

AGRICULTURAL LAW NEWSLETTER



Summer 2005

Update from the Minnesota State Bar Association's Agricultural Law Section

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DEADLINE EXTENDED FOR SIGNING THE EPA "AIR EMISSIONS CONSENT AGREEMENT"

Matt Benda, Peterson, Savelkoul & Benda, Ltd., Albert Lea, Minnesota

The sign-up period has been extended to July 1, 2005 for livestock farmers to participate in this voluntary program. The U.S. Environmental Protection Agency (EPA) is offering this opportunity to swine, dairy, and poultry producers who wish to allow the EPA to monitor their facilities for an estimated two-year emissions monitoring study. The EPA will use the data collected to establish a baseline criteria to determine compli-

ance with the Clean Air Act, Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and the Emergency Planning and Community Right-to-Know Act (EPCRA).

In exchange for participating in this program, livestock producers will receive limited civil liability protection from these federal provisions. The EPA has indicated that by early June it expects to re-

spond, at least in part, to the numerous comments that have been submitted by citizens and industry groups. Practitioners should monitor these comments and any changes to the Consent Agreement in advising their livestock producer clients. The website is: <http://www.epa.gov/compliance/resources/agreements/caa/cafo-agr-050121.pdf>

LEGISLATIVE UPDATE

Paul Strandberg, Project Manager, Minnesota Department of Agriculture

While most of the agricultural agenda for the 2005 legislative session is languishing in conference committee awaiting agreement on dollars, some items of interest have become law. Farmer-Lender Mediation, sunsetted for July 1 of this year, received new life in the Omnibus Higher

Education Funding Bill signed by the governor on May 26. The sunset date was extended four more years to July 1, 2009 in 2005 Minn. Laws, ch. 107, art. 2, sec. 55.

Ethanol also received a boost with a new mandate in Chapter 52 that all gasoline sold in

the state contain 20% ethanol content by August 30, 2013 unless certain conditions are met.

Issues remaining include changes to local livestock siting laws and tax credits for dairy investment.

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INCREASED DIRECTOR LIABILITY

Mark J. Hanson, *Agribusiness And Cooperative Group, Lindquist & Vennum, PLLP, Minneapolis, Minnesota*

A director has the responsibility to discharge his or her duties in good faith in a manner that the director believes to be in the best interests of the company, with the care an ordinary prudent person in a like position would exercise under the same circumstances. The following three general areas have had an impact on increasing director liability to shareholders in situations where there is a business loss.

Sarbanes-Oxley. The Sarbanes-Oxley Act and related rulemaking (collectively "SOX") enhance the risk of liability. Although SOX does not modify duties or standards of director conduct, SOX requires the financial auditing and corporate obligations that are becoming "standards" against which to measure appropriate conduct. In addition, SOX allows private causes of action for violations and lowers the requirement for the Securities and Exchange Commission to bar a director from serving on a board by determining the director to be "unfit."

While much of SOX does not apply to companies that are not publicly traded, it is likely that the liability concepts of SOX will be argued in common law actions in state courts that will impact virtually all companies. SOX has had the subtle effect of influencing state fiduciary requirements and increasing expectations of directors.

Delaware Laws. Traditionally, directors would only face liability if they personally misled or defrauded the company or personally profited at the

expense of the company. Today, however, Delaware courts are raising the "good faith" expectation of directors which is required of directors in discharging their duties. The Chief Justice of the Delaware Supreme Court has stated that directors will be held liable for "bad faith" or lack of good faith and that directors, among other things, should: (i) have a reasonable corporate understanding of the company's business, competitive environment, financial controls, and financial disclosures; (ii) actively engage in board discussions and deliberations with healthy skepticism and constructive criticism; and (iii) rely in good faith on well chosen experts.

