Agricultural Law Update

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INSIDE

IN FUTURE ISSUES

Some Relief from Capitalization Rules

In Notice 88-24, 1988-14 I.R.B. 6, the IRS announced safe harbor figures for the cost of raising dairy and beef heifers, that can be used under IRC § 263A. The Notice also gives dairy and beef producers until October, 1, 1988, to amend their 1987 income tax return: (1) change their election regarding the treatment of preproduction expenses (i.e. whether to capitalize or expense them); and/or (2) use the safe harbor figures for their 1987 preproduction expenses.

The 1986 Tax Reform Act created IRC § 263A, which requires taxpayers to capitalize certain preproduction expenses. For most farmers, the rules apply only to plants and animals that have a preproductive period of more than two years. Since the preproduction period for livestock begins on the date of acquisition, breeding, or embryo implantation, and ends when the animal becomes productive, most raised dairy and beef heifers are subject to the rules. (See Beard, Lonnie R., *The Uniform Capitalization Rules and Cattle Held for Breeding and Dairy Purposes, 5 Agricultural Law Update, No. 2, pp. 4-6. (Nov. 1987)*)

The 1986 Tax Reform Act allows farmers to make a lifetime election (which can be changed only with consent of the Commissioner) to not capitalize preproduction expenses but, requires farmers who elect out to: (1) use the slowest depreciation option on all assets used in the farm business; and (2) treat gain realized on sale of plants and animals that are subject to the rules as ordinary income to the extent of the preproduction expenses.

One of the many difficulties farmers face in applying the rules is determining their preproduction costs. Technically, all direct and indirect expenses are to be included. Therefore, not only the costs such as feed and veterinary bills for each animal but also costs such as property taxes, depreciation and utilities must be allocated to each animal. The 1986 Tax Reform Act allows farmers to use a proxy

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USDA payment limitations rule struck down

In the case of *Women Involved in Farm Economics v. United States Dept. of Agriculture*, 6-82 F. Supp. 599 (March 31, 1988), the federal district court for the District of Columbia has ruled that the USDA's automatic treatment of married couples as one person for payment limitation purposes is unconstitutional and violates the Administrative Procedure Act (APA).

The plaintiff, a national nonprofit women's agricultural trade association, brought an action against the USDA based on the fifth amendment and the APA, challenging the regulation that provides that "[a] husband and wife shall he considered one person" for purpose of the $50,000 limitation on agricultural crop subsidy payments. 7 C.F.R. § 795.11. Under the rule, the Department treats all husbands and wives as one person, regardless of whether they may have owned and operated farms separately prior to the marriage and continue to operate them separately after marrying.

The plaintiff challenged the regulation under the fifth amendment as an infringement on the fundamental right to marry, as impermissible discrimination on the basis of gender, and under the APA as exceeding the agency's statutory authority to promulgate farm program regulations. The court in granting plaintiff's motion for summary judgment agreed with both the constitutional and statutory challenges.

On the issue of infringement on the fundamental right to marry, the court noted the inquiry must begin with the proper standard of review. While the court noted that the right to marry is a fundamental right, strict scrutiny is available only if the challenged section "directly and substantially interferes" with the right. The court determined that while the regulation may affect a couple's decision to marry, the regulatory interference was not sufficiently direct to invoke strict scrutiny.

The court then applied the rational basis test, reviewing the government's interest in the husband-wife regulation in the context of crop subsidy programs. The court noted that the Congressional goal of such programs is to reduce the quantity of planted acres of certain crops, but the regulation by partially excluding husbands and wives who have separate farms, works against the purpose of the statute. As a result, the regulation is not rational.

(Continued on next page)

SOME RELIEF FROM CAPITALIZATION RULES FOR DAIRY AND BEEF / CONTINUED FROM PAGE 1

for actual expenses such as the farm-price method or the unit-livestock method of accounting but those methods are foreign to producers who use cash accounting.

Notice 88-24 simplifies the problem of determining preproduction costs by allowing all dairy and beef producers to use a safe-harbor figure for the expenses instead of their own figures.

For beef, the safe-harbor figure for all preproduction costs is $340. One-quarter of that figure is to be claimed in the year the heifer is born, one-half is to be claimed in the next year, and the last one-quarter is to be claimed in the second tax year after the heifer is born. For example, if a beef heifer was born on July 1, 1987, and is destined for the producer's herd, the producer can comply with the IRC § 263A requirements by subtracting $85 from his or her 1987 Schedule F expenses and adding that to the heifer's basis. In 1988, $170 is subtracted from Schedule F expenses and added to the heifer's hasis. In 1989, $85 is subtracted from Schedule F expenses and added to the heifer's basis. Although the Notice does not address the issue, the $340 basis in the heifer can apparently be depreciated beginning in 1989, assuming she becomes productive that year.

