



Law and Taxation: A Retrospective of 20 Years

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This is the eighth in a series of articles celebrating the 20th anniversary of farmdoc. A list of all nine articles in the series and authors can be found at the end of this article.

In many respects, the development of law is an evolutionary process, adjusting slowly to the evolving needs and values of society. Certainty and stability with respect to property rights, regulatory programs and the tax structure provide a solid foundation for long-term business planning, elements especially important in the agricultural context. The Law and Tax section of *farmdoc* over the past twenty years has analyzed and provided legal interpretations of many of these incremental changes. Examples of this evolutionary approach include the law related to drainage, fences, and contracts. In some areas, however, the law has moved at a rapid pace to keep up with technological innovation, novel business strategies, changing land use patterns and complexities of the tax code. In our short summary below, we highlight just a few of these legal developments and make a few bold predictions about what key topics may arise in the next twenty years.

The Farm Lease: A Foundation of Agricultural Production

In Illinois and many other Midwestern states agricultural producers rent more land than they own. So in a very substantial way, the Farm Lease is a foundation for agricultural production. Historically, many farm leases were oral leases – perhaps a tribute to the honesty of farmers and farmland owners. But farm leases should be in writing for many reasons.

Farmdoc provided a new avenue for encouraging farmland owners and operators to memorialize their oral agreements in a writing. And when *farmdoc* expanded its subject matter scope to include "Law and Taxation", *farmdoc* articles about leasing, including lease forms, were among the earliest Law and Taxation contributions to the *farmdoc* website. Importantly, *farmdoc* also served as a collaborative bridge between the department's experts in farm management and its law group, allowing the *farmdoc* leasing materials to integrate the best of both management and law.

The first twenty years of *farmdoc* have witnessed an evolution in lease language, trends away from the traditional share lease (which often would renew automatically year after year) toward the cash lease (which would be expressly renewed and often revised every year). And these two decades have also

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witnessed the birth of the flex lease – most typically a cash lease with the amount to cash rent determined by formula utilizing price and yield data as specifically described in the lease. *Farmdoc* has kept pace with these changes and, in some ways, contributed significantly to the continuing evolution of the farm lease.

The Biotechnology Revolution

First commercialized in 1996, genetically engineered plants now constitute a majority of the corn, soybean and cotton grown in the United States. Much of the early discussion on this topic focused on two key areas: the economic consequences of potential commingling of genetically engineered varieties with conventional or organic production supply chains and the parameters of intellectual property protections for this new technology. Other issues included chemical use (whether the quantity would increase and the toxicity decrease) and the potential for further concentration in seed markets that could have a negative impact on consumers (farmers). In *Bowman v. Monsanto*, 569 U.S. 278 (2013), a unanimous Supreme Court settled the intellectual property debate upholding utility patents for glyphosate-resistant soybeans along with restrictions on seed saving.

With respect to commingling, two issues were at play. First, the potential for pollen to drift to neighboring farms that did not adopt genetically engineered varieties and, second, the potential for post-harvest commingling further along the supply chain such as at the grain elevator or further aggregation source. The pure pollen drift scenario pitting neighboring farmers against each other, fortunately, has not played out in the court system as instances of drift tend to have been handled privately. Post-harvest commingling, however, has resulted in several high-dollar lawsuits. The *StarLink* litigation was the first nation-wide claim filed on behalf of corn farmers suffering from losses due to the contamination of the food supply chain with the unapproved for human consumption *StarLink* corn variety. Product recalls, loss of export markets and extensive genetic testing requirements resulted in a precipitous drop in corn prices affecting farmers and the subsequent lawsuit. *StarLink*-related materials created and posted on *farmdoc* were extremely valuable to farm producers throughout the corn belt in making claims under the *StarLink* court settlement. A few years later, a similar commingling situation in the rice market resulted in a similar finding of liability for the unauthorized release of Liberty Link Rice that resulted in product recalls and collapse of export markets. The *StarLink* and *Liberty Link Rice* cases firmly established the viability of common law negligence and nuisance claims for damages arising from the commingling of food/feed supply chains with genetically engineered products not yet approved for general commercial release. A third contamination incident with Syngenta's MIR 162 "Viptera" corn not yet approved for export to certain major markets built on law developed in these two prior cases, resulting in even more extensive liability for the seed developer.

