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## INDEMNIFIED, EVENTUALLY: INSURED FARMERS RESORT TO LITIGATION TO OBTAIN PROPER GRIP PAYMENTS

by Jeff Todd, Spencer Smith and Jeremiah Buettner\*

In the March 2008 Update we addressed Group Risk Income Protection (GRIP) policy disputes (*RMA's Inconsistent Practices Cost Farmers*) and described the inconsistent positions taken by the Risk Management Agency (RMA) in three cases involving claims made by several hundred Texas insureds for the 2006 crop year. At the time, the cases were involved in arbitration, litigation and administrative appeals. Now that the cases have been resolved, this article describes what can be learned from the disputes.

### The GRIP Policy & RMA's Inconsistent Payment Determinations

GRIP is a program of crop insurance intended to be a risk management tool to insure against widespread loss of revenue from the insured crop in a county, whether due to low yields, low prices, or both. The policies are issued by private insurance companies (Approved Insurance Providers or AIPs) and are federally reinsured by the RMA, a division of the USDA. Essentially, the insured farmer will be entitled to a payment when the revenue for the insured's county is below a certain point, the "trigger revenue."

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\* Attorneys with the Oklahoma-based law firm of McAfee & Taft, represented groups of farmers in the Parmer, Moore and Dallam County, TX administrative actions. They have represented over one hundred wheat, corn and cotton farmers in all three forums (administrative appeals, arbitration, and federal court judicial reviews)

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## IS A FARMER'S POTENTIAL OBLIGATION TO USDA UNDER THE GUARANTEED LOAN PROGRAM SUBJECT TO A DISCHARGE IN BANKRUPTCY?

by Ashley Schweizer

The United States Department of Agriculture (USDA) operates two loan programs to provide financing to farmers, the direct loan program and the guaranteed loan program. The USDA's Farm Service Agency (FSA) administers these programs and is often referred to as the "lender of last resort" because the loans are available only to farmers who cannot obtain financing elsewhere. Under the direct loan program, the USDA is the lender, and it provides the financing directly to the farmer under a two party contractual relationship.<sup>1</sup> In contrast, with the USDA's guaranteed loan program, there are three parties involved: the USDA, a commercial lender, and the farmer/borrower. The commercial lender supplies the farmer with the financing while the USDA guarantees the commercial lender's loan up to a certain amount.<sup>2</sup> If the farmer defaults, the lender will pursue collection efforts, but the USDA will pay the commercial lender for what it cannot recover, up to the amount of the guarantee,

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

After the crop year, RMA determines the actual county revenue by multiplying the county’s harvest price by NASS’s estimate of the actual county yield. Ultimately, if the county revenue drops below the trigger revenue, an indemnity is due under the policy.

RMA’s calculation of the actual county revenue is perhaps the most important step in determining the insurers’ payment obligation to a GRIP policyholder. However, as described in our March 2008 article, RMA took inconsistent positions on whether or not it had the authority to manipulate NASS estimates of county yields. In some cases, RMA would argue that it had the authority to do so to get a “more accurate” higher yield, which consequently lowered the indemnity due the insureds. In other cases, RMA refused to adjust NASS yields to lower the yield (which would increase the indemnity) despite demonstrably inaccurate statistics. Now that the 2006 Texas GRIP matters have been resolved, there is valuable precedent outlining RMA’s obligations to GRIP policyholders.

#### **Parmer County Corn**

Parmer County irrigated corn producers were involved in the largest GRIP policy dispute for the 2006 crop year. Based on the NASS published county yield for corn, Parmer County irrigated corn farmers were entitled to an indemnity of approximately \$235 per acre. Before directing payment for this amount, however, RMA made an after-the-fact determination that planting non-irrigated corn was not a “good farming practice” in west Texas, and was therefore uninsurable.

The express terms of the GRIP policy mandate that all corn planted in the county be used in setting the county actual county

yield, regardless of insurability. Nevertheless, RMA unilaterally modified the NASS numbers by subtracting thousands of planted non-irrigated acres. In doing so, RMA artificially inflated the county yield and deflated indemnity payments due the insured farmers. When the insured farmers received their indemnity payments, they were only for \$45 per acre. As a group, Parmer County irrigated corn producers received nearly \$3 million less than was due under the GRIP policies. Moreover, RMA later retracted its “good farming practice” determination, but failed to pay the balance of the indemnity.

