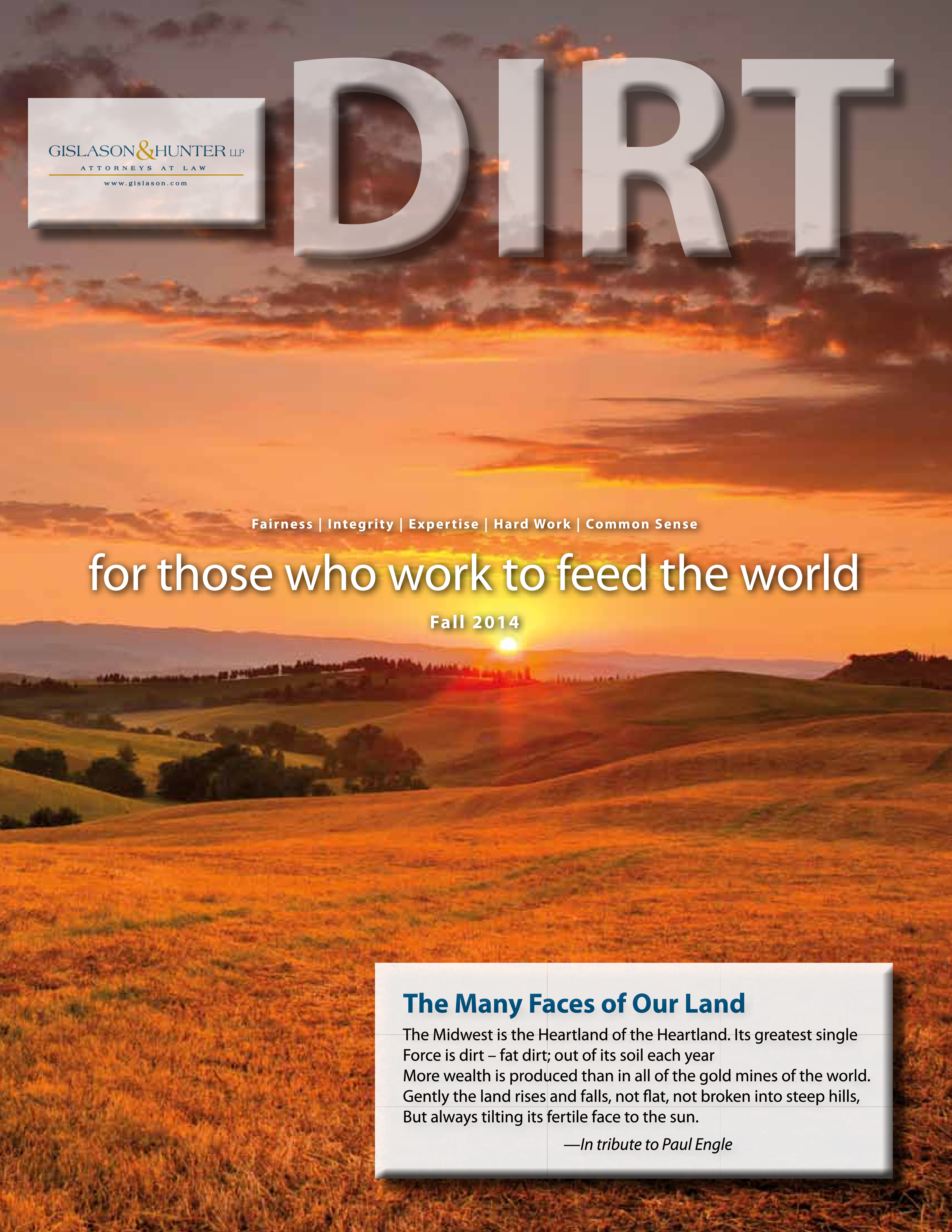

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Fall 2014

The Many Faces of Our Land

The Midwest is the Heartland of the Heartland. Its greatest single
Force is dirt – fat dirt; out of its soil each year
More wealth is produced than in all of the gold mines of the world.
Gently the land rises and falls, not flat, not broken into steep hills,
But always tilting its fertile face to the sun.

—In tribute to Paul Engle

Gislason & Hunter is pleased to support the following Agriculture programs and events

I & S Group Water Quality Seminar
June 2014
Gislason & Hunter Attorneys Jeff Braegelmann and Matt Berger presented at the conference. I & S Engineer Chuck Brandel provided the enclosed summary of water issues (see Page 42).

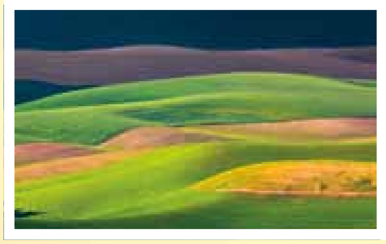
Ag Round Table
August 2014
Gislason & Hunter LLP and AgriGrowth combined forces to present a program featuring Dr. Brian Buhr.

Shown at Left: Perry Aasness, Gary Koch, Dr. Brian Buhr, Glenn Stolt

Gislason & Hunter LLP sponsored the Luau at the Ag Leadership Conference in Brainerd.
August 2014

The 27th Annual Agriculture Lending Conference was hosted by Gislason & Hunter LLP.
September 2014

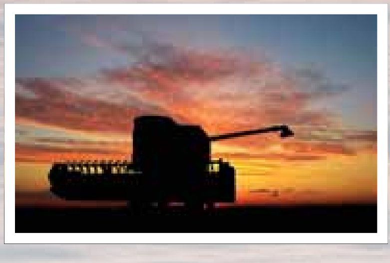
Upcoming Events



AgriGrowth Annual Meeting
Platinum Sponsor
Thursday, November 6
Minneapolis Convention Center

Minnesota Soybean Growers – Transitioning your Farm
Seminars
December 16 – Marshall, MN
December 17 – Mankato, MN

Minnesota Pork Producers Taste of Elegance
Sponsor
Tuesday, January 20
Minneapolis Hilton



Farm Bureau Leadership Conference
Sponsor
January 23 & 24
Treasure Island, Red Wing

Minnesota Feed & Grain Association
Sponsor
January 25 –27
Minneapolis Hilton

Minnesota Ag Expo
January 28 & 29
Mankato Civic Center

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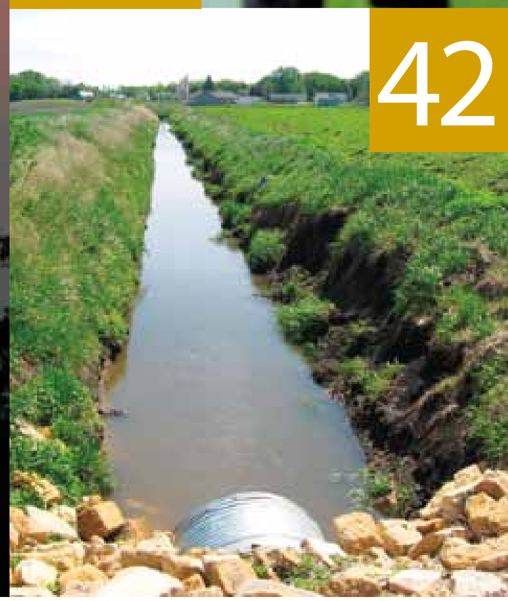

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Conservation Compliance *and the* 2014 Farm Bill

by Bruce Knight

Since its initial inclusion in the 1985 Farm Bill, conservation compliance has been one of the most effective provisions aimed at protecting America's natural resources. To be eligible for a number of farm program benefits, including direct payments, conservation programs, and other Title I and Title II programs, producers must demonstrate that they meet certain basic conservation standards on their land. When it was originally introduced, however, conservation compliance was also required for producers to receive premium subsidies for crop insurance. This requirement remained in place until the 1996 Farm Bill, when lawmakers seeking to increase participation in federally subsidized crop insurance programs dropped the provision from the bill.

Beginning in 2012 during the development of the most recent Farm Bill, it became evident that significant changes were going to be made to the farm safety net. Direct payments were set to be repealed, and a strengthened crop insurance program would instead be the primary safety net for farmers. As a result, conservation compliance would no longer be tied to the largest federal payment program supporting agricultural producers. However, Senator Saxby Chambliss (R-GA) introduced an amendment with bipartisan support that would re-link conservation compliance to premium subsidies for crop insurance. This amendment was passed in a close, but bipartisan, vote and remained on the bill through final passage this past February.

Conservation compliance has two primary components: highly erodible land (HEL) and wetlands compliance. For HEL compliance, a violation occurs when a producer is growing an agricultural commodity on any field that is considered highly erodible without applying an NRCS conservation plan to the land. A wetlands violation occurs when a producer converts a wetland.

Producers who have not been participating in farm programs and are coming under the highly erodible land conservation requirements for the first time will have five reinsurance years to develop and comply with an approved conservation plan to remain eligible for insurance subsidies. Those determined to be in violation have two reinsurance years to develop and comply with an approved conservation plan. For wetlands, a crop insurance purchaser has one reinsurance year to begin to remedy a violation before being declared ineligible. If a producer converts a wetland to cropland after the February 7, 2014 date of enactment, they will be ineligible for a premium subsidy in future years unless they mitigate the conversion.

It's important to note that those who are currently in compliance will not need to do anything differently, and those who need to come into compliance for the first time will have a transition period to develop a conservation plan for highly erodible land. With enactment of the new bill came an immediate restriction on draining wetlands for those purchasing subsidized crop insurance.

Farmers and ranchers who have opted out of farm program payments, and drained wetlands or plowed highly erodible land since 1985, but want to participate in a federally subsidized crop insurance program will need to mitigate the changes they've made to their land as part of the process of developing a conservation plan. Landowners will still have the option to participate in the crop insurance program if they choose not to make required conservation changes to their land; but they will pay the full, unsubsidized price of the insurance.

Under the provisions in the 2014 Farm Bill, self-certification of compliance with environmental requirements would remain the same, as would current enforcement procedures, which would continue to be handled by the Farm Service Agency (FSA) and the Natural Resources Conservation Service (NRCS). The crop insurance agents will have no role in enforcement. In addition, NRCS would give priority for conservation planning to newly covered producers.

About 80 percent of farmers use crop insurance as an essential risk management tool to manage price volatility and weather variability. Farmers and ranchers do pay a premium for the insurance, but about 60 percent of the actual cost is covered by the taxpayers through USDA subsidies. As a result, supporters of re-linking conservation compliance and crop insurance argued that the public has a stake in crop insurance and should receive an appropriate benefit linked to its investment.

In summary, the recently passed Farm Bill re-links conservation compliance provisions and crop insurance subsidy eligibility. For most farmers, this will entail no change in business. However, farmers who are converting highly erodible land or draining wetlands will need to consult with USDA before taking action.

Bruce Knight
Principal and Founder of
Strategic Conservation Solutions, LLC

Bruce Knight is a nationally recognized expert on conservation, agriculture and the environment. Knight is the principal and founder of Strategic Conservation Solutions, LLC. From 2002 to 2006, Knight served as Chief of Natural Resources Conservation Service, the lead U.S. Department of Agriculture (USDA) agency for conservation on private working agricultural lands. Knight was the Under Secretary for Marketing and Regulatory Programs at the USDA from 2006-2009. Drawing on his experience as a former association executive, lobbyist, regulator and Capitol Hill staffer, Knight has a broad understanding of how Washington works. He also brings firsthand knowledge of farming to his national policymaking credentials. A third-generation rancher and farmer and lifelong conservationist, Knight operates a diversified grain and cattle operation in South Dakota using no-till and rest rotation grazing systems. His farming and ranching background gives him the opportunity to practice stewardship and husbandry, providing firsthand knowledge of the interdependency of animal, plant and human health with the environment. Knight is a graduate of South Dakota State University. He is married and has two children.

TACKLING THE URBAN MYTH ON FARMING

by Lori Stevermer

If you ask people to describe a farm and the people that work on it, I'd be willing to bet the image that comes to mind first is one of red barns and guys in bib overalls and flannel. Fond memories of grandparents and summer vacations most likely go along with that image. Now ask those same people what a corporate farm looks like and a totally different image comes to mind; one perhaps less inviting, darker and more sinister. Welcome to the world of modern agriculture, where misconceptions and untruths threaten the practices farmers use to grow food.

Minnesota has 3200 farm families that raise pigs. Another 22,500 jobs are created in various industries around Minnesota because of these pig farmers.

Through my involvement in the MN Pork Producers Association (MPPA), I've had the opportunity to meet many of these families—and the diversity they bring makes our industry stronger and richer. Many farms, like our own, are corporate farms, where family members own shares in the farm primarily to make transfer of ownership to the next generation easier. Try as I might, I can't tell a corporate farmer from a "regular" farmer. They look the same to me. Following the We Care® principles of good animal husbandry, environmental stewardship and care for employees and neighbors is important to all of them.

My husband and I are small farmers—we have a 150-sow farrow to finish farm. However, we often comment on how fortunate we are to live in Minnesota. As the second-largest pig producing state with 14 million raised in 2012, Minnesota has a great network of people—veterinarians, educators, industry associates and agribusiness—who provide valuable resources to farmers. We have access to some of best and brightest minds because of where we live. Contrary to what some may think, large farms are not a threat to us. Lack of knowledge about today's pig farmers by consumers and elected officials may be a bigger threat.

To help clear up these misconceptions, the MPPA and MN Pork Board have invested in a project called Pig3D (www.pig3d.com). My family and I were fortunate to be part of Pig3D. The goal was simple and straightforward: show the people of Minnesota that pig farmers use a variety of production styles and business practices to produce a safe, healthy, lean protein. We opened up our barns and ourselves to let people see what happens on our farms and to help them realize we care about the same things they do: the animals, the environment, food quality and our neighbors. Sustainability is a popular topic and it's important that people know today's pig farmer uses 41% less water and 78% less land to produce pork than 50 years ago. We've also reduced our carbon footprint by 35%.

MN Pork has used media resources like *Bring Me the News* and social media to push videos and information to the public. The response has been positive and some good conversations have been generated. These videos were also used at FarmFest and the MN State Fair, which meant a great number of people were able to see what a farmer looks like and what happens on their farms.

We've all read the statistics on how more people want to know where their food is coming from and how it's grown. This creates opportunities to talk about what we do as farmers. For the past four years, MN Pork has done Oink Outings at various town festivals and farmers' markets. We set up a tent and have activities for the kids and encourage people to ask us questions about raising pigs. For each question we get asked, we donate 1lb of ground pork to Second Harvest Heartland. People are surprised that we are real farmers, but the "why are you here" often turns to "tell me more about". One question I get asked quite often is how antibiotics are used in feeding pigs. Most consumers are surprised to find out that antibiotics have a withdrawal time and that we don't constantly put them in the feed. Sure, we get tough questions. Sow housing and animal welfare are popular and emotional topics. One thing we need to keep in mind as we talk with people who aren't involved in agriculture is to use terms they are familiar with. We can talk all day about the care we give young pigs in the farrowing barn, but if someone doesn't know what farrow means, our good intentions are lost. My husband Dale and I have had conversations with people who at the start have been skeptical of what we do, but by the end have a greater understanding and, more importantly, a higher trust in our practices as pig farmers.

Today's farmers are different from those in the past. They have advanced degrees in areas of study other than agriculture. I know microbiologists, pharmacists and engineers who have returned home to be pig farmers. Think of the conversations they can have with urban consumers about how their food is grown and the importance of MN farms to their lives. These individuals have a variety of experiences and a greater understanding of local, state, national and international issues. Today, 30% of the pork raised in the United States is exported. Having a global perspective will help our farmers compete in the future.

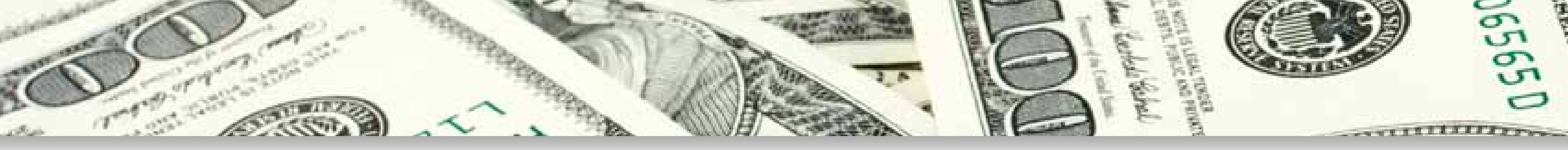
Farmers are known as independent, self-sufficient people. However, we are less than 2% of the population, and chances are that number won't increase. Through projects like A Greater MN

(www.farmandfoodmn.org), we're working to show Minnesotans the impact that agriculture has on business and the economy. To help dispel the urban myths, we're working to create alliances with businesses, chambers of commerce and elected officials because, at the end of the day, having a strong farm industry isn't just good for farmers; it's good for all of Minnesota.

