Agricultural Law Update

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INSIDE

IN FUTURE ISSUES

Implied right of action under the Farm Credit Act revisited

The issue of whether Farm Credit System member-borrowers may sue System institutions for violations of the Farm Credit Act has been rekindled by enactment of the Agricultural Credit Act of 1987. No Farm Credit System legislation expressly grants a private right of action for its enforcement. Indeed, a provision of the House version of the 1987 Act that would have granted member-borrowers the right to sue any Farm Credit System institution for violation "of any duty, standard, or limitation prescribed under the [Farm Credit] Act and owing to the borrower" was eliminated in the conference committee. *See* H.R. Conf. Rep. No. 100-140, 100th Cong., 1st Sess. 178, *reprinted in* 1988 U.S. Code Cong. Admin. News 2956, 2973. Therefore, the issue has been and remains whether any of the modern Farm Credit System legislation creates an implied private right of action.

It appears to be well-settled that the Farm Credit Act of 1971 did not create an implied private right of action. *E.g., Smith v. Russellville Production Credit Association*. 777 F.2d 1544 (11th Cir. 1985). The absence of any specific statutory or regulatory "borrowers' rights" in the 1971 Act together with the absence of any legislative history reflecting a Congressional intent to imply a private remedy under it essentially precluded the finding of an implied right of action for the Act's enforcement. *See Bowling v. Block*, 602 F.Supp. 667, 670-71 (S.D. Ohio 1985).

The passage of the Farm Credit Amendments Act of 1985 buoyed the hopes of borrowers' rights advocates. Analyzed under the four-fold test for determining the existence of an implied right of action articulated by the U.S. Supreme Court in *Cort v. Ash*, 422 U.S. 66, 78 (1978), the 1985 Act appeared to satisfy each. First, the 1985 Act created specific "borrowers' rights" provisions enacted for the benefit

(continued on next page)

Payment limitation final rules for the 1989 crop year

The final regulations for implementing changes in the payment limitation on farm price support benefits for the 1989 crop year were published on August 5, 1988. 53 Fed. Reg. 29552- 29579. The final rules make several changes in the proposed rules first published on April 6, 1988. 53 Fed. Reg. 11474. The new rules, which will be found at 7 C.F.R. Part 1497 – Payment Limitation, are designed to carry out the major revisions enacted by Congress in the Omnibus Budget Reconciliation Act of 1987 [Pub. L. No. 100-203 (H.R. 3545), December 22, 1987, section 1301-1307; amending section 1001 of the Food Security Act, codified at 7 U.S.C. § 1308, et seq.]. The major provisions of the new law were discussed in Fransen, "Major changes in ASCS payment limitation law commencing in 1989," 4 Agric. L. Update 5 (March 1988).

As was discussed in that article, the new provisions make several major changes in the payment limitation that will affect the way farm businesses are organized and operated. The changes include a limitation on number of entities in which a person can participate and receive benefits and a requirement that to be deemed a person for purposes of receiving benefits, a party must provide a "significant contribution" of either land, equipment, or capital *and* personal labor or active personal management. Special provisions for the application of the payment limitation within family farming operations were also included.

The final regulations provide further refinement of how the ASCS will implement the provisions and provide valuable explanations and examples of the application of the new rules. The ASCS received over 360 comments to the rules proposed in April, and made several revisions to reflect those comments. Important modifications include a change in the definition of "significant contribution of active personal management" to no longer require a determination based on the number of hours spent, but instead based on whether the activities are critical to the profit of the farming operation. An hours requirement is maintained for the labor

(Continued on page three)

of System borrowers. Second, the legislative history of the Act revealed a colloquy on the House floor between one of the original bill's sponsors and another House member in which the understanding was expressed that the Act and its regulations would be enforceable by borrowers. *See* 131 Cong. Rec. H 11,518-19 (daily ed. Dec. 10, 1985). Third, the legislative scheme created by the Act appeared to contemplate that the recognized "tension" between borrowers and the System would be resolved in actions brought by one or the other of those two participants, and that regulating the financial integrity of the System would be a separate concern of the reorganized and newly independent Farm Credit Administration. Finally, because the 1985 Act created rights that were not traditionally a concern of state law, a federal remedy appeared appropriate.

Notwithstanding the above, the reception to the claim by the federal district courts was negative. *Redd v. Federal Land Bank of St. Louis,* 661 F. Supp. 861 (E.D. Mo. 1987), aff'd, No. 87- 1794 (8th Cir. July 6, 1988); *Mendel v. Production Credit Assoc. of the Midlands,* 656 F. Supp. 1212 (D.S.D. 1987) (appeal pending).

The *Redd* cased was recently affirmed by the Eighth Circuit; the sole issue decided being whether the 1985 Act created an implied private right of action for damages. Because the Redds had filed a plan for reorganization under Chapter 11 after the denial by the district court of their request for a temporary restraining order, the Eighth Circuit concluded that there was no need to address the issue of whether the 1985 Act created an implied cause of action for equitable relief. However, in passing the issue, the court cited *Federal Land Bank of St. Paul v. Overboe,* 404 N.W.2d 445, 448 (N.D. 1987), as supporting the proposition that equitable relief may be proper under the 1985 Act, an implicit suggestion that it might approach the equitable issue differently than it did the Redds' claim asserting a right of action for damages. In *Overboe,* the Supreme Court of North Dakota recognized an "administrative forbearance defense" to a federal land bank foreclosure.

