Agricultural Law Update

VOLUME 4, NUMBER 6, WHOLE NUMBER 42 MARCH 1987

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INSIDE

IN FUTURE ISSUES

Justice delayed is democracy denied.

— Robert F. Kennedy

Contrived "float" violates Packers and Stockyards Act

In the case of *Beef Nebraska Inc. v. United States, U.S. Department of Agriculture*, (USDA) 807 F.2d 712 (8th Cir. 1986), Beef Nebraska, a "packer," was found to have delayed the collection of funds by sellers through the use of checks drawn on a distant "country" bank. The Eighth Circuit held this activity was violative of the unambiguous language of section 228b(c) of the Act, which provides:

> Any delay or attempt to delay by a...packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an 'unfair practice' in violation of this chapter...

Prior to July 1982, Beef Nebraska of Omaha used checks drawn on the Omaha National Bank (ONB) to pay sellers of livestock. Because ONB was classified as a "city" bank by the Federal Reserve System, the check cleared according to schedules applicable to "city" banks — ordinarily the same day they were presented to the Federal Reserve Bank in Omaha.

Because these checks drawn on the accounts of ONB's customers were presented to the Federal Reserve Bank throughout the day, ONB could not precisely predict the value of checks that would clear on any given day. Thus, the packer had either to maintain large balances in its ONB account, or pay large amounts of overdraft charges.

On June 28, 1982, Beef Nebraska opened a "controlled disbursement" checking account at ONB. Checks drawn on this account appeared to have been drawn on the State Bank of Palmer, an institution classified as a "country" bank by the Federal Reserve System.

In reality, ONB would intercept the check at the Federal Reserve Bank, process it, and deduct the amount from its customer's controlled account. The State Bank of Palmer had no contact with the check. Because of the State Bank of Palmer's "country" status, checks drawn on its accounts ordinarily cleared a day later than those drawn on ONB. ONB took advantage of this extra day to accurately determine how much its customer's controlled account would be debited the next business day.

(continued on next page)

Conservation easements: A new option for delinquent FmHA borrowers

On Jan. 15, 1987, the Farmers Home Administration (FmHA) published draft regulations to implement Section 1318 of the Food Security Act of 1985, which authorizes the agency to cancel farmer/borrowers' debts secured by farmland in exchange for conservation easements. *See*, 52 Fed. Reg. 1,763.

As things now stand, here is the basic shape of the program:

Eligible borrowers include those with FmHA farmer program loans closed prior to Dec. 23, 1985, and who are unable to service their debt.

Eligible lands include: wetlands, highly erodible land, and other uplands that are important as wildlife habitat, scenic areas or floodplain. Unless wetland, it must have been row-cropped each of the 1983 through 1985 seasons. Normal rotations in hay and participation in set-asides count.

Debt will be canceled in proportion to the amount of farmland over which an easement is placed. For example, if half the land serving as FmHA collateral is placed under easement, then half of the borrower's debt may be canceled. Easements will restrict various land uses as necessary to achieve conservation objectives. Responsibility for enforcing easements will fall upon government agencies and private organizations that volunteer.

This "easement-for-credit swap" option will be considered along with other current FmHA work-out alternatives.

The American Farmland Trust has worked hard to encourage the FmHA to go ahead with this discretionary program, believing that it affords an excellent opportunity to serve the interests of both resource conservation and financially-troubled producers.

The deadline for public comment on the regulations was Feb. 17, 1987, and the FmHA apparently intends to issue final regulations sometime this spring.

— Edward Thompson Jr.

PACKERS AND STOCKYARDS ACT VIOLATION/CONTINUED FROM PAGE 1

The Eighth Circuit, in Beef Nebraska's petition to set aside the order of the USDA's judicial officer forbidding the above practice, determined that the phrase "collection of funds" must be defined according to its common meaning because the phrase is not defined in the Act. This meaning was found to be "the securing of payment of a check from money on deposit on which the check is drawn." *Id.* at 717.

Beef Nebraska, by using checks drawn on the State Bank of Palmer, extended the time necessary for a seller of livestock to secure payment of Beef Nebraska's check. The common meaning of the language used in section 228b(c) compelled the conclusion that Beef Nebraska's actions "delayed" the "collection of funds."

The court also found that since section 228b(c) prohibits "any" delay, the fact that there may have been only a one-day delay (or that there was not always a delay) was of no consequence.

— Michael B. Thompson

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Federal Register in brief

The following is a selection of final rules, proposed rules, and notices that have been published in the *Federal Register* in the last few weeks:

1. Soil Conservation Service; Revision of Farmland Protection Policy Act; Proposed Rule. 52 Fed. Reg. 1,465.

2. Immigration and Naturalization Service (INS); Preliminary Advice Pending Implementation of the Immigration Reform and Control Act of 1986; Notice of Advice. 52 Fed. Reg. 52-1,675.

