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## Farmer Held Merchant Under Texas UCC: Nelson v. Union Equity Co-Operative Exchange

Union Equity, a grain storage, marketing, and exporting corporation, sued Carroll Nelson, a farmer, for damages arising from his failure to deliver 5,000 bushels of wheat at \$3.56 a bushel pursuant to an oral wheat futures contract<sup>1</sup> entered into by the parties on August 1, 1973. A written confirmation of the oral agreement was sent by Union Equity to Nelson who neither signed nor rejected it. Nelson entered a general denial to the allegations and pleaded that the Statute of Frauds barred recovery.<sup>2</sup> Union Equity contended that the "merchant" exception to the Statute of Frauds applied because written confirmation sufficient against the sender had been sent within a reasonable time, and the receiver had reason to know its contents and had not objected to it in writing within ten days.<sup>3</sup> The validity of that contention depended upon a finding that Nelson, a farmer who raised wheat, cotton, and livestock, was also a merchant for purposes of the Uniform Commercial Code. The trial court held for Union Equity, and the court of civil appeals affirmed.<sup>4</sup> The Texas Supreme Court granted a writ of error. *Held, affirmed*: A farmer who raises and sells an annual wheat crop is a merchant under the definition provided by the Texas Uniform Commercial Code. *Nelson v. Union Equity Co-Operative Exchange*, 548 S.W.2d 352 (Tex. 1977).

### I. THE STATUS OF FARMER AS MERCHANT

The question of whether a farmer is a merchant under the UCC is one of recent origin, and courts facing the issue have reached opposite conclu-

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1. In a forward or futures contract a farmer agrees to sell his crop at a specified price on a future date. In order for the purchaser of the crop to protect himself from market fluctuations which could reduce the value of the crop significantly by the date set for delivery, he ordinarily sells the crop to an exchange immediately following his purchase, confirming the oral contract to purchase with a written memorandum. A farmer could bind the grain company by acceptance of the memorandum if the market appeared stable or declining, or if the market rose he could insist that no enforceable written contract existed and sell his crops at the higher market value. Most of the cases discussed in this Note involve the same factual paradigm.

2. TEX. BUS. & COMM. CODE ANN. § 2.201(a) (Tex. UCC Vernon 1968), which provides: Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

3. The "merchant exception" to the Statute of Frauds is found in *id.* § 2.201(b), and provides (emphasis added):

*Between merchants* if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of Subsection (a) against such party unless written notice of objection to its contents is given within ten days after it is received.

4. *Nelson v. Union Equity Co-Op. Exch.*, 536 S.W.2d 635 (Tex. Civ. App.—Fort Worth 1976).

sions.<sup>5</sup> The Supreme Court of Arkansas, rejecting in *Cook Grains, Inc. v. Fallis*,<sup>6</sup> the contention that a farmer was a merchant, emphasized the idea of professionalism as understood in the ordinary use of the term.<sup>7</sup> The court cited the official comment to the Arkansas version of the UCC in support of its interpretation.<sup>8</sup> The meaning of the word "merchant" was limited in this case to those whose livelihood consisted of continuous purchases and sales of merchandise; excluded from the court's definition was a farmer who sold only his crop.<sup>9</sup> Later cases have used similar language in reaching the same result.<sup>10</sup> For example, the Alabama Supreme Court also held that a farmer was not a merchant, implying that the fact that the farmer never sold goods other than his own was determinative of the issue.<sup>11</sup>

