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Cases, Regulations and Statutes

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FOOTNOTES

1. I.R.C. § 162(a).
4. See n. 2 supra.
7. Id.
9. Id.
10. I.R.C. § 168(c)(1).
14. Id.
15. Id.
17. Id.
18. Id.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

ADVERSE POSSESSION

ADVERSE USE. The plaintiff’s land was separated from the defendant’s land by a road but the plaintiff’s land actually extended several feet onto the defendant’s side of the road. The defendant had built a driveway across the disputed land to the road, maintained a shed on the disputed land, and grew crops on the disputed land as close as possible to the road. The plaintiff argued that the defendant’s use of the land was permissive; therefore, no adverse possession could occur. The court held that permission was not supported by the evidence because the plaintiffs never objected to the defendant’s predecessors in title use of the disputed land and the plaintiff had asked the defendant for permission to use the shed on the disputed land. The court held that the defendant’s construction of the driveway, mowing and growing of crops were sufficient use of the disputed land to support acquisition of the land by adverse possession. Sierens v. Frankenreider, 632 N.E.2d 1055 (Ill. Ct. App. 1994).

The plaintiff had cleared timber from the defendant’s property and filed suit to quiet title by adverse possession to the area where the trees were cut. The plaintiff claimed to have built a fence around the area, cleared the area, built a shed on the property, maintained a garden and constructed a pond. Expert witnesses, however, testified that aerial photographs did not indicate any activity on the disputed land until the timber cutting operation began. The court held that the trial court’s decision for the defendant was supported by the evidence. In addition, the trial court’s failure to award damages for the cut trees was also upheld because the defendant failed to show how many trees were cut. Phillips v. Fisher, 634 So.2d 1305 (La. Ct. App. 1994).

BANKRUPTCY

GENERAL-ALM § 13.03.*

DISCHARGE. The debtors operated a dairy farm and filed for Chapter 7. The debtors had leased cows and calves from the creditor and had entered into a purchase contract for cows and calves in which the creditor retained a security interest until the contract payments were made. The debtor/husband sold most of the leased and contract animals without the permission of the creditor and without remitting the proceeds to the creditor or making the lease or contract payments. The debtor/wife did not participate in the sale of the animals but was found to have participated in the dairy as a partner with the debtor/husband. The court held that the debtor/husband’s sale of the leased and contract animals was a willful and malicious injury of the creditor’s rights in the property; therefore, the creditor’s claim for the rent and contract price was nondischargeable under Section 523(a)(6). The claim was also held nondischargeable as to the debtor/wife because the wife was a partner in the business. In re Bullington, 167 B.R. 157 (Bankr. W.D. Mo. 1994).

EXEMPTIONS

CATTLE. The debtor dairy farmer claimed three bulls as exempt tools of the trade under Vt. Stat. § 2740(2). In denying the exemption, the Bankruptcy Court distinguished the Vermont exemption as much narrower than the exemption statutes involved in the cases which allowed such an exemption. The court also noted that an exemption for cattle was otherwise provided; thus, indicating that cattle were not intended by the legislature to be exempt as tools of the trade. The appellate court reversed, citing precedent from other circuits that farm animals can qualify as tools of the trade for farmers. The appellate court noted that other tools of the trade were also eligible for other specific exemptions, e.g., trucks were tools of a trade and eligible for the motor vehicle exemption. The court also noted that the value limitation on exempt tools of a trade would prevent abuse by debtors and limit the detrimental effect on creditors. In re Parrotte, 22 F.3d 472 (2d Cir. 1994), rev’g unrep. D. Ct. dec. aff’g, 143 B.R. 622 (Bankr. D. Vt. 1992).

LIFE INSURANCE. The debtor claimed an exemption for the proceeds of a life insurance policy in an access account established on the pre-petition death of the debtor’s spouse. The trustee argued that the exemption was available only as to unmatured policies and that once the proceeds were paid, the money no longer qualified as an insurance policy. The court held that the exemption covered the proceeds of the insurance policy access account established.