3. Farmers Home Administration (FmHA); General Revision of Farmer Program Regulations; Proposed Rule. 52 Fed. Reg. 1,706. The proposed rule would amend FmHA regulations to, among other things: 1) provide for the use of ratios and standards and a preapplication for determining the degree of potential loan risk on insured loans; 2) remove appraisal regulations from CFR; 3) require each state to publish unit prices for farm commodities each year; 4) authorize the State Director to overturn a favorable County Committee decision; 5) prohibit loans for advance payment of cash leases; 6) require crop insurance; 7) restrict use of balloon payments; 8) restrict new loans to previously FmHA foreclosed borrowers and some previous borrowers whose FmHA debts have been debt settled; 9) require financial information from all members of an entity and delete the reference to principal members; 10) add provisions for farm debt restructure and conservation set-aside easements; and 11) further clarify the use of proceeds from the sale of chattel security and the release of chattel security. The comment period for these amendments was extended to March 19, 1987 by an Extension of Comment Period, 52 Fed. Reg. 4,913.

4. INS; Availability of Preliminary Draft Regulations Implementing Certain Provisions of the Immigration Reform and Control Act of 1986. 52 Fed. Reg. 2,115.

5. FmHA; Notice of Revision of Privacy Act System of Records. 52 Fed. Reg. 2,247. "This action is necessary to permit financial consultants, advisors, or underwriters access to FmHA records for the purpose of developing packaging and marketing strategies for the sale of FmHA loan assets."

6. Commodity Credit Corp. (CCC); Referral of Delinquent Debts to the Internal Revenue Service for Tax Refund Offset; Interim Rule. 52 Fed. Reg. 2,393. Comments receivable until March 23, 1987.

7. Internal Revenue Service; Income Tax; Certain Elections Under the Tax Reform Act of 1986; Temporary Regulations. 52 Fed. Reg. 3,623. These regulations apply to elections made after Oct. 22, 1986, unless otherwise indicated.

8. Federal Grain Inspection Service; Optimal Grain Grading; Request for Public Comment. 52 Fed. Reg. 4,151. Comments due by April 13, 1987.

9. CCC; Conservation Reserve Program; Final Rule. 52 Fed. Reg. 4,265. Effective date: Feb. 6, 1987.

10. APHIS; Requirements and Standards for Accredited Veterinarians; Conflict of Interests; Notice of Extension of Comment Period for Proposed Rule. 52 Fed. Reg. 5,308. Written comments due March 25, 1987.

— Linda Grim McCormick

Payment cap

With the signing of the corrected Continuing Resolution (H.R.J. Res. 738, Pub. L. No. 99-591) on Oct. 30, 1986, a new $250,000 limit on farm payments was adopted for the 1987 crop year. It is to be continued until the authority of the Food Security Act of 1985 expires.

Labeled a "foot in the door" response by supporters and opponents alike, the new limit (actually a combination of two separate limits) promises to be just the opening salvo in the coming Congressional battles concerning farm program expenditures — especially the income support programs.

The new $250,000 payment limitation retains (unchanged) the separate $50,000 per farmer limitation on deficiency and land diversion payments. These payments are combined into the $250,000 limit, which will now include disaster payments, resource adjustment payments, marketing loan differential gain in the rice and cotton programs, increased deficiency payments caused by the implementation of the Findley loan option for wheat and feed grains, as well as any inventory reduction payments.

The $250,000 limit will not include regular, non-recourse loans as was originally promoted by the provision's sponsor, Rep. Silvio Conte, D-Mass. A $250,000 limit on honey loans is included, however.

The measure also requires the Secretary of Agriculture to report by March 1, 1987 to Congress on the results of a U.S. Department of Agriculture study on the payment limitation issue.

Finally, the measure allows the Secretary to adjust upward the application of the $250,000 limit in the event the Secretary determines that loan forfeitures will substantially increase, that market prices will collapse, or that substantially fewer acres will be enrolled in the crop programs.

— Chuck Culver

Software preliminary injunction denied

The Fifth Circuit has declined to issue a preliminary injunction based on copyright and trade secret claims. *Plains Cotton Cooperative Association v. Goodpasture Computer Service Inc.*, 807 F.2d 1256 (5th Cir. 1987).

Plains Cotton Cooperative Association had sought to enjoin competitors from marketing, distributing, or otherwise using, allegedly stolen or copied computer software.

The computer software was designed to assist cotton producers by allowing subscribing users to retrieve desired cotton market information. Subscribers did not have access to documentation, programming, design, or functional specifications of the computer software programs.

Competitors, including former employees of Plains Cotton Cooperative Association, had developed a similar personal computer version of a cotton exchange program. The major difference was that the competitors' program was designed for personal computers, whereas Plains Cotton Cooperative Association's system used a mainframe computer.

The first reason for denying the preliminary injunction was that Plains Cotton Cooperative Association had not shown that harm stemming from the alleged infringement of copyright was not compensable in damages.

The court also found that Plains Cotton Cooperative Association had not demonstrated a substantial likelihood of success on the merits because of substantial evidence that the competitors had not copied its program. This evidence operated to refute both the copyright and the trade secrets claims.

— Terence J. Centner

No reinstatement of voided lien

The case of *In re Newton*, 64 B.R. 790 (Bankr. C.D. Ill. 1986), involved the question of whether a grain dealer who bought crops from the farmer/debtor in possession took free of a bank's security interest.

The bank had loaned the farmer $123,800, d taken a security interest in crops to be anted in the coming season. The farmer, with intent to defeat the bank's interest, filed bankruptcy before planting the crops — thus preventing attachment of the bank's lien.

During the pendency of the bankruptcy, the crop was sold to the grain dealer. The dealer was convinced to issue the check for the proceeds to the farmer alone. The farmer's Chapter 11 bankruptcy was dismissed later for failure to prosecute. A liquidation chapter in bankruptcy was subsequently filed and the farmer discharged.