The safe harbor figure for dairy heifers is $540. Therefore, $135 is capitalized for the year of birth, $270 the next year, and $135 the next year.

The Notice allows taxpayers to first elect to use the safe harbor figures on their 1987 or their 1988 tax returns. Taxpayers who do not have beef or dairy cattle in 1987 or 1988 may elect the safe harbor figures in the first year he or she raises beef or dairy cattle. However, once a taxpayer elects to use the safe harhor figures, the safe harbor figures must be used on all subsequent returns unless consent to change accounting methods is obtained from the Commissioner.

– Philip E. Harris

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USDA PAYMENT LIMITATIONS RULE STRUCK DOWN / CONTINUED FROM PAGE 1

The court noted further evidence of this lack of rational purpose in the recent Congressional amendment that will require the USDA to allow couples who separately owned farms prior to and during marriage to receive separate payments for the 1989 and succeeding crop years. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330. The court noted that the Congressional change for future years strongly suggests the present regulation is not consistent with the Congressional intent.

The court rejected the USDA's argument in support of the regulation, in particular noting that it is "wholly unpersuasive to argue" that the farming operations of married couples are always economically interdependent and that therefore it would he "futile or too expensive to try to distinguish among them." The court noted that under the payment limitation rule, other economically interdependent entities, such as partnerships, are allowed to meet criteria for separate payments. Therefore, married couples, with separate farms should be allowed to meet such criteria.

The court also held that the regulation's treatment of a husband and wife as one person was illogical as a matter of plain statutory language and rejected the archaic notion that a husband and wife are one person.

The court also rejected the government's claim that the rule helps minimize fraud on the crop subsidy program as being unsupported. The court held that mere assertions of potential fraud are insufficient to find a classification such as this automatic exclusion rational.

Because the court found that regulation unconstitutional on the right to marry issue, it did not consider the plaintiff's challenge on the basis of gender.

As to the claim that the regulation violated the APA and exceeded the agency's statutory authority, the court noted the discretion normally given to agency interpretation. But here, the court noted that the conclusions reached in the consideration of the rational basis for the regulation were equally applicable in considering whether the rule was a rational exercise of statutory authority. Because the policy of completely barring married couples from qualifying for two payments operates against the Congressional policy of encouraging participation in the crop subsidy program and insuring that the policy is implemented fairly, the court held the agency action was inconsistent with the statutory mandate and thus violates the APA.

The court rejected the agency's claim that adding the extra "persons" from a liberal husband and wife policy would add $182 million in costs to the farm programs as a "gross overstatement," noting that the agency's figures assumed that all married farm couples could qualify for a second payment.

Finally, the USDA argued that the recent Congressional amendment made the issue moot. The court noted, however, that the Congressional change would not be effective until 1989 crop year, and that until then the present regulations clearly adversely affect the plaintiff's members. The agency also argued that because, the court's decision was sure to he appealed by the losing side, the new regulations would be in place by the time of the appellate review and thus the court should wait. The court observed that this theory conceded that the issue was not moot and further was an inappropriate basis for a court to stay its hand.

In its judgment the court permanently enjoined the USDA from "refusing to allow husbands and wives to qualify as separate persons on the hasis of section 795.11."

One legal issue that might arise from this ruling is whether husbands and wives do not have separate farms prior to marriage but obtain them after marriage should be given the opportunity to request treatment as separate persons. Under the new Congressional amendment on the husband and wife issue, and under the new USDA proposed regulations to put the change into effect for the 1989 crop year (see side bar article on page 3), only husbands and wives who had separate farms *prior* to marriage and who maintain separate operations after marriage will qualify as separate persons. Because the new rule is the result of direct Congressional language in drafting the farm program policy it appears doubtful that a court would find that the new policy does not meet a rational basis test.

– Neil D. Hamilton

Federal Register *in brief*

The following is a selection of matters that have been published in the *Federal Register* in the past few weeks.

1. CCC. Standards for approval of warehouses for grain, rice, dry edible beans, and seed. Final rule. Effective date: 4/1/88. "The provision of the proposed rule requiring bonding from warehousemen in any State where the State law does not guarantee every depositor a pro rata share of the commodities or proceeds from warehouse liquidation or bankruptcy is not adopted." 53 Fed. Reg. 10060.

2. CCC. Payment limitation, and determination of eligibility of foreign individuals or entities to receive program benefits. Proposed rule. 53 Fed. Reg. 11474.

3. CCC. Grains and similary handled commodities, loan and purchase programs. Interim rule. Effective date: 4/6/88. 53 Fed. Reg. 11239.

4 SCS. Soil, water, and related resources; notice of availability of "A National Program for Soil and Water Conservation." Comments due 6/4/88. 53 Fed. Reg. 10135.

