

BIOTECHNOLOGY AND OTHER NEW DEVELOPMENTS IN AGRICULTURAL LAW

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Executive Summary

Chronology of StarLink™ Regulatory Events by APHIS and FDA

- StarLink is a genetically enhanced corn variety planted on about ½ % of corn acreage.
- Before StarLink could be sold, it was subject to regulation by APHIS, FDA, and EPA.
- 1998: USDA's Animal and Plant Health Inspection Service announced its conclusion that StarLink was not a plant pest and would no longer be regulated by APHIS.
- 1998: FDA completed its food safety consultations concerning StarLink.
- 2000: FDA is monitoring the voluntary recalls of foods which may contain StarLink.

Chronology of EPA's Regulation of StarLink™

- EPA has regulated StarLink under its authority to regulate pesticides, because StarLink is genetically enhanced to resist the European corn borer.
- 1998: EPA registered StarLink (its "insecticide-like" Cry9C protein) as a plant-pesticide. The 1998 and subsequent registrations limited StarLink to animal feed and industrial uses. But Aventis, StarLink's owner, voluntarily cancelled the registration after traces of StarLink DNA were found in taco shells. So StarLink won't be sold as seed next year.
- 1998: EPA exempted StarLink from a food "pesticide tolerance" requirement in animal feed. There is no risk to humans eating meat or other products from StarLink-fed animals.
- 2000: As of December 1, EPA had not yet approved StarLink for "direct" human food use. To date, EPA has found . . . "there is no evidence to indicate that Cry9C is or is not a potential food allergen." But the issue is pending.

Lessons and Implications from the StarLink™ Saga

- The U.S. biotech regulatory system is worthy of our trust and confidence.
- Regulatory policy: When should a crop variety be approved for one use (e.g., feed) but not another similar use (e.g., human food)? Should food safety issues, like the potential allergenicity of foods derived from a genetically enhanced crop, be regulated under FDA's approach, EPA's approach, or both?
- Liability issues: Who should be potentially liable for what damages in matters like this?

- Future actions of farmers: What are the implications regarding farmer contracts, and for selecting, growing, and handling genetically enhanced crop varieties.

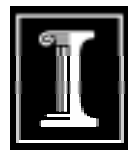
Other New Developments in Agricultural Law

- Attorneys General confirm Aventis is paying a \$0.25/ bu. premium to buy StarLink grain inventory and is taking other measures in response to concerns of farmers and elevators.
- Uniform Commercial Code amendments affect Statutory Landlord's Lien Upon Crops: Beginning July 1, 2001, ag landowners have additional reasons to file "Financing Statements." Bankers and grain elevators should also pay attention to the amendments.
- *Corona* case discusses liability for animals running at large; fence law remains important.

Note: See <<http://web.aces.uiuc.edu/farm.doc/legal/index.html>> (the Farm.doc site for agricultural law and taxation) for more information about these and other topics.

StarLink: A Case Study in Agricultural Biotech Regulation

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EXTENSION

StarLink™ Case Study: Overview of Topic

- Chronology of U.S. Regulatory Events
 - USDA-APHIS, FDA, EPA
- Lessons from the StarLink Episode
 - Regulatory System Worthy of Our Confidence
 - Implications for Public Policy Decisions
 - Lots of Potential Liability Issues
 - Implications for Future Farmer Actions

