Agricultural Law Update

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RMA's inconsistent practices cost farmers

The Risk Management Agency (RMA), a division of the United States Department of Agriculture that administers the government's federally reinsured crop insurance program, has yet to settle on a consistent practice for determining the payouts under certain policies. For the 2006 crop year, RMA has interpreted the payment obligations of the Group Risk Income Protection (GRIP) plans of insurance at least three different ways – all to the detriment of west Texas insureds. In each situation, RMA has taken positions contrary to the insured farmers' interests. The results being (1) erroneously low indemnity payments that clearly contradict the express terms of the policies, (2) improper requests by insurance companies for reimbursement of indemnity payments, and (3) costly litigation.

Group Risk Income Protection – an introduction

GRIP is a method of crop insurance intended to be a risk management tool to insure against widespread loss of revenue from the insured crop in a county, whether due to low yields, low prices, or a both. Essentially, the insured farmer will be entitled to a payment when the revenue for the insured's county is below a certain point, the "trigger revenue."

The "trigger revenue" is derived from multiplying the coverage level (selected by the insured farmer) by the *expected* county revenue. The expected county revenue is the product of the expected harvest price as outlined in the crop provisions and the estimated county yield. The estimated county yield is provided by the National Agriculture Statistics Service (NASS) and represents NASS's estimate of the total production of the crop in a county divided by its estimate of the total acres grown.

After the crop year, RMA determines the actual county revenue by multiplying the county's harvest price by NASS's estimate of the actual county yield. Ultimately, if the county revenue drops below the trigger revenue, RMA authorizes an indemnity payment.

Parmer County wheat

Clearly, the method of determining payment under a GRIP policy is complicated. One of the most important aspects, however, is proper determination of the *actual* county revenue. When the NASS estimates for a county's yield are dramatically off, it can have significant effects on the final payment to the insured farmer.

No wonder that several wheat farmers in Parmer County, Texas, were upset when

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Investment advisory fees paid a testamentary trust subject to 2% floor

Affirming an opinion of the 2nd Circuit, the Supreme Court, in its January 16 opinion in *Knight v. Commissioner* [552 U. S. ____ (2008)], unanimously agreed that investment advisory services paid by a testamentary trust are limited to the excess above 2 percent of the trust's adjusted gross income (AGI). IRC §67(a) subjects miscellaneous itemized deductions to 2% of AGI floor, with amounts less than that amount not deductible. The opinion resolved a split in the circuits. In the 6th Circuit such fees were fully deductible, while in the 4th and Federal Circuits such fees were subject to the 2% floor as customarily or commonly incurred by individuals outside of trusts. In its opinion in this case, the 2nd Circuit applied a more restrictive test, allowing trusts to fully deduct those expenses that could not be incurred outside of a trust. [*Rudkin Testamentary Trust* v. *Commissioner*, 467 F. 3d 149, 155, 156 (2006)]. The Supreme Court adopted the approach of the 4th and Federal Circuits in requiring an analysis of whether an expense of a trust is customarily or commonly incurred by individuals outside of trusts. The Court recognized that this approach lacks administrative convenience but felt compelled to adopt this test as consis-

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NASS erroneously omitted several thousand acres of wheat that was actually harvested in the 2006 crop year.

The farmers believe that NASS's initial reported acreage for wheat in Parmer County was accurate, but that its estimate of total production was nearly twice the actual production. After numerous meetings with RMA and NASS, the Parmer County insureds convinced NASS to revise its numbers. However, while NASS corrected its erroneous production estimate, it subtracted nearly 10,000 acres of harvested irrigated wheat and 30,000 acres of harvested non-irrigated wheat. This action, whether a mistake or intentional, artificially inflated the final county yield for Parmer County, which substantially decreased the indemnity due under the GRIP policies.

To make matters worse, RMA's own production numbers and the production reports from the Farm Service Administration establish that the NASS estimate is wrong. However, RMA refused to correct the clear mistake, and as a result, several of the insured farmers filed an appeal to the National Appeals Division of the USDA.

The RMA's "official" position in the appeal is that it is "required" by regulation to use the NASS official yield data to determine the trigger and payment yields, and that it cannot correct the NASS numbers – even if it wanted to.

Parmer County corn

Parmer County's irrigated corn farmers are facing a contradictory argument by RMA. Under their GRIP policies, the insured farmers qualified for an indemnity payment for the 2006 crop year, which at the correct coverage rate should have been about $235 an acre. When the checks came from the insurance companies, however, they were only for $45 an acre. Unlike the wheat case, where RMA refused to correct erroneous numbers from NASS, in this case, RMA took correct numbers from NASS and threw them out in favor of its own calculation.

The erroneously low payment seems to have been the product of RMA's improper revision of the NASS numbers for the final county yield. GRIP policies explicitly state that in calculating the final county yield, *all* corn planted in the county is considered, whether irrigated, non-irrigated, insured, uninsured, planted for grain, planted for silage, *etc*. RMA, however, issued an after-the-fact determination that non-irrigated corn was not a good farming practice in Parmer County in 2006, and thus subtracted thousands of non-irrigated acres from the NASS published yields prior to issuing the 2006 final county yields. By excluding these acres, RMA once again dramatically reduced the indemnity payments due the insured farmers.

