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INSIDE

IN FUTURE ISSUES

Liberty of thought is the life of the soul.

— Voltaire

Sale of farm did not constitute the sale of a security

The application of the Securities Act of 1933 and the Securities Exchange Act of 1934 to agricultural business arrangements was recently litigated in *Boeck v. Logan 480 Dairy Farm,* 606 F.Supp. 868 (S.D. Iowa 1985).

The plaintiffs had sold their dairy farm to the defendants, receiving two promissory notes as partial payment. The plaintiffs reserved a security interest in livestock, fixtures, equipment, buildings and crops, and also reserved foreclosure and forfeiture rights if the notes were not paid as scheduled. After the defendants failed to make required payments on the notes, the plaintiffs filed a claim against the defendants in federal court, alleging violations of the Securities Acts, among others.

The plaintiffs alleged that the transaction, which included promissory notes and installment contracts, constituted a "security," and that they were solicited to enter into the sales transaction by the defendants so that there was an "offering" under the Securities Act of 1933. The defendants moved to dismiss the claims concerning the Securities Acts' violations, arguing that the transaction was *not* a security.

The court found that the economic realities of the transaction indicated that the sale of the farm was a commercial endeavor rather than a sale of a security. Thus, the transaction was not covered by the federal Securities Acts.

— Terence J. Centner

Wetlands determination

An interesting case involving assertion of jurisdiction over wetlands by the Corps of Engineers under Sections 301 and 404 of the Clean Water Act is *United States v. City of Fort Pierre, South Dakota,* 747 F.2d 464 (8th Cir. 1984) *reversing* 580 F.Supp. 1036 (D.S.D. 1984).

The piece of ground involved — known as the Fort Pierre Slough — was originally a side channel of the Missouri River, but had, over time, been separated from the river by a series of man-made projects. In 1907, 1927 and 1962, bridge construction sealed off the northern end of the property. From 1907 on, the ground gradually dried and because there was southerly drainage available, it grew into a thickly-wooded river bottom exhibiting, in the words of the Court of Appeals, "...none of the characteristics normally associated with a wetland-type ecological system."

The court found that after the bridge construction, the property had no hydrologic connection with the Missouri River. In 1968, the Corps of Engineers used the southern end of the property as a dump site for some 50,000 cubic yards of dredge material from the river. This act changed the character of the slough once again. Because of the deposit, normal runoff could not drain from the slough, and the property took on the appearance of a wetland. Due to the trapped water, the trees died, and only cattails and other wetland-type vegetation survived.

In 1980, the city of Fort Pierre constructed several streets through the slough. In 1981, the Corps brought suit, asserting that the slough is a wetland and that construction in a wetland requires a Section 404 permit. The District Court found for the Corps, but the Court of Appeals reversed, holding that property is not a wetland where its wetland characteristics were entirely due to inadvertent activity of the Corps itself in depositing dredge material:

> "We do not believe that the Corps' wetland jurisdiction extends to the Fort Pierre Slough. Here, prior to 1968, the slough was not a wetland, and exhibited none of the characteristics associated with a wetland. Further, any wetland characteristics now exhibited by the slough did not result from natural evolution and were not the intended or anticipated result of private or governmental activity. Rather, the slough's wetland characteristics resulted entirely as the inadvertent, unintended by-product of the Corps' dredging activity." 747 F.2d at 467.

While the court's decision applies to a fairly unique fact situation, it is nonetheless in-

(continued on next page)

Farm Credit System mergers and consolidations

The Farm Credit Administration, by its Federal Farm Credit Board, has adopted additional regulations and revised existing regulations dealing with amendments to the Federal Land Bank Association and Production Credit Association charters and with procedures for effecting mergers or consolidations of such associations. The merger and consolidation procedures include requirements for disclosure of information to voting stockholders to insure that they are adequately informed regarding association merger of consolidation proposals. 50 Fed. Reg. 20396 (1985) (to be codified at 12 C.F.R. pt. 611). The effective date of this rule was June 24, 1985. 50 Fed. Reg. 27930 (1985).

— Donald B. Pedersen

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WETLANDS DETERMINATION
CONTINUED FROM PAGE 1

teresting to observe that the court ignored the early history of the ground, which was as a natural side channel of the Missouri River. Under most circumstances, side channels of prairie rivers exhibit the characteristics of wetlands as described in the Corps' regulations, 33 C.F.R. § 323.2: "[A]reas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." By limiting its factual analysis to the time period beginning with the first man-made interference with the property's natural condition, the court managed to divert its findings away from the ground's natural condition and function. The "normal circumstances" referred to in the Corps' definition of wetlands would seem to refer to the ground in its natural condition. The court, in this case, has constricted its use of "normal circumstances" to include only those circumstances existing after the first bridges were built.