* Agricultural Law Manual (ALM). For information about ordering the Manual, see the last page of this issue.
would fall more heavily on the debtor than two trials would for the separate trial outside of bankruptcy would deplete the automatic stay to litigate the debtor's and president's was not a debtor in the case. The IRS sought relief from the responsible person in the corporation. The IRS had assessed taxes and the IRS had filed a claim in the debtor's Chapter was projected. require requirement by claiming that in the plan no such income income during the plan and the debtor could not negate that because the debtor's plan provided for payment of such income during the plan and the debtor could not negate that requirement by claiming that in the plan no such income was projected. In re Rowley, 22 F.3d 190 (8th Cir. 1994), aff'g unrep. D. Ct. dec. aff'g, 143 B.R. 547 (Bankr. D. S.D. 1992). FEDERAL TAXATION-ALM § 13.03[7].

AUTOMATIC STAY. The debtor was a vice-president of a corporation which had failed to pay federal employment taxes and the IRS had filed a claim in the debtor’s Chapter 13 case for the 100 percent penalty against the debtor as a responsible person in the corporation. The IRS had assessed the same penalty against the corporation’s president who was not a debtor in the case. The IRS sought relief from the automatic stay to litigate the debtor’s and president’s liability for the employment taxes, arguing that a single trial on the issue would be more efficient. The court held that relief from the automatic stay would not be granted because a separate trial outside of bankruptcy would deplete the bankruptcy estate; thus, the hardship of the separate trial would fall more heavily on the debtor than two trials would harm the IRS. In re Robinson, 94-2 U.S. Tax Cas. (CCH) ¶ 50,326 (E.D. Va. 1994).

AVOIDABLE TRANSFERS. The debtor was a corporation owned by one shareholder. The shareholder was also a shareholder in another corporation which operated a similar business in another city but had ceased business. The assets of the defunct corporation were transferred to the debtor corporation for no consideration. Within one year before the bankruptcy petition was filed, the debtor paid the employment taxes owed by the defunct corporation. The trustee sought to recover the tax payment under Section 548(a)(2) as a payment made when the debtor was insolvent. The court held that insufficient evidence was available to determine whether the debtor was insolvent at the time of or as a result of the tax payment to grant summary judgment. The court also held that, under Section 502(d), if the tax payment is determined to be avoidable, the claims of the IRS in the case would be enjoinable until the tax payment was repaid to the trustee. In re Larry's Marineland of Richmond, Inc., 166 B.R. 871 (Bankr. E.D. Ky. 1993).

AVOIDABLE LIENS. The IRS had filed tax liens against the debtors’ property in 1992 and the debtors filed for Chapter 7 in 1993. The debtors sought to avoid the tax liens against property listed in I.R.C. § 6323, using the trustee’s avoidance powers, under 11 U.S.C. § 545(2), as a good faith purchaser. The court held that a trustee has the power to avoid tax liens against such property but that the debtors do not have the power to avoid such liens; therefore, the debtors had no standing to bring the avoidance action. In re Robinson, 166 B.R. 812 (Bankr. D. Vt. 1994).

CLAIMS. The IRS failed to file a claim in the case until more than one year after the bar date for claims. The IRS had been sent timely and sufficient notice of the bankruptcy case and provided no explanation for the delay in filing. The court held that the untimely filed claims would not be allowed in the case. Some of the IRS claims were secured by tax liens and the trustee sought to avoid those liens as not valid against the proceeds from the sale of the debtor’s property under I.R.C. § 6323 and 11 U.S.C. § 545. The court held that the liens could not be avoided because there was sufficient other property to secure the liens. In re Benny’s Leasing, Inc., 166 B.R. 823 (Bankr. W.D. Pa. 1993).

The debtor filed a Chapter 7 case and listed federal employment tax claims. Notice of the case and the bar date for filing claims was sent to the IRS but not the U.S. Attorney’s office. The IRS failed to file a claim until after the claims bar date and the trustee sought to disallow the claims as untimely filed. The IRS argued that the notice was defective because notice was not sent to the U.S. Attorney’s office and that an extension of the time to file the claim should be allowed because the debtor had not filed a return as to the taxes involved. The court held that where a claim involved only taxes, the U.S. Attorney’s office need not receive a notice and that the debtor’s listing of the employment tax claim on its bankruptcy schedules was sufficient notice to the IRS of the claim. In addition, the court held that an extension could be granted only if applied for before the claims bar date. In re Larry Merritt Co., 166 B.R. 875 (Bankr. E.D. Tenn. 1993).