In essence, the Eighth Circuit denied that the 1985 Act created an implied private right of action for damages on the grounds that the 1985 Act's grant of broad cease and desist authority to the Farm Credit Administration, 12 U.S.C.A. § 2261(a)(West Supp. 1988), indicated a Congressional intent to place enforcement of the Act exclusively within the province of the FCA. The court declined to give dispositive weight to the House bill sponsor's statement during the floor debate that borrowers would be able to sue to enforce the Act.

As a result of the Redd decision, the pivotal issue for claims that the Agricultural Credit Act of 1987 creates an implied private right of action may be whether the FCA's cease and desist authority preempts borrower enforcement of that Act as well as the 1985 Act. Neither the 1985 nor the 1987 Acts differ materially in legislative history or statutory scheme. Although the legislative history of the 1987 Act is replete with statements by individual members of Congress that the Act creates a private right of action, the FCA's cease and desist powers were unaffected. *See Leckband v. Naylor,* No. CV3-88-167, Slip. Op. at 7-8 (D. Minn. May 17, 1988), *appeal filed,* No. 88-5301 MN (8th Cir. July 18, 1988).

A number of cases asserting an implied private right of action under the 1987 Act are now pending appeal. *E.g., Leckband v. Naylor; Martinson v. Federal Land Bank of St. Paul,* No. 88-31 (D.N.D. April 21, 1988), *appeal filed,* No. 88-5202 ND (8th Cir. May 20, 1988) (*Leckband* and *Martinson* have been consolidated for appeal); *Zajac v. Federal Land Bank of St. Paul,* No. A3-88-115 (D.N.D. July 19, 1988) *appeal filed,* No. 88-5353ND (8th Cir. August 15, 1988) (motion for consolidation pending); *Harper v. Federal Land Bank of Spokane,* No. 88-449-PA (D. Ore. May 5, 1988), *appeal filed,* No. 88-4033 (9th Cir. July 26, 1988). Because most, if not all, of those cases present claims only for equitable relief, the various appellate courts, including the Eighth Circuit, may adopt a different analysis than was followed in *Redd.* However, the primary claim of the System parties in each of those cases is that Congress intended for the FCA to be the exclusive enforcer of the Act. *See* Brief of Appellants at 15-20, *Martinson v. Federal Land Bank of St. Paul* (arguing that the FCA was intended by Congress to be the reconciler of the "broad Congressional purposes of both protecting farmer borrowers and assisting farm credit lenders").

Resolution of the issue may turn on the failure of the FCA to have promulgated regulations governing the process by which borrowers may invoke the use of the FCA's powers and by which they may participate in any proceedings initiated under those powers. The statute is silent in both regards and, without implementing regulations, the availability of the cease and desist authority may be more theoretical than real. The U.S. Supreme Court has recognized that where the administrative process created by a statutory scheme is inadequate to insure the full participation of the aggrieved party, the existence of an administrative "remedy" will not be a bar to the exercise of federal court jurisdiction. *See Cannon v. University of Chicago,* 441 U.S. 677, 704 n. 41 (1979); *Rosedo v. Wyman,* 397 U.S. 397, 406 n. 8 (1970). That aspect of the issue, one not addressed in Redd, may be the focal point of the cases now on appeal. *See Leckband v. Naylor,* Slip Op. at 8 ("The cease and desist powers granted FCA by 12 U.S.C. Sec. 2262 are inappropriate, both in scope and timing, to effectively protect [the right of first refusal]").

–Christopher R. Kelley

Postscript: In its brief in *Leckband v. Naylor,* filed with the Eighth Circuit on September 12, 1988, the Federal Land Bank of St. Paul requested a ruling on the merits on the right of first refusal issue. Without conceding the implied cause of action issue, the Federal Land Bank noted that the FCA was a party to the action and that the district court had jurisdiction under the Administrative Procedure Act to determine the validity of the now final regulations [53 Fed. Reg. 35427, Sept. 14, 1988] governing the right of first refusal. The implied cause of action issue presented in Zajac will be argued before the Eighth Circuit at the same time as *Leckband* and *Martinson.*

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provision. Another change allows a partner in a land-owning partnership that crop leases property and who does not provide labor or management to receive benefits as a landowner if there is documentation providing that if the partnership breaks up, the partner will receive a share of the land. Another change allows cash renters to rent equipment from the landowner and qualify as a "person" as long as the transaction is at arms-length and the rental rate is at fair market value. The final rules also include 7 C.F.R. Part 1498 – Foreign Persons Ineligible for Program Benefits, which carries out the Congressional prohibition on farm program benefits going to non-resident aliens. *–Neil D. Hamilton*

Ag Credit Act of 1987 and farmers in bankruptcy

In *In re Dilsaver*, 86 Bankr. 1010 (Bankr. D. Neb. 1988), the bankruptcy court consolidated four cases and held (1) that the provisions of the Agricultural Credit Act of 1987 (Act), 101 Stat. 1568, apply to debtors in bankruptcy, including those whose bankruptcies were filed prior to the effective date of the Act, and (2) that Federal Land Bank motions to sequester rents and profits from real estate secured by FLB mortgages constitute "foreclosure proceedings" that require compliance with the Act.

