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Appropriate jurisdiction for wetlands litigation

At issue in *Treacy v. Newdunn Assoc.,* 344 F.3d 407 (4th Cir. 2003), was a 43 acre parcel (the "Newdunn Property") located near Newport News, Virginia. Of the 43 acres, it was undisputed that 38 acres were wetlands as defined in the U.S. Army Corps of Engineers (the Corps) regulations under the Clean Water Act (CWA). In the summer of 2001, Newdunn Associates, Orion Associates, and Northwest Contractors (collectively "Newdunn") began ditching and draining the wetlands on the Newdunn Property. Newdunn informed the Corps, that, based upon the Supreme Court's decision in *Solid Waste Agency of N. Cook County ("SWANCC") v. U.S.,* 531 U.S. 159 (2001) (wherein the Supreme court determined that the Corps' attempt to exercise jurisdiction based upon its Migratory Bird Rule failed), the Corps had no jurisdiction over the wetlands on its property. Newdunn proceeded with ditching and draining the property without applying for a permit from either the Corps or the Virginia State Water Control Board (the "Board").

The Newdunn wetlands had a natural hydrological connection to Stony Run, a navigable waterway-in-fact, until the construction of Interstate 64 ("I-64"). Its current hydrological connection to Stony Run is by intermittent surface water flows through about 2.4 miles of manmade ditches and natural streams along and under I-64. Silt-laden water from the Newdunn Property was observed mixing with clean water downstream from the Newdunn Property prior to entering Stony Run.

The district court removed a state court action filed by the Board, under the Virginia Nontidal Wetlands Resources Act of 2000 (the "Virginia Act"), and consolidated it with an action filed by the Corps under the CWA. The district court found that the Corps lacked jurisdiction and that the Virginia Act was merely coextensive with federal law. The Fourth Circuit reversed.

The Fourth Circuit first addressed the question of whether it had jurisdiction over the Board's action based upon Virginia law. After extensive examination of the language of the Virginia Act and its legislative history, the Fourth Circuit concluded that the Virginia Act contained none of the jurisdictional limitations contained in the CWA, noting in a footnote that the Virginia Act was passed not to incorporate the limitations in the CWA but to remedy shortcomings in the jurisdictional reach of the CWA. The Fourth Circuit also found that the relationship between the federal and state permitting processes (defined in section 401 of the CWA) did not imply a dependence of the state process on the federal process. The Fourth Circuit commented that a state could require a permit for activities in a wetland while the CWA required no federal permit for the activity. The Fourth Circuit noted that it was logical for Virginia to borrow the Corps definition of a wetland because the Corps has vast technical resources for defining wetlands. The Fourth

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Producer failed to preserve trust benefits under PACA

The United States Court of Appeals for the Sixth Circuit held that a produce wholesaler could not recover from a commercial lender the assets of a statutory trust created by the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. §§ 499a-499t, because it failed to properly preserve its rights to the PACA statutory trust. *Overton Distrib., Inc. v. Heritage Bank*, 340 F.3d 361, 366-68 (6th Cir. 2003).

Plaintiff Overton Distributors, Inc. ("Overton") supplied produce to Quality Foods of Tennessee, Inc. ("Quality") from 1993 through 2000. *See id.* at 363. In 1993, Overton sent a letter to Quality stating that Quality would pay Overton's invoices within twenty-five days of receiving deliveries of produce. *See id.* at 364. For the following four years, Overton's invoices reflected these payment term. *See id.*

In 1998, Overton changed its invoices to provide that it was to receive payment from Quality within ten days after the end of each calendar month in which Overton delivered

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Circuit also noted that the question of whether the 38 acres were wetlands was not in dispute. The only issue in dispute was whether the Board had jurisdiction over those wetlands under the terms of the Virginia Act. Because the Fourth Circuit concluded that the Board's action was not based upon a question of federal law, it determined that there was no federal jurisdiction and the Board's action had been improperly removed from state court.

