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INSIDE

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"Justice is the firm and continuous desire to render to everyone that which is his due."

— Justinian

An analysis of H.R. 4072

The signing into law of H.R. 4072 (PL98-258) on April 10, by the President capped a successful push by wheat state Congressmen to enact a better wheat program before the 1984 campaign season began. Unfortunately, Administration insistence that any improvement of the wheat program had to be coupled with a target price freeze forced rice, cotton, and, to a lesser extent, corn interests to swallow major concessions. OMB Director David Stockman, with the eager assistance of wheat interests and a corps of Senate Republicans continued his mastery over the remnants of the once formidable Farm Bloc by preventing the Senate from transforming H.R. 4072 into a traditional "mini" farm bill-something for everyone. And many have speculated that Secretary Block saved his job by spearheading a budget-reduction package, however illusory, on the heels of one of the costliest years for federal agriculture programs, nearly $30 billion.

The big winner undoubtedly is wheat. Although the target price is rolled back to $4.38 per bushel for both 1984 and 1985 from $4.45 and $4.65, respectively, the creation of a 10% paid diversion with a payment rate of $2.70 a bushel, 50% in advance, gives wheat farmers the ability to recoup any losses. Non-paid acreage reduction is reduced from 30% to 20% and the original 10-20% PIK option is maintained, although the payment rate is increased from 75% to 85% of farm program yields. Also, haying and grazing will be permitted on diverted acreage for 1984 wheat, at the option of each State's ASCS, if the acreage was devoted to wheat before January 12, 1984.

(continued on page 2)

Special use agreement

One of the requirements for special use valuation that has caused serious problems in recent months for estates electing the special method for valuing farmland at death is the requirement for an agreement to be signed by all parties with an interest in the property subject to the election. The parties must consent in the agreement to personal liability for any additional federal estate tax on recapture. The agreement must be filed with the notice of election.

Several recently issued private letter rulings have sketched out how serious the IRS is in requiring that the agreement must be signed by all parties with an interest.

- Ltr. Rul 8416002: a special use valuation election was ineffective because the agreement was not signed by contingent remainder beneficiaries of an inter vivos trust.
- Ltr. Rule. 8416007: the election was ineffective because no one signed the agreement on behalf of a corporate landowner even though two shareholder-directors signed in their individual capacities.
- Ltr. Rul. 8342004: election not allowed where co-owners who were not heirs of the decedent did not sign the agreement. Ltr. Rul. 8412014 involved a similar fact situation where a brother of the decedent — who was not an heir but was a co-owner of land with the decedent — did not sign the agreement.
- Ltr. Rul. 8352112: the election was denied where the agreement was not signed by anyone on behalf of a grandchild — born three months after the decedent's death — as a contingent beneficiary.

The rulings make it clear that the language in the regulations that the agreement must be signed by all parties with an interest will be strictly construed.

— Neil E. Harl

H.R. 4072
CONTINUED FROM PAGE 1

The 1984 programs for rice, cotton, and feed grains are unchanged. USDA officials pressed for target freezes on these commodities for both 1984 and 1985, but wheat state Senators revised their original proposals to exclude the remaining program crops for 1984.

In 1985 the rice target price will be frozen at $11.90 per hundredweight, instead of the scheduled $12.40. Rice farmers will be required to set aside at least 25% of their acreage if the carryover level exceeds 25 million cwt. Any set aside amount above 25% will be in a paid diversion program at $2.70 a hundredweight, to be increased to $3.25 if the carryover is between 35 and 42.5 million cwt. and to $3.50 a hundredweight if carryover levels exceed 42.5 million cwt.

Upland cotton will have a target price freeze in 1985 at 81 cents per pound instead of the scheduled 86 cents per pound. If cotton carryover levels exceed 3.7 million bales, the Secretary shall announce at least a 25% set aside, with any amount above 20% to be in a paid diversion program at 25 cents per pound. The payment rate will rise to 30 cents per pound if carryover levels exceed 4.1 million bales and 35 cents per pound if the levels exceed 4.7 million bales.