The producers initiated an arbitration proceeding against their AIPs, which led to the discovery that RMA had caused the lower payment. The arbitration was stayed and the producers pursued an administrative action against RMA before the USDA’s National Appeals Division (the NAD). The group sought a determination that RMA breached the terms of the GRIP policy by adjusting the published NASS yield.

The NAD held that RMA was allowed to adjust NASS yields as long as the adjustments were not arbitrary and capricious. In this case, the Director found that, in subtracting the non-irrigated acres because of a good farming practice determination that was later retracted, this revision was arbitrary and capricious. RMA subsequently agreed to pay the producers \$2.5 million in indemnity plus the \$45 per acre already paid, plus an additional \$50,000 for their attorneys’ fees and costs.<sup>1</sup>

#### **Parmer County Wheat**

In addition to the Parmer County corn producers, several wheat producers in Parmer County were forced to resort to litigation when the RMA directed payment of the GRIP indemnity based on demonstrably inaccurate NASS data. Unlike the Parmer County corn case, where RMA defended itself by claiming it was entitled to adjust NASS data as it saw fit, RMA argued otherwise in the Parmer County wheat case.

Prior to the publication of the final county yield for Parmer County wheat, a few wheat producers had reviewed preliminary NASS yields and discovered that NASS had erroneously high production numbers.

The producers contacted both NASS and RMA, ultimately convincing them to adjust the production estimates three times before issuing a final published yield. Even after the adjustments, the numbers were still too high, resulting in an erroneously low indemnity. Despite acknowledging the flawed data provided by NASS, RMA refused to modify the NASS numbers, arguing that it was “required” to use official NASS estimates, whether they reflected accurate production data or not.

Several wheat producers challenged RMA’s position in front of the NAD. The group sought a determination that by convincing NASS to alter its initial NASS numbers, RMA had committed itself to using accurate production data. According to the terms of the GRIP Policy, RMA was not allowed to recalculate indemnity payments even though the NASS yield may be subsequently revised. Because the insured producers, NASS and RMA had all acted outside the policy by changing the numbers to make them more accurate the producers argued, RMA had a duty to actually determine and use accurate yield data.

The NAD ultimately held that RMA did not violate the terms of the GRIP policy by calculating the indemnity based on revised NASS estimates. The Director noted that while RMA has the authority to adjust NASS yields, rather than simply adopting them, it is not under a duty to make such adjustments. However, the Director noted that RMA could not make post-payment revisions to NASS yields to the detriment of a producer.

#### **Moore County and Dallam County Wheat**

Under the Parmer County wheat case, it is clear that RMA cannot make post-payment revisions to NASS yields, which is exactly what it attempted to do to wheat producers in Moore and Dallam Counties.

In March 2007, NASS published its county yields for Moore and Dallam Counties for the 2006 crop year. RMA relied on the yields and calculated and paid the producers’ indemnity. However, in July 2007, NASS revised its originally published estimates after further analysis of the data,

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significantly increasing the yield. In response, RMA recalculated the producers' indemnity payments and directed the AIPs to demand refunds of "overpayments" from the insureds.

The wheat producers joined together and initiated an NAD appeal seeking a determination that RMA could not retroactively recalculate indemnity payments based on revised NASS yields and demand refunds of already paid indemnities.

The NAD again noted that, while RMA has the authority to adjust NASS yields, it does not have the authority under GRIP to recalculate a previously issued indemnity payment to the detriment of the producer. Thus, the producers obtained an order declaring the demands for refund improper

and an award for the attorney fees in connection with the NAD appeal.

### Conclusion

The lesson to be learned by the foregoing cases is that the NAD has held that RMA may make reasonable adjustments to the NASS final yields in calculating GRIP indemnity payments, but is not under a duty to do so. All adjustments must be based in fact and not be arbitrary and capricious, as RMA attempted to do in the Parmer County corn case. Furthermore, RMA's ability to adjust NASS yields does not allow it to make post-payment recalculations of the indemnity to the detriment of the producer, as RMA attempted to do in the Moore County and Dallam County wheat case. Finally, GRIP insureds will be able

to recover attorney fees in situations where they are forced to resort to litigation to enforce the provisions of the GRIP policy before the NAD.

While this may provide some assurance as to how a GRIP indemnity payment should be calculated, we will have to wait and see if RMA will consistently adhere to these rules.