— John H. Davidson

A paste of bones and meat

In *Community Nutrition Institute, et al v. Block*, 749 F.2d 50 (D.C. Cir. 1984), consumer groups brought suit challenging the validity of labeling regulations promulgated in 1982 for meat products made in part with meat mechanically separated from bone. A mechanical deboning process crushes bones and meat and forces the resulting paste through a sieve.

Prior to 1982, regulations required that the product from mechanical deboning be identified as "mechanically processed (species) product" (MP(S)P) — for example, mechanically processed beef product. 9 C.F.R. §319.5 (1979). In addition, the labels of products containing mechanically deboned meat had to bear two prominantly lettered qualifying phrases next to the finished product (e.g., frankfurters), 9 C.F.R. §317.2(j)(13) (1979). The first phrase, "mechanically processed (species) product" was required on the grounds that MP(S)P was a unique and unexpected ingredient. The second phrase, "contains up to ____ percent powdered bone," was to advise persons on calcium-restricted diets of the increased calcium content.

The 1982 regulations changed the product name to "mechanically separated (species)" (MS(S)), 9 C.F.R. §319.5(a) (1984), eliminated the phrase indicating the presence of MP(S)P, 9 C.F.R. §317.2(f)(1) (1984), and replaced the powdered bone content phrase with calcium content information, 9 C.F.R. §317.2(i)(13) (1984). The existence of MS(S) is to be listed in the ingredient statement, 9 C.F.R. §317.2(f)(1) (1984).

Consumer groups claimed that the new regulations permitted the sale of misbranded and adulterated food products in violation of the Federal Meat Inspection Act, 21 U.S.C. §601-95 (1982). They also alleged that the agency violated the APA by relying on staff scientific studies completed after the close of the comment period.

In upholding the lower court decision, the Court of Appeals held that the secretary has broad discretion as to the content of meat food product labels. The court could find no abuse of discretion by the secretary as to the mechanical deboning labeling requirements. Although the Court found that the scientific tests were completed after the comment period, it found no violation of the APA as the studies did not provide new information critical to the secretary's determination.

— John D. Copeland

Cooperative without authority to withhold funds

A court of appeal in Louisiana has found that a dairy cooperative did not have authority to withhold funds due to a member for milk delivered, and thereby committed tortious conversion. *Gautreau v. Southern Milk Sales Inc.*, 463 So.2d 1378 (1985). The cooperative had failed to remit to the member full payment for milk delivered, because it claimed the member had delivered contaminated milk. The member thereafter initiated the action to enjoin the cooperative from withholding money, to recover money already withheld, and for other relief. The court found that the member had delivered contaminated milk, so the cooperative was entitled to damages. Absent any authority, however, the cooperative had no right to withhold the member's funds as compensation for the damages incurred from the contaminated milk. The cooperative's exercise of dominion over the member's property was wrongful, and thereby constituted tortious conversion.

— Terence J. Centner

Company/grower litigation in the vertically integrated poultry industry

A recent decision of the United States Circuit Court for the Eastern District of North Carolina is helpful in identifying issues that may arise in controversies involving production or grow-out contracts in the vertically integrated poultry industry.

In *Smith v. Central Soya of Athens Inc.*, 604 F.Supp. 518 (E.D.N.C. 1985), the plaintiffs (hereinafter Smiths) sought compensatory and punitive damages for the alleged breach of written egg production contracts and for violation of the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat., §§75-1.1 et. seq.

Smiths alleged that defendant companies induced them to build four poultry houses by orally representing that defendants "would continue putting poultry in the houses" and that Smiths "would have an income for 20 years on the poultry houses." Smiths complained that defendants later refused to provide additional chickens, thereby breaching their promise and damaging plaintiffs. They also contended that the representations were fraudulent, unfair and deceptive under the North Carolina Act.

In 1971, H. Morrison Smith began housing chickens for Central Soya pursuant to an egg production contract. Prior to that time, he had engaged in a variety of commercial enterprises and was considered an experienced businessman.

In 1973, 1976 and 1977, H. Morrison Smith built three additional chicken houses and, after completion of each one, entered into a further egg production contract with Central Soya to house an additional specified number of chickens. H. Morrison Smith's nephew, Dwight S. Smith, participated in building the fourth house under the partnership name "Prima Layers." Each egg production contract related to a particular chicken house and specified the number of chickens to be housed therein.

In December 1981, after supplying chickens to Smiths for 10 years, Central Soya sold its business to Sun City, assigning to Sun City all of its interest in the egg production contracts. Sun City completed performance under the contracts for the production period then in progress.