Corn farmers in 1985 must absorb a drop from $3.18 per bushel to $3.03 in the target price. If the corn carryover exceeds 1.1 bushels, the Secretary can implement a set aside program from 5 to 20%. No less than 5% will be in a paid diversion if there is a set aside and any reduction above 15% will be equally divided between a paid diversion program and the ARP. The payment rate will be $1.50 per bushel.

H.R. 4072 has been likened to a "mini" farm bill because several credit assistance provisions were included. One of the most important, and controversial, is the raising of the FmHA operating loan limits from $100,000 to $200,000 on insured loans (direct loans) and from $200,000 to $400,000 on guaranteed loans. The maximum repayment period on consolidated or rescheduled FmHA loans is raised from seven to 15 years and FmHA disaster loans (EM) can be made to producers in counties adjacent to declared disaster counties. The application period for all disaster loans is extended to eight months. Collateral requirements on disaster loans have been a serious hindrance, and both Houses agreed to allow farmers to value assets used as collateral at their value one year before the date of the disaster declaration, if that value is higher than current value.

H.R. 4072 also provides additional funds for the insured, Economic Emergency (EE) program. In October, 1983, as a result of the *Kjeldahl* v. *Block* case, the Secretary was ordered to release $600 million that had been earlier appropriated for the EE program. However, OMB Director David Stockman, in January, 1984, ordered that only $50 million of the $600 million allocation could be used in insured loans. Both Houses, responding to harsh criticism of this forced reallocation, attempted to ease the turmoil in the EE loan program by earmarking $310 million more of the original pool for insured loans.

Arguably the most important credit provision in H.R. 4072 is the authority for the Farmers Home Administration to reschedule, reamortize, defer, or consolidate loans at the interest rate on the original note or the current interest rate, whichever is lower. FmHA officials privately have hailed this provision as one that will reduce outstanding indebtedness because more producers will seek loan servicing.

A non-binding Sense of Congress resolution requesting that the President seek over $1.5 billion in additional money for 1984 and 1985 export programs is also included. Increased export aid was a condition of corn interest support for the target price freeze.

H.R. 4072, which passed the House in November, 1983, by a voice vote as a purely wheat enhancement bill, met with spirited debate in the Senate because of the target price freeze provisions. Senator Heflin of Alabama forced the USDA to negotiate on enhancing the cotton program before he would consent to the bill being brought up for debate and Senators Bumpers and Pryor, both of Arkansas, conducted an eleventh-hour "mini" filibuster which resulted in modest concessions to rice interests. However, as a rule, the wheat state Senators and the crops of Senate Republicans swept all before them. After three days of debate, the Senate passed H.R. 4072, 78 to 10.

In conference, the five Republican Senate conferees repeatedly defeated attempts by the Democratic Senate and House conferees, led primarily by Representative Harkin of Iowa, to amend the Senate version of H.R. 4072. The bill was reported out with minor changes and passed by voice vote in the Senate and by the recorded vote of 379-11 in the House. H.R. 4072, a testament to the strength of wheat interests and David Stockman, is but a taste of what farm interests can expect during the debate of the 1985 farm bill.

— R. Charles Culver

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FmHA loans and crop insurance

The Farmers Home Administration (FmHA) has amended its emergency loan regulations to require crop insurance in some instances. The amended regulations were published in 49 Fed. Reg. 17734-17735, April 25, 1984.

• If emergency loan funds are used as the primary source of crop production financing, crop insurance is required, if available, as a condition of loan approval. FmHA will require an "Assignment of Indemnity" on a borrower's crop insurance policy.

• If FmHA is not the primary lender for annual crop production expenses, but has a security interest in the crop, crop insurance will be required even if the primary lender will be the beneficiary under the "Assignment of Indemnity."

