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Cases, Regulations and Statutes

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[7] *Id*.
[8] I.R.C. § 280A(c)(1).
[9] Rev. Rul. 82-26, 1982-1 C.B. 114.
[10] Est. of Campbell v. Comm'r, T.C. Memo. 1964-83.
[11] Lokan v. Comm'r, T.C. Memo. 1979-380.
[12] Bennett v. U.S., 61-2 U.S.T.C. ¶ 9697 (N.D. Ga. 1961).
[13] I.R.C. § 121.
[14] I.R.C. § 1034.
[15] Treas. Reg. § 1.121-3(a).
[16] See n. 4 *supra*.
[17] Treas. Reg. § 1.165-9(a).
[18] See O'Byrne and Davenport, Farm Income Tax Manual § 329(c) (9th ed. 1987).
[19] See Est. of Miller v. Comm'r, T.C. Memo. 1967-44 (vacation residence).
[20] See Treas. Reg. § 1.165-9(b)(1).
[21] Dawson v. Comm'r, T.C. Memo. 1972-4; Henry v. Comm'r, T.C. Memo. 1983-277.
[22] Treas. Reg. § 1.165-9(b)(2).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

BANKRUPTCY

GENERAL-*ALM* § 13.03.*

DISCHARGE. The debtor was the president and a director of a grain dealer corporation that was also in bankruptcy. The trustee in the corporation's case sought an order denying the discharge of the debtor under Section 727(a)(3) for falsification of records to the state department of agriculture and the corporation's auditors. The debtor argued that Section 727(a)(3) applied only where the falsification prevented the trustee from obtaining accurate financial records and did not apply to falsification as to third parties. The court held that because the debtor's actions did not prevent the trustee from obtaining accurate records in the bankruptcy case, the discharge would not be denied. The court noted that the corporation's own poor records prevented the trustee from obtaining accurate information. The trustee also sought to deny the debtor's discharge under Section 523(a)(2) for tendering false financial records to the state department of agriculture, resulting in continuation of the corporation's grain dealer license, credit purchases from some producers, and the corporation's failure to pay for these purchases. The court held that the trustee could not bring a dischargeability action on behalf of only some of the corporation's creditors. The trustee in the corporation's case also sought denial of discharge of the debtor for fraud while in a position of fiduciary duty. The court held that a director of a corporation does not serve as a fiduciary as to the corporation's creditors. ***In re* Martin, 162 B.R. 710 (Bankr. C.D. Ill. 1993)**.

ESTATE PROPERTY. Two years before filing for bankruptcy, the debtors had established a revocable trust with the debtors as trustees and beneficiaries. The debtors had the right to revoke the trust at any time. The court held that the right to revoke the trust was a property interest which passed to the bankruptcy estate and the trustee had the power to revoke the trust. ***In re* Ross, 162 B.R. 863 (Bankr. D. Idaho 1993)**.

EXEMPTIONS.

AVOIDABLE LIENS. After subtraction of the consensual liens against the debtor's homestead, the debtor had equity in excess of the exemption amount. The debtor argued that the fair market value of the house should be reduced by the hypothetical costs of sale, but the court rejected that valuation because the house was not going to be sold. The debtor sought to avoid a judgment lien against the house which partially impaired the exemption, arguing that the entire lien should be avoided so that the debtor would receive any future appreciation. The court held that the judgment lien would be avoided only to the extent the lien impaired the exemption. ***In re* Abrahimzadeh, 162 B.R. 676 (Bankr. D. N.J. 1994)**.

HOUSEHOLD GOODS. The debtor claimed an exemption, under Va. Code § 34-29, for two televisions, a record player and a VCR. The court held that the items were household goods eligible for the exemption. ***In re* Hanes, 162 B.R. 733 (Bankr. E.D. Va. 1994)**.

OBJECTIONS. The debtor originally filed a Chapter 13 case and claimed $3,000 in property as exempt. No objections to the exemptions were filed. The case was converted to Chapter 7 and another creditors' examination took place and the trustee filed an objection to the exemptions within 30 days after the examination. The debtor argued that the objection was invalid as untimely because it was not filed within 30 days after the Chapter 13 creditors' examination. Although the court recognized that the rules did not explicitly provide for a new time limit for objections after a conversion, the court held that the conversion restarted the time limit for objections to exemptions and that the trustee's objection was timely. ***In re* Jenkins, 162 B.R. 589 (Bankr. M.D. Fla. 1993)**.