Moving to the question of the Corps' jurisdiction under the CWA, the Fourth Circuit noted that jurisdiction under the CWA does not extend to the limits of jurisdiction under the Commerce Clause, but is determined under the CWA, and the limiting term in the CWA is the term 'navigable waters'. In *U.S. v. Deaton,* 332 F.3d 698 (4th Cir. 2003), the Fourth Circuit determined that the Corps has jurisdiction over any body of water that eventually flows into a navigable water. The Fourth Circuit determined that there was a sufficient nexus between the wetlands on the Newdunn Property and navigable waters-in-fact to "amply" support Corps jurisdiction. The Fourth Circuit seems to have been particularly impressed with photographic evidence of silt-laden water from the Newdunn Property as it coursed to Stony Run.

Three conclusions may be drawn from *Treacy.* First, *Treacy,* together with *Deaton,* and the Sixth Circuit decision in *U.S. v. Rapanos,* 339 F.3d 447 (6th Cir. 2003), suggest that courts will limit *SWANCC* to invalidating the Corps' Migratory Bird Rule. [In *Rapanos,* the Sixth Circuit revisited the criminal conviction of John Rapanos for filling a wetland in Michigan in violation of the CWA. The case had been remanded to the Sixth Circuit by the Supreme Court for review in light of *SWANCC.* The Sixth Circuit remanded the case to the district court, which found that the Corps had no jurisdiction over wetlands on Rapanos' land and dismissed the charges. The Sixth Circuit reversed and reinstated the convictions. Citing the Fourth Circuit decision in *Deaton,* the Sixth Circuit found that a wetland, hydrologically connected to navigable waters-in-fact, though that connection may be through an artificially-created waterway, is within the jurisdiction of the Corps under the CWA. The Sixth Circuit rejected the contention that such wetlands must be adjacent to navigable waters-in-fact.] Second, *Treacy, Deaton,* and *Rapanos* illustrate that the determination of Corps jurisdiction over a particular wetland will be fact-driven, with a detailed analysis and exposition establishing the connection between the wetland at issue and a water navigable-in-fact required. Third, where an independent basis in state law, establishing jurisdiction, exists, wetlands litigation, over the same property, is likely to proceed simultaneously in federal and state courts.

—Theodore A. (Ted) Feitshans, North Carolina State University

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AALA Editor.........................Linda Grim McCormick

2816 C.R. 163, Alvin, TX 77511
Phone: (281) 388-0155
E-mail:
lgmccormick@academicplanet.com

Contributing Editors: Theodore A. (Ted) Feitshans, North Carolina State University; Drew L. Kershen, The University of Oklahoma; Roger A. McEowen, Kansas State University; Leon Geyer, Virginia Tech; John D. Mead, Natioanl AgLaw Center, Fayetteville, AR.

For AALA membership information, contact Donna French Dunn, Executive Director, 4115 South Duff Avenue, Suite C, Ames, IA 50010-6600. Phone: (515) 956-4255.

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its produce to Quality. *See id.* The payment terms were changed because Quality consistently submitted late payments to Overton. *See id.* The invoices also contained the following statement:

> The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a claim over these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received.

Id.

Quality continued to pay Overton "on an irregular and tardy basis," often taking between forty and sixty days to make payment. *See id.* Although Overton complained about Quality's late payments, "it never required Quality to strictly abide by any specific terms of payment." *Id.*

Defendant Heritage Bank ("Heritage") provided banking services to Quality. *See id.* at 364. In 1996, after experiencing significant financial difficulties, Quality entered into a financing agreement with Heritage that allowed Quality to obtain loans using its accounts receivable as collateral. *See id.* Approximately ninety percent of those accounts arose from the sale or resale of produce covered by PACA. *See id.* at 363.