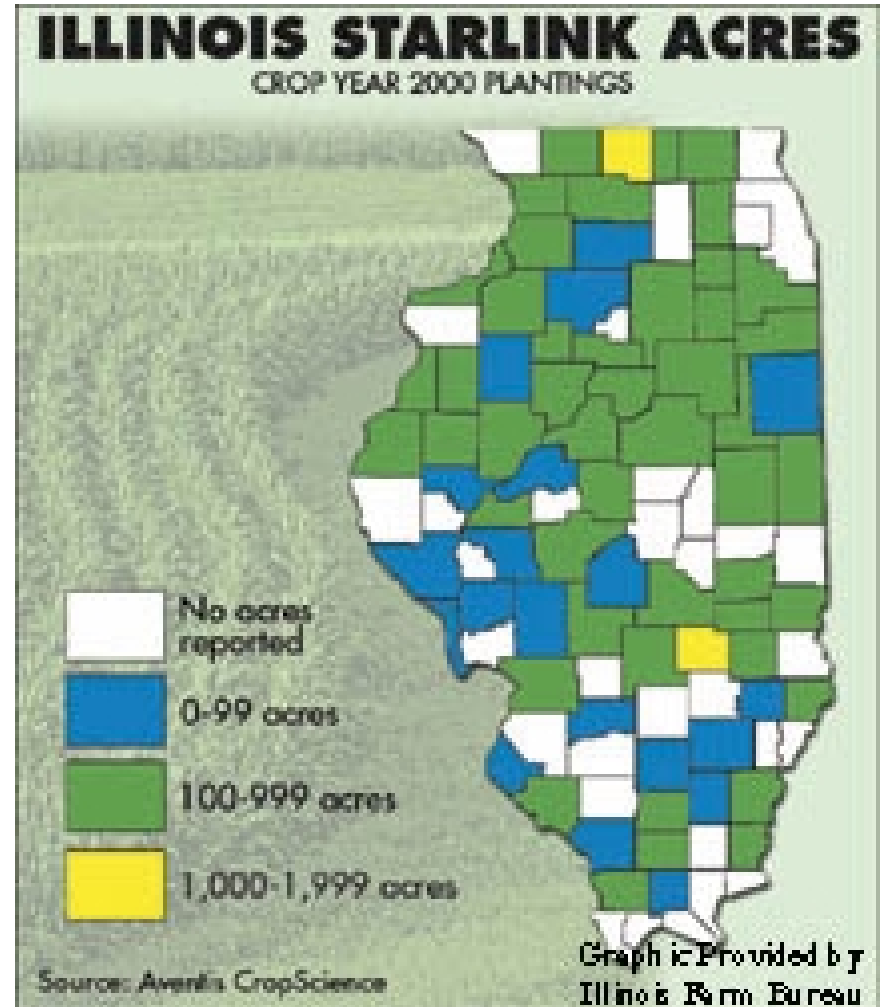
Background: StarLink in Illinois

<http://www.agr.state.il.us/starlink.htm>

Illinois farmers planted about 17,000 acres of StarLink® (about 0.01% of the 2000 Illinois crop)

Illinois ranks seventh in the nation in terms of acres of StarLink®

Nationwide, 315,000 acres of the corn were planted in 2000. Another 168,000 acres were planted as buffer areas to prevent cross-pollination.



StarLink: Chronology of Regulation

Review of Food/Ag Biotech Regulation

StarLink™ is a genetically engineered corn plant which makes its own insecticide-like protein, has been approved as a commercial crop, and is approved for use as livestock feed (approval for human food is pending).

Before StarLink hybrids could be sold commercially, StarLink was subject to regulation by APHIS, by FDA, and by EPA.

See Uchtmann's paper on Starlink Regulation:

http://web.aces.uiuc.edu/farm.doc/legal/starlink_table.html

1998: StarLink™ and APHIS

(Animal & Plant Health Inspection Service)

APHIS is responsible for protecting US agriculture from pests and diseases. APHIS regulations require a permit or formal notification prior to "introducing" a genetically engineered product like StarLink™ in the U.S. The regs also provide for de-regulating a genetically engineered product.

In the May 15, 1998 Federal Register, APHIS announced it would no longer regulate StarLink™ because it did not present a plant pest risk.

APHIS Reasons: StarLink plants...

- 1) exhibit no plant pathogenic properties,
- 2) are no more likely to become a weed than insect resistant and herbicide tolerant corn developed by traditional breeding,
- 3) are unlikely to increase the weediness potential of any other plant with which they can interbreed,
- 4) are not likely to cause damage to raw or processed agricultural commodities,
- 5) are unlikely to harm threatened or endangered species/organisms beneficial to agriculture, and
- 6) are unlikely to reduce the ability to control insect or weed pests in corn and other crops.

1998: StarLink™ and FDA

FDA has abroad authority to ensure the safety of US foods.

Human food or animal feed developed by genetic engineering (e.g., StarLink) must meet the same rigorous safety standards as other food products.

Discussions about StarLink were completed with FDA in 1998. FDA noted the safe use of the Cry9C protein (the “insecticidal ingredient” in StarLink) is regulated by the EPA and EPA approved the use of StarLink in animal feed on May 22, 1998.

2000: StarLink™ and FDA

FDA also has broad authority to recall foods or take other legal action against any product that poses a hazard to the public.

Once StarLink DNA traces were found in human food, the food companies initiated a voluntary recall;

FDA is now monitoring.

FDA views this as a “Class II” Recall

the product may cause temporary or medically reversible adverse health consequences, or

the probability of serious health consequences is remote.

Overview: StarLink™ and EPA

The Federal Insecticide, Fungicide, and Rodenticide Act gives EPA authority to regulate the distribution, sale, use and testing of plants producing pesticidal substances like StarLink's Cry9C protein. EPA says such *pesticidal substances must be registered*.

