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INSIDE

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"Live-haul" poultry crews are subject to NLRA protection

Resolving a split in authority between the circuits, on April 23, 1996, a divided Supreme Court held that "live-haul" poultry crews were subject to National Labor Relations Act (NLRA) protection. *Holly Farms Corp. v. National Labor Relations Board*, No. 95-210, 1996 WL 190810 (U.S. Apr. 23, 1996). This decision affirmed the position of the National Labor Relations Board (NLRB), which had held that these workers were not exempt under the "agricultural laborer[s]" exemption.

The parties to the case were Holly Farms Corporation, a wholly owned subsidiary of Tyson Foods, Inc., and certain employees of Holly Farms' poultry facility in Wilkesboro, North Carolina. These employees, termed "live haul" crews, consist of three categories of workers: chicken catchers, forklift operators, and live-haul drivers. As is common in the poultry industry, Holly Farms operates as a vertically integrated poultry corporation. Holly Farms hatches broiler chicks at its own hatcheries, then delivers the chicks to the farms of independent contractors. These contractors raise the birds into full-grown broiler chickens. Holly Farms pays the contract growers for their services, but retains title to the broilers and supplies the food and medicine necessary to their growth. When the broilers are seven weeks old, Holly Farms sends a live-haul crew to reclaim the birds and deliver them to the processing plant for slaughter. The court described the live-haul crews as typically consisting of "nine chicken catchers, one forklift operator, and one live-haul driver [who] travel in a flat-bed truck from Holly Farms' processing plant to the farms of the independent growers." *Id.* at *3. The Court further described that "at the farms, the chicken catchers enter the coops, manually capture the broilers, and load them into cages. The forklift operator lifts the caged chickens onto the bed of the truck, and the live-haul driver returns the truck, with the loaded cases and the crew, to Holly Farms' processing plant where the birds are slaughtered and prepared for shipment to retail stores." *Id.*

In 1989, the local union at the Holly Farms Wilkesboro processing plant filed a representation petition with the NLRB seeking an election in a proposed bargaining unit that included employees on the live-haul crews. Despite Holly Farms' objection, the NLRB approved the unit, ruling that the live haul workers were employees protected by the NLRA rather than agricultural laborers exempted under section 2(3) of the Act. 29 U.S.C. § 152(3). On appeal, the Fourth Circuit affirmed the NLRB ruling. *Holly Farms Corp. v. National Labor Relations Board*, 48 F.3d 1360, 1372 (4th Cir. 1995).

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Crop insurance proceeds held to be exempt in bankruptcy

A bankruptcy court in Missouri recently interpreted the federal crop insurance program as providing a federal exemption for crop insurance proceeds. *In re Clark*, 186 B.R. 249 (W.D. Mo. 1995). The case arose when Chapter 7 farm-debtors attempted to claim two crop insurance payments as exempt in bankruptcy. The Chapter 7 trustee objected.

Section 522(b)(2)(A) of the Bankruptcy Code provides that debtors who elect to claim state exemptions may also claim exemptions granted to them under federal law other than the specific exemptions set forth in section 522(d). The debtors used this provision in conjunction with provisions from the Federal Crop Insurance Act (FCIA) as amended to argue that their insurance payments were exempt from their bankruptcy estate.

The court noted that federal crop insurance is a an "extensively regulated program." *Id.* at 251 (citations omitted). It was first authorized under the FCIA as part

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Noting a split in the circuits regarding the interpretation of the application of the NLRA to live haul crews, the Supreme Court granted certiorari. 516 U.S. ——, 116 S.Ct. 416 (1995). *See NLRB v. Hudson Farms, Inc.*, 681 F.2d 1105, (8th Cir. 1982), *cert. denied*, 459 U.S. 1069 (1982) (consistent with Fourth Circuit holding that live-haul crew members were not agricultural laborers under the NLRA exemption); *Valmac Industries, Inc. v. NLRB*, 599 F.2d 246, 249 (8th Cir. 1979)(same); *Coleman v. Sanderson Farms, Inc.*, 629 F.2d 1077, 1079 (5th Cir. 1980) (live-haul workers employed by vertically integrated poultry producers are engaged in "agriculture"); *NLRB v. Ryckebosch, Inc.*, 471 F.2d 20, 21 (9th Cir. 1972)(same).

