INSIDE

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IN FUTURE ISSUES

U.S. Appeals Court rules against USDA in Bird Grain *case*

The U.S. Court of Appeals for the Eighth Circuit on January 15 filed its long-awaited decision in the so-called "Bird Grain" court case [*Appley Brothers, et. al, v. United States,* which may be accessed at ftp://server.wulaw.wustl.edu/8th.cir/990115/1902.P8], upholding the liability finding against the U.S. Department of Agriculture made by a South Dakota federal district court.

The case involved the claim of several depositors (collectively referenced as *Appley Brothers*) against USDA for an alleged deficient examination of a federally licensed warehouse in South Dakota that subsequently became insolvent. The plaintiff-deposits alleged that a federal warehouse examiner had failed to follow the procedures in USDA's *Warehouseman's Handbook* when he conducted a "special exam" in August, 1988 to check on the status of corn previously placed in temporary storage that had been discovered to be out-of-condition in a previous regular exam.

In a subsequent exam conducted in November, 1988, the warehouse examiner discovered what the court termed "massive shortages" of grain against obligations that at one point had reached 475,689 bushels—representing nearly half of the facility's total obligations—which caused USDA to suspend the warehouse's federal license. The plaintiff-depositors sued, claiming that USDA's negligent inspection of the warehouse had delayed its closing, and that they had deposited grain at the facility during the intervening period.

In affirming the lower court's ruling, the U.S. appellate court found that:

> USDA could not claim the broad waiver of sovereign immunity under the Federal Tort Claims Act—designed to grant broad discretionary authority to government agencies in implementing federal law—because the warehouse examiner had not adhered to the written instructions in the *Warehouseman's Handbook*. The handbook—which has since been revised and is now known as the *Warehouse Operator's Handbook*—stated at the time that when conducting a "special examination," the examiner's report was to be "specific regarding the quantities and location (within the storage facilities) of out-of-condition commodities.

However, in this instance, the federal warehouse examiner simply had observed that the temporary bunkers in which the out-of-condition corn previously had been

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A proposal to expand qualification under recreational use statutes

Every state legislature has sought to encourage property owners to maintain natural and rural areas while making these areas available for appropriate recreational activities through a recreational use statute. Recreational statutes provide an incentive for property owners to allow others to use their property by reducing the duties recreational providers owe recreational users. The limited duty of care to keep premises safe often serves as an incentive to property owners to promote recreational uses of their properties; recreational use statutes make it less likely that a property owner will be liable for damages to an injured recreational user.

It has been twenty years since the revision of the 1979 Model Recreational Use Act. A review of cases suggests that major obstacles remain in some state recreational use statutes that deter fuller access to private lands. One impediment of many recreational use statutes is a provision that precludes recreational providers from receiving certain types of compensation. This paper examines different limitations against compensation in the state recreational use statutes to identify options for expanding their protection of providers. While the objective may be to enable more

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stored were empty, and failed to inquire as to the whereabouts of the 300,000 bushels previously stored in the bunkers. "[T]he requirements that the examiner's report be specific (regarding the quantities and location of out-of-condition commodities) establishes, at a very minimum, a duty to investigate," the appellate court wrote in its decision.

> Had (the warehouse examiner) conducted any investigation about the disposition of the previously reported deteriorating corn, the discretionary exception would likely protect (the examiner's) decisions in conducting the investigation. Here, however, (the examiner) conducted no investigation at all…. Accordingly, the district court correctly concluded that (the examiner) had a mandatory duty to investigate the status of the corn noted during the August 5 inspection….

USDA had a common law duty under the so-called "Good Samaritan" doctrine found in South Dakota law to protect the interests of farmers and other depositors. Again citing the *Warehouseman's Handbook*, the appellate court ruled that the "reason for the warehouse inspections makes clear that USDA did 'undertake to render a service' which was 'necessary' for the protection of those who stored grain at Bird Grain" and that the depositors "reasonably relied on the USDA inspection process."

The outcome of this case is significant because USDA has argued that an adverse decision might cause it to propose federal grain merchandising regulations under the U.S. Warehouse Act. USDA's rationale has rested, in part, on the fact that the district court decision referenced a 1978 ruling by the U.S. Court of Appeals for the Seventh Circuit [*United States v. Kirby*—a case involving grain inspection at a federally licensed warehouse] that found that regulations issued under the U.S. Warehouse Act "explicitly adopt a broad, non-technical interpretation of 'stored' grain to include all grain kept in a licensed warehouse, not merely grain which is held as a bailment and for which warehouse receipts have been issued (e.g., purchased grain)." However, the federal district court and appeals court decisions in the *Bird Grain* case focus extensively on the fact that the warehouse examiner and his superior failed to follow USDA's own procedures, as specified in the *Warehouseman's Handbook*.