The FLB mortgage on Dilsaver's farm provided for a conveyance of rents and profits if foreclosure was initiated. The debtor filed a petition for Chapter 11 relief in August, 1986. The debtor requested that the FLB restructure his loan under the Agricultural Credit Act of 1987, arguing that the Act applied to him and that sequestering of property of the estate would interfere with his ability to restructure his distressed loan under the provisions of the Act.

The FLB asserted that it was entitled to apply to the court for permission to perfect its lien in rents and profits, pursuant to 11 U.S.C. section 552(b)(1987). The debtor contested this, contending that the rents and profits are property of the estate and that therefore relief from stay pursuant to 11 U.S.C. section 362(d) is required to sequester them.

Based on the review of the Act's legislative history, the court held that the Act applies to debtors-in-bankruptcy. The House Conference Report stated that a "distressed loan," as defined by the Act, is one that is "not yet subject to a foreclosure or bankruptcy proceeding." This reference to a "bankruptcy proceeding" was deleted from the Act. This convinced the court that Congress did not intend a per se exclusion of debtors in bankruptcy from the protections of the Act. Moreover, the court found that the Act has a broad, remedial character, and that the application of the Act to debtors in bankruptcy "does not create an extraordinary burden on the Farm Credit System."

Upon finding that the debtors' FLB loans are distressed loans, the court found that the Act prohibits certain lenders, such as the FLB, from initiating or continuing foreclosure proceedings with respect to any distressed loan until the lender has evaluated the loan for restructuring. It further found that, under the Act, Farm Credit System lenders must restructure nonaccrual loans if restructuring will produce more financial return to the lender than foreclosure. The fundamental purpose of this is to keep the farmer-debtor in business, if that can be accomplished as cheaply as foreclosing the loan. The court construed the FLB motions as "the first step towards the enforcement of a claim against property of the estate" and as an attempt to utilize nonreal property collateral for purposes of adequate protection. Therefore, the court held that the motions constitute foreclosure proceedings and that the FLB must comply with the Act. The holding applies to bankruptcy petitions filed prior to the Act's effective date.

The court noted that Nebraska law would require the FLB to initiate a foreclosure proceeding before requesting the appointment of a receiver and sequestration of rents and profits. Neb. Rev. Stat. § 25-1081, 1082 (Reissue 1985). Therefore, the court reasoned that it would not grant rights to the FLB in a bankruptcy proceeding which state law would deny it outside of bankruptcy. 11 U.S.C. § 552(1987).

–Julia Wilder

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Court denies restructuring review

On September 15, 1988, the federal district court for the district of Oregon declined to review a restructuring decision in *Troutman v. Federal Land Bank of Spokane*, No. CV88-726-PA (order denying preliminary injunction) (relying on *Miller v. Federal Land Bank of Spokane*, 587 F.2d 415 (9th Cir. 1978)).

–Christopher R. Kelley

AG LAW CONFERENCE CALENDAR

Ninth Annual American Agricultural Law Association Conference and Annual Meeting.

Oct. 13-14, 1988. Westin Crown Center, Kansas City, MO.

Penn State October Federal and State Income Tax Workshops.

Oct. 11-12, Lancaster, PA.
Oct. 13-14, Williamsport, PA.
Oct. 17-18, Souderton, PA.
Oct. 20-21, Bedford, PA.
Oct. 25-26, Pittsburgh, PA.
Oct. 27-28, Meadville, PA.

Topics include: individual tax update; farm return issues; and computerized tax filing.

Sponsored by Penn State. For more information, call 814-865-7656.

Fourth Annual Farm, Ranch, and Agri-Business Bankruptcy Institute.

Oct. 6, 7, and 9, 1988. Lubbock, TX.

Topics include: the Agricultural Credit Act of 1987; UCC related issues; tax consideration in Chapters 7, 11, and 12; "life after *Ahlers*".

Sponsored by the Texas Tech University School of Law and the West Texas Bankruptcy Bar Association. For more information, call Robert A. Doty, 806-765-7491

Iowa Chapter Federal Bar Association Bankruptcy VII Seminar.

October 20-21, 1988. Savery Hotel, Des Moines, IA.

Topics include: security interests in government farm payment programs, agricultural lending under the UCC, and Chapter 12 confirmation.

Sponsored by Iowa Chapter Federal Bar Association. For more information, call 515-282-6095

Representing Farmers With Federal Farm Loans.

October 14, Durham, North Carolina

Topics include: debt restructuring under FmHA and FCA; tax implications; and bankruptcy implications.

Sponsored by the North Carolina Association of Black Lawyers. For more information, call David Harris at 919-682-5969

Black Land Loss Training.

October 16-18, 1988. Downtown Ramada, Memphis, TN.