5. INS. IRCA; implementation; SAWs; preliminary application definition. Interim rule. 53 Fed. Reg. 11062.

6. IRS Limitations on passive activity losses and credits; notice of public hearing on proposed regulation (6/28/88). 53 Fed. Reg 10104.

7. BLM. Grazing Administration; amendments to the grazing regulations. Final rule. Effective date: 4/28/88. 53 Fed. Reg. 10224.

8. FCIC Federal claims collection; salary offset; IRS tax refund offset. Final rule. Effective date 4/1/88. 53 Fed. Reg. 10526.

9. FCIC. Combined Crop Insurance regulations. Effective date: 4/19/88. 53 Fed. Reg. 12759.

10. FCIC. General Crop Insurance regulations; witbdrawal of notice of proposed rulemaking. 53 Fed. Reg. 12774.

11. FCS. Capital Corporation; organization. Final rule: Withdrawal. Effective date: 4/13/88. 53 Fed. Reg. 12140.

12. FCS. Financial Assistance Corporation: securities; book entry procedures. Final rule. 53 Fed. Reg. 12140.

13. FCS. Announcement of public hearings on borrower rights (6/8/88); announcement of public hearings on minimum permanent capital standards (6/9/88). 53 Fed. Reg. 15402.

14. APHIS. Horse protection regulations; interim rule with request for comments. Comments due 6/27/88. 53 Fed. Reg. 14778.

15. APHIS. Horse protection. Interim rule with request for comments. Comments due 6/27/88. 53 Fed. Reg. 15640.

16. APHIS. Genetically engineered organisms and products; exemption for interstate movement of certain microorganisms under specified conditions. Final rule. Effective date 4/20/88. 53 Fed. Reg. 12910.

17. APHIS. Availability of environmental assessment and finding of no significant impact relative to issuance of a permit to field test genetically engineered insect tolerant tomato plants. 53 Fed. Reg. 12551.

18. APHIS. Importation of fruits and vegetables. Final rules. Effective date: 5/31/88. "Removles] language authorizing states to enforce safeguards other than those contained in federal regulations concerning the entry of fruits and vegetables into the U.S. for local consumption." 53 Fed. Reg. 15357.

19. FmHA. Highly erodible land and wetland conservation. Final rule, correction. 53 Fed. Reg. 14777.

20. FmHA. Appeals procedure; national appeals staff establishment. Proposed rule. 53 Fed. Reg. 12695.

– Linda Grim McCormick

Job Fair

The American Agricultural Law Association's Fourth Annual Job Fair will be held concurrently with the 1988 Annual Meeting October 13 and 14, 1988, at the Westin Crown Center in Kansas City. An efficient link between employers and prospective employees, Job Fair offers a means to interview either attorneys interested in career changes or highly qualified students.

Prior to the annual meeting, known positions and information regarding scheduled on-site interviews will be circulated to ABA-approved law school placement offices by the Job Fair Coordinator. Placement offices will forward resumes to interested firms and organizations. Employers can schedule interviews any time during the conference.

To obtain further information or to arrange an interview, please contact: Gail Peshel, Director, Career Services and Alumni Relations, Valparaiso University, School of Law, Valparaiso, Indiana 46383, 219 / 465-7814

Proposed regs implementing Congressional changes in payment limitation rules for 1989 crop year

The USDA has promulgated proposed rule changes implementing the Congressional amendments to the payment limitation rules. These changes, which were enacted as subtitle C of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 99-203, will go into effect for the 1989 crop year. The proposed regulations are found at 53 Fed. Reg. 11474 (April 6, 1988), and will add a new 7 C.F.R. Part 1497. *– Neil D. Hamilton*

AG LAW CONFERENCE CALENDAR

Ninth Annual American Agricultural Law Association Conference and Annual Meeting.
Oct. 13-14, 1988. Westin Crown Center, Kansas City, MO.
Topics to include: annual review of agricultural law; international agricultural trade; farm program participation; agriculture and the environment; agricultural taxation; and agricultural financing and credit.
Reserve these dates now. Details to follow

Environment Litigation.
June 20-24, 1988. University of Colorado School of Law, Boulder, CO.
Topics to include: particular aspects and problems in actions under NEPA and analogous state court litigation under "little NEPA" laws; preliminary injunctions in air and water pollution, hazardous waste, and other environmental cases; and evidentiary problems.
Sponsored by ALI-ABA
For more information, call 215-243-1630 or 1-800-CLE-NEWS

1988 Summer Agricultural Law Institutes.
Drake University, Des Moines, IA.
June 6-9: Federal income tax issues – agricultural.
June 13-16: Water law and agriculture.
June 20-23: Agricultural bankruptcy and secured transactions.
June 27-30: Federal farm legislation – selected subjects.
July 5-8: Iowa agriculture finance law.
July 11-14: Agricultural lender liability.
For more information, call 515-271-2065