The bank asserted that although section 552 prevented attachment of the lien, the dismissal of the first chapter restored its lien under section 349(b). The bank's position was that the grain dealer (who had notice of the crop note) was not a good faith purchaser.

The court held that section 349(b) does not provide for reinstatement of a security interest cut off by section 552.

Rather, section 349(b) provides only for the reinstatement of liens voided under section 506(d) unless the court for cause orders otherwise. Therefore, the bank did not have a perfected security interest in the farmer's crop.

Of tangential interest is the bankruptcy court's questionable jurisdiction to hear this matter.

— Patricia A. Conover

State agricultural bargaining provision excised

In the August 1984 issue of *Agricultural Law Update*, we reported the Supreme Court's decision in *Michigan Canners and Freezers Association Inc. v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461 (1984), concerning federal preemption of certain state regulations relating to agricultural bargaining associations.

Although *Michigan Canners* involved a Michigan statute, it was suggested that a Maine statute which precludes handlers from contracting with others while negotiating with a bargaining association might con- in a similar infirmity.

The Supreme Judicial Court of Maine reached this anticipated conclusion in *Bayside Enterprises Inc. v. Maine Agricultural Bargaining Board*, 513 A.2d 1355 (1986). The court affirmed a lower tribunal judgment that section 1958(4) of the Maine Agricultural Marketing and Bargaining Act, Me. Rev. Stat. Ann. tit. 13, Sections 1953-1965 (1981) is preempted by the federal Agricultural Fair Practices Act (AFPA, 7 U.S.C. Sections 2301-2306 (1982).

Relying on *Michigan Canners*, the Maine court concluded that the Maine statute went beyond the AFPA in more extensively regulating the activities of producers' associations. Contrary to the policy declarations of the AFPA, the Maine statute effectively coerced independent producers to join an association in order to avoid being closed out of the marketplace.

The court excised the offensive section, and allowed the rest of the statute to continue to regulate the relationship between handlers and associations.

— Terence J. Centner

AG LAW CONFERENCE CALENDAR

Seminar on Bankruptcy Law and Rules.

March 26-28, 1987, Marriott *Marquis* Hotel, Atlanta, GA.

Topics include farm bankruptcy.

Sponsored by the Southeastern Bankruptcy Law Institute.

For further information, contact Myra Bickerman at 404/396-6677.

Agricultural Labor Management Developments 1987.

March 30-31, 1987, The Dickenson School of Law, Carlisle, PA.

Sessions on the Immigration Reform and Control Act of 1986, "right-to-know" legislation and pesticides, labor/management relations, immigration reform, employer responsibilities, role of state government in farm labor, effective personnel management practices, and dispute resolution techniques.

Sponsored by The Dickenson School of Law and others. For more information, call: 717/243-5529, Ext. 286.

Agricultural Loans: The New Chapter 12 Law.

April 1, 1987

Locations in the following states: Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Mississippi, Missouri, New York, North Carolina, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia and Wisconsin.

Topics include: A review of Chapter 12, discount rate, procedural and interpretive questions, and representing the creditor or debtor in Chapter 12.

Sponsored by the Continuing Legal Education (CLE) Satellite Network and CLE Institutes or Bar Associations of most of the participating states.

Call 217/525-0744 for specific locations and for further information.

Update on Commercial Law.

April 3, 1987, Creighton University School of Law, Omaha, NE.

Topics include: U.C.C. cases, commercial legislation, and bankruptcy issues.

Sponsored by Creighton University School of Law.

For further information, call Barbara Gaskins, 402 280-3076.

FmHA actions against delinquent borrowers — An update

by Mason E. Wiggins Jr.

Responding to the changes that were taking place in the farm economy and the rural community in the late 1970s, Congress expanded Farmers Home Administration (FmHA) loan deferral authority to farmer programs in the Agricultural Credit Act of 1978. See 1 *Agricultural Law Update* 3 (March 1984). The Act included the following provision:

> the Secretary of Agriculture may permit, at the request of the borrower, the deferral of principal and interest on any outstanding loan made, insured, or held by the Secretary...and may forego foreclosure of any such loan, for such period as the Secretary deems necessary upon a showing by the borrower that due to circumstances beyond the borrower's control, the borrower is temporarily unable to continue making payments of such principal and interest when due without duly impairing the standard of living of the borrower. 7 U.S.C.A. § 1981a.

The FmHA did not voluntarily implement a loan deferral program under this new authority.

Beginning in 1980, the FmHA began to foreclose on the farms of certain delinquent borrowers. *Curry v. Block*, 541 F. Supp. 506 (S.D. Ga. 1982), *aff'd* 738 F.2d 1556 (11th Cir. 1984), was a class action suit for all Georgia farmers either in, or threatened with, FmHA foreclosure.

Because of bad weather conditions and skyrocketing interest rates, the Currys fell behind on their FmHA farm program payments. In September 1980, the FmHA peremptorily accelerated their entire loan balance as a prelude to foreclosure.

No notice of loan servicing alternatives was given. In their lawsuit, the Currys asserted that section 1981a requires the Secretary of Agriculture to give borrowers personal notice of loan servicing alternatives before accelerating their loans, and that regulations implementing loan deferral had to be promulgated by the FmHA.