RETIREMENT PLANS. The debtor owned an interest in two retirement plans established by two companies for their retired directors. The plans were paid from the companies' general revenues on an annual basis and did not create any fund or trust corpus. The plans were not ERISA qualified. The plans had spendthrift clauses restricting the debtor's transfer rights as to future payments. The court held that the plans did not create trusts excludible from the bankruptcy estate. ***In re* Hanes, 162 B.R. 733 (Bankr. E.D. Va. 1994)**.

CHAPTER 12-*ALM* § 13.03[8].*

ATTORNEY-CLIENT PRIVILEGE. The FmHA sought conversion of the debtor's Chapter 12 case to Chapter 7 for fraud in attempting to hide assets belonging to the bankruptcy estate. During the Rule 2004 examination of the debtor, the FmHA discovered that the debtor had not disclosed in the bankruptcy schedules bank account funds

resulting from the sale of collateral securing an FmHA loan to the debtor. The debtor stated that the debtor in preparation for the bankruptcy filing had told the debtor's attorney's certified legal assistant (CLA) that the account existed. The FmHA sought to depose the CLA but the debtor invoked the client-attorney privilege to bar the CLA from giving any information about the preparation of the bankruptcy schedules. The court held that the privilege did not exist in this case because the information involved only the financial facts required to be reported by all debtors. In addition, even if the privilege existed, the debtor lost the privilege when the debtor disclosed that the CLA had been given the information about the account. ***In re* French, 162 B.R. 541 (Bankr. D. S.D. 1994)**.

ELIGIBILITY. For the taxable year preceding the filing for Chapter 12, the debtor's Schedule F gross income included income from the sale of farm equipment and income from custom farming work done for third parties. The court held that the income from these items was farm income for Chapter 12 eligibility purposes because the income was listed under Schedule F, the items involved farming and the income was used in the farm operation. ***In re* Barnett, 162 B.R. 535 (Bankr. W.D. Mo. 1993)**.

PLAN. A secured creditor objected to the debtor's Chapter 12 plan as unfeasible. The plan was based on increased income from the sale of timber and hay, profit from a cattle operation for which the debtor had only tentative funding, and income from the debtor's two nonfarm jobs. The court confirmed the plan, holding that most of the increase in profits from the hay and timber sales and the cattle operation was not needed to adequately fund the plan and that if the debtor was unable or unwilling to maintain the two jobs and defaulted on the plan, the creditor was protected by its ability to bring foreclosure upon default by the debtor. ***In re* Barnett, 162 B.R. 535 (Bankr. W.D. Mo. 1993)**.

FEDERAL TAXATION-*ALM* § 13.03[7].*

DISCHARGE. More than two years before the debtor filed for bankruptcy, the debtor met with an IRS agent about unpaid federal income taxes from previous years. The agent and the debtor filled out substitute Forms 1902-B for each year and filled in the personal information on Forms 1040 for each year. The debtor signed only the 1902-B Forms. The debtor sought a ruling that the substitute forms constituted filings for purposes of Section 523(a)(1)(B)(i), allowing the discharge of taxes for which a return was filed more than two years before the bankruptcy filing. The court held that although, in most cases, a substitute form filled out by the IRS did not constitute a filing, where the debtor signs the forms as an acknowledgement of the debtor's liability for the taxes, the substitute forms would constitute a filing for purposes of Section 523(a)(1)(B)(i). ***In re* Lowrie, 162 B.R. 864 (Bankr. D. Nev. 1994)**.

CONTRACTS

MUTUAL MISTAKE. The plaintiff sold several combines to the defendant who traded-in several pieces of farm equipment as part of the downpayment. The plaintiff filled out the contract of sale and listed all of the equipment but failed to subtract from the value of two tractors, liens against the tractors. Before the error was discovered, the plaintiff had taken possession of the tractors and paid the liens against them. The contract was modified four months after the signing of the original contract but the error was still not discovered until three months after the contract was amended. The plaintiff sought reformation of the contract for mutual mistake or unjust enrichment. The defendant argued that the plaintiff should be bound by the terms of the contract because the contract was written by the plaintiff, the plaintiff had the responsibility for determining the value of the traded-in pieces, the defendant relied on the "bottom-line" cost of the contract, and any mistake was made only by the plaintiff in failing to identify the liens in the value of the traded-in tractors. The court held that a mutual mistake occurred in that both parties accepted the contract valuation of the tractors; therefore, the plaintiff was awarded the cost of payment for those liens. **York Equipment, Inc. v. Ashwill, 510 N.W.2d 79 (Neb. Ct. App. 1993)**.