### ENDNOTES

<sup>1</sup> Non-irrigated corn farmers in Parmer County, who were also contesting the RMA's actions in federal court, clearly benefited from the irrigated producers' NAD appeal. After the NAD's decision, RMA agreed to settle with the non-irrigated corn farmers.

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## **Schweizer—IS A FARMER'S POTENTIAL OBLIGATION TO USDA UNDER THE GUARANTEED LOAN PROGRAM SUBJECT TO A DISCHARGE IN BANKRUPTCY?**(cont. from p. 1)

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assuming all requirements are met.<sup>3</sup> The USDA is then authorized to seek reimbursement from the farmer for the amount of the loss claim it paid to the commercial lender.<sup>4</sup>

This article explores the legal issues that arise in the guaranteed loan program when the farmer files for relief in bankruptcy under Chapter 7. Filing may occur at a time when the loan is in default, before the USDA has any direct involvement. The commercial lender will be listed as a primary creditor in the bankruptcy, but the debtor and his/her attorney may not think about listing the USDA. Should the USDA debt also be listed as an obligation on the bankruptcy schedule? Will the debt to the USDA under the guaranteed loan program be discharged? The answer to both of these questions is yes. Compliance with the Bankruptcy Code mandates that the USDA debt should be listed as an obligation on the bankruptcy schedule because the USDA, as a guarantor of the loan, is a creditor of the farmer/debtor. The USDA holds a contingent claim against the farmer that arose prepetition under the terms of the original loan. Assuming that the debt is listed, the USDA's contingent claim should be discharged in a Chapter 7 bankruptcy, and the farmer given a fresh start in accordance with the underlying policy of the Bankruptcy Code.

### *Defining "Creditor"*

The Bankruptcy Code's definition of "creditor" includes any "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor."<sup>5</sup> Applying this to the USDA guarantee, two questions are suggested: 1) is the right to collect on the guarantee a "claim against the debtor;" and 2) when does this claim arise?

### *Is the Guarantee a "Claim Against the Debtor"?*

The Bankruptcy Code defines a "claim" in part as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."<sup>6</sup> The Ninth Circuit Court of Appeals in *In re Jastrem*<sup>7</sup> recognized that the Bankruptcy Code's definition of "claim" is broad because it seeks to encompass *all* debts owed by the debtor and to discharge them in order to provide the debtor a "fresh start" in accordance with the purpose of the Bankruptcy Code (emphasis added).<sup>8</sup>

It is important to note that the definition of "claim" includes a contingent right to payment,<sup>9</sup> though the Bankruptcy Code does not expressly define the term "contingent claim." The legislative history confirms that

it was the drafters' intent for all contingent claims to be addressed in the bankruptcy case in order to provide the debtor with the maximum amount of help available.<sup>10</sup> The House Report to the Bankruptcy Reform Act of 1978 states that "the bill [Pub. L. No. 95-598, which would become the Bankruptcy Reform Act of 1978] contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court."<sup>11</sup> The Report specifically provides that "[a] guarantor of or surety for a claim against the debtor will also be a creditor, because he will hold a contingent claim against the debtor that will become fixed when he pays the creditor whose claim he has guaranteed or insured."<sup>12</sup>

Over the years, case law has developed a similarly all inclusive definition of "contingent claims." The court in *In re All Media Properties, Inc.*<sup>13</sup> articulated a definition of contingent claims that has been "generally accepted."<sup>14</sup> The definition provides,

[C]laims are contingent as to liability if the debt is one which the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger the liability of

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the debtor to the alleged creditor and if such triggering event or occurrence was one reasonably contemplated by the debtor and creditor at the time the event giving rise to the claim occurred.<sup>15</sup>

Applying this definition to the farmer’s obligation to the USDA under the guaranteed loan program, it is clear that the USDA holds a contingent claim against the farmer. When the farmer defaults on the loan to the commercial lender and the USDA pays the commercial lender the guaranteed amount, then the USDA can pursue the farmer for the amount it paid to the commercial lender. This situation or “triggering event” was “reasonably contemplated” by all parties at the beginning of the loan process as evidenced by FSA’s Handbook, Part 14, Section 363(A).<sup>16</sup> The Handbook indicates that it is the USDA’s policy for a federal debt to arise against the farmer for any money the USDA pays on behalf of the farmer.<sup>17</sup>