Under the GRIP policy, RMA does not have the right or authority to manipulate the NASS yields, which by its terms consist of corn planted for all purposes, whether it is insured corn or not. The policies neither give RMA the authority to change the payment methodology nor allow RMA to remove any corn acres from the calculation. Furthermore, RMA had already maintained in the wheat case that they are *required* to use NASS data, even if it is incorrect. Apparently, consistency (even in the same county) is not of great concern to RMA.

To the further consternation of the insured farmers, RMA retracted its good farming practice determination in December 2007. Thus, RMA, which never had the authority to subtract the non-irrigated corn acres from the payment methodology, now admits that the reason it did so was wrong. Of course, RMA has not volunteered to correct its erroneously calculated indemnity payments.

At least two groups of Parmer County corn farmers are currently engaged in arbitration, litigation, and administrative appeals with the insurance companies and RMA. A group comprised of farmers with irrigated corn acres is contesting RMA's failure to comply with the payment methodology defined by the GRIP insurance policies. A group of farmers primarily with non-irrigated acres is fighting the good farming practice determination and RMA's retroactive exclusion of non-irrigated acres from insurance coverage.

Moore County wheat

In a final example of RMA's inconsistency, wheat farmers in Moore County, Texas, received an indemnity payment under their GRIP policies only to have RMA demand that they repay thousands of dollars. In March, 2007, crop insurance companies issued their payments on GRIP policies based on the NASS published yields. Then, in October 4, 2007, at the direction of RMA, the insurance companies sent a letter to the farmers explaining that RMA had made changes to correct the estimated NASS yields relating to the policy. RMA claimed that the incorrect numbers had led to an "overpayment" to the farmers.

RMA's actions are in violation of the GRIP insurance policy terms, which state that "[t]he payment will not be recalculated even though the NASS yield may be subsequently revised." RMA's explanation for its action is that the recalculation is a "correction" not a "revision." This play on words that mean the same thing is hardly a legal basis for RMA's action. Nevertheless, the Moore County insureds have been forced to hire counsel and bring an NAD appeal to protect their rights.

Conclusion

In the three cases cited, RMA has taken three different positions with regard to their ability to modify the NASS estimates used in setting indemnity payments under GRIP Policies. In Parmer County Wheat, RMA refused to correct an obvious error in the NASS numbers. In Parmer County Corn, RMA modified the NASS numbers based on its own determination that non-irrigated corn was not a good farming practice – a determination that has since been reversed and was not allowed under the terms of the policy. Finally, in Moore County Wheat, RMA revised the NASS numbers and then demanded a refund from the farmers.

The common thread of the RMA's actions is not merely inconsistency, but inconsistency at the expense of the insured farmers. In all three cases the farmers have received a wrongfully determined indemnity payment, and in all three cases the farmers have been forced to resort to litigation to enforce their rights. One must only wonder what inconsistent action RMA is taking outside of west Texas.

–Jeff Todd and Spencer Smith, McAfee & Taft, Oklahoma City, OK

Editor's note: the authors are currently representing groups of farmers in the Parmer and Moore County, TX administrative actions.

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Air emissions of hazardous substances from animal waste on farms: EPA proposes administrative exemptions for CERCLA/EPCRA reporting obligations

Since the 2003 decision in *Sierra Club v. Tyson Foods*, 299 F. Supp.2d 693 (2003) and the 2004 *Sierra Club v. Seaboard Farms, Inc.* decision, 2004 U.S. App. LEXIS 22455, application of Comprehensive Environmental Response Compensation Liability Act (CERCLA) and Emergency Planning and Community Right to Know Act (EPCRA) reporting obligations to air emissions from agricultural facilities has been a controversial topic.

Proposals to amend CERCLA and EPCRA to exclude animal waste from the definition of hazardous substances under these laws have been introduced in Congress, but each failed to pass. The subject of this article is the latest action, a proposed exemption for air releases of hazardous substances from animal wastes, taken by the Environmental Protection Agency, to meet livestock industry concerns. 72 Fed. Reg. 73700-73708 (Dec. 28, 2007).

CERCLA/EPCRA reporting obligations

In the Supplementary Information to the proposed rule, the reporting obligations are detailed:

> Under Comprehensive Environmental Response Compensation Liability Act (CERCLA) section 103(a), the person in charge of a vessel or facility from which a CERCLA hazardous substance has been released into the environment in a quantity that equals or exceeds its Reportable Quantity (RQ) must immediately notify the National Response Center (NRC) of the release. A release is reportable if a RQ or more is released into the environment within a 24-hour period (see 40 CFR 302.6). This reporting requirement serves as a trigger for informing the Federal government of a release so that Federal personnel can evaluate the need for a response in accordance with the National Contingency Plan (NCP) and undertake any necessary response action in a timely fashion.
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> …
>
> Emergency Planning and Community Right to Know Act (EPCRA) notification is to be given to the community emergency coordinator for each Local Environmental Planning Committee for any area likely to be affected by the release, and the SERC (State Environmental Planning Committee) of any state likely to be affected by the release…. EPCRA section 304 notification requirements apply only to releases that have the potential for off-site exposure and that are from facilities that produce, use, or store a "hazardous chemical,'' as defined by regulations promulgated under the Occupational Safety and Health Act of 1970.