–Randall C. Gordon, National Grain and Feed Association, Washington, D.C. Reprinted with permission of National Grain and Feed Association. Copyright 1999.

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recreational providers to qualify for protection under a recreational use statute, the immunity from liability needs to be granted without compromising the claims of recreational users who deserve compensation for injuries. Four narrow suggestions are offered to provide greater encouragement to private landowners to make properties available to others for recreational purposes.

Statutory protection

Recreational use statutes were enacted to reduce situations in which qualifying recreational providers could incur liability for damages of injured participants. The statutes provide protection whenever a provider-defendant raises the statute as a defense and meets the statutory preconditions in the form of qualifications and exceptions. Litigation concerning preconditions shows an ambiguous set of rules that may operate to frustrate the opening of private lands for recreation uses.

Recreational use statutes alter the duty of care. Persons making recreational lands available to others do not owe recreational users a duty of care to keep premises safe. By obviating the common law duty of care in qualifying situations and the duty to give warnings, recreational providers may escape liability for negligence or gross negligence. However, most statutes assert that persons providing recreational activities incur liability for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity.

A critical issue under many recreational use statutes is whether the receipt of compensation disqualifies a recreational provider from protection under the statute. While early recreational use statutes often contained prohibitions on charges and fees, under the 1979 Model Act, a new definition of "charge" expanded the compensation permitted under recreational statutes. Today, most state statutes enunciate the prohibited charges as admission fees. Whenever various fees, expenses, or costs are not admission fees, they do not disqualify a provider from the statutory defense.

Exceptions for permitted charges

Five exceptions have been acknowledged in an attempt to expand the situations where recreational providers could qualify for the protection afforded by a recreational use statute. Because not all state legislatures have incorporated these five exceptions into their recreational use statutes, this section reviews the exceptions to clarify how they might be used to expand the liability protection afforded by state recreational use statutes.

A first exception is to allow participants to share game, fish, or other products with a provider without disqualifying the provider from the statutory protection. If recreational use statutes are to encourage persons to make their properties available to others for hunting and fishing, this exception would help achieve this objective. Yet the statutory language of allowing the sharing of products has not been incorporated in very many statutes. Instead, many states redefined charges as admission fees. Because the sharing of game, fish, and other products generally is not an admission fee, such remuneration may not disqualify recreational providers from the statutory defense in most states.

The broad encompassing clause "ben-

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North Carolina amends seed law to provide for arbitration of seed complaints

The North Carolina General Assembly recently passed a new arbitration bill that is included in the North Carolina Seed Law (N.C.G.S. §§ 106-277.2, et seq.). These amendments were contained in House Bill 1055, approved October 30, 1998. Arbitration is conducted by the Seed Board, created by the new law. Arbitration may be binding or non-binding depending upon prior agreement between the producer and the seed company.

Effective January 1, 1999, seed companies, in order for their seed to be covered by this law, must print the following statement (or reasonable equivalent) on the seed bag or label attached to the bag:

Notice of claims procedure for defective seed

North Carolina provides an opportunity for persons who believe that they have suffered damage from the failure of agricultural or vegetable seed to perform as labeled or warranted, or as a result of negligence, to have the matter investigated and heard before a special seed board as an alternative to filing a court action. To take advantage of this procedure, a purchaser of seed must file a complaint with the North Carolina Commissioner of Agriculture in time for the seed, crop, or plants to be inspected. Failure to follow this procedure will limit the amount of damages you may be able to recover. Please contact the Commissioner of Agriculture for information about this claims procedure.

If this statement is used on the bag or container, then buyers must go through the procedures described in the North Carolina Seed Law if they expect to re-

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efits to (or arising from) the recreational use" was listed as an exception to the fee prohibition of the 1979 Model Act. Although the clause has not found its way into very many state statutes, Illinois has incorporated this clause in its statute. This allows providers to collect benefits related to a recreational use if they structure compensation as payment for something other than an admission fee. The ability to receive benefits other than admission fees significantly broadens the category of recreational providers who can qualify for the protection of a recreational use statute.