The financing agreement contained numerous provisions that limited Heritage's exposure. *See id.* at 364. The BMA provided that Quality would remain liable for all of the advances it received if the proceeds from the accounts receivable did not cover the amount of the loans advanced by Heritage. *See id.* The agreement also included "a blanket security interest on all of Quality's assets and a representation that Quality's receivables were free and clear of security interests, liens, and claims of third parties. *See id.*

Quality went out of business in January, 2000, leaving Overton unpaid for more than $220,000 in produce. *See id.* In July of 2000, Quality filed a Chapter 7 bankruptcy petition. *See id.* at 363. Because Quality was insolvent, Overton filed suit against Heritage to recover its losses, asserting that it had properly preserved its claim to trust benefits under PACA, that the financing agreement between Quality and Heritage breached the PACA trust, and that Overton was therefore entitled to recover from Heritage. *See id.* at 365. Heritage argued that "Overton had not properly preserved its trust benefits, and that, even if it had, the ... [financing agreement] represented a bona fide sale of the accounts receivable to the bank, not a security interest that would allow Overton to claim priority over these funds." *Id.*

The district court determined that Overton had properly preserved its PACA trust benefits, that the financing agreement breached the PACA trust, and that "Heritage's bona-fide-purchaser defense was without merit." *Id.* It ordered Heritage to pay the full amount due from Quality plus prejudgment interest. *See id.*

On appeal, the Sixth Circuit reversed the district court's decision. The court explained that one of the purposes of PACA was to protect unpaid sellers of perishable agricultural commodities because "[d]ue to

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Wind energy production – legal issues and related concerns for landowners

By Roger A. McEowen

Farmers have long used wind energy. Beginning in the 1800s, farmers installed several million windmills across the mid-west and plains to pump water and generate power for lights and radios. Today, farmers, ranchers, and other rural landowners in suitable areas are utilizing wind energy in a different manner. By leasing out a portion of their land to wind energy developers for the installation of high-tech wind turbines, rural landowners can diversify their income and provide some stability to the variability of farm income.[1] However, wind farming presents numerous legal issues that landowners must consider carefully before entering into an agreement with a wind development company.

The potential for wind energy development

Wind farms are clusters of wind turbines that generate electricity. They tend to be located in areas that have reliable and favorable wind speeds and that are near electric power transmission lines and, in some instances, large cities.[2] Private companies are developing most of the wind farms in the U. S. by using either their own land or leasing the land from private landowners or from the government. The developers sell electricity from the wind farms to power marketers, electric utilities, and, in some instances, directly to specific companies or government agencies. Presently, wind generates only about one percent of the power utilized in the U.S., but it is believed that by 2020, six percent of the nation's power will be generated by wind.[3] Because wind turbines require large areas of land with strong, steady winds, certain areas of the country have the potential to be a significant player in the future development of wind farming.[4]

Government incentives for wind energy production

Both the federal government and numerous states have provided incentives to encourage wind energy development. The federal Renewable Energy Production Tax Credit provides an income tax credit per kilowatt hour for the production of electricity from a qualified wind energy facility placed in service after December 31, 1993, and before January 1, 2004.[5] The credit is presently 1.8 cents per kilowatt-hour and is adjusted annually for inflation. The credit applies to each kilowatt-hour of electricity produced from wind and sold to unrelated parties during the first ten years after the facility is placed in service. Likewise, the Renewable Energy Production Incentive program provides financial incentive payments for electricity produced and sold by new qualifying renewable energy generation facilities. For depreciation purposes, renewable energy systems placed in service after 1986 are classified as five-year property utilizing the double-declining balance method. At the state level, Kansas exempts renewable energy property from state property tax.[6]

The mechanics of wind turbines

The typical wind turbine sits atop a tower that ranges from 170 to 320 feet high. The blade diameter is 75 to 100 feet with a weight between 8,000 and 10,000 pounds. The cost to install is approximately $1 million per megawatt of installed capacity, with the typical turbine having an installed capacity of 750 kilowatts to 1.5 megawatts. A 1.5 megawatt turbine can generally produce enough energy to power 400-500 homes annually. A section of land can house anywhere from six to twelve turbines.

