



# ANIMAL LAW

The newsletter of the Illinois State Bar Association's Section on Animal Law

## Letter from the Editor

By Melissa Anne Maye, Editor, Animal Law Section Newsletter

Welcome to the inaugural edition of the Animal Law Section newsletter! As I sit here, looking out over December's first snowfall, I'm struck by how much my animals have meant to me throughout my life. In my personal life, my pets have given me comfort when I was lonely and laughter when I needed it the most. Nothing compares to the joy that my dog, Sadie, experiences when I come home from work, and I find it both humbling and admirable that my dogs never seem to be in a bad mood. My two horses, Jody and Maggie, even gave me a legitimate excuse to procrastinate writing this letter because, despite the arctic temperatures, I still needed to clean out the barn!

In my professional life, many clients came to me because they ran an animal-related business and needed my assistance in incorporating

their businesses, negotiating leases, and drafting agreements tailored for their particular line of work. I met people who opened pet shops, ran dog-walking businesses, boarding stables, feed supply stores and veterinary practices. Some people wanted to make provisions for the care of their animals after their death; others needed to know what are the proper procedures to rescue an abused or neglected animal? And who gets the dog after the divorce?

Throughout the course of my career, I have met many attorneys who are also animal lovers, and that common interest ultimately led to the creation of the Animal Law Section of the Illinois State Bar Association. I am very proud and honored to have been invited to participate in this

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## Comments from the Chair

By Amy A. Breyer, Founder and Chair, Animal Law Section

The new Animal Law Section got underway this bar season with its first formal meeting on October 3, 2009 in Springfield. This new section already has 14 council members and more than 150 total members. We're very pleased with the growth we've experienced, and with the interest that has been generated throughout the Bar Association for our fledgling endeavor.

After putting together a successful and well-received CLE program last season in Chicago and at Pere Marquette Lodge in Grafton, the Section currently is looking ahead to its next CLE program. We are again planning a June seminar. Topics for the upcoming seminar are still "TBA," but last June's conferences included presenta-

tions on estate planning and pet trusts; divorce and "pet custody" issues; livestock liability, an update on farming and wildlife regulations, issues in prosecuting animal cruelty cases, and more.

The section also is preparing to draft and sponsor its first legislative proposal, and possible legislative projects include various reforms to state or local animal control laws; strengthening a court's ability to appropriately deal with pets in divorce; and a truth-in-sheltering measure that would require shelters to provide greater disclosure of their euthanasia practices. We also have been closely following proposed legislation throughout the year on a variety of topics,

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## Letter from the Editor

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groundbreaking Section of the Bar Association. After all, how many people can say they are doing something “new” in the law? Special thanks to Amy A. Breyer, our founder and the first Chair of the Animal Law Section; her vision is why this Section exists today.

The relationships between animals, humans and the law are constantly evolving, and sometimes the law can be slow to respond. Regardless of whether an animal is a pet, a liability, or a livelihood, there are

countless ways in which the law, animals and people interact. Because “animal law” is so diverse, the Animal Law Section strives to create a forum where lawyers can find legal resources and answers to the questions that will arise in your practice.

One way we hope to educate and entertain our section members is through our CLE programs. Another is through this newsletter. In future editions look for diverse topics, such as calculating damages for the value of a pet,

veterinarian liability, managing wildlife, animal rescue issues, livestock liability, pending, proposed, and passed legislation, and more! If you would like to submit an article for consideration in future publications, please feel free to send it to me at [mmaye442@aol.com](mailto:mmaye442@aol.com). I also welcome your suggestions regarding what types of articles you would like to see, and what information you would find most helpful in your practice. ■

## Comments from the Chair

*Continued from page 1*

including transportation of livestock and a proposed repeal of the current Illinois ban on horse slaughter.

If you would like to receive upcoming newsletters and stay current in this diverse area of the law, we invite you to join our section! Membership costs \$20 per year, and en-

titles you to \$10 off our June CLE. What better way to stay on the cutting-edge of one of the newest areas of law and earn your CLE credits, too?