Topics include: ag lender liability, tax delinquency sales, and organization strategies.

Sponsored by Mississippi Legal Services Coalition. For more information, contact Gloria Graves at 601-944-0765

Sixth Annual Rural Attorneys and Agriculture Conference: Preparing for the 1990's.

Nov. 4, 1988 Drake University School of Law, Des Moines, IA.

Topics include: representing farm borrowers in debt negotiations with the Farm Credit System; FmHA programs for implementation of debt restructuring; significant developments in agricultural bankruptcy and secured financing.

Sponsored by Drake Law School Agricultural Center. For more information, call Jean Johnson, 515-271-2955

The Disaster Assistance Act of 1988

by Julia R. Wilder and Alice A. Devine*

The Disaster Assistance Act of 1988, H.R. 5015, 100th Cong., 2d Sess., 134 Cong. Rec. H6455 (Aug. 8, 1988), was enacted on August 11, 1988. This article provides a brief survey of its major provisions.

I. Emergency Livestock Feed Assistance Act

Conditions for aid

Section 603 of the Act directs the Secretary to make assistance available in areas where, because of flood, disease, insect infestation. drought, fire or other natural disaster, the Secretary determines that "a livestock emergency exists." Assistance is also available to livestock producers who conduct farming or ranching activities in counties contiguous to a county where the Secretary has determined that a livestock emergency existed; or who are eligible for assistance under some other section of the Act.

The Act notes that any state, county, or area determined eligible for the emergency feed program or the emergency feed assistance program conducted prior to the passage of the 1988 Act may be eligible for assistance under the new provisions.

Qualifying livestock

The term "livestock" is broadly construed by the Act to include cattle, sheep, goats, swine, poultry, equine animals used for food or in the production of food, fish used for food, and other animals designated by the Secretary that are (1) part of the foundation herd or offspring, or (2) are purchased as part of the normal operation and not to receive additional benefits. § 602(2)

Qualifying producer

Section 605 of the Act defines who is eligible for the assistance. A "qualifying livestock producer" is one who has suffered a "substantial loss in feed normally produced on the farm for such producer's livestock as a result of the livestock emergency and as a result, does not have sufficient feed that has adequate nutritive value and is suitable for each of such producer's particular types of livestock for the duration of the emergency." § 605(a)(2). A qualifying producer is eligible for assistance under the new program or may elect to receive assistance under programs established prior to the passage of this Act.

Available assistance

Section 606 authorizes the Secretary to implement one or more of the following programs:

1) Donation of feed owned by the Commodity Credit Corporation (CCC) to producers who are financially unable to purchase feed or participate in any other program;

2) Sale of feed grain owned by the CCC at a price that does not exceed 75% of the current basic county loan rate for livestock emergencies determined to exist prior to January 1, 1989. For any other livestock emergency, the price is not to exceed 50% of the average market price in the county or area involved;

3) Reimbursement of transportation expenses related to feed grain donations or sales under (1) or (2) above, not to exceed 50% of such expenses;

4) Reimbursement of not more than 50% of the cost of feed purchased by producers for livestock during the livestock emergency;

5) Hay and forage transportation assistance not to exceed 50% of the cost of transporting hay or forage purchased from a point of origin beyond a producer's normal trade area.

6) Livestock transportation assistance not to exceed 50% of the cost of transporting livestock to and from grazing locations.

In addition to the programs outlined in section 606, the Secretary is authorized by section 607 to implement the following special assistance:

1) Donations of feed owned by the CCC for use in feeding livestock stranded and unidentified as to its owner;

2) Reimbursement not to exceed 50% of the cost of:

A) installing pipelines or other facilities for livestock water;

B) construction or deepening of wells for livestock water;

C) developing springs and seeps for livestock water.

3) Reimbursement not to exceed 50% of the cost of burning prickly pear cactus to make suitable feed;

4) Making commodities owned by the CCC available to producers through the use of a catalog that specifies location, cost, and quantity.

Application deadline

The application deadline will be March 31, 1989, unless the Secretay sets a later date by regulation.

Limitations

Section 609 limits the total amount of benefits that a person may receive under the feed assistance act to $50,000. Doubling up of benefits is prevented in that a person may not receive benefits for the same crop loss under both the feed assistance act and the crop loss assistance act *(infra)*. Further, section 610 states that any person who has annual qualifying gross revenues in excess of $2,500,000 shall not be eligible for any benefits under the feed assistance act.

Assistance to dairy farmers

The scheduled January 1, 1989, 50 cent per hundredweight decrease in the dairy price support is deleted. In addition, a temporary increase of 50 cents per hundredweight for milk will be in effect from April 1, 1989 to June 30, 1989. § 102.

Emergency forage program

The Secretary is directed to implement an emergency forage cost share program for re-establishment of pasture damaged by the drought or related conditions in 1988. This assistance may be provided only when the forage will not regenerate naturally. reseeding is the most cost effective method to rejuvenate the forage, and reseeding is not done simply to improve forage damaged by the drought. The Secretary is directed to assume one half of the costs of seed, fertilizer, and other inputs. No person may receive more than $3,500. §103.