DISCHARGE. When the debtor filed the Chapter 11 petition, the IRS was in the process of auditing the debtor’s tax returns. The debtor did not list any tax claims and the IRS did not file any tax claims in the bankruptcy case. The debtor’s plan was confirmed without objection but did not contain any provision for payment of taxes. After the plan was confirmed, the IRS issued a notice of deficiency for four taxable years and penalties for substantial underpayment of taxes, all of which would have been nondischargeable if filed in the bankruptcy case. The debtor argued that the plan confirmation discharged all debts, including the taxes, or that the tax claims were barred by res judicata of the plan confirmation or laches. The court held that nondischargeable tax claims are not affected by a plan confirmation, the plan confirmation was not res judicata as to nondischargeable taxes, and the doctrine of laches cannot be asserted against the IRS where the IRS has assessed the taxes within the statute of limitations for assessments. Matter of Fein, 22 F.3d 631 (5th Cir. 1994).
The debtor claimed that the IRS claim for 1981 taxes was dischargeable. The IRS asserted that the taxes were nondischargeable because no tax return was filed. The IRS had prepared a substitute return and filed a claim in the case based on the substitute return. The debtor claimed to have filed the 1981 return by regular mail but did not produce any other evidence of payment of the taxes or filing of the return. The court held that the taxes were nondischargeable for failure to file a timely return. *In re Brown, 166 B.R. 249 (Bankr. S.D. Ala. 1994)*.


**FEDERAL AGRICULTURAL PROGRAMS**

**BRUCELLOSIS**. The APHIS has adopted as final regulations changing Texas from Class B to Class A for purposes of interstate movement of cattle. *59 Fed. Reg. 36024 (July 15, 1994)*.

**PESTICIDES- ALM § 2.04.* The plaintiff's residence was treated for termites by one defendant with pesticides manufactured by the other defendants. The plaintiff suffered from cancer of the lungs and sued the defendants for the injury based on negligence in marketing and applying the pesticides, failure to properly test the pesticide and failure to warn about the dangers of the pesticides. The plaintiff also filed actions for breach of implied warranty and strict liability for marketing and applying a dangerous and defective product. The defendant argued that the failure to warn action was pre-empted by FIFRA. The court held that the negligence action for failure to warn was pre-empted by FIFRA but that the negligence actions for failure to properly test the product were not pre-empted. The court refused to dismiss the other claims because insufficient record was available to determine if the plaintiff's actions were based on information on the pesticides' labels. *Bingham v. Terminix Intern., Co., L.P., 850 F. Supp. 516 (S.D. Miss. 1994)*.

**FEDERAL ESTATE AND GIFT TAX**

**DISCLAIMERS- ALM § 5.02[6].** The decedent's spouse died in August 1990 and the decedent died in January 1991. The decedents owned real property as tenants by the entirety and mutual funds and bank accounts as joint tenants. Within nine months after the death of the predeceased spouse, the decedent's personal representative filed a disclaimer of the decedent's interest in the predeceased spouse's property bequeathed to the spouse. The IRS ruled that the disclaimer was qualified as to the bank account and mutual fund to the extent of the predeceased spouse's contribution to the accounts because no withdrawals had been made by either owner. The IRS also ruled that because neither of the tenants by the entirety owners could unilaterally partition the property, the decedent's interest in the real property was created when the property was purchased; therefore, the disclaimer was not qualified because it was not filed within nine months after the decedent's tenancy by the entireties interest was created. *Ltr. Rul. 9427003, March 30, 1994*.

The decedent's will bequeathed property in trust to the surviving spouse with remainders in trust to the decedent's surviving children. The surviving spouse disclaimed any interest in the trust property but did not disclaim any intestate share in the decedent's estate. The decedent's children and the guardians of the grandchildren disclaimed their remainder interests in the trust. The disclaimers were all made to decrease state inheritance taxes. The disclaimed interests passed by intestacy to the surviving spouse. The surviving spouse also established a trust which would be funded at the surviving spouse's death and would be similar to the remainder trust interests established by the decedent's will. The IRS ruled that the disclaimers were effective for estate tax purposes and that the reduction in state inheritance tax and the new testamentary trusts were not consideration received for the disclaimers. *Ltr. Rul. 9427030, April 12, 1994*.