72 Fed. Reg. 73702 (Dec. 28, 2007).

Scope of the Proposed Rule

The Supplementary Information also outlines the intended scope of the proposed rule:

> The scope of this proposed rule is limited to releases of hazardous substances to the air from animal waste at farms…. The Agency is proposing an administrative reporting exemption from the CERCLA section 103 and EPCRA section 304 notification requirements….The scope of this proposed rule is intended to include all hazardous substances that may be emitted to the air from animal waste at farms.

72 Fed. Reg. 73703 (Dec. 28, 2007).

To clarify the scope of the reporting exemption, the Agency proposes definitions for "animal waste" and "farm" "…to be added to the Code of Federal Regulations that only pertains to regulations promulgated pursuant to CERCLA section 103 and EPCRA section 304.

> *Animal Waste*—means manure (feces, urine, other excrement, and bedding, produced by livestock that has not been composted), digestive emissions, and urea. The definition includes animal waste when mixed or commingled with bedding, compost, feed, soil and other materials typically found with animal waste.
>
> …
>
> *Farm*—means (a.) any place whose operation is agricultural and from which $1,000 or more of agricultural products were produced and sold, or normally would have been sold, during the census year. Operations receiving $1,000 or more in Federal government payments are counted as farms, even if they have no sales and otherwise lack the potential to have $1,000 or more in sales; or, (b.) a Federal or state poultry, swine, dairy or livestock research farm.

72 Fed. Reg. 73703 (Dec. 28, 2007).

Which hazardous substances is EPA proposing to exempt from the CERCLA/ EPCRA reporting requirements?

EPA is proposing to exempt "those hazardous substance releases which are emitted to the air (typically during digestion, break-down or decomposition) from animal waste at farms. Although ammonia and hydrogen sulfide are the most recognized hazardous substances that are emitted from animal waste, there may also be some amounts of additional hazardous substances released."72 Fed. Reg. 73701 (Dec. 28, 2007).

What is not included within the scope of this Proposed Rule?

As explained in the Supplementary Information Section of the Proposed Rule,

> [t]his administrative reporting exemption is limited in scope to those releases of hazardous substances to the air from animal waste at farms. EPA is not proposing to exempt from CERCLA section 103 or EPCRA section 304 notification requirements for releases of hazardous substances from animal waste to any other environmental media or at any other facilities other than farms (i.e., meat processing plants, slaughter houses, tanneries). In addition, EPA is not proposing to exempt from CERCLA section 103 or EPCRA section 304 notification requirements of any release of hazardous substances to the air from any source other than animal waste at farms.

72 Fed. Reg. 73704 (Dec. 28, 2007).

What is the Agency's rationale for the exemption?

As explained in the Supplementary Information Section:

> EPA's rationale for this administrative reporting exemption is based on the purpose of notifying the NRC (National Response Center), and SERC (State Emergency Response Committees) and LEPCs

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2% floor/Cont. from page 1

tent with the language adopted by Congress in IRC §67(e)(1).

IRC §67(e)(1) provides a limited exception to the 2% floor "for costs which are paid or incurred in connection with the administration of the estate or trust and which would not have been incurred if the property were not held in such trust or estate..." There was no dispute that these expenses, if incurred by an individual would be subject to the 2% floor.

The trustee argued that the Connecticut Prudent Investor Act required it to incur these fees, making the fees unique to trusts and fully deductible under IRC §67(e)(1). The Tax Court disagreed, holding that IRC §67(e)(1) applies only to fees not commonly incurred by others than trusts. [*Rudkin Testamentary Trust* v. *Commissioner*, 124 T. C. 304, 309–311 (2005)].

Of significance beyond tax law, the citation, in this opinion authored by the Chief Justice, to *Cooper Industries, Inc.* v. *Aviall Services, Inc.* [543 U. S. 157, 166 (2004)], and to Webster's Third New International Dictionary (1993) and the American Heritage Dictionary (3d ed.1996) signals the Court's continued reliance on textualism seen not only in *Cooper Industries,* but also in *Rapanos v. U.S.* [547 U.S. 715 (2006)].

—Theodore A. Feitshans, North Carolina State University

Settlement funds in conversion actions and proceeds of converted collateral under the Uniform Commercial Code

By Anthony Schutz

The Bankruptcy Court in the District of Minnesota, Judge O'Brien, has concluded that a secured lender has no security interest in settlement funds acquired by its debtor, even when those settlement funds are paid to resolve a lawsuit between the debtor and third parties for converting cattle in which the secured party had a perfected security interest. *In re Zych*, 379 B.R. 857 (D. Minn., Dec. 18, 2007).

