadline for receipt of applications is May 1, 1993. AA/EOE.

STATE ROUNDUP

IOWA. *Feedlot nuisance protection.* In a significant ruling, *Masuen v. Loutsch*, No. 2-208/90-1851, Iowa Court of Appeals, Oct. 27, 1992, the Iowa Court of Appeals has rendered the first interpretation of Chapter 172D, the nuisance protection for livestock feedlots that comply with applicable environmental rules and county zoning. The ruling came in a dispute between two neighboring farmers over the effect of runoff of water and manure from a cattle feedlot and a nearby cattle lane. At issue in the case was whether the plaintiff's nuisance claims concerning the runoff were blocked by the operation of Chapter 172D. The appeals court held the chapter did apply because the feedlot established operation prior to the plaintiff's ownership of the farm. In what may be the most important aspect of the ruling, the court interpreted the language of section 172D.3(1), which provides: "A person complies with this section as a matter of law where no rule of the department exists." The court decided that:

> Thus, a feedlot, as defined by section 172D.1(6), has an absolute defense against nuisance claims unless the conditions or circumstances in question are subject to regulation and the feedlot has violated the applicable regulation. Where there is no applicable regulation, the feedlot is deemed to be in compliance for purposes of establishing a defense to a nuisance action under section 172D.2.

The district court had held that the defendant violated DNR rules on the operation of the waste settlement basin; therefore the court of appeals agreed those actions could be subject to a nuisance suit under section 172D.2. However, on a related claim concerning a nuisance for runoff and manure from the cattle lane, the appeals court reversed the district court's finding of a nuisance because there was no showing the defendants violated any applicable regulations. As a result that nuisance claim was barred by Chapter 172D. More importantly, the plaintiffs had also claimed a nuisance as a result of "increased odors, flies, and dust." The Court of Appeals held, "again, the Masuens cite no applicable regulations. Due to section 172D.2, we are unable to find the Loutschs' operation of the feedlot constituted a nuisance due to odors, flies, and dust."

This ruling illustrates the potential impact of the decision. Chapter 172D may provide an absolute defense from a nuisance action if the activity alleged to cause a nuisance is not subject to regulation. Most livestock related nuisance suits involve allegations of odors; however, Iowa has no odor control rules applicable to livestock facilities, other than distance separation for construction of earthen waste slurry storage and anaerobic lagoons. As a result, under the court's reading of Chapter 172D, if a feedlot qualifies for the nuisance protection by having priority of ownership of realty, then the chapter may present an absolute bar to nuisance claims based on odors or other unregulated activities.

The district court had held that even if the nuisance action was barred by section 172D.2, common law nuisance was not abrogated by any Iowa statute. The appeals court rejected this narrow interpretation of the effect of Chapter 172D, ruling:

> We note, however, that "nuisance," as defined in section 172D.1(11) means "public or private nuisance as defined either by statute or by the common law." Thus, section 172D.2 establishes a defense against both statutory and common law nuisance actions.

The district court did find the defendants were liable for damages from trespass for the water and manure that drained onto the plaintiff's property. The appeals court ruled Chapter 172D does not present a bar to actions grounded in trespass. As a final note, the court refused to grant an injunction requiring the defendants to move the feedlot, finding that would cause them undue hardship.

—Neil D. Hamilton, Director, Agricultural Law Center, Drake University Law School, Des Moines, Iowa

Eleventh Circuit rules on FIFRA remand

The Eleventh Circuit recently reconsidered its holding in *Papas v. Upjohn Co.*, No. 89-3752, 1993 WL 41169 (11th Cir. Mar. 8, 1993) on the issue of the preemption of common law tort claims by the Federal Insecticide Rodenticide and Fungicide Act (FIFRA). *See*, J.W. Looney, *FIFRA Preemption of Common Law Tort Claims*, Agric. L. Update, Dec. 1992, at 1. The reconsideration came in response to a remand order from the United States Supreme Court. *Papas v. Zoecon Corp.*, 112 S.Ct. 3020 (1992). The Supreme Court ordered the remand for further consideration in light of its decision in *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992), another preemption case.

On remand, the Eleventh Circuit ruled that FIFRA expressly preempted the plaintiffs' claims to the extent they were based on inadequate labeling or packaging of pesticides.

—Christopher R. Kelley, Arent Fox Kintner Plotkin & Kahn, Washington, DC

Federal Register *in brief*

The following is a selection of matters that were published in the *Federal Register* in February, 1993.

1. EPA; NPDES general permit and reporting requirements for discharges from concentrated animal feeding operations. 58 Fed. Reg. 7610.
2. APHIS; Animal Damage Control Program; Availability of supplement to the draft environmental impact statement; notice. 58 Fed. Reg. 8252.
3. CCC; Disaster Payment Program and Tree Assistance Program for 1990, 1991, and 1992; final rule; effective date 2/16/93; 58 Fed. Reg. 9107.
4. PSA; Amendment to certification of central filing system; Oklahoma. 58 Fed. Reg. 9558.
5. USDA; Outreach and assistance grants program for socially disadvantaged farmers and ranchers; request for proposals. 58 Fed. Reg. 11172.
6. FCA; Equal Access to Justice Act; application for award of fees and other expenses; effective date 2/23/93. 58 Fed. Reg. 10945.

—Linda Grim McCormick

CONFERENCE CALENDAR

Tenth Annual Current Environmental and Natural Resources Issues Seminar
April 16-17, 1993, Lexington, Kentucky
Topics include: new groundwater regulations, status report on federal programs scheduled for review in next few years, and case update.
Sponsored by the Mineral Law Center, University of Kentucky, College of Law.
For more info., call (606) 257-1161.

Equine Law
April 29-30, 1993, Marriott Griffin Gate Resort, Lexington, Kentucky
Topics include: equine sales across national boundaries; taxes and the horse industry; Canadian system.
Sponsored by the University of Kentucky College of Law.
For more info., call (606) 257-2921.

Annual APA National Conference "Agenda for America's Communities"
May 1-5, 1993, Chicago
Topics include: protecting farmland in northeastern Illinois; small towns and rural planning.
Sponsored hy APA.
For more info., call (312) 955-9100.

ADDRESS
CORRECTION REQUESTED

219 New York Avenue
Des Moines, Iowa 50313

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

AALA Distinguished Service Award

The AALA invites nominations for the Distinguished Service Award. The award is designed to recognize distinguished contributions to agricultural law in practice, research, teaching, extension, administration, or business.

Any AALA member may nominate another member for selection by submitting the name to the chair of the Awards Committee. Any member making a nomination should submit biographical information of no more than four pages in support of the nominee. The nominee must be a current member of the AALA and must have been a member for at least the preceding three years. Nominations should be sent to Patricia Conover, 4255 Arrowhead Rd., Auburn, AL 30830.