The express language of the NLRA provides that its protections extend only to workers who qualify as "employee[s]" under section 2(3) of the Act. 29 U.S.C. § 152(3). The term "employee," is limited so as not to include "any individual employed as an agricultural laborer." *Id.* The NLRA does not contain any definition of "agricultural laborer." However, as the court noted, Congress has directed that "agricultural laborer" under section 2(3) "shall derive its meaning from the definition of 'agriculture' supplied by section 3(f) of the Fair Labor Standards Act of 1938 (FLSA). *Holly Farms Corp.*, No. 95-210, 1996 WL 190810 at *4.

Section 3(f) of the FLSA provides:

> 'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities ..., the raising of livestock, bees, fur-bearing animals, or poultry, and any practices ... performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

29 U.S.C. § 203(f). As previously interpreted by the Court, this definition, "includes farming in both a primary and a secondary sense." *Id.* (citing *Bayside Enterprises Inc*, 429 U.S. 298, 300 (1977). The Court explained:

> "Primary farming" includes the occupations listed first in § 3(f): "the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities ... [and] the raising of livestock, bees, fur-bearing animals, or poultry." 29 U.S.C. § 203(f). "Secondary farming" has a broader meaning, encompassing, as stated in the second part of § 3(f): "any practices ... performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."

Id. (citing *Bayside*, 429 U.S., at 300, n. 7).

Applying this to the live crew employees, the Court stated that as there was no contention that these individuals were themselves engaged in raising poultry, only the application of the "secondary farming" test was at issue, that is, whether these employees were engaged in practices "performed by a farmer or on a farm as an incident to or in conjunction with such farming operations." *Id.* (citing 29 U.S.C. § 203(f)).

The Court began its analysis with a restatement of the deference doctrine established by *Chevron, U.S.A., Inc. v, Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Under this doctrine, if the statutory language is plain, the courts must give effect to it as written. If the language is ambiguous, however, the courts must "respect the judgment of the agency empowered to apply the law." *Holly Farms Corp.*, No. 95-210, 1996 WL 190810 at *5. The Court further noted that FLSA exemptions were to be "narrowly construed." *Id.*

With regard to the truck drivers, the Court summarily dismissed the claim that they could be exempted. Because their work is not "on the farm," they could only qualify for the exemption if their activities constituted the raising of poultry and thus fit under the definition of a primary farming activity. Again citing *Bayside*, the Court held that when an integrated poultry producer contracts with independent growers for the care and feeding of chicks, it loses its status as a farmer engaged in raising poultry. It does not regain this status when it sends out its employees to collect the birds for slaughter. Accordingly, the trucker/employees cannot assume farmer status for purposes of the exemption. *Id.*

The more difficult analysis for the Court was whether the chicken catchers and fork lift operators were exempted from the NLRA protections as a secondary farming activity, i.e., an activity "on a farm." On this issue, the petitioners argued that the plain language of the statute mandated a finding that these employees were exempted from NLRA protections. While the court found Holly Farms' position "plausible," it did not find it "inevitable." Accordingly, the Court turned to an analysis of the reasonableness of the NLRB's interpretation.

The NLRB decision stressed that in order for activities to be exempted as secondary farming activities, they must be "incident to or in conjunction with *such* farming activities" (emphasis added). The Court agreed with this emphasis and focused on the detached relationship between the live crew and the farmer who had raised the chickens. The Court described this relationship as follows:

> Once the broilers have grown on the farm for seven weeks, the growers' contractual obligation to raise the birds ends, and the work of the live-haul crew begins. The record reflects minimal overlap between the work of the live-haul crew and the independent growers' raising activities. The growers do not assist the live-haul crews in catching or loading the chickens; their only responsibilities are to move certain equipment from the chicken coops prior to the crews' arrival, and to be present when the crews are on the farms (citation omitted). Nor do the live-haul employees play any role in the growers' performance of their contractual undertakings.

Id. at *6. As further support for the position that the live crew's activities were not incidental to the farming activities conducted by the grower, the Court examined the relationship between the live-haul crew and the processing business of its employer, Holly Farms.

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The chicken catchers, forklift operators, and truckdrivers work as a unit. They all "work out of the processing plant" in Wilkesboro, located three miles from the hatcheries (citations omitted). Crew members begin and end each shift by punching a time clock at the processing plant (citation omitted) and are functionally integrated with other processing-plant employees (citation omitted).

