Agricultural Law Update

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Virtue is like a rich stone, best plain set.

— Francis Bacon

State Legislature Ag Law Roundup

CONNECTICUT authorized municipalities to establish a special Agricultural Land Preservation Fund to gather both private and public funds for use by the municipality in the acquisition of development rights of agricultural land. . . and for any expenditures incurred for the preservation of agricultural land. 1984 Conn. Legis. Serv. 84-184 (West)

Authorized the state's commissioner of agriculture, after a producer referendum, to issue an apple marketing order for the purpose of promoting and enhancing the marketing of apples. 1984 Conn. Legis. Serv. 84-259 (West)

Required livestock sale barns to segregate and mark animals consigned for sale as dairy and breeding cows from those designated for slaughter. All consigned cows must be certified free of brucellosis and tuberculosis and, if shipped into the state for sale, must have health certificates from the state of origin. 1984 Conn. Legis. Serv. 84-55 (West)

Established an Aquaculture Commission to propose programs and plans to stimulate the growth of aquaculture and to promote the farming of state waters. "Aquaculture" is defined in the legislation to be the "controlled cultivation and harvest in the waters and tidal wetlands of the state of aquatic animals and plants, including, but not limited to, oysters, clams, mussels, shellfish, lobster and crabs, fish and other commercially important seaweed." Conn. Gen. Stat. Ann. 83-36 (1984 West Appen.)

Enacted a comprehensive enabling statute for workers cooperatives. 1984 Conn. Legis. Serv. 84-430 (West)

FLORIDA now requires grain dealers to issue "delivery tickets" to producers within 24 hours after delivery of the grain. "Delivery ticket" is defined as "a document provided to the producer by the grain dealer in conjunction with the delivery of grain to the grain dealer," and shall include, in addition to both the grain dealer's name and producer's name, the scale ticket number, the type of grain, the net weight, grade factors, base price per bushel, the net price and total amount paid and the grain dealer's or his agent's signature. Each grain dealer is then required to maintain liquid security in an amount equal to the value of the grain which he has received from producers, but for which the producers have not received payment. 1984 Fla. Sess. Law. Serv. 32 (West)

Enacted the "Florida Aquaculture Policy Act." The Department of Agriculture and Consumer Services is to provide developmental assistance to aquaculture ("the cultivation of animal and plant life in a water environment") through the development of a statewide aquaculture plan and by providing staff for the Aquaculture Review Council. 1984 Fla. Sess. Law Serv. 39 (West)

IOWA provided for the creation, management and administration of a protected water area system in the state. The state conservation commission is authorized to designate any water area ("river, lake, wetland, or other body of water and adjacent lands where the use of those lands affect the integrity of the water resource") for inclusion in the protected water area system. The protected water area system is defined in the legislation as ". . . a total comprehensive program that includes goals and objectives, the state plan, . . . individual management plans, . . . the acquisition of fee title and conservation easements . . . and management of such areas." Additionally, the commission is authorized to use any one or a combination of available methods, except condemnation, for managing and preserving a protected water area. These methods include fee and less-than-fee title acquisition techniques, such as "easements, leasing agreements, covenants and existing tax incentive programs." 1984 Iowa Leg. Serv. 58 (West)

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Authorized agricultural supply dealers to request, prior to the sale on credit of "agricultural chemicals, seed, feed or petroleum products to a farmer," a financial institution which has either "a security interest in collateral owned by the farmer or an outstanding loan to the farmer for an agricultural purpose" to issue a memorandum which states whether or not the farmer has a sufficient net worth or line of credit to assure payment of the purchase price on the terms of the sale. If issued, the memorandum is an irrevocable and unconditional letter of credit to the benefit of the agricultural supply dealer for a period of thirty days following the date on which the final payment is due for the amount of the unpaid purchase price. 1984 Iowa Leg. Serv. 114 (West).

MAINE allowed the money received from a tax levied on the blueberry industry (one-half cent per pound of fresh fruit on all blueberries grown, purchased, sold, handled or processed in the state) to go toward promotion, advertising and market development. Thirty percent of the funds collected will be given to the University of Maine to supplement its research and extension programs related to improved methods of growing, harvesting, processing and marketing of blueberries. 1984 Maine. Legis. Serv. 483.