The average person today is three generations removed from the farm. They get information on food from a variety of sources, many of them with anti-animal agriculture agenda. Those of us involved in agriculture, especially those of us who work directly with farmers, have a great opportunity to share the truth about modern agriculture and clear up the myths about farming.

Lori Stevermer
President, Minnesota Pork Producers Association Board

Lori Stevermer is a graduate of the University of Minnesota with a bachelor's degree in animal science. Lori and her husband Dale raise pigs and crops near Easton and have three kids: Brett, Adam and Beth. She is currently a Swine Marketing Specialist for Hubbard Feeds and has worked in the feed business for almost 30 years. She has been on the Minnesota Pork Producers Association Board for the past five years and is now serving as President. Lori enjoys advocating for the swine industry at local, state and national events. Lori's interests include attending her kids' sporting activities, running, biking and volunteering as a 4-H adult leader.



FINANCIAL INSTITUTION LETTER FIL-39-2014:

CLOSER SCRUTINY BY THE FDIC OF AG LENDERS

by Gary Koch

I. INTRODUCTION.

An important player in agribusiness, and one not often discussed, is the Federal Deposit Insurance Corporation (FDIC). The FDIC is a government corporation acting as an independent agency created by the Banking Act of 1933. The FDIC is governed by a Board of Directors comprised of five members appointed by the President of the United States and confirmed by the U.S. Senate. Three members of the Board are voting and two are ex-officio—with the voting members being appointed to six-year terms. The ex-officio members of the Board are the Comptroller of Currency and the director of the Consumer Financial Protection Bureau.

The FDIC's duties are significant, in part, because of its supervision of Banks—to include Banks lending to farmers and ranchers. Banks eligible to have government insured depository accounts are subject to FDIC jurisdiction and its supervision role. In consideration for receiving the benefits of deposit insurance (backed by the full faith and credit of the U.S.) the FDIC is entitled to supervise Bank operations. It is this supervisory role that can result in a direct impact on the creditworthiness of farmers and ranchers when they seek loans—whether new loans or refinance of existing credit.

The FDIC supervisory role and how that rule affects creditworthiness of farm Borrowers are related to FDIC duties to ensure safety and soundness of financial institutions. Each Bank under FDIC supervision must regularly issue a Report of Condition and Income ("Call Report"). The Call Reports and the underlying assets of the Bank as summarized in the Call Report are subject to FDIC audit. The result of the audit is a rating of the Bank based on a composite score (1–5) of the Bank's capital adequacy, assets, management capability, earnings, liquidity and sensitivity (to market risk) (the "Camel" rating).

The Camel rating is significant to Borrowers for two primary reasons. In order to achieve a good score, the loans that are a part of the Camel rating must demonstrate appropriate evidence of safety and soundness as to repayment—and if not, those loans may have an adverse impact on the Camel rating. If Camel ratings are low, the FDIC may require corrective action—and in extreme cases Bank owners may have to provide, from the owner's own funds, additional capital to the Bank so as to maintain adequate liquidity and reserves. Further, a lower Camel rating adversely impacts the value of the Bank itself—which may affect sale of the Bank or its assets.

As a part of the supervisory role, and in order to give Banks guidance on how the FDIC will evaluate Bank assets (to include the loans to farm and ranch Borrowers), the FDIC issues periodic guidance documents. One such guidance is Financial Institution Letter FIL-39-2014, dealing specifically with ag loans.

II. FIL-39-2014—OVERVIEW.

On July 16, 2014, the FDIC revised and reissued its Financial Letter regarding Product Management of Agricultural Credits through Economic Cycles. The Letter announces principles that should be used by lenders in managing ag credit, risk management, and appropriate workout strategies. The July 16, 2014 Letter revises the prior FIL-85-2010 which was issued December 14, 2010.

The Letter is preceded by a Statement of Applicability. The Statement of Applicability provides that the Letter is directly applicable to FDIC supervised institutions with assets under $1 Billion; however, the principles in the Letter have potential general application in audits of ag loans generally.

The Letter is also preceded by a general summary of the detailed guidance that follows. In its Summary, the FDIC references the fact that "USDA projects a slowdown in growth of various farming and livestock sectors, and the agricultural sector remains susceptible to shocks such as weather-related events, market volatility, and declining land values." The Summary is noteworthy in that it expands the list of risk factors which FDIC makes directly applicable to managing ag credit; prior guidance primarily focused on the volatility of the commodity cycle.

The significance of FDIC guidance is that it is intended to influence the manner in which Banks manage ag credit. Departure from criteria set forth in the guidance may result, without other action, in downgrade of the status of a loan; or affect the determination regarding creditworthiness for new credit applications. In either event, criticism of loans may impact ultimate determinations regarding the Bank's ratings and issues relating to safety and soundness.

III. FIL-39-2014—PRODUCT MANAGEMENT OF AGRICULTURAL CREDITS THROUGH ECONOMIC CYCLES.

The Letter first discusses management considerations related to economic cycles. The Letter acknowledges that "overall farm debt-to-asset ratio remains low at approximately 11%." However, FDIC also notes that "Notwithstanding the current strength of the agricultural industry, the USDA forecasts higher borrowing costs, moderation in growth of farmland value, and a decline in net farm income (of approximately 27%) in 2014."

This section of the Letter concludes with the observation that "the industry remains susceptible to financial shocks from various sources" to include weather, market volatility, geopolitical risk, and declining commodity prices. Different from earlier FDIC guidance is the direct reference to expected decline in net farm income. The FDIC, in its expectation of "sound risk mitigation" and "prudent banking practice" is directing lenders to factor potential decline in net farm income in to lending decisions.

Accordingly, the FDIC has announced its expectation that evaluation of creditworthiness must include potential declines in farm income.

IV. FIL-39-2014—PRODUCT RISK MANAGEMENT IN AGRICULTURAL LENDING.

The Letter next turns to risk management. In terms of risk management, the 2014 Letter departs in several ways from the 2010 guidance.

The current Letter provides that risk analysis "should center on a Borrower's cash flow and repayment capacity and not rely unduly on collateral values." Deleted is the earlier language that entitled lenders to rely, in part, on their "understanding of [the] individual borrower" and on the "local agricultural base and customer credit needs." This comment appears to unfavorably address the practice of weighing the prior business history with the Borrower; especially those past circumstances where the Borrower continued to make loan payments in the face of adverse economic conditions.

The current Letter provides that credit analysis must assess timing and level of cash flow "that match the purpose and terms of a loan. Sound practices include evaluating baseline cash flows under significantly modified projections for key variables, such as input costs, interest rates, and sale prices." Deleted is the earlier language that entitled lenders to rely on a "reasonable range of future conditions that may affect commodity and farmland prices." The FDIC comment appears to require testing of ability to repay under a worst case scenario, as opposed to measuring repayment ability under reasonable forecasts of future economic conditions. Presumably included in input costs are farm rental payments and whether current rates are sustainable.

The current Letter provides that "Although risk mitigation products and programs [i.e., crop insurance / guarantees / hedging] can be beneficial, lenders should focus credit analysis on a Borrower's financial strength and repayment ability. Such analysis should be sensitive to evidence of speculation" in land prices and commodities. Management should "develop a process for monitoring collateral values to manage risk over the life of the loan."

Deleted is the earlier language that entitled lenders to structure the terms of a loan as "appropriate for the Borrower's funding needs given the timing of cash flows from farm operations" as well as language stating that "lenders should analyze secondary repayment sources and the strength of collateral support."

Taken together, the two foregoing items require caution regarding strength of land values in securing repayment; and seem to require that the timing of when the farm Borrower receives payment for commodities must match up with time of loan repayment.

The current Letter supplements earlier language regarding concentration of credit in particular Borrowers or industry segments. The Letter states that risk management practices addressing concentration must include "agricultural lending policies that detail the board's risk tolerances and include appropriate procedures for identifying, monitoring, and controlling concentrations." This may be especially significant to rural Banks which have a loan portfolio of predominantly ag-related credit.

V. FIL-39-2014—DEVELOPING APPROPRIATE WORKOUT STRATEGIES FOR AGRICULTURAL CREDITS.

The Letter then discusses workout strategies. The current Letter restates general principles regarding loan workouts with stressed Borrowers. "FDIC believes prudent loan workouts can take many forms, including the renewal or modification of loan terms, or the restructuring of credit facilities with or without concessions."

Deleted is the earlier language that lenders "can and should" utilize the "Interagency Policy Statement on Product Commercial Real Estate Workouts (CRE Loan Workouts Guidance)." Also deleted from the earlier letter is the language stating that loan workouts can include the "extension of additional credit."

VI. REFERENCES TO OTHER GUIDANCE.

The Letter refers the lender to FIL-5-2010 (Interagency Statement on Meeting the Credit Needs of Creditworthy Small Business Borrowers—general statements regarding balanced approach in risk management for small business loans, to include reference to FIL-128-2008); FIL-61-2009 (Interagency Policy Statement on Prudent Commercial Real Estate Loan Workouts—including factors showing a prudent and well-conceived workout plan); and FIL-128-2008 (Interagency Statement on Meeting the Needs of Creditworthy Borrowers). These other guidance documents may be considered in evaluating ag credit.

VII. SUMMARY.

FIL-39-2014 clearly represents regulatory concern as to what is perceived as the likelihood of increased stress in the ag sector. The FDIC guidance cautions with respect to reliance on the sustainability of high land prices in supporting loans. The FDIC guidance emphasizes current cash flow above all other factors in evaluating Borrower repayment ability. The guidance letter may be construed as having a limiting affect on workout of distressed loans—especially where new funding for ongoing operations may be necessary. Knowing, in advance, what the Bank may require in light of the FDIC guidance should be included as another planning item as farmers and ranchers make financing plans for the coming year.

Gary W. Koch
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Gary Koch brings a rare level of knowledge, skill and insight to the full spectrum of legal issues faced by businesses today. Born and raised on a farm, he is a leader in the field of agribusiness law, helping clients meet the challenges of the Midwest agricultural economy in every aspect of farming enterprise. The same range of expertise makes him a formidable advocate for businesses of all kinds.

Gary's agricultural practice covers financial, corporate and administrative law, and commercial litigation. He has been instrumental in the development of integrated agricultural production systems, and has extensive experience in environmental and land use cases.

On the financial side, in addition to working with institutions providing financing to agricultural producers and processors, Gary has successfully litigated virtually every type of commercial case. This includes several multi-state bank/commercial cases relating to competing secured claims. Gary lectures extensively throughout Minnesota on commercial, environmental and agricultural matters.

Gary has been with Gislason & Hunter LLP since 1984. In addition to being a partner at the firm, he serves as a member of the Executive Committee.

by Dustan J. Cross

AUDITOR'S LETTERS in the Corporate Context:

An Attorney's Perspective

During the course of an audit performed under the standards of the Financial Accounting Standards Board (FASB), an auditor will typically request that management direct the company's lawyers to provide an assessment concerning the company's known but unresolved claims as well as unasserted claims and contingent liabilities. These requests, commonly known as auditor letters, create a tension between the auditor's need to have adequate information to disclose contingent and unasserted liabilities in the audited financial statements so that the financial statements are not materially misleading, and the attorney's need to maintain the attorney-client privilege and the attorney's work product.

Under generally accepted accounting principles ("GAAP"), a loss that both is probable and can be reasonably estimated must be accrued in the financial statements of the company even if the loss remains a contingency. However, if there is a reasonably possible (but not probable) risk that a loss has occurred or will occur, or if the range of loss is not reasonably determinable, then the contingency is not accrued, but is to be disclosed in the notes to the financial statements. The auditor's letter to the company's attorney is the primary means by which the auditor is able to identify and account for contingencies which should either be accrued or disclosed on the notes to the financial statements.

An auditor's letter typically requests an attorney to identify: (1) pending or threatened litigation; (2) unasserted claims known to the company; (3) a description of the case; and (4) the attorney's evaluation of the possible range of outcomes. Typically the letter will specify a minimum amount the contingency or claim must meet to be considered material; if a claim is below that amount, the lawyer is not requested to identify it. The letter also generally requests confirmation from the lawyer that the lawyer has disclosed to the client's management all known potential claims, asserted or unasserted, of which the lawyer is aware.

In the process of preparing an audit, the auditor relies on FASB Standard 450 (previously FASB Standard 5), which provides the standard governing accounting for contingent liabilities. Under that accounting standard, "probable" means the future event or events are likely to occur. "Reasonably possible" means that the chance of the future event or events occurring is more than remote and less than likely. If the loss is probable, it is accrued; if it is reasonably possible, it must be disclosed in the notes to the financial statements. An auditor

generally wants an attorney to identify: (1) the existence of a condition, situation or set of circumstances indicating the existence of a possible loss to an entity arising from litigation, claims and assessments; (2) the period in which the underlying cause for the legal action occurred; (3) the degree of probability of an unfavorable outcome; and (4) the range of potential loss. The lawyer is required to provide information on matters either in which the lawyer has been engaged or to which the lawyer has devoted substantial or substantive attention on behalf of the company in the form of legal consultation or representation.

From a lawyer's perspective, an attorney represents the organization and his duty of loyalty is to that organization. On the other hand, an auditor has additional responsibilities beyond loyalty to the organization, specifically to opine on whether the company's financial statements are or are not materially misleading for persons who are reasonably expected to rely upon the financial statements, including shareholders and creditors. There is an inherent tension between these two responsibilities; specifically, the disclosure of the lawyer's assessment of contingencies, including unasserted claims and pending litigation, in an audited financial statement may require discussion involving the attorney's work product which is otherwise generally protected from disclosure, and face the risk of amounting to a waiver of the attorney-client privilege.

In the corporate context, the courts have recognized that the attorney-client privilege has significant value, as it facilitates candid legal advice and permits internal investigation of potential legal compliance and other issues. While the attorney-client privilege in the corporate context has been firmly established by numerous judicial decisions, other privileges are not so well established. Some states, but not Minnesota, do recognize a limited accounting privilege, for instance. A few limited jurisdictions recognize a more general privilege of "self-critical" analysis. The open-ended nature of what is or is not "self-critical", however, has led most jurisdictions to reject such a broad privilege. Since a privilege is a right to protect and not disclose truthful information, traditionally courts construe them narrowly and do not wish to expand them. Thus, in most states, internal audit findings, outside accountants' reports, management letters, and accounting review of internal controls and compliance are not deemed privileged. Thus, in many instances, the corporate client's only privilege is with its attorney; and protecting that privilege is the responsibility and duty of both the organization and the organization's attorney.

Per auditing standards, an auditor is instructed to obtain contingency assessments from a company's management, but neither the auditor nor management is equipped to make legal judgments. Thus, the legal inquiry letters from management (drafted by the auditor) present a dilemma for the attorney wanting to facilitate the preparation of accurate, audited financial statements while not waiving attorney-client privilege or disclosing protected work product to the public.

The dilemma is obvious in the case of an assessment of potential loss. If a company is actively litigating against a third-party plaintiff, that company may take the position that it has valid defenses, and that the plaintiff has not proven its damages in any event. In court filings and correspondence to the plaintiff, the company maintains that it intends to try the case and is taking a hard line toward settlement. However, if the attorney defending the corporation discloses to the company's auditor that, in the lawyer's opinion, it is likely that the plaintiff will prevail and that the risk of loss is in the neighborhood of $300,000.00 to $400,000.00, that information would likely be included in the notes to the audited financial statements (if not accrued as a loss in the financial statement itself) and likely obtainable (whether through discovery or otherwise) by the plaintiff.

Once in possession of that information, the plaintiff's settlement position would obviously take into account defense counsel's assessment. In such a case, the lawyer's candid and detailed response to the auditor's letter could affirmatively damage the client.

