

AGRICULTURAL LAW DEVELOPMENTS SHAPING THE SECTOR AND LEGAL PRACTICE*

*Roger A. McEowen***

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I. OVERVIEW

Agricultural law is largely the result of the perceived uniqueness of agriculture.¹ In many respects, agricultural law is “law by the exception.”² Because

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** Leonard Dolezal Professor in Agricultural Law, Iowa State University, Ames, Iowa and Director of the Iowa State University Center for Agricultural Law and Taxation. Member of the Kansas and Nebraska Bars, and honorary member of the Iowa Bar.

1. See Roger A. McEowen & Neil E. Harl, *Principles of Agricultural Law* §1.01 (Robert P. Achenbach Jr., ed., Jan. 2009 ed.). This uniqueness from other business enterprises can be found in production agriculture’s dependency upon natural forces, its operation in an isolated, rural environment, with the success of the business often dependent upon factors that are beyond the control of the owner (such as weather, product input prices, availability of production inputs and variable consumer demand). The perceived uniqueness of agriculture may also stem from the Jeffersonian ideal of a nation populated with numerous and small family farming operations. See DON PAARLBERG, *FARM AND FOOD POLICY: ISSUES OF THE 1980S*, 5-12 (1980).

2. This is an often-used phrase of Professor James B. Wadley of the Washburn University Law School, and is an apt description of agricultural law. For a variety of reasons, the law views many aspects of agricultural production as significantly different from other industrial enterprises. For example, farm employers are not subject to many federal labor laws and in many states are not included within the scope of the state workers’ compensation provisions. Agricultural

of the many areas of special treatment farmers receive under the law, perhaps farmers and ranchers should familiarize themselves with the agricultural legal issues and developments as often as many of them consult daily market reports. But, agricultural businesses are complex, as is the law as applied to agriculture. Just like other sectors of the economy, practically anything that an agricultural producer does has an impact on others. That places a premium on practitioners representing agricultural clients to stay on top of the many areas of law that apply in a unique manner to such clients.

Not only is the law unique in many areas as applied to agriculture, in recent years agricultural production (both crops and livestock) has also become more concentrated and interdependent via contractual arrangements.³ Agricultural producers are, for the most part, no longer self-sufficient, but are dependent on others for input supplies and output markets. Laws govern all of those commercial relationships. Any disruption along the chain for input supplies, or in the output marketplace, has the potential to cause economic disruption and legal issues for producers. Thus, while the legal issues are many and difficult, so are the economic issues. That makes the legal representation of agricultural producers even more difficult for many practitioners.

In addition to the uniqueness of agricultural law, agricultural legal issues now arise in areas not considered a generation ago. Prior to the 1970s, environmental protection laws impacting agriculture were practically non-existent.

cooperatives are generally exempt from federal antitrust constraints and, therefore, can engage in activities which are prohibited to nonfarm businesses. Likewise, the Uniform Commercial Code (UCC) has special provisions for goods which are designated as "farm products." Other UCC rules governing implied warranties on the sale of goods do not apply to some farm livestock sales. *See* Roger A. McEowen and Neil E. Harl, *Principles of Agricultural Law*, §2.08[2][a] (Robert P. Achenbach Jr., ed., Jan. 2009 ed.). In some states a farmer is not considered a merchant for many purposes under the UCC. Also, an entire section of bankruptcy law has been created specifically for farmers and ranchers, Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3105 (1986), adding 11 U.S.C. §1201 et seq., and all states offer protection to agricultural operations from nuisance lawsuits brought by disgruntled neighbors. In addition, agricultural land in most states is now valued at agricultural use value, rather than fair market value for real property tax purposes. Agriculture also has some exceptions from federal hazardous chemical legislation and water pollution programs. Sometimes, alleged farming operations are challenged under state and local zoning laws, but many states exempt agricultural activities from county zoning. Many special rules also exist for "farmers" in the realm of federal income taxation. *See* Roger A. McEowen and Neil E. Harl, *Principles of Agricultural Law*, Chapter 6 (Robert P. Achenbach Jr., ed., Jan. 2009 edition).

3. *See* MARY HENDRICKSON & WILLIAM HEFFERNAN, UNIV. OF MO., CONCENTRATION OF AGRICULTURAL MARKETS (2007), available at <http://www.nfu.org/wp-content/2007-heffernan-report.pdf> (providing data concerning the concentration of agricultural production and agricultural markets).

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Now, major areas of agricultural law involve biotechnology, water quality (and, in some areas, quantity), food safety, and antitrust. Most certainly, laws impacting agriculture will continue to grow and will likely become even more complex.⁴

For rural lawyers in general practice, the increasing points of intersection between the law and agricultural activities and the increasing complexity of those laws and the legal relationships they create, make the practice of law more difficult. While there are areas of the law that will be proven constants for the rural practitioners – such as income tax, estate and business planning—even those areas have become more complex and expansive.

So, at the present time, what are the major areas of law that are shaping the agricultural sector and legal practice? What might become the major areas in the future? There are several areas that are identifiable at the present time and some trends that indicate what might become major issues in the future.

Here's my list (in no particular order):

II. MAJOR AREA #1 – TAX LAWS IN A CONSTANT STATE OF FLUX

In recent years, an increasing amount of federal tax legislation has been enacted on a non-permanent basis.⁵ This has been true not only for federal in-

4. As an example of the ever-increasing impact of the relevance of agricultural law to agricultural producers and practitioners, the Iowa State Board of Regents, in November 2006, unanimously approved the creation of the Center for Agricultural Law and Taxation at Iowa State University. The Center operates without receiving any state or federal funding, and its website, www.calt.iastate.edu, is expected to receive more than one million hits in its second year of existence.