In April 1982, Sun City offered Smiths replacement chickens under a new egg production contract for the fourth (Prima Layers) house. Plaintiffs refused to accept the offer. As a result, Sun City removed all chickens from the Smiths' houses at the end of the laying season in August 1982, and supplied no further replacement chickens. Smiths then initiated the suit.

A review of the various contracts between Smiths and defendants reveals that between 1971 and 1976, five written contracts were entered into between H. Morrison Smith and Central Soya. The fifth and final contract involved Central Soya and Prima Layers partnership. It was dated Sept. 12, 1977, and covered the fourth house.

The contracts contained the usual industry clauses — Smiths were to provide the facilities, equipment and labor; the chickens and eggs remained the sole property of the company; company could enter Smiths' property at any time; company could dispose of chickens at "its pleasure;" a merger clause providing, "there are no agreements, understandings, representations or warranties between the company and grower, except those herein set forth;" and a clause obligating the company to furnish only one flock of chickens per contract. Each contract was renewed, one flock at a time, and the parties continued performance under the contracts without incident until April 1982.

Breach of Contract Claim

The initial issue was whether the purported oral representations of Central Soya's agent should be excluded as inadmissable parole evidence.

North Carolina provides for exclusion of parole evidence both by common law and by the sales article of the state's Uniform Commercial Code. N.C. Gen. Stat. § 25-2-202. Because these contracts were for services and not for the sale of goods, the court determined that the common law rule was pertinent. It applied because the writing integrated all of the terms of the contract and superceded all other agreements relating to the transaction. Contract merger clauses create a rebuttable presumption that each writing is complete and is an exclusive statement of the contract terms.

In order to rebut the presumption and, in effect, invalidate the merger clauses, the Smiths would have had to offer evidence to establish the existence of fraud, bad faith, unconscionability, negligent omission or mistake in fact. The court found that Smiths failed to meet their burden. The court noted that Smiths were experienced businessmen, and that they had read and understood the contracts prior to signing them. Clearly, there was no breach of the contracts as written. Defendants merely declined to renew at the end of the contract period.

Unconscionability

The Smiths' major challenge to the merger clauses was based on the theory of unconscionability. To prevail on this theory, the Smiths would have had to demonstrate:

1) That they had no meaningful choice but to deal with the defendants and accept the contracts as offered; and
2) That the merger clauses were unreasonably favorable to the defendants.

The court found neither element. As a practical matter, the preprinted, standardized contracts may have made the merger clause non-negotiable, but plaintiffs did not have to enter into the contracts. The court noted that the Smiths did not allege or introduce evidence to suggest that they were under economic duress when they signed the contracts. The court found that defendants did not occupy a grossly superior bargaining position, nor did they benefit unreasonably from the merger clauses.

The court went on to state that even if the parole evidence was found to be admissible, the alleged representations, at best, constituted mere expressions of belief or opinion regarding the future of plaintiffs' and defendants' respective businesses. The comments, "we're in the chicken business to stay" and "the chicken houses will last for 20 years," in the view of the court, created absolutely no contractual obligations.

Unfair Trade Practices Claim

Smiths alleged that the representations by defendants and their agents were fraudulent, unfair and deceptive acts under the North Carolina Act. Having found no breach of contract and, therefore, implicitly no fraud, unfair or deceptive act on defendants' part in the formulation or execution of the contract, the court dismissed the claim.

However, the court went on to discuss the fraud claim, assuming *arguendo* a breach of contract. The allegations in the complaint were found to be insufficient to state a claim for actual fraud, because the complaint did not state that the purported representations of the defendants were false when made. At most, Smiths alleged a representation by Central Soya of its intent to supply chickens in the future, which representation was, in fact, carried out for over 10 years; and an opinion as to the expected production period of the chicken houses. An unfulfilled promise alone cannot be made the basis of an action for fraud (unless made with the fraudulent intention *not* to carry it out).

Finally, the court indicated that North Carolina defines an unfair trade practice as one that is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. The court indicated that the plaintiffs' allegations were inadequate to support any such claims.

— Roy C. Whitehead Jr.

Farm estate planning practices in Missouri

by Stephen F. Matthews and John H. Poehlman

Like most land grant universities, the University of Missouri conducts extension programs in the estate planning area. Typically, these are free (or minimal-fee) evening sessions, with local probate judges, attorneys, insurance salespersons and extension staff providing general information about wills, interstate descent, state and federal death taxes, and various other estate planning tools and strategies. But extension sessions do not necessarily result in adoption of an estate plan for those attending. The audience is patiently encouraged to seek out competent legal advice and draw up an individualized estate plan.