A third form of compensation allowed under the 1979 Model Act is contributions in kind and services or cash to help a provider with land conservation measures. Such compensation would not operate to defeat the liability protection offered providers under the recreational use statute. Some statutes couch such compensation as being permitted for wildlife management. Moreover, donations of money for land conservation are condoned.

Public utilities and others sometimes lease lands to governments for use as recreational or park lands. The lessor property owners may thereby receive compensation. The 1979 Model Act recognized this possibility and provided an exception whereby providers of such lands would qualify for the protection of a recreational use statute.

Fifth, a number of recreational use statutes recognize that nominal sums paid to recreational providers should not disqualify providers from the protection afforded by recreational use statutes. Wisconsin recently adopted a broad exception for compensation whereby a recreation provider may collect up to $2,000 during a year, but compensation of gifts of products, compensation for conservation of resources, and payments from governmental bodies is not included in determining this dollar figure.

States with recreational statutes that do not incorporate these five exceptions for permitted charges may not be giving sufficient encouragement to landowners to open private lands for recreational purposes.

Further possibilities

A few state legislatures have enunciated further exceptions to allow additional forms of compensation. Four contemporary exceptions show novel provisions to encourage dispensation for recreational providers opening their properties for recreational purposes: (1) contributions to offset educational costs, (2) tax-based compensation for agricultural land, (3) fees for game rights, and (4) a liability ceiling with insurance coverage for agricultural properties.

North Carolina allows private recreational providers to qualify for the defense of the recreational use statute whenever educational services are involved. This provision shows that contributions for educational services could be added as a statutory exception that would not disqualify the provider from the protection of the recreational use statute.

The Texas recreational use statute deviates more significantly from the prohibition against compensation. Recreational providers of agricultural land may charge for entry to their premises and qualify for the statutory protection so long as the total charges are less than "four times the total amount of ad valorem taxes imposed on the premises the previous year...." Other providers of recreational lands may qualify for the protection of the statute as long as their total charges are less than "twice the total amount of ad valorem taxes...."

The Texas Legislature also considered liability of owners of agricultural land in context of a limitation on the amount that can be recovered by injured recreational users. The Texas recreational use statute contains a provision limiting monetary damages for qualifying private landowners of agricultural land to $500,000 for each person and $1 million for each occurrence of bodily injury or death. Separate from the personal injury lid, there also is a limit for injury to or destruction of property of $100,000 for each occurrence. Private landowners qualify for this protection only if they have adequate liability insurance coverage to compensate injuries occurring on their property.

One recreational pursuit intended to be encouraged by recreational use statutes was hunting on private lands. Given the prohibition against admission fees in most recreational use statutes, landowners allowing others to hunt or collect game on their property cannot collect fees and still qualify for the statutory protection. A state's law could be structured so that charges for fishing, trapping, and the removal of firewood would not exclude coverage of the recreational use statute.

Concluding comment

The various provisions of state recreational statutes show disparities in the treatment of compensation as a qualifier for liability protection. While most statutes preclude protection for persons collecting admission fees, other provisions allow qualified compensation. Greater thought might be given to expanding the private property owners who can qualify for the dispensation provided by recreational use statutes. Especially important are exceptions applicable solely to agricultural areas. By incorporating new exceptions into a recreational use statute, a legislature might be more successful in encouraging private property owners to make their properties available to others.

–Terence J. Centner, University of Georgia, Athens, GA

Agricultural environmental management in New York

By Ruth A. Moore

This article describes an initiative under way in New York State to address agricultural nonpoint source pollution in a comprehensive, coordinated, proactive way. It is called the Agricultural Environmental Management Initiative, or AEM,[1] and it is a partnership effort between state, federal and local agencies, farmers, educators, private sector businesses, and the community. It is a voluntary program intended to assist farmers in protecting environmental resources while maintaining viable agricultural operations.

In New York, agriculture is generally considered to be a preferred land use for protecting environmental resources. The State has a vested interest in preserving farmland and keeping farms in business. The New York State Constitution declares it to be the policy of the State to preserve and protect agricultural land for food production and other environmental benefits.[2] Farms provide precious open space in a heavily populated state like New York. They also provide water recharge areas, clean airsheds, and some of the most beautiful vistas in the State, which contribute to a healthy tourism industry. But farmers are facing more extensive and complicated environmental laws and regulations that affect the way they farm and the way they fulfill their role as stewards of the land. AEM is designed to help address environmental concerns such as agricultural runoff, yet maintain healthy agricultural businesses. It provides an administrative framework for effective nutrient management on farms.