**INSTALLMENT PAYMENT OF ESTATE TAX- ALM § 5.05[1].** The decedents died in 1981 and 1987 and their estates elected to pay the federal estate tax in installments under I.R.C. § 6166. The estates included stock in a corporation in which a portion of the stock was held in escrow as security for the estate tax liens. The heirs used a reverse triangular merger to form a holding company which would acquire the original corporation stock and to form a new subsidiary. The reorganization would qualify under I.R.C. § 368(a)(1)(A). The IRS ruled that, although a Section 368(a)(1)(A) reorganization would normally cause acceleration of payment of estate tax, in this case the reorganization would not cause acceleration of the payments because the reorganization was merely a change in the form of doing business and that all other aspects of ownership and management remained the same. *Ltr. Rul. 9427029, April 12, 1994*.

**SPECIAL USE VALUATION- ALM § 5.03[2].** The decedent's estate included irrigated farmland for which the estate made the special use valuation election. In calculating the special use valuation, the estate excluded the portion of the gross rental equal to the amount of irrigation assessments. The practice in the area was to pass the irrigation assessments on to the tenants. The estate argued that (1) the passed through irrigation assessments were not part of the annual gross cash rent for the land or (2) that the irrigation assessments should be considered as tax deductible under I.R.C. § 2032A(e)(7)(A)(i) as local real estate taxes. The court held that the irrigation assessments were not deductible from the rent because the statute referred to gross cash rent which included all rent received without reduction for any of the landlord's costs of renting the land except the deductions expressly provided in the statute. The court held that the irrigation assessments were not deductible as local real property taxes, as defined by Treas. Reg. § 20.2032A-4(c), because the assessments related to a benefit, irrigation, which increased the value of
the land. Est. of Klosterman v. Comm’r, 94-2 U.S. Tax Cas. (CCH) ¶ 60,172 (9th Cir. 1994), aff’d, 99 T.C. 313 (1992).

FEDERAL INCOME TAXATION

ALTERNATIVE MINIMUM TAX. The taxpayer had been employed as a researcher and product developer. The taxpayer’s employment contract provided that the taxpayer would retain all patent rights to products developed by the taxpayer, with the company having exclusive licensing rights to the products. The company paid the taxpayer a royalty under the licensing agreements. The company continued to pay the royalties after the taxpayer ceased employment with the company. The taxpayer argued that the royalty income was not income from a trade or business and was included in qualified investment income for purposes of calculating the alternative minimum tax (AMT) allowance for deductible qualified interest. I.R.C. § 55(e)(1)(E). The court held that the taxpayer was not in the trade or business of inventing; therefore, the royalty payments were investment income for purposes of AMT. In re Owen, 166 B.R. 960 (Bankr. W.D. Okla. 1993).

BAD DEBT DEDUCTION- ALM § 4.03[7]. The taxpayer was an accountant who loaned money to a client for use in the client’s business and personal expenses. The court held that the taxpayer could not deduct the unpaid portion of the loan because the taxpayer could not have expected repayment given the taxpayer’s knowledge of the client’s finances at the time the loan was made. The taxpayer was also liable for the substantial understatement penalty for claiming the bad debt deduction, because the taxpayer failed to show any substantial authority for the bad debt deduction and failed to disclose information about the deduction on the taxpayer’s return. Mayhew v. Comm’r, T.C. Memo. 1994-310.

C CORPORATIONS- ALM § 7.02. BUSINESS DEDUCTIONS. In completing a redemption of the corporate taxpayer’s stock from an ESOP, the corporation borrowed the funds used to purchase the stock. The corporation claimed the loan fees and expenses as business deductions. The District Court held that under I.R.C. § 162(k), the fees and expenses were not deductible because they were incurred as part of a stock redemption. The appellate court reversed, holding that the purpose of the loan proceeds was irrelevant for purposes of deductibility and that the “origin of the claim,” i.e. a loan, was the proper test for deductibility. In re Kroy (Europe) Ltd., Kroy, Inc., 94-2 U.S. Tax Cas. (CCH) ¶ 50,316 (9th Cir. 1994), rev’d, 92-2 U.S. Tax Cas. (CCH) ¶ 50,611 (D. Ariz. 1992), rev’d, 92-1 U.S. Tax Cas. (CCH) ¶ 50,146 (Bankr. D. Ariz. 1992).