But do farm families have an estate plan? To answer that basic question, we surveyed 894 farm families in July 1981 from two Missouri counties selected as representing typical crop/livestock/tenure arrangements found throughout Missouri. The 894 farm operations were obtained from the county Agricultural Stabilization and Conservation Service (ASCS) offices, and included those farm operators who owned or leased 200 acres or more. Our response rate was 36% (324) for farm operators and 32% (292 farm spouses) for the farm spouse section of the questionnaire.

Survey Objectives

First, we were interested in how much estate planning had been accomplished by farm operators and farm spouses. Secondly, where did farmers turn to for estate planning advice and information? And, finally, why do some farm families fail to make estate plans?

Farm Operator Characteristics

The farm operators who responded averaged 49 years of age, 93.3% were married — and all but four were male. The average size farm was 418 acres, with 56.5% being both crops and livestock, 35.7% mostly crops and 5.2% mostly livestock. Business legal form was predominantly sole proprietorships (69.7%), with 15.9% being partnerships and 11.4% classified as corporations.

What Estate Planning Had Farm Operators Done?

Sixty-three percent said they had done "some estate planning." The types of estate planning undertaken are as follows (as a percent of all farm operators):

- Had executed a will 49.4%
- Life insurance 87.7%
- Trust(s) 20.4%
- Retitled farmland 17.0%
- Incorporated the farm 10.5%
- Gifts in excess of annual exclusion 10.2%

In a 1949 North Central Farm Estate Planning Study, Barlowe and Timmons surveyed 901 Missouri farmers, finding that 12.2% had wills. A 1977 *Farm Journal* survey by Land found that 79% of the Midwestern farm respondents had made a will. In this study, about three-fourths of those operators with wills had made or revised them within the last five years.

Farmer Objectives When Doing Estate Planning

Farm operators were asked to rank five estate planning objectives in order of importance — the choices being of "major" or "some" importance, or "not relevant to my objectives." The top objective was clearly "to reduce estate taxes," with 81.7% declaring this objective to be of "major" importance. The other four choices (with responses indicating "major" importance) were as follows:

- See that the farm is continued by heirs 51.2%
- Turn the farm over to someone else 38.2%
- Transfer the property to heirs, but no coneern that the farm be continued 27.4%
- Sell part or all of the farm for retirement needs 5.8%

Sources Used to Obtain Farm Estate Planning Advice

Farm operators were asked to rank their three top choices as to where to obtain estate planning advice from the following list, with these results (numbers of respondents):

	#1	#2	#3	Total
Attorney	129	56	13	198
Estate Planning Consultant	39	36	25	100
Life Insurance Agent	18	35	28	81
Accountant	8	26	35	69
Farm Magazines	7	16	35	58
Banker	5	20	29	54
Extension Agent	9	13	28	50

Attorneys were clearly the most-often used source of advice. Apparently there are "consultants" in Missouri offering farm estate planning advice, with figures showing they are being utilized by farmers more than life insurance salespersons, bankers or extension agents.

When asked whether they had located an attorney experienced in farm estate planning, the farm operators responded "yes" 55.8% of the time and "no" 15.4% of the time, with the rest saying, in general, that they had not looked for an estate planning attorney.

Farm magazines are a highly regarded source of estate planning advice, as 84% of the respondents said they found such articles helpful.

How Much Would They Pay for Estate Planning?

While 11% said they would not pay anything, 58% would pay up to $500, 23.5% between $500 and $1,000, 5.5% between $1,000 and $2,500, while only 2% would pay more than $2,500.

Why Did Some Farmers Fail to Make an Estate Plan?

The farmers were asked to explain *why* if they had done little or no estate planning. Of those responding to this question, 57% had "just really never gotten around to it," 45% found the "estate tax laws too confusing," 23% "couldn't find an attorney experienced in estate planning," and 15% hadn't done much estate planning because "it's too expensive." Surprisingly, only 5% justified their lack of estate planning by saying, "it takes too much time." Seven percent said, "there is no need to plan in my case."

Remember that 63% of the farmers responding had done "some" estate planning, yet 59% said they had done "little or no" estate planning. This overlap suggests that some farmers consider their estate planning efforts insufficient.

Net Estate Estimates

This study was conducted in 1981, when the federal estate tax credit was $47,000 — or equivalent to a deduction of $175,625. Furthermore, the estate tax marital deduction in 1981 was limited to the greater of $250,000 or 50% of the adjusted gross estate. Given these perspectives, a "net estate" (assets minus debts) in excess of $200,000 would likely incur some federal estate tax, at least upon the death of the surviving spouse. Some redivision of property and special will provisions would seem advantageous to those combined husband and wife farm estates in excess of the unified credit equivalent.