II. Emergency crop loss assistance

The crop loss provisions are complex. Basically, disaster payments will be made on crop losses greater than 35%. Rules and regulations are expected to be promulgated within the next month. Before action is taken to harvest or destroy existing crops, consultation with the County Agricultural Stabilization and Conservation Service is recommended to assure the best economic selection is made.

The emergency crop loss assistance program is divided into sections based upon program participation and type of commodity grown.

Program participants

Section 201 provides that disaster payments shall be made to individuals who participated in programs where total harvested commodity on a farm is less than the result of multiplying 65% of the farm program payment yield established by the Secretary by the sum of the acreage planted for harvest and the acreage prevented from being planted.

The rate of payment shall be equal to a) 65% of the established price for the crop for any deficiency in production greater than 35%, but not greater than

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75% for the crop, and b) 90% of the established price for the crop for any deficiency in production greater than 75% of the crop. § 201(a)(1)(A) and (B).

Disaster payments will not be made to individuals who did not comply with the acreage requirement of the program unless the producer agrees to purchase multiperil federal crop insurance for the 1989 crop. § 201(A)(2).

Section 201(a)(4) provides that a producer of wheat or feed grains who elected after March 11, 1988, to enter the 0/92 program may within 30 days of the effective date of the Act elect to receive disaster benefits in lieu of 0/92 payments. The producer must still meet the 35% crop loss requirement.

Under Section 201(b), participants in the commodity programs for wheat, feed grains, upland cotton, and rice whose actual yields are less than the amount resulting from multiplying the farm program payment yield established by the Secretary by the sum of the acreage planted for harvest and the acreage prevented from being planted (the "qualifying amount") will not be required to repay advance deficiency payments with respect to that portion of deficiency in production that does not exceed 35% of the qualifying amount. Section 201(b)(2)(B) requires that producers, in order to qualify for the above waiver, must agree to purchase federal crop insurance for the 1989 crop year subject to exceptions contained in section 207(b). Section 201(b)(3) allowed producers who did not receive advance deficiency payments to elect within 30 days of the Act to do so. Section 201(b)(4) states that if advance deficiency payments are required to be refunded, such refund shall not be required before July 31, 1989.

Program non-participants

Section 202(a) establishes the criteria for disaster payments to program nonparticipants for target price commodities. Basically, the same formulas as described above apply in determining crop losses. The rate of payment formula substitutes the county average yield for program yield, and instead of target price, the basic county loan rate is applied in the calculation. The disaster payment calculated will be reduced by a factor equivalent to the acreage limitation program percentage for the particular crop under the production adjustment program. §202(c).

Section 202 limits the credits granted for prevented planting. Again, to receive these benefits, producers must agree to obtain federal crop insurance in the following year.

Peanuts, sugar, tobacco

Section 203(a) establishes that as to producers of peanuts, sugar beets, sugar cane, and tobacco who suffer similarly defined losses, based on county average yields (or program yield in the case of peanuts), the Secretary shall make disaster payments at a rate equal to (a) 65% of the applicable payment level for any deficiency in production greater than 35% but not greater than 75% for the crop and (b) 90% of the applicable payment level for any deficiency greater than 75% for the crop. The applicable payment levels are described in Section 203(a)(2)(1)(A), (B), and (C): for peanuts as the price support level; for tobacco at the national average loan rate; for sugar beets and sugar cane as the Secretary determines based upon the price support levels.

This section limits the credit allotted for prevented planting acres. Additional special rules for peanuts, tobacco, and sugar are contained in section 203(d), (e), and (f) respectively.

Soybeans and nonprogram crops

Section 204 provides that losses for producers of soybeans will be calculated on the basis of state, area, or county yields over the three previous years, using equivalent formulas described above. Producers of nonprogram crops will have the opportunity to establish proven yields using any one of the three previous crop years. Failing that, the county average yield for the commodity will be applied.

The same percentages of payment level as described above apply. The payment level is determined by averaging the last five years' prices, excluding the highest and lowest prices. Again, limitations are placed on the prevented planting credits. Section 204(c) requires agreement to purchase federal crop insurance.

Application deadline

The application deadline is the same as under the Feed Assistance program.

Crop quality reduction program

Section 205 establishes a program whereby the Secretary may make additional disaster payments to producers who have suffered losses resulting from the reduced quality of the crop. The producer must have incurred at least a 35%, but not greater than 75%, deficiency in production.

Federal crop insurance

Section 206 sets forth the rules for calculating the effects of the receipt of Federal Crop Insurance indemnity payments on the disaster assistance provided. Section 207 establishes requirements for future purchases of federal crop insurance on the 1989 crops. The first prerequisite to a requirement of future crop insurance is that the producer must have had a greater than 65% crop loss. Crop insurance will not be required if the 1989 premium is more than 125% of the 1988 premium and can be waived if the producer can show undue hardship. Further, the FCIC is directed to enter into an educational campaign to inform producers and FCIC agents of the benefits of federal crop insurance.

Payment limitations

Section 211 establishes that no person can receive more than $100,000 in combined livestock feed assistance and crop disaster payments. Furthermore, producers are prohibited from receiving double benefits by receiving a disaster payments and emergency livestock assistance for the same crop loss.