In 1976, the American Bar Association provided guidelines attempting to balance the attorney's need to avoid inadvertent waiver of the attorney-client privilege while providing the auditor with the necessary information to provide audited financial statements. The concern recognized by the ABA was that disclosure of unasserted possible claims may result in disclosure of privileged materials and protected work product. Arguably, under some courts' interpretation of how waiver works, any evaluation of a claim disclosed to an auditor could constitute waiver of any privilege with respect to that claim. Thus, the attorney must exercise great care in summarizing and detailing contingent liabilities in response to the auditor's letter.

The ABA recommends that an attorney only identify: (1) the case, claim, or other proceeding; (2) a brief description of the nature of the ligation or claim without editorial comments; (3) the position asserted or to be asserted by the client regarding the litigation as set forth in the pleadings or other response to the claimant; (4) the amount of the demand by the claimant; and (5) the current procedural status of the matter. The ABA recommends that lawyers should provide an opinion predicting the outcome of overtly threatened or pending litigation only in those relatively few clear cases where the likelihood of an unfavorable outcome is either "probable" or "remote".

Businesses need to remember that the audited financial statements remain their financial statements; the auditor merely confirms that the statements fairly reflect and do not materially misstate the financial status of the company as of the date of the financial statements. In doing so, the company must recognize that the attorney faces some degree of tension in assisting that necessary function while not harming the client's interest by waiving attorney-client privilege communications or disclosing work product materials. Many times, unfortunately, a client becomes a passive bystander to the audit process and does not fully understand the interaction between the auditor and the firm's attorney. Understanding that the auditor has a responsibility not just to the client alone but also to other third-parties, who may reasonably be expected to rely upon the financial statements, should provide some insight into why the attorney's response to an auditor's letter is typically short and not specific regarding assessments of pending or threatened litigation.

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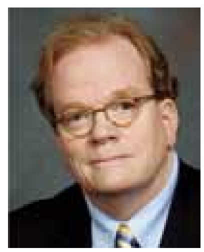
Women in Agriculture

by David Sturges



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On April 29, 2013, the United States Department of Agriculture's (USDA) Economic Research Service released its *Characteristics of Women Farm Operators and Their Farms,* which reported that the number of women-operated farms more than doubled between 1982 and 2007. According to the study, when all women involved with farming are taken together, there are nearly one million women in farming, accounting for 30% of U.S. farmers. Commenting on her blog on the study, then United States Agriculture Deputy Secretary Kathleen Merrigan observed: "This [study] puts real numbers to a trend . . . [that] there is serious momentum behind women in agriculture." There are also large numbers of women employed in the agricultural workplace. These employment trends underscore the importance and impact of recent state and federal pregnancy discrimination rules and laws in the agricultural workplace.

The first is *Enforcement Guidance: Pregnancy Discrimination and Related Issues,* (Guidance) released on July 14, 2014, by the United States Equal Employment Opportunity Commission (EEOC). The second is Minnesota's *Women's Economic Security Act* (WESA) which was signed into law by Minnesota Governor Dayton on May 11, 2014. While WESA is a bigger umbrella also addressing a number of economic issues impacting women in the workplace, its reasonable accommodation requirements for pregnancy and childbirth dovetail with the EEOC's Guidance.

The backdrop for the EEOC's Guidance is the *Pregnancy Discrimination Act* (PDA), which amended Title VII of the *Civil Rights Act* of 1964, adding a prohibition against sex discrimination on the basis of pregnancy. More specifically, the PDA provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work."

A central and important point of interpretation of the PDA has been the phrase that "women affected by pregnancy **shall be treated the same** for all employment-related purposes" (emphasis added). Over the past thirty-plus years, the phrase "treated the same" has garnered a great deal of judicial comment and interpretation. As a general proposition, as of today the majority view has been that where an employee policy treats pregnant workers and non-pregnant workers alike, an employer has complied with the PDA. By way of explanation, this judicial interpretation means that an employer is not required to extend any benefit to pregnant women that the employer does not already provide to other disabled employees. In other words, if an employer does not provide light duty to an employee for a non-employment-related injury, a pregnant woman is not entitled to light duty, absent more, simply because of her pregnancy. Accordingly, failure to provide a pregnant woman with light duty is generally not contrary to the anti-discrimination provision of the PDA.

That core precept of the PDA is presently before the United States Supreme Court for review *(Young v. United Parcel Service, Inc.,* 707 F.3d 437 (4th Cir. 2013), *cert. granted* U.S.L.W. 3602 (U.S. July 1, 2014) (No. 12-226)).

A brief recitation of the facts in *Young* is helpful, especially against the backdrop of the EEOC's Guidance. *Young* arose out of an action by an employee against her employer, alleging that she was the victim of pregnancy discrimination in violation of both the Americans with Disabilities Act (ADA) and the PDA. The employee brought an action against her employer after she had told her employer that her physician had advised that she should not lift more than 20 pounds for the first 20 weeks of her pregnancy and not more than 10 pounds thereafter. The employee claimed discrimination for the unwillingness of the employer to provide her with an accommodation, namely light duty. The employer refused to accommodate the employee, stating in part that the requirements of the job required her to lift up to seventy pounds. The employee argued that the employer's policy which limited light duty work only to some employees, namely those injured on the job, who were disabled within the meaning of the ADA, or those who had lost their Department of Transportation certification, was discriminatory inasmuch as similar treatment was not extended to pregnant workers. The employer invoked the generally held view that the PDA requires that it "treat pregnant employees the same as other persons not so affected but similar in their ability or inability to work."

Affirming the District Court's opinion in favor of the employer, the Court of Appeals similarly observed that, in accordance with the majority view, where an employer's policy treats pregnant workers and non-pregnant workers alike, the employer has complied with the PDA. The Supreme Court will hear arguments in the case in December.

The Guidance runs a somewhat parallel course with the *Young* case and invokes the concept of what is meant by "treated the same" as considered in *Young,* except it has reached a conclusion at odds with the general view as expressed in *Young.*

That part of the Guidance which has brought a great deal of discussion is the EEOC's position that, pursuant to the PDA, a pregnant worker is entitled to "reasonable accommodation" as that term is defined by the ADA.

Acknowledging that "pregnancy itself is not a disability", the Guidance nonetheless states that "pregnant workers and job applicants are not excluded from the protections of the ADA." The EEOC arrived at its conclusion based upon the Americans with Disabilities Act Amendments Act (ADAAA) and the change therein of the definition of the term "disability." That expansion of the definition of disability said the EEOC makes it "much easier for pregnant workers with pregnancy-related impairments to demonstrate that they have disabilities for which they may be entitled to a reasonable accommodation under the ADA." This core mantra in place, the Guidance sets out a lengthy list of so-called "Best Practices" for employers. These best practices suggest, among other things: (1) development of a strong policy based on the requirements of the PDA and the ADA and (2) training for managers and employees about the rights and responsibilities related to pregnancy and childbirth and related medical conditions. Rejecting longstanding Federal Court case precedent, the Guidance goes on to say that an employer may limit leaves related to pregnancy, childbirth, or related conditions to women affected by those conditions. Moreover, the Guidance provides that "If there is a restrictive leave policy (such as restricted leave during a probationary period), an employer should evaluate whether such policy 'disproportionately impacts pregnant workers and, if so, whether it is necessary for business operations.'"

With respect to reasonable accommodation, the Guidance suggests as a "best practice" that the employer "have a process in place for expeditiously considering reasonable accommodation requests." Examples of reasonable accommodation set out in the Guidance include (1) redistributing marginal functions that the employee is unable to perform due to the disability; (2) altering how an essential or marginal job function is performed; (3) modifying equipment and devices; (4) modifying work schedules; and (5) making temporary light duty assignments.

The Guidance was not a unanimous decision of the five-member Equal Employment Opportunity Commission; rather, Commissioner Lipnic and Commissioner Barker voted against the Guidance. Their dissents focused in significant part on the reasonable accommodation provision of the Guidance that seems to morph the PDA and the ADA, and specifically the concept that the PDA "assures women who are protected under the PDA the right to reasonable accommodations the same as persons with disabilities under the ADA, as amended by the ADAAA."

Commissioner Barker expressed concern that in accordance with the terms of the Guidance a "pregnant employee with any kind of job restriction need not show that she has a disability under the ADA, to be entitled to a reasonable accommodation." Instead, observed Commissioner Barker, the employee would simply have to "point to an ADA comparator." The critical effect of the provision, said Commissioner Barker, would permit pregnant employees to "bypass the requirements of a qualified individual with a disability under the ADA, *thus elevating Pregnant Employees to a kind of super-status above that of individuals with disabilities.*" That philosophy, said Commissioner Barker, would result in a "me too" leverage whereby one can claim "whatever a person with a disability under the ADA is entitled to, I am entitled to, too."

Commissioner Lipnic observed that the "Guidance takes the novel position that under the language of the PDA, a pregnant worker is, as a practical matter, entitled to 'reasonable accommodation' under the ADA and that an individual with a covered disability under the ADA is an appropriate comparator for PDA purposes to a woman who has a similar restriction due to pregnancy." Commissioner Lipnic rejected that argument, asserting that it "assumes that all non-pregnant workers who are 'similar in their ability or inability to work' to a pregnant worker enjoy the same workplace rights, or are a monolithic and homogenous bloc." And like Commissioner Barker, Lipnic wrote that the Guidance "reads out of the law the requirement that pregnant workers be treated **the same,** not better than, other workers for all employment purposes."

Both of the dissenting Commissioners also took exception to the timing of the Guidance in light of the fact that two of the core principles of the Guidance, namely the issue of reasonable accommodation and the relationship of the PDA to the ADA, are the subject of upcoming review by the United States Supreme Court in *Young.* That in mind, said the Commissioners, the EEOC should have stood down until such time as the Supreme Court rules to make sure that the Guidance is not rendered moot by the Supreme Court's decision.

Pending a resolution by the Supreme Court, the Guidance will be enforced by the EEOC. That having been said, as with other EEOC interpretive guidelines, the Guidance is not law. Rather, in keeping with the United States Supreme Court's position on EEOC guidelines, it is "entitled to respect" only to the extent that the interpretation has the "power to persuade."

The *Young* case notwithstanding, or the views of the dissenting Commissioners, it appears that the guidelines in the Guidance are not unique affirmations of pregnancy discrimination policy. To the contrary, there is ample state legislation generally supporting many of the Guidance concepts and prescriptions.

There has also been an effort on this front at the Federal level. At the Federal level, Senator Robert Casey (D-PA) introduced the so-called *Pregnant Workers Fairness Act* (Fairness Act) in May 2013. The Fairness Act declares that it is an unlawful employment practice for employers to: (1) fail to make reasonable accommodations to known limitations related to the pregnancy and childbirth-related medical conditions of job applicants or employees; (2) deny employment opportunities based on the need of the entity to make reasonable accommodations due to pregnancy; and (3) require such job applicants or employees to accept an accommodation that they choose not to accept; or (4) require such employees to take leave if another reasonable accommodation can be provided to their known limitations.

The Fairness Act has been referred to the Senate Committee on Health, Education, Labor and Pensions, where it remains.

Federal law aside, twelve states have enacted pregnancy accommodation laws. The list includes Alaska, California, Connecticut, Delaware, Hawaii, Illinois, Louisiana, Maryland, Minnesota, New Jersey, Texas and West Virginia. New York City, Providence and Philadelphia have also enacted laws, all of which include a reasonable accommodation provision as well.

Minnesota's WESA focuses on a number of women's economic issues in the workplace. It includes new or expanded protections for nursing mothers and for pregnancy and parental leave. It provides for an expansion of sick leave and safety leave, and prohibits discrimination based on familial status. Provisions with respect to pay equity certification and extension of unemployment benefits in certain circumstances are included as well.

WESA's pregnancy accommodation requires employers with 21 or more employees to provide reasonable accommodation to an employee for conditions related to pregnancy, childbirth, or related health conditions, if an employee requests one, with the advice of the employee's healthcare provider. Under WESA an employer must provide reasonable accommodation to an employee for health conditions related to pregnancy if the employee so requests, with the advice of the employee's licensed healthcare provider or certified doula, unless the employer demonstrates that the accommodation would impose an undue hardship on the operation of the employer's business. "Undue hardship" is not otherwise defined by WESA.

Particularly noteworthy is WESA's provision that a pregnant employee may request certain identified accommodations, which accommodations must be provided to the employee by the employer and without the need for advice of a licensed healthcare provider or certified doula. These accommodations include: (1) more frequent restroom, food and water breaks; (2) seating; and (3) limits on lifting over 20 pounds.

Of particular importance, too, is the WESA provision that mimics the ADA in requiring that an employee and employer must engage in an "interactive process with respect to an employee's request for a reasonable accommodation." WESA provides some examples of "reasonable accommodation" which include, but are not limited to: (1) temporary transfer to a less strenuous or hazardous position; (2) seating; (3) frequent restroom breaks; and (4) limits to heavy lifting.

The requirements of WESA notwithstanding, an employer is not required to create a new or additional position in order to accommodate a pregnant employee pursuant to the provisions of WESA. Moreover, an employer is not required to discharge any employee, transfer any other employee with greater seniority, or promote any employee. As with the suggestion in the Guidance, an employer may not require an employee to take leave or accept an accommodation.

WESA also has an anti-retaliation provision prohibiting an employer from retaliating against an employee for requesting or obtaining accommodation under WESA.

While the Guidance has provoked significant discussion, despite the conclusions in *Young,* the laws of Minnesota, eleven other states and several municipalities impose many of the "best practices" as set out in the Guidance and, in particular—in some form or another—"reasonable accommodation" guidelines.

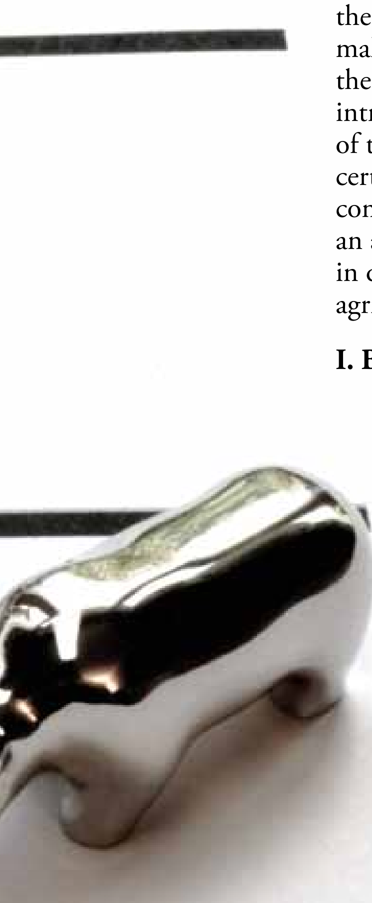
CFTC New Position Limit Rules;

New Bona Fide Hedging Definition

by David C. Kim

Price risk management associated with inputs and outputs in agriculture has become such a fundamental component of agribusiness in the U.S. that we hardly ever get by a day without being concerned on open positions in our commodities hedging accounts. For better or worse, increased dependency on futures contracts and other derivative products has led us to a bigger but severely more volatile hedge market. For instance, possibly due to the PEDV driven hog market fiasco, the trading volume of the Chicago Mercantile Exchange (CME) Lean Hogs Futures in August of 2014 has seen a 188.4% increase from the same month a year before. As we see an increasing number of farmers, producers, and speculators participating in commodities hedging activities, together with increasing volume of their trades, we also observe enhancing regulatory scrutiny from the two primary market regulators: (1) the U.S. Commodity Futures Trading Commission (CFTC) and (2) the CME Group. Their regulatory surveillance, monitoring and enforcement that are most relevant to farmers and producers of agricultural commodities center at the trading limitation imposed under the Commodities Exchange Act (the CEA) as revised by the Wall Street Transparency and Accountability Act of 2010 (the Dodd-Frank Act). Especially, the way "bona fide hedging position" is defined through the CFTC regulations, which is in the process of being finalized through its rule making process under the Dodd-Frank Act, will have a substantial impact upon the way we execute futures contracts and correspond with the CME. This article introduces the most recent attempt by the CFTC to narrow down the definition of the "bona fide hedging position" and to allow position limit exemptions to only certain enumerated categories of trades and, by and large, only for long positions in commodity contracts for anticipated requirements not exceeding ***twelve months*** for an agricultural commodity, and short positions in commodity derivative contracts in quantity unsold anticipated production not exceeding ***twelve months*** for an agricultural commodity.

