

Ag Legal Issues in the Time of Covid

By Tim Linden

While many of the trends regarding legal issues in the agricultural space do not appear to have changed significantly in the past year, the coronavirus, and the pandemic it has unleashed, is certainly top of mind and has greatly impacted the legal process. Civil cases are not going to trial, lawyers and clients are not meeting in person, depositions are being taken by Zoom and government agencies are not operating in the same manner as they were a year ago.

Western Grower & Shipper contacted a handful of attorneys specializing in ag law to get their take on the current situation. Collectively, they see more nuisance lawsuits and demand letters as plaintiff attorneys have reportedly increased their efforts to manipulate class action lawsuits. There are also new legal actions relating to the coronavirus and more expected to be on their way.

Below are reports from five attorneys, all of whom are participants in the Western Growers Agricultural Legal Network, which guarantees members a discount for some legal services.

Paul Moncrief of Moncrief & Hart

For Paul Moncrief, who specializes in contract law in Salinas, CA for Moncrief & Hart, his work-life has not been upended by COVID-19, but the novel coronavirus has kept him busy dealing with many potential legal issues surrounding the pandemic. In a far-reaching interview covering many different contract types dealing with agricultural practices, the veteran ag law attorney

revealed that there are more questions than impacts due to the coronavirus. Parties to both sides of many different contracts are exploring the role that COVID-19 might play in potential litigation, but for the most part, he said using the coronavirus to break a contract is not a winning argument.

In law, force majeure or an Act of God, is a common legal clause in contracts that frees both parties from

liability or obligation when an extraordinary event happens. Moncrief said that, like with many legal disputes in the produce industry between buyer and seller, most of the contract issues regarding product during the early stages of coronavirus-caused business shutdowns were worked out between the parties amicably. Buyers and sellers have ongoing relationships so they

have an interest in solving the issues without litigation and they typically do so. But Moncrief said that from a strictly legal perspective, a buyer purchasing a product who then loses his customer for that product because of a restaurant closure, for example, would have a difficult time winning litigation based on force majeure. “This doesn’t really fit the definition,” he said. “Market risk is not an Act of God.”

Moncrief did note that there certainly were instances when force majeure could be applied. For example, a contracted supplier of produce for an event in the future that could not be held because of a government mandate would have a difficult time trying to enforce that contract.

When speaking to *WG&S* in August, he reiterated that the early weeks of the pandemic did result in cancelled orders and other issues but they were typically worked out between the parties, with contracts since then attempting to add the pandemic to the “Act of God” list. Moncrief said some buyers did try to add that wording to contracts already in place but he advised his clients against signing such addendums.

He said the coronavirus, and other issues such as food safety concerns, continue to create situations where buyers, especially large buyers, try to shift liability to the shipper or grower. Moncrief said basic contract law calls for each party to pay the damages they cause. He said not only is it bad business to accept liability for damages you don’t cause, but it can also run afoul of your insurance policy. He explained that insurance companies write policies to insure you against your own actions that result in damages to another party. By accepting liability above that, you risk invalidating your policy. At the very least, your insurance company probably will not pay for the damages that you did not cause even if you contractually accept liability.

Moncrief also cautioned against signing contracts that on their face are unfair but the buyer demands your concurrence with a “take it or leave it” offer. He said while this might seem like a coerced signing, the courts will not see it that way. “It is still enforceable,” he said. “It’s the market risk you assume.”

Although he did say that public policy might offer some relief. For example, California law is specific about the terms that can be enforced with regard to non-compete clauses that employees are often asked to sign. A company in another state would not be able to enforce such a clause against a California employee if it is counter to California law.



Lynn Jacquez & Chris Schulte, SJ-Lake & Heron

The coronavirus has materially impacted the agricultural work of SJ-Lake attorneys Lynn Jacquez and Chris Schulte as they are heavily involved in a wide range of labor law issues and have been inundated with legal questions since the beginning of the pandemic. "It's been a five-alarm fire ever since," said Jacquez, noting that both regulatory and liability issues are top of mind for agricultural companies across the country.

She explained the law firm does a lot of work with employers trying to secure temporary foreign workers through the Department of Labor's H-2A guest worker program. The final approval for an application typically requires an in-person meeting at a U.S. facility in the worker's country of origin. COVID-19 eliminated that possibility, so many work-arounds had to be developed for H-2A workers to be approved. This caused additional shepherding of these applications through the process by the applicants and their attorneys. Visa challenges occurred on a daily basis. She said navigating the H-2A process during these difficult times has become a logistical equation and very case specific. She did express how impressed she has been with how the parties to these contracts have collectively risen to the challenge, sorted through the issues, and made the program work. But there have been a multitude of issues.

Schulte said state and local regulations regarding social distancing and mask wearing also impacted the federal



program, and SJ-Lake's efforts, as the U.S. company applicants typically needed to adjust their deliverables because of new rules. For

example, providing housing is part of the H-2A requirement and social distancing rules typically meant providing twice as much living space for each worker. He

added that more government agencies have been involved than what is typically the case.

Other legal work that has surfaced specific to the coronavirus includes the Paycheck Protection Program loans that were part of the stimulus package. The loans offered forgiveness if employers followed specific regulations concerning keeping employees on the payroll.

In the non-COVID-specific realm of labor law, Schulte said there continues to be litigation trends concerning paying workers for travel time and eliminating the overtime exemption for ag workers. That has largely already occurred in California with labor activist now setting their sights on accomplishing the same worker benefit in Colorado.

The Washington D.C.-based SJ-Lake does a lot of advocacy work for its clients and Jacquez said an interesting six months lies ahead as it pertains to both the H-2A program and immigration reform. The Trump Administration is in the midst of issuing new regulations for H-2A, which the agricultural industry believes will be less onerous than the previous rules,

which were put in place in 2010. However, the new rules have not been announced, hence they will not be in place if a new administration takes the helm in January of 2021. It's likely that a new round of discussions will begin on H-2A with the previous work basically scrapped.