The turbines are very sophisticated machines with computerized controls. A turbine's generator output increases as wind speed increases, with maximum power typically generated with wind speeds of 30-35 mph. The turbines are usually programmed with a cut-out wind speed of between 55 and 65 mph.[7]

Legal issues for landowners

A wind energy agreement should never be negotiated without first having the agreement reviewed by legal counsel. A wind energy agreement is a legally binding agreement that should be reviewed carefully and understood clearly before being executed. It is important to understand that wind energy agreements are long-term agreements that will impact the land subject to the agreement for many years, likely beyond the lifetime of the landowner that executes the agreement. The following is a list of questions that landowners should ask when analyzing any wind energy agreement:

• How much of the land will be subject to the agreement? Care should be taken to limit the legal description of the land to only the area that is reasonably necessary for the proper exercise of any easement rights that are granted.

• How long will the land subject to the agreement be affected? Easements tend to be either perpetual or permanent and terminate only by voluntary termination on the holder's part or involuntary termination due to default by the easement holder. As a general rule, landowners should avoid agreements that provide for automatic renewal periods.

• Based on the property rights that are given up, are the proposed payments adequate for the present time and for the life of the agreement? (Note: The answer to this question requires an understanding of the mechanics and economics of wind energy production.)

• If the agreement offers an up-front lump-sum payment, is the payment representative of a fair amount for the rights involved?

• What are the tax consequences of the wind energy payments that will be paid under the agreement? (Note: The answer to this question depends on tax changes at the federal and state levels–the area is in an almost constant state of flux.)

• What are the tax consequences that result from granting a perpetual easement instead of granting an easement for a term of years? The granting of a perpetual easement could constitute a sale of land for tax purposes.

• Does the developer want to develop the land or simply use a portion of the surface for a term of years? Remember, the developer may want to tie up as much of the land as possible, even though only a portion of the land will actually be used. The developer needs rights over sufficient property to allow the construction of wind turbines and related physical structures, the installation of power lines or cables to carry the electricity to a power company, and access from public roads to and from the land containing the wind turbines and related structures.

• Does the agreement guarantee that a set number of wind energy turbines will be constructed on the land by a specific date and, if not, is the developer willing to guarantee a minimum amount of payments?

• Are payments under the agreement based on revenues generated by the wind turbines? Can the landowner get information as to how the owner's revenue will be calculated?

• Is the developer able to sell or transfer without the landowner's consent any of the land use rights obtained under the agreement? If so, will the original developer remain liable if the new developer or holder of the easement right does not pay the landowner or otherwise defaults?

• What events trigger the developer's right to terminate the contract? Can the developer terminate the contract at any time without cause? If so, how are payment

Roger A. McEowen is Associate Professor of Agricultural Economics and Extension Specialist, Agricultural Law & Policy, Kansas State University, Manhattan, Kansas. He is a member of the Kansas and Nebraska Bars.

due under the agreement to be handled?

• What termination rights does the landowner have? How does the landowner exercise those rights?

• If the agreement is terminated, whether by agreement of the parties or otherwise, what happens to the wind energy structures and located facilities erected on the property? What is the developer required to remove? How soon must structures be removed? Who pays for their removal?

When a wind energy agreement is being negotiated, certain issues are critical to the creation of an equitable agreement. Unfortunately, one of the common problems with many wind energy agreements is that once they are proposed and submitted to a landowner, the company wanting to execute an agreement tends to refuse to negotiate changes to the terms of the agreement. The company's ability to refuse to negotiate terms of the proposed agreement will depend largely on whether a landowner has meaningful options and competent legal representation.[8] Key provisions to a wind energy agreement that require careful attention by legal counsel for landowners contemplating a wind farm include the following:

• Is the proposed contract a lease or an easement? If a lease is involved, it should be long enough for the developer to recoup its investment (probably at least 20 years). Does the developer have a right of renewal? If so, does the landowner have the right to renegotiate any of the lease terms? Any lease should not be perpetual–a violation of the rule against perpetuities might be involved (at least in those states that have retained the rule).

• If an easement is involved, does the easement include turbine sites, substations, air space, buffer areas, vegetation restrictions, building restrictions, transmissions, and associated rights of way?