Case law confirms this interpretation that guarantors of debtors are considered to be contingent claim holders, i.e., creditors under the Bankruptcy Code.<sup>18</sup> The court in *In re Denochick* acknowledged that the term “creditor” within the Bankruptcy Code is “very broad,” and it “encompasses a guarantor of a debt.”<sup>19</sup> Additionally, the Bankruptcy Court in the District of Massachusetts opined that “[g]uarantors of an obligation of a debtor in bankruptcy hold contingent claims against that debtor’s estate.”<sup>20</sup> Thus, since a guarantor holds a contingent claim, then it is considered a creditor.<sup>21</sup>

*When Does the USDA’s Claim Arise?*

The Bankruptcy Code defines the term “debt” to mean “liability on a claim.”<sup>22</sup> Prepetition debts are debts that arose before the filing of the bankruptcy petition as opposed to postpetition debts, which arose after the debtor filed the bankruptcy petition. Prepetition debts are subject to discharge as part of the bankruptcy, but postpetition debts are not. If the USDA’s contingent claim arose prepetition, i.e., when the loan was made and the guarantee put in place, the claim will be discharged in the subsequent bankruptcy. If on the other hand, USDA’s claim only arises when the USDA pays the commercial lender, this

payment is likely to occur postpetition, often after the bankruptcy is completed. This interpretation would support a finding that the debt would be a postpetition debt that was not discharged by the bankruptcy.

Bankruptcy case law confirms that USDA’s contingent claim under the guaranteed loan program arises as part of the loan transaction. The Bankruptcy Appellate Panel of the Ninth Circuit opined in *In re Wade Cook Financial Corp.*<sup>23</sup> that “[t]he character of a claim does not transform from prepetition to postpetition because that claim is contingent, unliquidated or unmatured when the debtor files its petition.”<sup>24</sup> Consequently the fact that the USDA’s claim is contingent and that the amount is not fixed until the USDA pays the commercial lender is irrelevant as to whether the debt is a prepetition or postpetition debt. According to the Ninth Circuit, a contingent claim that is not fixed can still be a prepetition debt.<sup>25</sup> The court goes even further and states that “[a] debt can be owing prepetition even though that debt did not come into existence until postpetition events occurred.”<sup>26</sup> This means that there must be liability for the debt at the time the petition is filed, but the debt does not have to be due or fixed in order for it to be considered a prepetition debt.<sup>27</sup> Therefore, even if the amount is not fixed or due until the USDA pays the commercial lender after the bankruptcy is over, it is still a prepetition debt because the farmer’s liability for the debt attached as part of the prepetition loan transaction. The Bankruptcy Code does not require that the amount of a debt or claim has to be fixed prior to the filing of the bankruptcy petition.<sup>28</sup>

Accordingly, the USDA’s contingent claim against the farmer would be a prepetition debt that is subject to discharge in the bankruptcy case despite the fact that the USDA pays the commercial lender after the bankruptcy is over.

In conclusion, as a guarantor of the farmer’s loan with the commercial lender, the USDA holds a contingent claim against the farmer that stems from the underlying loan agreement. In a Chapter 7 bankruptcy, the debtor should schedule the USDA as a creditor with a contingent claim. This

claim will subsequently be discharged in the bankruptcy, even if the USDA makes a postpetition settlement with the lender. This is consistent with the Bankruptcy Code’s policy of providing the debtor with a “fresh start.”<sup>29</sup>

**ENDNOTES**

- <sup>1</sup> 7 C.F.R. § 761.2(b) (2009) (definition of “direct loan”).
- <sup>2</sup> *Id.* (definition of “guaranteed loan”).
- <sup>3</sup> *See id.* (definition of “loss claim”).
- <sup>4</sup> 7 C.F.R. § 762.149(m) (2008).
- <sup>5</sup> 11 U.S.C. § 101(10)(A) (2000).
- <sup>6</sup> *Id.* § 101(5)(A).
- <sup>7</sup> 253 F.3d 438 (9th Cir. 2001).
- <sup>8</sup> *Id.* at 442 (quoting *California Dep’t of Health Serv. v. Jensen*, 995 F.2d 925, 929-30 (9th Cir. 1993)).
- <sup>9</sup> 11 U.S.C. § 101(5).
- <sup>10</sup> H.R. Rep. No. 95-595, at 309 (1977).
- <sup>11</sup> *Id.*
- <sup>12</sup> *Id.* at 310.
- <sup>13</sup> 5 B.R. 126 (Bankr. S.D. Tex. 1980).
- <sup>14</sup> *Frye*, 1997 WL 33475063, at \*1.
- <sup>15</sup> *Id.* (quoting *In re All Media Properties*, 5 B.R. at 133).
- <sup>16</sup> U.S. Dep’t of Agric., FSA Handbook: Guaranteed Loan Making and Servicing 14-28 (2007), [http://www.fsa.usda.gov/Internet/FSA\\_File/2-flp.pdf](http://www.fsa.usda.gov/Internet/FSA_File/2-flp.pdf).
- <sup>17</sup> *Id.*
- <sup>18</sup> *In re Denochick*, 287 B.R. 632, 633 (W.D. Pa. 2003); *In re Sunset Hollow Properties, LLC.*, 359 B.R. 366, 382 (Bankr. D. Mass. 2007).
- <sup>19</sup> *Denochick*, 287 B.R. at 633.
- <sup>20</sup> *Sunset Hollow Properties*, 359 B.R. at 382 (citing *Smith v. Cunningham*, 163 B.R. 657, 660 (Bankr. D. Mass. 1994)).
- <sup>21</sup> *Id.*
- <sup>22</sup> 11 U.S.C. § 101(12).