I. Background.



a. **The Dodd-Frank Act.** Under the Dodd–Frank Act, which went into effect on July 21, 2010, Congress has required the CFTC to establish limits on the amount of positions "other than bona fide hedge positions" that may be held by any person with respect to futures or options contracts. In establishing the position limits, Congress also required the CFTC to set limits (1) on the number of positions that may be held by any person for the spot month, each other month, and the aggregate number of positions for all months, and (2) to the maximum extent practicable, in its discretion to diminish, eliminate, or prevent excessive speculation, to deter and prevent market manipulation, to ensure sufficient market liquidity for bona fide hedgers, and to ensure that the price discovery function of the underlying market is not disrupted.

b. Proposed Rule by CFTC in 2011. Based on the statutory requirements under the Dodd-Frank Act, the CFTC issued a Notice of Proposed Rulemaking on January 26, 2011 (the 2011 Proposed Rule), stating that Title VII of the Dodd-Frank Act "requires" the CFTC "to establish position limits for certain physical commodity derivatives." Under the 2011 Proposed Rule, the CFTC established position limits for 28 referenced contracts, including contracts on milk, feeder cattle, lean hogs, live cattle, corn, oats, soybeans, soybean meal, soybean oil, and wheat. The 2011 Proposed Rule would have applied spot-month position limits separately for physical-delivery contracts and all cash-settled contracts. With respect to cash-settled contracts, the 2011 Proposed Rule incorporated a conditional spot-month limit that would have permitted traders without a hedge exemption to acquire position levels that are five times the spot-month limit if such positions are exclusively in cash-settled contracts and the trader holds physical commodity positions that are less than or equal to 25 percent of the estimated deliverable supply. The 2011 Proposed Rule established exemptions from position limits for bona fide hedging transactions. The CFTC noted in the 2011 Proposed Rule that, unlike transactions permitted under the pre-existing definition of "bona fide hedging transactions and positions" as activity that *normally, but not necessarily,* represents a substitute for cash market transactions or positions, the Dodd-Frank Act requires *all* bona fide hedging transactions and positions to represent a substitute for a physical market transaction.

c. Court Action against 2011 Proposed Rule. On December 2, 2011, International Swaps and Derivatives Association and Securities Industry and Financial Markets Association filed a complaint in the United States District Court, District of Columbia, challenging the CFTC's authority to adopt the 2011 Proposed Rule. The plaintiffs argued that the CEA requires the CFTC to have specific findings of the necessity and appropriateness of the position limit regulations contained in the 2011 Proposed Rule before they are adopted. Plaintiffs further contended that the Dodd-Frank Act did not change this requirement. To the contrary, the CFTC argued that the Dodd-Frank Act effectively changed the CEA and has "mandated" the CFTC to adopt position limit regulations "without" finding their necessity and appropriateness. The court sided with the plaintiffs and vacated the 2011 Proposed Rule. In doing so, the court concluded that the CFTC fundamentally misunderstood its statutory authority under the CEA, as amended by the Dodd-Frank Act, and mistakenly interpreted the statute as permitting rule without making prior findings that position limits were necessary and appropriate. The CFTC appealed to the United States Court of Appeals, District of Columbia Circuit, but later consented to dismiss the case.

d. 2013 Proposed Rule. On December 12, 2013, the CFTC has published a new proposed rule for position limits for derivatives with provisions that are largely identical to those included in the 2011 Proposed Rule: *Position Limits for Derivatives,* 78 F.R. 75680 (Dec. 12, 2013) (the 2013 Proposed Rule). In the 2013 Proposed Rule, the CFTC stated that it disagreed with the court's ruling in *International Swaps and Derivatives Association v. United States Commodity Futures Trading Commission.* The CFTC reiterated its position that the Dodd-Frank Act mandate on position limit requires it to impose such limits without first finding that any such limit is necessary to prevent excessive speculation in a particular market. Nonetheless, the CFTC claimed in the 2013 Proposed Rule that "out of an abundance of caution" in light of the court decision, and without prejudice to any argument the CFTC may advance, it has performed and now has, as a separate and independent basis for the 2013 Proposed Rule, a preliminary finding that the 2013 Proposed Rule is necessary to achieve the statutory purposes. The preliminary finding that the CFTC relied on in the 2013 Proposed Rule was based on a silver price spike caused in 1979 and 1980 by certain speculators in the silver trading market. CFTC remarked in the 2013 Proposed Rule that sudden or unreasonable fluctuations or unwarranted changes in the price of a commodity derivative contract may be caused by a trader establishing, maintaining or liquidating an extraordinarily large position whether in a physical-delivery or cash-settled contract. Also it noted that the CFTC has long found, based on its experience, that unchecked speculative positions can potentially disrupt markets.

II. Position Limits.

a. Covered Commodities. The position limit applies to the "Core Referenced Futures Contracts" listed under proposed 7 C.F.R. § 150.2(d), which includes:

(1) CBOT Contracts: Corn, oats, soybeans, soybean meal, soybean oil, and wheat traded on the Chicago Board of Trade (the CBOT); and

(2) CME Contracts: Class III milk, feeder cattle, lean hogs, and live cattle traded on the CME.

b. Spot-Month Position Limit. 7 C.F.R. § 150.2(a) proposed under the 2013 Proposed Rule provides that:

"No person may hold or control positions in referenced contracts in the spot month, net long or net short, in excess of the level specified by the Commission for (1) physical-delivery referenced contracts; and, separately, (2) cash-settled referenced contracts."

Under 7 C.F.R. § 150.1 proposed under the 2013 Proposed Rule, "Spot Month" means:

> "(1) For physical-delivery commodity derivative contracts, the period of time beginning at the earlier of the close of trading on the trading day preceding the first day on which delivery notices can be issued to the clearing organization of a contract market, or the close of trading on the trading day preceding the third-to-last trading day, until the contract is no longer listed for trading (or available for transfer, such as through exchange for physical transactions).
>
> (2) For cash-settled contracts, spot month means the period of time beginning at the earlier of the close of trading on the trading day preceding the period in which the underlying cash-settlement price is calculated, or the close of trading on the trading day preceding the third-to-last trading day, until the contract cash-settlement price is determined and published; provided however, if the cash-settlement price is determined based on prices of a core referenced futures contract during the spot month period for that core referenced futures contract, then the spot month for that cash-settled contract is the same as the spot month for that core referenced futures contract."

The 2013 Proposed Rule proposes to set spot month limits at the current trading levels at the designated trading markets.

According to the 2013 Proposed Rule, a trader may hold positions up to the spot month limit in the physical-delivery contracts as well as positions up to the applicable spot month limit in cash-settled contracts (i.e., cash-settled futures and swaps). The 2013 Proposed Rule proposes to set spot month limits at the current trading levels at the designated trading markets (DCMs), such as CBOT and CME. Alternatively, initial levels may be based on estimates of deliverable supply submitted by a DCM, if verified by the CFTC. For instance, the CFTC is considering an alternative to setting the spot month limit at a level based on 25 percent of estimated deliverable supply. Subsequent levels would be adjusted no less frequently than every two years based on the CFTC's determination of deliverable supply developed in consultation with DCMs.

c. **Non-Spot-Month Position Limits.** 7 C.F.R. § 150.2(b) proposed under the 2013 Proposed Rule provides that:

> "No person may hold or control positions, net long or net short, in referenced contracts in a single month or in all months combined (including the spot month) in excess of the levels specified by the Commission."

The 2013 Proposed Rule provides that the formula for the non-spot-month position limits is based on total open interest for all referenced contracts in a commodity. Proposed initial levels will be set based on open interest in futures and swaps. According to the CFTC, subsequent levels will be adjusted no less frequently than every two years based on referenced contract open interest for a calendar year using the sum of futures open interest, cleared swaps open interest, and uncleared swaps open interest.

III. Exemptions and Prerequisites for Exemptions.

a. Bona Fide Hedging Exemption. In general, the position limits provided under the 2013 Proposed Rule do not apply to "bona fide hedging positions" if certain conditions are satisfied under the rule. However, the 2013 Proposed Rule provides that, for certain "anticipatory bona fide hedge positions," the person shall file Form 704 with the CFTC in advance of the date the person expects to exceed the position limits. 7 C.F.R. § 150.1 proposed under the 2013 Proposed Rule provides that the "bona fide hedging positions" mean:

"Any position whose purpose is to offset price risks incidental to commercial cash, spot, or forward operations, and such position is established and liquidated in an orderly manner in accordance with sound commercial practices, *provided that*…,[f]or a position in commodity derivative contracts in a physical commodity… [s]uch position:

(A) Represents a substitute for transactions made or to be made, or positions taken or to be taken, at a later time in a physical marketing channel;

(B) Is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise;

(C) Arises from the potential change in the value of (1) assets which a person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising; (2) liabilities which a person owes or anticipates incurring; or (3) services that a person provides, purchases, or anticipates providing or purchasing; and

(D) Is enumerated in paragraph (3) ("enumerated hedging positions"), (4) ("other enumerated hedging positions"), or (5) ("cross-commodity hedges") of this definition…."

As provided in subparagraph (D) of said definition, the most critical change proposed by the 2013 Proposed Rule is to allow a person to exceed position limits for "bona fide hedging position" only if any of the following requirements are satisfied:

(1) Enumerated Hedging Positions: There are three types of enumerated hedging positions that fall under this category:

(A) Hedges of Inventory and Cash Commodity Purchase Contracts. Short positions in commodity derivative contracts that do not exceed in quantity ownership or fixed-price purchase contracts in the contract's underlying cash commodity by the same person.

(B) Hedges of Cash Commodity Sales Contracts. Long positions in commodity derivative contracts that do not exceed in quantity the fixed-price sales contracts in the contract's underlying cash commodity by the same person and the quantity equivalent of fixed-price sales contracts of the cash products and by-products of such commodity by the same person.

(C) Hedges of Unfilled Anticipated Requirements. Long positions in commodity derivative contracts that do not exceed in quantity unfilled anticipated requirements of the same cash commodity, and that do not exceed ***twelve months*** for an agricultural commodity, for processing, manufacturing, or use by the same person *provided that* such positions in a physical-delivery commodity derivative contract, during the lesser of the last five days of trading or the time period for the spot month in such physical-delivery contract, do not exceed the person's unfilled anticipated requirements of the same cash commodity for that month and for the next succeeding month.

(2) Other Enumerated Hedging Positions. For agricultural commodities, there are two types of other enumerated hedging positions that fall under this category, but in order to satisfy such position, it shall not be maintained in any physical-delivery commodity derivative contract during the lesser of the last five days of trading or the time period for the spot month in such physical-delivery contract:

(A) Hedges of Unsold Anticipated Production. Short positions in commodity derivative contracts that do not exceed in quantity unsold anticipated production of the same commodity, and that do not exceed ***twelve months*** of production for an agricultural commodity, by the same person.

(B) Hedges of Offsetting Unfixed-Price Cash Commodity Sales and Purchases. Short and long positions in commodity derivative contracts that do not exceed in quantity that amount of the same cash commodity that has been bought and sold by the same person at unfixed prices: (1) basis different delivery months in the same commodity derivative contract; or (2) basis different commodity derivative contracts in the same commodity, regardless of whether the commodity derivative contracts are in the same calendar month.

(3) Cross-Commodity Hedges. Positions in commodity derivative contracts that are enumerated hedging positions or other enumerated hedging positions as discussed above may also be used to offset the risks arising from a commodity other than the same cash commodity underlying a commodity derivative contract, provided that the fluctuations in value of the position in the commodity derivative contract, or the commodity underlying the commodity derivative contract, are substantially related to the fluctuations in value of the actual or anticipated cash position or pass-through swap and no such position is maintained in any physical-delivery commodity derivative contract during the lesser of the last five days of trading or the time period for the spot month in such physical-delivery contract.

b. Conditional Spot-Month Limit Exemption. The position limit may be exceeded for cash-settled referenced contracts provided that such positions do not exceed five times the level of the spot-month limit and the person holding or controlling such positions does not hold or control positions in spot-month physical-delivery referenced contracts.

c. Additional Prerequisites for Exemptions. According to the 2013 Proposed Rule, position limit exemptions discussed above are not available unless the following additional preconditions are satisfied:

(1) Recordkeeping Requirements. Persons who avail themselves of exemptions under the 2013 Proposed Rule shall keep and maintain complete books and records concerning all details of their related cash, forward, futures, futures options and swap positions and transactions, including anticipated requirements, production and royalties, contracts for services, cash commodity products and by-products, and cross-commodity hedges, and shall make such books and records, including a list of pass-through swap counterparties, available to the CFTC upon request.

(2) Reporting Requirements. 7 C.F.R. § 19 proposed under the 2013 Proposed Rule requires all persons holding or controlling positions in commodity derivative contracts in excess of any position limit provided under the 2013 Proposed Rule and for any part of which a person relies on an exemption, including, without limitation, the bona fide hedging position exemption and conditional spot-month limit exemption, to file series '04 reports (CFTC Form 204 "Statement of Cash Positions of Hedgers", CFTC Form 504 "Statement of Cash Positions for Conditional Spot Month Exemptions", CFTC Form 704 "Statement of Anticipatory Bona Fide Hedge Exemptions") with the CFTC.

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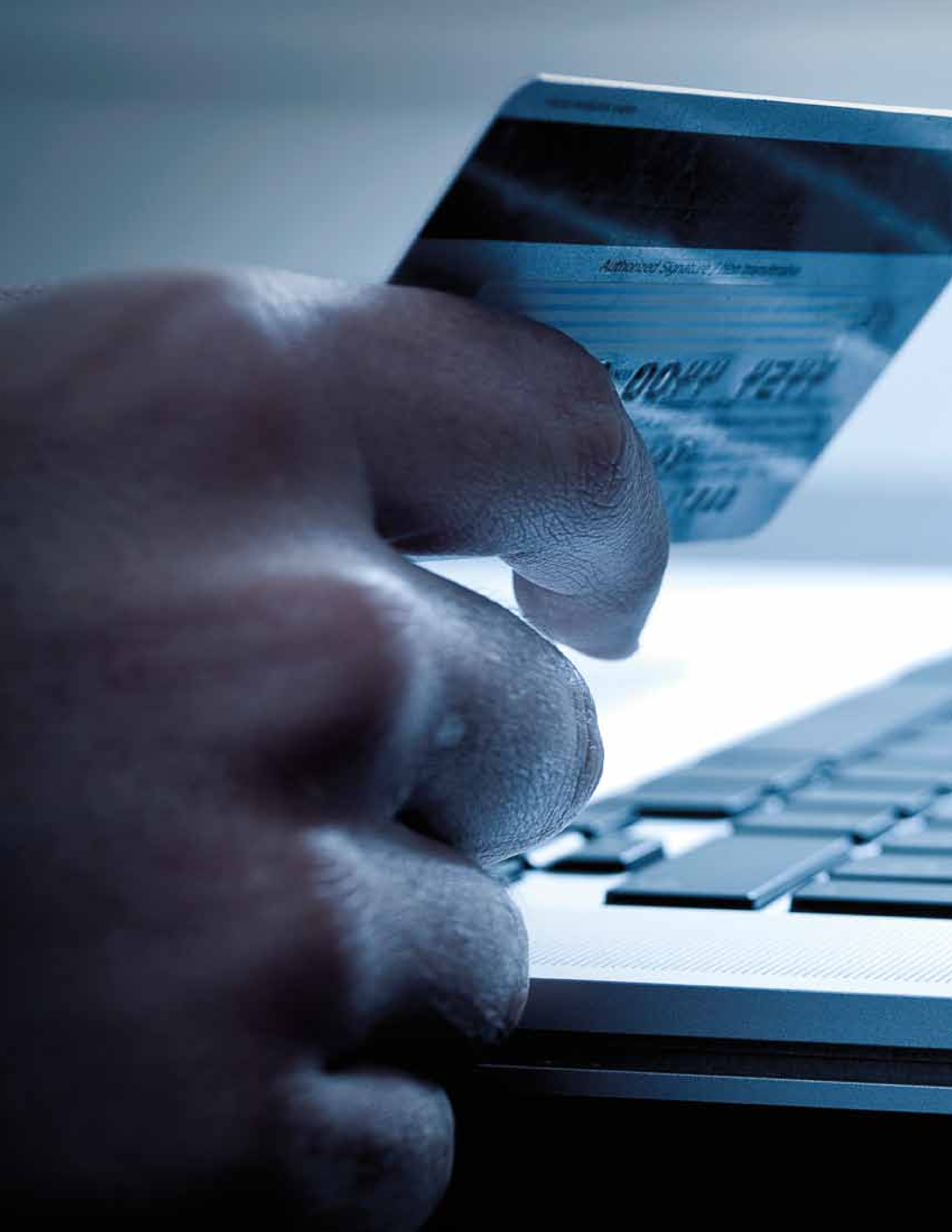
Based on his prior experiences as an investment banker, David brings a unique balance between the law and business into his practice, which centers heavily around representing businesses and entrepreneurs in a wide range of areas including manufacturing, engineering, bio-science, financial and agricultural industries. Through his financial and legal career for over twenty years, David has accumulated expertise in corporate and commercial matters and regularly advises clients on $200 million to $500 million transactions each year. David often leads complex transactions across the U.S., as well as in growing markets overseas such as Central and South America and Asia.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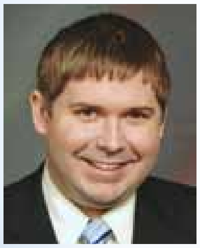
Avoiding Common Pitfalls in E-Commerce

by Matthew Berger



By Matt Berger
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Throughout the past several decades, significant advances in computer and communications technologies have changed the way in which we interact and communicate with other people in both our personal and professional lives. With these technological developments, more and more marketing is being conducted, and more and more business transactions are being negotiated, consummated, and performed, by electronic means. But the increasing use of electronic methods to conduct these traditional business activities creates a number of unique pitfalls that must be avoided when engaging in electronic business transactions.