• Is a sale of the land contemplated? If so, how is the selling price computed? Any sale price should consist of the fair market value of the land plus the wind energy value. Remember, the granting of a perpetual easement could constitute a sale for tax purposes.

• What is the amount of compensation to be paid? Take care to ensure that the definition of "gross revenue" is done properly. Is it defined as the sale of electrons or the sale of green credits, or some other manner?

• Is the revenue to be a flat amount annually, an annual payment per tower, a percentage of gross proceeds, a payment of a certain amount of kilowatt hours generated annually, or an amount based on the selling price of megawatts per year, whichever amount is greater?

• Is an inflationary factor built into the contract payment provisions? To protect the landowner's interest, it should be.

• Does the agreement cover land that will not be needed for the wind farm and related structures? From the landowner's perspective, it should not be. Take care to limit the legal description of covered land.

• How long can the land be tied up without any construction of a wind energy facility?

• Must a minimum number of turbines be constructed? Does the agreement call for a minimum payment to the landowner regardless of the number of turbines constructed?

• An up-front lump-sum payment has tax consequences–make sure they are understood.

• What are the intentions of the developer concerning the use of the land? That makes understanding the use provisions of the agreement of primary importance. The construction clause should limit the construction of wind energy structures to not more than three or four years with adequate compensation paid to the landowner for restricting the use of the land during that time.

• Can the developer assign the agreement? If so, a clause should be inserted that ensures the original developer's liability if the assignee defaults under the terms of the agreement. (Note: Developers want the ability to assign the agreement and subordination language.)

• Is the landowner willing to consent to a mortgagee of the developer? If so, a clause should be included that limits the landowner's obligations to the mortgagee.

• Consider including an indemnification clause that indemnifies the landowner for any liability incurred as a result of permissive activities (such as crop tenants, custom harvesters, and subsurface tenants) on the property subject to the wind energy agreement.

• What are the landowner's rights concerning usage of the property? Has the landowner reserved rights to use the land for livestock grazing, the raising and harvesting of crops, the construction of improvements that are necessary and incidental to farming or other agricultural activities?

• How are taxes and utilities to be handled? Is the developer required to pay any increase in real estate taxes as a consequence of the installation of the wind energy facility? Is the developer required to pay all water, electric, telecommunications and other utility service used by the wind facility? Is the developer required to pay all property taxes levied against the wind energy facility?

• Consider the use of a clause that requires the landowner to be treated as favorably as neighbors (consider how to define "neighbor') executing similar agreements.

• Include a clause requiring the removal of all improvements the developer makes upon termination (whether voluntary or otherwise) of the agreement. Relatedly, for developments in some areas, a provision should be included specifying which party gets the rock that gets excavated to build the wind energy structures.

• Require the agreement to be recorded (not just a memorandum of the agreement) to eliminate the necessity of having to locate a copy of the lease in the event of sale or mortgage of the property.

• Never agree to confidentiality clauses concerning the terms and conditions of the agreement.

• Have the contract reviewed by the landowner's insurance agent for analysis of any additional risks created by the wind energy project.

• Will the agreement violate any U.S.D.A. land-use restrictions if the subject land is enrolled in a U.S.D.A. program? If such a possibility exists, consider including in the agreement a clause requiring the developer to indemnify the landowner for any lost government payments or the imposition of any penalties.

• Evaluate the agreement with an eye toward the risk faced by the landowner. That includes environmental concerns, issues that could be raised by neighbors (i.e., nuisance-related concerns), and potential violation of applicable zoning and set-back requirements. It is probably a good idea to require the developer to maintain liability insurance coverage related to wind energy activities on the land. The landowner should be named as an additional insured, and the policy should provide that it cannot be cancelled by the developer without prior written notice to the landowner.

• What does the agreement provide for if the property is condemned? Which party receives any condemnation payments?