Fifth Annual Agricultural Law Institute.
June 10, 1988. Hotel Sofitel, Bloomington, MN.
Topics to include: agricultural credit and financing; current issues in agricultural taxation; and agriculture and water quality.
Sponsored by Hamline University School of Law.
For more information, call 612-641-2336

Sixth Annual Western Mountains Bankruptcy Law Institute.
July 2-6, 1988. Jackson Lake Lodge, Jackson Hole, Wyoming.
Topics include: lender liability, agricultural issues, and recent developments.
Sponsored by Institutes on Bankruptcy Law.
For more information, call 404-535-7722.

California's Proposition 65 – Implications for Agriculture

by Mason E. Wiggins, Jr.

Proposition 65, "The Safe Drinking Water and Toxic Enforcement Act," [hereinafter cited as Act] was adopted by the California electorate in November 1986. The principal objective of the initiative is to protect the state's drinking water from toxic contamination. A second aspect requires a warning to any person before his or her exposure to chemicals known to cause cancer or reproductive toxicity. While environmentalists laud the passage of this initiative as revolutionary, it has been criticized by the business community as extreme, ambiguous, and vague in some of its most important provisions.

Implementation of the Act is a subject of great concern to the California business community because the new law clearly requires action on the part of business, state government, and other affected parties. The California Health and Welfare Agency was designated by Governor Deukmejian as the lead agency in developing specific implementing regulations. At this writing no final regulations or guidelines have been promulgated. Thus, no one is quite sure what is required for full compliance. Emergency regulations were published February 17, 1988, effective for 120 days – it appears the Agency will extend these regulations for another 120 days, at which time it must publish final regulations.

The provision requiring warnings became effective February 27, 1988, as did a "bounty hunter" clause that may generate an enormous amount of litigation. Individuals can file suits against alleged violators of the law and share twenty-five percent of fines collected.

Proposition 65 – The Law

The Act sets forth a finding by the people of California that hazardous chemicals pose a serious potential threat to their health and well-being. Section 1 of the Act states:

The people of California therefore declare their rights:

(a) To protect themselves and the water they drink against chemicals that cause cancer, birth defects, or other reproductive harm.

(b) To be informed about exposures to chemicals that cause cancer, birth defects, or other reproductive harm.

(c) To secure strict enforcement of the laws controlling hazardous chemicals and deter actions that threaten public health and safety.

(d) To shift the cost of hazardous waste cleanups more onto offenders and less onto law-abiding taxpayers.

Section 2 of the Act sets out the prohibitions and the enforcement mechanisms. The main focus of the legislation is contained in two amendments to the California Health and Safety Code [hereinafter cited as Code]:

25249.5. *Prohibition On Contaminating Drinking Water With Chemicals Known to Cause Cancer or Reproductive Toxicity.* No person in the course of doing business shall knowingly discharge or release a chemical known to the state to cause cancer or reproductive toxicity into water or onto or into land where such chemical passes or probably will pass into any source of drinking water, notwithstanding any other provision or authorization of law except as provided in Section 25249.9.

25249.6. *Required Warning Before Exposure to Chemicals Known to Cause Cancer or Reproductive Toxicity.* No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual, except as provided in Section 25249.10.

Enforcement

The provisions for civil and criminal penalties are stringent. Any person who, in the course of doing business, violates the statute faces a civil penalty not to exceed $2,500 per day. Penalties are increased for hazardous waste disposal at a facility that has not been issued a proper permit – from $5,000 to $100,000 for each day of violation. If the disposal causes bodily injury, the violator, if convicted, may be punished by a criminal penalty of up to thirty-six months imprisonment and/or up to $250,000 per day per violation. Code §§ 25249.7 and 25189.5(d).

The initiative also requires that municipal, county, or state employees advise the local Board of Supervisors and the local health officer when they discover an illegal discharge or a threatened illegal discharge of a hazardous waste. A knowing and intentional failure to report information may subject the employee, if convicted, to serious penalties – fines up to $25,000, loss of employment, and even imprisonment. Code § 25180.7.

Of particular concern is the right of any person to sue for an injunction to prevent violations of the Act, once law enforcement officials decline to take action. Those bringing suit will be awarded a "bounty" – twenty-five percent of the civil and/or criminal penalties collected. Code § 25249.7(d).

The "bounty hunter" provision raises the stakes both for the public and for business. Agriculture appears to be far more vulnerable than most businesses because its contact with the public is so pervasive. Irrigation return flow ditches, fields on which farm chemicals have been applied, ponds, equipment wash-down areas, wells, and underground storage tanks are all areas of particular vulnerability for farmers because of the risk of chemicals reaching drinking water supplies. Sales of treated agricultural commodities and employment of persons in sprayed fields will also give rise to potential liability under the Act.

