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Cases, Regulations, and Statutes

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Footnotes

[1] Pub. L. No. 109-222.

[2] Act § 101.

[3] Act § 102.

[4] Act § 202.

[5] Act § 204.

[6] Act § 207.

[7] Act § 301.

[8] Act § 302.

[9] Act § 401.

[10] *Id.*

[11] Act § 510.

[12] I.R.C. § 408A.

[13] Act § 512.

[14] Act § 514, *adding* I.R.C. § 199(d)(1)(A)(iii).

[15] Act § 503.

[16] Act § 502.

[17] Act § 509.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

ADVERSE POSSESSION

POSSESSION. The plaintiffs owned property to the south of the defendant's crop field. Between the properties ran a road or path with telephone poles to the north of the road. The previous owners of the plaintiff's property built a house on their property and garage on a portion of the disputed strip, which included the road and a strip of grass up to the poles. the previous owners mowed the grass strip, stored wood and used a burn barrel on parts of the strip. Although the defendants acquiesced in the plaintiffs acquisition of the road by adverse possession, the defendants argued that the use of the grass strip was so minor that passage of title to the grass strip by adverse possession was not proper. The court held that continuous possession of every inch of a disputed strip was not required; therefore, the plaintiffs' and their predecessors' use of the grass strip was sufficient to include passage of title to the strip with the road by adverse possession. The case is designated as unpublished. **Stevens v. Howard, 2006 Wisc. App. LEXIS 455 (Wis. Ct. App. 2006)**,

BANKRUPTCY

GENERAL

DISASTER PAYMENTS. The debtors filed a Chapter 7 plan in August 2002 and received a discharge in December 2002. In February 2003, the U.S. Congress enacted the Agricultural Assistance Act of 2003 which provided crop disaster relief for 2001 and 2002 crop disaster losses. After the bankruptcy case was closed, the debtor applied for the disaster relief in August 2003 and a check was sent to the bankruptcy trustee. The case was reopened for a determination as to whether the payment was estate property. The court held that the disaster payments were not estate property because the debtor's right to the payment did not arise until after the petition was filed. The trustee argued that the crop loss was the key action which gave rise to a contingent property right which merely vested when the disaster relief law was enacted. Although acknowledging a split among courts on the issue, the court rejected that argument and agreed with those cases holding that such payments were not estate property. The court noted that the issue arises because Congress passes disaster relief programs which are retroactive which may provide for post-petition payments for pre-petition losses. The court noted that if Congress wished to avoid the result in similar cases, the protection of creditors could be included in the legislation. ***In re* Burgess, 438 F.3d 493 (5th Cir. 2006), *aff'g en banc*, 392 F.3d 782 (5th Cir. 2004)**.

FEDERAL TAX

DISCHARGE. The debtors filed a Chapter 13 plan in 1996 and sought to have their 1997 income taxes included in the claims covered by the Chapter 13 plan and discharge. The trustee and IRS objected so the debtors included an agreement in the plan that the 1997 taxes would not be discharged. Two years after that case was closed, the debtors filed another Chapter 13 case, with the 1997 taxes included as an unsecured, non-priority claim, eligible for discharge because due more than three years before the filing of the petition. The IRS argued that the three year period of Section 507(a)(8)(A)(i) was tolled during the first bankruptcy case, leaving less than three years for collection of the taxes. The court held that the prior bankruptcy case did toll the three year limitation period and that the taxes were nondischargeable in the second bankruptcy case. ***In re* Brensing, 337 B.R. 376 (Bankr. D. Kan. 2006)**.

POST-PETITION TAXES. The IRS has issued a revenue procedure providing the procedures for a bankruptcy trustee to request a prompt determination of a bankruptcy estate's tax liability incurred during the administration of the bankruptcy case. **Rev. Proc. 2006-24, I.R.B. 2006-22, 943**.