UNCONSTITUTIONAL IMPAIRMENT. The plaintiff was a farm implement dealer. The defendant was a farm implement manufacturer which had purchased the manufacturing of farm implements from a bankruptcy company. When the plaintiff went out of business, the plaintiff sought, under N.C. Code § 51-07-01, to have the defendant accept in payment for a debt the returned inventory of spare parts purchased from the previous company which were still listed in the defendant's price list and catalog. The defendant argued that its purchase of the former company was free and clear of any prior obligations of the company and that N.C. Code § 51-07-01 unconstitutionally impaired that contract by requiring the defendant to accept the plaintiff's prior inventory. The court held that the defendant was not impaired by having to accept parts currently on its price list and that even if the contract was impaired, the state had a significant public purpose in protecting distributors of vehicles and farm implements of companies which are sold to new owners. **Farmers Union Oil Co. v. Allied Products Corp., 162 B.R. 834 (D. N.D. 1993)**.

ENVIRONMENT

GROUND POLLUTION-*ALM* § 2.03[2].* The defendants were previous owners of the plaintiff's land and had operated a gas processing plant on the property. The plant dumped several toxic contaminants on the soil, polluting the ground and water with continuing pollution effects. The plaintiff used the property for farming and brought an action in continuing nuisance, continuing trespass and negligence. The defendants argued that the actions in nuisance and trespass were improper because one cannot create a nuisance or trespass on one's own property. The court held that an action in continuing nuisance and continuing trespass could be brought by a subsequent owner. The defendants also argued that the defendant was not in the class of persons to which the defendant's owed a duty to disclose the contamination because the plaintiff was not the first purchaser from the defendants. The court held that because the contamination violated public statutes against pollution, the plaintiff was one of the class of persons protected by the statute. **Newhall Land & Farming**

v. Superior Court, 23 Cal. Rptr.2d 377 (Cal. Ct. App. 1993).

FEDERAL AGRICULTURAL PROGRAMS

COMMUNITY LOANS. The FmHA has adopted as final regulations providing for the Community Facility loans to assist rural communities of 5,000 or less inhabitants in obtaining adequate drinking water. **59 Fed. Reg. 11530 (March 11, 1994)**.

CROP INSURANCE-*ALM* § 13.04[1].* The FCIC has adopted as final regulations consolidating the policy provisions for small grains (wheat, barley, flax, oats and rye) into one policy and providing for coverage for late planting, prevented planting, malting barley and winter wheat. **59 Fed. Reg. 9382 (Feb. 28, 1994)**.

The FCIC has issued interim regulations for crop insurance for figs to offer insurance on figs with added coverage for quality adjustment. **59 Fed. Reg. 9614 (March 1, 1994)**.

DISASTER PAYMENTS-*ALM* § 10.03[4].* The CCC has adopted as final regulations amending the livestock emergency programs (1) to simplify the method of determining total livestock feed needs, (2) to change the method of determining pasture value, (3) to apply the $50,000 payment limitation to crop years instead of calender years, and (4) to alter the method of calculating interest on refunds due the CCC. **59 Fed. Reg. 9918 (March 2, 1994)**.

In 1991, the plaintiff suffered loss of a cotton crop due to excessive rains and applied to the ASCS for disaster credit. The local committee denied a portion of the request by reducing the yield because it found that the plaintiff had planted the cotton using substandard farming techniques in that the land was too wet and grassy. The committee hearing included testimony from other local cotton farmers as to planting techniques and crop successes in 1991. The court held that the ASCS denial of a portion of the disaster benefits was not arbitrary or capricious and was supported by the evidence presented. **Brouillette v. U.S.D.A., 840 F. Supp. 55 (W.D. La. 1993)**.