Trademark Issues in E-Commerce

One of the primary pitfalls that arises in undertaking electronic transactions relates to the use of trademarks on the Internet and social media and in other electronic communications. A "trademark" or "service mark" is a word, phrase, symbol, and/or design that identifies and distinguishes the goods or services that are provided by one person from the goods or services that are provided by another person. A business's right to protect its trademarks against infringement has long been recognized and enforced. This protection serves two distinct purposes: (1) to protect the public from confusion regarding the source of goods and services, and (2) to protect businesses from the diversion of trade through misrepresentation as to the source of goods or services and appropriation of the business's goodwill and reputation. In order to obtain protection as a trademark or service mark, however, a mark must be capable of identifying and distinguishing the goods and services provided by one person from the goods and services provided by another person.

Under the federal Lanham Act, the owner of a trademark or service mark that is used in commerce may apply for registration of the mark. Although registration is not necessary for the enforcement and protection of a trademark or service mark, registration creates a presumption (i) of the registered mark's validity, (ii) of the registrant's ownership of the mark, and (iii) of the registrant's exclusive right to use the mark in commerce with respect to the goods or services specified in the registration.

If a trademark or service mark is not registered, the protection of the mark is generally limited to the geographic markets where the user's goods or services are sold. And even though registration creates a presumption of the owner's exclusive right to use the mark across the entire nation, courts have declined to enforce trademark protections against

"concrete plans to expand into the infringer's trade area."

geographically remote users of a similar mark unless the owner establishes that its products and the infringing products are sold in the same geographic area or that the owner has "concrete plans to expand into the infringer's trade area."

As more and more businesses utilize websites, social media, and other electronic communications to market and sell their products and interact with customers and suppliers, concerns regarding the use of trademarks and service marks may extend beyond the limited geographic areas where a particular business conducts business. For example, consider a small, family dairy farm that produces fresh dairy products and sells such products from a farm store located at the farm. Historically, such an operation would have a limited geographic market and likely would not be concerned about another dairy farm operating a similar business, under the same name, in a neighboring state. But what if each of these farm stores creates a website and Facebook® page to market their products and communicate with customers—or even sell their products through such electronic means? Suddenly, these local farm stores may reach people around the world and risk confusion with a similar business operating in a distant location.

As a result of these concerns, businesses that operate a website or use social media or other electronic methods to communicate with potential customers or business partners should take steps to protect their trademarks or service marks against infringement and to avoid infringement of other businesses' trademarks or service marks. For example, a business should conduct Internet and social media searches for other businesses with similar names or marks that could result in confusion. Additionally, in order to maximize trademark protections, businesses engaged in electronic marketing and communications should strongly consider applying for a federal registration of their trademarks and service marks. If such steps are not taken, a business may face potential liability for trademark infringement and may incur significant costs and loss of good will if the business has to change marks.

Procedural Requirements for Electronic Business Transactions

A second common pitfall in e-commerce relates to the specific procedural requirements necessary to ensure the validity of electronic business transactions. The law imposes a number of general requirements that apply to common business transactions, regardless of manner in which they are undertaken. For example, in order to create a valid and legally enforceable contract, there must be an offer by one party to the contract, an acceptance of that offer by the other party to the contract, and an exchange of something of value among the parties to the contract. Additionally, the Statute of Frauds requires that certain contracts—e.g., contracts that will not be performed within one year, transfers of real estate, and contracts for the sale of goods for a price of $500 or more—must be evidenced by a written document signed by the party against whom the contract is to be enforced. These general requirements must be satisfied regardless of whether a transaction is negotiated, consummated, or performed electronically or by other means.

But electronic transactions must also satisfy a second set of procedural requirements that have been enacted to ensure that electronic transactions provide comparable protections and procedures to traditional, paper-based transactions. Minnesota—along with 46 other states, the District of Columbia, Puerto Rico, and the Virgin Islands—has adopted the Uniform Electronic Transactions Act to govern electronic business transactions. This statute generally provides, subject to certain exceptions, that electronic records, contracts, and signatures must be granted the same legal effect as similar paper documents. But the statute only applies to transactions where each party agreed to conduct the transaction by electronic means. Moreover, in order for an electronic transaction to be enforceable, the electronic documents comprising the transaction must be provided in a manner that allows the recipient "to store or print [the] electronic record[s]."

The Uniform Electronic Transactions Act also allows for "electronic signatures" that will be deemed the equivalent of a signature on a paper document. Specifically, an electronic signature requires (i) a "sound, symbol, or process" (ii) that is "attached to or logically associated with a record" and (iii) that is "executed or adopted by a person with the intent to sign the record." Examples of sounds, symbols, or processes that may satisfy these requirements (if properly attached to the electronic record and adopted with the requisite intent) include the following: a typed name at the end of an e-mail message; a typed name on a document preceded by "/s/" or "/e/"; an image of a handwritten signature that is inserted into or attached to an electronic document; the entry of a password or PIN; or clicking on an acceptance box or button on an Internet webpage.

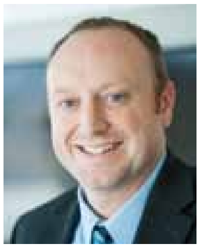
Finally, in undertaking electronic transactions, it important to implement appropriate security measures to authenticate the identity of persons involved in the transactions (e.g., using login and password information to limit access to email accounts or transactional programs to authorized persons) and to ensure that electronic data remains accessible and accurately reflects the information of the original document.

Conclusion

Technological innovations have made it easier to communicate with both customers and suppliers and conduct business using electronic means. But these innovations also pose a unique set of pitfalls—from both marketing and transactional perspectives—for unwary users. An awareness of these pitfalls will allow you to take affirmative steps to avoid potential liabilities with your online business practices and ensure that electronic business transactions in which you engage will be valid and enforceable if problems arise.

CONSERVATION DRAINAGE:

Innovative drainage concepts that provide win-win solutions for farmers and the environment



By Chuck Brandel, PE
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Many of today's producers, landowners, and soil and conservation districts are facing the challenging task of improving aged ditch and tile drainage systems. The implementation of more innovative drainage solutions is illustrating how both production goals and water quality improvements can be accomplished through collaboration.

I was privileged to be a presenter and host at a recent workshop examining agricultural drainage and the future of water quality. The event brought together nearly 200 professionals in agricultural drainage including producers, landowners, environmental specialists, government officials and nonprofit organizations from Minnesota and Iowa. The day featured presentations by leading experts—in law, academia, government and private practice—who spoke on critical topics including multi-purpose drainage, drainage law and best management practices. Breakout sessions focused on what is currently being implemented in our landscape and how these practices are working, as well as landowner tax ramifications, restoration and protection strategies, soil sustainability and cover crops.

> It was gratifying to showcase innovative drainage concepts that provide win-win solutions for farmers and the environment.

It was gratifying to showcase innovative drainage concepts that provide win-win solutions for farmers and the environment. Several demonstration projects were discussed including the Mapleton Area Agricultural/Urban Runoff Water Quality Treatment Analysis and Blue Earth County Ditch 57 (BE CD 57).

Recognized as a model project, BE CD 57 is the result of important collaboration among farmers, landowners, county authorities, engineers, surveyors, tiling contractors, DNR, and other state and county agencies. Together, this group developed several goals that included replacing a deteriorating tile system, increasing drainage capacity, improving water quality and reducing peak flows, and increasing native habitat, all while protecting downstream landowners and natural features. From these goals, a multi-purpose drainage management plan was created. A state grant was awarded, in part due to the broad scope of the project including four impacted watersheds.

Implementation of the plan included using native grass buffers along the sides of the original ditch, installation of two large storage ponds (which capture and hold runoff to reduce peak flows and improve water quality), a two-stage ditch, and a rate control weir at the outlet of the system. The two-stage ditch design reduces bank erosion, traps sediment and removes nutrients from drainage water. Together, these enhancements are making an ongoing difference. In one particular significant rain event, 2.63 inches fell in just two hours. Eighteen hours later, the two storage ponds were still doing their job, which allowed the farmland to drain down in time to save the crop while protecting downstream areas from flooding.

We continue to measure the benefits of this project and other conservation drainage projects in order to promote their implementation. As antiquated tile systems need replacement, there is a great opportunity for utilizing new strategies. Implementation of these and other innovative concepts on a larger scale will further benefit producers, the landscape, and water quality into the future.

Chuck Brandel, PE is a Principal and Senior Civil Engineer at I+S Group. He is a highly sought expert on agricultural drainage and frequently presents on the subject to local, county and state government agencies, as well as professional organizations and nonprofits. He is known for his ability to collaborate with a wide range of participants—including landowners, local and regional representatives and nonprofit organizations—in order to develop innovative solutions.

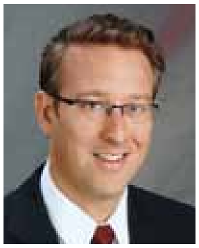
To review the workshop presentations, visit:

http://www.is-grp.com/insight/engineering/agricultural-drainage-workshop/

The Problem With “NATURAL” Food

by Peter Hemberger

You do not have to look very far in any grocery store to find foods labeled "natural" or "all natural".



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The term "natural" has become the darling of food marketers used to imply wholesomeness and to put consumers at ease about the safety or healthfulness of a product. Even though marketers use "natural" and most consumers attribute a specific positive meaning to the term, "natural" is only informally defined by the federal agencies tasked with removing confusion from the food marketplace.

According to a Consumer Reports survey released this past summer, 59% of consumers check to see if the products they are buying are labeled as "natural." More than 80% of consumers believe that foods carrying a "natural" label should come from foods that contain ingredients grown without pesticides, do not include artificial ingredients and do not contain GMOs. Alongside other claims like "organic," which does have a strict definition, foods labeled "natural" continue to increase in sales every year. According to a recent Nielsen Report, the food industry now sells approximately $41 billion-worth of products a year marketed as "natural."

In the world of food marketing, companies certainly understand that the term "natural" sells, and while not all consumers trust such claims, many consumers act as though the label "natural" means something positive. But what does "natural" really mean?

The FDA, which is granted the power to promulgate food definitions and standards of food quality by the Federal Food Drug and Cosmetic Act, has failed to formally define "natural." Rather than define the term, the FDA adopted an informal policy in 1991 stating that "natural" means that "nothing artificial or synthetic (including colors regardless of source) is included in, or has been added to, the product that would not normally be expected to be there." Not only is this definition vague at best, it is entirely qualified by and dependent upon the consumers' expectations about what would "normally be expected to be" in a particular food. As stated by Stephen Gardner, director of litigation for the center for Science in the Public Interest (CSPI), when it comes to the meaning of "natural," "all that matters is what consumers think 'natural' means." In addition to being vague, this FDA policy carries only the weight of an advisory opinion and does not establish a legal requirement.

The USDA, which is also statutorily mandated to protect consumers by prohibiting false and misleading labeling with regard to meat and poultry products, has provided a similar advisory definition in its *Food Standards and Labeling Policy Book.* In this Policy Book, "natural" is defined to mean a product that:

(1) does not contain any artificial flavor or flavoring, coloring ingredient, or chemical preservative (as defined in 21 CFR 101.22), or any other artificial or synthetic ingredient; and

(2) is not and does not have ingredients that are more than minimally processed.

"Minimal processing" is further defined to mean that the product was processed in a manner that does not fundamentally alter the product, which does not include traditional processes used to make food edible or to preserve it or to make it safe for human consumption.

Any "natural" labeling must also include a statement explaining the meaning of the term "natural" such as "no artificial ingredients" and "minimally processed."

In 2013, the USDA offered up Draft Guidance in an attempt to better define the meaning of "natural." However, the Draft Guidance merely states that "natural" is a synonym for a "non-synthetic." "Synthetic" is defined as "a substance that is formulated or manufactured by a chemical process or by a process that chemically changes a substance extracted from naturally occurring plant, animal, or mineral sources, except that such term shall not apply to substances created by naturally occurring biological processes." This definition provides little help. Also, the applicability of the Draft Guidance may be limited to determinations made related to the National Organic Program and not to labeling generally.

To say the least, there is confusion regarding a consistent meaning of "natural." One thing that is certain is that where there is mass confusion and big money there is certain to be litigation. Individuals and consumer groups, such as CSPI, have started hundreds of lawsuits across the country over the last years claiming that certain "natural" labels are deceptive and misleading. These lawsuits are often brought under state laws relying on state level labeling statutes. California, in particular, has become a center for "natural" food label litigation where the Northern District of that state is now referred to as the "Food Court." However, actions are also brought across the country including a recent action in federal court in Massachusetts where a class of plaintiffs has alleged that the Coca Cola Company falsely portrayed Coke products as all natural.

In response to claims based upon state statutes, food company defendants often argue that the FDA has primary jurisdiction over "natural" food labeling issues. However, because the FDA has repeatedly declined to adopt formal regulations regarding the meaning of the word and there is no indication that the agency intends to revisit the decision any time soon, courts do not defer to the FDA but instead rely upon their own discretion and state-level jurisprudence.

In a recent set of cases out of the Northern District of California and the District of New Jersey, a group of judges requested guidance from the FDA on labels such as "natural" "all natural" or "100% natural." Specifically, the judges were referring the question of whether food products containing ingredients produced using genetically modified ingredients may be labeled as natural, and for an administrative determination under 21 C.F.R. § 10.25(c). The FDA again declined to provide any guidance, citing "complexities of the current request, including the competing concerns among and between stakeholders," and further stating that it would be prudent and consistent with the FDA's commitment to principles of openness and transparency to first engage the public on this issue. The FDA stated that even if it were to embark on a public process to define "natural," its policy would likely remain unchanged. (The FDA also cites limited resources and the low priority of labeling concerns.)

Despite the FDA's continued refusal to define or provide guidance on the meaning of "natural" beyond its original 1991 policy statement, the FDA has issued a smattering of warning letters to companies it has deemed to be improperly using a "natural" label. In the warning letters, the FDA refers to its informal policy. While warning letters may be seen as providing some indication of the FDA's position, they are extremely infrequent given the scope of the term's use in commerce. To make things worse, the FDA's application of its policy has not always been consistent. For example, in July 2008, when answering the question of whether high fructose corn syrup (HFCS) is "natural," the FDA explained that it would not restrict the use of the term "natural" except on products that contain added color, synthetic substances and flavors. Just 3 months earlier, in April 2008, the FDA's position was that HFCS was **not** natural.