The Court also noted that there was a correlation between Holly Farms' slaughter rate and the work available for live-haul crews and that the live production manager for Holly Farms' Wilkesboro facility described catching and delivery of grown broilers as the first step in the producer's processing operations. *Id.* at *7. While the Court acknowledged that an activity could be "incidental" to more than one thing, the issue before it was whether the particular activities of the live crew were "incidental" to the farming operation of the grower. For example, the Court stated that a different result might be found if the live-haul crew worked as employees of the farmer. *Id.* at *6, n. 8

The Court also examined the Department of Labor regulations interpreting the NLRA. Although the Court noted that these regulations did not address the precise situation before the Court, it found the Board's ruling to be consistent with the relevant regulations. For example, the Court referenced the regulation that provides that "[t]he fact that a practice performed on a farm is not performed by or for the farmer is a strong indication that it is not performed in connection with the farming operations there conducted." *Id.* at *9 (citing 29 C.F.R. § 780.143).

The Court found that the NLRB's conclusion that "the collection of broilers for slaughter was an activity serving Holly Farms' processing operations, and not Holly Farms' own or the independent growers' farming operations" was "persuasive." Noting again that a reviewing court's role was "limited," the Court affirmed the NLRB ruling that the live crew employees were entitled to NLRA protection.

Four Justices joined in Justice O'Connor's opinion that concurred in part and dissented in part from the majority opinion. They concurred with the majority in affirming the NLRB ruling with respect to the truck drivers, but dissented with respect to the chicken catchers and the fork lift operators. According to Justice O'Connor, the language of the statute was unambiguous and required only an analysis of the type of activity performed by the worker. Because the activities performed by these workers were agricultural, no further inquiry needed to be made. Justice O'Connor further criticized the majority's consideration of the employment relationship between the workers and Holly Farms, pointing out that an integrator could contractually obligate the farmer/grower to hire that integrator's live-haul crew.

—*Susan A. Schneider, Hastings, MN*

Crop insurance proceeds/Continued from page 1
of the Agricultural Adjustment Act of 1938. Therefore, the court held that any exemption provided in the statute would be properly categorized as a federal exemption for purposes of section 522(b)(2)(A).

The court next turned to the specific language relied upon by the debtors. The statute provides that:

> [c]laims for indemnities under this chapter shall not be liable to attachment, levy, garnishment, or any other legal process before payment to the insured or to deduction on account of the indebtedness of the insured or the estate of the insured to the United States except claims of the United States or the [Federal Crop Insurance] Corporation arising under this chapter.

Id. (citing 7 U.S.C. § 1509 (Supp. 1995)).

The court noted that the statute did not use the term "exemption." However, turning to the definition of exemption, property that is exempt is not "liable to sale on execution, or from taxation, or from bankruptcy, or attachment." *Id.* (citing Black's Law Dictionary 513 (5th Ed. 1979). The court held that claims for indemnity under the FCIA are exempt "because they are not subject to attachment, levy, or garnishment." *Id.* (citing 31 Am. Jur. 2d Exemptions § 230 (1989)).

The court found further support for its holding in the federal crop insurance regulations. In response to attempts by creditors to obtain insurance payments under state law, the Federal Crop Insurance Corporation (FCIC) issued a regulation that specifically provided that:

> [a]n interest of a person in an insured crop existing by virtue of a lien, mortgage, garnishment, levy, execution, bankruptcy, or an involuntary transfer shall not entitle the holder of the interest to any benefit under the contract except as provided in the policy.

7 C.F.R. § 401.5 (1991). A specific assignment form is required under the contract.

On this basis, the court held that the crop insurance payments at issue were exempt. The court further held that the trustee could not avoid the debtor's interest as a perfected lien creditor under section 544 of the Bankruptcy Code. *Id.* at 252.

For an analysis of a debtor's unsuccessful attempt to argue that a deficiency payment was exempt under a different, but somewhat similar, federal statute, see *In re Pritchard*, 75 B.R. 877 (Bankr. D. Minn. 1987) (anti-assignment provision in federal statute and regulation does not rise to level of exemption).

—*Susan Schneider, Hastings, MN*

Federal Register *in brief*

The following is a selection of items that were published in the *Federal Register* from March 20, 1996 to April 17, 1996.