5. See Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (codified as amended in scattered sections of 26 U.S.C.); Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752 (codified as amended in scattered sections of 26 U.S.C.); see also Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, 118 Stat. 1166 (codified as amended in scattered sections of 26 U.S.C.); American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 (codified as amended in scattered sections of 26 U.S.C.); Tax Increase Prevention and Reconciliation Act of 2005, Pub. L. No. 109-222, 120 Stat. 345 (codified as amended in scattered sections of 26 U.S.C.); Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, 120 Stat. 2922 (codified as amended in scattered sections of 26 U.S.C.); Tax Increase Prevention Act of 2007, Pub. L. No. 110-166, 121 Stat. 2461 (codified as amended in scattered sections of 26 U.S.C.); Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (codified as amended in scattered sections of 12 U.S.C.); American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 (codified as amended in scattered sections of 26 U.S.C.). For a summary of effective dates, phase-ins, phase-outs and expiration dates of various tax provisions, see Sheila Owen, Selected Federal Tax Provisions Expiring 2008-

come tax, but also with respect to federal estate tax. That fact makes long-range tax planning very difficult and also indicates that agricultural clients (and their legal counsel) should be re-evaluating their estate and business plans and income tax management strategies *more* frequently. For practitioners, that point can be difficult to impress upon some clients. With respect to federal estate tax, 2008 was the first of four consecutive years in which the applicable exclusion was set to change each year.⁶ That has implications for many clients whose potential gross estate values may swing from being taxable if death were to occur in one year, to non-taxable if death were to occur in a different year (perhaps even the next day).⁷ It also has crucial implications for language used in estate planning documents that could impact, for example, relative amounts passing either outright or in trust for a surviving spouse.⁸ So, death and taxes are certain, but dates, rates, basis rules, and exemption levels are not.

From an income tax standpoint, major (and non-permanent) changes in the amount the typical farm client can claim in depreciation on assets used in the farming business have significant implications.⁹ Another income tax planning

2010 (Thomson Reuters/Practitioners Publishing Company), *available at* <http://www.calt.iastate.edu/PDF/tax%20provisions%20that%20are%20set%20to%20expire.pdf>.

6. The applicable exclusion from federal estate tax was \$2 million in 2008 (with a tax rate of 45 percent on taxable amounts in excess of \$2 million), became \$3.5 million in 2009 (again with a 45 percent tax rate on taxable amounts in excess of \$3.5 million), will be \$0 in 2010 (because the federal estate tax is repealed, as is the rule allowing full income tax basis step-up (or step-down) at death equivalent to fair market value at the time of death), and is set to become \$1 million in 2011 (with a top rate of 55 percent). *See* I.R.C. § 2010 (2009); Michael S. Kutzin, *Estate Tax is Repealed—Maybe*, <http://www.seniorlaw.com/estatetaxrepeal.htm> (explaining the implications of the Economic Growth Act of 2001 on estate planning). It is likely that the Congress will pass legislation before the end of 2009 that will address the future of the federal estate tax.

7. Additional consideration must be given to the execution of health care powers to carry out client wishes in the event of an accident or illness that places the client in a permanent vegetative state. The dramatic change in the federal estate tax applicable exclusion from year-to-year may place particular priority on the timing of death in these situations.

8. For instance, as the applicable exclusion from federal estate tax rises, standard drafting language in wills and trusts that carves out an amount for the “bypass” trust for the surviving spouse that is tied to the exclusion amount will also rise by a corresponding amount, with the residual marital trust decreased by a like amount. That could result in an unwanted and unexpected decrease in the marital share of the estate passing to the surviving spouse.

9. *See* Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1111, 110 Stat. 1758 (codified as amended at 26 U.S.C. § 179(a)(1) (1996)). In 2007, the amount of expense-method depreciation (I.R.C. § 179(b)(1) (2008).) That could be claimed on qualified assets was \$125,000. *See* U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq Accountability Appropriations Act, Pub. L. No. 110-28 § 8218, 121 Stat. 192 (2007). That amount has increased steadily since 2001, when the maximum amount that could be expensed on qualified assets was \$24,000. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1111, 110 Stat. 1758

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complication is whether a state will adopt any particular change in federal tax law.¹⁰ Also, for many farm clients, the self-employment tax (and associated planning strategies related to minimizing the impact of self-employment tax) may have more of an impact than the income tax.¹¹ Strategies that account for the self-employment tax as part of the overall income tax planning and management strategy must be considered. Likewise, the alternative minimum tax (AMT)¹² can impact tax planning for many clients, and the typical one-year “patch” of the AMT complicates planning.

On the estate tax side of things, for example, recent successful IRS litigation against family limited partnerships has serious implications for estate tax planning for rural clients, whose net worth in recent years has increased largely because of rising land values.¹³ Tax planning and client representation is also

(1996). In 2008, the ceiling on expense-method depreciation was increased to \$250,000. Economic Stimulus Act of 2008, Pub. L. No. 110-185, § 102, 122 Stat. 618 (2008). Without further legislation, the \$250,000 amount was scheduled to drop \$133,000 in 2009, but legislation enacted in early 2009 restored the \$250,000 amount (and the \$800,000 beginning of the phase-out) for 2009 retroactive to January 1, 2009. See The American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, Sec. 1202, *amending* I.R.C. § 179(b)(7). Also, for assets placed in service during a tax year beginning in 2003-2010, an I.R.C. § 179 election (for all or a portion of an asset’s cost) can be made or revoked by filing an amended return for the year the asset was placed in service and the deduction was claimed. See IRS Chief Counsel Office Information Letter 2009-0059 (Feb. 17, 2009) (confirming that taxpayers can make or revoke an expense method depreciation election on an amended return for a taxable year after 2007 and before 2011 without the need for Treasury Regulations to be issued; IRS noted that taxpayers can rely on the guidance set forth in Rev. Proc. 2008-54, 2008-38 I.R.B. 722, Section 7 for making and revoking such elections). Also, under legislation enacted in 2008, an additional first-year “bonus” depreciation amount is available for qualified assets equal to 50 percent of an asset’s basis. Economic Stimulus Act of 2008, Pub. L. No. 110-185, § 102, 122 Stat. 618 (2008) (current version at I.R.C. § 168 (2009)). Under The American Economic and Reinvestment Act of 2009, bonus depreciation was extended for 2009 retroactive to January 1, 2009. Pub. L. No. 111-5, Sec. 1201, *amending* I.R.C. § 168(k)(2) and I.R.C. § 168(k)(4).

10. The concept is known as “coupling,” and states vary on whether they will couple with the federal government on the depreciation (as well as other) rules. For a table (as of July 29, 2008) containing state rules concerning conformity to the federal “bonus” depreciation and the enhanced expense-method depreciation rules, see ORVILLE W. BLOETHE ET AL., *TAX MANUAL B-29* (2008).