CONSTRUCTIVE DIVIDENDS. The taxpayer was the sole shareholder of a corporation which operated several technical schools. The corporation made several advances to the taxpayer who used the proceeds to make several real estate investments, including additional technical schools. The advances were treated on the corporation’s books as loans with interest charged and set maturity dates. The taxpayer was able to repay several of the advances but financial difficulties caused several of the loans to remain unpaid when the taxpayer filed for bankruptcy. Although the court noted that the taxpayer’s control of the corporation favored treating the proceeds as constructive dividends, the court held that the advances were bona fide loans which were not included in the taxpayer’s taxable income. In re Fischer, 94-2 U.S. Tax Cas. (CCH) ¶ 50,322 (Bankr. M.D. Tenn. 1994).

CASUALTY LOSSES- ALM § 4.05. The taxpayers owned four contiguous parcels of land, one of which contained the taxpayers’ residence. A fire destroyed the residence and the trees and shrubs on all four parcels. The taxpayers’ basis on each of the parcels was not exactly determined but the basis for all of the property was at least equal to the loss determined by comparison of the fair market values before and after the fire; therefore, the taxpayers were eligible for a casualty loss deduction for the loss of value on all four parcels. Beams v. Comm’r, T.C. Memo. 1994-301.

DISCHARGE OF INDEBTEDNESS- ALM § 4.02[15]. A partnership was composed of several limited partnerships (LPs) and owned rental real property. The property was managed by a company hired by the partnership which provided services for the business tenants. The partnership had borrowed money from a bank and had filed for Chapter 11 bankruptcy to restructure the debt. The partnership expected the restructuring to result in discharge of indebtedness income. The IRS ruled that the operation of the rental real estate was a trade or business; therefore, the indebtedness qualified as real property business indebtedness for purposes of I.R.C. § 108(c)(3) and the partnership could decrease its basis in property by the amount of discharged indebtedness income if each of the LPs elected to have I.R.C. § 108(c) apply. The IRS also ruled that the LPs’ interests in the partnership would qualify as depreciable property to the extent of the partnership’s interest in depreciable property. Ltr. Rul. 9426006, 9426007, 9426008, 9426009, 9426010, 9426011, March 25, 1994.

ELECTRONIC DEPOSITS. The IRS has provided guidance for taxpayers who were required to make a electronic funds transfer (EFT) which was not timely received by the IRS through no fault of the taxpayer. The ruling provides the requirements for establishing reasonable cause for the untimeliness of the EFT in order to abate the failure to deposit penalty. Generally, the taxpayer may show reasonable cause through the taxpayer’s books and records or the records of the financial institution through which the EFT was made. Rev. Rul. 94-46, I.R.B. 1994-29.

HEDGES-ALM § 4.02[6]. The temporary and proposed regulations involving hedges, discussed in Neil Harl’s article in 4 Agric. L. Digest, p. 165, have been adopted as final. The regulations provide that a transaction that is not entered into primarily to reduce risk is not a hedge. Treas. Reg. § 1.1221-2(c)(1). Thus, it is not a hedge to sell a commodity produced by the taxpayer and then to buy the commodity in the futures market. However, the IRS comments to the regulations state that a hedge occurs when a taxpayer engages in a store-on-the-board transaction as a hedge of an expected agricultural price support payment. The final regulations add a special rule for noninventory
supplies. If a taxpayer sells only a negligible amount of a noninventory supply, the noninventory supply is treated as ordinary property for the purposes of determining whether a hedge of the purchase of that noninventory supply is a hedging transaction. Treas. Reg. § 1.1221-2(c)(5). 59 Fed. Reg. 36355, 36360 (July 18, 1994).

HOBBY LOSSES—ALM § 4.05[1]. The taxpayer operated a horse buying, selling, training and breeding operation with a record of 13 years of losses. The court held that the business was not operated with the intent to make a profit because the business was not operated in a business like manner. The taxpayer maintained no books or records and did not maintain a separate checking account for the business. The court noted that although the losses were covered by the taxpayer’s personal assets, the taxpayer could no longer expect the business to become profitable after 13 years of losses. Kaufman v. Comm’r, T.C. Memo. 1994-305.