Also, under the Federal Food, Drug and Cosmetic Act, EPA sets *tolerance limits for pesticides* on and in food and feed, or establishes an exemption from the requirement of a tolerance.

5/12/98: StarLink's Plant-pesticide Received Registration from EPA

A pesticide cannot be legally used if it has not been registered with EPA's Office of Pesticide Programs.

StarLink produces its own plant-pesticide (the Cry9C protein toxic to ECB). Therefore, the plant-pesticide in StarLink had to be registered before StarLink hybrids could be sold commercially.

After assessing risks to the environment and human health, EPA issued a Pesticide Registration subject to certain terms and conditions

StarLink™ Pesticide Registration: Yr 2000 Terms and Conditions

EPA's updated Pesticide Registration subjected StarLink to certain terms and conditions, e.g., StarLink (and corn within a 660 foot buffer) could only be used for animal feed/non-food industrial uses, and grower agreements must specify the planting of 20% non-Bt corn refuges.

The 660 feet buffer was to minimize pollen spread from StarLink hybrids to other corn. The non-Bt corn refuges are to delay insect resistance to plant-expressed Bt pesticides.

5/22/98: Cry9C Exempted From Pesticide Residue Tolerance In Feed

Based on toxicology data and the limited human exposure expected with animal feed use, EPA concluded there was reasonable certainty that no harm would result from aggregate exposure to the U.S. population, including infants and children, to residues of the Cry9C protein and DNA in livestock feed or the meat, milk, poultry, or eggs from StarLink-fed animals.

4/7/99: Should Exemption from a Pesticide Residue Tolerance be Expanded to Cover Human Food?

EPA announced receipt of a pesticide petition proposing to expand the exemption from the requirement of a tolerance for StarLink's plant-pesticide (Cry9C protein) and the DNA necessary for its production in corn.

The petition sought to extend the exemption for these substances to all food commodities.

12/21/99: EPA's Review of Petition Completed, Public Comment Sought

EPA completed its initial review of the data submitted in support of AgrEvo's April 1999 petition and solicited public comment on the data evaluation records and on a list of questions regarding human allergenicity assessment for non-digestible proteins expressed as plant-pesticides

6/29/00: EPA'S Scientific Advisory Panel (SAP) Reports

The evaluation of potential human allergenicity of non-digestible proteins expressed as plant-pesticides was the subject of a February 29, 2000, FIFRA Scientific Advisory Panel (SAP) meeting. The SAP report was issued on June 29, 2000 and the SAP "...agreed that based on the available data, there is no evidence to indicate that Cry9C is or is not a potential food allergen."

10/12/00: Voluntary Cancellation of Pesticide Registration Announced

On October 12, 2000 EPA announced that, at the urging of EPA, Aventis had requested EPA to cancel its Pesticide Registration for StarLink.

The cancellation means that future sales of StarLink seed corn would be unlawful (unless the Registration is reinstated at a later date).

This action came in the wake of the discovery of StarLink in taco shells and other food products

10/25/00: EPA Given New Info, Narrower Request For Exemption

On October 25, 2000, Aventis submitted new information in support of its petition for an exemption from the requirement of a tolerance for StarLink's genetically engineered "plant-pesticide".

This new submission limited the request only to foods made from StarLink.

The submission specifically addressed the potential allergenicity of the Cry9C protein that may be present in human food made from StarLink™.

10/31/00: EPA Issued Public Notice Regarding Submission

EPA's notice provided info on Aventis' submission and outlined EPA's process for seeking public comment on, and external scientific review of, the new information.

EPA also announced its intention to hold a public meeting of an independent, external scientific peer review group to consider the potential allergenicity of the Cry9C protein.

11/13/00: Prelim Evaluation by EPA; SAP Meeting to be 11/28

Some highlights of EPA's prelim evaluation:

- Toxicity/**potential allergenicity**: EPA still questions whether Cry9C is an allergen.
- **Sensitization** to the Cry9C protein: EPA still has questions on potential sensitization.
- Simulated **exposure** to the Cry9C protein: EPA seeks SAP'S views on whether Aventis has demonstrated scientifically a level of exposure below which Cry9C would not elicit an allergic response in sensitized individuals, if Cry9C behaves as an allergen.

12/1/00 EPA SAP Report

Allergenicity: there is a "medium likelihood" that StarLink protein is a potential allergen

Sensitization: assuming StarLink is an allergen, there is a "low probability" that some people have already become sensitized to StarLink

- But, children may be more sensitive than adults and the study of infant diets should be given high priority.