1. USDA; Rules of practice under PACA; final rule; effective date 4/22/96. 61 Fed. Reg. 11501.
2. USDA; Claims, administrative regulations amendment; claims based on negligence, wrongful act or omission; federal regulatory review; comments due 5/13/96. 61 Fed. Reg. 16231.
3. APHIS; National Poultry Improvement Plan and auxiliary provisions; final rule; effective date 4/22/96. 61 Fed. Reg. 11515.
4. CCC; Extension of maturing 1994 and subsequent crop year wheat and feed grain price support loans; final rule; effective date 3/21/96. 61 Fed. Reg. 11514.
5. EPA; Pesticide worker protection standard, decontamination requirements; notification to the Secretary of Agriculture. 61 Fed. Reg. 14040.
6. Department of Labor; Migrant and Seasonal Agricultural Worker Protection Act; notice of proposed rulemaking and request for comments; comments due 6/12/96. 61 Fed. Reg. 14035.

—*Linda Grim McCormick, Alvin, TX*

NCALRI

The National Center for Agricultural Law Research and Information invites you to visit its Web site (URL:http://law.uark.edu/arklaw/aglaw/). A line is set up to the final farm bill text that was recently approved by Congress and sent to the President.

The Center Web page also offers information about the Center and its publications, additional farm bill versions and information, and links to other agriculture, government agency, general law, international law, and full-text law sites, and an annotated environmental law bibliography.

—*Sally Kelley, Research Associate Professor, National Center for Agricultural Law Research and Information, University of Arkansas School of Law, Fayetteville, AR*

Marketing agricultural commodities through use of hedge-to-arrive contracts may violate CFTC rules

By Roger A. McEowen

In recent months, the National Grain and Feed Association, which represents feed mills, country grain elevators, and grain handling facilities across the country, has formed two task forces to study certain types of cash grain contracts between merchants and producers. "Hybrid" cash contracts, often variations of common forward pricing contracts, have become increasingly common in the past two to three years. One of the most popular is the hedge-to-arrive contract, which specifies a futures month, but allows producers to fix basis levels at some point before delivery. However, hedge-to-arrive contracts often render delivery requirements unclear and may violate Commodity Futures Trading Commission (CFTC) regulations that prohibit "trade options" on certain agricultural commodities. A "trade option" (an off-exchange derivative) is a commodity option that is offered to a producer, processor, or commercial user of, or a merchant handling, the commodity that is the subject of an option transaction, and which is entered into solely for business purposes. While off-exchange trade options are permissible, and are generally exempt from CFTC regulations (other than rules forbidding unlawful representations and fraud), the exemption is unavailable for options on domestic agricultural commodities including wheat, cotton, rice, corn, oats, soybeans and soybean derivatives, livestock, and frozen concentrated orange juice.

Presently, agribusiness firms and elevators are under considerable competitive pressure to offer contracts to producers that utilize state-of-the-art marketing techniques. However, some of these marketing devices (which are, essentially, variations of forward contracts) may be subject to the CFTC ban. While there presently are no reported cases involving agricultural commodities that squarely address this issue, it is an important legal concern facing elevators and producers that are utilizing hedge-to-arrive contracts.[1] For example, if a court were to rule that a given contract between an elevator and farmer was not, in fact, a forward contract, but an illegal trade option in violation of CFTC rules, the contract terms would not be binding on third parties. This would allow a third party who might suffer financially from performing its obligations, a legal opportunity to refuse performance.

On November 8, 1995, the CFTC Commissioner announced a roundtable discussion concerning the present prohibition of agricultural options. A public meeting was held on December 19, 1995 in Washington, D.C. Items discussed included: (1) the purposes served by, and the benefits of, continuing the prohibition on agricultural trade options; (2) the costs entailed by continuing the prohibition; (3) the purposes of, and possible benefits to be derived from, lifting the prohibition; (4) the costs entailed in lifting the prohibition; (5) the possible uses of trade options in the enumerated agricultural commodities, if permitted; (6) the possible problems of permitting the offer and sale of such instruments; and (7) the possible impact of lifting the prohibition on price discovery and producers' cash prices.

The Futures Trading Act and the Grain Futures Act

Congress enacted the Futures Trading Act (FTA) in 1921 to regulate boards of trade on which futures trading occurred so as to prevent price manipulation and perceived excess speculation on grains.[2] The Act also attempted to eliminate "bucket shop" businesses that offered small investors the opportunity to speculate and wager on the price of commodities through unreported deals. These operations tried to match a customer order exposing the shop to the risk of upward price movement with an order exposing it to the risk of a downward movement. However, the shop also tried to assume the risk of any net positions. When market prices moved adversely to the bucket shop's net position, however, the shop would typically close and leave behind uncollectible debts.