Agricultural landscape in New York

There are approximately 36,000 farms in New York State, averaging around 214 acres in size.[3] New York farms cover 7.7 million acres, representing 26 percent of the State's total land area.[4] New York agriculture is rich in its diversity, from the multitude of crops grown, such as corn, apples, grapes, horticultural specialties, and a large dairy sector, to the types of land available for agricultural production. New York is first in the nation in cabbage, second in apples, and third in grapes, tart cherries and cauliflower.[5] New York ranks third after California and Wisconsin in the production of milk.[6] Agriculture is also a major contributor to New York State's economy, producing approximately three billion dollars in gross farm receipts.[7] Livestock agriculture, a potentially significant source of agricultural nonpoint source pollution, forms a substantial segment of New York's farm economy.[8] More often than not, New York farmland borders on a lake, stream, reservoir, or coastline. This proximity to watercourses, and proximity to population centers that make use of the watercourses, posed a challenge in designing a statewide program for agricultural environmental management.

The agricultural nonpoint source problem in New York

The New York State Department of Environmental Conservation (DEC) has identified nonpoint source pollution generally as the largest threat to water quality in the State, constituting the primary source of contamination for 94% of the water quality impairments for rivers in the state, 87% of lake and reservoir impairments, 95% of Great Lake shoreline problems, and 66% of restricted bays and estuaries.[9] Agriculture is cited as the primary source of water quality impairment in approximately 26% of impaired rivers and 19% of lakes and reservoirs.[10]

The Agricultural Environmental Management Initiative

AEM summary

The AEM Initiative is at the core of New York's strategy to address agricultural nonpoint source pollution. AEM is a voluntary, incentive-driven, cooperative, locally based program to help farmers comply with the myriad of environmental laws and regulations affecting their farms, while helping them to maintain healthy, economicaly viable farm businesses. The program is a cooperative effort of federal, state and local agencies, educational and outreach institutions, farmers, and rural communities. The initiative is "pro-active": it helps farmers identify environmental problems with their operations, and gives them the tools to help them address those problems.[11]

AEM origins

AEM has its roots in the New York City Watershed Agricultural Program, which assists farmers in preventing agricultural runoff from reaching the vast drinking water supply system for New York City, which consists of reservoirs and streams in the Catskill region. AEM was then tested and continues to be implemented in the Skaneateles Lake Watershed, the drinking water supply for the City of Syracuse. To date, 48 out of New York's 62 counties are actively implementing some phase of the AEM Initiative. Over 4,000 farms are participating in the Initiative, and the number continues to grow.

AEM tiered approach

AEM is based on a five-tiered environmental planning and implementation process for identifying environmental concerns on a farm, developing a plan to address those concerns, implementing that plan, and then evaluating the effectiveness of the process.[12] Farmers work through the tiers to the point where environmental concerns have been addressed, documented, and evaluated. The process is farm-specific and cost-effective. The tiered approach is designed to direct resources to the farms with the greatest potential for impacting the environment. Farmers participating in the program work with a team of agricultural and environmental professionals to address environmental concerns associated with their farms in a way that achieves the farm business objectives and meets federal, state, and local environmental goals. AEM also provides a framework for interagency cooperation to provide farmers with the assistance they need.

At the local level, working groups plan, direct, and carry out AEM. Membership of these groups typically includes individuals from Cornell Cooperative Extension, the NYSDEC, Soil and Water Conservation Districts, and the USDA's Farm Service Agency (FSA) and Natural Resources Conservation Service (NRCS). Farmers, agribusiness, non-farm interests, and other community groups are also encouraged to participate.

At the state level, the New York State Soil and Water Conservation Committee oversees the AEM Initiative. The Committee is a Governor-appointed body charged by statute with setting State soil and water policy and coordinating the work of county soil and water districts.[13] The Committee receives guidance and recommendations from its AEM Steering Committee, which has several subgroups that handle outreach, evaluation, certification, and other program issues as they arise. The Steering Committee also reviews and evaluates program tools such as innovative software packages to assist in nutrient management planning.

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The Steering Committee has representatives from NRCS, FSA, state agencies such as Agriculture, Health (which is responsible for implementing the federal Safe Drinking Water Act)[14], State (which directs the State's Coastal Zone Program)[15], and Environmental Conservation (which administers federal Clean Water Act programs)[16], soil and water districts, agribusiness, and farmers.