FEDERAL AGRICULTURAL PROGRAMS

COTTON. The CCC has issued proposed regulations amending regulations governing the cotton Marketing Assistance Loan Program authorized by the Farm Security and Rural Investment Act of 2002. The proposed changes include the outside storage of upland cotton pledged as collateral for CCC loans; the certification provided by approved ginners to produce bales that are compliant with CCC loan eligibility requirements; the re-concentration and transfer of upland cotton pledged as collateral for CCC loans; and the storage credit provided to producers when an upland cotton marketing assistance loan is repaid. **71 Fed. Reg. 30318 (May 26, 2006)**.

EMERGENCY CONSERVATION PROGRAM. The FSA has issued proposed regulations amending the regulations for the Emergency Conservation Program to implement provisions of the Department of Defense, Emergency Supplemental Appropriation to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (Pub. L. 109-149) providing assistance to nursery, oyster, and poultry producers and non-industrial private forest landowners to rehabilitate public or private oyster reefs or farmland damaged by hurricanes during calendar year 2005. **71 Fed. Reg. 30263 (May 26, 2006)**.

FARM LOANS. The defendant applied for an FSA loan and at the loan closing stated that the defendant's financial condition had not changed since the time of the loan application, although the defendant had sold all the defendant's soybeans just before the closing. The loan funds were restricted in that all withdrawals had to receive written FSA approval. Most of the funds were withdrawn with FSA approval but the defendant managed to withdraw $27,000 without FSA approval and used the funds for personal purposes. The defendant was charged with violating 18 U.S.C. § 1001 for making a false financial statement and with violating 18 U.S.C. § 658 for converting property pledged to the FSA. A jury verdict was returned convicting the defendant on both counts. The defendant appealed both verdicts as not supported by the evidence. The court held that the false statement count was supported by evidence that the defendant knew that the defendant's eligibility for the loan was a close question and that any change in financial condition would materially affect the loan qualification. In addition, the defendant had granted a security interest in all crops and knew that the sale of crops just before closing would substantially alter the security for the loan. In support of the other count, the court noted that the defendant had attempted to withdraw the funds from another branch of the bank and was turned down because FSA approval was needed for withdrawal. With full knowledge of the conditions of the loan, the defendant approached another branch of the same bank and was able to convince them to allow withdrawal without FSA approval. **United States v. Rice, 2006 U.S. App. LEXIS 13319 (8th Cir. 2006)**.

SUGAR. The CCC has issued a notice which sets forth the establishment and adjustments to the sugar overall allotment quantity (OAQ) for the 2005-crop year which runs from October 1, 2005 through September 30, 2006. CCC set the 2005-crop OAQ at 8.600 million short tons raw value (STRV) on August 12, 2005. On August 19, 2005, CCC allocated the cane sector allotment to cane-producing states and cane processors and reassigned an expected cane supply shortfall of 120,000 STRV to imports. On September 29, 2005, CCC increased the OAQ to 8.825 million STRV and reassigned another 276,000 STRV of expected cane shortfall to imports. On December 2, 2006, CCC reassigned another 450,000 STRV of an updated cane supply shortfall to imports. On February 2, 2006, CCC increased the OAQ to 9.350 million STRV and reassigned 500,000 STRV of the anticipated domestic supply deficit to imports. The revised FY 2006 cane state allotments and cane and beet sugar processor allocations were announced on March 22, 2006. **71 Fed. Reg. 30373 (May 26, 2006)**.

TOMATOES. The AMS has announced that it is soliciting comments on its proposal to revise the United States Standards for Grades of Greenhouse Tomatoes. The AMS is proposing to revise the standards to allow that percentages of defects and size classifications be determined by count rather than weight. This would result in a revision of the following sections of the standards: Tolerances, Size Classification, Standard Pack, Damage, and Serious Damage sections. Additionally, AMS is proposing to delete the "Unclassified" section, add moldy stems as a damage defect, and add a scoring guide for damage and serious damage for skin checks. **71 Fed. Reg. 30860 (May 31, 2006)**.

VETERINARIANS. The APHIS has issued proposed regulations which amend the regulations regarding the National Veterinary Accreditation Program to establish two accreditation categories in place of the current single category, to add requirements for supplemental training and renewal of accreditation, and to offer accreditation specializations. **71 Fed. Reg. 31109 (June 1, 2006)**.