Overall: there is "low probability" of allergic reactions in the population exposed to the corn, given the low levels of StarLink in the U.S. diet.

SAP Report: Further Study, etc.

Highest Priority for further study: individuals who claim to have experienced adverse effects from eating StarLink should be studied as soon as possible to determine whether StarLink was the source of the reactions.

EPA press release: EPA to continue evaluating the scientific information, and develop the appropriate regulatory approach to ensure protection of public health and continued consumer confidence in the food supply.

EPA Follow-up Already Started

- Studying people claiming to have suffered allergic reactions to StarLink
- Evaluating effects of processing on Cry9C protein molecules
- Reviewing analytical methods for measuring Cry9C in processed foods
- Continuing food supply monitoring to see if StarLink residues are still present

Lessons from StarLink Episode

- U.S. Biotech Regulatory System is Worthy of our Trust and Confidence
- There Are Implications for Public Policy
- There Are Lots of Potential Liability Issues
- There Are Implications for Farmer Actions
 - Contracting
 - Selecting, Growing, Handling GMOs

Lesson 1: US Biotech Regulatory System Is Worthy of Our Confidence

- Appropriate checks and balances
- Appropriately shared responsibility between public and private entities
- Decisions made in the “sunlight”
- Opportunities to comment: public, scientists, consumers, companies
- Dynamic and evolving, as it must
- Decisions are science based, but not science decided, e.g., the SAP answers questions and offers advice, but does not make the decisions

Lesson 2: There Are Some Implications for Public Policy

- Approvals for feed use only (split-use approvals)?
 - In the absence of a better identity preservation marketing system, it is probably unwise to approve a seed variety for feed/industrial use only
- Concurrent regulatory jurisdiction?
 - EPA, rather than FDA, has been the workhorse in addressing StarLink food safety issues because the new protein has insecticidal properties
 - Normally, FDA would be the workhorse in assessing allergenicity risks
 - Should we be looking to EPA, or FDA, to be the experts in matters of allergenicity risks associated with new proteins in food? Or should it depend, as it does now, on whether the new protein adds pesticidal properties (EPA is key) or adds nutritional, etc. characteristics (FDA)?
- Others, e.g., need to foster better . . .
 - systems for handling Identity Preserved grain?
 - systems for managing pollen drift?

Concurrent Regulatory Jurisdiction

Assessing food safety risks like allergenicity

New Protein is Pesticidal

- EPA is key agency
- Safety standard for issuing a tolerance:

“Reasonable certainty that no harm will result from aggregate exposure . . .”

- 21 U.S.C. §346a(b)(2) and (c)(2)
- Commonly used to assess safety of chemical pesticide residues

Protein Is Non-Pesticidal

- FDA is key agency
- Safety determined under 1992 policy:

Is new food substantially equivalent to its non-GMO counterpart?

<<http://vm.cfsan.fda.gov/~lrd/biopoly.html#policy>>

Lesson 3: Lots of Liability Issues

Potential Damages -- Partial List:

- Economic Losses, presumably in the millions, associated with the product recalls
- Discounted prices, etc., for commingled grain
- Costs of all the testing now being done
- Extra transportation costs, etc., to move StarLink commingled grain to a buyer, or to move StarLink to and from a buyer who rejected the shipment
- Costs of settling claims of people who allegedly have eaten StarLink and suffered an allergic reaction
- Economic Losses associated with lost exports, if any, arising from the StarLink affair

Entities With Potential Liability:

- Food Manufacturers and Retailers are potentially liable for the costs of settling claims of customers allegedly suffering allergic reactions (but Aventis is probably liable for their losses)
- Aventis is potentially liable for many of the remaining possible damages, but seed companies which didn't fulfill their responsibility to keep StarLink confined to feed uses may also be liable
- What about farmers and elevator operators? Might they also be liable for some potential damages?

Which Farmers/Elevators Might Share in the Potential StarLink Liability

- Growers who knew about but did not fulfill their obligation to maintain a 660 foot buffer and keep StarLink and “buffer” corn in feed-only marketing channels
- Growers who signed contracts to deliver “GMO free” grain, and then delivered StarLink “tainted” grain in violation of the contractual standard
- Elevators which negligently handled StarLink or intentionally shipped it to get rid of it

Note: The “potential liability” will not necessarily ripen into “actual liability” this time

Some Potential Theories of Liability

- Negligence: failure to exercise reasonable care under the circumstances
- Nuisance: using one's property in a way that interferes unreasonably with other's rights to use and enjoy their property
- Breach of Contract: delivering goods that do not conform to the contractual standard
- Breach of Implied Warranties (Unif. Com. Code - Merchantability/Fitness for Particular Purpose)
- Strict Liability (probably not, in author's opinion)

Lesson 4: Implications for Future Farmer Actions (e.g. Contracting)

Don't sign contracts or make assurances saying your crop ...