Tree farmers

Section 221 provides assistance to eligible tree farmers who lost 35% of their 1987 or 1988 seedlings as a result of the drought. Owners of 1,000 acres or less of trees may receive up to $25,000 in cash or seedlings.

Income limitations

A person with annual "qualifying gross revenues" in excess of $2,000,000 is not eligible for assistance. If a majority of the person's income is from farming, ranching, or forestry, "qualifying gross revenues" means the gross revenues from those operations. If less than a majority of a person's annual income is from farming, ranching, or forestry, the "qualifying gross revenues" is the person's gross revenues from all sources. § 231.

III.Other emergency provisions

Soybeans, sunflowers, and oats

Section 301 grants the Secretary the discretion to offer a program whereby producers can plant soybeans or sunflowers on a portion of the producer's permitted acres without jeopardizing the existing crop base. This portion cannot be less than 10% nor greater than 25% of the permitted acres. The option can be continued in 1990. Similarly section 302 provides that if the acreage limitation percentage established for a crop of feed grains is less than 12.5%, the Secretary shall be authorized to allow the planting of oats on permitted acreage.

Farmer-owned reserve

Section 303 contains special provisions concerning the repayment of reserve loans during the next year and for the redemption of generic commodity certificates for repayment of loans. Section 304 allows producers of tobacco and peanuts flexibility in the transfer of tobacco and peanut allotments.

(Continued on next page)

Conservation measures

Section 321 states that producers who participated in the Conservation Reserve Program but harvested hay during the natural disaster period may not have their rental payments reduced if the producer carries out at his own expense, further conservation practices, including development of windbreaks, restoration of wetlands, establishment of wildlife plots, and restoration of wetlands.

Emergency loans

Farmers are not disqualified for FmHA emergency loans on the grounds that available federal crop insurance was not purchased. § 311.

Operating loans

The Secretary must ensure that FmHA direct operating loans for 1989 crop production are made sufficiently available to farmers who suffered losses because of a natural disaster during 1988 so that the farmers and ranchers are able to stay in business. § 312(a).

Loan guarantees

The Secretary is directed to issue FmHA guarantees to commercial or cooperative lenders for loans to refinance or reamortize 1988 operating loans or installments due and payable in 1988 or 1989. § 312(b)(1). These provisions apply to loans that otherwise cannot be repaid by farmers and ranchers because of major losses suffered in a natural disaster in 1988. The guarantees are available during the fiscal year that ends September 30, 1989. Id.

The guaranteed loan may be reamortized over a period of time not to exceed six years from the original due date of the payment or installment. § 312(b)(3).

Forbearance and loan restructuring provisions

Special forbearance provisions apply to the Farmers Home Administration and the Farm Credit Administration, with respect to farmers who suffered major losses because of a natural disaster in 1988. These provisions state that the Secretary should exercise forbearance in the collection of interest and principal on FmHA direct loans, § 313(a)(1); expedite the use of credit restructuring and other credit relief mechanisms authorized under the Agricultural Credit Act of 1987 (101 Stat. 1568), § 313(a)(2); and encourage commercial lenders who are participating in FmHA guaranteed farmer lending programs to exercise forbearance, § 313(a)(3).

Similar directives apply to the Farm Credit Administration.

Rural business

The Act provides disaster assistance to a wide variety of rural businesses in the form of guarantees on loans that those businesses incur in an effort to alleviate losses caused either directly or indirectly by a natural disaster during 1988. § 331(a). This includes guarantees on loans that are used to refinance or restructure debt. Id. The loan guarantee may not exceed ninety percent of the principal amount of the loan. An eligible borrower may receive a guarantee of up to $500,000. § 331(c)(1)

Water assistance

Under section 401, the Secretary is authorized to address rural water management problems that are related to drought conditions or other forms of inadequate water supply. Options include promoting or establishing irrigation or watershed projects or any other water management or dronght management activities. § 401(b).

The Secretary of the Interior is directed to make a determination of opportunities for using, conserving, or otherwise augmenting water supplies that are available to federal reclamation projects and Indian water resource developments. The Interior Secretary is further directed to undertake construction, management, and conservation activities that will mitigate damage resulting from drought conditions in 1987, 1988, and 1989. § 412(1)(B). Further the Interior Secretary is to facilitate water "marketing" by assisting "willing buyers in their purchase of available water supplies from willing sellers" and to redistribute that water to help mitigate dorught losses occurring in 1987, 1988, and 1989. This redistribution is to be based upon priorities that, although determined by the Interior Secretary, are consistent with state law. § 412(2).

The Secretary of the Interior is also authorized to execute contracts that make water available from reclamation projects on a temporary basis to mitigate drought losses. §413(a). These contracts must be consistent with state law and existing contracts, and must terminate no later than December 31, 1989. § 413(a) and (b)(4). The Act insures that the price for water will enable the federal government to recover its costs under the program. § 413(b)(1)

The lands that are presently subject to the ownership limitations of reclamation law are not exempted from those limitations because of the delivery of these temporary water supplies. § 413(b)(3). Moreover, lands that are not subject to irrigation law and that receive temporary irrigation water do not become subject to the ownership limitations because of the delivery of temporary water supplies. § 413(b)(2).