The Secretary of Agriculture responded that it was within the discretion of the FmHA whether to implement section 1981a, and that, in any event, the FmHA was in the business of making loans and should be treated as a business.

The court held otherwise, finding that the FmHA loan program "was to aid the underprivileged farmer, and, therefore, the farmer's loan program is a unique mixture of social welfare legislation and carefully designed to supplement the business needs of high credit risk farmers." *Id.* at 513.

The court concluded that section 1981a did impose a duty on the FmHA to give personal notice and information to borrowers on alternatives and loan servicing relief. The court also held that the FmHA must issue regulations implementing section 1981a.

Eight months before the Eleventh Circuit affirmed *Curry*, the Eighth Circuit decided *Allison v. Block*, 556 F. Supp. 400 (W.D. Mo. 1982), *aff'd* 723 F.2d. 631 (1983).

The Allisons fell behind in their FmHA payments due to adverse weather conditions and low crop yields. In May 1981, the FmHA accelerated the Allisons' loan, demanding full payment by June 15, 1981 to ward off foreclosure. The Allisons were not given notice of loan servicing alternatives that might have been available.

While reading a farm magazine, Roger Allison discovered that there might be loan payment deferral relief from the FmHA. He requested the relief, and was turned down. Allison later sued, upon learning that the Secretary of Agriculture had not implemented section 1981a.

The Secretary of Agriculture argued that section 1981a merely gave him the discretion to implement a loan servicing deferral plan. The district court held, however, that section 1981a required the Secretary of Agriculture to implement (though not necessarily by regulation) a deferral program with substantive and procedural standards that would include notice and a chance to be heard. The Eighth Circuit affirmed.

Then came *Coleman v. Block*, 562 F. Supp. 1353 (D.N.D. 1983). Coleman, due to poor crop yields, fell behind in his FmHA farm program payments. The FmHA accelerated his loans on Christmas Eve 1981. Coleman appealed within the agency, but was denied. Coleman was never informed by the FmHA of a loan deferral program, or of other servicing alternatives, and he sued.

Coleman began as a class action suit on behalf of North Dakota farmers who held FmHA farmer program loans. The plaintiffs' allegation went beyond *Curry* and *Allison* in that it sought to stop the FmHA's practice of terminating (without notice and before proper acceleration) releases of income security needed for living and operating expenses.

Typically, a FmHA borrower's crops, livestock and the proceeds thereof are subject to a security interest in favor of the FmHA. The FmHA normally releases to the borrower part of the proceeds for necessary living and operating expenses as budgeted in the Farm and Home Plan.

When loans went into default, rather than proceeding to foreclose, the FmHA was often peremptorily refusing to make planned releases of income security. These freeze-outs left delinquent borrowers with few alternatives — liquidate "voluntarily," or file for bankruptcy liquidation.

A preliminary injunction against the FmHA was granted. *Coleman* I, 562 F. Supp. 1353 (D.N.D. 1983). Later, the class was expanded to include a nationwide class of similarly situated borrowers, *Coleman* II, 100 F.R.D. 705 (D.N.D. 1983).

Farmer program borrowers in Alabama, Florida, Georgia, Kansas, Michigan, Minnesota and Mississippi were excluded because of cases pending in those states. In February 1984, Minnesota was admitted to the class action, while a motion to allow Mississippi to enter is pending.

The preliminary injunction for the nationwide class was issued in *Coleman* III, 580 F. Supp. 192 (D.N.D. 1983), and was made permanent in *Coleman* IV, 580 F. Supp. 194 (D.N.D. 1983). Finally, in *Coleman* V, 632 F. Supp. 997 (D.N.D. 1986), the permanent injunction was modified to include borrowers not currently operating under an approved FmHA Farm and Home Plan. Pending matters are titled *Coleman v. Lyng*.

Coleman enjoined the FmHA from loan acceleration, repossession of chattels, demanding voluntary transfer in lieu of foreclosure, terminating *planned* releases of farm production income necessary to pay living and operating expenses, and foreclosure unless the defaulting borrower receives at least 30 days notice. This notice must:

1) inform the borrower of his or her right to an informal hearing to contest the liquidation or termination and to establish eligibility for loan deferral pursuant to 7 U.S.C. § 1981a;

2) provide the borrower with a statement that gives the reasons for the proposed liquidation or termination;

3) inform the borrower of the factors that determine eligibility for loan deferral; and

4) inform the borrower of the official who would preside at the informal hearing. *Coleman* IV, 580 F. Supp. at 210 (D.N.D. 1984).

The FmHA Responds — Slowly

The FmHA continued to take adverse actions against certain delinquent borrowers without promulgating regulations. On Dec. 20, 1983, the FmHA issued a Notice of Temporary Directives to its field staff concerning loan servicing as a response to the preliminary injunction. 49 Fed. Reg. 470 (1984).

The "pretermination" package was designed to be used to give notice of loan servicing (including deferral) while the litigation

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was pending. These guidelines were used by the field staff to liquidate as many as 5,000 delinquent borrowers — until they were withdrawn by the FmHA on Oct. 19, 1984. 49 Fed. Reg. 41,220 (1984).

Interim Rules

On Nov. 30, 1984, the FmHA proposed rules to provide for notifying borrowers of loan servicing alternatives (consolidation, rescheduling, reamortization, deferral, restructuring, subordination by the FmHA, and rewriting loans at limited resource interest rates), and to set standards for their administration. 49 Fed. Reg. 47,007 (1984).