No matter what your practice area, human interests often intersect with animal interests. The ISBA's Animal Law Section of-

fers you both an opportunity to stay on top of this constantly evolving area, as well as a valuable link to resources you may need when that intersection of interests crosses your desk. Welcome, and we look forward to your thoughts and input throughout the upcoming year. ■

## The Illinois Pet Trust Act<sup>1</sup>

*By Melissa Anne Maye*

Some individuals are so attached to their companion animals that they wish to provide for their care and well-being, even after the owners have died. Prior to 2005, the law in Illinois only recognized companion animals as “property” and did not recognize trusts established for the benefit of animals. In fact, prior to 1990, very few states recognized pet trusts, but since then, the idea has caught on, and now, in 2009, 42 states recognize pet trusts as a viable estate planning tool.<sup>2</sup>

Lin Hanson, a lawyer with the firm DiMonte & Lizak, L.L.C., recognized this “gap” in estate planning when he encountered numerous clients who did not have family or friends that they felt would adequately care for their pets after the owners passed away. Consequently, in 2004, Hanson researched the laws in the 19 states that recognized pet trusts,

and he and a group of concerned lawyers drafted proposed legislation that ultimately became H.B. 1027. The General Assembly passed the bill, and effective January 1, 2005, the Pet Trust Act permitted people in Illinois to create trusts for the benefit of one or more of their companion animals through their estate plans. The Pet Trust Act can be found at 760 ILCS 5/15.2 (West 2008).

Concerned pet owners can now set aside funds for the care of their animals, and can designate a trustee to manage the fund for the care, support and medical needs of their pets. They also can name the physical custodian of their pet.

Following the death of the pet, the Act provides for three possible distributions of any remaining trust property. First, the pet owner can designate who shall receive the property. If no such provision is made, but

the person has a general or residuary beneficiary who takes the remainder of his estate, that person will receive the remainder of the pet trust. Finally, if there is no other beneficiary, the property in the pet trust will devise to the heirs of the person who established the trust, as determined by Illinois intestacy laws.

Sometimes we hear stories about eccentric wealthy people leaving millions of dollars for the care of a dog or cat. For example, in her will, Leona Helmsley set aside \$12 million for the care of her white Maltese, “Trouble.” The Illinois Pet Trust Act addresses this, by allowing the supervising judge to reduce the amount of the gift to what is reasonably necessary for the care of the designated animal or animals. Hanson recommends counseling your client to leave just enough in the trust for the pet’s needs, but not an “exorbitant” sum. This will reduce the likelihood that the

trust will be legally challenged. After all, you wouldn't want to open the door for a disgruntled heir to argue that your client was mentally incompetent at the time the trust was drafted.

Creating pet trusts has become one of the fastest growing areas of animal law. Attorneys who have a practice that focuses on estate planning should become familiar with the Pet Trust Act. When interviewing clients about their proposed estate plan, it is important to inquire if your client has pets, and if he or she would be interested in establishing a pet trust as part of their overall estate plan.

Imagine the peace of mind you can provide for your clients, knowing that they have set aside funds and designated a person to care for their beloved pets after they are gone. ■

1. Special thanks to Lin Hanson, of DiMonte & Lizak, LLC, for permission to utilize the information found in his article entitled "Trusts for Companion Animals," Vol. 17, No. 2 of the DiMonte & Lizak Newsletter published in April, 2004.

2. Cited by the American Veterinary Medical Association, State Legislative and Regulatory Affairs Department, <<http://www.click2houston.com/family/20324907/detail.html>>.

## Distinguishing marketing claims for grass-fed, organic, and pasture-raised livestock

By A. Bryan Endres & Stephanie B. Johnson<sup>1</sup>

### I. Introduction

In an effort to distinguish their products from those of competitors, some segments of the livestock and meat industries make labeling claims referring to special attributes of their product or process.<sup>2</sup> A disparity exists, however, between consumer demand for livestock products based on production attributes and consumer understanding of precisely what production practices lay behind specific retail labels. Although the USDA regulates use of several production-based claims such as grass-fed, organic, and pasture-raised, industry-led efforts to create ever more differentiated (and often more stringent) product labels to satisfy consumer expectations remains a growing niche aspect of the food industry. In its simplest form, tension exists between the minimum standards developed for government-backed food labels and industry demands to further differentiate their products via specialized labeling to meet increasingly specific consumer expectations. This article reviews recent developments with respect to three government-controlled livestock labeling claims.