11. As Robert Kelly states, “In 1960, prior to the Great Society, Social Security taxes were 15.9 percent of all federal income. In 1984 they were 35.9 percent. Social Security hurts most the low-income workers of America.” ROBERT E. KELLY, *THE NATIONAL DEBT, FROM FDR (1941) TO CLINTON (1996)* 178 (McFarland & Company, Inc. (2000)). The percentage had risen to 39 percent in 2004. See Nashville Area Chamber of Commerce, Dep’t of Econ. Dev., “Federal Tax”, <http://www.nashvilleareainfo.com/Default.aspx?Page=FederalTaxes>.

12. See I.R.C. § 55 (2009).

13. See, e.g., *Holman v. Comm’r*, 130 T.C. 12, *13-17 (2008) (the court resurrected the I.R.C. § 2703 argument to defeat a family limited partnership (FLP)). While the IRS has defeated

complicated by an apparent IRS litigation strategy, evident in some cases, of losing at the trial court level due largely to poor preparation, not appealing the trial court's decision, and then issuing a non-acquiescence to the trial court's opinion or issuing some type of administrative ruling which ignores the court's ruling.¹⁴

If keeping up with tax legislation impacting rural clients were not enough, practitioners must also keep abreast of the endless stream of court decisions and IRS rulings that involve agricultural clients and impact tax planning.

III. MAJOR AREA #2 – INCREASING EMPHASIS ON FORMAL CONTRACTUAL RELATIONSHIPS

The increased concentration of agricultural markets and increased industrialization of agriculture has resulted in agricultural markets that are highly interdependent. This interdependence has resulted in the increased use of production contracts. Farmers with fewer options for buyers of their products may view contract farming as their only means of staying in production agriculture. As such, these producers can be vulnerable to contract terms that may be non-

the tax planning aspects of numerous FLPs in court, it remains clear that FLPs can still be a powerful estate planning tool if the planning is done correctly – the parties involved respect and abide by the agreement, run the FLP like a business, operate the entity for other than tax-avoidance reasons and enough assets are left out of the FLP for the general partner to live off. *See Astleford v. Comm'r*, 95 T.C.M. (CCH) 1497, *17 (2008) (substantial valuation discounts for gift tax purposes upheld for gifts of FLP interests (major asset of FLP was farmland)). Rising agricultural land values also raise an important question concerning what post-death events that impact farmland valuation in a rising market can be used to determine date-of-death value. The issue is important because, even with the increased post-death value, the decedent's estate may still be lower than the applicable exclusion amount and therefore not subject to federal estate tax, but the heirs could receive a higher income tax basis in the property. Conversely, for years, the IRS estate tax examiners have tried to use post-death sales as date-of-death comparables on a rising market when an increase in tax would result, but deny their application if only an increase in basis would result. For a detailed discussion of the issue, *see* Roger A. McEowen, *Farmland Estate Valuation in an Era of Rising Land Values*, ESTATE PLANNING, Oct. 2008, at 31.

14. *See, e.g.*, *Mattie Carter Trust v. United States*, 256 F. Supp. 2d 536, 541 (N.D. Tex. 2003) (at trial, the IRS failed to cite any case law to support its position, merely relying on a "snippet" of legislative history that the only way a trust could satisfy the material participation test for purposes of the passive loss rules was for the trustee to meet the test personally; the court said that the IRS's position "subverts common sense," but the IRS did not appeal the court's decision, did not issue regulations to support its position and restated its position in a Technical Advice Memorandum. *See* I.R.S. Tech. Mem. 2007-33023 (Aug. 17, 2007); *Kohler v. Comm'r*, 92 T.C.M (CCH) 48, *16 (2006) (post-death stock transfer restrictions could be taken into account to determine the value of the stock for estate tax purposes; the IRS performed poorly at trial, did not appeal the court's decision, and issued a non-acquiescence to the court's opinion. *See* *Kohler v. Comm'r* (2008) action on Dec. 2008-01 (Mar. 5, 2008)).

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negotiable and other terms that may be one-sided.¹⁵ That raises legal issues concerning growers' rights, many of which are related to unequal bargaining power. Other issues arising from the use of contracts in agriculture involve whether a particular contract producer is an independent contractor or an agent and the applicability of state consumer protection statutes to agricultural producers. Similarly, contractual production of agricultural commodities raises questions about whether the contract producer retains the ability to pledge crops or livestock grown under contract as collateral for loans.

Needless to say, contract production provides challenges to lawyers who must be well-versed in negotiating contracts for clients, and may need to become familiar with the arbitration process (given that many agricultural production contracts provide for mandatory arbitration before filing suit in court). Agricultural production contracts also require lawyers to have more than a basic understanding of the economics of agricultural production in order to understand payment clauses and inflation adjustments, among other economic terms and clauses contained in the contracts.

On a similar note, farm leases raise critical contract issues, as does the recent advent (at least in the Midwest) of wind energy leases/easements.¹⁶

IV. MAJOR AREA #3 – ANTITRUST

For all lawyers with agricultural producers as a primary clientele base that have practiced for any substantial length of time, antitrust law has not been a major part of their practice. In recent years, however, the application of antitrust law to agriculture has expanded rapidly. This development is not unrelated to the increasing concentration of agricultural markets and the increased industrialization of agricultural production.

15. Many agricultural production contracts are form contracts drafted by the integrated firm with which the grower is contracting, with non-negotiable terms. Such contracts may be held to be contracts of adhesion and could be held void depending upon whether the factual circumstances demonstrate unconscionability. *See, e.g.,* Okla. Att'y Gen. Op. No. 2001-17 (2001). Another problem with production contracts is that they commonly allow the integrator to terminate the producer's contract at anytime without cause. In that event, the only remedy producers may have may be based upon certain state law provisions governing production contracts. *See, e.g.,* *Crowell v. Campbell Soup Co.*, 264 F.3d 756, 765 (8th Cir. 2001).

16. *See, e.g.,* ROGER A. MCEOWEN, CTR. FOR AGRIC. LAW & TAXATION, WIND ENERGY PRODUCTION: LEGAL ISSUES AND RELATED LIABILITY CONCERNS FOR LANDOWNERS IN IOWA AND ACROSS THE NATION (Apr. 13, 2009), available at <http://www.calt.iastate.edu/briefs/CALTLegalBrief-WindEnergyProduction-LegalIssues.pdf>.