- has no GMO germplasm
- is not contaminated by any pollen drift
- is not contaminated by mechanical handling

But its probably ok to say (assuming it's true)...

- only the following seed varieties, as represented by the seed company, were (will be) planted
- buffer areas, as required by the tags on any seed varieties, were (will be) installed and handled as specified in the written requirements
- reasonable care was (will be) taken to avoid mechanical contamination by any seed varieties requiring special handling

In other words, don't guarantee what you can't guarantee

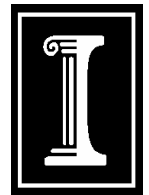
Growing & Handling Implications

StarLink is not approved for 2001, but we have learned:

- Be cautious in your corn seed selection
 - http://www.ncga.com/11biotechnology/know_where/statement.htm
- Know, understand, and follow the terms/conditions associated with each seed variety, e.g., buffer requirements, limitations on use, non-Bt refuges
- Save at least one seed tag and other statements about the terms/conditions for each variety; this documents the terms/conditions as you were informed of them
- Segregate GMO and Non-GMO grain where feasible; exercise care to avoid mechanical mixing

Agricultural Law: New Developments

- Sixteen Attorneys General Write Avenis
- Statutory Landlord's Lien on Crops
- Recent Case: *Corona v. Malm* Clarifies Illinois Law Regarding Liability for Animals Running at Large
- Other Topics of Interest to Audience



New Development: Sixteen State Attorneys General Write Aventis

Attorney General Jim Ryan, one of 16 AGs, recently sent a letter confirming measures Aventis has promised to take in response to the StarLink situation. The letter also urged Aventis to take additional steps which include establishing claims and handling procedures to ensure that farmers and elevators can obtain speedy compensation if they incur costs or losses as a result of StarLink corn.

See <<http://www.ag.state.il.us/warnings.html>>

Points Confirmed in AG Letter

- October 20, 2000, deadline for farmers to decide to participate in the StarLink Enhanced Stewardship (SES) Program (25¢/bu. premium for StarLink and buffer corn) has been extended.
- May 1, 2001, deadline for on-farm feeding with the SES program has been extended. New deadlines are under discussion.
- Farmers who participate in the SES Program are not waiving any rights to recover any additional damages they may have incurred as a result of growing StarLink corn.

Points Confirmed, Cont'd

- Aventis will provide logistical support (paying costs of transportation, storage, demurrage, etc.) relating to co-mingled corn stored on farm that is later delivered to an approved location.
- However, the \$0.25/bu. incentive will be payable only for actual StarLink corn and buffer corn contained within the commingled lot.
- The portion of the commingled corn stored on the farm which is not StarLink corn or buffer corn will not be included in the SES Program.

Points Confirmed, Cont'd

- In addition, if growers utilize StarLink Logistics, then Aventis agrees to "work with" growers should value discounts be assessed against their commingled grain.
- If growers do not utilize StarLink Logistics, then Aventis will "work with" growers with respect to such value discounts on a case-by-case basis.

Points Confirmed, Cont'd

- Growers who can verify to Aventis that they grew corn within 660 feet of StarLink corn (buffer growers) will be eligible to participate in the SES Program regarding the corn grown in the buffer strip as long as the corn is contained and/or fed on-farm.
- Aventis will pay storage and transportation costs associated with delivering the buffer corn and corn commingled with buffer corn to an approved delivery location.

Points Confirmed, Cont'd

- In addition, if buffer growers utilize StarLink Logistics, then Aventis agrees to "work with" buffer growers should any value discounts be assessed against their commingled grain.
- If buffer growers do not utilize StarLink Logistics, then Aventis will "work with" buffer growers with respect to such value discounts on a case-by-case basis.

Points Confirmed, Cont'd

- If grain elevators received StarLink corn, Aventis will work with them to assure that both StarLink and commingled corn are directed to appropriate approved delivery points.
- Aventis will pay for extra transportation, demurrage, and testing costs incurred by a grain elevator in directing the grain to an approved delivery point.
- Aventis will "work with" grain elevators to address problems related to discounts for StarLink and commingled corn delivered to an approved delivery site.