Clearly, wind farming has the potential to provide significant economic benefits for rural landowners. However, substantial peril exists that landowners that do not evaluate proposed agreements with developers carefully can be taken advantage of significantly. Landowners should have any proposed agreement evaluated by legal counsel and attempt to negotiate any unfa-

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vorable terms. Failure to do so could result in many years of dissatisfaction for landowners.

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[1] The advantages of wind energy production include the creation of a clean, non-polluting renewable resource that can displace imported foreign oil, the prevention by a single wind turbine of 5,000 tons of carbon dioxide emissions annually, the creation of more jobs per dollar of investment than any other energy technology, and a shorter construction time as compared to conventional power plants.

[2] The leading states in wind energy production are CA, TX, IA and MN. The top five states for wind energy potential are ND, TX, KS, SD and MT.

[3] According to the Wind Energy Association, wind could produce over ten billion kilowatts annually. That is three times the amount of power used presently in the U.S.

[4] See the text of footnote 2 *supra*.

[5] I.R.C. §45. The Energy Policy Act (Act) of 2003, H.R. 6, would extend the availability of the credit through 2006. See Act, §1302.

[6] Kan. Stat. Ann. §79-201.

[7] As an example, the Gray County Wind Farm near Montezuma, KS, is the largest wind farm in Kansas at the present time. It was built in 2001 by FPL Energy, a Florida-based company. The farm encompasses 12,000 acres and has 170 turbines with a generating capacity of 110 megawatts. The towers are 212 feet high with a blade span of 77 feet. A computer turns the blades to face the wind. The blades begin rotating at 7 mph, and at 9mph the blades turn at 14 rpm and start to generate electricity. At a wind speed of 13 mph, the blades increase their rpm to 22, their maximum speed. At 33 mph the turbine generates its maximum power and at 56 mph, the computer automatically turns the blades sideways to the wind. The towers and turbines are built to withstand wind at up to 134 mph.

[8] Of particular concern is a provision in many wind energy agreements under which the landowner agrees to indemnify and reimburse the developer if a third party on the property with the landowner's permission damages the wind farm structures. For example, if a landowner contracts with a custom cutter to harvest wheat on the premises that is also subject to a wind energy lease and the custom cutter's activities set the wheat field on fire that causes damages to the wind farm structures, the landowner, under such an indemnification provision, is liable for the resulting damages. Another concern is that with some wind energy agreements, the developer the landowner executes the contract with is a shell corporation created for liability purposes. For example, the Gray County, KS, wind farm lease runs to a wholly-owned subsidiary corporation with a minimal amount of net worth.

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

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the need to sell perishable commodities quickly, sellers of perishable commodities are often placed in the position of being unsecured creditors of companies whose creditworthiness the seller is unable to verify." *Id.* at 364-65 (citing *Endico Potatoes, Inc. v. CIT Group/Factoring, Inc.*, 67 F.3d 1063, 1067 (2d Cir. 1995)). It also explained that in 1984, Congress amended PACA when it added a statutory trust in favor of unpaid sellers that protects them "against financing arrangements made by merchants, dealers, or brokers who encumber or give lenders a security interest in the commodities" that provide them with priority over secured creditors. *Id.*

The court explained that to preserve its rights in a PACA statutory trust, a seller must give written notice to the buyer of its intention to preserve its trust benefits and that such notice may be provided on the invoices given to the buyer. *See id.* at 365. It further explained that:

> [i]f the seller and the buyer use the default payment terms provided in the regulations ("within 10 days after the day on which the produce is accepted"), this notice of intent to preserve benefits is all that is necessary. On the other hand, if the parties agree to payment terms greater than 10 days after acceptance, but in no event more than 30 days after acceptance, this agreement must be in writing. The seller must also disclose these non-statutory payment terms "on invoices, accountings, and other documents relating to the transaction. . . ." "The maximum time for payment for a shipment to which a seller, supplier, or agent can agree and still qualify for coverage under the trust is thirty days, after receipt and acceptance of the commodities . . . ."

Id. (citing 7 U.S.C. § 499e(c)(3); 7 C.F.R. § 46.46(e)(1),(2)).