— Neil E. Harl

New CFTC reparations rules

by Thomas M. McGivern

In 1983, over 139 million contracts were traded on the nation's commodity exchanges, an increase of almost 25% from 1982. Of these contracts, agricultural commodities were the most heavily traded, accounting for over 41% of total volume.[1] Thus far in 1984, total trading volume is even higher than the record levels of 1983. This increased use of futures trading, which includes trading by those associated with agriculture, plus the expected use of exchange-traded agricultural options commencing in the fall of 1984, creates the potential for an increased number of disputes between trading professionals and their agriculturally-related customers.

Commodity futures trading dispute resolution has been characterized at times in the past in uncomplimentary terms, such as complicated, costly and, especially, slow. Like others in the trading public, agricultural producers and processors have had a number of forums in which to resolve these disputes, including exchange arbitration, reparations at the Commodity Futures Trading Commission (Commission of CFTC), or an action in state or federal court. Recently, however, a number of significant changes have occurred which are designed to remedy some of the problems associated with past dispute resolution.

First, the Futures Trading Act (FTA) of 1982[2] amended the Commodity Exchange Act (CEA or Act) in a number of ways to resolve questions on the availability of certain forums. The 1982 amendments added new section 22 to create an express private right of action under the Act, a response to *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*[3] and other cases addressing implied private rights of action under the CEA. Section 6d of the Act on state jurisdiction was amended to permit state officials to initiate proceedings in state (subject to certain restrictions), as well as federal, court for alleged violations of antifraud provisions of the Act, or Commission rules, regulations or orders. The 1982 amendments also deleted the $15,000 limit on arbitration claims conducted under the auspices of an exchange or registered futures association (RFA), thus opening this avenue to a greater number of litigants.

Another recent change designed to aid in the resolution of futures trading disputes was the implementation in March 1983 of an arbitration pilot program by the National Futures Association (NFA). The NFA, and RFA authorized under section 17 of the Act is an industry self-regulatory organization which became operational in October 1982. The NFA performs designated regulatory functions with the CFTC in an oversight role. Some of these functions include: (1) the screening, testing, and registration of certain futures industry professionals;[4] (2) ensuring compliance with NFA rules, such as capitalization requirements and segregation of funds; and (3) providing an arbitration forum for dispute resolution between NFA members and their customers. NFA officials announced in February 1984 that the testing period for the arbitration program was completed, and that the program is now fully operational.[5] NFA is also authorized to offer its arbitration forum as a substitute for the arbitration forums required of the futures exchanges under the CEA.

Finally, a third major change is the adoption of revised reparations rules by the CFTC, which became effective on April 23, 1984.[6] The revised rules are designed to streamline the reparations process and reduce the backlog of over 900 reparations cases currently in various stages before the CFTC Administrative Law Judges (ALJs). The impetus for these revisions were CEA amendments proposed by the CFTC in 1982, which resulted in a directive by Congress in the 1982 FTA to "promulgate such rules, regulations, and orders as it (the CFTC) deems necessary or appropriate for the efficient and expeditious administration of..." the reparations procedure.[7] The rule revisions as finally adopted represent a significant modification of past, and even the proposed, rules for reparations found in Part 12 of the Commission's regulations.[8]