List of Chemicals

The initiative requires that the governor, in consultation with the state's qualified experts, publish a list of those chemicals known to the state to cause cancer or reproductive toxicity. The list must be updated in light of additional knowledge and republished at least once per year. The initiative provides that the list of toxic substances shall include those identified in California Labor Code section 6382(b)(1) and (d). Code § 25249.8.

The toxic substances identified in the Labor Code include those on the International Agency for Research on Cancer (IARC) list, on the National Toxicology Program (NTP) list, and in the Occupational Safety and Health Act (OSHA)

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rules for mixtures containing one tenth of one percent of a listed carcinogen.

On February 27, 1987, Governor Deukmejian announced the formation of a twelve-member science advisory panel of the "state's qualified experts". The panel members provide advice and counsel both at formally convened panel and subcommittee meetings and in response to written requests submitted to them by the governor or the Health and Welfare Agency. The panel also nominates chemicals for regulation under the Act. Code § 25249.8.

On February 27, 1988 the governor issued a list of prohibited chemicals including those on the referred lists that had heen shown to be human carcinogens, but excluding those on the referred lists demonstrated to be harmful solely by animal tests. On the day the governor's list was released, the proponents of Proposition 65 filed suit in California Superior Court seeking to have included the entire lists referred to in the initiative The Attorney General of California refused to defend the governor in this lawsuit. At an April 24, 1987 hearing the court granted plaintiff's motion for a preliminary injunction requiring the governor to list approximately 200 additional chemicals by May 11, 1987. The governor has complied with this ruling, but has appealed the decision – at this writing the final outcome is unknown.

In the meantime, however, the panel of experts is likely to suggest additions to the governor's list from the chemicals nominated and included by the panel on its list of "candidate toxic substances" irrespective of what happens in the lawsuit. The IARC and NTP lists also are continually being expanded. The Health and Welfare Agency is also polling state and federal agencies to ascertain which chemicals they have required to he labelled as carcinogens or reproductive toxins – the criteria for listing under the Act.

Discharge of Prohibited Chemicals

The discharge prohibition applies to any discharge of a chemical on the governor's list that may come into contact with any source of drinking water. The Act defines a source of drinking water to mean "either a present source of drinking water or water which is identified or designated in a water quality control plan adopted by a regional board as being suitable for domestic or municipal uses." Code § 25249.11(d).

California's State Water Resources Control Board has unofficially voiced the opinion that not only surface water but all of California's groundwater is a source of drinking water. The Health and Welfare Agency has also concluded that the Act's definition applies both to surface water and groundwater. Hence, any discharge into or onto land is suspect. Regional water control plans vary widely in degree of specificity in identifying and classifying groundwater sources.

Including all water sources will make it difficult to establish that a discharge has not passed into a source of drinking water. If suit is brought under the Act it is up to the alleged violator to prove that the chemical did not, in fact, reach any water supply. Code § 25249.9(b). This shifting of the burden of proof by the Act will make it difficult in some instances to prove that a particular runoff did not reach any source of drinking water.

Warnings as to Prohibited Chemicals

The warning provisions apply to any exposure or potential exposure of persons occurring in the course of doing business. There is potential exposure when a product containing a listed prohibited substance is used by a manufacturer, when consumer products containing prohibited substances are marketed, or when any person is exposed to emissions of industrial facilities or to farm chemicals.

Exemptions from Discharge Prohibition

The law applies only to persons acting "in the course of doing business." The Act specifically exempts any person employing fewer than ten employees. The Act also does not apply to any municipal, state or federal department or agency. Interestingly enough, the Act does not apply to any entity operating a public water system. Code § 25249.11(b).

The initiative does, however, provide defenses to a person charged with an illegal discharge. The law shall not apply to any discharge or release that takes place less than twenty months subsequent to the listing of the chemical in question. Code § 25249.9(a). The discharge is also not prohibited if it will not cause any significant amount of the listed substance to enter any source of drinking water. Code § 25249.9(b)(1). "Significant amount" means any detectable amount unless the discharger can show (1) if carcinogenic it poses no significant risk assuming lifetime exposure at the level in question; or (2) if a reproductive toxin, it will have no observable effect assuming exposure at one thousand times the level in question. The burden of proving the facts for exemption is on the defendant. Code §§ 25249.10(c) and 25249.11(c).

Exemptions from Warning Requirement

The initiative also provides exemptions from the warning requirement. The warning requirement does not apply to exposure to chemicals where governing federal law preempts state authority. The law does not apply to any exposure that takes place less than twelve months subsequent to the listing of the chemical in question. The warning requirement is also not required if the person responsible can show that the exposure poses no significant risk. Code § 25249.10.