By its nature, antitrust law involves the application of economics to business transactions facing the agricultural client. For many rural lawyers, merely spotting a potential antitrust issue for an agricultural client may be a challenge, as the issues can be subtle. For example, in 2007, the U.S. Supreme Court issued one of its most noteworthy antitrust decisions in decades. The Court held that all vertical price restraints are to be judged by the Sherman Act's rule of reason standard, rather than being deemed per se illegal.¹⁷ While the Court's opinion, at first blush, might not seem to have much direct application to agricultural producers,¹⁸ the inability of manufacturers to specify a minimum price below which a retailer cannot go in reselling a product has been profoundly influential on the advancement of "big-box" retailers and the "Walmartization" of rural America. The Court's opinion now opens the door for manufacturers, distributors, and retailers of goods to consider resale price maintenance agreements in an effort to improve competitiveness and increase sales. The magnitude of the change, however, will likely turn on a number of factors including whether business practices will change in traditional distribution channels, and how negotiations concerning intellectual property licenses will be impacted.¹⁹

For the livestock sector, the primary federal legislation that governs legal and economic relationships between buyers and sellers is the Packers and Stockyards Act (PSA).²⁰ The PSA makes it unlawful for any packer who inspects livestock, meat products, or livestock products to engage in any course of business, or do any act, for the purpose or with the effect of manipulating or controlling prices or creating a monopoly in the buying, selling, or dealing of any article in restraint of commerce.²¹ In a nationwide class action lawsuit against Tyson, the plaintiffs claimed that Tyson violated the PSA through Tyson's use of acquiring cattle via a strategy of captive supplies.²² While the jury returned a verdict of \$1.28 billion for the class, and the trial court judge noted that the economic findings showed that Tyson's use of captive supplies depressed cash cattle prices, the

17. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), *overruling* *Dr. Miles Med. Co. v. Park & Sons Co.*, 220 U.S. 373 (1911).

18. *See id.* (likely to have a direct impact on manufacturers, distributors and retailers of goods).

19. State laws are another source of potential constraint on changes in distribution practice.

20. Packers and Stockyards Act, 7 U.S.C. §§ 181-231 (2007). For a general discussion of the PSA see Roger A. McEowen and Neil E. Harl, *Principles of Agricultural Law*, §15.02[2] (Robert P. Achenbach Jr., ed., Jan. 2009 ed.).

21. 7 U.S.C. § 192(a),(e) (2007).

22. *Pickett v. Tyson Fresh Meats, Inc.*, 315 F. Supp. 2d 1172, 1174 (M.D. Ala. 2004), *aff'd*, 420 F.3d 1272 (11th Cir. 2005).

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trial court judge overrode the jury's decision and ruled that Tyson was entitled to use captive supplies in order to "meet competition" and assure a "reliable and consistent" supply of cattle.²³ The case was affirmed on appeal and the U.S. Supreme Court declined to hear the case.²⁴ Similarly, another federal court later ruled that a plaintiff, in order to prevail on a PSA price manipulation claim, must show that a packer had the specific intent to violate the PSA and that the packer's conduct harmed competition.²⁵ However, two recent cases have held that, based on the plain language of the PSA, a plaintiff need *not* show that a packer's conduct harmed competition to find a PSA violation.²⁶

These cases are of particular importance for livestock producers, the lawyers that represent them, and the advancement of open and competitive livestock markets.

V. MAJOR AREA #4 – PATENT LAW

The U.S. Supreme Court's 1980 opinion in *Diamond v. Chakrabarty*²⁷ ushered in the era of biotechnology in agriculture, and with it, new legal issues for rural practitioners. The decision determined that living things, such as genetically engineered microorganisms, could be patented under general patent law so long as they satisfied the statutory criteria.²⁸ In recent years, plantings of genetically modified crops have increased substantially.²⁹ Monsanto, the worldwide

23. *Id.* at 1175-76.

24. *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1288 (11th Cir. 2005), *aff'g*, 315 F. Supp. 2d 1172 (M.D. Ala. 2004), *cert. denied*, 574 U.S. 1040 (2006).

25. *See Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1234 (10th Cir. 2007); *see also* *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir. 2005), *cert. denied*, 546 U.S. 1034 (2005).

26. *Wheeler v. Pilgrim's Pride Corp.*, 536 F.3d 455, 460-61 (5th Cir. 2008) (holding that the statutory language is plain, clear, and unambiguous and other court opinions finding a requirement that a plaintiff prove adverse effect on competition reached well beyond the PSA's clear and unambiguous text); *White v. Pilgrim's Pride Corp.*, No. 2-07-CV-522, 2008 U.S. Dist. LEXIS 74793, at *6-*11 (E.D. Tex. Sept. 29, 2008) (defendant's (poultry integrator's) motion to dismiss plaintiff's claim under the Packers and Stockyards Act (PSA) for price manipulation and unfair dealing was denied because plaintiff need not show an adverse impact on competition to prevail under PSA; defendant's motion to dismiss plaintiff's state law claim that defendant violated Texas Deceptive Trade Practices Act (DTPA) denied because plaintiff is a "consumer" under DTPA via relationship to overall transaction with defendant's (as opposed to simply looking at the contractual relationship between the parties); plaintiff's fraud claim likewise not dismissed).

27. *See Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

28. *Id.* at 310.

29. USDA, ECONOMIC RESEARCH SERVICE, ADOPTION OF GENETICALLY ENGINEERED CROPS IN THE U.S., <http://www.ers.usda.gov/Data/BiotechCrops/> (last visited Apr. 20, 2009) (pro-

leader in the development and marketing of genetically modified seed, has created an entire legal department with the sole purpose of enforcing its seed patents and licensing agreements. The company has filed numerous lawsuits against farmers, most in the Federal District for the Eastern District of Missouri.³⁰ The two primary issues that farm clients face with respect to the use of genetically modified crops are: (1) getting sued for patent infringement for saving and replanting patented seed (both GMO and conventional);³¹ and (2) getting sued by a neighboring farmer who planted conventional seed for “contamination” of the conventional crop due to pollen drift.³²

Prior to the last fifteen years, patent law was not likely to be on the radar screen of many rural practitioners. It is another legal issue that is very technical and requires particular expertise that will normally be beyond the scope of the typical rural practitioner’s practice.³³

VI. MAJOR AREA #5 – FARM PROGRAM ADMINISTRATIVE APPEALS

A significant amount of the regulation of agricultural activities is conducted by and through administrative agencies that promulgate and make decisions that affect producers’ behavior. Usually, a farmer or rancher’s contact with an administrative agency is in the context of participation in an agency-administered program, or being cited for failure to comply with either a statutory or administrative rule. Consequently, it is necessary for farmers and ranchers (and their legal counsel) to have a general understanding of how administrative agencies work and the legal effects of their decisions. Several core principles should be kept in mind: (1) disputed matters must first be dealt with in accordance with the agency’s procedural rules before the matter can be addressed by a

viding data sets showing the increasing rate of adoption of genetically engineered crops in the U.S.).