HERBICIDES. The plaintiff was a family farm corporation which applied to its soybean crop a herbicide manufactured by the defendant. The label on the herbicide stated that rotational crops could be planted on applied acres 18 months after the application. The plaintiff planted sugar beets on the land in subsequent crop years which suffered carryover damage. The defendant had meanwhile changed the label to provide for a 24 month waiting period before planting of rotational crops. The plaintiff alleged that the defendant was negligent in not properly labeling the herbicide with the proper carryover period. The court held that the negligence claim was expressly preempted by FIFRA. **Quad R Farms v. American Cyanamid Co., 840 F. Supp. 694 (D. Minn. 1993)**.

MEAT AND POULTRY INSPECTION. The FSIS has issued proposed regulations amending the meat inspection regulations for meat production using advanced meat/bone separation machinery and recovery systems. **59 Fed. Reg. 10246 (March 3, 1994)**.

The FSIS has announced that it is considering proposed regulations amending the regulations governing poultry products produced by mechanical deboning and is seeking public comment. **59 Fed. Reg. 10230 (March 3, 1994)**.

PERISHABLE AGRICULTURAL COMMODITIES ACT-*ALM* § 10.05[2].* A produce company sold fresh produce to the debtor. For several months, the sales were made with no agreement on when payment was due for the produce. The produce company alleged that at some time it sent a letter to the debtor which set a 30 day payment period for all shipments and the invoices began to state that payment was due in 30 days. However, the produce company provided no evidence of when the letter was sent or signed by the debtor. The court held that the alleged agreement was ineffective to establish extended payment terms for purposes of the PACA trust requirements. The court also held that the payment terms statements on the invoices were insufficient to establish the extended payment terms because the invoices arrived after the produce was received by the debtor. ***In re* Lombardo Fruit & Produce Co., 12 F.3d 110 (8th Cir. 1993), *aff'g*, 150 B.R. 941 (E.D. Mo. 1993), *aff'g in part and rev'g in part*, 106 B.R. 593 (Bankr. E.D. Mo. 1989)**.

CORRECTION: The citation for *In re Lombardo Fruit & Produce Co.*, Vol 5, No 6, p. 45, should have read as follows:***In re* Lombardo Fruit & Produce Co., 12 F.3d 806 (8th Cir. 1993), *rev'g in part and aff'g in part*, 150 B.R. 941 (E.D. Mo. 1993), *aff'g in part and rev'g in part*, 107 B.R. 952 (Bankr. E.D. Mo. 1989)**. The summary should have included the following sentence at the end: "The appellate court reversed, holding that the produce stall purchase was separate from the produce transactions and did not affect the seller's PACA trust benefits; however, the court held that the seller did not qualify for the PACA trust because the parties did not have a prior written agreement for payment terms for the produce sales.

PEANUTS. The ASCS has adopted as final regulations establishing the 1994 national poundage quota for quota peanuts at 1,350,000 short tons. **59 Fed. Reg. 9065 (Feb. 25, 1994)**.

SOYBEANS. The FGIS has adopted as final regulations revising the standards for soybeans. **59 Fed. Reg. 10569 (March 7, 1994)**.

TUBERCULOSIS. The APHIS has adopted as final regulations adding a classification "Accredited-free (suspended) State" for a state whose accredited-free status has been suspended because of detection of tuberculosis in cattle or bison in the state. **59 Fed. Reg. 9071 (Feb. 25, 1994)**.

FEDERAL ESTATE AND GIFT TAX

CHARITABLE DEDUCTION-*ALM* § 5.04[4].* The taxpayer established an irrevocable charitable lead unitrust providing an annual payment to a charitable organization of 6 percent of the net fair market value of trust property at the beginning of each taxable year for the lifetime of the taxpayer. The remainder of the trust passed to the taxpayer's family members. The taxpayer's guardian, through a probate

court order transferred a specified sum to the trust and had the power to make subsequent contributions. The IRS ruled that annual distribution to the charity would be deductible from the trust taxable income, that the transfer of property to the trust would, in part be eligible for a charitable gift tax deduction, and that the trust corpus would not be included in the taxpayer's gross estate. **Ltr. Rul. 9406030, Nov. 17, 1993**.

The taxpayer established a ten-year irrevocable charitable lead unitrust providing an annual payment to a charitable organization of 8 percent of the initial fair market value of trust property at the trust's inception. The remainder of the trust passed to the taxpayer's family members. The taxpayer retained the right to substitute property of equal value for the trust corpus. The IRS ruled that annual distribution to the charity would be deductible from the trust taxable income, that the value of the annuity interest was eligible for a charitable income tax deduction, and that the trust corpus would not be included in the taxpayer's gross estate. **Ltr. Rul. 9407014, Nov. 18, 1993**.