MINNESOTA enacted legislation providing a lien for agricultural production inputs. "Agricultural production input" refers to both crop production input and livestock production input. Crop production input is defined in the legislation as "...agricultural chemicals, seeds, petroleum products, the custom application of agricultural chemicals and seeds and labor used in preparing the land..." Livestock production input refers to "...feed and labor used in raising livestock." A supplier is authorized to notify a lender of an agricultural production input lien by providing a lien-notification statement to the lender. If the lender responds with a letter of commitment (a "binding, irrevocable and unconditional agreement...to honor drafts or other demands for payment....") for a part or all of the amount in the lien-notification statement, the supplier may not obtain a lien for the amount stated in the letter of credit. 1984 Minn. Sess. Law Serv. 315 (West)

Authorized a tax credit in an amount equal to 10% of the net cost of conservation tillage planters. "Conservation tillage planters" are defined to mean "planters or planting attachments designed...to plant row or small grain crops under a no-till, ridge-till, or strip-till method of conservation tillage." 1984 Minn. Sess. Law Serv. 482 (West)

Enacted legislation prohibiting in certain counties practices which cause accelerated erosion and sedimentation. An occupier of agricultural land is in violation of the act if he is using farming practices which create "excessive soil loss." Excessive soil loss means "soil loss resulting from erosion that is more rapid than the gradual erosion of land when all reasonable soil and water conservation practices have been applied" and may be evidenced by "sedimentation on adjoining land or in any body of water." The act also authorizes the governing body of the local government to inspect the land upon complaint, and to issue an administrative order if they find the soil loss excessive. Failure to comply with an administrative order is a misdemeanor. However, a land occupier may not be required to establish soil conservation practices unless state cost-sharing funds have been approved and made available to the land occupier in an amount equal to at least 75% of the cost of the practice on a voluntary basis, and a 50% cost share on issuance of an administrative order. 1984 Minn. Sess. Law Serv. 184 (West)

Authorized the Energy and Economic Development Authority to purchase, make, or participate in farm loans and to issue bonds or notes for this purpose. The definition of "farm loans" was amended in the legislation to include "rehabilitation: and 'the acquisition of livestock for breeding purposes.'" However, the loans may not exceed $100,000 in principal amount. 1984 Minn. Sess. Law Serv. 381 (West)

NEW YORK enacted legislation establishing conservation easements. A conservation easement is defined as "...an easement, covenant, restriction or other interest in real property...which limits or restricts development, management, or use of such real property for the purpose of preserving...the condition of the real property." A conservation easement shall be held only by a public body (state agency or municipal corporation or nonprofit conservation organization. Additionally, it is not a defense in any action to enforce a conservation or preservation easement that: it is not appurtenant to an interest in real property; it can be assigned to another holder; it is not a character that has been traditionally recognized; it imposes a negative burden; it imposes affirmative obligations upon the owner or holder of the burdened property; the benefit does not touch or concern real property; or there is no privity of estate or contract. N.Y. Envtl. Conserv. Law § 49-0303-0305 (McKinney 1984)

SOUTH DAKOTA authorized conservation district supervisors to designate as "fragile land" any area of the district which, according to USDA's classification system, is Class IV, VI, VII, or VIII, and is "so erosive as to cause a public hazard when converted to cropland use." S.D.C.L. § 38-8A-6 (1984). Additionally, for any land so designated, the conservation district may require a conservation plan preceding the conversion to cropland. S.D.C.L. § 38-8A-22 (1984). Land owners or operators are required to prevent dust blowing and soil erosion by practices such as leaving crop stubble. S.D.C.L. § 38-8A-22 (1984). Authorized the board of supervisors of any conservation district, if advised in writing that soil is blowing from any land, to inspect the land and determine what can be done to prevent or lessen the blowing of soil from the land. The

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board is then authorized to issue an order to the owner and operator requiring treatment of the soil. The order shall include the treatment required, and the date the treatment is to be started and completed. S.D.C.L. § 38-8A-23-24 (1984). If the owner or operator fails to implement the required treatment, and the supervisors of the conservation district determine that there is an emergency, they can ask that the county commissioners perform the work and assess the cost against the land.

South Dakota's anti-corporation farming statute was amended. To qualify as a family farm corporation, one of the stockholders was previously required to be a person residing on or actively operating the farm. This definition has now been expanded to include, in addition, a"...person who has resided on or has actively operated the farm...." S.D.C.L. Ann. § 47-9A-14 (Supp. 1984)

WASHINGTON Established a provisional International Marketing Program for Agricultural Commodities and Trade (IMPACT) center at Washington State University. The IMPACT center will coordinate the teaching, research, and extension expertise at Washington State University to assist in the development of long-term international markets for Washington agricultural products, and determine which new or existing agricultural products can and should be exported to foreign markets to create or retain jobs in Washington. 1984 Wash. Legis. Serv. 369 (West)