Due to a lack of authoritative guidance on the meaning of "natural," individual states are left to discern a meaning for themselves. For some consumers this means continued unwitting reliance upon what may be meaningless puffery or even active deception. For food companies, given the word's proven track record on the shelves, the use of "natural" is likely to stick around. However, there are some signs that "natural" is falling into disfavor because of the uncertainties of its use and growing risks of litigation. One thing that is certain is that the FDA and USDA, although tasked with protecting consumers from misleading food labels, have failed to provide consistent and authoritative guidance on the meaning of "natural." This lack of guidance allows confusion and misunderstanding to abound, which likely poisons the well for other food labeling terms, such as "organic," which do have a defined and enforced meaning.

RECENT CASES OF INTEREST

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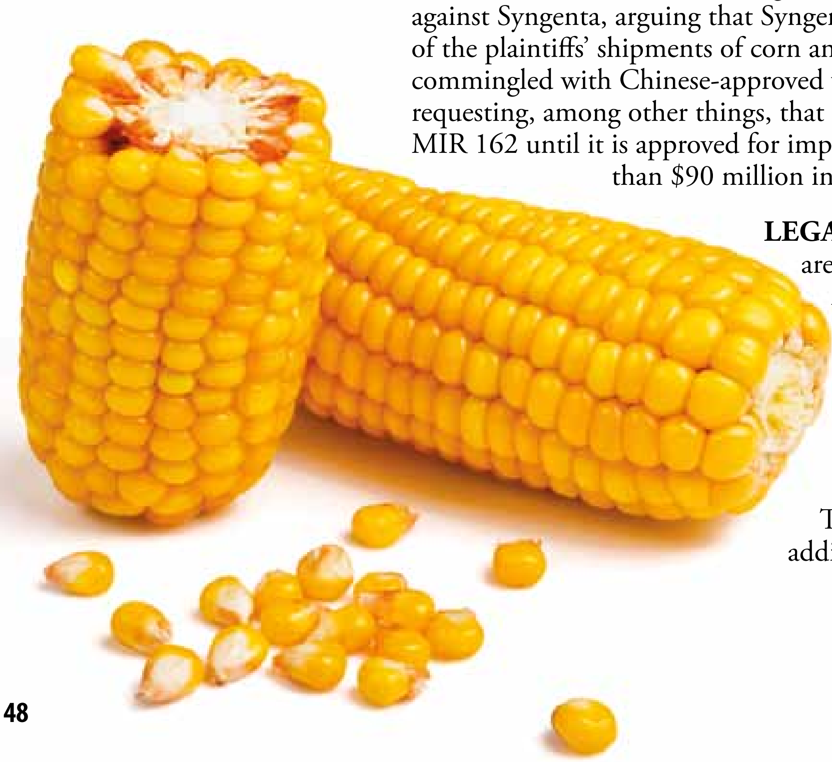
Syngenta Alleged Negligent for Selling GMO Corn in U.S. Before Receiving China's Approval

***Cargill v. Syngenta Seeds, Judicial Court for the Parish of St. John the Baptist, State of Louisiana,* No. 67061 (filed Sept. 12, 2014);**
***Trans Coastal Supply Company, Inc. v. Syngenta AG, et al.,* Case No. 14-2221 (C.D. Ill., filed Sept. 12, 2014).**

THE PARTIES: Cargill, Inc., which is based in Minnesota, is the largest privately held corporation in the U.S., and the U.S.'s largest grain exporter. Trans Coastal Supply Company is an international exporter of corn and dried distillers grain based in Illinois, and is the 19th-largest international exporter in the U.S. Syngenta AG is a Swiss agribusiness that develops and markets seeds, chemicals and other agricultural biotechnology. Its seed business is also headquartered in Minnesota.

THE FACTS: Syngenta developed, patented, and marketed genetically modified, pest-resistant corn known as "MIR 162." MIR 162 was approved for use in the U.S. in 2010, and has since been approved in the European Union and Japan. However, though Chinese authorities have determined that GMOs are generally safe for human consumption, the Chinese government recently stopped issuing approvals for new GMOs—including MIR 162. China has rejected hundreds of thousands of tons of U.S. corn due to the presence of MIR 162 crop commingled with approved varieties.

THE DISPUTE: Plaintiffs Cargill and Trans Coastal filed separate complaints against Syngenta, arguing that Syngenta should be liable for China's rejection of the plaintiffs' shipments of corn and distiller's grain because MIR 162 was commingled with Chinese-approved varieties in their shipments. Plaintiffs are requesting, among other things, that the Court enjoin Syngenta from selling MIR 162 until it is approved for import into China. Cargill is claiming more than $90 million in damages.



LEGAL ISSUES: Cargill and Trans Coastal are both claiming that Syngenta was negligent in selling MIR 162 on the open market before obtaining Chinese approval, knowing that MIR 162 would inevitably be commingled with corn that could have otherwise been exported to China. The complaints also include claims of unfair trade practices. Trans Coastal's complaint makes a few additional, unusual claims as well, such as

alleging that MIR 162 is a “public nuisance,” as it is commingled with other corn and corn seed supplies and thus interferes with the public’s “right to be notified of whether the corn sold to the public is contaminated with genetically modified organisms.”

CONCLUSIONS: These cases are unique in that the plaintiffs are not claiming that there is anything wrong with MIR 162 from a biological standpoint; their only issue with MIR 162 is that China has not yet approved it for importation. The cases are still in their earliest phases, but they raise interesting and important issues related to genetically modified organisms and the impact of other countries’ regulations on U.S. agriculture.

Energy Companies Required to "Buy the Farm"
Great River Energy, et al. v. Schoenbauer Farms, Inc., et al.,
File No. 70-CV-13-1182 (Minn. Dist. Ct. Aug. 7, 2014).

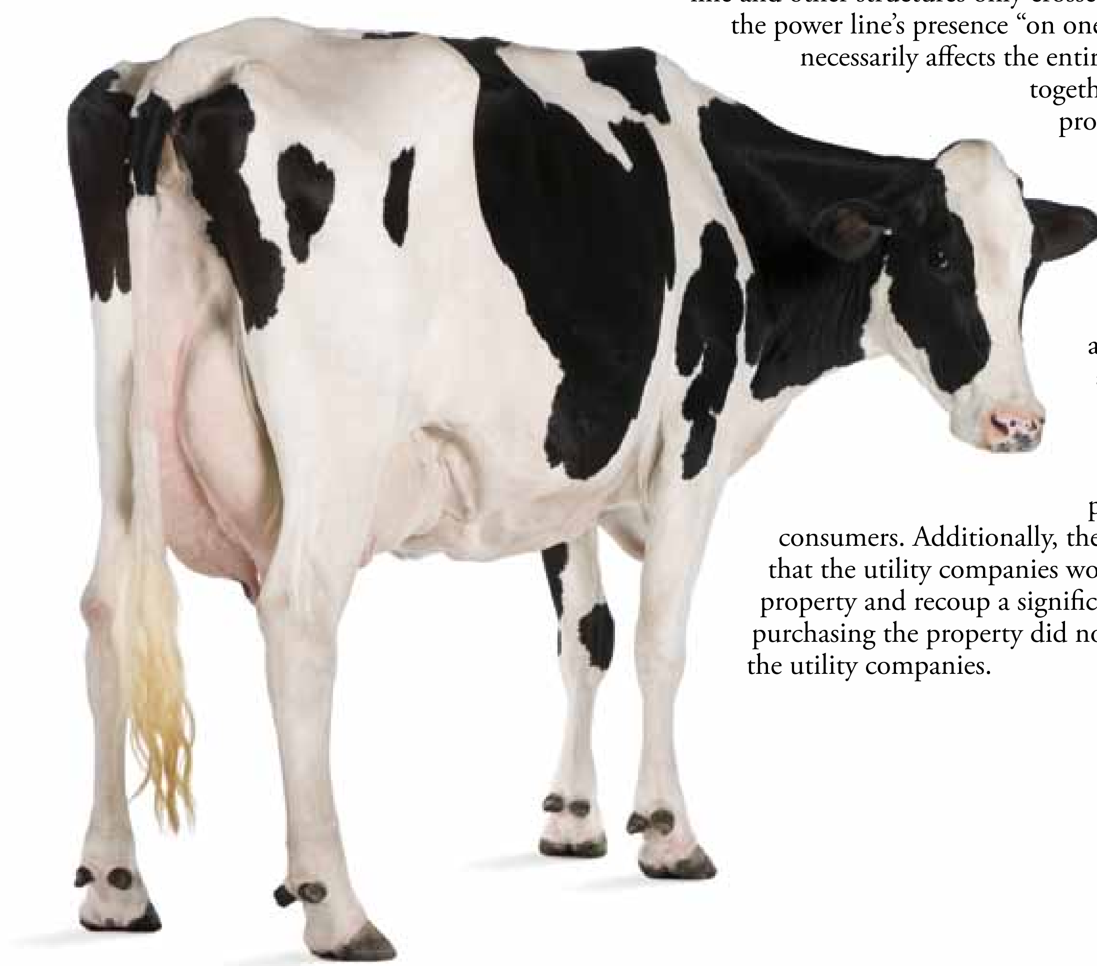
THE PARTIES: The Petitioners in this case were 11 utility companies, including Xcel Energy and Great River Energy, involved in the "CapX2020 Initiative," a $2 billion project to expand the electrical grid in the Upper Midwest. The Respondents were various trusts and business entities that own and operate Cedar Summit Farm, a small organic dairy farm located near New Prague, Minnesota.

THE DISPUTE: The CapX2020 group required an easement of less than 1 acre for a transmission line right-of-way to install poles and run high-voltage power lines over the dairy farm's property. The dairy farm made a "Buy-the-Farm" election, compelling the CapX2020 group to buy 132 acres of land, mainly pasture and barns used in the dairy operation.

The CapX2020 group objected to the election, claiming that the landowners' election failed the Buy-the-Farm law's reasonableness standard. The Scott County District Court held a hearing pursuant to statute to determine whether to uphold the CapX2020 group's objection to the election.

LEGAL ISSUES: Under Minnesota's eminent domain statute, when a utility acquires certain kinds of property, including agricultural property, to construct a high-voltage line, the utility may be required to buy more than just the small parcel physically needed for the structure. Minnesota law gives the property owner the option to require the utility buy any "contiguous, commercially viable land"—essentially requiring the utility to buy the whole farm from the farmer at fair market value.

CONCLUSIONS: The Court upheld the dairy farmers' election in whole and required the utility companies to purchase all 132 acres. The Court concluded that even though the high-voltage line and other structures only crossed one acre of the farm, the power line's presence "on one portion of the property necessarily affects the entire property which is farmed together for the purpose of producing 100 percent grass-fed organic milk." The dairy farm's election was "reasonable" because the farmers had lived on the property for decades and marketed their dairy as an organic, bucolic, "old school" dairy farm, and the presence of high-voltage power lines damaged those perceptions in the eyes of consumers. Additionally, there was substantial evidence that the utility companies would be able to resell the property and recoup a significant portion of their costs, so purchasing the property did not place an undue burden on the utility companies.

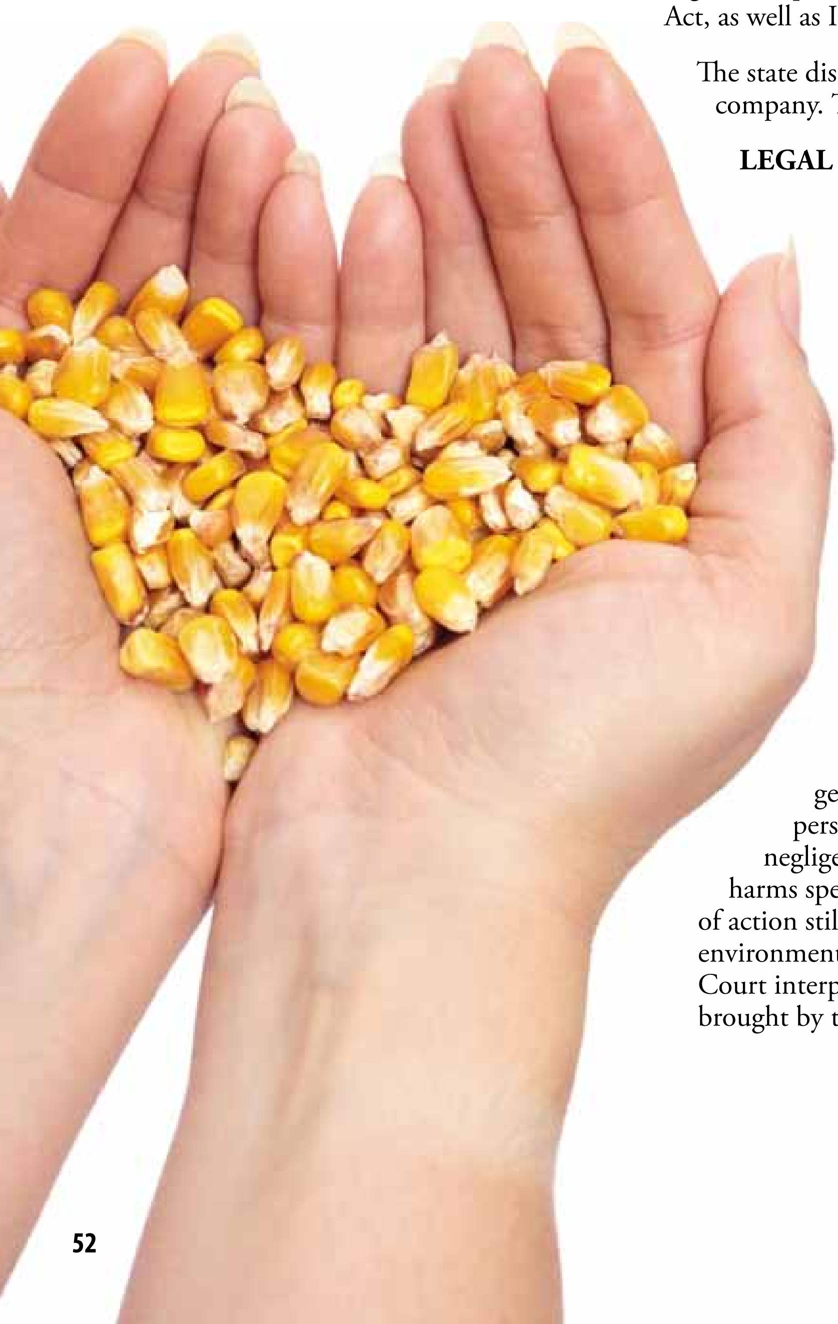


Iowa Common Law Nuisance Claims Still Viable in Environmental Disputes
Freeman v. Grain Processing Corp., No. 13-0723 (Iowa Sup. Ct. June 13, 2014).

THE PARTIES: Plaintiffs are eight residents of Muscatine, Iowa, living within 1.5 miles of the defendant's facility. The defendant Grain Processing Corp. operates a corn wet milling facility in Muscatine.

THE DISPUTE: In 2011, the Iowa Attorney General filed suit against Grain Processing Corp. for alleged Clean Air Act and Clean Water Act violations. Shortly after the Attorney General filed, a group of Muscatine citizens filed suit against the grain company as well, alleging common law and statutory nuisance, trespass, and negligence based on the company's operation releasing pollutants and noxious odors. The citizens claimed, among other things, that the grain company was negligent in failing to update to newer technologies that would decrease pollution. The citizens sought damages for lost use and enjoyment of their property as well as an injunction against the grain company's operations. While the State and the grain company reached a settlement, whereby the grain company agreed to switch from coal to natural gas by mid-2015, the private parties did not settle with the grain company.

The grain company then filed a motion for summary judgment in the case with the private parties. The grain company's main argument was that the common law nuisance and other claims the private parties had brought were preempted by the federal Clean Air Act and Clean Water Act, as well as Iowa statutes governing air and water quality.



The state district court granted summary judgment to the grain company. The citizens appealed to the Iowa Supreme Court.