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<sup>23</sup> 375 B.R. 580 (B.A.P. 9th Cir. (2007)).  
<sup>24</sup> *Id.* at 595 (citing *Braniff Airways, Inc. v. Exxon Co.*, 814 F.2d 1030, 1036 (5th Cir. 1987)).  
<sup>25</sup> *Id.*  
<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (quoting *Rozel Indus., Inc. v. Internal Revenue Service*, 120 B.R. 944, 949 (Bankr. N.D. Ill. 1990)).  
<sup>28</sup> *Wade Cook Financial Corp.*, 375 B.R. at 595-96 (citing *Braniff*, 814 F.2d at 1036).  
<sup>29</sup> Note that this analysis does not address

the situation in which the debtor is found to have violated any of the provisions limiting his or her discharge or dischargeability. 11 U.S.C. §§ 523, 747.

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**HOW TO ASSIST FARMERS AND RANCHERS TO NEGOTIATE A WIND LEASE ON THEIR PROPERTY**

by Cari B. Rincker\*

In light of the recent economic stimulus plan and the Obama Administration’s push for green jobs and renewable energies, livestock producers from coast to coast are interested in how they can financially benefit from this trend and negotiate a wind energy lease on their property. Since wind leases generally range from as few as five years to as many as fifty years or more, farmers and ranchers are well advised to put these agreements in writing and have them reviewed by an attorney prior to signing them.

This article seeks to provide guidance to attorneys in assisting farmers and ranchers who are interested in a possible wind energy lease on their property or are currently in negotiations with a wind developer.

**Starting Point: Evaluate the Property’s Location**

As the real estate truism states— in wind development, the key is location, location, location. The first question that every attorney should ask is whether the farmer or rancher’s property is suitable for a wind farm. Wind speed is the most obvious factor in determining suitability of a property. Wind speed data is available through the National Renewable Energy Laboratory. However, some livestock producers choose to hire an environmental consultant to receive scientific data on their property’s wind potential. See e.g., Phillip Bring, *Harvesting the Wind*, ANGUS JOURNAL (April 2009).

Wind speed is just one factor in determining whether your land is marketable to wind developers. Rocky, mountainous terrain and protected federal lands serve as constraints for wind developers. Proximity to transmission lines can make a property more marketable. Finally, location also determines federal, state, and local legal frameworks and available economic incentives for wind developers.

**Have Your Client Talk to His or Her Neighbors and Join Forces**

Once property is determined to be suitable for wind development, it is recommended that neighboring area farmers or ranchers form a landowner association with one another in order to increase their collective bargaining power with wind companies. The larger the block of acreage that can be bundled among landowners, the more marketable the property will be to a wind developer. Additionally, this gives farmers and ranchers greater leverage to negotiate increased revenues and more favorable wind lease terms. Also, landowner associations provide an opportunity to spread out legal fees among several livestock producers, making it more affordable to retain an attorney to review and negotiate terms in the wind lease. Finally, cooperation among several producers helps improve transparency, ensuring all landowners get the best possible terms in their lease.

**Understand the Four Wind Development Stages**

When negotiating a wind lease agreement, it is important for attorneys to understand the four major stages of wind development: (i) development period, (ii) construction period, (iii) operational period, and (iv)

termination period. The duration of each of the stages should be narrowly defined in the lease.