Directors' and Officers' Liability Insurance. Directors customarily rely on directors' and officers' ("D&O") insurance for financial protection against D&O claims. Carriers, in larger headline cases, have rescinded or threatened to rescind policies based on fraudulent financial information when the policy was acquired. In other cases, D&O coverage was jeopardized because initial claims against management or aggregate limited director recovery. In addition, Delaware law and the laws of many other states do not allow indemnification of directors for expenses or the cost of settlement when a director did not act in good faith.

The headline names of Enron, WorldCom, Abbott Laboratories, and Disney may make the above issues seem remote and not applicable to smaller companies. Small and mid cap companies have not been in the spotlight, but the liability trends are being

established with the large cap companies. Commentators have suggested that small and mid cap companies are becoming increasingly attractive to plaintiffs' lawyers. They reason that the large cap cases drag out for years and cases against small and mid cap companies, which take less time to settle or try, will emerge as attractive targets. In addition, almost half of the financial restatements, a leading indicator of ensuing securities litigation, have been made by companies with less than \$100 million in revenue (*2003 Annual Review of Financial Reporting Matters*, Huron Consulting Group).

The job and position of director will continue to change with more responsibility and greater potential liability for mistakes. The first priority for a director is to evaluate the company and the job of being a director. The Chief Justice of the Delaware Superior Court estimates that 100 hours per year for ordinary board activities is not unreasonable. I believe that two hours per week for most companies is probably not enough. Good corporate governance practices promote good decision making.

In summary, directors should be advised to evaluate the demands, responsibilities, and liabilities of being a director; understand the limits of D&O insurance; insist on good corporate governance practices; and use good faith reliance on consultants, management, and advisors.

“WHO’S ON FIRST?” - MAINTAINING YOUR FIRST LIEN SECURITY INTEREST IN CROPS

Michael S. Dove, *Partner, Gislason & Hunter LLP, New Ulm, Minnesota*

A lender working with a crop farmer typically obtains a blanket security interest in the farmer’s crops. Keeping that security interest in first position requires some diligence. A supplier of seed or chemical inputs can bump the lender from its first lien position if the lender is not scrupulous about reading and responding to mail.

A seed or chemical supplier seeking to bump the lender from its first lien position is required to send the lender a lien-notification statement marked “IMPORTANT—LEGAL NOTICE.” See MINN. STAT. §514.964, subd. 3(b). If the lender *ignores* this lien-

notification statement or fails to respond within ten days, the seed or chemical supplier obtains a crop production input lien *which takes priority over* the lender’s security interest in the crops. See MINN. STAT. §514.964, subd. 3(f).

To avoid this situation, upon receiving a lien-notification statement, the lender must send both the supplier and the farmer either (1) a letter of commitment agreeing to finance the seed or chemicals or (2) a written refusal to issue a letter of commitment. See MINN. STAT. §514.964, subd. 3(d).

If the lender issues a letter of commitment, the seed or chemical supplier does not acquire any interest in the crops. On the other hand, if the lender sends a written refusal to provide financing, the seed or chemical supplier might still acquire a lien against the crops, but that lien will be subordinate to the lender’s first lien position security interest.

Only a diligent lender who responds promptly to lien-notification statements will be spared from having to wonder, “Who’s on First?”

NOTES FROM THE CHAIR

Brian Boysen, *Agricultural Law Section Chair, Eden Prairie, Minnesota*

Welcome back to the MSBA Ag Law Section Newsletter. It is my privilege to add some comments to this edition. It would not have been possible to revive it without the support of many persons, some of whose names appear and some whose names do not. To all those, I express thanks. A special thanks to our volunteer editor, Andrea Silbermann and the MSBA staff including Renee Anderson and Mary Kempton for “getting it done and out the door.”

During the past year we have been working as a Section Council to increase the visibility of the section and expand from the base of the Ag Law Institute to be more helpful to our section members. The newsletter is one attempt to accomplish that.

Readers’ comments are welcome and writers’ offers are also encouraged. The viability of the newsletter will depend on the willingness of the section members to support it. The initial approach will be to distribute by email as much as possible. Please give us your feedback.