Stephen F. Matthews is an associate professor of agricultural economics at the University of Missouri-Columbia as well as an attorney. John H. Poehlman is a graduate research assistant in the department of agricultural economics at the University of Missouri-Columbia.

To a large extent, the surveyed farmers had taken steps to do some estate planning. However, most efforts resulted in wills and life insurance. Thirty-two percent of those undertaking estate planning efforts had trusts, while 27% had retitled farmland — both of which are encouraging steps. But should more have been done?

The following farmer estimates of their "net estates" might suggest even more estate planning needs to be done:

Estimate "Farm Estate" Size	Percent
Less than $200,000	17.0
$200,000 to $399,999	25.3
$400,000 to $599,999	24.6
$600,000 to $799,999	14.8
$800,000 to $999,999	8.5
$1,000,000 and more	9.4

About 52% of these farm operators owned most of their farmland jointly with their spouse with "right of survivorship."

Farmer Estimates of Potential Federal Estate Tax Liability

Recall that 82% of these farm respondents thought "reducing estate taxes" on their estate was of "major" importance. The farmer "guesstimates" of their federal estate tax liabilities are as follows:

Estimated Taxes	Percent of Farmers
Less than $25,000	15.1
$25,000 to $49,999	16.4
$50,000 to $99,999	17.6
$100,000 to $149,999	6.4
$150,000 to $199,999	4.4
$200,000 or more	5.5
"Really don't know"	34.6
	100.0

Fifty percent of these farmers believed their federal estate taxes would be over $25,000, while one-third believed their federal estate taxes would exceed $50,000.

How Would They Pay the Federal Estate Tax Bill?

Twenty-six percent were not sure how they would pay the estate taxes due. Of those farmers who had given payment some thought, these were the options chosen (some farmers chose a combination, so the percentages are not cumulative):

- Life insurance proceeds 54.0%
- Sell off farm machinery/livestock 33.0%
- Use cash on hand 22.2%
- Use savings 22.2%
- Borrow funds 15.7%
- Use the installment option (§6166) 14.5%
- Sell stocks, bonds 6.7%
- Sell some farmland 6.1%

Note how few of the respondents favored selling part of the farmland (6.1%). Life insurance was the major payment plan (54%).

Farm Spouse Survey Component

There were 292 farm spouses responding to the "farm spouse" section of the questionnaire. Fifty-seven percent had done "some" estate planning. The types of estate planning undertaken was as follows (as a percent of all farm wives in the study):

- Will 47.9%
- Life insurance 71.6%
- Trusts 17.1%
- Written proof of farm participation 5.9%
- Checking/savings accounts in spouse's name only 14.7%
- Gifts planned 12.0%

Farm spouses were likely to have revised their wills in the last five years (77%). The amount of farm spouse life insurance was low, as 62.2% of those with some life insurance had less than $10,000 coverage, while 32% had between $10,000 and $50,000. Only 5.6% of the respondents had more than $50,000 worth of life insurance.

What Does the Farm Wife Plan to Do with the Farm if Her Husband Predeceases Her?

- Rent the farm to an heir . . . 41.4% (121)
- Keep managing the farm . . 32.5% (95)
- Sell part or all of the farm . . 13.0% (38)
- Rent the farm to a neighbor or farm manager 6.1% (18)

Farm wives could have checked off more than one choice, so the actual responses (out of a possible 292) are in parenthesis. Clearly, most wives anticipate keeping farm ownership and its management in the family. Very few plan to sell the farm, or even rent it to a non-family member.

Farm Wife Participation in the Farm Business

Ninety-six percent of the farm wives were engaged "in some activity" of the farm business. Clearly, estate planners must recognize the significance of the spouse's contributions when examining alternate estate plans. Following is a percentage breakdown of the types of farm activities undertaken by the farm wives surveyed:

- Farm management 27.7%
- Regular fieldwork 26.7%
- Harvestime fieldwork 38.6%
- Livestock care and feeding 40.7%
- Bookkeeping 64.0%
- Running errands 87.6%

Not to be overlooked is the farm spouse's contribution toward paying for co-owned farmland from her own funds earned from off-farm employment, inheritances and farm salary. While 46.4% could not trace more than 10% of the land cost to their own funds, farm spouses often could trace substantial farmland payment to their own funds, as indicated:

Land Payments Traceable	Percent of Farm Wives
10% to 25%	27.8%
25% to 50%	16.5%
Over 50%	9.3%

Attendance at Estate Planning Seminars

Forty-one percent of the farm operators had attended estate planning meetings. The University of Missouri Extension Service sponsored 62% of the meetings attended, while farm organizations (25%), insurance companies (23%), banks (15%), estate planning consulting services (12%) and farm cooperatives (5%), have also sponsored seminars.