The FTA attempted to control these problems in grain futures markets by imposing a tax on all futures contracts, with two important exceptions. Section 4(a) of the FTA exempted from tax all future delivery contracts made by owners and growers of grain, owners and renters of land on which grain was grown, and associations of such persons. Section 4(b) exempted future delivery contracts made by or through members of boards of trade that had been designated by the Secretary of Agriculture as contract markets. Sales of cash grain for deferred shipment were excluded from the definition of "future delivery." The FTA's legislative history indicates that the Congress made this distinction to allow farmers to sell part of next season's harvest at a set price to an elevator or miller.[3] However, the Congress seemed to recognize that the exception applied only to cash forward contracts where both parties actually contemplate future delivery of actual grain.[4]

The Supreme Court declared the FTA unconstitutional in 1922 as an improper exercise of the Congress' taxing power.[5] The Congress responded by passing the Grain Futures Act (GFA) later that same year.[6] The GFA generally prohibited the offer or sale of grain for future delivery, but carried forward unchanged the forward contract exemption contained in the FTA.[7] The GFA's statutory framework gradually developed into the Commodity Exchange Act (CEA), which the Congress passed in 1936.[8]

The Commodity Exchange Act

Under the CEA, no person may offer, enter into, or confirm a commodity option transaction unless that transaction is specifically permitted under the CFTC rules.[9] Likewise the Act prohibits the offer and sale of a contract for future delivery of a commodity unless that contract is effectuated on or subject to the rules of a board of trade (exchange) that has been designated a contract market.[10] To obtain this designation, a board of trade must satisfy the criteria set forth in the CEA including enforcing its rules to prevent manipulation in certain market segments.[11] After its designation, the contract market must continue to satisfy those initial criteria, as well as fulfill ongoing CEA requirements.[12]

As in the FTA and GFA, exempt from the CEA's regulatory scheme are commercial merchandising transactions in physical commodities where delivery is delayed or deferred for commercial convenience or necessity. In addition, the term "future delivery" does not include "any sale of any cash commodity for deferred shipment or delivery."[13] Thus, the CEA does not regulate transactions involving actual physical delivery of commodities, including those transactions where delivery is on a deferred basis. The belief is that transactions that contemplate actual physical delivery do not provide the same opportunity for speculation and manipulation of futures and options as do contracts where delivery is not required, or is required but is merely illusory.[14]

The CEA vests the CFTC with plenary jurisdiction over "any transaction which is of the character of, or is commonly known to the trade as an 'option'...."[15] The CEA does not define the term "option."

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Therefore, to determine whether an instrument is an option, the Commission and the courts have examined pre-existing contract law, commercial practice, and the economic nature of the contract.[16]

Distinguishing between forward contracts, deferred pricing contracts, and trade options

Historically, the determination of whether a particular contract is exempt as a forward contract has depended on whether the contract's terms and the parties' practice under the contract clearly establish that both parties contemplate future delivery of an actual commodity.[17] In general, the contract must be a binding agreement on both parties where one party agrees to make delivery and the other party agrees to accept delivery of the commodity.[18] In addition, there must be evidence of the transaction's use in commerce. This requires, among other things, an examination of whether the parties are commercial entities that have the capacity to make or take delivery and whether delivery, in fact, has routinely occurred under such contracts in the past.[19]

Forward contracts typically are not standardized. Contract terms are often negotiated, particularly grade, delivery point, and settlement date. Even in those instances where contract terms are standardized by a single contracting party, certain terms may remain open for negotiation. Usually, forward contracts establish a fixed price for a particular commodity at the time of contract formation. Likewise, forward contracts are typically individually negotiated sales of commodities where actual delivery of the commodity is anticipated, but is merely deferred for reasons of commercial convenience or necessity. These type of contracts are not readily transferable and are usually entered into between parties able to make and receive physical delivery of the goods. A forward contract creates mutually binding obligations.