### II. Grass-fed Livestock Claims

In 2002, the USDA's Agricultural Marketing Service proposed standards for several livestock and meat marketing claims designed to facilitate communications between pro-

ducer and consumer to better inform purchasing decisions.<sup>3</sup> One proposed standard that engendered particular public comment was for animals raised on grass, green or range pasture, or forage throughout their lifecycle, with only limited supplemental grain feeding—so called "grass-fed" claims.<sup>4</sup> The 2002 proposal required grass (or grass equivalents such as green or range pasture or forage) to comprise at least 80 percent of the animal's primary energy source throughout its lifecycle.<sup>5</sup> In response to significant comments directed at the 2002 proposal, the USDA in 2006 revised its proposed "grass-fed" labeling claim, requiring grass and/or forage to constitute 99 percent of the total energy source for the lifetime of the animal.<sup>6</sup>

The USDA, however, declined to limit grass and forage consumption to only non-harvested grasses or to restrict the use of stockpiled or stored forage.<sup>7</sup> Supporters of this ban on stored forage argued that consumers would expect "grass-fed" livestock to be "free range" and not fed in confinement.<sup>8</sup> USDA acknowledged the "synergistic nature to grass feeding and free range conditions,"<sup>9</sup> but due to the diverse grass-feeding regimes across the nation, the agency found the limitation impractical and unduly restrictive.<sup>10</sup> Rather, to satisfy consumer demand for both grass-fed and free range products (and other attributes such as no added hormones), the agency encouraged producers to distinguish

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their goods further via separate, voluntary labeling claims beyond “grass-fed.”<sup>11</sup>

Accordingly, in 2007, the USDA adopted final rule requiring a 100 percent grass or forage-based diet standard for use of the “grass-fed” claim.<sup>12</sup> The change from 99 to 100 percent primarily resulted from criticism that calculating and verifying the 99 percent standard was unnecessarily difficult, especially considering that there is little difference between the two amounts.<sup>13</sup> Further, the agency decided to remove the “energy source” language in the standard in order to clarify that supplemental sources of energy and protein are not permitted under the grass-fed claim.<sup>14</sup> The USDA also declined to limit the grass-fed designation to animals exclusively fed live grass because of the wide range of climates across the United States and allowed certain stockpiles of stored and harvested forages within the grass-fed standard.<sup>15</sup> Although USDA’s final standard allows livestock intake of vitamin supplements and selected minerals in order to adjust for possible diet deficiencies, it prohibits some supplements, including cereal grains, grain byproducts, cottonseed meal, and soybeans.<sup>16</sup> The USDA abstained from incorporating hormone and antibiotic bans in the grass-fed standards, noting that such a distinction would be more appropriate as a separate marketing claim.<sup>17</sup> Further, the final standard requires “continuous access to pasture during the growing season.”<sup>18</sup>

Although the USDA’s final decision adopted a seemingly stringent 100 percent dietary standard, the rule fell far short according to the American Grassfed Association (AGA), a trade association representing many raisers of grass-fed livestock.<sup>19</sup> The AGA advocates year-round pasture along with a prohibition of growth hormones and antibiotics, arguing that failure to incorporate those requirements into the USDA’s rule will create consumer confusion rather than enhance accurate communication.<sup>20</sup> The AGA also criticized the USDA’s voluntary verification process, under which other producers can use a grass-fed-type claim without following the USDA standards. Accordingly, the AGA announced its own industry-backed standard for certifying grass-fed meat operations, which prohibits confinement, antibiotics, and added hormones.<sup>21</sup>

### III. Organic Livestock Claims

Tension between minimum government standards and industry desire to make more

specialized claims is also prevalent in the organic meat industry. Prior to the passage of the Organic Food Production Act (OFPA) in 1990, USDA, under the authority of the Meat Inspection Act and the Poultry Products Inspection Act, explicitly prohibited the use of the term “organic” in association with meat or poultry products. Rather than specify organic standards for livestock in the OFPA, Congress delegated the development of organic standards to the National Organic Standards Board (NOSB), for eventual incorporation into the National Organic Program regulations.