*Development Period.* In this initial stage, the wind company evaluates the property for its potential by completing the following activities—wind assessments, environmental review, economic modeling, permitting, and securing financing. During this period, other than installing a meteorological tower on the property to measure the wind, the wind developer typically makes little use of the property itself.

*Construction Period.* During the construction period, wind turbine generators, steel towers, foundations, concrete pads, anchors, fences, and other fixtures will be installed in the pasture or field. If construction does not commence within the specified time, the lease should terminate automatically or the wind developer may tie-up the land for forty plus years without ever constructing a turbine on the property.

*Operational Period.* Next, during the operational period, wind energy is being generated on the property, transmitted to available markets, and sold for profit. The operational period may last up to fifty or sixty years.

*Termination Period.* In this phase, the party ends, and the wind developer ceases to produce wind energy. Here, the wind developer is obligated to remove its equipment from the farmer or rancher’s property. This is commonly referred to as “decommissioning.” Decommissioning may be limited to a few months, while remediation may take several years to adequately complete.

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### **Negotiate Financial Terms**

Since a farmer or rancher's property will be significantly encumbered by a wind lease, attorneys should make sure he or she is adequately compensated. There are no clear-cut rules with financial revenues as the market varies due to geographic location, total acreage, wind speed, terrain, proximity to transmission lines, and available economic incentives for the wind developer. Due to the uncertainty in the market and whether a wind developer will actually develop a piece of property, attorneys should help try to secure as much money as possible up front for the farmer or rancher.

Financial terms in a wind lease should be periodically adjusted for inflation.

Before signing a wind lease, attorneys should consider the following financial terms:

*Minimum Rent.* Landowners should ideally negotiate for an annual minimum rental payment, which should increase each year during the development period. This helps ensure a guaranteed amount of money each year for the livestock farmer or rancher, regardless of fluctuations in the market or wind production.

*Construction Bonus.* Livestock producers should negotiate a "construction bonus" in addition to the annual minimum rental payment for the time when the developer commences construction on the wind farm.

*Royalties.* After construction, when the wind turbines become operational and generate electricity for sale by the wind developer, farmers and ranchers will typically receive an annual royalty--oftentimes a percentage of the gross revenues. The royalty percentage should also periodically increase as well and include a percentage of any money received by the wind developer in lieu of the sale of electricity.

*Termination Fee.* Livestock producers should negotiate to receive a "termination fee" if the wind developer terminates the lease agreement prior to construction. This is appropriate since the farmer or rancher loses revenue for the period necessary to negotiate with another developer.

*Attorneys Fees.* Especially if a landowner association is formed, farmers and ranchers should not be shy to ask the wind developer to pay for all or part of legal expenses necessary during negotiation or litigation

expenses that may arise out of the wind lease.

*Payment for Other Uses.* Among the other uses for which a livestock producer can expect payment include the following: roads, transmission lines, substations, meteorological towers, and payments for access to in-holdings if the land includes a large amount of federal or state land within its boundaries.

On a final note, livestock producers should also reserve the right to conduct an audit from time to time to verify they are receiving the amount of money guaranteed to them under the terms of the lease agreement.

### **Property Rights Should Be Protected**

The lease agreement should not only identify the uses for the wind developer, but it should also reserve all other uses to the farmer or rancher. For example, the agreement should reserve all rights to mineral exploration and development to the landowner, as well as all water, hunting and fishing rights. Furthermore, ranchers may wish to protect part of his/her property from development such as the riparian areas, irrigation ditches, or boulder formations.

### **Reduce Liability**

Most wind lease agreements will include an indemnification provision requiring both parties to defend and hold each other harmless from claims for any future loss or damage arising from the various uses of the property. Beware of this provision as farmers and ranchers are not on an equal playing field with wind developers. To explain, any loss to the landowner arising from the wind developer's use and occupation of the land may total in the thousands or tens-of-thousands of dollars; however, any loss to the wind developer arising from the landowner's use and occupation of his own land may total in the millions or tens-of-millions of dollars.

To illustrate this disparity, the cost to replace a livestock producer's fence, barn, a good horse, or show steers does not compare to the cost to replace a wind turbine or electrical substation. Most farmers and ranchers cannot afford this type of liability.

Therefore, attorneys should limit potential liability to an affordable figure, such as the receipt of insurance proceeds. Otherwise, a single accident may completely bankrupt a

family's livestock operation.