The case

Rabo Agrifinance lent money to Zych, and Zych entered into a security agreement adequately describing its collateral by using the categories defined in the UCC. *See* UCC 9-108.[1] Rabo filed a financing statement (which apparently used the same language as the security agreement) identifying its collateral as, *inter alia*, farm products, inventory, general intangibles, contract rights, proceeds, and livestock and its progeny. Zych sold 217 head of the cattle collateral through Nicollet and GFI America, Inc., both of which were licensed and bonded dealers and market agents under the Packers and Stockyards Act. GFI experienced financial difficulties and entered bankruptcy. Zych (and Rabo) remained unpaid to the tune of $221,811.09 after GFI's check to Zych bounced. Ultimately, Zych sued Wachovia Capital Finance, GFI's lender, for unlawfully sweeping GFI's account in violation of the Packers and Stockyards Act, which requires that brokered cattle proceeds be segregated in a custodial account. Zych, GFI, and Wachovia settled the claim, with Zych getting 51% of his claim immediately distributed and the remainder of the claim preserved against the bankruptcy estate in the GFI case.

Zych was also in bankruptcy and his settlement in the dispute with GFI and Wachovia became part of Zych's bankruptcy estate. Zych's lender, Rabo, moved for relief from the stay in the Zych bankruptcy, claiming a perfected security interest in the settlement funds.[2] The bankruptcy court denied relief from the stay, concluding that the settlement funds were proceeds of a commercial tort claim and, thus, Rabo's security interest did not attach because it did not sufficiently describe the commercial tort claim as collateral.

Under section 9-108(e), describing collateral by UCC type is not sufficient when it comes to commercial tort claims. Rabo's security agreement, of course, had no description of the commercial tort claim. Rather, Rabo was claiming a security interest in the settlement funds as proceeds of the cattle in which it perfected its security interest. More specifically, Rabo was claiming that its security interest in the cattle attached to the money received by GFI as proceeds. Those proceeds—collateral under UCC section 9-102(a)(12)—were then converted by Wachovia and GFI. Thus, to Rabo, Zych's commercial tort claim was proceeds of collateral and, thus, the settlement funds were also proceeds to which Rabo's security interest attached and remained perfected under section 9-315.[3] The court, however, rejected the claim, basically establishing a rule that a secured party's claim to proceeds does not include commercial tort claims, or proceeds of such claims, that may arise from the conversion of the secured party's collateral.

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Tort claims as proceeds

Generally speaking, when a creditor obtains a security interest in collateral, under section 9-203(f), it also automatically obtains a security interest in proceeds of that collateral under section 9-315. The attachment of a security interest in identifiable proceeds contained in section 9-315(a)(2) helps a secured party maintain its security after collateral is disposed of. Given the protection of buyers in many commercial transactions from their sellers' secured creditors,[4] this corresponding protection for secured creditors is important. The court's disposition seriously undermines the protection given creditors under section 9-315(a)(2).

As an initial matter, the court seems to conflate the notions of proceeds and original collateral in its opinion. Commercial tort claims, as original collateral, are subject to two primary limitations: (1) the description must be more specific than that used for most other collateral, and (2) after-acquired property clauses cannot create security interests in commercial tort claims.[5] The court reads these restrictions on security interests in commercial tort claims as vitiating any argument that a security interest could attach to such claims as proceeds of original collateral. But those restrictions, while they surely do govern the creation of a security interest in a commercial tort claim as original and after-acquired collateral, do not displace the protections afforded secured parties under section 9-315 when it comes to proceeds. Granted, one alternative mechanism for secured creditors who wish to maintain a level of security is to include a description of many types of collateral in the security agreement, accompanied by an after-acquired property clause. But this method of protection does not have an impact on whether section 9-315 covers a commercial tort claim as proceeds of other collateral.

The UCC definition of proceeds, especially since the 1999 amendments, is clearly broad enough to include tort claims as proceeds of collateral.[6] And the UCC specifically notes that tort claims can be proceeds of other collateral, within the scope of Article 9. Section 9-102(a)(13) defines the term "commercial tort claim." Comment 5.g to that section provides more information on how Article 9 applies to them: "A tort claim may serve as original collateral under this Article only if it is a 'commercial tort claim.' See 9-109(d). . . . A security interest in a tort claim also may exist under this Article if the claim is proceeds of other collateral."[7] Section 9-109(d)(12) states that its provisions do not apply to "an assignment of a claim arising in tort, other than a commercial tort claim, but sections 9-315 and 9-322 apply with respect to proceeds and priorities in proceeds." Comment 15 to section 9-109 also states that "[t]his article now applies to assignments of 'commercial tort claims' ... as well as to security interest in tort claims that constitute proceeds of other collateral (e.g., a right to payment for negligent destruction of the debtor's inventory)." The court ignored the comments to section 9-102, and read the language of 9-109 and its comment 15 to mean that tort claims could be proceeds of original collateral, while *commercial* tort claims could not. The fundamental mistake here is the court's failure to realize that commercial tort claims *are* tort claims. Read in this manner, tort claims can be proceeds within the scope of section 9-315 but not original collateral; commercial tort claims can be both original collateral (subject to some special rules) and proceeds within the scope of section 9-315.