Most of the controversy to date centers on the amount of pasture (as opposed to feedlot confinement) required for organically raised livestock. In 2005, the NOSB recommended requiring ruminants to graze on pasture during the growing season.<sup>22</sup> Rather than finalize proposed rules for public comment, USDA instead decided to engage in additional “fact finding” on the NOSB proposal.<sup>23</sup> While USDA debated the respective merits of proposed pasture requirements, demand for organic dairy products skyrocketed.<sup>24</sup> In response, several large-scale dairy operations sought and received organic certification. Scale efficiencies led these producers to adopt feedlot production systems rather than the “pasture-based” systems envisioned by many in the organic community. Despite the initial certification of large-scale dairies, the USDA has issued “Notices of Proposed Revocation” to some organic dairy operations, alleging they are violating the terms of the National Organic Program, including failure to establish and maintain access to pasture, transferring dairy cattle between organic and non-organic production methods, and failure to maintain and disclose adequate records of the production operations.<sup>25</sup> The USDA’s recent enforcement actions indicate that it may be moving, albeit slowly, toward a feedlot-free organic standard.

Despite the rapid growth of the organic dairy industry in recent years, the industry is currently in decline as a result of the current economic recession.<sup>26</sup> Due to debt from expenses/lost revenue during the conversion to organic, the increase in organic feed prices and decreased consumer demand, many organic dairies are closing.<sup>27</sup> Some small organic dairy farmers have implored USDA Secretary Tom Vilsak to shut down the large-scale “factory” organic dairies in order to decrease the surplus of organic milk on the market.<sup>28</sup> Comments from Secretary Vilsack

at a July county fair in Wisconsin pledging a commitment to enforcing organic standards so that small farms can keep operating further indicates that leadership at USDA may be taking a much harder look at the organic certification of large scale organic dairy production.<sup>29</sup>

### IV. Pasture-Raised Livestock Claims

Even outside the realm of “organic” certification, much of the tension between minimum government standards for labeling and industry desire for more specialized claims centers on livestock access to pasture. In 2002, the USDA requested comments on standards for certified labeling claims relating to livestock production, including a standard for pasture-raised livestock.<sup>30</sup> A claim that livestock is “pasture-raised” means animals have had “continuous and unconfined access to pasture throughout their life cycle.”<sup>31</sup> For red meat product labels, the agency further required that a claim of “pasture-raised” or “free-range” be qualified with the statement “never confined to a feedlot.”<sup>32</sup> Although the USDA has yet to promulgate a final rule governing pasture-raised livestock claims, the agency currently certifies such claims on a case-by-case basis.

Although the USDA’s standard excludes animals raised on feedlots from the definition of pasture-raised, some organizations, such as the Animal Welfare Institute (AWI), believe the USDA’s proposed standard is not stringent enough. AWI advocates for a pasture-raised definition that imposes limitations on the type of pastureland animals may graze on, as well as limits on the amount of animals grazing on a particular pasture.<sup>33</sup> Because the pasture-raised definition does not impose any limitations on antibiotics or hormones, some consumers may be misled into thinking that a “pasture-raised” product includes those attributes.

### V. Conclusion

The tension between industry desire to meet consumer demand for specialized products and government minimum standards permeates all types of process attribute claims for livestock products. As consumer demand for livestock products based on production attributes grows, the greater the need for USDA to set clear standards that allow livestock producers to differentiate their products in line with consumer expectations. This area of law will likely see regulatory development in the future as new prod-

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uct attributes come to market and consumer expectations evolve. ■

1. A. Bryan Endres is an Assistant Professor of Food and Agricultural Law at the University of Illinois and member of the ISBA's Animal Law Section Council. Stephanie B. Johnson is a third year law student at the University of Illinois College of Law.