Points Confirmed, Cont'd

- Aventis will make the sites on the approved delivery site list available on a case-by-case basis and as necessary to assist delivery of StarLink corn and commingled corn to those locations.
- Aventis will provide testing and test kits at no charge to growers and elevators who request them, in those cases where there is a demonstrated need for testing.

AG Requests to Aventis

- Liquidity of Farmers and Grain Elevators
 - Establish improved claims handling system
- Logistical Support Needed to Make Grain Handling System Work
 - more approved sites, hire additional staff
 - more testing resources, improve communication
- Lost Value of StarLink and Commingled Corn
 - Aventis must take further, concrete steps to accept responsibility for these economic losses

State Attorneys General Involved

- Alabama, Connecticut, Illinois,
- Iowa, Kentucky, Maryland,
- Michigan, Minnesota, Missouri,
- Nebraska, New Mexico, North Dakota,
- Ohio, Oklahoma, South Dakota and Tennessee

Note: Full text of letter can be found at

<<http://www.ag.state.il.us/starlinkletter.htm>>.

Additional Notes....

New Development: Statutory Landlord's Lien on Crops

*Special thanks to Mr. Del Banner for
his advice and assistance with the
preparation of these materials*

Overview of Topic

- Background: Security Interests in Ag Products
- UCC Article 9 Revised, effective 7/1/01
- Changes Affecting Statutory Landlord's Lien
- Key Concepts: Ag Liens Include Landlord's Lien
- Landlord's Lien Example
- More Key Concepts

Background: What is a Security Interest in Ag Products?

A “Security Interest” means an interest in personal property or “fixtures” which secures payment or performance of an obligation. It arises by *consent* of the parties.

A “Security Interest” is to grain or livestock what a “Mortgage” is to farmland

Example: A bank or landlord with a S.I. in farmer’s crops has a lien on the crops (the “collateral”) as security for a debt or other financial obligation

Background: How Has The Law of Security Interests Changed?

- Article 9 (Secured Transactions) of the Illinois UCC contains the law of security interests
- Public Act 91-893, generally effective 7/1/01, rewrites Article 9
- Some substantive law changes; much renumbering
- Old and New Article 9 available on the Internet at <http://www.legis.state.il.us/ilcs/ch810/ch810act5/articles/ch810act5artstoc.htm>.

What Changes Affect the Statutory Landlord's Lien on Crops?

- A major change for us in agriculture is that while *agricultural liens* – including Statutory Landlord's Liens -- will continue to arise outside of Article 9, the rules as to their *perfection* and *priority* are now determined under Article 9 – *except as the legislature may provide a special priority to such liens – as it has in the case of landlords.*
- The result is that the Landlord's Lien, *if perfected through the filing of a financing statement with the office of the Secretary of State*, will prevail over all other ag liens and security interests and can survive the bankruptcy of the tenant (prior to 7/1/01, this lien could be avoided by a bankruptcy trustee!)
- This also means that the Landlord's Lien, *unless perfected by filing*, has little value in assuring that rent will be paid.

Key Concept: Agricultural Lien

"Agricultural lien" [new UUC §9-102(a)(5)] is an interest, other than a security interest, in farm products:

- (A) which secures payment or performance of an obligation for:
 - (i) goods or services furnished in connection with a debtor's farming operation; or
 - (ii) rent on real property leased by a debtor in connection with its farming operation;
- (B) which is created by statute in favor of a person that:
 - (i) in the ordinary course of its business furnished goods or services to a debtor in connection with a debtor's farming operation; or
 - (ii) leased real property to a debtor in connection with the debtor's farming operation; and
- (C) whose effectiveness does not depend on the person's possession of the personal property.

Key Concept: Landlord's Lien upon Crops [765 ILCS 9-316]

Every landlord shall have a lien upon the crops grown or growing upon the demised premises for the rent thereof, whether the same is payable wholly or in part in money or specific articles of property or products of the premises, or labor, and also for the faithful performance of the terms of the lease. Such lien shall continue for the period of 6 months after the expiration of the term for which the premises are demised, and may be enforced by distraint as provided in Part 3 of Article IX of this Act.

Landlord's Lien – Effect on “Buyers” [Paragraph 2]

A good faith purchaser shall, however, take such crops free of any landlord's lien unless, within 6 months prior to the purchase, the landlord provides written notice of his lien to the purchaser by registered or certified mail. Such notice shall contain the names and addresses of the landlord and tenant, and clearly identify the leased property.