A look at the case law under pre-revision Article 9 reveals some level of dispute over the general premise of tort claims as proceeds of original collateral, but most courts concluded that tort claims could be proceeds of original collateral even though tort claims were omitted from Article 9's coverage generally.[8] The comments in revised Article 9 make it clear that tort claims can constitute proceeds of other collateral, and the revisions to Article 9 that brought commercial tort claims into the mix as original collateral were not meant to displace the notion of tort claims (commercial or not) as proceeds of collateral. As mentioned, Comment 15 to section 9-109 specifically states that "[t]his article now applies to assignments of 'commercial tort claims' ... *as well as* to security interest in tort claims that

constitute proceeds of other collateral." (emphasis added). The "as well as" language, considered in context, could be understood to refer to old Article 9's coverage of such claims as proceeds of other collateral. That is, the "as well as" language seems to be a referral to existing practice under pre-revision Article 9. In sum, if a commercial tort claim is still a tort claim, then the court's refusal to allow a proceeds-based claim was erroneous.

Tort-claim settlements as after-acquired property

After-acquired property clauses are ineffective to attach a security interest to a tort claim because tort claims are generally excluded from the scope of Article 9.[9] Commercial tort claims are included in Article 9, but after-acquired property clauses remain ineffective as to them; "such claims must exist when the security agreement is authenticated."[10] But after-acquired property clauses are effective with most other kinds of collateral. So a question arises: Does the settlement of a tort claim create collateral that can be reached with an after-acquired property clause?

For example, if Rabo had an after-acquired property clause in its security agreement covering after-acquired general intangibles, one could argue that the settlement obligation was a payment intangible within the definition of general intangibles. If that were true, then the after-acquired property clause may have been effective to attach the security interest and, so long as the filed financing statement identified the collateral,[11] Rabo should have been a perfected secured party.

The Code would appear to sanction this result.[12] Collateral often moves from category to category. And proceeds may fall within a different UCC category than the collateral from which they arise. Thus, while a tort claim may not be within the scope of Article 9 or after acquired-property clauses, one could argue that once the tort claim is settled, the defendant's obligation to pay is a payment intangible that is within Article 9's coverage and, thus, the after-acquired property clause covering general intangibles can apply. It is unclear from the *Zych* court's opinion whether or not Rabo's security agreement contained an after-acquired property clause (let alone one covering general intangibles); however, the court appears to reject the argument.

While there may be support for the after-acquired-property argument, the merits of such an argument are weaker than those for protecting proceeds under section 9-315. Part of the reason for restricting security interests in tort claims may be to protect debtors from secured lenders who take security interests in after-acquired tort claims and then argue that their security interest attached to, for example, a personal injury action. Arguably, a security interest in such a claim should be set up under non-UCC law because such a claim has very little to do with the commercial context within which Article 9 operates.[13] Treating the proceeds of such a claim—e.g. a settlement obligation—as a payment intangible that can be picked up by after-acquired property clauses from commercial transactions would have the potential to undermine the reasons for excluding non-commercial tort claims from Article 9's scope. The *Zych* court notes this.[14]

Those arguments against attachment are a bit harder to apply to commercial tort claims because such claims are at least related to the debtor's business operations.[15] Thus, Article 9 brings them into its coverage but it imposes stricter description requirements and it shields them from after-acquired property clauses. So if a business, for example, has a claim against an accountant for professional negligence, the secured party could lend money to the business and take an Article 9-governed security interest in the commercial tort claim. In order to do so, it would have to describe the existing claim more specifically than is required of other types of collateral.[16] However, in the eyes of the UCC, there is little reason to allow the lender to latch onto such a claim through an after-acquired property clause because such a tort claim, even though it is commercial, still has little to do with protecting the typical sorts of collateral involved in commercial financing. Thus, as with tort claims generally, the treatment of a debtor's commercial tort claims should carry through to the (for lack of a better term) settlement intangibles that are proceeds of such claims. In other words, as with the tort-claim exclusion, after-acquired-property arguments could undermine the reasons for, here, requiring specific descriptions of commercial tort claims and shielding them from after-acquired property clauses. This line of reasoning significantly undercuts the arguments for treating settlement obligations as general or payment intangibles to which a security interest could attach through an after-acquired property clause.

Of course, not all commercial tort claims are the same. That is, some will involve the conversion or destruction of original collateral that is more typically associated with commercial financing. On those sorts of facts, the use of after-acquired-property arguments is more persuasive. But I would contend that such arguments are persuasive precisely because we first think about protecting the secured party from harm to (including the disposition of) its collateral by attaching its security interest to its collateral's proceeds. Indeed, if proceeds rules protect the secured party, then there is little reason for after-acquired-property rationales. Properly applied proceeds rules protect secured parties by attaching their security interests to tort claims and the settlements, judgments, and money that result from such claims where the claim originates from the destruction or injury to original collateral. With that protection, there is no need to invigorate the after-acquired property rules and argue that the settlement obligation resulting from a commercial tort claim is now a less-rule-bound intangible. And the problems associated with allowing that argument—i.e., undermining the general exclusion of non-commercial tort claims and the restrictions on commercial tort claims—counsel against using those arguments to protect the secured party. Thus, proceeds rules, considered in context, might achieve the proper balance between protecting secured parties and the reasons for commercial and non-commercial tort claims' treatment under the UCC.