Under the new rules, the Commission has consolidated its organizational units responsible for administering various procedures under the former reparation rules by creating a new "Office of Proceedings," and charging that office with responsibility for the administration of all reparation rules except those concerning direct review by the Commission. The newly created position of "Director of the Office of Proceedings" has been designated under the regulations to serve as administrative head of this office, with supervisory authority over all office personnel other than ALJs and their personal law clerks. The Director has wide-ranging authority, including preliminary consideration of the pleadings, assignment of cases and approval of travel itineraries for the ALJs. Another position in the Office of Proceedings is the "Judgement Officer," a Commission employee who will conduct proceedings and render decisions pursuant to the new "voluntary decisional procedure" and the "summary decisional procedure," both of which are discussed below. This position is roughly analogous to that of the Hearing Officer under the former rules. The position of "Proceedings Officer" has also been created. This Officer will assist the ALJs in cases conducted pursuant to the "formal decisional procedure," also discussed below, by preparing the record in the formal procedure, a role similar to that of U.S. magistrates in the federal court system. The Proceedings Officer will expedite discovery by deciding discovery-related disputes under the formal procedure, and will also be assigned default cases. Finally, a "Proceedings Clerk" will act under the supervision of the Director, and is responsible for maintaining the reparations docket, acting as custodian of the records and notifying the parties of actions taken and orders entered in reparations matters.

An important change under the new rules is the determination of when a reparations "proceeding" is commenced. The process is initiated by filing a complaint with the Office of Proceedings. The Director conducts a brief review to determine whether the complaint is "clearly unsuitable" for a reparations proceeding.[9] If the complaint is determined to be unsuitable, consideration of the complaint is terminated without any need for action by the respondent.[10] If not clearly unsuitable for reparations, the Director is required to forward the complaint to one or more of the named respondents for satisfaction of the complaint. The respondent has forty-five days either to pay the complainant the amount of damages claimed or file an answer. The respondent may submit with his answer a "motion for reconsideration of the determination to forward the complaint," pursuant to section 12.18. This motion is intended to point out patent and superficial defects which would render the complaint clearly unsuitable for reparations. The Director may grant such a motion, without a formal ruling, by terminating consideration of the pleadings

pursuant to section 12.27; or he may deny the motion, again without a formal ruling, by determining to forward the proceedings pursuant to section 12.16.[11] The respondent's answer may also include counterclaims, which must either allege facts which independently would be the proper subject of reparations, or arise out of the same transactions or occurrences set forth in the complaint.[12] Finally, the respondent's answer must also elect which of the decisional procedures discussed below is preferred, and if appropriate, pay the filing fee if the procedure elected has a more costly fee than the procedure elected by the complainant. At this point the Director determines whether to forward the pleadings pursuant to section 12.22 (default) or section 12.26 (commencement of a reparations proceeding). Only if the pleadings are forwarded is a "proceeding" commenced. This process is designed to save both the parties and the Office of Proceedings time and expense by eliminating the need for certain steps until a proceeding is actually commenced.

Probably the most significant of the changes under the revised rules are the new decisional procedures. The "voluntary decisional procedure" is intended to be the most inexpensive and expeditious of the three procedures, and has been compared with NFA and commercial arbitration. This procedure is available regardless of the amount claimed or counterclaimed, but will be employed only when all parties agree to its use. The filing fee under this procedure is $25. All claims and counterclaims must be submitted in documentary form to a Judgement Officer, who will render a decision.

At the time the Proceedings Clerk serves notice to the parties that a proceeding has been commenced pursuant to section 12.26, he is also required to issue an order directing the parties to complete discovery within sixty days. As under the former rules, discovery is allowed to proceed without leave of the decisionmaker.[13] Under the voluntary procedure the Judgment Officer is not permitted to hold pre-decision conferences nor to conduct discovery and oral examination of parties and witnesses. Pursuant to section 12.105, all proof under this procedure must be submitted in documentary and tangible form. The Judgement Officer renders a final decision unaccompanied by findings of fact. This decision is not appealable to either the Commission or a court.[14]

The Commission has noted advantages to both complainants and respondents in using the voluntary procedure. First, a decision pursuant to this procedure can be expected within six months after the complaint is filed. Second, the respondent does not have to pay a filing fee and, because there is no oral testimony, neither party will incur legal expenses attributable to preparing for and presenting such testimony. Third, unlike NFA arbitration, complainants using the voluntary procedure will be able to institute proceedings against leverage transaction merchants and floor brokers. Fourth, the respondent will not be liable for prejudgment interest if a reparation award is rendered against him, and successful counterclaims will likely be obtained earlier. Finally, awards may not exceed the amont of damages claimed or counterclaimed, and for a respondent found to have violated the CEA or Commission rules and regulations, such a finding will not constitute a basis for, *inter alia*, revocation or suspension of his registration.[15]