Conversely, deferred pricing contracts do not establish a priceat the time the contract is consummated. Instead, the contract establishes a formula that specifies the final contract price by a later closing date. The formula may specify a particular base price, such as a futures contract price or major cash market price. The agreement may also establish a differential to be added to or subtracted from the base price to determine the final price. The contract also specifies a period of time during which the producer may "fix" the final price. For example, the parties might enter into a contract in March that guarantees the farmer the price of the December futures contract plus or minus an agreed-upon differential. The farmer may set the final price for the commodity between the time of contract formation and the "closing date," e.g., the last business day in November, based on the producer's expectation of the price trend for that contract.

Some deferred pricing contracts require immediate delivery. Under these type of contracts, title passes upon delivery even though the contract permits the farmer to delay fixing the final commodity price until the agreed-upon closing date although the commodity has already been delivered and title has passed to the merchant. The contract also eliminates the producer's need to secure storage space for the commodity. The CFTC has generally viewed these types of deferred pricing contracts as a form of spot contract used solely to merchandise the commodities. Both parties have transferred title to the commodity, and delivery has occurred.[20]

In determining whether an instrument is an option or a forward contract, the courts and the CFTC carefully examine the economic reality of any particular transaction, and pay little regard to the parties' description.[21] An option is a limited risk instrument where the option purchaser is not liable for payment resulting from any adverse price movement of the commodity underlying the option. Instead, the option purchaser will benefit from a favorable price move and will not be liable for any other losses beyond the premium or other payment that the purchaser pays for the option. In *Commodity Futures Trading Corporation v. U.S. Metals Depository Co.*,[22] the CFTC alleged that the defendants were selling proscribed options. The court opined that the determination whether the instrument was an option began with the definition of "options." The court noted that while neither the CEA nor the CFTC's regulations defined the term, that the courts had often differentiated between options and deferred delivery (or futures) contracts. The court noted that futures contracts are a transferable contractual agreement "to buy or sell a fixed amount and grade of a certain commodity on some specified date. A commodity option, on the other hand, confers upon the holder the right to buy or to sell either a specified amount of a commodity or a futures contract for that same amount within a certain period at a given price.

The court went on to identify three aspects that convinced the court that the defendant's instruments were options. The court noted that an option gives the purchaser the right to make or take delivery of the commodity. The initial charge for an option is normally a nonrefundable premium covering the grantor's commissions, costs, and profits. The purchasers' losses on anoption are normally limited to the premium. Thus, the court concluded options are "limited risk" investments--the buyer is under no obligation to exercise his option and will, at most, lose the iuitial fee. Thus, an option is a contract where only the grantor is obligated to perform. Consequently, the option purchaser faces only limited risk from adverse price movements. This characteristic distinguishes an option from a forward contract in which both parties must routinely perform and face the full risk of loss from adverse price changes since one party must make and the other party must take delivery of the commodity. For options, only the grantor of a call (put) is required to sell (buy) a given quantity of a commodity (or a futures contract on that commodity) on or by a specified date in the future if the option is exercised.

Client advice

The NGFA has requested that the CFTC remove its prohibition of off-exchange agricultural options contracts. A seven-member risk evaluation task force is presently studying the issue. In the meantime, producers and elevators should view hedge-to-arrive contracts cautiously. For practitioners representing elevators, elevator managers should be advised to place limits on credit levels that any particular producer is allowed on hedge-to-arrive contracts, as well as an overall limit on the elevator's total exposure to hedge-to-arrive contracts. Likewise, the managerial decisionmakers of the elevator should ensure that the individual(s) given authority to make marketing arrangements with producers is (are) sufficiently trained in the use of derivatives. For practitioners representing agricultural producers, at least a rudimentary knowledge and understanding of derivatives as a marketing tool is critical to provide competent counsel as to whether such mechanisms should be utilized to market the client's products.

[1] In late 1995, the Wall Street Journal reported that a Minnesota cooperative faces potential losses of at least $1.5 million arising from the aggressive use of hedge-to-arrive contracts. Suzanne McGee, *Farmers May Be Next Victims of Derivatives*, Wall St. J., Dec. 11, 1995, at C1.

[2] Act of August 24, 1921, Ch. 88, 42 Stat. 187.

[3] *See, e.g.*, Hearings on H.R. 168, 231, 2238, 2331, 2363, and 5228 before the House Committee on Agriculture, 67th Cong. 1st Sess. 8, 16, (1921).

[4] During Senate floor debate, Kansas Senator Capper reiterated that the exception only covered "future" or "pit" trans-

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If you desire a copy of any article or further information, please contact the Law School Library nearest your office.