Benefits of AEM

What are the advantages of the AEM approach? For farmers, AEM:

· helps them comply with state and federal environmental regulations through a program of one-stop shopping for the services of various state, federal, and local agricultural and environmental service agencies;

· documents what farmers are already doing and will do to protect the environment—something that can be very helpful in business planning and when answering questions from non-farm neighbors;

· can improve farmers' access to state and federal cost-share programs to help finance needed environmental improvements.

For the environment, AEM:

· uses a tested and proven approach for identifying and remediating environmental risks on farms;

· targets watersheds and farms within those watersheds where environmental problems are identified or suspected;

· fosters better communication between farmers, non-farm neighbors and the community as a whole through outreach and education.

Financial incentives: the state agricultural nonpoint source abatement and control program

AEM relies on incentives for its success. In the New York City and Skaneateles Lake watersheds, New York City and the City of Syracuse, plus other sources, provide full funding to farmers to plan and implement best management practices in order to comply with Environmental Protection Agency (EPA) surface water supply filtration avoidance requirements.[17] The State Soil and Water Conservation Committee administers a statewide cost-share program called the Agricultural Nonpoint Source Abatement and Control Program.[18] It provides cost share assistance to county soil and water conservation districts to help farmers prevent or abate nonpoint source pollution. In particular, it provides matching funds to districts to do agricultural environmental planning, using the AEM Tiered Planning approach. Funds are also available to implement best management practices on farms that have been identified through the AEM Tiered Planning process. All implementation projects must meet NRCS standards and specifications to be eligible for funding.[19]

Almost five million dollars was awarded to soil and water districts in the 1997-98 State fiscal year.[20] Similar funding awards are anticipated for the 1998-99 fiscal year. Many State-funded agricultural nonpoint source projects also receive federal Environmental Quality Incentives Program[21] funding, as well as farmer and conservation district contributions, in a partnership effort to maximize environmental benefits.

Regulatory initiatives: CAFO permitting

New York is also developing a regulatory program for larger livestock farms that discharge into navigable waters. Those operations will soon be subject to a permitting program administered by DEC. DEC is chairing a workgroup that is developing a concentrated animal feeding operation, or CAFO, point source permit to meet the requirements of the Clean Water Act. The group is working closely with all of the stakeholders in the AEM Initiative to integrate and coordinate AEM with the proposed permit program. In partnership with NRCS and EPA, the State is working to coordinate the regulatory CAFO permit program and nonregulatory AEM Initiative in a way that makes it easy for the farmer to participate in either or both, depending on the type and size of his or her operation, and advances the State's water quality objectives at the same time. Regardless of permit status, farmers are still subject to the State's water quality standards[22], and farms may be penalized or may enter into consent orders for violations of those standards. However, if a farmer is cited for a violation, DEC has adopted a policy to work with the farmer in conjunction with soil and water district and NRCS staff to resolve the problem.[23]

The clean water action plan and the proposed unified strategy for animal feeding operations

EPA and USDA have finalized a Unified National Strategy for Animal Feeding Operations.[24] The Strategy sets a national performance expectation that all animal feeding operations develop and implement Comprehensive Nutrient Management Plans (CNMPs). The Strategy states that CNMPs should address, as necessary, feed management, manure handling and storage, land application of manure, land management such as tillage and grazing management, record keeping, and other utilization options, such as composting. The plan should also address risks from other pollutants, such as pathogens.

In general, the proposed Strategy is consistent with the planning process and objectives of the AEM Initiative. However, significant financial and technical assistance will be necessary to meet the Strategy's goals. For New York, the Strategy establishes an expectation of developing and implementing CNMPs on an estimated 1,000 CAFOs by the year 2005, and on an additional 10,000 CAFOs by 2009. Private sector participation in the AEM Initiative, through certification of private sector planners, and a program of education and outreach to agribusiness, will be critical in meeting the objectives of the proposed strategy. Increased outreach to farmers to encourage participation will also be an important factor in implementing the strategy. Finally, flexibility at the federal level will allow innovative state programs like AEM to develop and grow.

Conclusion

New York has found that the AEM Initiative is an effective approach for assisting farmers in implementing nutrient management practices. Farmers are willing to participate in the Initiative because they recognize that it is good for business, good for neighbor relations, and helps avoid potential regulatory problems. Building on the strong partnerships forged in New York, AEM should continue to contribute to improved environmental conditions and a strong agricultural economy.