Conclusion

In re Zych is an interesting case because it rejects the notion of proceeds under the UCC as a protection for the secured party. It also appears to reject an alternative line of defense—after acquired property clauses—for secured parties, even when that method is applied to the payment intangibles that may arise from commercial tort claims. While the latter conclusion may be justified, the former is clearly not consistent with the Code's approach to tort claims or proceeds. Notably, however, the court did not leave Rabo without recourse—at least in theory. The court noted that Rabo may have its own conversion claim against GFI.[17] GFI, under the Food Security Act, was holding proceeds of the sale of encumbered cattle subject to Rabo's security interest and failed to remit them to Zych and Rabo. On those facts, GFI is a converter. Query: Will GFI raise the payment to Zych as a defense to Rabo's conversion action? And what about the purchaser of those cattle, National Beef? Rabo's security interest may have continued post sale,[18] making National Beef a converter. But that is an article for another day. The Zych case is currently on appeal to the United States District Court for the District of Minnesota.

[1] The author refers to the provisions of

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Settlement funds/ cont. from p. 5
Revised Article 9. The specific state law at issue in the case does not appear to deviate from the uniform version promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws. Revised Article 9 was promulgated in 1999, and it became effective in most states on July 1, 2001.

[2] Notably, a perfected secured party competing for the proceeds was Zych's attorney of record in the Wachovia dispute. It had filed a financing statement covering its attorney's lien and identified its collateral, including the settlement proceeds, by case number. The attorneys, who were also representing Zych in his bankruptcy, assigned their claim to the bankruptcy estate for the benefit of the unsecured creditors because of the likely conflict it posed to their representation and because the lien may have qualified as an avoidable preference. 379 B.R. at 860, n.2.

[3] *See* UCC §§ 9-315(c) through (e). Rabo's facts do not raise the prospect of an attached, but unperfected, security interest in proceeds given UCC §§ 9-315(d)(1), (2), and possibly (3). Thus, the text of this article assumes perfection under § 9-315(d) if the security interest attached.

[4] UCC § 9-320; 7 U.S.C. § 1631.

[5] *See* UCC §§ 9-108(e) (description of collateral) and 9-204(b)(2) (after-acquired property clauses).

[6] UCC § 9-102(a)(64); *accord Price v. Nationwide Mut. Ins. Co. of Des Moines*, 152 P.3d 1274 (Kan. Ct. App. 2007) (unpublished) (concluding that settlement funds from a dispute between debtor and insurer over stolen collateral were proceeds under section 9-102(a)(64).

[7] *See In re Sarah Michaels, Inc.*, 358 B.R. 366, 376 (N.D. Ill. 2007) (concluding that creditor had security interest in debtor's cause of action against a third party for damage to equipment given the security agreement's inclusion of "proceeds"); *In re Weirsma*, 324 B.R. 92 (9th Cir. BAP 2005). The Weirsma case was later reversed on jurisdictional grounds, 483 F.3d 933 (9th Cir. 2007), but the cited opinion held that settlement funds were encumbered with a security interest from original collateral on two alternative theories: (1) the settlement obligation was a general intangible within the scope of the security agreement which contained an after-acquired property clause, or (2) the funds were the proceeds of the original collateral which was equipment destroyed in a fire that led to the lawsuit in which the settlement arose.

[8] *See In re Boyd*, 658 P.2d 470 (Okla. 1983) (concluding that funds paid to a debtor for damage to an encumbered automobile were not proceeds); *In re Stone*, 52 B.R. 305 (W.D. Ky. 1985) (concluding that "monies received in settlement of a tort claim for the tortious damage or destruction of secured collateral are proceeds"); *McGonigle v. Combs*, 968 F.2d 810, 828 (9th Cir. 1992) (concluding that tort-settlement proceeds were proceeds of original collateral and noting an analogy: "The classic situation is that of a tort recovery obtained by a debtor for damage to secured property; the secured creditor obtains a lien on such payment to replace the diminished value of the security.").

[9] UCC § 9-204(b) (after-acquired property clauses); UCC 9-109(d)(12) (general exclusion for tort claims with exception for commercial tort claims)

[10] UCC § 9-204(b) & cmt. 4. Notably, the court's reasoning also vitiated any claim to a judgment as proceeds of a tort claim. Article 9 generally does not cover an "assignment of a right represented by a judgment, other than a judgment taken on a right to payment that was collateral." UCC § 9-109(d)(9). Because proceeds do not include a commercial tort claim, such a claim cannot be a "right to payment that was collateral." Thus, a judgment taken on such a right will not qualify for the exception to the general exclusion of judgment assignments.

[11] Such an indication would not need to mention after-acquired property. UCC §§ 9-204 cmt. 7, 9-504 cmt. 2.

[12] *See* UCC § 9-109, cmt. 15 (comment to general exclusion of tort claims from Article 9's scope, stating "once a claim arising in tort has been settled and reduced to a contractual obligation to pay, the right to payment becomes a payment intangible and ceases to be a claim arising in tort").