Migrant and seasonal workers

Low-income agricultural workers qualify for assistance if they have suffered an economic detriment because of the drought, which can include lost income and inability to find work. The Act virtually presumes that work availability has been severely curtailed by the drought. Therefore, workers do not bear the burden of demonstrating an attempt to locate and secure employment. Importantly, the Act does not authorize payment assistant directly to the workers; rather it provides assistance to Job Training Partnership Act agencies based on drought-related unemployment statistics within the appropriate service delivery area. § 503.

Other sections

The Act contains several other sections that were not discussed in this article. They include: Sale of Corn to Ethanol Producers (§332); Survey of Agribusiness (§333); Forward Contracting Report (§334); Rural Economic Development Response to the Drought (§335); Agricultural Exports (§341); and Study of Effect of Drought on Food Prices (§352).

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Editor's note: The editor acknowledges the assistance provided by Mark Halverson, legislative assistant for agriculture to Sen. Tom Harkin, Iowa.

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. FmHA; "Borrowers' rights;" implementation of the Agricultural Credit Act of 1987; interim rule with request for comments; effective date 10/14/88; comments due 11/14/88. 53 Fed. Reg. 35637.

2. FmHA; Disaster Assistance and Emergency Loan policies, procedures, and authorizations; final rule; effective date 8/22/88. 53 Fed. Reg. 30382.

3. FmHA; Agricultural Loan Mediation Program; final rule; effective date 8/26/88. 53 Fed. Reg. 32597.

4. INS; Admission of adjustment of status of Replenishing Agricultural Workers (RAWs); notice of availability of preliminary working draft of proposed regulations for the admission or adjustment of a RAW to temporary resident status. 53 Fed. Reg. 30685.

5. USDA; Grazing and livestock use on the National Forest system; proposed rule. "The proposed regulations would clarify the definition of excess livestock, remove the rules on grazing advisory boards, and provide for establishing a minimum number of livestock for which a new permit would be issued. . . ." among other things. Comments due October 17, 1988. 53 Fed. Reg. 30954.

6. USDA; Rural labor; IRCA of 1986; SAWs program; final rule; effective date: 8/19/88. Redefines "vegetables" and "other perishable commodities." 53 Fed. Reg. 31630.

7. APHIS; brucellosis; tatoo use restriction for identification of sows and boar; correction; effective date 8/23/88. 53 Fed. Reg. 32029.

8. EPA; Worker protection standards for agricultural pesticides; correction. 53 Fed. Reg. 32322.

9. PSA; Poultry regulations and policy statements; notice of proposed rulemaking; extension of comment period; comments due 11/8/88. 53 Fed. Reg. 32624.

10. FCA; "Borrowers' rights;" implementation of the Agricultural Credit Act of 1987; final rule; effective date – expiration of 30 days after this publication during which either or both houses of Congress are in session. 53 Fed. Reg. 35427.

– *Linda Grim McCormick*

Creditor interests in federal farm program payments

The following are recent cases touching upon the issue of creditors' interests in federal farm program payments.

The case of *In re Halls*, 79 Bankr. 419 (Bankr. S.D. Iowa 1987) holds that federal rules on assignments preempt application of state commercial law, and treats any security agreement as an "assignment." As a result, any payments in form of PIK certificates are not subject to creditor claims and claims to cash are subject to "pre-existing debt" rules. *Accord In re Lehl*, 79 Bankr. 880 (Bankr. D. Neb. 1987).

In re Arnold, Bk. An. 87-00767W (Bankr. N.D. Iowa 1988), holds contrary to *Halls*, ruling that there is no preemption, and that a state security interest is valid in farm payments.

The case of *In re George*, 85 Bankr. 133 (Bankr. D. Kans. 1988) holds that anti-assignment regulations do not preempt state commercial law, thus PIK certificates are subject to security interests as proceeds.

In re Lundell Farms, 86 Bankr. 582 (Bankr. W.D. Wis. 1988), is a case that allowed CCC to setoff against farm payments in a Chapter 11 proceeding.

In re Holman, 85 Bankr. 869 (Bankr. Kan. 1987), raises the issue of whether a security agreement is an "assignment" for purposes of federal law, and holds that there is no pre-existing debt when debt and security interest are entered into at the same time though not enforced until later year payments.

In re Hazelton, 85 Bankr. 400 (Bankr. E.D. Mich. 1988), is a case that denied FmHA attempts to a setoff in a Chapter 12 proceeding.

The case of *In re Stephenson*, 84 Bankr. 74 (Bankr. N.D. Texas 1988), also denied an FmHA attempt to setoff in Chapter 12 against disaster payments, on the basis that it was barred by a Chapter 12 confirmation.

In re Waters, 83 Bankr. 594 (Bankr. N.D. Iowa 1988) (withdrawn from publication for rewriting, will be republished with similar result) holds that CRP payments are subject to a "rents and profits" clause under a mortgage and are not personal property subject to UCC.