### **Wind Developer Should Pay Taxes and Utilities**

As expected, wind energy development will inherently increase the property value on a farm or ranch. Due to this fact, attorneys should make sure that the lease agreement assigns any increase in property taxes to the wind developer--otherwise, the increase will be the burden to the landowner. In addition, any utilities necessary for the construction or operation of the wind farm should be the responsibility of the wind developer.

### **Farmer or Ranchers Should Be Notified When Rights Are Assigned**

Without question, the wind lease agreement will specify whether the landowner and the wind developer may assign the contractual rights and obligations to third parties. Almost always, wind developers will request freedom to sublease, assign, and mortgage their rights without the consent of the landowner. These broad rights may be necessary in order for the wind developer to obtain financing; however, livestock producers should demand to be notified each time the lease is transferred to another party to understand who is responsible for any default of the lease agreement.

### **Wind Developer Should Not Put Liens On Property**

The wind developer should be required to keep the land free and clear of all liens related to the wind farm. It should be the responsibility of the wind developer instead of the livestock producer to contract and make payment for all labor and materials related to the construction of the wind farm. Additionally, the wind lease should not hold the farmer or rancher responsible if the wind developer cannot afford to pay for labor and materials.

### **Negotiate Ability To Terminate Lease In Event of Default**

One of the most important provisions of any wind agreement is the default and termination clause. Most wind leases allow the wind developer the ability to terminate the lease at any time and for any reason while the landowner has little autonomy to terminate the agreement. Farmers and ranchers should negotiate to have the ability

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the terminate the lease if the wind developer defaults in any way such as fails to: pay rent, maintain adequate insurance, pay taxes, or any other obligation in the contract.

**Property Should Be Protected During Decommissioning and Remediation**

In the event of default, or termination of the lease, the farmer or rancher should specify how much time the wind developer is permitted to remove the wind turbines from the land. Payment must also be established during this time period. In order to prevent the wind developer from simply “walking away” from the project, farmers or ranchers should demand a “decommissioning security,” to be paid as soon as the wind turbines become operational.

Designating proper reclamation provisions is one of the most important aspects of the wind lease agreement. Reclamation is necessary during construction, operation, repairs, and after the project has been removed from the land. Livestock producers cannot rely on the governmental authorities to protect their property so reclamation must be adequately explained in the lease itself. This is particularly important if the farm or

ranch has contains unique characteristics or wildlife habitat that need to be protected.

Reclamation measures should identify the means to keep track of the original condition of the property, either through photographs or an assessment prepared by a range professional. Moreover, other reclamation measures should discuss the following issues: (i) identification of improvements that should be removed, (ii) instruction on depth of soil removal, (iii) description of stockpiling of topsoil and storage during construction, (iv) decompaction of the soil, (v) reclamation of roads, (vi) revegetation, (vii) erosion, (viii) seeding, (ix) protection of revegetation, (x) noxious weeds, (xi) dust control, and (xii) trash removal.

**Look At The Farmer or Rancher’s Particular Situation**

The above mentioned issues are the most important to property negotiate with a wind energy company before entering in this type of long-term agreement. However, there are several miscellaneous issues that may need attention such as a forum selection clause, arbitration clause, condemnation, or discussion of what happens to land included

in a conservation reserve program (“CRP”) or any other governmental program.

**Final Thoughts**

Many livestock producers around the United States are interested in taking advantage of the recent economic stimulus plan and the Obama Administration’s push for renewable energies and green jobs by negotiating a wind lease on their property. Though this venture can be highly profitable, the long-term considerations must be carefully reviewed before any farmer or ranchers signs on the dotted line. If a farmer or rancher’s property is suitable for wind development, collective bargaining eliminates the need for a middleman broker and can help ensure that more attractive commercial and legal terms can be negotiated. Attorneys can play an instrumental role in this process from helping farmers and ranchers join forces to help ensure the terms of the wind lease protect a farmer or rancher and his or her children and grandchildren.

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*In an ongoing class action lawsuit*

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**MUSHROOM COOP LOSES ANTITRUST IMMUNITY, DISTRICT JUDGE RULES**

by Marlis Carson

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brought by direct purchasers of mushrooms, a federal district court judge has ruled that Eastern Mushroom Marketing Cooperative (EMMC) is not entitled to the Capper-Volstead antitrust immunity. Ruling on cross-motions for summary judgment, the judge determined that the cooperative’s admission of a non-farmer member with voting rights destroyed its antitrust immunity.