"Warning," within the meaning of the Act, need not be provided separately to each exposed individual and may be provided by general methods such as labels on consumer products, inclusion of notices in mailings to water customers, posting of notices, publication in public news media, and the like, provided that the warning accomplished is clear and reasonable. Code § 25249.11(f).

Discussion of Warning Requirements for Products Destined for Human Consumption

The limitations of this paper and its scope preclude a discussion of every aspect of the Act. The following is a short discussion of some problems that may arise when the Act is applied to water and products intended for human consumption.

Proposition 65 was promoted as an Act aimed primarily at landfills and industrial polluters. Its real impact, however, will be on farms and agribusiness. California's economy has boomed through its ties to agriculture. Agribusiness in California is very diverse, ranging from wineries and citrus groves to seafood packing houses. The water discharges from these facilities that contain even traces of the substances on the Governor's list could be challenged in court when this part of the law goes into effect.

(Continued on page 6)

Of great concern are the requirements (1) that any discharge of a prohibited listed chemical into a source of drinking water be done "knowingly" (Code § 25249.5) and (2) that no person shall "knowingly and intentionally" expose any individual to a chemical on the governor's list without first giving "clear and reasonable warning." Code § 25249.6. The definitions of "knowingly," "intentionally," and "clear and reasonable" have yet to be clarified.

Some definitions have been suggested. The food industry is concerned about the absolute approach. Some traces of a prohibited listed chemical, if used in the production of a product, will remain when the product is sold, even if undetectable. Therefore anything sold which has been treated by a chemical on the governor's list will result in the intentional exposure of the consumer. Under this view practically every food product sold would need a warning label.

On the other hand, the practical approach would require a detectable presence. The practical approach puts more weight on "intentional presence." However, the absolutists will argue for a very narrow construction, and if they prevail they get twenty-five percent of the penalty.

Federal law, by analogy, may give some guidance. The FDA uses the Delaney Clause to prohibit the use of food additives that are shown to contain a carcinogenic material that poses a cancer risk greater than *de minimis*. A former FDA commissioner once ruled that a nondetectable amount of a suspect material was deemed to be present in a plastic bottle because "scientific theory" postulated that some migration would occur between a plastic wall and a liquid material. However, when this "scientific theory" came before the late Judge Harold Leventhal on appeal, he found a *de minimis* exception pursuant to the Delaney Clause.

What constitutes "clear and reasonable" warnings? No standard exists even in the emergency regulations. Warnings drafted now may have to be defended in years to come. Products are being canned now that have a shelf life of more than twelve months – this could present a potential problem in the future. Of course, the initiative calls for a reasonable warning, not a one-on-one communications.

The business and agriculture communities of California have reason to worry as Proposition 65 is implemented. Unless the lead agency is very specific in its implementation guidelines as to what has to be labelled or what needs a warning, agribusiness in California may overreact as it seeks to protect itself from liability.

The Grocery Manufacturers of America have pointed out that virtually all food naturally contains arsenic and other trace elements known to be carcinogenic. There are also chemicals in beer and wine and roasted and broiled food that may be added to the list of toxics, if it is determined that they contain carcinogens, as some studies suggest. *See*, Abelson, *California's Proposition 65*, 237 Science 1553, (25 September 1987) [hereinafter cited as *Science*].

The fresh produce industry uses many different pesticides. Some have been found by the federal government to be either carcinogens or reproductive toxins. The federal government has established residue tolerances for such pesticides at such a minute level that consumption is considered to be safe. However, Proposition 65 allows no residue of substances that the state has determined to be carcinogenic or a reproductive toxin. The producer must prove that exposure poses no significant risk or that a clear warning of the risk has been given to the consumer.

This warning requirement presents a serious dilemma for growers. There are fifty to ninety pesticides registered for use for each fruit and vegetable. However, only a few pesticides are used during any one growing season and the choices often are dictated by the weather and other conditions not controlled by the grower.

Growers can elect to list and warn only as to pesticides likely to be used during the upcoming growing season and run the risk of omission; or they can elect to publish a list of all the pesticides available for use. In the latter case, pesticides not used on the fruit or vegetable purchased by the consumer would inevitably be listed on the warning notices.

This type of overkill warning could confuse and unduly frighten the average consumer. Milton Russel, who until recently was assistant administrator for Policy and Planning and Evaluation at the Environmental Protection Agency, has made the following observation:

> Real people are suffering and dying because they don't know when to worry, and when to calm down. They don't know when to demand action to reduce risk and when to relax, because health risks are trivial or simply not there. I see a nation on worry overload. One reaction is free floating anxiety. Another is defensive indifference. If everything causes cancer, why stop smoking, wear seat belts or do something about radon in the home? Anxiety and stress are public health hazards in themselves. When the worry is focused on phantom or insignificant risks it diverts personal attention from risks that can be reduced. *Science* at 1553.