The new "summary decisional procedure" is designed to replace the Commission's former "summary proceeding," in which all proof was submitted in documentary form and the amount of damages claims or counterclaims did not exceed $5,000. A Judgment Officer will also preside over the summary decisional procedure,[16] where claims or counterclaims are limited to $10,000 and the filing fee is $100.

The summary decisional procedure does not afford parties full oral hearing privileges or the opportunity to submit memoranda on proposed findings of fact and conclusions of law. However, the Judgment Officer is permitted, in his discretion, to conduct one or more pre-decision conferences in Washington, D.C. or by telephone, for such purposes as discussing the advisability of electing the voluntary procedure, encouraging settlement, simplifying or clarifying issues, obtaining stipulations, and discussing amendments or supplements to the pleadings. An oral hearing will be held only upon the motion of a party, and where the Judgment Officer concurs that an oral hearing is "necessary or appropriate to resolve factual issues which are central to the proceeding."[17] Oral hearings may be held in Washington, D.C. or conducted by telephone, and except in extraordinary circumstances, must be completed within sixty days after notification that the oral hearings, will take place. In an oral hearing, the Judgment Officer has authority to conduct oral examination of the parties, and may also permit the parties to conduct oral direct and cross examination of other parties and witnesses.

After the parties have concluded their submissions of proof, the Judgment Officer will render an initial decision which must be accompanied by findings of fact, may include an award of costs (including reasonable attorney's fees, if appropriate), and, if warranted, an award of prejudgment interest. A decision under the summary procedure may be appealed to the Commission. The Commision estimates that the Judgment Officer's initial decision under this procedure can be expected within nine months after the complaint is filed.

The "formal decisional procedure" is for cases where the amount claimed or counterclaimed exceeds $10,000, and at least one party does not elect the voluntary procedure. The formal procedure affords the parties a more traditional administrative hearing, and the decision may be appealed to the Commission and a U.S. Court of Appeals. The filing fee for this procedure is $200.

As in the voluntary and summary procedures, the parties in a formal procedure are permitted to proceed with discovery after the section 12.26 proceeding has commenced. It is the responsibility of the Proceedings Officer, discussed *infra*, to assist the parties in completing discovery as soon as practical. To this end, the Proceedings Officer, during the sixty-day period for discovery, has the authority to rule upon motions for: protective orders; orders compelling discovery; enlarging the time permitted for discovery for an additional period not to exceed thirty days; leave to serve written interrogatories of a number exceeding thirty; and, orders and subpoenas directing non-parties to comply with discovery. The Proceedings Officer may also hold pre-decision conferences in Washington, D.C. or by telephone, and make recommendations to the assigned ALJ regarding what action should be taken "if counsel for a party engages in abusive conduct, or a party fails to comply with a discovery notice or request, an order compelling discovery, or otherwise abuses the discovery procedure..."[18] Any discovery-related ruling issued by a Proceedings Officer may be appealed to the assigned ALJ.[19]

An opportunity for an oral hearing will generally be available for parties in a formal procedure, and is expected to become the rule as opposed to the exception. Oral hearings are permitted only in twenty specified cities. However, whether an oral hearing will be held is left to the ALJ's discretion, and he may dispose of some or all of the issues without an oral hearing if he determines that documentary and other tangible forms of proof are sufficient for resolution of factual issues. The ALJ is authorized to order that the direct testimony of the parties and their witnesses be presented in documentary form only, to expedite matters.