2. United States Standards for Livestock and Meat Marketing Claims, 67 Fed. Reg. 79,552, 79,553 (Dec. 30, 2002).

3. Id. at 79,553-79,554.

4. Id. at 79,555.

5. Id. at 79,555.

6. United States Standards for Livestock and Meat Marketing Claims, Grass (Forage) Fed Claim, 71 Fed. Reg. 27,662, 27,664 (May 12, 2006).

7. Id.

8. Id.

9. "Granted, most grass (forage) fed livestock will also qualify as free range livestock (not fed in confinement); however, not all free range livestock will receive their entire energy source from grass or forage." Id.

10. Id.

11. Id.

12. United States Standards for Livestock and Meat Marketing Claims, Grass (Forage) Fed Claim for Ruminant Livestock and the Meat Products Derived From Such Livestock, 72 Fed. Reg. 58,631 (Oct. 16, 2007).

13. Id. (recognizing that it is easier to verify a 100 percent diet than a 99 percent diet).

14. Id.

15. Id.

16. Id. at 58,635.

17. United States Standards for Livestock and Meat Marketing Claims, Gras (Forage) Fed Claim for Ruminant Livestock and the Meat Products Derived from Such Livestock, 72 Fed. Reg. 58,631, 58,637 (Oct. 16, 2007).

18. 72 Fed. Reg. at 58,637.

19. <<http://www.americangrassfed.org/wp-content/uploads/2009/02/Press%20release%2010-16-07%20USDA%20claim.pdf>>.

20. Marian Burros, New Rules Set for Meat Sold as Grass-fed, NY Times, Oct. 19, 2007

21. AGA Moves Forward with Certification Program!, <<http://www.americangrassfed.org>> (visited June 22, 2008).

22. NOSB, Formal Recommendation to the National Organic Program, March 18, 2005, available at <<http://www.ams.usda.gov/nosb/FinalRecommendations/Feb05/PastureRec.pdf>>.

23. National Organic Program (NOP) – Access to Pasture (Livestock), 71 Fed. Reg. 19,131 (April 13, 2006).

24. See Carolyn Dimitri & Kathryn M. Venezia, Retail and Consumer Aspects of the Organic Milk Market, USDA, Economic Research Service, May 2007, available at <<http://www.ers.usda.gov/publications/LDP/2007/05May/LDPM15501/ldpm15501.pdf>> (noting that demand for organic

milk increased 25 percent in 2005); Kim Severson, An Organic Cash Cow, N.Y. Times, Nov. 9, 2005, at F1 (noting that although organic milk comprises only three percent of total milk sales, the annual growth rate for organic milk was 23 percent, while overall milk consumption fell by eight percent).

25. See, e.g., the USDA's Notice of Proposed Revocation sent to Aurora Organic Dairy on April 16, 2007, available at <<http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5063457&acct=nopgeninfo>>.

26. Katie Zezima, Organic Daries Watch the Good Times Turn Bad, N.Y. Times (May 28, 2009), available at <[http://www.nytimes.com/2009/05/29/us/29dairy.html?\\_r=1](http://www.nytimes.com/2009/05/29/us/29dairy.html?_r=1)>.

27. Id.

28. Organic Dairy Farmers' Rally – USDA Secretary Asked to Vigorously Enforce Organic Laws, available at <<http://www.cornucopia.org/2009/07/organic-dairy-farmers-rally-usda-secretary-asked-to-vigorously-enforce-organic-laws/>>.

29. Id.

30. United States Standards for Livestock and Meat Marketing Claims, 67 Fed. Reg. 79,552, 79,553 (Dec. 30, 2002).

31. Id. at 79,554.

32. Id.

33. See <<http://www.awionline.org/ht/d/ContentDetails/i/2336>> (visited July 29, 2009).

## Innkeepers Lien Act and a boarder's bankruptcy

By Laura McFarland-Taylor, Esq.<sup>1</sup>

An interesting question came up on a listserv I belong to: whether or not a trustee in a boarder's Arizona bankruptcy case could void that state's agister's lien in favor of the boarding barn and sell the boarder's horses to satisfy the bankruptcy estate debts.