Although much of the legal uncertainty accompanying the biotechnology revolution has been resolved, in the current trade environment, export restrictions and/or tariffs on commodity crops present an avenue to inflict economic and political pain. A more subtle approach in future trade disputes could be further delayed approvals for new genetically engineered crop varieties, such as in the Syngenta litigation, triggering additional liability and disruption in commodity markets.

A Changing Tax Code, the One Certainty in Life

The substantial changes to the federal tax code since *farmdoc* started twenty years ago are simply too extensive to summarize. More recently, the 2018 Tax Cuts and Jobs Act imposed a variety of changes, some quite complicated while others more straightforward. Two provisions warrant a brief mention for their potential impact on farmers.

The qualified business income deduction (QBID) has many complicated aspects, but they only affect certain taxpayers. Farmers, however, that do qualify for the QBID deduction can save substantial taxes. QBID itself is too complicated to discuss in this review article, but if you are a farmer, be sure your tax professional is familiar with IRC §199A and discuss its potential application to your operation.

Another major change was with IRC §1031 like-kind exchanges (LKE). Under the 2018 law, a LKE is only available for real property exchanges. Farmers will continue to exchange one piece of farm equipment for another. For example, some farmers will trade tractors or combines each year. These exchanges are no longer tax deferred, but that may not increase their income tax. The revised tax code treats each piece of equipment that is relinquished as if it was sold, and therefore will probably create taxable income. On the other hand, the newly acquired equipment is eligible for the immediate write-off under IRC §179. The limit

on IRC §179 was increased to \$1 million and the phase-out threshold was increased to \$2.5 million. Both of these amounts will be increased each year based on inflation.

On the Horizon?

It is always risky to make predictions about the direction of the law, but two general themes could incite revolutionary changes in the legal landscape as opposed to the otherwise evolutionary developing of the law in the agricultural context: big data and global climate change.

Much has been written about the potential of massive data flows to enhance production efficiency. This, of course, raises privacy and data ownership concerns in an uncertain legal environment. The capability to generate and analyze data also could prompt enhanced traceability and verification demands from producers and input suppliers. One rapidly developing aspect is the use of blockchain technology not for cryptocurrency purposes, but rather promoting supply chain integrity. These potential changes in response to end user demands may not be part of new or enhanced government regulatory programs, but rather developments in the private law of contracts and commercial norms embedded in the agricultural supply chain. In sum, data can be a powerful tool, but could also give rise to new contract-based responsibilities.

With respect to climate change, farmers are adept at making needed adjustments to changing weather patterns. The future may also bring accompanying regulatory changes. Although unlikely in the near term, some statutory or regulatory change with respect to greenhouse gases is foreseeable. What that program will look like and whether agriculture will enjoy exemptions similar to those embedded in other regulatory programs applicable to general business operations, will be key questions hashed out at the federal and state level. One tangential aspect of a renewed focus on land use issues in the greenhouse gas context could spill over to the water arena. The Des Moines Water Works litigation was a shot across the bow with respect to potential legal changes to the status of farm drainage, and the TMDL for the Chesapeake Bay was another wake up call for non-point source pollution in the agricultural context. The technical, political and legal challenges of reducing non-point source pollutant loads in the Mississippi River and Gulf of Mexico would pale in comparison to the complexities of the Chesapeake Bay watershed. This may be another area where enhanced traceability and monitoring associated with the big data revolution could provide new pathways for pollution reduction, as well as potential responsibilities for the agricultural community.

Whatever the future brings, a strong *farmdoc* team imbedded with a robust law and taxation component should be able to identify and distill these new developments. Providing agricultural producers and policy makers with practical insights and guidance will be a valuable contribution in an ever changing political, legal, economic, and natural environment.

In conclusion, we hope that over the years we have provided interesting and relevant analysis to the broader agricultural sector and look forward to what new legal developments the future will bring that we can share with the *farmdoc* community.

***farmdoc daily* 20th Anniversary Celebration Series**

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