30. CENTER FOR FOOD SAFETY, *MONSANTO VS. U.S. FARMERS* 31 (2005), available at <http://www.centerforfoodsafety.org/pubs/cfcMONsantovsFarmerReport1.13.05.pdf>.

31. See, e.g., *Monsanto Co. v. Trantham*, 156 F. Supp. 2d 855, 858 (W.D. Tenn. 2001); *Monsanto Co. v. McFarling*, 302 F.3d 1291, 1293 (Fed. Cir. 2002) *Ralph v. Pipkin*, 183 S.W. 3d 362 (Tenn. Ct. App. 2005); *Monsanto Co. v. Dragan*, No. 05CV786S, 2006 U.S. Dist. LEXIS 75670 (W.D. N.Y. Oct. 18, 2006).

32. For a discussion of possible causes of action for pollen drift, see Carie-Megan Flood, *Pollen Drift and Potential Causes of Action*, 28 J. CORP. L. 473, 487-97 (2003).

33. For a discussion of the legal issues associated with genetically modified organisms, see ROGER A. MCEOWEN & NEIL E. HARL, *PRINCIPLES OF AGRICULTURAL LAW* §15.03[5] (Robert P. Achenbach Jr., ed., 2008 ed.).

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court of law (exhaustion of administrative remedies);³⁴ (2) administrative proceedings must be participated so as to preserve a reviewable record of factual and legal issues for a court of law;³⁵ (3) an administrative agency's interpretation of the laws it administers does not have the force of law;³⁶ (4) a USDA administrative agency cannot seek judicial review of the Farm Service Agency (FSA) National Director's review of a National Appeals Division Hearing Officer's determination;³⁷ and (5) the U.S. Circuit Courts of Appeal for the Seventh, Eighth, and Ninth Circuits have held the Equal Access to Justice Act applies to administrative hearings before the USDA's National Appeals Division.³⁸ That last point means that if a farmer prevails against the agency, the farmer may be able to recover attorney fees and expenses if the administrative officer determines that the government's position was not substantially justified.³⁹

Participation in federal farm programs also has implications for the proper structuring of farm business arrangements.⁴⁰ That fact has other tax and legal implications that must be taken into consideration.⁴¹

34. *But see* Gold Dollar Warehouse, Inc. v. Glickman, 211 F.3d 93, 98 (4th Cir. 2000) (plaintiff not required to exhaust administrative remedies before challenging imposition of personal liability for violation of tobacco market quotas where plaintiff made facial challenge to regulation).

35. The exhaustion of administrative remedies, as a general rule, also requires that legal issues be raised during the administrative process so as to be preserved for judicial review. *See* Ballanger v. Johanns, 495 F.3d 866, 869-71 (8th Cir. 2007) (some of plaintiff's legal claims were precluded because they were not raised during the administrative process; administrative exhaustion is required as to each legal issue).

36. *See* Christensen v. Harris County, 529 U.S. 576, 587 (2000).

37. The National Director's decision constitutes the administrative agency's final decision from which the agency cannot seek judicial review. 5 U.S.C. §702. An "appellant" that has standing to request judicial review is defined in terms of being a participant in federal farm programs. 5 U.S.C. §551. As such, the administrative agency lacks standing to request judicial review and review is limited to an aggrieved producer. *Id.*

38. *See* Five Points Road Joint Venture v. Johanns, 542 F.3d 1121, 1125-26, 1129 (7th Cir. 2008) (Equal Access to Justice Act (EAJA) applies to USDA administrative appeals; NAD proceedings meet the definition of "adjudication," provide an opportunity for a hearing, and are on the record; thus, the prevailing party may recover attorney fees and expenses if administrative officer determines that government's position was not substantially justified); Aageson Grain and Cattle v. USDA, 500 F.3d 1038, 1047 (9th Cir. 2007); Lane v. USDA, 120 F.3d 106, 108 (8th Cir. 1997).

39. *See, e.g.,* B & D Land and Livestock Co. v. Schafer, No. C 07-3070-MWB, 2009 U.S. Dist. LEXIS 42997 (N.D. Iowa May 21, 2009) (court awarded fees, expenses and other costs in wetland enforcement action; defendant's position not substantially justified and no special circumstances existed to bar award of fees, costs and related expenses).

40. This point makes it important for practitioners to be familiar with farm program legislation and the administrative interpretation of statutory rules concerning eligibility for and participation in such programs. For a discussion of the impact of farm program legislation on farm

The legal system is deeply involved in addressing environmental problems facing production agriculture. Perhaps no industry is more dependent upon the environment than is agriculture. Increased regulation has occurred in the environmental area, with much of it directed at agriculture.⁴² Thus, it is imperative that farmers have a general knowledge of the areas of environmental law that could impact them; and rural lawyers need to stay abreast of developments in the environmental area on numerous fronts. A complicating factor is that environmental legal issues involve both state and federal law.⁴³

business organization, see Roger A. McEowen, Kelvin Leibold and Erin C. Herbold, Ctr. For Agric. Law & Taxation, Payment Limit Rules Under the 2008 Farm Bill – Planning Implications for Producers, (Mar. 4, 2009), available at <http://www.calt.iastate.edu/briefs/CALT%20Legal%20Brief%20-%20Payment%20Limit%20Rules.pdf>.

41. For example, the 2008 Farm Bill contains new income limitations effective with the 2009 crop year for purposes of eligibility for commodity and price support programs with the definition of income having planning implications. See Robert E. Moore and Roger A. McEowen, Ctr. For Agric. Law & Taxation, Determining “Income” for Farm Program Payment Eligibility Purposes, (Feb. 19, 2009) available at <http://www.calt.iastate.edu/briefs/CALT%20Legal%20Brief%20-%20AGI%20Rules%20for%20Farm%20Program%20Eligibility.pdf>.

42. See, e.g., Roger A. McEowen and Neil E. Harl, *Principles of Agricultural Law*, Chapter 14 (Robert P. Achenbach Jr., ed., Jan. 2009 ed.).