FEDERAL ESTATE AND GIFT TAXATION

FAMILY-OWNED BUSINESS DEDUCTION. The decedent's estate included stock in a corporation. The estate hired an accounting firm to prepare the estate tax return and to value the stock. Based on the valuation provided by the accounting firm, the firm determined that the estate was not eligible for the family-owned business deduction and the estate tax return was filed without the deduction. After an IRS audit, the estate agreed to increase the value of the stock for estate tax purposes and requested an extension of time to file an amended return which included the FOBD deduction. The extension was granted by the IRS. **Ltr. Rul. 200620020, Feb. 6, 2006**.

IRA. The decedent's estate included an IRA which passed to four beneficiaries. The taxpayer was one of the beneficiaries and was disabled. The taxpayer's guardian established a "special needs" trust which gave the guardian, as trustee, complete discretion to pay or accumulate income. The trust was formed to remove the IRA income from the taxpayer's income to enable the taxpayer to continue to be eligible for Medicaid. The taxpayer's share of the IRA was placed in the trust. The IRS ruled that the trust was a grantor trust; therefore, the contribution of the IRA to the trust was not considered a transfer under I.R.C. § 691(a)(2). **Ltr. Rul. 200620025, Feb. 21, 2006**.

TRANSFERS WITH RETAINED INTERESTS. The decedent had placed most investment assets in a revocable trust for the decedent's benefit but after the decedent became mentally incapacitated, the decedent children, under an attorney-in-fact agreement, established a family limited partnership and transferred most of the trust assets to the new FLP. The court held that the partnership assets were included in the decedent's estate because the decedent, through the attorney-in-fact, retained the full economic benefit of the assets under an implied family agreement. The implied agreement was found because (1) the FLP had no business activity and was designed merely for estate tax planning; (2) the decedent's relationship with the assets did not change; (3) although members of the decedent's family received interests in the FLP, the assets were treated the same as if they were still in the trust, including the using of cash to make annual gifts to family members and to pay the decedent's living expenses; and (4) the decedent was elderly and in poor health when the assets were transferred. In addition, the court held that the FLP assets were included in the estate because the transfer was not a bona fide sale for adequate and full consideration. The same factors above were also used to support the lack of a bona fide sale. **Estate of Rosen v. Comm'r, T.C. Memo. 2006-115**.

FEDERAL INCOME TAXATION

BUSINESS EXPENSES. The taxpayer's business records were seized by the FBI in 1991 as part of a tax fraud investigation and were returned in 1995. The taxpayer claimed that the records for 1992 and 1993 were also taken by the FBI but no proof of that seizure was presented. The taxpayer claimed that, upon the return of the records, the taxpayer's spouse disposed of the records. Thus, the taxpayer had no written records to substantiate any business expenses for 1992 and 1993. The taxpayer attempted to present oral testimony as to rent and advertising expenses but the court found the testimony to be inconsistent and incomplete. The court noted that the expenses claimed would have left the taxpayer with only $960 in income for 1992 and noted that the taxpayer failed to explain how the taxpayer paid for living expenses during that year. The court upheld the IRS disallowance of most of the claimed expenses for lack of substantiation. **Braun v. Comm'r, T.C. Memo. 2006-110**.

CAPITAL ASSETS. The taxpayer had won a state lottery and received annual payments for five years before assigning the remaining annual payments to a third party in exchange for a lump sum payment. The taxpayer reported the assignment as a sale of a capital asset with a tax basis of zero. The court, consistent with several prior cases, held that the lottery payments were not capital assets because there was no underlying investment by the taxpayer. **Watkins v. Comm'r, 2006-1 U.S. Tax Cas. (CCH) ¶ 50,329 (10th Cir. 2006), *aff'g*, T.C. Memo. 2004-244**.