GENERATION SKIPPING TRANSFER TAX-*ALM* § 5.04[6].* A decedent's will transferred stock in a family corporation to two irrevocable pre-1985 trusts for the decedent's children and grandchildren. The trusts were identical except for the beneficiaries. The two primary beneficiaries decided to split the business into two separate businesses and proposed to modify the trusts to have each trust own the stock from its own business. The beneficiaries also modified the trustee voting powers. The IRS ruled that the modifications to the trusts would not subject the trusts to GSTT. **Ltr. Rul. 9406033, Nov. 17, 193**.

MARITAL DEDUCTION-*ALM* § 5.04[3].* The decedent's will bequeathed property to a charitable pooled income trust which provided for monthly payments to the decedent's surviving spouse from the income from the bequeathed property. At the death of the surviving spouse, the bequeathed property passed to the charitable organization. No person had a right to appoint the trust property to any person other than the surviving spouse. The IRS ruled that the bequest of the property to the pooled income trust was eligible for the marital deduction as QTIP. **Ltr. Rul. 9406013, Nov. 10, 1993**.

The IRS has adopted as final regulations governing QTIP. The IRS acknowledged that *Pennsylvania Nat'l Bank & Trust Co. v. U.S., 387 U.S. 213 (1967)* held that a right to receive a specified periodic payment from a trust qualified as a right to receive a specific portion of the trust for purposes of the marital deduction. However, the final regulations adopted the definition of "specific portion" enacted by Pub. L. No. 102–486, § 1941, 106 Stat. 2823 (1992), *adding* I.R.C. §§ 2056(b)(10), 2523(e)(2), to include only interests determined on a fractional or percentage basis. The *Pennsylvania* holding was still applicable for estates and gifts made prior to the effective date of the 1992 act. The final regulations also changed the proposed regulations to add that the executor was responsible for making the QTIP election as to property not in the estate, e.g., an intervivos trust. The final regulations also added the availability of a protective QTIP election if at the time of the filing of the return, a bona fide issue remains as to the amount or nature of the property received by the surviving spouse or whether an asset is included in the gross estate. Although the IRS acknowledged two federal appeals courts' decisions to the contrary, *Est. of Robertson v. Comm'r, 94-1 U.S. Tax Cas. (CCH) ¶ 60,153 (8th Cir. 1994), rev'g, 98 T.C. 678 (1992)* see p. 45 *supra; Est. of Clayton v. Comm'r, 976 F.2d 1486 (5th Cir. 1992), rev'g, 97 T.C. 327 (1991)*, the final regulations provide that QTIP property does not include trust property passing to the surviving spouse contingent upon the executor's election to treat the property as QTIP. **59 Fed. Reg. 9642 (March 1, 1994)**.

FEDERAL INCOME TAXATION

BUSINESS DEDUCTIONS. A corporation was not allowed deductions for repairs made to a house owned by the corporation but used by the corporation's sole shareholder as a residence. The court held that the deductions were disallowed because the repairs benefitted only the shareholder. In addition, the court held that the repairs constituted constructive dividends to the shareholder. **Gill v. Comm'r, T.C. Memo. 1994-92**.

COOPERATIVES-*ALM* § 14.03.* The taxpayer was a subchapter T nonexempt cooperative. The taxpayer argued that the taxpayer was not subject to alternative minimum tax (AMT) because a cooperative was not able to apply any minimum tax credit to reduce the AMT in taxable years that the regular tax exceeded the tentative minimum tax. The IRS did not respond to the taxpayer's argument but ruled that cooperatives are subject to the AMT under statutory construction, the regulations and the legislative history. The ruling notes that patronage dividends can be deducted from AMT; therefore, if a cooperative distributes all of its income, the cooperative would not have any AMT liability. **Ltr. Rul. 9407001, Nov. 2, 1993**.

COURT AWARDS AND SETTLEMENTS-*ALM* § 4.02[14].* The taxpayer's employment was terminated and the company offered the taxpayer a higher termination settlement if the taxpayer signed a release of all claims against the company. The taxpayer signed the release and sought to exclude the settlement payment as a personal injury settlement payment. The court held that because the release involved all claims against the company, the taxpayer could not show that the settlement was received for any injury to the taxpayer and the settlement must be included in the taxpayer's taxable income. **Taggi v. U.S., 94-1 U.S. Tax Cas. (CCH) ¶ 50,085 (S.D. N.Y. 1993)**.