Most FmHA borrowers whose accounts had not yet been accelerated would have these amendments applied to them. The amendments, purportedly, were not to apply to those borrowers who had received both the "pretermination" package and an acceleration notice before Oct. 20, 1984.

Liquidations that occur pursuant to the pretermination package are suspect, however, as the FmHA may have been acting contrary to the *Coleman* injunction. This raises the possibility of remedies, such as a class action suit to reinstate such borrowers if their land is still in FmHA inventory, or

aps, even damages.

From Oct. 19, 1984 until Nov. 1, 1985 (when the final rules were promulgated), the FmHA had no permanent agency regulatory procedure in place.

Emergency Agricultural Credit Act of 1984

Congress, still trying to deal with the farm crisis, passed the Emergency Agricultural Credit Act of 1984, Pub. L. No. 98-258, 98 Stat. 130. On March 24, 1985, the FmHA took steps to implement some of its provisions. 50 Fed. Reg. 11,498 (1985) (to be codified at 7 C.F.R. at scattered parts).

The Act increased the limits on insured operating loans from $100,000 to $200,000 and from $200,000 to $400,000 for guaranteed operating loans. Guaranteed loans are made by commercial banks, production credit associations and private lenders with the backing of a FmHA guarantee.

Borrowers' rights discussed in this article generally do not apply in guaranteed loan cases, but other regulations of more limited scope are pertinent. The Act also set the interest rates the FmHA could charge borrowers when loans are deferred, consolidated, rescheduled, or reamortized.

The FmHA Publishes Final Rules

Nov. 1, 1985, the FmHA published its final delinquent borrower rules. 50 Fed. Reg. 45,750 (1985) (to be codified at 7 C.F.R. at scattered parts) (discussed at 3 *Agricultural Law Update* 3 (November 1985)).

These regulations set standards for the FmHA to follow in taking adverse action on farmer loan accounts. A delinquent borrower is to be sent a "notice of intent to take adverse action," which is to inform him or her that the FmHA intends to accelerate the loan and that servicing options are available. 50 Fed. Reg. 45,761 (1985).

These options include rescheduling, consolidation, reamortization, transfer to limited resource status, subordination by the FmHA, restructuring, and deferral. Additionally, the regulations set standards providing that all options would be exhausted before the loan is accelerated.

If the borrower does not apply for any of the loan servicing options, appeal the decision, or agree to pay off the loan within 30 days of receipt of notice, the FmHA will issue a notice of acceleration, and proceed to force liquidation.

When loan servicing is requested, it is the practice of the FmHA to look at rescheduling, consolidating, reamortization, transfer to a limited resource status, subordination by the FmHA, or restructuring before looking to deferral. Deferral (up to five years on all or part of the loan) will be granted only if it will make the farm cash flow.

In any case, a borrower must meet three statutory criteria to qualify. The first is that the circumstances must be beyond the borrower's control. This is no longer a problem issue, because the current regulations state that general economic conditions are pertinent.

The second is that the inability to pay is only temporary. This has become a major obstacle to deferrals, because the farmer must project income, cash flow, and expenses — not only in the year that he or she applies — but also for the year following the five-year deferral.

This means the farmer must have two completed Farm and Home Plans — for example, one for 1987 and one for 1992. The Plan for the sixth year is completed with projected data that the FmHA has set in its Administrative Notices, which project poor commodity prices and a 30% increase in living expenses over the next five years.

This makes it difficult — if not impossible — to project a positive cash flow for the sixth year out. An effort is being made to amend the complaint in *Coleman v. Lyng* to test the FmHA's action in dictating this future economic data.

Three of the eight non-statutory criteria for deferral eligibility (*see* 7 C.F.R. § 1951.44 (c)(1986)) continue to be challenged by the plaintiffs in *Coleman v. Lyng*. They are that the borrower: 1) acted in good faith in trying to meet agreements with the FmHA and made an honest effort to pay, but cannot due to reasons beyond his or her control; 2) properly maintained and accounted for security; and 3) has disposed of all non-essential assets in accordance with agreements made with the FmHA, and applied the proceeds to the FmHA loan account or paid other creditors in accordance with lien priorities or other approved agreements.

The court has not yet ruled on these challenges, but the criteria are now being used by the FmHA.

The affect of delays in implementing deferrals has resulted in a special problem for many farmers. Interest on loans has been piling up and must now be capitalized as part of the deferred debt. This problem would not have been as serious if the deferral program had been implemented by the FmHA as Congress intended. The legal implications of this problem are beyond the scope of this summary report.

On March 3, 1986, two new orders were issued in *Coleman* V. 3 *Agricultural Law Update* 1 (April 1986). The first order amended and modified the court's injunction of Feb. 17, 1984, by enjoining the FmHA from refusing to release its liens on normal income security to meet necessary but *unplanned* family living and farm operating expenses, unless it provides the borrower with notice outlining the right to a hearing within 20 days after the denial of the requested release.

The court stated that this order addressed only the plaintiffs' rights to notice of, and opportunity to contest, the FmHA's decisions. The order also stated that the court was not passing judgment on the wisdom of the FmHA's decisions in cases of individual borrowers. 632 F. Supp. 997 (D.N.D. 1986). Note that the FmHA regulations still fail to define "necessary living and operating expenses."