Many suggest that it is the federal government that should decide safety questions as to food additives or as to pesticide use. The federal government, particularly the FDA, arguably has the knowledge, the rules, and the experience to decide what levels of pesticides are safe in our food supply. Some argue that setting "significant risk" levels, using formulas established by the EPA, FDA or other scientific bodies, may alleviate some of the anxiety. Others suggest that Congress should preempt states from requiring warnings for food at variance with warnings already required by federal law. See, Pelzer, Catching Proposition 65 Fever, AgriFinance, 28-29 (November 1987) [hereinafter cited as AgriFinance].

The National Impact

As Proposition 65 takes effect, other areas of the country will be watching. In some states environmentalists have already tried to push through legislation similar to the California law. Last year initiatives in Louisiana and Missouri failed, as did legislation efforts in Massachusetts, New York, and Oregon. *AgriFinance* at 29.

However, Iowa passed a groundwater protection law that taxes sales by chemical manufacturers of nitrogen fertilizer to help develop a state fund for various water quality programs, including more research into non-chemical alternatives for agriculture. Telephone interview with Robert D. Foreman, Associate Director, Legislative Affairs, Government Affairs Division, National Paint and Coatings Association, Washington, D.C., (January 15, 1987) [hereinafter cited as Foreman].

At this writing, the Massachusetts House has H.B. 6118 – "The Toxic Use Reduction Act" – pending on the floor. However, quick passage appears unlikely. Masspirg, the state public interest group, has said that it will take the issue to a ballot initiative if the legislature does not adopt the act. Foreman.

In Oregon, although the legislature will not meet in 1988, a study commission has been formed to identify potential legislation for the next session. In Tennessee, Senate Bill 1821 has been introduced and it is identical to California's Proposition 65. Similar legislation is likely to be introduced in Louisiana and North Carolina. *AgriFinance* at 29.

Sources also report that the Sierra Club, one of the primary supporters of Proposition 65 in California, has received inquiries from its chapters in Colorado, Arkansas, and New York. Foreman.

Environmentalists may turn to Congress if states fail to legislate or if enacted legislation is viewed as too lax. Agriculture and other business interests may do the same if state measures are viewed as too stringent.

Bills have already been introduced in the U.S. Senate that would allow states to retain authority to set tolerance levels more stringent than those in effect in federal standards. House members, on the other hand, appear to favor a national standard to avoid the setting of varying tolerances by the several states. *AgriFinance* at 29.

Mediation funds

Congress has appropriated $7,500,000 for each of the fiscal years 1988 through 1991 to fund matching grants for state mediation programs. Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1662. A state may receive a maximum of $500,000 per year of matching funds for the operation and administration of a state run agricultural loan mediation program.

To qualify for grants a state must have in place a mediation program which:

(1) provides for mediation services to be provided to producers, and their creditors, that, if decisions are reached, result in mediated, mutually agreeable decisions between parties under an agricultural loan mediation program;

(2) is authorized or administered by an agency of the state government or by the governor of the state;

(3) provides for the training of mediators;

(4) provides that the mediation sessions shall be confidential; and

(5) ensures that all lenders and borrowers of agricultural loans receive adequate notification of the mediation program. Pub. L. No. 100-233, 101 Stat. 1662, 1663, section 501(c).

The process of qualification is straightforward. The governor of a state sends to the United States Secretary of Agriculture a description of the agricultural mediation program of the state and a statement certifying that the state has met all of the above requirements. The Secretary of Agriculture has fifteen days to decide whether the state qualifies for matching grants. If the Secretary certifies that the state qualifies, he must provide financial assistance to the state within sixty days. The assistance capped at $500,000 per year per state is further limited to not more than fifty percent of the cost of the operation and administration of the state program.

What happens when the creditor involved in mediation is a creditor of a federal lender? The new law has a special section addressing the issue of waiver of mediation rights by Farm Credit and FmHA borrowers. Farm Credit institutions may not make a loan secured by a mortgage on agricultural property conditional on a borrower's waiver of rights under the agricultural loan mediation program of any state. FmHA, when making, insuring, or guaranteeing any farm program loan to a farm borrower may not require a borrower to waive any mediation rights.

Farm Credit and FmHA are required to cooperate in good faith with requests for information or analysis of information made in the course of mediation and must present and explore debt restructuring proposals advanced during mediation.