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actions where the transfer of grain was actually contemplated (see 61 Cong. Rec. 4762, 67th Cong., 1st Sess. (Aug. 9, 1921)).

[5] *Hill v. Wallace*, 259 U.S.44 (1922).

[6] Pub. L. No. 67-331, 42 Stat. 998 (1922).

[7] Id. § 2.

[8] Pub. L. No. 74-675, 49 Stat. 1491 (1936).

[9] *See, e.g.*, 17 C.F.R. §§ 32.2-32.4 (1996).

[10] 7 U.S.C. § 6(a)(1996).

[11] 7 U.S.C. § 7 (1996).

[12] 7 U.S.C. § 6 (1996).

[13] 7 U.S.C. § 2a(1)(A)(1996).

[14] At least one court has ruled that trading in futures markets without intent of delivery constitutes illegal gambling (*Mohr v. Miesen*, 47 Minn. 228, 49 N.W. 862 (1891)). However, in a later decision by the same court, the court noted that trading commodity futures no longer constituted gambling (*ACCI International Commodity Services, Inc. v. Lindwall*, 347 N.W.2d 522 (Minn. Cr. App. 1984)).

[15] 7 U.S.C. § 2 (1996).

[16] *See, e.g., Commodity Futures Trading Corp. v. Precious Metals Associates*, 620 F.2d 900 (1st Cir. 1980); *British American Commodity Options Corp. v. Bagley*, 552 F.2d 482 (2d Cir. 1977), *cert. denied*, 44 U.S. 938 (1977).

[17] *See, e.g., Commodity Futures Trading Corp. v. CoPetro Marketing Group, Inc.*, 680 F.2d 573 (9th Cir. 1982).

[18] *See, e.g., In re Stovall* [1977-1980 Transfer Binder], Commod. Fut. L. Rep. (CCH) para. 20,941 (Dec. 6, 1979).

[19] *NFT Metals, Inc. v. Manhattan Metals, LTD*, 576 F. Supp. 1046 (S.D.N.Y. 1983).

[20] The delivery requirement cannot be satisfied merely by transfer of title; actual physical delivery must be seriously contemplated (*see, Commodity Futures Trading Commission v. Noble Metals, International, Inc.*, 67 F.3d 766 (9th Cir 1995)).

[21] *See, e.g. Precious Metals Associates v. Commodity Futures Trading Commission*, 620 F.2d 900 (1st Cir. 1980).

[22] 468 F. Supp. 1149 (S.D.N.Y. 1979).

State Roundup

FLORIDA. *Cows know little of strict liability.* The Florida Supreme Court recently answered a certified question concerning the circumstances under which a livestock owner can be held liable for animals that stray onto public roads and cause accidents. *Fisel v. Wynns*, 667 So.2d 761 (Fla. 1996).

On March 15, 1992, Fisel's pickup struck a cow that had wandered onto a county road through an open gate. As the court would later relate, "Fisel's truck struck a black cow standing in a dark road at midnight." The cow's owner was Wynns, who lived on forty acres on which he kept forty head of cattle. The property was fenced and the relevant gate was secured by a sliding latch that can only be operated by human hands. The undisputed evidence was that Wynns had closed that gate the day before the accident. In addition, the evidence revealed no previous escape and no previous trespassers through the gate. Fisel sued Wynns for injuries suffered in the accident. The trial court entered summary judgment in favor of Wynns, and Fisel appealed.

The Fifth District Court of Appeal affirmed and, finding the case law in this area neither recent nor totally consistent, certified the following question to the Florida Supreme Court. "Have changing conditions in Florida altered public policy as announced in *Selby v. Bullock*, 287 So.2d 18 (Fla. 1973), so that a livestock owner may now be liable for injuries resulting when the owner's livestock wanders through an open gate, and the reason the gate is open is unknown?" *Fisel v. Wynns*, 650 So.2d 46 (Fla. 5th Dist. Ct. App. 1995).