43. Much environmental legislation and regulation restricting private land use activities is created pursuant to the Commerce Clause of the U.S. Constitution. U.S. CONST. art. I, § 8. The U.S. Supreme Court has invalidated federal involvement in local activities that do not substantially affect interstate commerce. See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). Lower courts have not necessarily followed that line of reasoning. See *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir. 1995), *cert. den.*, *Cargill v. United States*, 516 U.S. 955 (1995) (Thomas, J. dissenting). However, it may be immaterial whether particular conduct involves a connection with interstate commerce to give the federal government regulatory authority over the activity. See *United States v. Dierckman*, 201 F.3d 915 (7th Cir. 2000). In *Dierckman*, the court held that the federal government could regulate a farmer’s activity on private land pursuant to the spending power. *Dierckman* 201 F.3d at 922. This case involved a farmer’s challenge to the farm program benefit eligibility with respect to the farmer’s disturbance of isolated wetlands on the farmer’s property. *Dierckman* 201 F.3d at 920-21. Even though interstate commerce was not involved, the court ruled that the 1985 Farm Bill was not an exercise of direct regulatory power which requires a connection to interstate commerce under the commerce clause, but merely established rules conditioning the receipt of federal farm program benefits on wetland preservation. *Dierckman* 201 F.3d at 922-23. As such, the court reasoned, the “swampbuster” provisions in the 1985 Farm Bill are indirect regulation invoking the spending power and are, therefore, not limited by the commerce clause in requiring a connection to interstate commerce. *Dierckman* 201 F.3d at 922-23.

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The primary areas of environmental law at the state level include (variations by jurisdiction): (1) agricultural chemical application and disposal; (2) regulation of confinement livestock facilities; (3) manure disposal rules; (4) control of water pollution; (5) federal regulation of “wetlands”; (6) solid waste disposal; (7) nuisance and right-to-farm laws (state level); and (8) disposal of dead animals. At the federal level, the primary areas of environmental law important to farmers and ranchers include: (1) the Federal Insecticide, Fungicide and Rodenticide Act (regulation of manufacturing, marketing and labeling of all pesticides in the U.S.);⁴⁴ (2) the Federal Water Pollution Control Act (a.k.a. the Clean Water Act) (regulates the release of “pollutants” into surface water and authorizes state plans to control nonpoint source pollution);⁴⁵ (3) the Safe Drinking Water Act;⁴⁶ and (4) the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (a.k.a. Superfund) (authorizes the Environmental Protection Agency to require cleanup of “hazardous” waste sites).⁴⁷

Each of the areas of environmental law mentioned above is very complex and requires particular expertise by practitioners.

VIII. MAJOR AREA #7 – BANKRUPTCY LAW

Many issues that arise in agricultural law are cyclical in nature. Bankruptcy is certainly one of these areas. The frequency with which a practitioner will have to address bankruptcy issues on behalf of clients is largely tied to economic conditions in the agricultural marketplace as well as the general economy. In the 1980s, bankruptcy issues moved to the forefront of client issues for many rural practitioners in the Midwest, as a result of poor economic policy decisions in the 1970s⁴⁸ coupled with encouragement from the federal government and

44. See Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (2007).

45. See Federal Water Pollution Control Act, Pub. L. No. 110-352, 62 Stat. 115 (codified as amended in scattered sections of 33 U.S.C.).

46. Safe Drinking Water Act of 1974, 42 U.S.C. §§ 300(f)-(j) (2007).

47. See Comprehensive Environmental Response, Compensation and Liability Act, 4 U.S.C. §§ 9601-9675 (2007). Under CERCLA, “hazardous waste” is defined in a manner applicable to many common chemicals that are used on a farm or ranch.

48. In reality, the seeds from the New Deal of the 1930s were just beginning to take root in the economy in the 1970s. The nation’s aggregate debt had risen from approximately \$19 billion in 1932 to almost \$400 billion by 1970. See KELLY, *supra* note 11 at Chapter 1 and Chapter 12, Table 12.4. By 1979, the debt exceeded \$700 billion. *Id.* at Table 12.4. During the four years of the Carter Administration, the national debt increased by nearly \$250 billion (an unparalleled amount at that time). This debt-financed spending (to pay for the continuing New Deal programs of the 1930s and the Great Society programs of the 1960s *Id.* at 166 (pointing out that the fundamental reason for the growth of the public debt over several decades was the ever-increasing cost of

some agricultural economists that farmers to take advantage of increased credit availability in order to leverage expansions of productive capacity.⁴⁹ A subse-

the welfare state)) coupled with certain international economic supply shocks triggered inflation that spurred double-digit price increases annually until it was about 12 percent by early 1979 and 13.1 percent when President Carter left office in early 1981. As a result, the Carter Administration decreased the money supply by decreasing the amount of credit available by virtue of higher interest rates. In a debt-run economy (such as what the U.S. – thanks to the New Deal and Great Society programs – had become), consumer buying slows down with the hope that inflation will also (indeed, this same technique was one of the controls established by the Roosevelt Administration in the 1930s, and inflation of the money supply is why the Roosevelt Administration removed the money supply from the gold standard – to gain the ability to regulate the currency as deemed necessary). See, e.g., BURTON J. FOLSOM JR., *NEW DEAL OR RAW DEAL? HOW FDR'S ECONOMIC LEGACY HAS DAMAGED AMERICA*, Chapter 8 (Threshold Editions, (2008)). The Carter Administration's move to tighten the money supply and the resulting increase in interest rates resulted in, among other things, a precipitous drop in agricultural land values. In 1981, the incoming Reagan Administration brought restored confidence to the economy, took bold steps to deal with inflation, and instituted the largest tax cut in U.S. history which, beginning in December of 1982 triggered "25 consecutive months of economic growth that lifted the four-year growth of U.S. gross domestic product to 8.9 percent – the best peacetime performance since the early 1950s." KELLY *supra* note 11, at 172. However, simultaneously, the Democrat-controlled Congress was able to successfully block the Administration's attempts to reduce spending and instead increased aggregate spending to more than match the additional revenue generated by the tax cuts. As Robert Kelly points out, "Reagan made it painfully clear to liberals that the entitlement system they had created could not be cut – to reduce cost, it had to be substantially modified. To do this, liberals would have to admit that they had been wrong for years, and they would have to share the unpopular responsibility for cutbacks. They were not prepared for that. They preferred to underrate the Soviet problem and blame Reagan for overspending" See *id.* at 173-174. Thus, while federal receipts increased substantially during the 1980s, federal outlays increased at a greater rate. An important point is that the deficit of 1981-1984 was not because of lack of revenue. Instead the failure of the Congress to control spending on social programs and inflation were the primary factors. Also, since the time of President Eisenhower, only Presidents Carter and Ford "spent *less* [emphasis added] on *Defense* than Reagan did in 1984 when measured as a percentage of gross domestic product." See *id.* at 174. Clearly, the reason for the deficits under President Reagan was Congressional spending to continue welfare-state programs, not tax cuts or defense spending.