LEGAL ISSUES: The main issue was whether federal or state environmental statutes preempted older, common law causes of action when it comes to claims of environmental harm. Statutes preempt common law if the statute establishes such a "comprehensive regulatory scheme" that the legislature must have intended the statutes replace the common law and be the only cause of action for aggrieved parties.

CONCLUSIONS: The Iowa Supreme Court reversed the lower court and denied summary judgment, holding that state common law claims against in-state polluters are still viable, even though complex federal and state statutes also deal with environmental harms. Environmental statutes were enacted because common law causes of action were inadequate to redress harms caused by pollution. However, these statutory regimes are designed to protect the general public, not to provide damages to specific persons. Common law tort claims like nuisance and negligence are designed to compensate individuals for harms specifically to the individual, so the common law causes of action still have a place in environmental lawsuits. Federal environmental laws also contain "savings clauses," which the Court interpreted as keeping the kinds of common law claims brought by the plaintiffs here from being preempted.

Farm Bill and Federal Issues Update

by Brian Foster

FARM BILL IMPLEMENTATION

The U.S. Department of Agriculture (USDA) is scrambling to write regulations to implement the Agriculture Act of 2014 (Farm Bill) in time for producers of commodity program crops and dairy to make several critical choices related to federal government farm programs for crop years 2014 and 2015.

There is an increasing stream of information coming out of USDA's Farm Service Agency (FSA) about the new farm programs. Midwest producers of covered commodities (program crops) such as corn and soybeans received letters earlier this summer from their county FSA offices asking to verify program crop base acreages and yields.

There are three important sets of one-time, irrevocable decisions that must be made for each FSA farm by early next year by landowners and operators:

1. Update payment yields, done by landowners by February 27, 2015

2. Retain or reallocate payment base acres, done by landowners by February 27, 2015;

3. Farm program selection (see below), done by farm operators by March 31, 2015.

On September 25, 2014, Agriculture Secretary Vilsack announced the regulations for the new farm programs created by the 2014 Farm Bill—producers will need to do the paperwork at FSA offices dealing with program choice among Agricultural Risk Coverage – County (ARC-CO), Price Loss Coverage (PLC), and Agricultural Risk Coverage – Individual Coverage (ARC-IC) for each FSA farm. In addition, for the PLC program only, producers will need to decide on the Supplemental Coverage Option (SCO) under the federal crop insurance program.

The University of Illinois and a consortium of land-grant universities have developed excellent online tools to analyze farm program options using individual producer data. It is recommended that producers utilize the online tools to help make the most appropriate decisions for their farming operations. The tools can be found in the "Farm Bill toolbox" at: http://farmdoc.illinois.edu/farmbilltoolbox/.

It is advisable that producers, landowners, farm managers, bankers and other farm business advisors also pay close attention to announcements as they are made by USDA/FSA. One can follow the FSA Farm Bill rulemaking process at: http://www.usda.gov/wps/portal/usda/usdahome?navid=farmbill.

USDA announced that enrollment for the dairy Margin Protection Program (MPP) opened September 2 and will close November 28, 2014. MPP in the 2014 Farm Bill represents a major overhaul of U.S. dairy safety net policy, replacing milk price and revenue support programs. MPP is a voluntary program which places an emphasis on protecting dairy production margins. MPP protects against severe downturns in the milk price, rising feed prices, or a combination of both.

To assist in the MPP decision process, the National Program on Dairy Markets and Policy (DMaP) has developed a decision tool and companion education materials in partnership with USDA/FAS and the University of Illinois-led National Coalition for Producer Education. The dairy MPP tool can be accessed at the above-noted Farm Bill tool box link, as well as at: http://www.fsa.usda.gov/FSA/pages/content/farmBill/fb_MPPDTool.jsp.

ANTIBIOTICS

The President on September 18 issued an Executive Order (EO) outlining efforts to address antibiotics resistance issues facing the public health system. The EO establishes a new inter-agency task force to develop a national action plan to begin implementation of the President's Council of Advisors on Science and Technology (PCAST) recommendations for addressing antibiotics resistance. The recommendations include development of a rapid diagnostics test to identify resistant infections in humans, research focused on development of new antibiotics and alternatives to antibiotics, and support for the ongoing efforts of the Food and Drug Administration (FDA) to phase out the use of medically important antibiotics for livestock growth promotion and increase veterinary oversight of the use of antibiotics in food animals.

In a related matter, a new study from Harvard University's School of Public Health on the risk to human health of antibiotics use in animal agriculture found that "the limited amount of data available make it hard to quantify the relationship between antibiotic use in animals and the occurrence of clinical antibiotics resistance."

WATERS OF THE UNITED STATES (WOTUS)

The Environmental Protection Agency (EPA) and Army Corps of Engineers have proposed a rule that would greatly expand regulated waters under the federal Clean Water Act. The proposal is the result of a series of court cases limiting their jurisdiction and raising concerns over the ability of the federal government to protect non-navigable waters such as wetlands. The new rule would have important, negative implications for livestock producers, imposing greater restrictions on facility siting and field application of manure, to name just two items.

In September, the U.S. House of Representatives overwhelmingly passed legislation on a bi-partisan basis that would prohibit the EPA and the Corps from implementing the proposed WOTUS rule. The "Waters of the United States Regulatory Overreach Protection Act" passed by a 262-152 margin, sending a strong message to the Administration that the EPA and the Corps are overstepping their regulatory authority. In addition, fifteen state Attorneys General have asked the EPA Administrator Gina McCarthy to withdraw the rule.

Under mounting pressure to scrap the proposed rule, EPA has extended the comment period for a second time, through November 14.

MANDATORY COUNTRY-OF-ORIGIN LABELING (M-COOL)

By all accounts, the U.S. will lose another round in the World Trade Organization's (WTO) dispute resolution process related to M-COOL. Two of our most important trading partners in livestock and meats, Canada and Mexico, will be preparing lists of products on which they can legally impose retaliatory import tariffs; to nobody's surprise, those products include pork, beef, poultry, and dairy products. The U.S. lost its argument defending M-COOL at the WTO in 2012, prompting the USDA to revise the rule; that effort was inadequate according to this most recent WTO ruling.

Numerous members of Congress are calling on the USDA to drop the labeling law as a result of this expected WTO outcome—in July, 114 House members sent a letter to Agriculture Secretary Vilsack urging him to withdraw the M-COOL rule if the WTO again determines the U.S. is not compliant with WTO obligations. M-COOL requires U.S. meat producers to place mandatory labels on meat packages identifying where the animal was born, raised and slaughtered, labels which add extra cost and have been shown to be of little importance to consumers.

TRADE

U.S. pork production and pork exports are stunning successes for American agriculture and the economy; about one-fourth of U.S.-produced pork is exported, in 2013 amounting to 2.14 million metric tons, generating $6 Billion in revenue. Free trade and trade agreements are critical for maintaining and expanding American pork exports.

Pork producers support two major trade initiatives that are currently in negotiation:

• Trans-Pacific Partnership (TPP)—This agreement would include numerous Asia-Pacific nations, including important agricultural and food products trading partners Canada, Mexico, Japan, Chile and Australia, as well as Vietnam which represents a large potential market for U.S. pork;

• Trans-Atlantic Trade & Investment Partnership (TTIP)—This potential agreement with the European Union seeks to open up a huge market of more than 450 million consumers to U.S. food and agriculture exports. Currently, U.S. pork exports to the EU are smaller than to Honduras, due to a wide array of trade barriers and sanitary-phytosanitary (SPS) restrictions.

Pork producers are especially concerned with Japan's insistence under TPP to exclude hundreds of items from the TPP negotiations that currently carry high tariffs, including pork. Until Japan agrees to seriously open up its market to U.S. agricultural and food imports, pork producers cannot support the TPP. This summer, 140 members of the U.S. House of Representatives signed on to a letter to the President raising concerns over the TPP obstructions being raised by Japan and Canada, calling on the Administration to pursue a trade deal without those two nations if they are unwilling to completely open their markets to U.S. agricultural products.

DIETARY GUIDELINES 2015

The Dietary Guidelines for Americans form the basis of federal nutrition programs; these standards are implemented by school lunch programs and they inform federal food purchasing.

Every five years, the US Department of Health and Human Services (HHS) and the USDA jointly develop a report called "Dietary Guidelines for Americans." The report is developed

with the assistance of an advisory group called the "Dietary Guidelines Advisory Committee" (DGAC), including independent and science-based recommendations. The current DGAC has indicated that it intends to consider not only nutritional data in the 2015 version of the report, but also look at and include the sustainability of food production in its latest set of dietary recommendations.

In July, Agriculture Secretary Vilsack hired an environmental nutritionist, Angela Tagtow, to oversee the DGAC. Tagtow, known as a "good food" activist, founded Environmental Nutrition Solutions, whose mission is to change the food system by making it more "sustainable, ecologically sound, and socially acceptable." She was formerly the chair of the Minnesota Institute for Sustainable Agriculture.

Livestock producers feel that the 2015 set of dietary guidelines should continue to be based on an objective and scientific review of the dietary and nutritional needs of Americans, and not veer off into additional information on sustainability for which the DGAC has no expertise.

ANIMAL WELFARE ISSUES AND CALIFORNIA'S EGG LAW

In 2008, California voters passed a ballot initiative mandating that by 2015 all California egg producers must shift to larger cages or "cage-free" housing. The California legislature then passed a law in 2010 requiring out-of-state egg producers to also comply with the California hen welfare standards. Six states—Missouri, Alabama, Iowa, Oklahoma, Kentucky and Nebraska—challenged the California law as an illegal restriction under the interstate commerce clause of the U.S. Constitution.

In early October 2014, the United States District Court for the Eastern District of California dismissed the case and ruled in favor of the State of California, the Humane Society of the United States (HSUS), and the Association of California Egg Producers. The six states that brought the lawsuit are currently considering their legal options given the recent ruling.

In several northeastern states, HSUS has been defeated as they targeted state legislatures with proposed laws to prescribe animal housing, specifically outlawing gestation stalls. Legislation proposed and supported by HSUS has been defeated or withdrawn for lack of support over the past year in New Jersey, Connecticut, and Massachusetts. HSUS continues its efforts at the state legislative level in New York, Vermont, and New Hampshire.

A HSUS-supported effort to put six animal welfare initiatives on the Colorado ballot in November was defeated by a coalition of livestock and agriculture groups.

And finally, in another significant defeat for HSUS, Missouri voters on August 5, 2014 passed a "Right to Farm" amendment to the state's constitution. HSUS had invested heavily in opposing the ballot initiative. Missouri joins North Dakota as the only states to include such a constitutional protection for farming.

GMO LABELING

Foes of genetically modified ingredients in food are leading efforts in no less than 20 states that would require mandatory food labeling if GMO ingredients are included. To date, only Vermont has approved legislation requiring GMO food labels, with efforts in numerous other states, including California, having been defeated in the past couple of years.

Federal legislation has been introduced, "The Safe and Accurate Food Labeling Act of 2014," that would put food labeling authority squarely in the hands of the U.S. Food and Drug Administration (FDA) and out of the jurisdiction of the states. Until now, the FDA has supported a voluntary approach by food manufacturers to GMO food labeling.

Anti-GMO activists are using publicly traded company shareholder meetings to try to advance their agenda. Recently an effort at the General Mills annual shareholder's meeting, to advance a shareholder resolution that would have called on General Mills to phase out the use of GMO food ingredients, failed miserably with merely two percent of the shareholder votes in favor.

TAX REFORM

The issue of so-called "tax inversion" has rekindled Congressional interest in federal tax reform, although there is no chance of comprehensive tax reform legislation being considered in this Congress. Legislative drafts of tax reform bills in both the U.S. House and Senate initially included significant restrictions on the use of cash accounting by agricultural entities. In the House, the final draft tax reform bill released by House Ways and Means Committee Chairman Dave Camp of Michigan included a specific waiver of the cash accounting restrictions for agriculture. In the Senate, a letter signed by 46 Senators opposing the cash accounting restrictions was sent to Senate Finance Committee Chairman Ron Wyden of Oregon.

DOT HOURS OF SERVICE

The U.S. Department of Transportation issued a one-year hours-of-service waiver for livestock haulers effective June 6, 2014. Livestock producers are engaged in a legislative process to make this waiver permanent, but opposition continues from unions who are using a "fear factor" related to truck/driver safety to oppose the livestock hauler waiver.

FOOD SAFETY MODERNIZATION ACT (FSMA)

The federal Food and Drug Administration (FDA) has submitted four Food Safety Modernization Act re-proposed rules for comment, due December 15, 2014. Included in the four is the "Current Good Manufacturing Practices and Hazard Analysis & Risk-Based Preventive Controls for Food for Animals." The re-proposed animal feed rule provides additional flexibility and clarifies the most significant hazards in the feed manufacturing sector, as well as clarifies the exemption to the rule for grain elevators.

GREENHOUSE GASES

The Supreme Court's ruling in its last session on EPA's ability to regulate greenhouse gas (GHG) emissions under the Clean Air Act was good news for livestock producers, as the Court made a strong point that EPA had overstepped its regulatory authority, and that new EPA rules on GHGs would be limited to new and existing stationary sources (mostly power plants) that fall under other air permitting authority. In the U.S. Congress, friends of the livestock industry have mobilized on this issue with legislation and numerous letters to the Administration warning against developing regulations that would hurt animal agriculture.

Brian Foster
Insight Enterprise Consulting

Brian Foster is the founder and principal of Insight Enterprise Consulting, LLC, a government affairs and international agribusiness development consulting firm.

He is an agribusiness and agricultural policy consultant with international work experience in Eastern Europe, Latin America, Africa and Asia. He managed Pioneer Hi-Bred International's seed businesses in Bulgaria and Ukraine, and now provides consulting services in agricultural production and farm management, marketing, and business strategy and planning to clients around the world.

In the U.S., Foster provides business development and agricultural policy advice to clients in the livestock and meat industries. He has served as Director of Business Development and Marketing for Christensen Farms in Sleepy Eye, Minnesota, and was Legislative Assistant on agricultural issues for former U.S. Congressman Tim Penny of Minnesota.

His education includes a master's degree in Agronomy from Iowa State University and an MBA from Purdue. Foster served as a U.S. Peace Corps volunteer in Costa Rica, providing technical assistance services to dairy farmers—he speaks fluent Spanish.

The Basics of LITIGATION *and* DISPUTE RESOLUTION

by Noel Phifer

A. INTRODUCTION

Assume that you have a claim for money owed to you arising from a personal or business dispute that you have not been able to resolve, and you are wondering if you should bring a lawsuit. In the alternative, assume that someone else is making a claim against you or your business for money damages that you believe to be invalid, and a lawsuit has been threatened against you. You have never been involved in a civil lawsuit; are not sure what a civil lawsuit is all about; and are planning to meet with an attorney.