Authorized the creation of an agricultural market development task force, the purposes of which are to identify foreign and domestic trade and market-related problems which affect Washington's agricultural industry, and identify strategies that could be employed to strengthen the state's agricultural industries bargaining position on foreign and domestic trade issues. 1984 Wash. Legis. Serv. 762 (West)

Authorized the state's Department of agriculture to impose civil penalties on milk producers holding a Grade A permit if the results of antibiotic or pesticide residue tests are abore the actionable level as determined by procedures set forth in the current edition of "Standard Methods for the Examination of Dairy Products." The penalty shall "be in an amount equal to one-half the value of the sum of the volumes of milk equivalent produced under the permit on the day prior to and the day of the adulteration." 1984 Wash. Legis. Serv. 1769 (West).

— John H. Davidson

California county ordinance prohibiting aerial spraying of herbicides upheld

The California Supreme Court upheld Mendocino County's ordinance which banned the aerial application of phenoxy herbicides in order to preserve and protect public health. *People ex rel. Deukmejian v. Mendocino County,* 36 Cal.3d 476 (1984). The court thereby sanctioned local regulation of a number of important weedkillers, including 2,4-D, 2,4,5-T and Silvex. Since the use of these chemicals is an important agricultural practice in the production of cereal crops and to retard hardwood growth during conifer reforestation, the decision may enable town halls, city halls, and supervisors' committees to adversely impact the viability of California's agricultural industry.

The California Supreme Court was presented a difficult preemption question concerning a county's right to regulate the aerial spraying of herbicides in view of state and federal laws concerning pesticides. The court commenced its analysis of the preemption question by noting California's constitutional authority for county regulation. Cal. Const., art. XI, § 7 (West Supp. 1984). Counties have broad powers for the protection of public health, so long as the regulations do not conflict with the constitution or with general laws. In addition, the California Legislature has imposed a duty upon counties to preserve and protect public health. Section 450 of the California Health and Safety Code mandates the adoption of ordinances, regulations and orders by county boards of supervisors to protect public health.

After delineating the authority of county action regulating the use of pesticides, the court's analysis proceeded to the basic maxim that local legislation in conflict with general law is void. The court noted three ways in which local legislation might conflict with state pesticide legislation: duplication, contradiction, or a subject matter fully occupied by the state. Local regulation of pesticides did not conflict with the California Environmental Review Act because the Legislature directed the Department of Food and Agriculture to develop a regulatory program providing for the environmental review of pesticide regulations to be certified pursuant to the procedures established in section 21080.5 of the Public Resources Code. Cal. Pub. Res. Code § 21080.5 (West Supp. 1984). The Director of the Department of Food and Agriculture and the county agricultural commissioners enforce the regulatory program. Cal. Food & Agric. Code § 11501.5 (West Supp. 1984). The existence of this flexible system of pesticide regulation, which takes into account local conditions, led the court to conclude that there was no state preemption.

The court also addressed the argument that the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) (7 U.S.C. § 136 *et seq.*) preempted this county ordinance. However, the court found no federal provision which expressly prohibited local governmental agencies from regulating the use of pesticides. The court then determined that the legislative history did not show a clear congressional intent that FIFRA was intended to preempt traditional local police powers. Thus the court concluded there was no "clear congressional intent to preclude states from authorizing local government entities to adopt restrictive regulations of pesticides."

— Terence J. Centner

New Bankruptcy Grain Storage Amendments

by Howard B. Pickard

The Bankruptcy Amendments and Federal Judgeship Act of 1984, P.L. 98-353, 98 Stat. 333, approved July 10, 1984 (the "1984 act"), provides limited relief to grain producers who may in the future face problems of the type experienced in the grain warehouse shortage cases publicized over the last several years. The grain warehouse provisions of the 1984 act are applicable to cases filed after Oct. 7, 1984. The relief is limited, due in large measure to the competing interests of such producers and other creditors who have dealt with or financed grain storage warehousemen who have gone bankrupty. Most grain warehousemen are also buyers and sellers of grain. They regularly receive grain from producers under bailment or purchase arrangements which are sometimes difficult to distinguish because of incomplete documentation or because of loose option arrangements, under which one of the parties may elect to finalize the transaction as either a sale or a bailment.

Grain is defined (section 557 (b) of the Bankruptcy Code, as added by section 352 (a) of the 1984 act) as "wheat, corn, flaxseed, grain sorghum, barley, oats, rye, soybeans, other dry edible beans, or rice."