The taxpayer was an attorney who owned a corporation in the business of buying and selling polo horses. The taxpayer included the legal fees from clients met through the polo horse business in the income from the polo horse business for the purpose of determining the profitability of the polo horse business. The court held that the legal fees were not includible in the income of the polo horse business because the polo horse business was not entered into for the purpose of obtaining legal clients. The court also held that the polo horse business was not entered into with the intent to make a profit because the taxpayer did not make a business plan or formulate any financial projections for the business. Mendoza v. Comm’r, T.C. Memo. 1994-314.

The taxpayers operated a horse boarding business and kept two of their own horses at the stable. The court allowed the taxpayers to deduct the related business expenses as to only one horse because only that horse was necessary as a demonstration to current and prospective horse boarders that the stable provided quality care of horses. Ottow v. Comm’r, T.C. Memo. 1994-319.

LIMITED LIABILITY COMPANY. The taxpayers formed a limited liability company (LLC) under the North Dakota Limited Company Act. The IRS ruled that the LLC would be taxed as a partnership because (1) the company lacked the corporate characteristic of continuity of life because, under the LLC Act and the LLC articles of organization, the consent of the remaining members was required to continue the company if a member left the company and (2) the company lacked the corporate characteristic of free transferability of interests because, under the LLC Act and articles of organization, a member cannot transfer a right to participate in the management of the company without the consent of the other members. Ltr. Rul. 9425023, March 25, 1994; Ltr. Rul. 9425027, March 25, 1994.

LANDLORD AND TENANT

CONSTRUCTIVE EVICTION. The plaintiff rented 315 acres of farm land to the defendants under a three year lease. In the end of the second year a dike on the land broke, causing some of the land to be unusable. The parties agreed to a reduced rent for the last year of the lease because of the flooding. In the fourth year the parties orally agreed to a one year lease which included the repair of the dike by the tenant with the rent decreased by the cost of the repairs. The dike was repaired but the tenant paid less than the amount of agreed to rent less the cost of the repairs and the landlord sued for the balance. The written lease provided that the tenant agreed to repair all improvements on the property. The tenant argued that the landlord’s failure to repair the dike caused a constructive eviction of the flooded property. The court held that the written lease did not impose a duty on either party to repair the dike. However, the court held that the oral lease placed the duty on the tenant to repair the dike and that because no flooding occurred after the tenant assumed the duty to repair the dike, the tenant was not entitled to a reduction in the rent. Coates v. Jaye, 633 N.E.2d 334 (Ind. Ct. App. 1994).
PRODUCTS LIABILITY

CATTLE FEED. The plaintiff was a dairy farmer who purchased feed supplemented with vitamins A and D from one of the defendants and manufactured by the other defendant. The plaintiff's cows became ill with some dying and others becoming useless for milk production. The plaintiff sued for breach of implied and express warranties and in strict liability. The defendants argued that the plaintiff failed to show that the feed caused the illness and death of the cows. The court held that, although the plaintiff demonstrated that the feed did not have sufficient vitamin A and D, the plaintiff did not provide sufficient evidence that the feed caused the death of the cows; therefore, the amount of damages could not include the value of the lost cows. However, because the plaintiff did demonstrate that the cows became ill after changing to the new feed, a new trial would be allowed on all causes of action. Purina Mills, Inc. v. Askins, 875 S.W.2d 843 (Ark. 1994).

COMBINE. The plaintiff operated a custom grain harvesting business and purchased four combines. The plaintiff experienced loss of tire pressure and other problems with the drive wheels on the combines, resulting in extensive down-time and loss of income. The wheels were manufactured by the defendant and supplied to the combine manufacturer. The plaintiff sued the wheel manufacturer for negligence and breach of implied warranty, seeking damages for lost profits and repair costs. The court held that under Texas law, economic losses could not be recovered in a negligence action against a supplier of parts used to manufacture another product. The court also held that the plaintiff could not recover economic loss damages under a claim for breach of implied warranty against a supplier because the plaintiff had no privity with the supplier but would only look to the manufacturer of the finished product for any warranty. Hininger v. Case Corp., 23 F.3d 124 (5th Cir. 1994).