5. Contrary decisions about this question have diminished the uniformity desired by framers of the UCC. Grain dealers, in order to protect themselves, should be aware of the interpretations made by the courts in the states in which they do business. When the state court has not spoken, the law is uncertain. *See* *Continental Grain Co. v. Martin*, 536 F.2d 592 (5th Cir. 1976) (under Texas law farmers were merchants for purposes of UCC Statute of Frauds); *Continental Grain Co. v. Brown*, 19 UCC Rep. 52 (W.D. Wis. 1976) (farmers primarily engaged in raising dairy cattle who sold 75,000 bushels of surplus corn were merchants under U.C.C. § 2.201(2)); *Continental Grain Co. v. Harbach*, 400 F. Supp. 695 (N.D. Ill. 1975) (farmer who had sold soybeans for only a few months, but had sold corn for several years, held himself out as having knowledge as to practices involved, and was, therefore, a merchant for purposes of U.C.C. § 2.201(2)); *Loeb & Co. v. Schreiner*, 294 Ala. 726, 321 So. 2d 199 (1975) (fact that a farmer who sold only his own crop was astute at selling his product was insufficient to make him a merchant for purposes of U.C.C. § 2.201(2)); *Cook Grains, Inc. v. Fallis*, 239 Ark. 962, 395 S.W.2d 555 (1965) (farmer who sold only his own crop was not a "professional" and hence not a merchant for purposes of the UCC); *Sierens v. Clausen*, 60 Ill. 2d 585, 328 N.E.2d 559 (1975) (farmer who sold crops to grain elevators in "cash sales" and "future contracts" was a merchant for purposes of U.C.C. § 2.201(2)); *Campbell v. Yokel*, 20 Ill. App. 3d 702, 313 N.E.2d 628 (1974) (farmer who regularly sold his crop was a merchant for purposes of U.C.C. § 2.201(2)); *Sand Seed Serv. Inc. v. Poeckes*, 249 N.W.2d 663 (Iowa 1977) (where evidence showed only that defendant was a farmer who annually sold what he himself grew, defendant was not a farmer as a matter of law for purposes of Iowa U.C.C. § 2.201(2)); *Decatur Coop. Ass'n v. Urban*, 219 Kan. 171, 547 P.2d 323 (1976) (a farmer who had sold his annual wheat crop for 20 years was not a merchant for purposes of U.C.C. § 2.201(2)); *Currituck Grain v. Powell*, 28 N.C. App. 563, 222 S.E.2d 1 (1976) (error to grant summary judgment for farmer on ground that he was not a merchant where evidence insufficient to prove he was merely a casual or inexperienced seller); *Ohio Grain Co. v. Swisshelm*, 40 Ohio App. 2d 203, 318 N.E.2d 428 (1973) (defendant who had been a farmer for many years and who was familiar with farm markets was chargeable with knowledge or skill of a merchant); *Lish v. Compton*, 547 P.2d 223 (Utah 1976) (hay and grain farmer who sold only his annual crop held not a merchant within meaning of U.C.C. § 2.201(2)); *Gerner v. Vasby*, 75 Wis. 2d 660, 250 N.W.2d 319 (1977) (cattle feed lot operator who sold surplus grain was not a merchant for purposes of § 2.201(2)). The fact that one company was cited as plaintiff three times, in the first three cases cited in this note, illustrates the potential for conflicting rulings facing any one grain dealer.

Other theories advanced for holding the farmer liable in the futures contract fact situation include promissory estoppel and equitable estoppel. For a discussion of how these theories have been applied by courts in several jurisdictions see Comment, *Promissory Estoppel, Equitable Estoppel and Farmer as Merchant: The 1973 Grain Cases and the U.C.C. Statute of Frauds*, 1977 UTAH L. REV. 59.

6. 239 Ark. 962, 395 S.W.2d 555 (1965).

7. 395 S.W.2d at 557.

8. *Id.*; see ARK. STAT. ANN. § 85-2-104 (Ark. UCC 1961), Notes 1-2. Note 1 states: "This section lays the foundation of this policy by defining those who are to be regarded as professionals or 'merchants' . . ." Note 2 states: "The term 'merchant' as defined here roots in the 'law merchant' concept of a professional in business . . ."

9. 395 S.W.2d at 557 (citing 27 WORDS AND PHRASES 136 (1961)).

10. *See, e.g.,* *Loeb & Co. v. Schreiner*, 294 Ala. 726, 321 So. 2d 199, 202 (1975) ("although a farmer might sell his cotton every year, we do not think that this should take him out of the category of a 'casual seller' and place him in the category with 'professionals'"); *Decatur Coop. Ass'n v. Urban*, 219 Kan. 171, 547 P.2d 323, 328 (1976) ("[t]he concept of professionalism is heavy in determining who is a merchant under the statute").