As soon as practical after submissions of proof, including an oral hearing if one is held, the ALJ is required to issue an initial decision with findings of fact and conclusions of law. The decision may include a reparations award and, if appropriate, an award of costs and prejudgment interest. As noted above, this decision is appealable.

The Commission expects that the initial decision will be rendered in a formal decisional procedure within a year after the complaint is filed.

There are many other subtle and not so subtle changes in the Commission's new reparation rules. The practitioner confronted with a reparations question is encouraged to review not only the new rules, but also the supplementary information accompanying these rules in the *Federal Register* release. The new reparations rules, coupled with changes brought about by the 1982 FTA and the NFA's arbitration program, should decidedly reduce the time for dispute resolution in commodity futures and options trading cases.

1. In addition, financial instruments accounted for 20.1% of all trading, followed by precious metals, 16.12%; stock indexes, 9.11%; foreign currencies, 8.51%; non-precious metals, 2.29%; petroluem products, 1.98%; and lumber, .56%.
2. Pnb. L. No. 97-444, 96 Stat. 2294 (1983).
3. 456 U.S. 353 (1982).
4. NFA membership is compulsory for commodity pool operators, futures commission merchants, introducing brokers and commodity trading advisors who accept authority to trade customer accounts. For exchanges, banks and commodity-related business firms, NFA membership is optional. Employees of NFA members who are required to register with the CFTC as associated persons are also required to become NFA associates. Only floor traders and floor brokers, who remain subject to exchange regulation, are not subject to NFA membership requirements. Further information on NFA may be obtained by writing them at 200 West Madison Street, Chicago, Illinois 60606, or calling (312) 781-1300.
5. A pamphlet entitled "Arbitration: A Way to Resolve Futures Related Disputes," plus additional information on arbitration is available by writing to the NFA Arbitration Administrator at the address listed in note 4, *supra*.
6. 49 Fed. Reg. 6602 (February 22, 1984).
7. Pub. L. No. 97-444, section 231, 96 Stat. 2294, 2319, 7 U.S.C. §18(b) (1982).
8. Revisions to 17 C.F.R. Part 12, 49 Fed. Reg. 6621, 15069 (1984) (to be codified at 17 C.F.R. §§12.1 -12.408) (hereinafter referred to in text and footnotes as "section").
9. A complaint is "clearly unsuitable" if, for instance, the statute of limitations on the claim has expired, the complainant names unregistered respondents who are not subject to reparations under section 12.2(y) of the regulations, or the subject matter is clearly beyond the Commission's reparations jurisdiction.
10. Note that in this instance a "proceeding," as defined in section 12.2(s), has not yet commenced. The determination not to forward a complaint for proceedings is not appealable to the Commission or, in the Commission's view, to a U.S. Court of Appeals. 49 Fed. Reg. at 6605.
11. This denial does not prejudice the respondent's right to reassert the matters cited in his motion in a later motion to dismiss. The motion to dismiss may be filed only *after* the reparations proceeding has commenced pursuant to section 12.26.
12. Even though a counterclaim may present facts which would be properly justifiable in reparations, a case will not be forwarded for a proceeding if the complaint itself is determined to be clearly unsuitable.
13. Although many aspects of discovery remain unchanged from the Commission's former rules, some important changes are worthy of mention. First, parties are not entitled to obtain the personal tax returns and business account records of any other party or person, absent the granting of a motion made therefore showing the need for this information, and that such information could not be obtained through other means. Second, regarding depositions on written interrogatories, parties are not entitled to responses on more than thirty interrogatories absent leave to do so by the decisionmaker, which will not be granted absent extraordinary circumstances. Third, "form interrogatories," *i.e.*, those not specifically tailored for discovery in the particular proceeding, will be disfavored, and protective orders and awards of costs for abuse of discovery will be readily granted when such interrogatories are used. Fourth, whenever a discovery-related dispute culminates in a protective order or an order compelling discovery, section 12.30(c) provides that costs, including attorney's fees, may be awarded as a sanction against the party whose conduct necessitated the order, unless there is substantial justification for that party's action. Finally, section 12.34 permits the decisionmaker to conduct discovery of his own motion in the summary and formal decisional procedures. There is no such authority for the decisionmaker under the voluntary decisional procedure. *See* 49 Fed. Reg. at 6611.
14. However, the Commission may, upon its own motion, review a final decision under the voluntary procedure if necessary to prevent "manifest injustice." The Commission interprets "manifest injustice" to extend, by analogy, only to those extraordinary conditions which would justify a federal court's decision to vacate an arbitration award pursuant to 9 U.S.C. §10 (1982). 49 Fed. Reg. at 6612.
15. 49 Fed. Reg. at 6603, 6611 and 6613.
16. *Cf.* section 12.2(o) (ALJ may, in appropriate cases, be called upon to decide summary procedures cases, while retaining his independence from agency control provided in 5 U.S.C. §3105 (1982))
17. Section 12.208.
18. Section 12.301.
19. Section 12.302. The Commission does not believe this appeal right will be abused because of the deterence provided by the possibility of sanctions for abuse of process. 49 Fed Reg. at 6616.