In *Selby*, the plaintiff was injured after his vehicle struck cattle on a public road. After judgment was entered for the cattle owners, Selby appealed, arguing that a statute requiring him to prove that the cattle owner had been negligent in failing to fence the cattle off the public road was an unconstitutional denial of equal protection. Selby asserted that since dog owners are subject to strict liability by statute, whereas strict liability is not imposed on livestock owners, he is denied equal protection. The Florida fencing statutes mandate that "No owner shall permit livestock to run at large on or stray upon the public roads on this state." Fla. Stat. Ann. § 588.14. The legislature went on to address liability. "Every owner of livestock who intentionally, willfully, carelessly, or negligently suffers or permits such livestock to run at large or stray upon the public roads of this state shall be liable in damages for all injury and property damage sustained by any person by reason thereof." Fla. Stat. Ann. § 588.15.

The Florida Supreme Court in *Selby* noted that the fencing statutes, passed pursuant to the state's police power, apply uniformly to all persons similarly situated. Further, the court determined that the classification is valid, as it bears a reasonable relationship to the object of the legislation—keeping livestock off the highway. The court opined that it was enough to require fencing by the livestock owner. To hold the owner to strict liability in addition would place an impossible burden on the livestock industry, requiring those in the industry to become insurers. The question, the court observed, is whether a fencing requirement or strict liability will most likely keep livestock off the highway and thereby protect the motoring public. "The answer appears clear. Cows know little of strict liability but do respect barbed wire."

Before the Florida Supreme Court, Fisel argued that changing conditions have altered public policy since *Selby* and a violation of Fla. Stat. Ann. § 588.14 is negligence per se. Fisel further maintained that requiring him to establish negligence results in a "shoo-in" rule whereby livestock owners escape liability absent a showing that they virtually shooed their animals into the road.

The supreme court began by noting that at common law livestock owners had to confine their animals or face liability. In the 1800's, open range laws reversed the common law rule and placed the burden on property owners to fence out straying livestock. Allowing livestock to range and graze on all uninclosed lands ended in 1949, with the passage of a statewide statutory scheme for keeping livestock off the public roads. The act requires owners to control their animals. Fla. Stat. Ann. § 588.14. Before imposing liability, the legislature required a showing of at least negligence, and opted not to hold livestock owners strictly liable. Fla. Stat. Ann. § 588.15

The court held that requiring livestock to be fenced off public highways is a fair exchange for not holding the owner liable unless he at least negligently allows his livestock to stray onto a public highway. The court found it "arguable that the requirement of fencing has done more for the protection of the motoring public than the requirement of proof of negligence has done for the protection of livestock owners." The supreme court reaffirmed *Selby*, declaring that any modification of the existing statutory scheme is a matter for the legislature.

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WYOMING. *Wrongful death claim against ranchers.* In *Roitz v. Kidman*, No. 95-186, 1996 WL 112406 (Wyo. Mar. 15, 1996), the Wyoming Supreme Court contemplated a wrongful death claim against ranchers resulting from an accident involving cattle on a road.

After dark, on September 24, 1993, a car struck several cows standing on a country road. As a result of the accident, a passenger in the car was killed. The parents, as personal representatives of the estate, brought a wrongful death action against certain ranchers as owners of the cattle. The parents argued that the ranchers were negligent in failing to keep their cattle off the road and that their negligence was a proximate cause of the passenger's death.

The trial court reasoned that the case fell within the "drifting livestock" exception contained in the Wyoming statutes and granted the ranchers' motion for summary judgment. The relevant statutory sections provide: "(a) No owner or person having custody or charge of livestock shall permit the livestock to run at large in any fenced public highways in Wyoming... (b) Any person or corporation violating this section shall be fined not less than fifty dollars ($50.00) nor more than seven hundred fifty dollars ($750.00) and in addition shall pay all damage done by the livestock. The provisions of this section do not apply to livestock drifting into lanes or fenced roads in going to or returning from their accustomed ranges." Wyo. Stat. § 11-24-108.

On appeal, the parents maintained that genuine issues of material fact existed as to whether the cattle were running at large or whether they were drifting. The parents also contended that issues of fact existed as to whether the ranchers were negligent in their care of the cattle. Following a review of the facts, the Wyoming Supreme Court agreed. Two gates were open on the night the accident occurred, allowing the cattle access to the road. The appellate court stated that a jury should determine what type of precautions the ranchers should have taken to keep the cows off the road. "For example, should the ranchers have kept the gates closed, and, if so, what actions should they have taken to ensure that the gates remained closed?" Further, fact issues were found to exist regarding whether the cattle were drifting from their summer pastures or whether the cattle were being held close to the land and then escaped. The supreme court reversed the district court and remanded for further proceedings.

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