DISASTER AREAS-*ALM* § 4.05[2].* The IRS has announced the disaster areas designated by the President for December 4, 1992 through December 31, 1993 for purposes of eligibility of taxpayers to qualify for I.R.C. § 164(i) deferral of claiming losses from those disasters. **Rev. Rul. 94-14, I.R.B. 1994-9, 38**.

DISCHARGE OF INDEBTEDNESS-*ALM* § 4.02[15].* In 1990, the taxpayer settled a recourse debt for less than fair market value, thus realizing discharge of indebtedness income. The taxpayer was insolvent at the time of the transaction. However, the taxpayer's tax return preparer mistakenly claimed the income as capital gains. After an audit in 1993, the error was discovered and the taxpayer applied to the IRS for an extension of time to file

the I.R.C. § 108(b)(5) election for insolvent taxpayers to reduce the basis of other assets to the extent of the income from the discharge of indebtedness. The IRS ruled that good cause was shown and allowed the extension. **Ltr. Rul. 9406015, Nov. 12, 1993**.

HOBBY LOSSES-*ALM* § 4.05[1].* The taxpayers were a doctor and spouse who operated a horse breeding and racing business. The court held that the business was not operated for profit, thus limiting deductions to income, because the taxpayers' recordkeeping was insufficient to evaluate the success of the business, the taxpayers did not seek financial advice to make the business profitable and the taxpayers had a history of losses from other cattle breeding and real estate rental businesses. **Meaney v. Comm'r, T.C. Memo. 1994-94**.

LOSSES-*ALM* § 4.05[1].* Starting in the 1920's, the taxpayer and its predecessor had purchased dairies all over the United States in order to establish a national business for dairy products. The taxpayer ceased the operations of many of the dairies in the 1970's and claimed losses for abandonment of intangibles associated with those dairies, including production efficiency, distribution system, customer bases, trade names and "a reliable source of supply." In a massive opinion discussing each dairy, the court held that, except for the intangible of "a reliable source of supply," the taxpayer failed to either show abandonment of the intangible asset or that the asset had any value separate from goodwill (which would allow only a capital loss deduction). **Kraft, Inc. v. U.S., 94-1 U.S. Tax Cas. (CCH) ¶ 50,080 (Fed. Cls. 1994)**.

PASSIVE ACTIVITY LOSSES-*ALM* § 4.05[3].* The taxpayer owned land and a building and leased the property to a wholly-owned S corporation under a May 1983 lease. The corporation operated a business on the property in which the taxpayer materially participated. The taxpayer sold the property to the corporation with resulting taxable gain. The taxpayer's rental of the property to the corporation constituted a passive activity and the taxpayer had previously disallowed passive activity deductions. The IRS ruled that the gain from the sale of the property was passive gross activity income and could be offset by previously disallowed passive activity deductions. **Ltr. Rul. 9406010, Nov. 9, 1993**.

PENSION PLANS. For plans beginning in February 1994, the weighted average is 7.37 percent with the permissible range of 6.64 to 8.11 percent for purposes of determining the full funding limitation under I.R.C. § 412(c)(7). **Notice 94-19, I.R.B. 1994-10, 16**.

RETURNS. The IRS has announced filing extensions for farmers who were prevented from timely filing of returns by March 1, 1994 because of ice storms in Mississippi, Tennessee, Arkansas, and Louisiana. **IRS News Release Feb. 18, 22, 24, 1994**.

LANDLORD AND TENANT

EMBLEMENTS-*ALM* § 13.05.* The decedent was a life tenant of farm land and had cropshare leased the land. The decedent died after crops had been planted on the land but before the crops were harvested. The plaintiff was the remainder holder of the title to the farm land and sought recovery of the decedent's share of the crop. The defendants were the decedent's estate and heirs who claimed the crop share under the doctrine of emblements under Or. Rev. Stat. § 91.230. The court held that the plaintiff remainder holder was entitled to the crop share because the doctrine of emblements did not apply. The court held that the doctrine of emblements did not apply because the doctrine protected a tenant's rights to a planted crop and not the lessor's rights to the crop. As between successors of a lessor, the determination is about rent from the property and not crops planted by the lessor, although the court conceded that a different result could apply if the lessor's involvement in the crop was greater. **Simpson v. McCormmach, 866 P.2d 489 (Or. Ct. App. 1994)**.