In the second matter, the plaintiffs had asked the court to enjoin the FmHA from using new Form FmHA 1962-1, "Agreement for Use of Proceeds/Release of Chattel Security," arguing that it deprived borrowers of any meaningful notice to be heard on disputes involving the planned use of farm proceeds.

The form appeared to make borrowers completely dependent on its contents to obtain releases of normal income security to pay necessary living and operating expenses. Although the court expressed reservations about the form, it did not enjoin its use.

It must be understood that the court's decision followed in the wake of FmHA Admin. Notice No. 1336 (Feb. 7, 1986), relaxing the rigid planning process contemplated by the form, and FmHA Admin. Notice No. 1355 (March 6, 1986), noting availability of administrative appeal of disputes over the

(continued on next page)

completion of the form, as well as the obligation of the FmHA to release income security as needed during the pendency of such appeal.

The court did hold, however, that the FmHA was enjoined (until further order) to provide an opportunity to appeal to all members of the plaintiff class who dispute an amount to be allocated to living and farm operating expenses during the process of completing Form 1962-1. A further challenge to certain language of the agreement on the back of the form is contemplated.

The plaintiffs also asked the *Coleman* court to enjoin the FmHA from using Forms 1924-25, 1924-26 and 1924-14. These forms are designed to give notice to borrowers that the FmHA intends to take adverse action, but that certain loan servicing options exist. The allegation was that the forms, taken together, are generally misleading, intimidating, confusing and inaccurate.

The court held that although the borrowers who receive the notices may be unable to understand all aspects of available options, the forms do alert them to the need to take some action to protect their rights and to seek further advice. 632 F. Supp. 1005 (D.N.D. 1986).

The FmHA currently is using these forms, and farmers and ranchers need to be informed that the 30-day deadline for response appears to be absolute. They should also be aware that it is extremely dangerous to respond using Form 1924-26 without the advice of a well-informed attorney. Efforts continue to try to get the FmHA to clarify these forms.

Final Rules for Borrowers Under Jurisdiction of a Bankruptcy Court

Farmers seeking rehabilitation under the jurisdiction of the Bankruptcy Court were finding it necessary to have pending proceedings dismissed before the FmHA would discuss loan servicing. On Sept. 30, 1986, the FmHA promulgated final rules requiring only that borrowers in bankruptcy obtain for the FmHA a lifting of the automatic stay for the limited purpose of applying for loan servicing. 51 Fed. Reg. 34,579 (1986) (to be codified at 7 C.F.R. pt. 1962).

The Food Security Act of 1985

The Food Security Act of 1985 made some changes in the FmHA procedures. Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354, 7 U.S.C.A. § 2000 (Supp. 1986).

The Act requires that two members of the previously all appointed three-person county committee be elected by farmers in the county where the committee is located. *Id.* at § 1311.

Whether this reform will actually change anything remains to be seen, since county committees deal with eligibility determinations — not loan applications and appeals.

The Food Security Act of 1985 regulates how the FmHA is to handle acquired land. First, if sales would depress local land prices, the FmHA is prohibited from selling. Second, family-sized farm operators must be given priority if there is a sale or lease of inventory land. Third, if the land is to be leased, the former owner must be given preference. *Id.* at § 1314.

The Act also authorizes dwelling retention, conservation easement and forestation programs, the latter having deferral and reamortization implications for distressed FmHA borrowers. Unlike the forestation program, however, the conservation easement program is intended only for those FmHA loans made prior to the passage of this Act. *Id.* at § 1318.

On Jan. 15, 1987, the FmHA proposed rules dealing with farm debt restructuring and the conservation set-aside program. 52 Fed. Reg. 1,763 (1987). The FmHA issued regulations that may allow the farmer/borrower whose residence ends up in FmHA inventory to lease it from the FmHA with an option to buy. 51 Fed. Reg. 9,174 (1986) (to be codified at 7 C.F.R. § 1955.73).

A month later, the FmHA issued regulations stating that farmers and ranchers with FmHA loans whose land ends up in FmHA inventory may be able to lease back their entire family-size farm with an option to buy. As previous owners of the land, they have first option to purchase the land back from the FmHA. 51 Fed. Reg. 13,479 (1986) (to be codified at 7 C.F.R. pt. 1955, subpts. B and C).

Most Recent Proposed Regulations and Issues

On Jan. 26, 1987, at 52 Fed. Reg. 2,717 (1987), under the forestation program called for in the Food Security Act of 1985, the FmHA proposed regulations to provide for the deferral, reamortization and reclassification of certain distressed farmer program loans when the farmer agrees to produce softwood timber on at least 50 acres of his or her marginal land.

The marginal land must have previously produced agricultural commodities, or have been used for pasture within the last five years. The land may not have a lien against it (other than the lien to secure the reamortized FmHA mortgage).

The total amount of the loans secured by the 50 acres cannot exceed $1,000 per acre. Such loans could be reamortized for up to 50 years, with payment deferred up to 45 years. The borrower is not permitted to harvest the softwood timber for use as Christmas trees.