49. The high inflation of the 1970s meant that real capital gains on farm real estate dwarfed those of preceding decades. See, e.g., *Agricultural Boom & Bust: Will History Repeat in the 1990's?*, USDA Economic Research Service, *Agricultural Outlook*, 25, tbl. 3, (April 1999) available at <http://www.ers.usda.gov/publications/agoutlook/apr1999/ao260e.pdf>. This apparent new "wealth" created an incentive for some farmers to buy additional land, and led to speculation in the agricultural land market by both farm and non-farm investors. In addition, the expansion of credit was likely aided to the extent that agricultural bankers based their farm loans on collateral (land) value rather than on cash-flow analysis. See *infra* note 51. Consequently, farm debt rose along with increasing real estate values, even though farm income levels were often inadequate to support the higher debt burdens. This made participation in federal farm programs even more important as a source of additional income.

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quent change in domestic economic and monetary policy to deal sharply with inflation increased interest rates, and a change in the worldwide supply and demand conditions for agricultural commodities brought land values back to reality.⁵⁰ These same factors also plunged many farmers, who had overextended due to the incentives of the inflationary economic policy of the 1970s, into bankruptcy.⁵¹

In 1986, Chapter 12 bankruptcy for farmers was enacted,⁵² creating a new area of bankruptcy law that rural practitioners had to become familiar with. Effective July 1, 2005, Chapter 12 became a permanent part of the bankruptcy code, and with the 2005 amendments an important tax rule associated with the priority of governmental claims in a bankruptcy estate was added.⁵³ The implications of that change are still working themselves out in court at the present time.⁵⁴

50. Upon taking office, the Reagan Administration put in place some temporary and harsh controls on federal spending and altered the federal farm programs to prohibit many of the largest farms from participating. Under President Carter, spending on federal farm programs increased by 185.1 percent. Under President Reagan, farm program spending increased, but at a lower rate. KELLY, *supra* note 11 at 182. The decline in land values that had begun with the tightening of the money supply during the Carter Administration, *supra* note 48, farm land values accelerated as buyers realized that the economic conditions of the 1970s were coming to an end.

51. Two agricultural economists have pointed out that a “significant proportion of the downturn in land values in the 1980s was in essence an excess amount of farmland offered to the market in a period of time when potential buyers had little appetite or limited funds to purchase those assets.” Mike Boehlje and Chris Hurt, *The Financial Crisis: Is This A Repeat of the 80’s For Agriculture?*, Purdue University extension monograph, *available at* http://www.agecon.purdue.edu/news/financial/crisis_return_80s.pdf. The authors point out that lenders were sometimes financing agricultural land purchases at 100 percent of the land’s then fair market value on the belief that land values would continue to rise. Thus, the authors point out lenders had become increasingly “collateral focused” rather than “cash-flow/earnings” focused. *Id.* The parallel with the current economic situation in the housing sector is obvious. For commentary on the causes of the current problems in the housing and financial markets see Roger A. McEowen, *Emergency Economic Stabilization Act of 2008, Ctr. For Agricultural Law and Taxation*, *available at* <http://www.calt.iastate.edu/PDF/EmergencyEconomicStabilizationActof2008.pdf> (pointing out that the current problems facing the housing and financial sectors were set in motion beginning in the late 1970s and were aided by poor policy decisions throughout the 80’s and 90’s, and also pointing out a Bush Administration attempt in 2005 to head-off some the brewing problems which the Congress rebuffed).

52. *See* 11 U.S.C. §1201 (2007).

53. 11. U.S.C. §1222(a)(2)(A) (2007) (a Chapter 12 debtor can treat claims arising out of “claim[s] owed to a governmental unit” as a result of “sale, transfer, exchange, or other disposition of any farm asset used in the debtor’s farming operation” as an unsecured claim that is not entitled to priority under Section 507 of the Bankruptcy Code, provided the debtor receives a discharge).

54. *See, e.g., In re Knudsen*, 389 B.R. 643, 668 (N.D. Iowa 2008) (provision not limited to capital assets used in farming, applies to post-petition sales of farming assets, and amount of

Historically, periods of prosperity are fleeting in agriculture, and all indications are that the present “Golden Age”⁵⁵ of agriculture will be no different. Unfortunately, that means that bankruptcy practice may soon be back in “vogue” for rural practitioners. The current parallels with the 1970s are uncanny. In the 1970s, the USDA, some lenders, and some agricultural economists, encouraged farmers to borrow against rising farmland values to plant fence-row-to-fence-row to feed a hungry world.⁵⁶ Today, USDA is again encouraging farmers to borrow against the rising equity in their land to invest in ethanol and bio-diesel plants.⁵⁷ Also, just like the 1970s, when “sales of farm machinery, fertilizer, and pesticides boomed and farm communities prospered, agribusiness is again banking on

non-priority taxes to be determined under marginal approach); *In re Schilke*, 379 B.R. 899, 903 (Bankr. D. Neb. 2007), *aff'd*, 2008 U.S. Dist. LEXIS 68176 (D. Neb. Sept. 9, 2008) (provision applies to taxes generated post-petition); *In re Dawes*, 382 B.R. 509, 521 (Bankr. D. Kan. 2008) (provision applies to taxes generated post-petition); *In re Hall*, 393 B.R. 857, 863-64 (D. Ariz. 2008); *In re Rickert*, No. BK06-40253-TLS, 2009 Bankr. LEXIS 17, *8 (Bankr. D. Neb. Jan. 9, 2009) (provision applies to post-petition taxes, and amount of non-priority taxes to be determined under proportional method (contrary to holding of *Knudsen*)); *In re Uhrenholdt*, No. BK06-40787-TLS, 2009 Bankr. LEXIS 144 (Bankr. D. Neb. Jan. 26, 2009) (provision applies to post-petition taxes, and taxes triggered by sale of corn to cattle feeding operation run by debtors entitled to non-priority treatment because debtors were “using” the corn as feed in the debtors’ own feeding operation); *In re Gartner*, No. BK06-40422, 2008 Bankr. LEXIS 3525 (Bankr. D. Neb. Dec. 29, 2008) (provision applies to taxes triggered post-petition). In early 2009, *Knudsen* and *Schilke* were consolidated for appeal to the United States Courts of Appeals for the Eighth Circuit. *Schilke* contains one issue on appeal – whether 11 U.S.C. § 1222(a)(2)(A) applies to post-petition transactions, including transactions that occur in the year of filing. *Knudsen* contains that issue as well as the issue of what sales of farm assets that are used in the debtor’s farming operation are covered by 11 U.S.C. § 1222(a)(2)(A), and what the proper methodology is for calculating the amount of the governmental claims to which 11 U.S.C. § 1222(a)(2)(A) applies.