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[1] NYS Department of Agriculture and Markets and NYS Soil and Water Conservation Committee, *Guide to Agricultural Environmental Management in New York State* (July, 1997).

[2] McKinney's Const. Art. XIV, sec. 4.

[3] New York Agric. Statistics Serv., *New York Agricultural Statistics* 1997-98 at 6, tbl. 3 (1998).

[4] *Id* at 6.

[5] *Id*. at 12, tbl. 7.

[6] *Id*

[7] *Id* at 11.

[8] Cash receipts for the sale of milk during 1997 totaled $1.53 billion. *Id* at 47. Gross income from livestock during 1997, which includes the sale of meat animals, wool, and the value of home consumption, totaled $129 million. *Id* at 55.

[9] NYS Dept. of Environmental Conservation. *Nonpoint Source Management Program 1997 Update III-1* (October, 1997 Draft).

[10] NYS Dep't. of Environmental Conservation, *1996 Priority Waterbodies List, Statewide Summary Report* 7, Figure 2 (February, 1997).

[11] *AEM Guide, supra* note 1 at Executive Summary 1.

[12] *Id* at Ch. 4, p. 1.

[13] N.Y. Soil and Water Conserv. Dist. Law section 4 (McKinney 1997).

[14] 42 U.S.C.S. sections 300f *et seq.* (1991 & Supp. 1998).

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Nebraska Supreme Court interprets U.C.C. Article 9-306(2)

In 1994, the Nebraska legislature amended Section 9-306(2) to add the following:

> Authorization to sell, exchange, or otherwise dispose of farm products shall not be implied or otherwise result, nor shall a security interest in farm products be considered to be waived, modified, released, or terminated, from any course of conduct, course of performance, or course of dealing between the parties or by any trade usage in any case in which (a) the secured party has filed an effective financing statement in accordance with the provisions of sections 52-1301 to 52-1321 [the Nebraska centralized notification system created in response to the Food Security Act of 1985] ..., or (b) the buyer of farm products has received notice from the secured party or the seller of farm products in accordance with the provisions of 7 U.S.C. § 163l(e)(1)(A), unless the buyer has secured a waiver or release of the security interest specified in such effective financing statement or notice from the secured party."

This 1994 amendment became the focus of *Battle Creek State Bank v. Haake*, 255 Neb. 666, 587 N.W.2d 83 (1998). The factual pattern was the following.

Dairy farmer borrowed money from Battle Creek State Bank. The Bank obtained a security agreement against the borrower's farm products and after-acquired farm products (i.e. cows, milk, etc.), and proceeds. The security agreement also contained a clause that the borrower had to obtain prior written consent of the Bank for any sale of any collateral. The Bank properly perfected, but in the EFS the bank did not claim milk as a farm product against which the security agreement attached. The Bank also did not enforce the prior written consent clause of the security agreement. Indeed, the Bank president testified that the Bank did not expect borrower to obtain the prior written consent because "it was just something that everyone understood" that the borrower would sell the milk to a milk processor.

Several years later, dairy farmer purchased dairy cows from Haake. Haake took a security interest against the cows and filed the financing statement. Haake claimed the cows and their products (milk) and proceeds as collateral for the purchase price. Haake claimed that this security agreement created a purchase money security interest (PMSI).

Dairy farmer went bankrupt. Bank sued Haake to recover milk proceeds that the dairy farmer had paid to Haake for the amount owed for the purchased dairy cows. Bank claimed a prior security interest in the cows, milk, and milk proceeds. Haake introduced evidence that the Bank did not enforce the prior written consent clause of the security agreement which meant that the Bank had waived its security interest. The trial jury agreed with Haake.

[Author's aside: The Bank did not sue the milk processor. While the case does not say why the Bank did not sue the milk processor, the facts show that the Bank did not claim the milk as a farm product on the EFS. Consequently, the milk processor was absolutely protected as a buyer of the milk from the Bank's claim due to 7 U.S.C. § 1631(d). The Bank could only try to recover the proceeds of the milk. Haake had these proceeds.]

Bank appealed to the Supreme Court of Nebraska, arguing that the 1994 amendments meant that Haake could not use the Bank's actions to establish an implied waiver for payments to Haake. The Bank argued that the 1994 amendments applied to proceeds payments to Haake regardless of whether those payments occurred before or after the 1994 amendments..