The court ruled that the district court erred when it determined that Overton had preserved its PACA trust benefits. *Overton*, 340 F.3d at 366. It stated that although Overton provided a statement of its intention to preserve its benefits in a PACA statutory trust, it failed:

> to place the payment terms as agreed to in the 1994 written agreement on these invoices. Instead, the payment terms on all invoices from 1998 were "10 days EOM," establishing that the payment was due within 10 days after the end of each calendar month in which produce was delivered. Because payments for produce delivered on the first of the month could be made as late as 40 days after the date of acceptance, the invoices indicated that Overton was agreeable to a payment schedule outside of PACA's protection.

Id.

Overton asserted that it should have been able to avoid the consequences of its failure to comply with PACA because the parties' 1994 agreement "and the payment terms on the relevant invoices" differed so as to make the agreement ambiguous, and therefore there was no agreement at all. *Id.* In the alternative, Overton argued that is failure to comply with PACA should be excused because "the different terms on the invoices were the result of a clerical error, and ... [it] should be given benefit of the doubt due to its good faith effort to substantially comply with PACA." *Id.*

The court rejected Overton's assertions, stating that the statutory language of PACA is clear and that "[a]bsent a written agreement altering the payment terms set in 1994, all of the subsequent invoices from Overton to Quality were required to disclose the agreed terms of payment." *Id.* (citing 7 U.S.C. § 499e(c)(3) and 7 C.F.R. § 46.46(e)(1)). *See id.* It added that

> [t]he parties had clearly agreed in 1994 to terms different from the standard 10-day payment provision contained in the PACA regulations. Consequently, PACA and the regulations mandate that those terms had to be disclosed on the invoices. Overton cannot have it both ways. It cannot, on the one hand, list terms on its invoices that are not only different from those mutually agreed upon, but also permit payment outside of PACA's requirements, and then on the other hand argue that it has substantially complied with PACA.

Id. at 366-67.

The court held that "[b]ecause Overton's 40-day maximum payment term failed to preserve its trust benefits under PACA, it is not entitled to assert priority over Quality's accounts receivable that arose from the sale of Overton's produce." *Id.* at 368. Thus, it did not consider whether the financing agreement was merely a security interest in Quality's accounts receivable or whether Heritage was a bona fide purchaser of those accounts. *See id.*

—John D. Mead, National AgLaw Center Graduate Fellow, Fayetteville, AR

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Lender trumps landlord who failed to file U.C.C.-1 financing statement

A federal judge, Henry E. Hudson, ruled in *Dean v. Hall*, No. 3:02 CV 728, Feb. 25, 2003, that a commercial lender who filed a financing statement perfecting its security interest in the crops of a tenant farmer takes priority over unperfected landlord. The landlord had an oral lease with the tenant farmer. She was unaware of revised Article 9 and thought that the landlords' statutory lien in the crops would give her priority. Since she failed to timely file a U.C.C.-1, she stood second in line according to the ruling.

The landlord argued that she had a priority under Virginia landlord's statutory lien (Va. Code Ann. § 55-231). The judge said prior to last year, she would have been correct. Revised Article 9 is now controlling law. The judge wrote this lien "is an interest in farm products which (A) secures payment for rent on real property leased to [the defendants] for farming operations; (B) is created by Virginia Code Annotated § 55-231 in favor of the plaintiff; and (C) its effectiveness does not depend on the plaintiff's possession of the real property in question. VA Lawyers Weekly, Vol. XVII, No. 43, 31 March 2003, p. 1092. Landlord must, after July 1, 2001, file a U.C.C.-1 financing statement with the State Corporation Commission to secure/retain priority. The legislature had adopted a one-year grace period. But the landlord's failure to file, left her with an unperfected interest.

Judge Hudson observed "that a section of Revised Article 9, Code section 8.9A-334(i) is right on point. That section provides a perfected security interest in growing crops has priority over a conflicting interest of a landowner if the debtor is in possession of the real property and granted summary judgment. The landlord was out $12,000.

—Leon Geyer, Virginia Tech

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