Patricia Conover

State Roundup

FLORIDA. *Cattle rancher fails to state cause of action on takings charge.* The appellant cattle ranch owner in *Farish v. South Florida Water Management District*, 515 So.2d 369 (Fla. App. 4 Dist. 1987), alleged that the appellee water management district had taken his property without just compensation. The appellant claimed that the district had made an unreasonably low offer to purchase the appellant's cattle ranch where the district was going to dam a canal and thereby flood sixty-seven percent of the ranch. The appellant alleged that its ranch operations would be destroyed by the flooding. The trial court granted the district's motion to dismiss for failure to state a cause of action, and the appeals court affirmed without stating a rational for its holding. – *Sid Ansbacher*

GEORGIA. *Timber v. hunting rights.* In the case of *Abernathy v. Georgia Kraft Co.*, 364 S.E.2d 851 (1988), the landowner leased hunting rights to appellant and thereafter leased timber rights to appellee. The Georgia Supreme Court held that in the absence of express restrictions, the landowner, acting in good faith, may manage his land freely, including leasing the timber rights, even though it injures hunting. – *Daniel M. Roper*

GEORGIA. *Horse straying.* In *Nichols v. Frey*, 366 S.E.2d 212 (1988), the Georgia Court of Appeals held that the defendant was not entitled to summary judgment since his opinion that his horses had fought, resulting in a hole in the fence through which they strayed onto a highway causing an accident, was insufficient for the purposes of summary judgment to negate the inference that the escape of the horses had resulted from the defendant's own negligence. – *Daniel M. Roper*

IOWA. *Activities of conservator as material participation for 2032A purposes.* In *Mangels v. U.S.*, 828 F.2d 1324 (1987), the district court had ruled in favor of the IRS that the plaintiff, as conservator of the share estate, had acted similarly to a crop-charge landlord, and thus the estate was not eligible for Section 2032A special use valuation.

The Eight Circuit reversed, holding that the activities of the conservator were attributable to the decedent. The court noted that strictly limiting eligible participation to acts by "the decedent or a member of the decedent's family" would discourage the use of conservatorships, an undesired and unwarranted result.

The court further held that the regulations required no comparison between the activities of a decedent (or a conservator) and the activities of a landlord in a typical crop-share lease.

Finally, the court found in the particular facts of the case that the activities of the conservator met the material participation requirements. – *Martin Begleiter*

MONTANA. *Bank's obligation of good faith and fair dealing.* Farmer owed Bank $90,000. Bank notified farmer that Bank could not provide operating monies unless it obtained a guarantee of farmer's debt from Farmers Home Administration. FmHA issued a Contract of Guarantee to the Bank, which guaranteed a line of credit up to a certain ceiling on loans made to farmer.

As part of the loan guaranty procedure, the farmer signed a promissory note, which was submitted as part of the application. The note was due seven years later.

The next year, Bank officers told farmer that he would *not* have to keep an escrow account as previously required, but in order to avoid the escrow account, a new promissory note would be required. The new note was for the same face value and interest, but was due in one year instead of seven. Thereafter, in each succeeding year, farmer signed successive notes as advances were made by the Bank and income was applied to the outstanding debt. However, the rate of interest increased substantially with each note.

The FmHA guaranty expired. The Bank then notified farmer that it was unwilling to refinance the debt or provide further operational monies. The Bank therefore liquidated the collateral under the notes, which resulted in the sale of the farmer's entire cattle herd, some crops, and some farm machinery.

Farmer sued the Bank, and a jury awarded the farmer compensatory damages of $104,790 and punitive damages of $100,000. The Bank appealed to the Montana Supreme Court.

In *Weinberg v. Farmers State Bank of Worden*, 752 P.2d, 719 (1988), the Montana Supreme Court noted that the legal obligation of good faith and fair dealing had already been extended in Montana to banks dealing with customers. A bank owes a fiduciary obligation to its customers where a customer and an officer of the bank had entered into a confidential relationship, especially when the bank plays the role of advisor. In this case, the bank officer had counseled the farmer to expand his cattle operation.

– *Donald D. MacIntyre*

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

AALA Distinguished Service Award. The AALA invites nominations for the Distinguished Service Award. The award is designed to recognize distinguished contributions to agricultural law in practice, research, teaching, extension, administration, or business.

Any AALA member may nominate another member for selection by submitting the name to the chair of the Awards Committee. Any member making a nomination should submit biographical information of no more than four pages (in quintuplicate) in support of the nominee. The nominee must be a current member of the AALA, and must have been a member thereof for at least the preceding three years. Nominations should be sent to John Becker, chair, AALA Awards Committee, Penn. State University, Department of Agricultural Economics, University Park, PA 16802; 814-865-7656.

Fifth Annual Student Writing Competition. The AALA is sponsoring its fifth annual Student Writing Competition. This year, the AALA will award two cash prizes in the amount of $500 and $250.

Papers must be submitted by June 30, 1988. For complete competition rules, contact Professor John Becker, Department of Agricultural Economics, Penn. State University, University Park, PA 16802; 814-865-7656.