A few days earlier — Jan. 15, 1987 — the FmHA proposed rules amending farmer loan program regulations. 52 Fed. Reg. 1,706 (1987). The following are a few controversial FmHA proposals:

- The FmHA seeks to use commercial credit standards to determine an applicant's degree of potential loan risk on insured loans.
- It is also proposed that the State Director be authorized to overturn favorable County Committee decisions and that there be no loans for the advance payment of cash leases.
- The FmHA also seeks to restrict new loans to previously foreclosed FmHA borrowers and previous borrowers whose FmHA debts have been settled.
- The FmHA also wants emergency disaster loans restricted to countywide disasters instead of the more isolated disasters caused by tornadoes and hail storms.

Comments were to be submitted by Feb. 17, 1987, but as a result of an uproar in Congress, the FmHA extended the comment period by 30 days. 52 Fed. Reg. 4,913 (1987). Sen. Patrick Leahy (D-Vt.) had asked for a 60-day extension, but Ron Ence, FmHA Legislative Director, stated that he doubted the U.S. Department of Agriculture would extend the comment period beyond the 30 days. *Economic Development; Agriculture*, Daily Rep. for Exec. (BNA) No. 30, at C-4 (Feb. 17, 1987).

According to Ence, the agency is anxious to start using the new rules with spring planting loans. As a result of the 30-day extension of the comment period, the earliest the FmHA can implement the revised rules is mid-April, and most of spring crop lending decisions must be made by May.

Sen. Leahy requested the 60-day delay because he wants a Congressional panel to study two of the proposals: 1) barring farmers from using operating loans to make cash rent payments; and 2) the new preloan screening requirements for loan applicants. Attorney generals in Iowa, Minnesota, Illinois and North Dakota have joined in protesting the new proposed rules.

Conclusion

Although there now are a number of options available to the FmHA farmer/borrower, a close examination of what is realistically available to an individual borrower presents a less optimistic picture. The judicial interpretation of section 1981a and its implementation by the FmHA has assured farmer borrowers certain procedural rights (notice, hearing, administrative appeal, review) before acceleration and forced liquidation.

Neither the Congress nor the courts have imposed any form of moratorium on the FmHA, however, and when proper procedure is followed by the agency, the final outcome frequently continues to be voluntary or forced liquidation. The FmHA remains free to foreclose on delinquent borrowers — it simply has to play by new rules.

The FmHA's implementation of provisions of the Food Security Act of 1985 has given certain liquidated borrowers the hope of qualifying for the dwelling retention, farmland retention, and debt settlement programs. Borrowers need to be cautioned, however, not to assume that these programs are available as a matter of course.

STATE ROUNDUP

IOWA. *Hog Facility Not Enjoined.* In the case of *Valesek v. Baer*, No. 85-1785 (Iowa Ct. App. Sept. 25, 1986), plaintiffs lived in rural homes adjoining defendant's property, which contained a swine confinement operation.

The plaintiffs complained of odors from disposal of the swine confinement wastes on land adjacent to their homes, and brought a nuisance action requesting an injunction against the disposal.

The appeals court upheld a lower court denial of permanent injunctive relief and held that even if the lower court had found that a nuisance existed, a permanent injunction to prevent spread of manure on a significant part of the defendant's property was inappropriate under the "relative hardship" test.

The court balanced the hardship of plaintiffs' transient discomfort when hog manure was spread on adjacent lands with the need for defendant to remove the waste from the storage facilities in an expeditious and economical manner.

Although the confinement facility was constructed after plaintiffs were residing in their homes, priority in time was not controlling because the court considered the raising of confinement swine to be "but a technological evolution of farming practices that have been used in this area for over a hundred years," and that it constituted an expected (albeit distasteful) incident of rural living.

— Neil Hamilton

PENNSYLVANIA. *Realty Transfer Tax-Family Farm Corporations.* Act 77 of 1986 amends the state realty transfer tax law, 72 Pa. Stat. Ann. Secs. 8101-C *et seq.*

Under the amended law, transfers from a farmer to a family farm corporation are excluded from the state realty transfer tax. Local municipalities may adopt the amended realty transfer tax provisions as their local realty transfer tax, or they can continue to apply the present local realty transfer tax provisions (53 P.S. 6902, 6902.1), which may lead to some different results.

Pesticide Control Act Amendments. Act 1986-167, effective March 12, 1987, makes substantial changes to the statutory and regulatory pesticide control program in Pennsylvania.

Those who are interested in this subject should refer to the Act or the bill in its final form, Senate Bill 1445, Printer's Number 2311.

— John C. Becker

SOUTH DAKOTA. *Conversion to Chapter 12.* Farmers who otherwise qualify for Chapter 12 bankruptcy treatment may be able to convert their pending Chapter 11 or 13 cases to Chapter 12. *In re Erickson Partnership*, No. 486-00333 (Bankr. D.S.D. Jan. 8, 1987), and *In re Swenson*, No. 486-00670 (Bankr. D.S.D. Jan. 8, 1987).

On May 28, 1986, Erickson Partnership sought relief under Chapter 11 of the Bankruptcy Code. The partnership had until Nov. 25, 1986 to file a reorganization plan under Chapter 11. As of Dec. 22, 1986 (the date of the hearing on the issue of conversion to Chapter 12), no reorganization plan had been filed. Thus, neither a disclosure statement nor a confirmation hearing had been set.

On Nov. 7, 1986, the Swensons filed for relief under Chapter 13 of the Bankruptcy Code. Like the partnership, the Swensons had not submitted a reorganization plan, nor obtained a confirmation hearing date prior to Dec. 22, 1986.