While I believe that the Illinois Innkeeper's Lien Act (Act) provisions for those who board horses (770 ILCS 40/49 and 40/50) are clear that the boarding barn has superior rights, I began to think of several scenarios where a boarding barn could find itself enmeshed in a boarder's bankruptcy action.

In this article, I will very briefly explore two scenarios from the perspective of the boarding barn: first, where Betty Boarder stops paying board to Boarding Barn on her horse Mr. Ed and files for bankruptcy protection after Mr. Ed has been sold pursuant to the Act, and second, where Betty Boarder stops paying board but files for bankruptcy protection prior to Boarding Barn selling the horse under the Act.

### Innkeepers Lien Act

There are two sections of the Innkeepers Lien Act that deal with horses:

770 ILCS 40/49. Stable keepers and any persons shall have a lien upon the horses, carriages and harness kept by them for the proper charges due for the keeping thereof and expenses bestowed thereon at the request of the owner, or the person having the possession thereof.

770 ILCS 40/50. Agisters and persons keeping, yarding, feeding or pasturing domestic animals, shall have a lien upon the animals agistered, kept, yarded or fed, for the proper charges due for the agisting, keeping, yarding or feeding thereof.

In most instances, 770 ILCS 40/49 is used in relation to horse boarding businesses—meaning your typical barn that boards horses and gives horseback riding lessons.

770 ILCS 40/50 is more often used for farm animals, including horses on pasture board or working ranch horses.<sup>2</sup>

The Sale of Unclaimed Property Act, 770 ILCS 90/3,<sup>3</sup> which governs the sale of property pursuant to the Act, states, in part:

Conformity to the requirements of this [The Sale of Unclaimed Property] Act shall be a perpetual bar to any action against such lienor by any person for the recovery of such chattels or the value thereof or any damages growing out of the failure of such person to receive such chattels.

By its plain language, it is clear that if Boarding Barn has perfected its lien and has sold or is in the process of selling Mr. Ed pursuant to the Act, then Boarding Barn's rights are superior to all others.

### Fact Pattern

Your client, Boarding Barn, has a written boarding contract with Betty Boarder, for the

boarding of her horse, Mr. Ed. In this contract is a paragraph regarding Boarding Barn's rights to Betty's horse, pursuant to 770 ILCS 40/49 and 40/50.<sup>4</sup> Betty is fast approaching 45 days past due on her board bill.

### **Selling a Horse Pursuant to the Innkeepers Lien Act:**

In an attempt to collect the debt owed, Boarding Barn makes numerous attempts to contact Betty, but gets no response. Boarding Barn decides to cut its losses.<sup>5</sup> What should they do to perfect their lien and sell Mr. Ed?

First, Boarding Barn will need to file a claim of lien in the county court.<sup>6</sup> Once the claim of lien has been filed, Boarding Barn should post a notice on Mr. Ed's stall door stating that a lien has been filed and that the animal is being held pursuant to the Innkeepers Lien Act.<sup>7</sup> Boarding Barn must give Betty 30 days written notice, pursuant to the Sale of Unclaimed Property Act,<sup>8</sup> that the horse will be auctioned off to pay the arrears plus expenses. Boarding Barn must also place a Notice of Sale in a newspaper that is circulated in the area in which the barn is located, for three consecutive weeks prior to the sale.<sup>9</sup> The Notice of Sale should contain the lien amount and, if applicable, a minimum bid.<sup>10</sup> The rules for how the sale should be conducted are included in the Sale of Unclaimed Property Act<sup>11</sup> and must be followed.

I advise my clients that in order to mitigate their damages, they should let the horse go for a reasonable amount. Particularly in this economic climate where good horses are being given away, it is not a good business decision to keep the horse unless Boarding Barn is willing to forgive the debt in exchange for the horse, or if Boarding Barn is willing to give the horse away.<sup>12</sup> In a perfect world, Mr. Ed would sell for enough to cover the past due board, as well as the expenses in perfecting the lien and the sale.<sup>13</sup> What happens if the sale comes up short and there is still a balance due? In most instances the best course of action is for Boarding Barn to file a small claims action against Betty for the amount still owed.<sup>14</sup>