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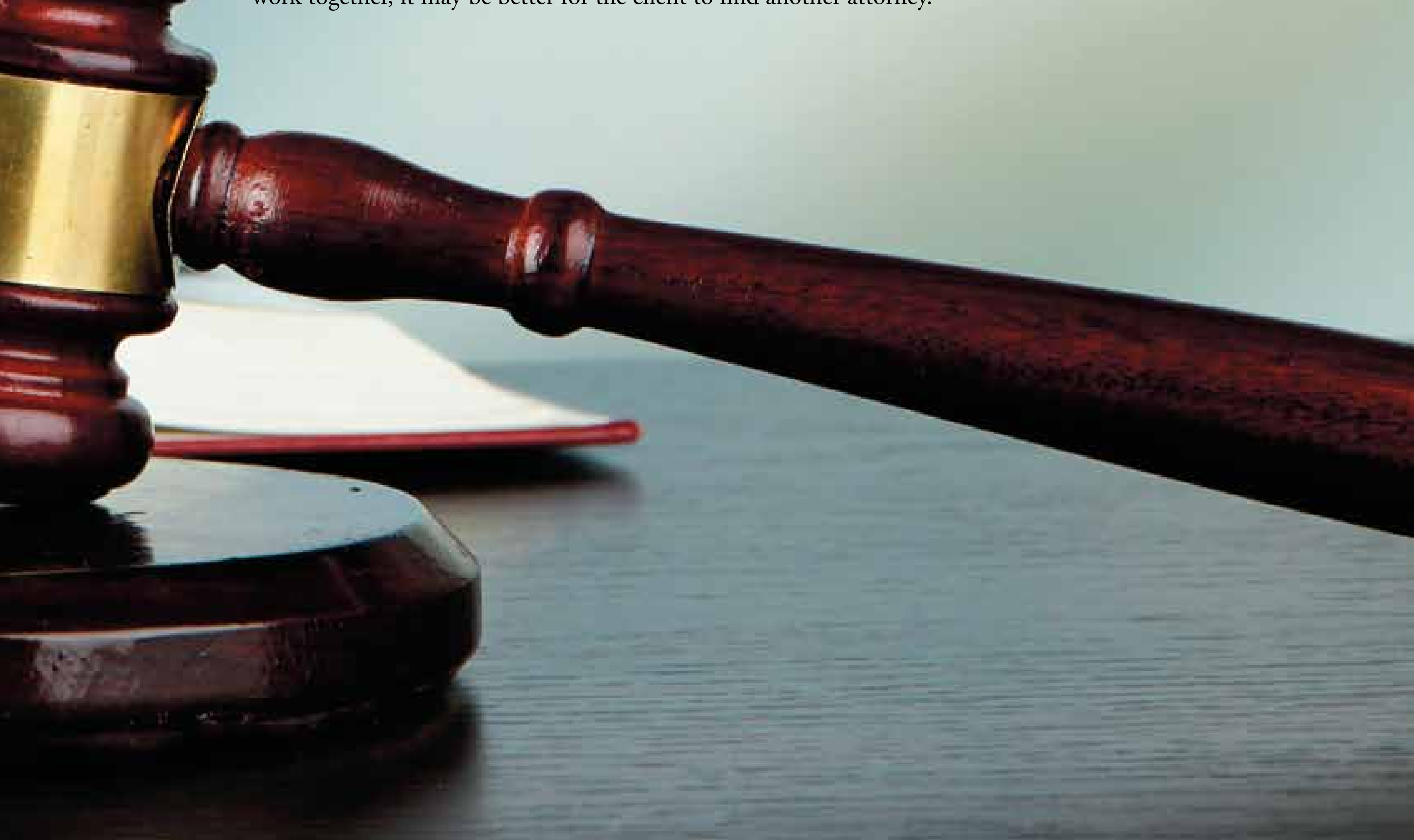
This article will set out some of the basics of litigation and dispute resolution for those unfamiliar with these issues.

B. PRE-LITIGATION PROCESS

1. The Initial Attorney Consultation.

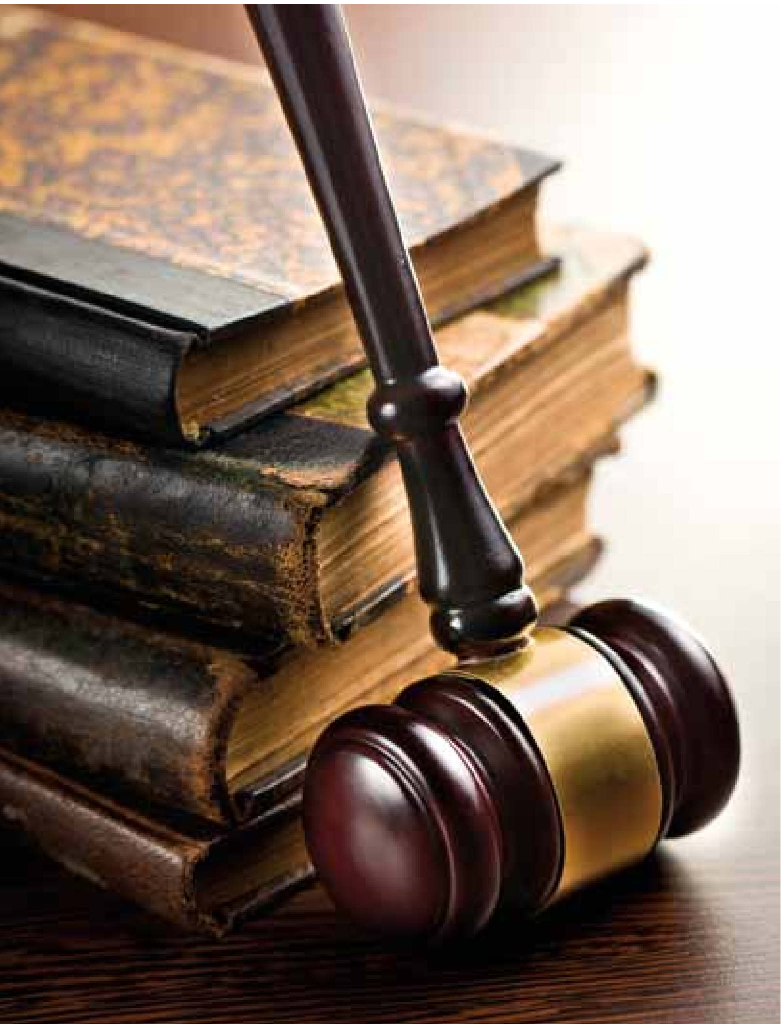
The most important aspect of the attorney-client relationship is effective communication. It is extremely important that the client be involved in the pretrial preparation, all settlement discussions and the trial or arbitration, if necessary. This requires a significant amount of trust and hard work on the part of both the client and the attorney.

Every attorney-client relationship is different and depends upon a number of factors, including the personalities involved and, most significantly, the needs and expectations of the client. It is extremely important at the initial consultation to discuss and identify these needs and expectations. If they are not realistic or are for a motive such as to “get even” which is unlikely to be resolved by litigation, problems are likely to develop down the road. If the client and attorney do not appear to be able to work together, it may be better for the client to find another attorney.



It is also important that the costs and expenses that are involved in the lawsuit be considered. Under the "American Rule," attorney's fees are generally not recoverable unless there is a specific contract provision or a statute providing for them. The client also needs to carefully consider the potential emotional stresses, the time commitment that will be required and possible business disruptions that may occur. A typical lawsuit will take a full year to be resolved, assuming there is no appeal taken following a trial. Another consideration is the collectability of a judgment. The fact that a party might obtain a judgment in its favor does not necessarily mean that the judgment will ever be collected.

Assuming that the attorney and client are a good fit and are willing to work together to resolve the dispute, they will then want to evaluate and discuss how best to meet the client's expectations and review the various courses of action that are available to achieve the desired results.



2. Who Decides the Dispute and How It Is Decided.

There has been a recent expansion of mandatory binding arbitration agreements contained in business contracts. These provisions also commonly occur in real estate agreements, employment agreements, and in various financial transactions, including credit card agreements.

In a typical binding arbitration, the parties exchange information and then are entitled to present evidence and to cross-examine witnesses at a hearing presided over by a neutral person selected by the parties, usually an attorney or a panel of three attorneys or other persons with expertise in the area of the dispute, who will decide the dispute.

In the absence of a statute or contract requiring arbitration, the parties may nevertheless decide to utilize arbitration, which may be more cost-efficient and provide a more timely resolution. There are a number of arbitration procedures and independent arbitration organizations that can be utilized.

If a lawsuit is to be pursued, the proper venue of the lawsuit needs to be considered. Can the matter be placed into suit in a Minnesota state court or in the Minnesota federal district court? If in a Minnesota state district court, consideration needs to be given to the county that the lawsuit be brought in.

3. Pre-Suit Settlement.

A settlement can be reached at any time during the litigation process. However, there are certain points where settlements are more likely to occur. Fairly often, even though the parties had not been able to resolve the issues themselves prior to obtaining counsel, a further effort at settlement prior to proceeding with litigation might be appropriate, as the parties may have learned something from meeting with their attorneys that may cause them to alter or reconsider their positions.

The parties may also consider engaging in mediation, which is a fairly informal process where a neutral person is retained by the parties to assist them in attempting to reach a settlement. The mediator does not have the authority to decide the dispute.

C. THE LITIGATION PROCESS

1. Commencing and Responding To a Lawsuit.

Assuming that the lawsuit is venued in a Minnesota state court, it is commenced by the service of a copy of the Summons and Complaint. The rules require the Complaint to set forth a short and plain statement of the claim showing that the party is entitled to relief. Typically, a defendant has 20 days to respond to the Complaint by serving an Answer, which sets out the defenses to each claim in short and plain terms, and which admits or denies the allegations in the Complaint. In the Answer, the defendant can also assert counterclaims against the plaintiff and cross-claims against any co-defendants.

2. Information Gathering.

a. Investigation. If not already performed, all relevant documents and agreements will be reviewed, including any statements that may have been made by anyone involved in the dispute, as well as any investigation reports that might exist such as police reports.

b. Mandatory Disclosures. Both the Minnesota state and federal rules require the parties to make certain mandatory disclosures within a specific time frame. These disclosures include: identifying all persons with discoverable information—along with the subjects of their information; either producing or describing by category all documents supporting the claims or defenses; a computation of each category of damages claimed; and producing any insurance agreements that might satisfy any judgment obtained.

c. Interrogatories. Interrogatories are written questions directed by one party to another, which require written answers to be prepared and signed under oath by the responding party. Interrogatories can only be directed to the parties in the lawsuit.

d. Document Requests. Document requests are written requests directed by one party to another, requiring the responding party to allow the requesting party to inspect and copy documents in the possession, custody or control of the responding party. Document requests cannot be served upon non-parties without a subpoena.

e. Requests for Admission. Requests for admission are written requests directed by one party to another party, which request the responding party to admit the truth of certain statements or the genuineness of certain documents.

f. Third-Party Subpoenas. The rules allow the parties to a lawsuit to serve subpoenas upon non-parties to either appear for a deposition or to produce documents, or both.

3. ADR.

In Minnesota, except for specific situations, all state court civil lawsuits are subject to a non-binding alternative dispute resolution process. The rules identify nine separate processes: arbitration; consensual special magistrate; summary jury trial; early neutral evaluation; neutral fact finding; mediation; mini-trial; and mediation-arbitration. The rules also allow the parties the opportunity to create their own ADR process.

In my experience, the parties will typically agree to participate in mediation following the completion of some or all of the information gathering process. If the parties cannot agree on an ADR process, the timing of the process, or the selection of a neutral, the judge will become involved and may order the parties to utilize one of the non-binding processes. In certain situations, the court may also find that ADR is not appropriate and will not require the parties to participate. Of the cases in which I have been involved, 90% to 95% either settle at the mediation session or shortly following it.

4. Summary Judgment Motions.

The Minnesota state and federal rules establish the procedure for the parties to seek and obtain a summary judgment. This procedure permits a judge to make a decision on the issues in the dispute without a trial, if there is no genuine issue of any material fact or if only a question of law is involved. In most lawsuits involving almost any complexity, one or more of the parties will often seek a summary judgment, or a partial summary judgment.

5. The Basic Trial Structure.

While alternative dispute resolution methods, such as arbitration and mediation, have become increasingly prevalent, civil trials in the federal and state court systems remain a very important method of resolving disputes. If the lawsuit has not been settled or decided in its entirety by summary judgment motions, then the matter will go to trial.

Jurisdictions differ in how trials are conducted. Either a judge will decide all issues or, if a jury trial is selected, the judge will determine the law and the jury will decide the fact issues presented. The basic structure in a Minnesota state court is as follows:

a. **Jury Selection.** The process for selecting a jury varies greatly and is controlled by rules, statutes and the presiding judge. Typically, the attorneys are allowed to question jurors regarding their backgrounds and life experiences. Some prospective jurors can be removed by the parties.

b. **Opening Statements.** The attorneys, with plaintiff going first, present to the jury an outline of what they expect the evidence will be. The defendant can decide to wait until later in the trial.

c. **Plaintiff's Case.** On "direct examination" the plaintiff presents evidence through witness testimony, exhibits, and any agreements as to undisputed facts to support plaintiff's claims. The defense attorney will "cross-examine" plaintiff's witnesses.

d. **Motion for Directed Verdict.** The defendant may ask the court for a ruling dismissing some or all of plaintiff's claims due to lack of proof.

e. **Defendant's Case.** This is now the defendant's opportunity to make an opening statement, if not done previously, and to then produce defendant's evidence supporting the defenses and any counterclaims.

f. **Motion for Directed Verdict.** The plaintiff may ask the court to rule in its favor, dismissing some or all of defendant's defenses or counterclaims.

g. **Rebuttal.** The parties have the opportunity to introduce evidence that refutes the other's evidence. It is limited to new evidence.

h. Instructions for the Jury. Both parties may request that certain instructions be given and object to the instructions proposed by the other party.

i. Closing Arguments. With the defendant now going first, the attorneys have the opportunity to argue the facts, inferences to be drawn from the facts, the credibility of the witnesses, the weight and probative value of testimony and exhibits, and the law applicable to the case. They inform the jury why a verdict should be rendered in their client's favor.

j. Jury Deliberation and Verdict. The judge will instruct the jury on the law that they must apply to the case. The jury then deliberates until they reach a verdict. Within the first six hours, the verdict must be unanimous; thereafter, the verdict can be divided provided the same jurors agree on all answers. The verdict is then returned to open court.

D. THE POST TRIAL LITIGATION PROCESS

1. Taxation Of Costs.

Following the trial, the "prevailing" party is entitled to receive reimbursement for certain expenses of the litigation, which are generally controlled by statute in Minnesota and include costs of the service of process, court filing fees, expert witness fees, etc. Again, under the American Rule, attorney's fees are generally not recoverable. The opposing party can object to the attempt to tax the costs. If contested, the judge will make the determination.

2. Post-Trial Motions.

After the verdict, the parties have a specific set number of days in which to file post-trial motions asking the judge to set aside the jury's verdict or for a new trial because of alleged errors that were made during the trial. The judge may also be asked to increase or decrease the amount of money damages that the jury may have awarded. When the post-trial motions have been decided, the judge will enter a final judgment.

3. Appeal.

After a final judgment is entered, a party wishing to appeal the judgment must then file a timely notice of appeal which begins the appellate process. With certain exceptions, appeals from the Minnesota district courts go directly to the Court of Appeals. Thereafter, the Minnesota Supreme Court's jurisdiction is usually limited to its discretionary review of decisions of the Court of Appeals. The scope of appellate practice and procedure is otherwise beyond the scope of this article.

For the losing party, the decision of whether or not to appeal should again involve an attorney and client consultation wherein they carefully review the grounds for an appeal, the chances of success, as well as the additional costs and expenses that would be involved in the appeal. Similarly, the prevailing party will need to discuss and decide on whether a cross-appeal should be filed if the opposing party decides to bring an appeal, and again consider whether the judgment amount is likely to ever be collected. Quite frequently, the parties will engage in further settlement discussions based upon their evaluations of these appellate issues. If no settlement is reached, the appeal then proceeds.

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Ag Practice Services

Gislason & Hunter is well-recognized within Minnesota and throughout the Midwest for our knowledge and experience in the agricultural industry. Our attorneys represent and advise a broad spectrum of national, regional, and local agribusiness clients—including livestock producers, packers, input suppliers, agricultural lenders, and individual farmers—in all aspects of their operations. Our work in agricultural matters includes both transactional advice and litigation in the following areas:

- Bankruptcy
- Business Formation and Restructuring
- Commercial Transactions
- Employment Issues
- Environmental Regulations
- Estate and Succession Planning
- Financing and Debt Restructuring
- Foreclosure and Debt Collection
- Governmental Regulations and Program Payments
- Insurance Disputes
- Intellectual Property Rights
- Manufacturing and Distribution
- Marketing and Production Contracts
- Personal Injury Claims
- Zoning and Permitting Issues

REPRESENTATIVE MATTERS

- Negotiated and drafted long-term marketing agreements for large, multi-state swine producers
- Drafted both turn-by-turn and long-term independent grower agreements for swine producers
- Drafted credit agreements, forbearance agreements, and other loan documents for loans to agricultural producers
- Structured multi-state production and distribution systems
- Negotiated and drafted asset acquisition and disposition agreements of all sizes
- Provided advice and representation for banks, bank participations, and bank syndications related to agricultural loans
- Litigated commercial and corporate disputes in state and federal courts throughout the Midwest
- Represented agricultural producers and allied industries before local, state, and federal regulatory agencies


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