Conclusions and Implications For Ag Lawyers

Farmers have identified their basic estate planning objectives, but are either unsure of how to implement them or need motivation to get something done. Attorneys may be looked to as the primary source of estate planning advice, yet farm clients remain confused about estate planning or may be unable to locate a "good farm estate planning attorney."

Ag lawyers have a real opportunity to motivate farmers to plan their estate. Yet the importance of client education should not be overlooked. Focus an equal amount of concern for the estate planning needs of the farm wife, for she is actively involved in the farm decision-making. This study found a strong linkage between farm spouse estate planning activities and whether her husband had undertaken estate planning.

Farmers are willing to pay for the estate planner's services, but advisers must do a good job of explaining the estate plan, including the amount of death taxes avoided.

Lastly, watch out for the farmer's fondness for "right of survivorship" property ownership. Over 50% of the farm operators continue to use either joint tenancy or tenancy by the entireties to co-own farmland with their spouse. Yet in 1981, over 80% of these farm operators estimated their "net estates" to be in excess of the unified credit equivalent ($175,625). The survivor's estate with such husband/wife co-ownership continues to be a "sleeper" problem.

STATE ROUNDUP

INDIANA. Uniform Commercial Code Amendments. As of Jan. 1, 1986, the 1972 official text of the Uniform Commercial Code (UCC) will be the law in Indiana. 1985 Senate Enrolled Tax Act No. 108. The most significant revision involves Article 9 on Secured Transactions. While Indiana joins at least 38 other states in adopting the 1972 UCC, certain aspects of Article 9 (those dealing with liens on farm products) will remain unique to Indiana. Since June 1, 1983, Indiana law, IC 26-1-9-307, has provided that a buyer of farm products from a farmer takes free of a lien in the farm products unless the buyer has received notice of the lien before full payment to the debtor/farmer. The required notice is a copy of the filed financing statement. The buyer is required to issue payment for the secured farm products in the names of the debtor/farmer and the secured party(ies) who has given proper notice. Failure of the buyer to include a secured party who has provided notice as a joint payee leaves the buyer liable for the secured party's interest in the farm product collateral. In 1982, the Indiana Legislature adopted a transitional buyer notice rule, with central filing by 1984 for farm products. But the central filing option was repealed with the revised 9-307 legislation in 1983, while the potential buyer notice provision was expanded.

— Gerald A. Harrison

MINNESOTA. Family Farm Security Program Strengthened. 1985 Minn. Laws Ch. 276 amends certain portions of Minnesota's Family Farm Security Program, Minn. Statutes, sections 41.56, 41.57, 41.59 and 41.61. The program guarantees loans for certain state residents who wish to purchase land for agricultural uses.

These latest amendments allow the commissioner of agriculture to fulfill a qualified party's mortgage payment obligations if there is a default. The commissioner can provide this assistance for up to two years, but the money eventually must be paid back at an interest rate 4% below the prevailing Federal Land Bank rate.

The defaulting contract for deed buyer also receives a break under Chapter 276. An agreement can be entered into with the commissioner, whereby the outstanding principal balance is reduced by a minimum of 10%. Thereafter, the loan is reamortized and guaranteed against default by the commissioner for the years remaining.

The necessary showing to qualify for the program requires that the applicant demonstrate to the commissioner's satisfaction that unique or temporary circumstances make the scheduled loan payments impossible, but that the necessary cash flow can be generated in the future. Chapter 276 was signed into law on May 31, 1985.

— Gerald Torres

MINNESOTA. 1985 Minn. Laws Ch. 4, "Minnesota Emergency Farm Operating Loans Act." The broad purpose of this law is to provide a mechanism that can aid in the restructuring of existing farm operating loans, and also provide assistance in the payment of interest on new farm loans. These goals are approached through two programs: (1) The Existing Farm Loans Program; and (2) The New Farm Loans Program. Although these programs are distinct, they basically operate in the same manner. That is, the state pays a percentage of the interest payment a farmer or family farm corporation owes, and the lending institution absorbs a smaller percentage. The programs are directed toward salvagable farms, and are an effort to give some modicum of relief to the financially-strapped farming community.

Under the Existing Farm Loans Program, the state can pay the interest attributable to the first 60 days (of a 120-day period) on the first $25,000 of operating or ownership farm loans. The lender may add to the principal of the loan the interest attributable to the second 60 days of this period — if the borrower secures a loan guarantee from the Farmers Home Administration (FmHA).