RIPARIAN RIGHTS

DUTY TO MAINTAIN DITCH. The plaintiffs owned a hay meadow which gently sloped into a ditch which ran from the plaintiff's property through the defendant's property. The plaintiff had dredged the ditch, including the portion on the defendant's property, several times over 30 years in order to allow the meadow to drain sufficiently to grow canary grass as a cattle pasture. The defendant refused to clear the ditch in 1983 and thereafter, claiming that the ditch had been dredged too deeply, causing diminished crops on the land surrounding the ditch. The plaintiff argued that Neb. Rev. Stat. § 31-224 required the defendant to annually clean the ditch of all obstructions. The defendant argued and the trial court held that the statute applied only to obstructions caused by the defendant and that the ditch filled in with natural erosion. The appellate court held that the statute applied to require cleaning if the defendant had knowledge of the obstruction, whether or not caused by the defendant. **Barthel v. Liermann, 509 N.W.2d 660 (Neb. Ct. App. 1993)**.

SURFACE WATER. The plaintiff owned farm land downgrade from the defendant. The defendant replaced a culvert under a driveway, causing water on over 200 acres to flow suddenly over the plaintiff's land, flooding several fields and destroying roads and culverts. The defendant also breached a dike which also sent 70 acres of water flowing over the plaintiff's land and caused flooding and silt deposits. The court held that although the defendant had the right to drain surface water onto the plaintiff's land, the drainage must be done in a reasonable and careful manner and without negligence. The court found that the defendant acted negligently in failing to obtain professional advice in replacing the culvert and breaching the dike so as to minimize the damage to the plaintiff's property; therefore, the defendant was liable for the damages caused by the draining. **Hickman v. Hunkins, 509 N.W.2d 220 (Neb. Ct. App. 1992)**.

SECURED TRANSACTIONS

REPOSSESSION-*ALM* § 13.01[6].* After the plaintiff defaulted on a loan, the defendant bank sent two employees to repossess the farm equipment collateral for the loan. The employees arrived when only the plaintiff's twelve year old son was present and moved a horse to the back of the barn where the horse could reach more food than it should eat, resulting in injury to the horse from colic. The employees

also moved a locked and braked truck, causing damage to the land and the truck's brakes. The employees took the plaintiff's tractor and a disc owned by the plaintiff's neighbor, breaking several blades in the process. After the plaintiff paid the loan balance and the repossession costs, the defendant bank refused to return the equipment unless the plaintiff signed a release of the bank's liability for damages caused during the repossession. The plaintiff sued for conversion for actual and punitive damages. The court held that the bank was liable for criminal conversion in that its employees committed criminal mischief in their unreasonable injury to the plaintiff's land, horse and equipment in the repossession. The court held that the failure of the bank to return the equipment after the plaintiff paid the loan and costs was also conversion. The court also held that the plaintiff failed to provide sufficient evidence of the value of the property involved and the amount of value loss from the injury during repossession. The court upheld the punitive damage award even though actual damages was reversed, because the law allowed at least nominal damages for criminal conversion. **Star Bank, N.A. v. Laker, 626 N.E.2d 466 (Ind. Ct. App. 1993)**.

SALE OF COLLATERAL-*ALM* § 13.01[6].* The debtors operated a fish farm and had granted to a bank security interests in the fish and equipment. After the debtors defaulted on the loans, the bank attempted to harvest the fish and dismantle some of the equipment, However, the persons hired to harvest the fish were unqualified and did not have the proper equipment to harvest the fish. Consequently, many of the fish died before they could be sold. In addition, some evidence indicated that the persons hired to harvest the fish sold the fish without reporting the proceeds to the bank. In attempting to remove the equipment, much of the equipment was damaged because the removers did not have adequate knowledge about the equipment. The debtors sought to bar a deficiency judgment on the loans because the collateral was not disposed of in a reasonably commercial manner. The bank argued that this standard only applied to the sale of the collateral after it was in the possession of the bank. The court held that the bank had possession of the fish and equipment because it had access to the property at all times and that disposition of collateral included the gathering of the collateral. The court also held that the bank's actions amounted to reckless destruction of the collateral and barred any relief to the bank in excess of the collateral. **Marks v. Powell, 162 B.R. 820 (E.D. Ark. 1993)**.