SEED. The plaintiff purchased grain sorghum seed from the defendant. The seed failed to produce a good crop and the plaintiff claimed that the failure to produce resulted from the inadequate application of a safener on the seed to protect it from carryover of herbicides. The plaintiff sued under theories of negligence, breach of contract, strict liability, violation of the Texas Deceptive Trade Practices Act, and breach of implied and express warranties. The court held that the negligence cause was properly dismissed because the failure of the defendant to properly perform tests and label the products involved contractual duties included in the breach of contract claims. The court also held that the strict liability claim was properly dismissed because the only injury was to the grain. The court held that the dismissal of the breach of express warranty was not proper as to the seller of the seed because the jury could have found that the seller represented that the treated seed would produce better crops than other seeds and that the plaintiff relied on the seller's superior knowledge and advice. The court also held that the dismissal of the breach of express warranty was not proper as to the producer of the seed because the jury could have found that the label claim of 85 percent germination was erroneous. The plaintiff's claim for breach of implied warranty of fitness for a particular purpose was improperly submitted to the jury because the plaintiff did not show that the seed was chosen for a particular purpose, only the general purpose of growing a commercial grain crop. The jury verdict for violation of the Texas Act was overturned because of insufficient evidence that the safener was inadequately applied. Crosbyton Seed Co. v. Mechura Farms, 875 S.W.2d 353 (Tex. Ct. App. 1994).

SECURED TRANSACTIONS

DEFAULT. The plaintiff purchased a tractor from a local implement dealer by trading in two tractors and giving a note for the balance, payable in annual installments. The note was assigned to the defendant. The plaintiff was late with the first installment and made only a partial payment of the second installment which was also late. The parties agreed to a schedule for the plaintiff's payment of the remainder of the installment but one month later, the defendant repossessed the tractor without notice and gave the plaintiff one month to redeem the tractor or the tractor would be sold. The tractor was sold at auction with the proceeds applied against the note. The plaintiff sued the defendant for wrongful repossession. The defendant was granted summary judgment because the trial court held that the debtor was in default at the time of the repossession and the note allowed repossession without notice after a default. The appellate court reversed, holding that the defendant's acceptance of the late payments and agreement to a schedule for making up the late payments was a waiver of the repossession clause of the note and required notice to the plaintiff that no more late payments would be accepted before the repossession clause could be used to make a repossession without notice. Therefore, summary judgment was not proper because a factual issue remained as to whether the defendant's conduct waived the plaintiff's default on the note. Moe v. John Deere Co., 516 N.W.2d 332 (S.D. 1994).

TRESPASS

TIMBER. The defendants were found to have cut timber on the plaintiff's land and the issue on appeal was whether punitive damages should have been awarded. The court found that (1) the defendants knew they were cutting trees on the plaintiff's land, (2) the defendants failed to practice good logging methods to prevent cutting trees on another's property, (3) the defendants knew a fence existed on the property line but did not locate the fence, (4) the defendants cut the trees in a way that increased damage to another's property, (5) the defendant cut the trees on the plaintiff's land, (2) the defendants failed to proceed good logging methods to prevent cutting trees on another's property, (3) the defendants knew a fence existed on the property line but did not locate the fence, (4) the defendants cut the trees on the plaintiff's land, (5) the defendants failed to maintain a logging road to prevent excess erosion. The court upheld the award of punitive damages. Holiday v. Campbell, 873 S.W.2d 839 (Ky. Ct. App. 1994).

CITATION UPDATES

Babin v. Comm'r, 23 F.3d 1032 (6th Cir. 1994), aff'd, T.C. Memo. 1992-673 (discharge of indebtedness) see p. 94 supra.

Stack v. U.S., 23 F.3d 1400 (8th Cir. 1994), aff'd, 93-1 U.S. Tax Cas. (CCH) ¶ 60,136 (D. Minn. 1993) (gross estate) see p. 92 supra.
Gillespie v. U.S., 23 F.3d 36 (2d Cir. 1994) (valuation)
see p. 85 *supra*. 

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