The Nebraska Supreme Court ruled that the 1994 amendments were not meant to be applied retroactively to pre-1994 payments to Haake. Furthermore, the Nebraska Supreme Court ruled that the Nebraska 1994 amendments only related to buyers of farm products. The Court decided that Haake was a competing secured party, not a buyer. Consequently, the Court ruled that the 1994 amendments did not apply at all to this case between two competing secured creditors.

The Nebraska Supreme Court additionally ruled that prior Nebraska case law allowed Haake to introduce the implied waiver evidence because that case law was still valid for non-buyers of farm products. The Court ruled that the jury had correctly returned a verdict for Haake on the evidence. The Court affirmed the jury verdict for Haake.

The Nebraska Supreme Court's decision that competing secured parties can use the defense of implied waiver in a priority dispute is a significant and surprising decision.

The Nebraska Supreme Court is correct in its ruling that the 1994 amendments applied only to buyers of farm products. Therefore, the Court is correct in its ruling that as between two secured parties the 1994 amendments were not relevant to this priority dispute between two competing secured parties.

With the issue of the 1994 amendments correctly resolved, commercial code lawyers would have thought that the issue of priority between competing secured parties is solely an issue of the Article 9 priority rules. In other words, commercial lawyers reading this fact pattern would have thought that the deciding issue would be whether Haake's PMSI in the cows would extend to the products of the cows (the milk) and, if extended, had Haake taken the necessary steps to have his § 9-312(4) PMSI trump the Bank's first-in-time security interest. *See e.g., Citizens Savings Bank, Hawkeye v. Miller*, 515 N.W.2d 7 (Iowa, 1994). The decision of the Nebraska Supreme Court that the doctrine of implied waiver applies also in priority disputes between competing secured parties causes a major attitude adjustment in the thinking of commercial lawyers.

–Drew L. Kershen, Professor of Law, The University of Oklahoma, Norman, O K

Electronic transfers of federal payments

The federal government was moving to require everyone receiving federal payments to receive them by direct electronic deposits into a bank account. This has been reversed. While persons will be encouraged to use electronic funds transfers, people now have a choice and can still receive payments by mail (in most cases). To have a choice, however, in some cases one may need to apply for a waiver to continue to receive a check. It depends on the particular agency. If one is receiving government payments, one needs to check with the particular agency to determine how that agency will handle payments.

—James B. Dean, Denver, CO

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[15] *See generally* Coastal Zone Act Reauthorization Amendments of 1990, 16 U.S.C. sections 1451-1464.

[16] *See* 33 U.S.C.S. section 1251 *et seq.* (1987 & Supp. 1998).

[17] 40 C.F.R. section 141.71 (1998).

[18] N.Y. Soil & Water Conserv. Dist. Law section 11-b (McKinney 1997).

[19] AEM *Guide, supra note 1 at Chapter 5, p. 3.*

[20] 1997 N.Y. Laws 55.

[21] 16 U.S.C.S. section 3839aa *et seq.* (McKinney 1984 & Supp. 1999).

[22] N.Y. Envtl. Conserv. Law section 17-0101 *et seq.* (McKinney 1984 &Supp. 1999).

[23] NY Dep't of Envtl. Conserv., Division of Water, *Technical and Operational Guidance Series 5.1.3: Investigation of Agricultural Sources of Water Pollution* (July, 1996).

[24] The final strategy is available on the Internet at http://www.epa.gov/owm.

SEED LAW/*Cont. from page 3*

ceive damages in excess of seed and planting costs. These steps are discussed below.

Arbitration requested by the buyer

When a buyer believes that purchased seeds fail to perform as labeled or warranted he or she shall make a sworn complaint against the dealer from whom the seeds were purchased. A sworn complaint consists of:

Details related to the purchase of the seed (dealer name, date the seed were purchased);

The purchased crop, variety or hybrid name and seed lot number;

The exact complaint about the seed; and

Damages sustained or expected to be sustained because of seed deficiencies.

The claim must be filed with the Commissioner in time to allow inspection of the seed and/or field in question. This means as soon as possible after the problem is noticed. If the claim is related to a poor stand, it cannot be investigated if the field has been replanted. A claim related to failure of a herbicide-tolerant variety or hybrid to perform as labeled cannot be investigated after harvest. A filing fee of $100.00 is required for each complaint and a copy of the complaint must be sent to the dealer by registered or certified mail at the time of filing.

Within ten days of receiving the complaint the dealer must file an answer and mail a copy of the answer to the buyer by registered or certified mail.