Limited Priority for Unsecured Claims

Section 350 of the 1984 act amends section 507 (a) of the Bankruptcy Code, 11 U.S.C., §507 (a) (1982), by according a fifth priority in the distribution of assets of the estate in bankruptcy to pay allowed, unsecured claims of producers for grain or the proceeds of grain against a debtor who owns or operates a grain storage facility. Such priority is limited to $2,000 for each claimant.[1] This provision will benefit small farmers who have unpaid claims for grain or claims for conversion of bailed grain.

Preservation of Right to Reclaim Grain Sold To Insolvent Warehousemen

Section 351 of the 1984 act adds a new subsection (d) to section 546 of the Bankruptcy Code relating to a grain producer's right to reclaim grain sold to an insolvent warehouseman. The powers of the bankruptcy trustee to avoid certain transfers of the debtor's property, such as those which are preferences, statutory liens, and post-petition transfers, are made subject to any common law or statutory right of a producer-seller of grain to the bankrupt warehouseman to reclaim such grain because of the warehouseman's insolvency. The seller must, however, make written demand for reclamation within 10 days after receipt of the grain by the warehouseman. The seller may be denied reclamation only if the court secures the seller's claim by a lien on property of the debtor. The new subsection (d) is substantially identical to the existing subsection (c) of section 546 of the Bankruptcy Code, which applies to sellers of any goods to an insolvent debtor, except that the court may also deny reclamation to other sellers if the court allows the seller's claim with a first priority as an administrative expense. Priority status for a claim would be less desirable than securing a claim by a lien because the debtor's free assets may be insufficient to pay priority claims. On the other hand, a claim secured by a lien would be assured of payment to the extent of the value of the security, which would have to be sufficient to pay the claim when the lien is granted.[2]

The Uniform Commercial Code, section 2-702 and section 2-507, comment 3, is the generally applicable statutory law relating to the right of a unpaid seller of goods to reclaim them from an insolvent buyer.

Expedited Determination of Interests In and Disposition of Grain Assets

The most important provisions of the 1984 act for grain producers are those contained in the new section 557, added to the Bankruptcy Code by section 352 (a) of the act, relating to expediting court determinations of interests in grain held by a bankrupt warehouseman, and expediting the disposition of such grain and the distribution of proceeds. The court is required to expedite such procedures on request of the trustee or any entity claiming an interest in grain or the proceeds of grain, and may take such action on its own motion without request. A timetable of not more than 120 days duration for the completion of such procedures is established unless modified by the court for cause.

The procedures to be thus expedited include all claims of ownership or interest in grain or its proceeds, a request for relief from the automatic stay, a request for abandonment or for determination of secured status, the appointment of a trustee or examiner, the disposition or distribution of grain or its proceeds, and the determination of any dispute relating to any of these matters.

In any case in which a debtor has in storage more than 10,000 bushels of a specific kind of grain, the trustee is required to sell such grain and to distribute the proceeds in accordance with the expedited procedures. This provision should minimize the potentially troublesome problem of when to sell a particular lot of grain in view of changing market conditions and the costs and risks of continued storage. The provision should facilitate the goal of expediting determinations by the court through resolving some issues that could be raised by grain claimants under the broad concept of adequate protection in section 361 of the Bankruptcy Code.

The statutory requirement that large lots of stored grain must be promptly sold could avoid some of the disastrous events that occurred in the Cox Cotton Company and James brothers' grain elevator bankruptcy case in the Eastern District of Arkansas. After the Eighth Circuit stayed the bankruptcy court's order authorizing the trustee to sell all grain held by the debtors in order to permit hearing and resolution of the suit by the state of Missouri challenging the jurisdiction of the bankruptcy court in Arkansas over elevators in

Missouri that were regulated by the Missouri Department of Agriculture under state law, Wayne Cryts and other farmers engaged in their much-publicized self-help procedure of forcibly removing soybeans claimed by Cryts from a Missouri elevator. The Eighth Circuit ruled in *State of Missouri v. United States Bankruptcy Court,* 647 F.2d 768 (1981), cert. denied 454 U.S. 1162 (1982) that the bankruptcy court had exclusive jurisdiction over the soybeans stored by the debtors in Missouri and terminated the stay.

Thereafter, the bankruptcy court adjudged Cryts in civil contempt and certified a proposed order of criminal contempt to the district court. The district court decided the appeal from the bankruptcy court's order in *In re Cox Cotton Co.,* 24 B.R. 930 (E.D. Arkansas 1982). While the district court found no fault with the bankruptcy court's findings on the evidence[3] the district court decided that contempt power could not constitutionally be vested in a non-Article III court and vacated the bankruptcy court's contempt orders. However, the district court treated the bankruptcy court's findings as a certification for both criminal and civil contempt and issued an order directing the appellants to show cause why they should not be held in contempt for the removal of the soybeans while they were under the jurisdiction of the bankruptcy court. After the show cause hearing, the district court found Cryts in civil contempt.