The annual meeting was held in conjunction with the Ag Law Institute on April 1, 2005 at the Minnesota Landscape Arboretum in Chanhassen. To reduce the size of the newsletter, the minutes will be posted on the section web site at <http://www2.mnbar.org/sections/agricultural-law/minutes.htm>.

The Council members for the coming year are: Matthew Benda (Vice-

Chair), Jill Krueger, Rick Stermer, Patrick Costello, Gary Hansen (Treasurer), Joe Thompson (Secretary), Edna Boyle-Lewicki and Mark Madsen, Kurt Anderson, Brian Boysen (Chair), Gary Petersen, Gail Von Bargen. The terms of the first four named expire in 2008, the terms of the next four named expire in 2007 and the terms of the last four expire in 2006. Each year there is an opportunity to join the Council. Your support will strengthen the section.

Our goal is to meet every other month with the option to phone in to the MSBA office. To give us your comments and other input, please refer to the contact information in this newsletter.

INTERNATIONAL TRADE INFORMATION FOR MINNESOTA AGRICULTURE LAW PRACTITIONERS

Edna Boyle-Lewicki

Agricultural producers and exporters increasingly find themselves at the center of international trade issues.

In turn, their legal representatives may find themselves working more often with national as well as local authorities. This article is intended to provide some basic information about the relevant U.S. agencies that handle international trade issues.

United States Department of Agriculture:

While USDA is undoubtedly familiar to you and your clients as the agency responsible for agriculture and rural development, it is also an important member of the U.S. interagency team responsible for international trade matters.

- The Foreign Agricultural Service (FAS) seeks improved market access for U.S. products; administers export financing and market development programs; provides export services; carries out food aid and market-related technical assistance programs; and provides linkages to world resources and international organizations. In addition to U.S. staff, FAS counselors and attachés are stationed in 90 countries around the world. <http://www.fas.usda.gov>

United States Department of Commerce:

The Commerce Department is comprised of numerous administrations and offices dealing with issues that affect business and trade, ranging from the Bureau of the Census to the National Oceanic and Atmospheric Administration to the United States Patent and Trademark Office.

- The International Trade Administration promotes U.S. exports (excluding agricultural commodities, which are the purview of USDA) and addresses unfair trade practices such as dumping and denial of market access. <http://www.ita.doc.gov>

United States International Trade Commission:

The ITC is an independent, nonpartisan, quasi-judicial federal agency with broad investigative powers on matters of trade, as well as a national resource where trade data are gathered and analyzed. It also maintains the Harmonized Tariff Schedules of the United States. <http://www.usitc.gov>

United States Trade Representative:

The Office of the U.S. Trade Representative (USTR) is responsible for developing and coordinating U.S. international trade, commodity, and direct investment policy, and overseeing

negotiations with other countries. <http://www.ustr.gov>

Edna Boyle-Lewicki is an Import Policy Analyst with the Office of Policy, Import Administration, U.S. Department of Commerce. She is a member of the Minnesota Bar Association and the Agricultural Law Section. Ms. Boyle-Lewicki received her J.D. from Georgetown University Law Center.

AG LAW SECTION FINANCIAL REPORT

Gary L. Hansen, Ag Law Section Treasurer, AgriBank, FCB, St. Paul, Minnesota

The Agricultural Law Section is in excellent financial standing, with equity exceeding \$8,000 according to the most current financial report provided by the MSBA as of March 31, 2005. This represents an equity increase of nearly \$500 since the beginning of the fiscal year on July 1, 2004. Revenue and expense account balances are as follows:

Beginning Balance 7-1-2004	\$7,618.92
Revenues:	
Membership Dues	1,030.00
Total Revenue	1,030.00
Expenses:	
MSBA Internal Section Invoices	165.05
Refunds/Reimbursements	32.87
In-House Charges	3.79
Administrative Fees	327.00
Miscellaneous/Other	2.46
Total expenses	531.17
Ending Balance	8,117.75

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