STATE REGULATION OF AGRICULTURE

MILK. The plaintiff was a milk marketing cooperative which had requested the Pa. Milk Marketing Board (PMMB) to provide that all premiums mandated by PMMB in two marketing areas be pooled among all eligible Grade A milk producers. The PMMB decided to reject the request because the pooling would result in a disadvantage to marketers in the two areas because the producers would receive less for their milk than producers in other areas, resulting in more difficulty for the marketers to obtain milk in the two areas. In addition, the PMMB found that the pooling of premiums would increase administrative costs, resulting in less payments to the producers in the two areas. The court held that PMMB decision was supported by adequate evidence and was rationally based on that evidence. **Milk Marketing, Inc. v. Pa. Milk Marketing Board, 635 A.2d 1110 (Pa. Cmwlth. 1993)**.

STATE TAXATION

LANDFILL FEE. The plaintiffs were agricultural land owners who were assessed a per acre fee by the county which was used to defray the estimated costs of disposing of wastes generated by agricultural operations in the county. The plaintiffs argued that the fee was a special tax invalidly adopted in violation of Calif. Cost. Art. XIII A, Sec. 4, because the fee was levied without relation to the individual owner's use of the landfill. The court held that the fee was valid as part of the county's reasonable effort to control illegal dumping and to protect the health and environment of the county citizens. **Kern County Farm Bureau v. County of Kern, 23 Cal. Rptr.2d 910 (Cal. Ct. App. 1993)**.

TRESPASS

TIMBER. The defendant was a logging company which contracted with the owners of timberland to harvest trees on the land. Although the owners owned full title to most of the land, the owners only owned a one-fourth undivided interest in a portion of the land. When the defendant began to harvest the timber on the tract, the other owners, the plaintiffs, informed the defendant that the tract was owned by the plaintiffs but the defendant continued to harvest trees until prevented by an injunction. The defendant then offered to remove the cut trees but the plaintiffs did not give such permission until the trees became unmarketable. The trial court had instructed the jury that the plaintiff could recover treble the value of the trees improperly cut if the jury found that the defendant had acted willfully, wantonly or maliciously in cutting the trees. The appellate court reversed, holding that the treble damage statute, W. Va. Code § 61-3-48a, provided for treble damages if the trees were cut without written permission of the owners; therefore, no willful, wanton or malicious act by the defendant was required. The defendant also argued that the damages should be reduced because the plaintiffs failed to mitigate their damages by allowing the defendant to remove the cut timber in sufficient time to sell the wood at full market value. The court held that the plaintiffs made a reasonable effort to protect their property when they first informed the defendant that the defendant was cutting trees on their property. **Chesser v. Hathaway, 439 S.E.2d 459 (W. Va. 1993)**.

CITATION UPDATES

Albertson's, Inc. v. Comm'r, 12 F.3d 1529 (9th Cir. 1993), *aff'g in part and rev'g in part*, 95 T.C. 415 (1991) (investment tax credit) see p. 30 *supra*.

Pepcol Mfg. Co. v. Comm'r, 13 F.3d 355 (10th Cir. 1993), *rev'g*, 98 T.C. 127 (1992) (energy investment tax credit) see p. 38 *supra*.

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WORKERS' COMPENSATION

ELIGIBLITY-*ALM* § 3.05[1].* The appellant was an insurer of a company which contracted with independent loggers to harvest timber. The appellee Department of Insurance and Finance (DIF) had ordered the appellant to rebate the workers' compensation insurance premium paid by the insured for the loggers. The appellant argued that the loggers were "subject employees" because the insured had the right to control the work of the loggers and the loggers could not hire employees without prior permission from the insured. The court held that the rule was that an employer must have exercised actual control over the workers in order for the workers to be subject employees and that in this case, no control over the harvesting methods was applied. In addition, the court held that because the logging contract provided that the loggers were responsible for all labor costs, the insured did not have control over the hiring of persons employed by the loggers. Therefore, the loggers were independent contractors and the insured was not required to pay workers compensation insurance premiums. **Port Blakely Tree Farms v. Nat'l Council on Comp. Ins., 865 P.2d 387 (Or. Ct. App. 1993)**.

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