Let's fast forward—Boarding Barn has won its small claims action against Betty and has a judgment against her. What happens if Betty then files for bankruptcy? Based on the language of the Sale of Unclaimed Property Act<sup>15</sup>, Boarding Barn can keep any money it made in the sale of Betty's horse; however, because the small claims judgment is probably dischargeable in Betty's bankruptcy,

Boarding Barn cannot collect its judgment unless the bankruptcy trustee has property in Betty's estate to sell that will satisfy her creditors.<sup>16</sup> Boarding Barn should consult with a bankruptcy attorney and discuss whether it would be advisable to file an adversary proceeding in Betty's bankruptcy case.

### **Boarder Files for Bankruptcy Protection Prior to Sale of the Horse**

In an attempt to collect the board owed, Boarding Barn makes numerous attempts to contact Betty, but gets no response. Boarding Barn decides to cut its losses; however, before Boarding Barn can sell Mr. Ed, Betty files for bankruptcy.<sup>17</sup> What happens now?

Most trustees do not want to deal with any property that has to be fed and will either allow the debtor to sell the horse (with the money going to the bankruptcy estate—not what you want to have happen) or, assuming the Boarding Barn has been proactive in protecting its rights, allow Boarding Barn to take possession of the horse pursuant to the Act. Sometimes you will come across a trustee who does not know much about horses and knows even less about what they are worth in this market – what happens if the trustee indicates that they want to sell the horse?

Under these circumstances it is very important that Boarding Barn has made clear its rights under the Act; if the trustee allows the debtor to sell the horse it is unlikely any of the funds received will go to the Boarding Barn. If the trustee drags its feet in taking possession of or selling the horse Boarding Barn could well be stuck with paying for the horse until the trustee takes possession or sells the horse. Boarding Barn must be proactive and have its attorney send a letter to the trustee asking that the trustee allow Boarding Barn to take possession of the horse pursuant to the Act.<sup>18</sup> If the trustee still drags its feet, Boarding Barn should file a motion to compel abandonment with the bankruptcy court and assert its rights under the Act.

### **Conclusion:**

The main points to take away from this discussion is to encourage your clients that operate boarding barns to include the language of the Innkeepers Lien Act in their boarding agreements,<sup>19</sup> to not let any boarder get too far behind in paying their board, and to be very proactive in protecting their rights under the Act.

Bankruptcy filings have skyrocketed<sup>20</sup> and will continue to grow for some time. Make sure your clients have protected them-

selves as best they can so that they are not the ones left with horses they cannot afford to keep. ■

1. Ms. McFarland-Taylor practices trademark law and equine law. Ms. McFarland-Taylor attended the John Marshall Law School in Chicago where she earned her JD in 1999, and her LL.M. in Intellectual Property Law in 2000. She may be contacted at: LMcfarland-Taylor@sbcglobal.net

2. I recommend to my clients that they reference both sections in their boarding agreements. See *infra* note 4.

3. 770 ILCS 90/3. All persons other than common carriers having a lien on personal property, by virtue of the Innkeepers Lien Act (770 ILCS 40/0.01 et seq.) or for more than \$ 2,000 by virtue of the Labor and Storage Lien Act (770 ILCS 50/0.01 et seq.) may enforce the lien by a sale of the property, on giving to the owner thereof, if he and his residence be known to the person having such lien, 30 days' notice by certified mail, in writing of the time and place of such sale, and if the owner or his place of residence be unknown to the person having such lien, then upon his filing his affidavit to that effect with the clerk of the circuit court in the county where such property is situated; notice of the sale may be given by publishing the same once in each week for three successive weeks in some newspaper of general circulation published in the county, and out of the proceeds of the sale all costs and charges for advertising and making the same, and the amount of the lien shall be paid, and the surplus, if any, shall be paid to the owner of the property or, if not claimed by said owner, such surplus, if any, shall be disposed under the Uniform Disposition of Unclaimed Property Act (765 ILCS 1025/0.05 et seq.). All sales pursuant to this Section must be public and conducted in a commercially reasonable manner so as to maximize the net proceeds of the sale. Conformity to the requirements of this Act shall be a perpetual bar to any action against such lienor by any person for the recovery of such chattels or the value thereof or any damages growing out of the failure of such person to receive such chattels.