[13] This was the original reason given for excluding tort claims from the UCC. *See* UCC § 9-104(k), cmt. 7 (pre-1999 revisions) (the tort claim exclusion goes to types of claims that "do not customarily serve as commercial collateral").

[14] *See In re Zych*, 379 B.R. at 864 n.7 (citing *In re Sarah Michaels, Inc.*, 358 B.R. 366, 379-80 (N.D. Ill. 2007)).

[15] *See* UCC § 9-102(13) (defining commercial tort claim).

[16] *See in re Shirley Medical Clinic, P.C.*, 446 F. Supp. 2d 1028 (S.D. Iowa 2006) (dealing with a commercial tort claim of the debtor against employees for breach of fiduciary duty and holding that the description "proceeds from any lawsuit due or pending" was an insufficient description under UCC § 9-108(e)(1)).

[17] 379 B.R. at 864 n.8.

[18] *See* UCC §§ 9-315(a)(1), 9-320(a), 7 U.S.C. § 1631.

Air emissions/Cont. from p. 3

> (Local Emergency Planning Committees) when a hazardous substance is released, and then the likelihood that a response to that release would be taken by any government agency.
>
> Upon receipt of a notification from the NRC, EPA determines whether a response is appropriate…. Thus, the question that EPA considered is whether the Agency would ever take a response action, as a result of such notification, for releases of hazardous substances to the air from animal waste at farms.

72 Fed. Reg. 73704 (Dec. 28, 2007).

EPA concluded that it did not believe the agency would ever take a response action based on air emission reports from farms and is therefore proposing to no longer require such reporting.

> This conclusion is based in part on EPA's experience. Specifically, to date, EPA has not initiated a response to any NRC notifications of ammonia, hydrogen sulfide, or any other hazardous substances released to the air where animal waste at farms is the source of that release.
>
> …
>
> Several states indicated that response actions are unlikely to be taken as a result of a notification of releases of hazardous substances from animal waste at farms. EPA received 26 comment letters from state and/or local emergency response agencies in its request for public comment on the 2005 petition from the National Chicken Council, National Turkey Federation, and U.S. Poultry & Egg Association. All of those comments supported granting the poultry petition—that is, exempting from CERCLA and EPCRA reporting requirements for ammonia emissions from poultry operations.

72 Fed. Reg. 73704 (Dec. 27, 2007).

What are the economic impacts of granting this exemption?

Costs that will be reduced are the costs of complying with CERCLA section 103 and EPCRA section 304 by those farms that release hazardous substances to the air from animal waste. The entities that will benefit from the reduced costs include the farms, and the Federal, state, and local governments responsible for receiving the reports. Estimated savings are $160,173,000 over the ten-year period beginning in 2009 by the farms and $8,109,000 by the government agencies responsible for receiving and processing the notifications under CERCLA section 103 and EPCRS section 304 over the same 10-year period.72 Fed. Reg. 73705 (Dec. 27, 2007).

Comments on the proposed rule were due on or before March 27, 2008.

—John C. Becker, Penn State University

Federal Register *Summary from February 15, 2008 to March 14, 2008*

CROP INSURANCE. The FCIC has issued proposed regulations amending the common crop insurance regulations, grape crop insurance provisions and table grape crop insurance provisions to expand coverage in Arizona and to make clarifying amendments. **73 Fed. Reg. 11054 (Feb. 29, 2008)**.

The FCIC has adopted as final regulations which add cultivated wild rice to the common crop insurance policy basic provisions. The regulations convert the cultivated wild rice pilot crop insurance program to a permanent insurance program for the 2009 and succeeding crop years. **73 Fed. Reg. 11314 (March 3, 2008)**.

The FCIC has adopted as final regulations which add provisions for mustard crop insurance to the common crop insurance basic provisions. The regulations make the pilot mustard crop insurance program permanent. **73 Fed. Reg. 11318 (March 3, 2008), adding 7 C.F.R. § 457.168**.

DISASTER ASSISTANCE.The FSA has adopted as final regulations governing the Dairy Disaster Assistance Payment Program III, as authorized by the *U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Pub. L. No. 110-28*. The program would provide $16 million in assistance for producers in counties designated as a major disaster or emergency area by the President, or those declared a natural disaster area by the Secretary of Agriculture. Counties declared disasters by the President may be eligible, even though agricultural loss was not covered by the declaration, if there has been an FSA Administrator's Physical Loss Notice covering such losses. The natural disaster declarations by the Secretary or the President must have been issued after January 1, 2005, and before February 28, 2007. Counties contiguous to such counties are also eligible. **73 Fed. Reg. 11519 (March 4, 2008)**.

GRADING. The AMS has adopted as final regulations increasing the fees and charges for federal voluntary egg, poultry, and rabbit grading, certification, and audit services for fiscal years 2008 and 2009. **73 Fed. Reg. 11517 (March 4, 2008)**.

GRAPES. The AMS has issued proposed regulations which revise the United States Standards for Grades of Table Grapes (European or Vinifera Type) issued under the Agricultural Marketing Act of 1946. The proposed changes were requested by the California Grape and Tree Fruit League to revise the tolerances to include an allowance for shattered berries due to the change of pack style from mostly plain pack to consumer size units. The proposed regulations revise the voluntary standards to add a 5 percent allowance for shattered berries in consumer containers for shipments that are en route or at destination. **73 Fed. Reg. 10185 (Feb. 26, 2008)**.