Jacquez is much more confident that immigration reform, at least as it relates to agricultural, will occur in 2021 regardless who wins the presidency. "In fact I will go out on a limb and predict that regardless of the (presidential) administration, the ag work force issue will be addressed in 2021."

She explained that there is bi-partisan support for such an action and the politics would appear to be favorable in either a Democratic administration or a second term Trump Administration.

Michael Duvall of Dentons US LLP

Michael Duvall is a member of Dentons' Litigation and Dispute Resolution practice, focusing on class actions, commercial litigation, appeals and administrative enforcement actions. He works from the global law firm's Los Angeles office where much of the firm's

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West Coast food company work is centered. Like the other attorneys interviewed for this story, Duvall's work has been impacted by the coronavirus. As a litigator, he would typically spend quite a bit of time in court, but the courts in Los Angeles, and many places across the country, are largely closed. He said that while in-person trials and court appearances are continuing to occur for some criminal cases and in emergency situations, civil jury trials have been halted since March. But that doesn't mean the work has stopped.

"We are not going to court, but cases are still matriculating as they normally would in their early stages," he said, noting that there are pre-trial hearings being held over the phone and via video. There are also Zoom depositions taking place and the normal correspondence between attorneys after a lawsuit has been filed or a demand letter sent.

Duvall said the demand letter is an ever-increasing tactic in the agricultural sector. It typically threatens class action status for some alleged unlawful trade practice such as inaccurate labeling of product. He said a settlement often is the result, with a payoff to the would-be plaintiff to prevent the class action from moving forward. With regard to unlawful trade practices, Duvall said increasingly the firm is seeing challenges to food label statements such as "pure, natural or healthy." While the use of the word "organic" is regulated by the USDA's National Organics Program, many of these other words do not have specific legal definitions, and may allow for jury interpretation, hence the potential lawsuits. He added that litigation has moved into additional areas, for example, a class action is likely to question statements about the food's source (including where it is grown or whether it is "natural"). The plaintiff claims that your label is false, misleading or deceptive.

But Duvall does not recommend that food companies avoid such phrases. They are often used because they resonate with consumers and are responsive to their demands. He advises clients to invest the time and money up front to substantiate the claim they are going to make and accept potential litigation as the cost of doing business. "When you are in the food business, you are a litigation target," he said. "When you are threatened with a lawsuit it means you have arrived. You are big enough to be a target."

But he reiterated that it is much less expensive to conduct the research for the basis of your claim—and have a lawyer review the documentation and the label—than to hire a lawyer after the fact to mount a defense. He said a company should have test results, certifications, and other documents to substantiate their labeling statements.

Considering legal life after the coronavirus, Duvall believes there will be some changes, but he relishes going back to the old ways of doing things in the litigation world. For example, he said many attorneys want to go back to in-person depositions, noting that it can be difficult to read a witness by Zoom. "There is no substitute for being face to face," he said.

He suspects trials will continue to be held in person, but if this pandemic stretches well into 2021 and continuing to delay a trial no longer makes sense, zoom trials may become more prevalent as well.



He also noted that the Los Angeles County court system, for example, has invested a great deal of money and time improving its video technology capabilities, ramping up the program over a three-month time period. It's logical, Duvall said, that they will want to utilize that technology even beyond these challenging times.

Erica Rosasco of McKague Rosasco

Erica Rosasco is a partner at McKague Rosasco LLP in Roseville, CA, whose practice focuses on agricultural employment law. "It's been a challenge," she said, speaking of her legal life during a pandemic. "Normally I travel a lot, seeing clients in person or making court appearances. I have not seen a client since COVID."

She said much of the litigation work has been halted as the various stakeholders are not available. "Litigation came to a stand-still. Much of what I do now is advise and consult," she said. "We've done quite a few webinars on COVID and the workplace rules surrounding it, but those seem to change every day."

She added that mediation by Zoom also appears to be less effective as one side or the other can literally, and dramatically, leave the conference, eschewing a back and forth approach and a resulting compromise agreement.



Rosasco said much of her work involves representing farm labor contractors as they appear to be the target of much litigation including class action suits or the easier-to-file Private Attorney General Act (PAGA) suits. She explained that with a class action suit a lot of pre-work has to be done by the plaintiff's lawyer to find and qualify a named class action plaintiff. That is much less important in a PAGA case,

which has made that legal tactic against employers proliferate. She said these PAGA suits often involve technical wage and hour violations and the threat of a class action unless a settlement is paid. She said technical violations on meal breaks, pay day regulations and hourly rates are common. Her advice is that employers need to follow both the spirit and letter of the law but she admits that technical violations are difficult to avoid. She cautioned employers against the "rogue manager" that does not follow company policy and commits labor violations. "You can't let one employee sink your ship."

While settling is often the most inexpensive route to take in these PAGA cases, Rosasco said they will go to trial on behalf of their clients when necessary to deter what she believes are unwarranted lawsuits. She said some of these plaintiff's lawyers take a shotgun approach to their lawsuit filings casting a big net in the hopes of finding one big fish every once in a while. She noted that one recent case involved a payment of \$2000 to the plaintiff, which included legal fees. "That was a loser. His fees had to be much greater than that," she said.

As a practical matter, Rosasco said the coronavirus has reduced the workload in some areas such as workplace violations. She said OSHA (Occupational Safety and Health Administration) does not have enough people to do inspections so there have been fewer violation citations. She worries about lawsuits filed against employers because of employees getting coronavirus, but that has not happened yet. 🐞