4. Right of Lien. Boarding Barn has the right of lien as set forth in the Illinois Innkeepers Lien Act, 770 ILCS 40/49 and 40/50, for the amount due for board and any additional agreed upon services and shall have the right, without process of law, to retain Owner's horse(s) until the indebtedness is satisfactorily paid in full. Should Boarding Barn have to invoke its privileges under the Lien Act, Owner will be required to pay any charges with a cashier's check or money order. NO PERSONAL CHECKS WILL BE ACCEPTED AT THIS POINT.

5. Never let a boarder get more than 60 days past due. No more than 45 days is even better.

6. Many argue that it is not technically necessary to file a claim of lien. I feel it is better to err on the side of caution and file the lien. If the boarder shows up to collect the horse and you do not have proof of the lien (and the signed boarding contract will not be enough) the police may allow the boarder to remove the horse from the property and you have lost your leverage and possibly your cause of action under the Innkeepers Lien Act.

7. Keep a copy of the lien in a safe place – if the boarder shows up with the police to get her horse,

you will need to show the lien to the police to prevent them from allowing the boarder to take the horse off the property. NEVER allow anyone to remove the horse from the property. Boarding Barn must retain possession of the horse.

8.. See supra note 3.

9. See supra note 3.

10. I often recommend a minimum bid as a way to keep the "kill buyers" away. Kill buyers generally don't pay more than 10 cents per pound so the minimum price will still be quite low. I don't think it would be wise to sell to a known kill buyer – although Boarding Barn has the right to sell the horse, from a public relations perspective I don't think you want to have to defend a challenge to that type of sale

11. See supra note 3.

12. How to go about doing this, and whether you should do this, is beyond the scope of this article.

13. In the unlikely scenario that the sale nets a profit, any money in excess of that owed to Boarding Barn would have to be paid to Betty Boarder.

14. Remember that in Illinois a business cannot be a pro se plaintiff in a small claims action. Ill. Sup. Ct. R. 282 (2009), so whether it is worth it for Boarding Barn to pursue a small claims action will take some analysis.

15. See supra note 3.

16. If Betty files bankruptcy under Chapter 13, it would be unlikely that the trustee would allow any Plan funds to go to pay for the horse's board, except under exceptional circumstances.

17. We are assuming that Betty Boarder has listed Boarding Barn as a creditor and has listed Mr. Ed as an asset of the estate.

18. If you represent Betty Boarder in this scenario, the trustee should receive a letter from you asking that trustee either take possession of the horse within 7 days or allow Boarding Barn to take possession of the horse pursuant to the Innkeepers Lien Act, otherwise you will seek an administrative claim for reimbursement of board paid to protect the asset and will file a motion to compel abandonment.

19. See supra note 4.

20. Cat Rabenstein, Bankruptcy Filings on the Rise (Oct. 1, 2009), at <<http://news.medill.northwestern.edu/chicago/news.aspx?id=140761>> (<http://tinyurl.com/yb3xbas>)

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### February

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**Friday, 2/05/10 – O'Fallon, IL, Regency Conference Center, Hilton Garden Inn**—Documenting the Commercial Deal: Loans, Leases and Mortgages. Presented by the ISBA Commercial Banking and Bankruptcy Section. Cap 75. 9-4:30.

**Friday, 2/05/10 – Normal, Bloomington – Normal Marriott**—Hot Topics in Agricultural Law. Presented by the ISBA Agricultural Law Section and Co – Sponsored by the ISBA General Practice Solo & Small Firm Section. Cap 150. Time TBD.

**Thursday, 2/11/10 – Chicago, ISBA Regional Office**—Charitable Planning: Techniques to Help Your Client. Presented by the ISBA Trust and Estates Section. 9-3:45.

**Monday, 2/15/10 – Chicago, ISBA Regional Office**—Documenting the Commercial Deal: Loans, Leases and Mortgages. Presented by the ISBA Commercial Banking and Bankruptcy Section. Time TBD. ■



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