On Dec. 22, 1986, the debtors moved for conversion of their cases to Chapter 12 of the Bankruptcy Code. There existed no argument between the creditors (the Farmers Home Administration (FmHA) and the Federal Land Bank of Omaha) and the debtors as to each debtor's ability to otherwise file under Chapter 12.

After the Bankruptcy Court determined it had subject matter jurisdiction over the debtor's motion for conversion to Chapter 12, the Court faced the central issue of eligibility for conversion to Chapter 12 of bankruptcies filed before the effective date of the Family Farmer Bankruptcy Act.

The FmHA and the Federal Land Bank argued against conversion to Chapter 12, believing that Bankruptcy Code sections 1112(d) and 1307(d) as amended did not apply to cases filed prior to Nov. 25, 1986 — the effective date of the Act.

The two lenders based their argument on the language of 302(c)(1) of the Family Farmer Bankruptcy Act, which provides: "The amendments made by subtitle B of Title 11 shall not apply with respect to cases commenced under Title 11 of the United States Code before the effective date of this Act." The amendments to sections 1112(d) and 1307(d) otherwise allow for conversion to Chapter 12.

The Court looked to the Joint Explanatory Statement of the Committee of Conference (Cong. Rec. H8999 (daily ed. Oct. 2, 1986)) to determine what Congress intended by the language of 302(c)(1). The Joint Statement provided that courts should use "their sound discretion in each case...allowing conversions only where equitable to do so."

Accordingly, courts should limit the availability of conversions to Chapter 12 "where the parties have substantially relied on current law." Thus, on the basis of the legislative language, the Bankruptcy Court thought it would violate the purpose of Chapter 12 if farmers were to be divided into two classes: farmers who commenced bankruptcy proceedings prior to Nov. 25, 1986, and farmers who commenced proceedings on that date or subsequent to it.

In dealing with the apparent conflict between the legislative history and the law as enacted, the court stated that it was "more probable [] that, in the final process of legislation, Congress inadvertently placed Sections 1112(d) and 1307(d) amendments within Subtitle B...[which] brought the amendment of these sections within the restrictive language of Section 302(c)(1) regarding the effective date, and thus, in apparent conflict with Congressional leaders' remarks of the Joint Explanatory Statement.

The Court found that in these two cases (since there were no plans for reorganization filed under Chapter 11 or 13), the debtors had not "substantially relied on current law." Thus, in these cases, it was equitable to allow for conversion from Chapters 11 and 13 to Chapter 12.

— Michael B. Thompson

Taylor Grazing Act

Under 43 C.F.R. § 4120.3-3, a permittee or lessee may apply to the Bureau of Land Management (BLM) for permission to modify a range improvement permit issued pursuant to section 15 of the Taylor Grazing Act, 43 U.S.C. § 315(m) (1982). Modification of a range improvement without BLM authorization is a prohibited act. 43 C.F.R. § 4140.1 (b)(2).

A livestock operator, pursuant to a range improvement permit, constructed a stock-watering facility, including steel gates which, when closed, bar access to livestock and wild horses.

Subsequently, the operator installed highway guardrails across the gate openings to discourage or prevent wild horses from gaining access to the watering facility, while still allowing entry to livestock.

This installation establishes a change in the purpose of the improvements originally authorized and constitutes a modification. Accordingly, the operator is required to seek authorization prior to installation. *Fallini v. Bureau of Land Management*, 92 IBLA 200 (June 12, 1986).

— Donald B. Pedersen

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

AALA REQUESTS NOMINATIONS. The American Agricultural Law Association (AALA) Nominating Committee requests your candidate suggestions and selection comments for the 1987-88 office of president-elect and two new members of the board of directors for the three-year term beginning in 1987. Please send your nominations and comments to David A. Myers, Chair, Nominating Committee, Valparaiso University, School of Law, Valparaiso, IN 46383; 219/465-7864. The deadline for nominations is April 1, 1987.

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 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 for this year must be made by June 30, 1987, and communicated to Drew L. Kershen, Chair, Awards Committee, School of Law, University of Oklahoma, 300 S. Timberdell Road, Norman, OK 73069; 405/325-4702.

FOURTH ANNUAL STUDENT WRITING COMPETITION. The AALA is sponsoring its fourth annual Student Writing Competition. This year, the AALA will award two cash prizes in the amounts of $500 and $250.

The competition is open to all undergraduate, graduate or law students currently enrolled at any of the nation's colleges or law schools. The winning paper must demonstrate original thought on a question of current interest in agricultural law.

Articles will be judged for perceptive analysis of the issues, thorough research, originality, timeliness, and writing clarity and style. Last year's winning papers were entitled: Plant Patent Protection; Incorporating a Modern Approach to Plant Identification Protection; and Crops as Collateral for Rent.

Papers must be submitted by June 30, 1987. For complete competition rules, contact Drew L. Kershen, Chair, Awards Committee, School of Law, University of Oklahoma, 300 S. Timberdell Road, Norman, OK 73069; 405/325-4702.

POSITION NOTED. Devres Inc., an international development firm in Washington, D.C., is interested in contacting forestry law specialists with French-speaking capabilities for possible short-term assignments in Africa. Experience working with forestry policy bodies in LDCs is desirable. Please contact Bruce Pansius, Devres Inc., 2426 Ontario Road N.W., Washington, D.C. 20009.