The case is *In Re: Mushroom Direct Purchaser Antitrust Litigation, Master File No. 06-0620, in the U.S. District Court for the Eastern District of Pennsylvania.*

The EMMC case began several years ago when the Department of Justice alleged the cooperative conducted a campaign to prevent nonmember farmers from buying or leasing available mushroom farms. In 2004 the Department and EMMC reached a settlement in the case; following the

settlement a class action lawsuit was filed against the cooperative by direct purchasers of mushrooms. The plaintiffs maintain that EMMC and its members violated the Sherman Act and the Clayton Act and are not eligible for antitrust immunity.

The Capper-Volstead Act (7 U.S.C. Section 291) gives agricultural producer organizations limited antitrust immunity “in collectively processing, preparing for market, handling, and marketing” their products and permits such organizations to have “marketing agencies in common.” In order to qualify for limited antitrust immunity under the Capper-Volstead Act, a cooperative must choose to either operate under a one member/one vote structure, or must limit distributions on dividends to eight percent. In addition, the association must conduct more than half of its business with members, and its voting members must all be producers.

After an initial discovery phase, the judge determined that one member of the cooperative was a non-farmer processor. EMMC conceded that M. Cutone Mushroom Co. was not a grower, but argued that the violation was a technical, de minimis violation that should not destroy the cooperative’s antitrust immunity. EMMC explained that M. Cutone Mushroom Co. is one of several mushroom-related companies owned by the Cutone family that are commonly owned, controlled, and operated by Mario Cutone and his family. EMMC maintained that M&V Enterprises (also owned by the Cutone family and a mushroom grower) should have been registered as the member of the cooperative, not M. Cutone Mushroom Co., and that the cooperative should not lose immunity because the wrong company was registered as the member.

The judge disagreed, noting that “it is

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\*General Counsel, Vice President, Legal, Tax and Accounting, National Council of Farmer Cooperatives

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**Carson—MUSHROOM COOP LOSES ANTITRUST IMMUNITY, DISTRICT JUDGE RULES** (cont. from page 7)

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undisputed that M. Cutone was a non-grower member who had the power to participate in the control and policy making of the association through voting.” The judge further noted that the “existence of even one non-farmer member in an agricultural cooperative is sufficient to destroy Capper-Volstead immunity.”

The mushroom cooperative and its members have filed a notice of appeal in the Third Circuit. The plaintiffs have filed a motion to dismiss and the parties are awaiting the circuit court’s decision. If the notice of appeal is denied, the case will be back in the District Court where several

issues will be litigated, including: whether a proper class has been certified; whether there was indeed a violation of the antitrust laws; and the amount of plaintiffs’ damages.

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**From the Executive Director:**

**NOMINATIONS FOR ANNUAL AWARDS SOUGHT**

Jesse Richardson, jessej@vt.edu, chair of the AALA Awards Committee reminds all members to submit nominations for the AALA annual awards: 2009 Distinguished Service Award; 2009 Student Scholarship Award; 2009 Professional Scholarship Award. Please submit nominations and nominated articles to Jesse as soon as possible.

**2009 ANNUAL CONFERENCE**

A reminder that the dates of the 2009 Annual Agricultural Law Symposium have been changed from October 16-17, 2009 to September 25-26, 2009. The conference program and registration forms are online now and the printed brochures should be arriving any day. President-elect Ted Feitshans has completed planning a very extensive program with a wide variety of topics and issues to be covered in a year of change and challenge for agriculture and agricultural law. If you would like to help with a presentation, contact Ted at ted\_feitshans@ncsu.edu.

The Crowne Plaza Hotel is located in south central Williamsburg at the site of the Civil War Ft. Magruder and within walking distance of the historic colonial Williamsburg site. Williamsburg has three airports with jet service within 45 minutes of the hotel - Richmond, Newport News and Norfolk. See [www.visitwilliamsburg.com](http://www.visitwilliamsburg.com) for servicing airlines.

Guest rooms for attendees are available at \$139.00+tax for single and double occupancy. The conference rate is also available for a very small number of rooms for two days before and the last day of the conference. For reservations, call 888-233-9527. Be sure to identify yourself as attending the American Agricultural Law Association conference. **All blocked rooms return to retail price on September 3, 2009.** This should be a well-attended conference so reserve your room early. If the block fills, contact RobertA@aglaw-assn.org and he will seek block expansion.

**Robert P. Achenbach, Jr., AALA Executive Director**