In the New Farm Loans Program, the state will pay two-thirds of the amount of interest foregone by the lender, as a result of making the loan available at a reduced rate. The lender then absorbs the other one-third of the lost interest.

Both programs impose certain requirements on the lender and the borrower. For instance, to qualify for the Existing Farm Loans Program, the lender must agree not to foreclose on loans secured through the program, or on farms in the process of applying. The borrower in the Existing Farm Loans Program is required to apply to the FmHA for loan guarantees and debt restructuring.

To qualify for the New Farm Operating Loans Program, the farmer must satisfy the following requirements: (1) Show a debt-to-asset ratio greater than 50%; (2) Show absence of a positive cash flow at an artificially-inflated interest index rate (the commissioner of agriculture's interest index); (3) Demonstrate a reasonable chance of obtaining the debt restructuring necessary to achieve a positive cash flow at a reduced interest rate; or (4) Show the ability to repay the loan.

The new Farm Operating Loan, itself, must be made at an interest rate between 7% and 10%; due and payable by March 1, 1986; made for operating expenses of the agricultural business; and provided by a lender who agrees to encourage the borrower to participate in a vocational adult farm business management program, and who offers to pay the tuition fee if the farmer cannot pay. In addition, these loans must be submitted to the FmHA for any available loan guarantee programs.

A lender may not receive interest payments under the Existing Farm Loans Program and the New Farm Loans Program to a single farmer for a loan principal amount greater than $100,000. The principal for a New Farm Operating Loan may not exceed $75,000. The legislature appropriated $25 million for these programs.

— Gerald Torres

MISSISSIPPI. Water Resources Legislation. The 1985 Mississippi Legislature enacted two bills with major impact on use of the state's water resources. House Bill No. 762 removes all references to appropriation of water from the Mississippi Code of 1972, and establishes a statewide permit system under a State Permit Board in the Commission on Natural Resources. Both surface and groundwater are brought under these regulations, except water for domestic use, water from wells with a surface casing diameter of less than six inches, and water from impoundments not located on free-flowing watercourses. House Bill No. 149 authorizes the creation of joint local government water management districts with the authority

to issue bonds, set rates, levy ad valorem tax and annex adjacent areas.

— *James H. Simpson*

OHIO. Worker's Compensation Developments. Recently, the Ohio Supreme Court handed down a ruling that jeopardizes the security that worker's compensation was designed to provide, especially in a high-risk industry such as agriculture. *Jones v. VIP Development,* 15 Ohio St.3d 90 (1984). The Court has tampered with the exclusivity rule that originally declared worker's compensation benefits to be the sole avenue of recovery for work-related injuries not intentionally inflicted.

Worker's compensation has never been a shield against liability for an employer's intentional torts. The *Jones* case expands the definition of intentional tort to include not only those acts committed with a specific intent to injure, but also those committed with the belief that the act creates a substantial risk of injury to the employee. Under this expanded definition, employees are still provided with a speedy and inexpensive remedy for work-related injuries. However, the employer is no longer provided with predictability and stability of the worker's compensation system, nor is he protected from unlimited liability for injuries growing out of the gray area between traditionally intentional acts and mere negligent acts.

— *Paul L. Wright*

PENNSYLVANIA. Prescriptive Easement - Increase in Size. The holder of an easement by prescription cannot increase the size of the easement by showing that modern farm equipment transported across the easement is wider than comparable farm equipment transported during the prescriptive period. An easement by prescription is limited in location and size to that use which arose during the prescriptive period. A reasonable increase in the degree of use is permissable, but an expansion of the dimension of original easement is not. *Hash v. Sofinowski,* _____ Pa. Super. _____, 487 A2d 32 (1985).

— *John C. Becker*

Rye is a capital asset

In *Asmussen v. United States,* 603 F.Supp. 60 (D.S.D. 1984), the court ruled that rye in the hands of the farmer who raised it was a capital asset. Therefore, upon sale of the rye, the gain realized by the taxpayer was treated as long-term capital gain.

The rye was grown in 1971 and was pledged as collateral for a Commodity Credit Corp. (CCC) loan in 1972. The taxpayer elected to treat the loan as income in 1972 pursuant to Internal Revenue Code (IRC) § 77. In 1973, the taxpayer redeemed the rye by paying off the loan. In 1976, the taxpayer sold the rye and realized a gain of $135,554.54, which was the difference between the selling price and the amount of the CCC loan that was previously included in income. The gain was reported as long-term capital gain on the taxpayer's 1976 return.

Upon audit, the Internal Revenue Service (IRS) disallowed the long-term capital gains deduction and assessed a tax deficiency and interest. The taxpayer paid the tax and interest under protest and filed a claim for refund of the taxes and interest.