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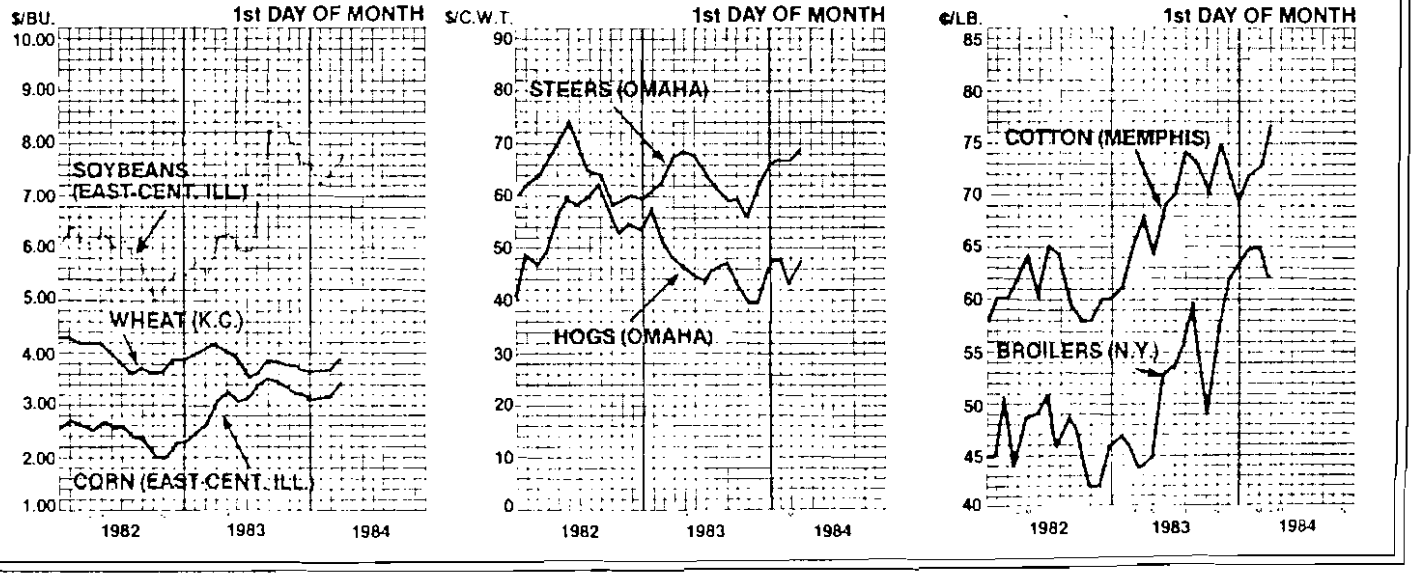

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