The case of *In re Butz*, 86 Bankr. 595 (Bankr. S.D. Iowa 1988) holds that CRP payments are not "rents" and are personal property subject to the UCC but are also then subject to the full force of the *Halls* ruling, i.e. payments in the form of PIK not "assignable."

In addition, the reader is referred to Hamilton, "Securing Creditor Interests in Federal Farm Program Payments", 33 S.D.L. Rev. 1 (1988).

–Neil Hamilton

State Roundup

FLORIDA. *Reasonable use no factor in diffused surface water case.* The Florida Third District Court of Appeal held in *Machado v. Westland,* 523 So.2d 596 (1987), that an owner of higher elevation land holds an easement on lower elevation land for the natural flow of surface water, but this easement does not permit the easement holder to artificially increase the flow of surface water onto the servient lands. The court held that the alleged reasonableness of the higher land owner's use of its property does not support an exception to this rule. The only factor for the trier of fact to consider is the amount of diversion of the surface water flowing onto the servient land. Id. at 598.

–Sidney F. Ansbacher

ILLINOIS. *Federal warehouse laws preempt state bonding rules.* In the late 70's and early 80's, the high incidence of grain elevator insolvencies brought about the advent of the grain insurance/indemnity funds for various states. Also leading to their creation was the difficulty many warehousemen and grain dealers experienced in obtaining surety bonds to satisfy the state's licensing requirements. The states of Illinois, Ohio, South Carolina (the first, having been established in 1954), Oklahoma, Kentucky, Iowa, and New York currently have Grain Insurance/Indemnity Funds. For the most part, these funds were started between 1980 and 1984. The states of South Dakota, North Dakota, Idaho, Washington, Missouri, Michigan, and Ontario, Canada are known to have pending proposals to enact similar legislation. The decision handed down by the U.S. District Court for the Central District of Illinois, *Demeter, Inc. v. Werries*, 676 F. Supp. 882 (1988) changes, at least for Illinois, some of the state's rules and regulations.

The corporate plaintiffs in *Demeter* were each federally licensed warehousemen engaged in grain warehousing activities in Illinois. The plaintiffs included Demeter, Cargill, Continental Grain, Bunge, Pillsbury, Illinois Cereal Mills, Fasco Mills, McLay Grain, and Gerstenberg and Tucker. The defendant, Larry Werries, is the Director of the Department of Agriculture for Illinois who is responsible for ensuring the participation of the plaintiffs in the grain insurance program. Among other things, the plaintiffs contended that provisions in the Illinois Grain Insurance Act (Ill. Rev. Stat. ch. 114, section 701 (1985)) and the Illinois Grain Dealers Act (Ill. Rev. Stat. ch. 111, section 301 (1985)) were unconstitutional because of (i) the Supremacy Clause of the U.S. Constitution, and (ii) each having been bonded pursuant to federal statute, the United States Warehouse Act (USWA). 7 U.S.C. section 241 (1982).

To obtain a license in Illinois, a grain dealer must join the Illinois Grain Insurance Fund. This is done by signing appropriate documents and paying a specified amount based on the dealer's total production during the prior fiscal year. In 1985, the state amended the Grain Insurance Act and the Grain Dealers Act to effectively mandate the participation by federally licensed facilities. The alternative to joining was to provide an equal amount of protection through either a bond for the total amount of their licensed capacity or collateral of an equal amount. Those supporting the changes to the Illinois law felt the Federal Surety Bond to be inadequate, taking into account the size of the loss that farmers could experience.

The plaintiffs supported the Federal Warehouse Act because of their need to deal with only one set of laws rather than the laws of each of the fifty different states. The plaintiffs further contended that the federal warehousing requirements involving bonding and net worth were sufficient protection. The bond requirements are currently twenty cents per bushel on the first million bushels, fifteen cents per bushel on the next million bushels, and ten cents per bushel on additional bushels with the total bond for each state not to exceed $500,000. The net worth requirement is twenty cents per bushel of licensed capacity with a minimum of $25,000.

Judge Mills granted the plaintiffs' request for summary judgment, citing largely as his authority the provision granting exclusive jurisdiction to the Secretary of Agriculture so long as the license is in effect (7 U.S.C. section 269 (1982)) and the Supreme Court's holding in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S. Ct. 1146, 91 L.Ed. 1447 (1947). Judge Mills concluded that the plaintiffs need look only to the federal authorities. They can operate without regard to state acts. The result is the same even if it is found that the federal scheme of protection is more modest and less pervasive than the state's regulatory plan. By foot note, this conclusion also applies when federal regulations preempt state action.

No appeal of the decision is expected.

–Paul A. Meints

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agricultural law update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

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.

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.

AALA Annual Meeting registration information.
Brochures detailing registration information concerning the Ninth Annual AALA Conference and Annual Meeting have already been mailed and should have been received by now.

In the event you did not receive a brochure, you may call 1-800-228-3000, the Westin Crown Center Hotel, for room reservations, and 816-276-1848, UMKC, for conference registration. The registration fee is $195.00. Law students may attend for $75.00.

Call UMKC/CLE at 816-276-1848 for further information.