The South Dakota District Court ruled that the payment of the loan in 1973 was a "repurchase" of the rye, which afforded the taxpayer an opportunity to take an investment position in the rye even though the rye had been produced on the taxpayer's farm. The court further held that the taxpayer had met the burden of showing a good faith intention to treat the rye as an investment rather than as property held primarily for sale in the ordinary course of business. The IRS appeal of this decision has been dismissed.

This holding is further authority for the argument that grain in the hands of donees who hold it as an investment is a capital asset. Therefore, if dominion and control of grain are transferred by a farmer to another person (e.g. children or grandchildren), the gain realized upon sale of the grain will not only be shifted to the donee for income tax purposes, but the character of the gain will be converted to capital gains. This technique was discussed in the March 1985 *Agricultural Law Update.*

— *Philip E. Harris*

Perfected security agreement fails to protect supply cooperative

An appellate court found that a supply cooperative failed to meet its burden of proof that grain sold by a secured party to a corporate buyer was covered by its security agreement. *Rose Acre Farms Inc. v. Decatur County Farm Bureau Cooperative,* 467 N.E.2d 26 (Ind. Ct. App. 1984). The cooperative had extended credit to the secured party in the spring of 1981 to grow a corn crop. The secured party signed a security agreement giving the cooperative a security interest in grain stored or growing on designated lands, and a signed financing statement was filed, perfecting the cooperative's interest. The cooperative also sent a copy of the financing statement to the corporate buyer, with a request that payment for grain received from the secured party be issued jointly to the secured party and the cooperative.

In the fall of 1981, the corporate buyer paid the secured party over $155,900 for delivered grain — without issuing joint checks. When the cooperative learned these facts, it immediately attempted to enforce its security interest. The cooperative was unable to collect the full amount from the secured party who filed for bankruptcy, and thus sued the corporate buyer for conversion. At trial, the cooperative failed to identify the source of the delivered grain, thereby leaving open the possibility that the grain sold by the secured party was not covered by the security agreement. Thus, the cooperative failed to substantiate its allegation that the corporate buyer had converted the grain.

— *Terence J. Centner*

Exchange of undivided interest for fee simple qualified under § 2032A

A decedent owned an undivided interest in seven ranches. The decedent's brothers own the other undivided interests. The decedent's estate and the decedent's brothers want to exchange interests so that the estate ends up owning fee simple in four ranches and the decedent's brothers end up owning the other three ranches.

The estate asked the Internal Revenue Service (IRS) if the exchange would qualify as an exchange of qualified real property under Internal Revenue Code (IRC) § 2032A(i)(1)(A). In Ltr. Rul. 8516077, the IRS said yes, assuming there is no cessation of qualified use under IRC § 2032A(c)(6). Therefore, the four ranches that the estate will end up owning will qualify for special use valuation.

— *Philip E. Harris*

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

1985 Annual Meeting

The American Agricultural Law Association (AALA) will hold its Sixth Annual Educational Conference Oct. 3 and 4, 1985, at the Hyatt Regency Columbus, Ohio Center, Columbus, Ohio. The focus will be on the changing structure of American agriculture and the impact of those changes on the law of property.

Professor Neil Harl will give the keynote address, and speakers from corporate and private practice, academia and government will address such topics as the land debt crisis and agricultural finance reform; developments in the law of environmental regulation and land use controls; current problems in wills, trusts and estate planning law; and government regulation of genetic engineering.

Early room reservations can be made by calling the Hyatt Regeney at 614/463-1234, identifying yourself as a participant in this conference, and asking for a room from the AALA block. For further conference information, contact Dave Myers at: 219/464-5477.

Job Fair

AALA is planning to hold a Job Fair concurrent with the 1985 annual meeting. An announcement of the Job Fair is being mailed to firms and organizations known to be involved in agricultural law. Notices of available positions will be sent to law school placement offices for dissemination. Resumes received from job seekers will be forwarded to interested firms and organizations, and interviews will be scheduled during the conference whenever indicated.

Interview rooms in the Hyatt Regency Columbus will be provided both days of the conference. In addition, highly visible space will be provided near meeting rooms so that job opportunities and messages can be posted. For information concerning the Job Fair, contact Gail Peshel, director of career services, Valparaiso University; 219/464-5498.

Applications Sought

As of Oct. 1, 1985, the position of secretary-treasurer of AALA will be open. This is an appointive position and the board of directors hopes to fill it at the annual meeting in Columbus, Ohio. Letters of application from interested persons should be submitted by Sept. 25, 1985, to Keith Meyer, School of Law, University of Kansas, Lawrence, KS 66045.