(I.e., buyers not given formal written notice within the preceding 6 mo. take crops free of the lien)

Landlord's Lien – Getting Names of Potential Buyers[Paragraph 3]

A landlord may require that, prior to his tenant's selling any crops grown on the demised premises, the tenant disclose the name of the person to whom the tenant intends to sell those crops. Where such a requirement has been imposed, the tenant shall not sell the crops to any person other than a person who has been disclosed to the landlord as a potential buyer of the crops.

Landlord's Lien – Super Priority [Paragraph 4]

A lien arising under this Section and duly perfected under Article 9 of the Uniform Commercial Code [*filed with Sec. of State*] shall have priority over any other agricultural lien . . . and . . . any security interest [*arising under UCC Article 9*].

Note: this 4th paragraph is the new language added by P.A. 91-893, eff. 7-1-01; the preceding 3 paragraphs remain unchanged.)

Example: Using Article 9 (after 6/30/00)

1. Landlord files a financing statement with the Sec. of State
 - Landlord has a Landlord's lien under 765 ILCS 9-316
 - Filing a financing statement gives the Landlord priority over any other agricultural lien or security interest arising under Art. 9, and priority over a trustee in bankruptcy
 - E.g., assume ag tenant owes a landlord rent, owes a bank, and owes other creditors, and landlord files a financing statement
 - landlord's right to the crop has priority over the bank's rights in the crop (even if the bank filed financing statement 1st)
 - landlord's right to the crop has priority over unsecured creditors' rights in crop (even if tenant files bankruptcy)

[But landlord's lien upon crops is not effective against an elevator buying the crop from the tenant (elevator is a buyer of farm products) unless landlord has sent written notice of its lien]

Example (Cont'd)

2. Landlord also requires that, prior to tenant's selling any crops from the rented land, the tenant disclose the names of people to whom the tenant intends to sell those crops.
3. Landlord then sends Written Notice of the lien directly to the potential buyers of the crops. The notice:
 - is sent by registered or certified mail within 6 months prior to the tenant's sales of the crop
 - contains the names and addresses of the landlord and tenant
 - clearly identifies the leased property

Now, if tenant sells the crop to a buyer who was given written notice, landlord's right to the crop (now in buyer's bins) is superior to buyer's rights in the crop

Example (Cont'd)

So . . .

- if an elevator (which has been given written notice of landlord's lien) takes delivery and pays the tenant for the crop, and
- if tenant doesn't pay the landlord the rent owed,
- then elevator must pay landlord for converting the collateral which secured landlord's rent

Obviously, elevators need to know what to do if they receive written notices; many will . . .

- make the check jointly payable to the seller and the party with a security interest or landlord's lien
- or call secured party/landlord to investigate before paying tenant

Key Concept: Buyer of Crops May Be Subject to Statutory Landlord's Lien

Buyers of crops (e.g., elevators) take subject to the Landlord's Lien on Crops if the buyer receives written notice of the Landlord's Lien complying with the requirements of 735 ILCS 5/9-316 (2nd Para.)

Buyers of tenant's crops may have to pay twice: once to seller, once to Landlord to whom rent owed

Key Concept: Place of Filing

- . . . the office in which to file a financing statement to perfect the security interest or agricultural lien is:
 - (1) the office designated for the filing or recording of a record of a mortgage on the related real property, if:
 - (A) the collateral is as-extracted collateral or timber to be cut; or
 - (B) the financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures; or
 - (2) the office of the Secretary of State in all other cases, including a case in which the collateral is goods that are or are to become fixtures and the financing statement is not filed as a fixture filing.
- Excerpt from new UCC §9-501(a)

Key Concept: Duration of Filing and Continuation

- The filing remains effective for five years from the date of filing.
- It may be *continued* by filing a *UCC-3 Continuation Statement within the six-months prior to lapse of the original filing.*
- Once continued, the filing continues in effect for another five years from the original lapse date.
- (Neither the Financing Statement nor Continuation Statement need be signed by the Tenant)

To Summarize . . .

- While protection against rights of buyers depends upon formal written notice, protection of the Landlord's Lien against the claims of others will, after 7/1/01, depend upon *perfection* by filing with the Secretary of State.
- Having perfected by filing, the Landlord will prevail over other ag liens, other security interests (regardless of the order of their filing) and the trustee in bankruptcy – essentially everyone *except buyers*.
- Without filing, *after 7/1/01, the Landlord will lose to all of these parties* – except as the Landlord may prevail against buyers that have received timely and proper written notice.