55. Wendy Wintersteen, Dean of the Iowa State University College of Agriculture and Life Sciences, stated in May of 2007 that the agricultural industry had entered a “Golden Age.” She has been quoted as saying: “We have entered the Golden Age for Agriculture which heralds the rebirth of our rural economy across much of America.” Lynn Henderson, *Van Eck’s Moo: The Right Place at the Right Time*, AGRI MARKETING, Mar. 2008, at 32, 35, available at <http://www.agrimarketingDigital.com/?iid=6939>. By the end of 2008, however, economic conditions in agriculture had worsened significantly. Commodity prices had fallen precipitously, numerous ethanol plants were in bankruptcy, land values had begun to level-off and farm bankruptcy filings were on the rise, particularly in the hog industry. Thus, Dean Wintersteen’s “Golden Age” may be the shortest lived “Age” in the history of the country.

56. Earl Butz, U.S. Secretary of Agriculture under Presidents Nixon and Ford from 1971-1976 is famously remembered for his phrase encouraging farmers to “plant fence-row to fence-row.” See, e.g., Tom Philpott “A Reflection on the Lasting Legacy of 1970s USDA Secretary Earl Butz, available at <http://www.grist.org/article/the-butz-stops-here/>.

57. See, e.g., John Ikerd, “It’s Time To Dismantle Failed Farm Programs”, available at [http://web.missouri.edu/ikerdj/papers/SFT-Farm%20Policy%20\(1-07\).htm](http://web.missouri.edu/ikerdj/papers/SFT-Farm%20Policy%20(1-07).htm).

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a surge in sales and profits and farm communities are banking on bio-fuels to propel them to prosperity.”⁵⁸ But, just as the financed prosperity of the 1970s came to a halt in the 1980s when a global economic recession collapsed U.S. exports and domestic monetary policy changed, the recent prosperous times in agriculture will likely cease when petroleum products come onto energy markets from currently untapped, alternative sources that are far less costly than bio-fuels.⁵⁹ In the long run, according to Professor Ikerd, “net energy rations will be reflected in relative market prices.”⁶⁰ That means that bio-fuels could end up being much more expensive than petroleum-based alternatives. Already, numerous ethanol plants have filed bankruptcy,⁶¹ the most prominent of which have been the bankruptcy filings of VeraSun – the nation’s second largest ethanol producer who filed Chapter 11 on October 31, 2008,⁶² and Pacific Ethanol, Inc., the largest West Coast ethanol producer who filed Chapter 11 on May 18, 2009. As Professor Ikerd points out, when those cheaper sources of energy come on-line, the agricultural energy “boom” likely will become a “bust.”⁶³ Consequently, current indications are that bankruptcy practice will rise in significance for agricultural lawyers.

58. *Id.*

59. “Tar sands, oil shale, and coal are all relatively abundant alternative sources of petroleum and are all about twice as energy efficient as bio-fuels, in terms of kcals of energy produced for each kcal of energy used in the production process.” *Id.* Also, for an excellent article outlining the economic problems with ethanol, see Peter Z. Grossman, *If Ethanol Is the Answer, What Is the Question?*, 13 DRAKE J. OF AGRIC. L. 149 (2008).

60. Ikerd, *supra* note 57.

61. As of May 2009, 19.7 percent of U.S. existing ethanol plants, representing 18 percent of production capacity were shut down. See Roger A. McEowen, Ctr. For Agricultural Law & Taxation, Status Update on the Ethanol Industry, (May 20, 2009), available at <http://www.calt.iastate.edu/ethanolupdate.html>.

62. Press Release, VeraSun Energy Corp., VeraSun Energy Corporation Launches Chapter 11 Case to Enhance Liquidity While it Reorganizes (Oct. 31, 2008), available at <http://www.verasun.com/press/details.cfm?ID=161>.

63. See Ikerd, *supra* note 57. In addition, ethanol, for all of its present political support and heavy subsidization by government at both the federal and state level, will not be able to escape the economics of its production. See David Pimentel & Tad W. Patzek, *Ethanol Production Using Corn, Switchgrass, and Wood; Biodiesel Production Using Soybean and Sunflower*, 14 NAT. RESOURCES RESEARCH 65, 66 (2005) (many scientific studies have reached the conclusion that ethanol production provides no net energy balance, “that ethanol is not a renewable energy source, is an uneconomical fuel, and its production and use contribute to air, water, and soil pollution and global warming”).

The seven areas identified above presently are (in my view) the leading areas of law impacting rural lawyers and their clientele. What issues will shape the future of agricultural law? Those issues may be closely tied to economic conditions, the regulatory environment and government policies based on highly-charged politics that are allegedly supported by “science.”⁶⁴

Representing an agricultural client is both challenging and rewarding. The representation is challenging because the law impacts a wide range of agricultural activities. It is rewarding because the mastery of those areas can provide significant benefits for the farm client, the client’s business, and the client’s family.

64. As of April 2009, legislation had been proposed at the federal level entitled “The American Clean Energy and Security Act of 2009.” The legislation is designed as a comprehensive approach toward a “clean energy” economy. However, the legislation has serious implications for the economy in general and agriculture in particular. For commentary concerning the potential impact of the proposed legislation and Congressional debate on the matter, *see* Roger A. McEowen, Ctr. For Agricultural Taxation & Law, “Global Warming” Bill moving through Congress—Debate Stifled (Apr. 27, 2009), *available at* <http://www.calt.iastate.edu/debate.html>.