Following an appeal and cross-appeal from the district court's judgment, the Eighth Circuit held that the district court erred in the decision with respect to the bankruptcy court's lack of contempt power. The Circuit Court concluded that the prospective decision of the Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.,* 458 U.S.50 (1982) mandated a finding of a constitutionally valid contempt power in bankruptcy courts prior to the effective date of the *Northern Pipeline* decision. The Circuit Court vacated the district court's decision and remanded the case for a review of the bankruptcy court's judgment limited to the due process limitation that the contempt order was "the least possible power adequate to the end proposed" and whether the findings by the bankruptcy court were clearly erroneous. *Lindsey v. Ipock,* 732 F.2d 619 (8th Cir. 1984).

Proof of Ownership of Grain

Section 354 of the 1984 act adds a provision to Bankruptcy Rule 3001, which simplifies the documentary proof of ownership of stored grain. The provision states that, to the extent not inconsistent with the United States Warehouse Act or applicable state law, a warehouse receipt, scale ticket, or similar document issued as evidence of title by a grain storage facility, shall constitute prima facie evidence of the validity and amount of a claim of ownership of grain.

The United States Warehouse Act requires a federally licensed warehouseman to issue receipts for all agricultural products stored under such act and makes detailed requirements for such receipts. 7 U.S.C. §§259, 260 (1982). The Tenth Circuit held in *Farmers Elevator Mutual Insurance Company v. Jewett,* 394 F. 2d 896 (1968), that the surety of a federally licensed warehouseman was liable to wheat depositors who were only given scale tickets, rather than warehouse receipts as prescribed by the act.

The Uniform Commercial Code, section 7-202 (1), provides that a warehouse receipt need not be in any particular form. Under the Code, section 1-201 (15), a document of title includes any document which, in the regular course of business or financing, is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers.

In the *Matter of Durand Milling Co., Inc.,* 9 B.R. 669 (Bankr. E.D. Mich. 1981), soybean weight slips issued by a warehouseman to producers were recognized under Michigan law as evidence of ownership of grain delivered by the producers to the warehouseman. Warehouse receipts issued by the South Carolina Department of Agriculture were held to be negotiable documents of title because the custom and usage of the trade treated them as such, even though they did not contain the words "order" or "bearer." *In re George B. Kerr, Inc.,* 25 B.R. 2 (Bankr. D. S.C. 1981.)

The recognition of a writing lacking the formality of a warehouse receipt as evidence of ownership of bailed grain is consistent with the common trade practice of storage warehousemen issuing a simple scale ticket or weight slip when grain is delivered to the warehouse for storage during the harvest season. While state warehouse laws may require a warehouseman to issue a formal warehouse receipt within a prescribed period after the commodity is received for storage, such requirements are sometimes not observed. The courts, as in *Matter of Durand,* usually treat the simple writing issued when the commodity is received by the warehouseman as evidence of ownership of bailed goods, even though the warehouseman has not complied with state law.

1.,2. A United States fisherman who has caught fish sold to a fish processing facility owned or operated by a debtor in bankruptcy is accorded comparable treatment to that provided for grain producers storing or selling grain to a debtor who operates a grain storage facility with respect to the fifth priority for claims and preservation of any common law or statutory right of reclamation.

3. Reading the *In re Cox Cotton Co.* decision reveals that the bankruptcy court found, and the district court affirmed, that Wayne Cryts has no right to any of the soybeans he removed from the elevator because he had endorsed his warehouse receipts to Commodity Credit Corporation to secure a $140,000 crop loan made to him in 1979, and had forfeited his rights in the soybeans to the Corporation when he defaulted on his loan, and that Commodity Credit Corporation was the proper party to assert the ownership interests in the soybeans that Cryts claimed was his. 24 B.R. at 935 and 957-958.

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Agricultural Law Update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

AALA Announces 1984-85 Officers and Board of Directors

The 1984-85 officers and board of directors for the American Agricultural Law Association were announced at the 5th Annual Ag Law Conference, held this year in Denver.

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The Association wishes to extend its thanks to its outgoing Past President, Dale C. Dahl and its outgoing board member Norman W. Thorson. Their services and contributions have been greatly appreciated by the association.