11. *Loeb & Co. v. Schreiner*, 294 Ala. 726, 321 So. 2d 199, 202 (1975). *See also* *Sand Seed Serv., Inc. v. Poeckes*, 249 N.W.2d 663, 666 (Iowa 1977) ("The undisputed facts show only that

On the other hand, several recent courts have held farmers to have the knowledge presumed of merchants. In 1973 an Ohio court of appeals considered an appeal in which a grain company contended that a farmer who had orally agreed to sell soybeans at \$5 a bushel breached the written confirmation of the agreement.<sup>12</sup> Without discussing specifically the definition of "merchant," the court rejected the contention that the farmer was a simple "tiller of the soil"; the court found the farmer liable and implied that no mere laborer could survive the heavily commercialized agricultural market.<sup>13</sup> In *Campbell v. Yokel*,<sup>14</sup> an Illinois appellate court opinion rendered the following year, the definition of merchant under the Illinois version of the UCC was discussed. The court determined that the farmer "dealt" in the crops he raised, thus bringing him within the ambit of the statutory definition.<sup>15</sup> The farmer was, therefore, liable for breach of an oral contract followed by written confirmation.<sup>16</sup> The court weighed the relative burdens that would be allocated between the parties as a result of such a decision. If the farmer were not held to be a merchant, he would not be bound under the contract until the date set for delivery. If the market price had dropped from the contract price, the farmer could bind the grain company by merely signing the contract. If the price had risen, he could ignore the contract and sell his goods at the higher market price. In either event, the grain company shouldered all of the risk. Under these circumstances, the court felt that the alternative of requiring a farmer to read his mail and timely reject unsatisfactory confirmations was not unreasonable.<sup>17</sup> Another factor, the impressive size of the transaction involved, has alone been held to justify deeming the farmer a merchant.<sup>18</sup>

## II. NELSON V. UNION EQUITY CO-OPERATIVE EXCHANGE

Against this background, the Fort Worth Court of Civil Appeals decided *Nelson v. Union Equity Co-Operative Exchange*,<sup>19</sup> a case of first impression in Texas. In upholding the trial court's finding that Nelson was a merchant,

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Poekes is a farmer who annually sells what he himself grows. Although this may make him an expert or professional in *growing* crops, it does not do so in *selling* them."); *Lish v. Compton*, 547 P.2d 223, 225 (Utah 1976) (in holding that a farmer was not a merchant, the court noted "[h]e has not and does not buy and sell from or for anyone other than what is produced on his own land").

12. *Ohio Grain Co. v. Swisshelm*, 40 Ohio App. 2d 203, 318 N.E.2d 428 (1973).

13. 318 N.E.2d at 430 (agricultural contracts and farm marketing are becoming increasingly sophisticated; in order to continue in a profitable business, the farmer must understand the workings of the market).

14. 20 Ill. App. 3d 702, 313 N.E.2d 628 (1974).

15. The court held that "a farmer who regularly sells his crops is a person who deals in goods of that kind." 313 N.E.2d at 629-30.

16. *Id.* ILL. ANN. STAT. ch. 26, § 2-104(1) (Smith-Hurd 1963) states:

'[M]erchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

17. 313 N.E.2d at 629-30.

18. *Continental Grain Co. v. Brown*, 19 UCC Rep. 52, 59 (W.D. Wis. 1976). The case was one in which a dairyman made a one-time sale of surplus grain for \$227,000. On similar facts involving a much smaller transaction, the Wisconsin Supreme Court reached an opposite result. *Gerner v. Vasby*, 75 Wis. 2d 660, 250 N.W.2d 319 (1977).

19. 536 S.W.2d 635 (Tex. Civ. App.—Fort Worth 1976).

the court stated that such a determination should be left to the trier of fact. The court's reasoning was that the trier of fact was in the best position to determine whether the farmer was "an ignorant, innocent, and inexperienced farmer" or a "knowledgeable and experienced trader."<sup>20</sup> Such a finding would serve to protect the innocent party. The Texas Supreme Court affirmed the holding of the court of civil appeals, finding that Nelson was a merchant when he entered into the oral contract with Union Equity. The court held, however, that the type of question faced was one of law rather than fact since the facts relating to Nelson's status were undisputed.<sup>21</sup>

The court began its opinion by interpreting the term "merchant" under the Texas version of the UCC, disregarding the ordinary meaning of the word in favor of the express definition provided by the Code. The court noted four distinct criteria. A person is a "merchant" if he:

(1) deals in goods of the kind, or (2) by his occupation holds himself out as having knowledge or skill peculiar to the *practices* involved in the transaction, or (3) by his occupation holds himself out as having knowledge or skill peculiar to the *goods* involved in the transaction, or (4) employs an intermediary who by his occupation holds himself out as having such knowledge or skill, and that knowledge or skill may be attributed to the person whose status is in question.<sup>22</sup>

Although the fourth criterion is admittedly inapplicable to this fact situation, the court determined that Nelson satisfied each of the remaining three.<sup>23</sup> In the opinion of the majority, selling an annual wheat crop constituted "trans-

20. *Id.* at 641.