Watch Farm.doc Web Site for More Information As 7/1/01 Draws Closer

- See “Securing Agricultural Rent Payments”
<http://web.aces.uiuc.edu/farm.doc/legal/index.html>
- Site will probably, for example, contain a UCC-1 Form used to file a financing statement

-New Developments-

Recent Case: *Corona v. Malm*

315 Ill. 3rd 692 (8/18/00)

Clarification of Illinois Law Regarding
Liability of Owner For Damages Caused
by Animals Running At Large

Facts in *Corona v. Malm*

- On November 5, 1997, a horse named "Pretty Girl" galloped directly across the path of a car.
- The car collided with the horse and was damaged.
- Plaintiff Corona, a passenger, was injured.
- At the time of the accident, the horse was boarded by Defendants, Ken and Tyra Malm, at their stable.
- The horse had escaped from Defendants' property.
- Plaintiffs sued basing their case, in part, on the Illinois “Animals Running at Large” Statute

Animals Running At Large Statute

510 ILCS 55/1

- All owners of livestock . . . shall be liable in civil action for all damages occasioned by such animals running at large;
- Provided, that no owner or keeper of such animals shall be liable for damages . . . caused by (their animals running at large) without the knowledge of such owner or keeper, when such owner or keeper can establish that he used reasonable care in restraining such animals from so running at large.

See <<http://www.legis.state.il.us/ilcs/ch510/ch510act55.htm>>

Action of Trial Court

- At trial, Plaintiffs offered proof of the collision, of Defendants being custodians of the horse, and of their damages, but they presented no evidence . . .
 - that defendants had failed to exercise reasonable care in maintaining fences to restrain Pretty Girl, or
 - that defendants had known that the horse had escaped
- The trial court granted summary judgment in favor of defendants.
- Plaintiffs appealed

Issue on Appeal

Did the Plaintiffs need to prove that . . .

- Defendants knew “Pretty Girl” had escaped, or
- Defendants had negligently maintained fences,

or was it Defendants’ responsibility to assert and prove this as part of their defense?

(If the burden of proof was on the Defendants, then the trial court erred in granting summary judgment to Defendants just because Plaintiffs had not offered evidence on these questions)

Decision of Court of Appeals

- Decision: Trial court erred in granting summary judgment (case referred back to trial court)
 - Plaintiff needs to plead and prove only that he or she was injured by an animal running at large that was owned or kept by the defendant.
 - The defendant must then affirmatively plead & prove:
 1. that he or she exercised due care in restraining the livestock,
 2. and that he or she lacked knowledge that it had escaped.
- Rationale: To hold otherwise is irrational and clearly contrary to the intent of the legislature.

What is a Lawful Fence?

- 4-1/2 feet high
- In good repair
- Adequate to keep cattle, horses, hogs, etc. from getting onto adjacent lands
- Provided that Townships or County Bds. can define a lawful fence differently for a Township or County
 - 765 ILCS 130/2 (Illinois Statutes)

Who has responsibility for a Division Fence?

- Adjacent Landowners “shall make and maintain a just proportion of the division fence between them. . . .”
-- 765 ILCS 130/3
- If responsible person neglects to repair his portion of a division fence, “fence viewers” can direct him to make the repair
-- 765 ILCS 130/6

What is a “Just Proportion”

- Custom in many places: the half on your right, as you stand on your land and look at the division fence
- What if there is a dispute between adjacent landowners?
 - Chose two “fence viewers” to resolve it
 - In Counties with TWP Organization, TWP Bd. of Trustees are automatically “fence viewers”

Fence Viewers and Dispute Resolution

- Fence Viewers frequently use custom to determine “just proportion” (half on right?)
- But if such a division wouldn’t be fair, they frequently fashion a different remedy
 - Example, person with water gap gets fewer rods
- Much discretion given fence viewers by the Illinois Fence Act

Fence Case: *In Re Estate of Wallis* 276 Ill. App. 3d 1053 (1995)

A Fourth District (Clark Co.) Case:

- Owners shall maintain a “just proportion”
- “Just proportion” doesn’t always mean half
- FV decision to require livestock owner to repair whole division fence (other owner had to keep brush back 3 feet) was within their discretion (so long as they considered appropriate factors e.g. relative benefits, present condition of fence, financial effect on each landowner, rights to use land as desired)

Wallis, cont'd

Fence Issue: How should the upgrade costs of the existing fence be divided?

Some unique facts:

- Existing fence could be repaired at minimal cost

- Only livestock owner wanted fence repaired

- Non-livestock “life-owner” in a nursing home, on public aid, and without fences all around farm

- Non-livestock “remaindermen” still had to clear brush within 3 feet of fence, and keep cleared

Other Ag Law Topics From Audience

- Drainage Law?
- Others?