—Robert P. Achenbach, AALA Executive Director

N.C. Court of Appeals decision may threaten conservation easements

In a December 18 decision, *Pottle v. Link* (COA07-359), the N.C. Court of Appeals determined that the 6-year statute of limitations (N.C.G.S. §1-50(3) governing incorporeal hereditaments applied to bar a suit for injunctive relief against defendants for encroaching upon an easement for ingress and egress. The Court of Appeals determined that the adverse possession period of 20-years (N.C.G.S. §1-40) was inapplicable to easements as well as covenants. As of this writing no appeal has been filed.

The Court of Appeals distinguished an encroachment upon an easement from an easement by prescription to which it stated that the 20-year adverse possession statute applies. Language in the opinion implies that the 6-year statute of limitation begins to run from the date of encroachment rather than the date of discovery; however, this was not an issue in the case.

Although the Court of Appeals did not address whether a conservation easement is an incorporeal hereditament, violations of which are subject to the 6-year statute of limitations, nonetheless the opinion appears to leave open the issue that the 6-year statute of limitations may apply to both term and permanent conservation easements created under North Carolina's Conservation and Historic Preservation Agreements Act (N.C.G.S. §§121-34 - 42). This should be of great concern to both governmental and private nonprofit holders of conservation easements who likely believed that, at worst, they faced a 20-year statute of limitations in which to seek injunctive relief for violations of conservation easements. For those less well-funded holders of conservation easements that do not annually inspect properties subject to easements held by them, this opinion should serve as timely warning.

—Theodore A. Feitshans, North Carolina State University

Freedom of information requests

The plaintiff submitted a FOIA request to the USDA seeking release of 13 databases maintained by the Farm Service Agency (FSA) relevant to its agricultural subsidy and benefit programs. FSA processed the request and released some information, but withheld other information on the ground that it contained private information about individual farmers protected by exemption six of the FOIA because the information would reveal financial information associated with an individual without shedding any light on the government's activities. The court held that the importance of the information to public scrutiny of the USDA's administration of subsidy and benefit programs outweighed the personal privacy interest. The court noted that disclosure of the databases would not constitute a clearly unwarranted invasion of personal privacy. *Multi Ag Media LLC v. Dep't of Agriculture*, 2008 U.S. App. LEXIS 3226 (D.C. Cir. 2008), *rev'g and rem'g*, 2006 U.S. Dist. LEXIS 55170 (D. D.C. 2006).

—Robert P. Achenbach, AALA Executive Director

Sale of Ch. 12 estate property

The Chapter 12 debtor's plan provided for payment of federal taxes by surrendering to the IRS eight parcels of land. The plan also provided that all federal and state tax claims which arose from the transfer of the property to the IRS were treated as general unsecured claims not entitled to priority under Section 507. The eight parcels were sold, resulting in substantial taxable capital gain tax. The debtor argued that, under Section 1222(a)(2)(A), the capital gains tax was a claim of the Chapter 12 estate. The IRS argued that Section 1222(a)(2)(A) did not apply to post-petition sales of the debtor's property. The court reviewed the three cases which have ruled on the issue, *In re Knudsen*, 356 B.R. 480 (Bankr. N.D. Iowa 2006) (ruled for debtor); *In re Hall*, 376 B.R. 741 (Bankr. D. Ariz. 2007) (ruled for IRS); and *In re Schilke*, 379 B.R. 899 (Bankr. D. Neb. 2007) (ruled for debtor), and followed *Knudsen* and *Schilke* in holding that capital gains taxes resulting from postpetition sales of a Chapter 12 debtor's property were administrative expenses entitled to application of Section 1222(a)(2)(A). *In re Dawes*, 2008 Bankr. LEXIS 362 (Bankr. D. Kan. 2008).

—Robert P. Achenbach, AALA Executive Director

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Membership Renewals

All members should have received a 2008 membership renewal notice. Many thanks to all members who have sent in their membership renewals. Please send in your membership renewals by April 20, 2008 to avoid missing the next issue of the *Update*. If you know of someone who would benefit from membership in the AALA, I can send you a brochure on the AALA with a membership form. RobertA@aglaw-assn.org

2007 Conference Handbook on CD-ROM

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2008 Conference

Planning for the 2008 Symposium is already underway, with new President-elect Maureen Kelly Moseman seeking topic ideas and speakers for the meeting in Minneapolis, MN on October 24-25, 2008 at the downtown Marriott. The Marriott is located near the light rail system which connects downtown to the airport, the Mall of America and other local attractions. We will be working with the Minnesota Bar Ag. Section to provide the best all around experience for attendees. Mark your calendars now so we can have a record attendance.

I would like to make a particular plea to AALA members in states neighboring Minnesota to provide me with names and addresses of practitioners, farmers, ranchers and agribusiness professionals in your states who might be interested in attending the conference. We have only a small advertising budget but would be happy to send a dozen or so brochures for you to hand out at meetings and conferences.

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