21. 548 S.W.2d 352, 354 (Tex. 1977).

22. TEX. BUS. & COMM. CODE ANN. § 2.104(a) (Tex. UCC Vernon 1968), *cited in* 548 S.W.2d at 355.

23. 548 S.W.2d at 355-56. The significance of Nelson's satisfying all three criteria can be understood after a reading of the U.C.C. § 2.104, Comment. Note 2 states that merchant status may be accorded to a person when he has either (1) specialized knowledge as to the *goods*, (2) specialized knowledge as to the *business practices*, or (3) specialized knowledge as to *both*. A determination of whether or not a person is a merchant for purposes of the UCC depends upon which test is applicable to the provision involved. According to the comment, those sections dealing with the Statute of Frauds, firm offers, confirmatory memoranda, and modification, U.C.C. §§ 2-201(2), 205, 207, 209,

rest on normal business practices which are or ought to be typical of and familiar to any person in business. For purposes of these sections almost every person in business would, therefore, be deemed to be a 'merchant' under the language 'who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices . . . involved in the transaction . . .' since the practices involved in the transaction are non-specialized business practices such as answering mail.

U.C.C. § 2.104, Comment. The class of merchants with respect to business practices, then, is very broad. Since farmers can be classified "persons in business," they fall into this broad category.

The class of merchants with respect to the goods of the kind is much more limited. According to the comment, this class is one requiring professional status as to the particular kind of good. Sections of the UCC involved are §§ 2-314, 2-402(2), and 2-403(2); these sections deal with the implied warranty of merchantability, retention of possession by a merchant seller, and entrusting of possession by a merchant "who deals in goods of that kind," respectively. Because farmers are expected to have a high level of skill or knowledge concerning their crops, they are considered merchants with respect to the product they sell.

The third class of provisions applies to businessmen who fall under either the "goods" or "practices" aspect of the merchant definition. These sections deal with good faith in the case of the merchant, TEX. BUS. & COMM. CODE ANN. §§ 2-103(1), 603, 605 (Tex. UCC Vernon 1968); risk of loss, *id.* § 2-509; and adequate assurance of performance, *id.* § 2-609: Since farmers fit under both the "goods" and "practices" aspects of the merchant definition, this category would apply to them also.

acting business" related to wheat, and, therefore, Nelson satisfied the first criterion.<sup>24</sup> The court suggested that in applying the second and third criteria the key issue was whether a person's *occupation* implied some particular knowledge or skill.<sup>25</sup> Whether or not he actually held himself out as having that knowledge or skill was unimportant, as long as he engaged in that occupation. By his occupation as an experienced farmer, Nelson was expected to understand the complexities of wheat planting, harvesting, and quality. He therefore held himself out, in the opinion of the court, as having knowledge or skill concerning the goods which were the subject matter of the contract.<sup>26</sup> Since he sold his crop for his livelihood rather than merely raising it for his own consumption, the court held that he necessarily represented to the persons with whom he transacted business that he had knowledge of the practices involved in the business transaction.<sup>27</sup> Therefore, both the second and third criteria were met.

Additional support for the court's finding that the defendant was knowledgeable of the practices involved was provided by the official comment to the UCC. The special UCC provisions relating to merchants are divided into three classes.<sup>28</sup> The class into which the Statute of Frauds provision falls is one which, according to the comment, rests on business practices such as answering mail, which are generally familiar to any person in business. Almost any person in business is, therefore, in this class.<sup>29</sup> The court found that by selling his wheat, Nelson held himself out as having such non-specialized knowledge.<sup>30</sup>