Investigation requested by a dealer

Any dealer who has receive notice of a complaint, either orally or in writing, may settle with the buyer directly or may request an investigation by the Seed Board. A filing fee of $100.00 is charged and the dealer must send a copy of the request to the buyer by registered or certified mail. The buyer may file an answer with the Commissioner of Agriculture and Consumer Services within ten days after receipt of the dealer's complaint.

Seed Board Investigations

The Commissioner will refer complaints to the Seed Board. The Board consists of five members: two from North Carolina State University, one from the North Carolina Seedsmen's Association, one farmer not associated with seed production or sales, and one representative of the North Carolina Department of Agriculture and Consumer Services. The Board will thoroughly investigate the complaint and notify the Commissioner of their findings. The decision and recommendation of the Board are binding on all parties to the extent agreed upon subsequent to the filling of the complaint.

If the seed company does not participate in arbitration and no arbitration statement is printed on the bag:

The buyer may file a complaint and request investigation by the Seed Board, but neither the buyer nor the dealer is bound by the decision or recommendation of the Board.

The buyer may take legal action against the seed company without filing a complaint with the Seed Board.

— Jan Spears, Professor, Department of Crop Science, and Ted Feitshans, Extension Attorney, Department of Agricultural & Resource Economics, N.C. State University.

Family limited partnerships—present interest issues

The section 2036 and section 2038 issues of *Bowgren* and *Swain* (sometimes referred to as Moody) Illinois Land Trust cases seemingly have the potential to spill over into other areas as well, e.g., Family Limited Partnerships. Proposed "fiduciary" legislation is being heard by the Senate Judiciary Committee on March 3rd in Springfield. Even though the legislation is likely to be enacted into law, the fiduciary responsibilities are only one of two problem areas in the *Bowgren* and *Swain* decisions. The "major" hurdle seems to be in finding a solution to Section 2038 or perhaps the internal inconsistencies between the law and the regulations relating to that section.

Over the last couple of years, the IRS seems to be raising "incomplete" gifts and "future interest" gift arguments with increasing regularity. In TAM 9751003, for example, the IRS held that a widow's gift of limited partnership interests to thirty-five family members were not eligible for the $10,000 annual "present" interest gift tax exclusion under Section 2503(b). Among other things, a limited partner had no right to withdraw capital unless he assigned his entire capital interest and the limited partner could not sell, assign, or encumber his partnerships interest, any attempt being "void ab initio." See also TAM 9131006.

President Clinton has again proposed eliminating valuation discounts on stocks, bonds, funds, and investments inside of a family limited partnership. His latest proposal for the Year 2000 Budget raises $1 billion between 1999 and 2003 by eliminating valuation discounts except with reference to an "active trade or business." The limited partnership interests, for both gift and estate tax purposes, are valued at a proportional share of the net asset value of the entity holding readily marketable assets. If enacted into law, the impact on gifting should be negligible, the major hit being felt for estate taxes as typically the bulk of the property still exists when the taxpayer dies. I do not envision potential legislation as exempting previously created family limited partnerships from the estate tax related issues. Some understanding can be gained by remembering "corporate freezes" and Chapter 14 changes.

Professional Trustees in Chicago, for example, report being overwhelmed by requests of handicapped and non-handicapped taxpayers alike creating family limited partnerships solely to obtain a discount on the stock and bond portfolio owned. It is doubtful that the Congressional Budget Office took the magnitude of this push into account in estimating the net fiscal revenue increase associated with eliminating the discount on this type of property. Either unfavorable court decisions or subsequent Congressional change seems likely.

—Paul A. Meints, Attorney at Law, Bloomington, IL

Conference Calendar

Agricultural Law Symposium
May 20-21, 1999, Garden City, Kansas Plaza Inn
Topics include: Reporting farm income (Prof. Neil Harl); Farm income tax (Prof. Neil Harl); Agricultural law update (Prof. Roger McEowen); Biotechnology in agricultural (Prof. James Wadley); Kansas' agricultural mediation service (Mr. Forrest Buhler); Electronic legal research (Prof. John Christensen).
Sponsored by: Kansas State University-Southern Plains.
For more info, call 785-532-1501.

New e-mail address

Please note the change in the editor's e-mail address: the new address is lgmccormick@teacher.esc4.com. In addition, if you have corresponded with me by e-mail in the past, please send me a short message so that I can reestablish my former address book. Having suffered a hard-disk crash, all entries in my e-mail address book are gone! Thanks.

—Linda Grim McCormick, editor