Nelson argued that this comment indicated an intention to limit the definition of "merchant" to professionals rather than to the "casual or inexperienced seller" which he claimed to be.<sup>31</sup> The court held that Nelson was a professional, since the sale of his crop constituted his livelihood.<sup>32</sup> The court suggested that the burdens are best allocated between parties if the meaning of the word "merchant" is interpreted broadly.<sup>33</sup> Under such an interpretation, all the farmer need do is read his mail and make timely objection to a confirmation. A narrow interpretation would require the purchaser to contract through means other than the confirmatory memorandum, which would severely restrict the present operation of the futures market.<sup>34</sup>

The dissent relied upon the ordinary meaning of the word "merchant," which was defined as "any one making a business of buying and selling commodities; a trafficker; . . . [o]ne who carries on a retail business; a

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24. The dissenting opinion found untenable the contention that Nelson "dealt" in wheat. "One sale a year of a commodity produced is less than a scintilla of evidence that the farmer deals in farm crops." 548 S.W.2d at 359.

25. *Id.* at 356.

26. *Id.*

27. *Id.*

28. *See* note 23 *supra*.

29. U.C.C. § 2.104, Comment, Note 2.

30. 548 S.W.2d at 356.

31. *Id.*

32. *Id.*

33. 548 S.W.2d at 357-58; *see* text accompanying note 16 *supra*.

34. 548 S.W.2d at 357-58.

storekeeper or shopkeeper."<sup>35</sup> Under such a definition Nelson clearly was not a merchant. But the dissent further argued that a proper reading of the statutory definition failed to support the majority's position. A farmer who merely sells his annual crop is neither a professional nor a dealer in the commodity.<sup>36</sup> The fact that Nelson sold his annual crop did not convince the dissent that he should be presumed to be aware of common practices in the market such as the fact that an unsigned contract may nevertheless be binding.<sup>37</sup> The dissent noted that, according to the official comment, knowledge of these practices, rather than knowledge of the goods, is determinative in the application of the Statute of Frauds provision.<sup>38</sup>

Finally, the dissent argued that the majority opinion would result in every individual who occasionally bought or sold significant household or personal items being considered a merchant.<sup>39</sup> This extreme prediction fails to consider the majority's reliance on the fact that Nelson's sale of his wheat crop was the source of his livelihood. Unless sales of items such as the above constitute a significant part of the seller's regular income, he would not be held to be a merchant under the Texas UCC.

The court's decision that Nelson was a merchant under both the "goods" and the "practices" aspects of the definition signifies that a farmer who sells his annual crop is a merchant for all purposes relating to that transaction under the Texas UCC.<sup>40</sup> Twelve code sections provide for rights and duties specifically applicable to merchants. In addition to the merchant exception to the Statute of Frauds provision<sup>41</sup> considered in this case, code provisions affected include sections dealing with the following areas: firm offers;<sup>42</sup> additional terms in acceptance or confirmation;<sup>43</sup> modification, rescission, and waiver;<sup>44</sup> the implied warranty of merchantability;<sup>45</sup> special incidents of sale on approval and sale or return;<sup>46</sup> rights of seller's creditors against sold goods;<sup>47</sup> entrusting of possession of goods;<sup>48</sup> risk of loss in the absence of breach;<sup>49</sup> duties as to rightfully rejected goods;<sup>50</sup> waiver of

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35. *Id.* at 358-59 (Johnson, J., dissenting) (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1950)).

36. *Id.* at 359.

37. *Id.*

38. While the dissent is correct that according to the comment it is knowledge of the practices which is determinative of the application of the merchant exception to the Statute of Frauds, the force of the argument is diminished by a closer examination of the comment. Knowledge of normal business practices is presumed of "almost every person in business . . . since the practices involved in the transaction are non-specialized business practices such as answering mail." See note 23 *supra*.

39. 548 S.W.2d at 360.

40. See note 23 *supra*. The forthright holding that this farmer is a merchant for all purposes under the UCC provides a more complete understanding of the law than is provided by the more limited analyses of other courts.

41. TEX. BUS. & COMM. CODE ANN. § 2.201(b) (Tex. UCC Vernon 1968).

42. *Id.* § 2.205.

43. *Id.* § 2.207(b).

44. *Id.* § 2.209(b).

45. *Id.* § 2.314.

46. *Id.* § 2.207(a)(3).

47. *Id.* § 2.402(b).

48. *Id.* § 2.403(b).

49. *Id.* § 2.509(c).

50. *Id.* § 2.603.