COURT AWARDS AND SETTLEMENTS. The taxpayer was employed as a special education teacher. The school filed a suit to have the taxpayer placed on mandatory sick leave for mental illness. The parties reached a settlement which paid the taxpayer $50,000 in exchange for the taxpayer's resignation and release of all claims. The taxpayer did not include the settlement proceeds in income because the taxpayer claimed that the payments were for diabetes, inner ear pain, and impetigo suffered during employment. The court held that the settlement proceeds were taxable income because the settlement agreement has no mention of payment for physical injury and the taxpayer did not file any claims in the law suit as to physical injuries. The court did not dispute that the taxpayer suffered from the medical conditions but held that the settlement proceeds were not paid as compensation for those conditions. **Peck v. Comm'r, T.C. Summary Op. 2006-86**.

DEFICIENCY NOTICES. The IRS sent written notices of income tax deficiencies to the taxpayer when the taxpayer failed to file returns for several years. The taxpayer sent letters to the IRS in response to the notices and the letters made several frivolous "tax protester" arguments as to the illegality of the income tax. The taxpayer argued that the notices were defective in that they did not technically follow the procedures of the Internal Revenue Manual. The court held that the notices were proper in that they complied with I.R.C. § 6212. The court also approved a penalty under I.R.C. § 6673 for making frivolous arguments for the purpose of delaying the collection process. **Wheeler v. Comm'r, T.C. Memo. 2006-109**.

DISASTER LOSSES. On May 2, 2006, the president determined that certain areas in Connecticut are eligible for assistance from the government under the Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5121) as a result of record snowfall, which began on February 1, 2005. **FEMA-3266-EM**. On April 12, 2006, the president determined that certain areas in Arkansas are eligible for assistance from the government under the Act as a result of severe storms and tornadoes, which began on April 1, 2006. **FEMA-1636-DR**. On May 17, 2006, the president determined that certain areas in Washington are eligible for assistance from the government under the Act as a result of severe storms, flooding, tidal surge, landslides and mudslides, which began on January 27, 2006. **FEMA-1641-DR**. On May 25, 2006, the president determined that certain areas in Massachusetts are eligible for assistance from the government under the Act as a result of severe storms and flooding, which began on May 12, 2006. **FEMA-1642-DR**. On May 25, 2006, the president determined that certain areas in New Hampshire are eligible for assistance from the government under the Act as a result of severe storms and flooding, which began on May 12, 2006. **FEMA-1643-DR**. On May 25, 2006, the president determined that certain areas in Maine are eligible for assistance from the government under the Act as a result of severe storms and flooding, which began on May 13, 2006. **FEMA-1644-DR**. Taxpayers who sustained losses attributable to these disasters may deduct the losses on their 2005 returns.

DISCHARGE OF INDEBTEDNESS. The taxpayer had owed the Securities and Exchange Commission a civil fine resulting from the taxpayer's former employment. In 2001 the SEC formally released the taxpayer from liability for the fine and issued a Form 1099-C, Cancellation of Debt, listing the fine as "Default on payment of penalty, disgorgement and interest." The taxpayer did not include the amount of the released fine in income and claimed that the taxpayer was insolvent when the fine was released. The taxpayer's 2001 tax return claimed a business loss and no wages or other income. Trial evidence failed to identify any assets owned by the taxpayer except an old car with minimal value. The court held that the taxpayer was insolvent in 2001 and under I.R.C. § 108(a)(1)(B), the discharge of the fine did not produce taxable income. *Editor's comment*: The case is a bit disturbing in that the court reported that the IRS admitted that it "had 'no affirmative knowledge' of any assets owned by petitioner, and this case was brought to trial 'to at least see what she at one time had and we believe that she could get.' " **Coppertino v. Comm'r, T.C. Summary Op. 2006-87**.

DIVORCE PAYMENTS. The taxpayer's divorce decree with a prior spouse provided that the taxpayer would be the sole owner of the taxpayer's marital residence. The decree denied any support or maintenance payments to either party. The decree also provided that the taxpayer would be liable for the mortgage on the residence and that the payment of the former spouse's share would be considered "in the nature of support" and non-dischargeable in bankruptcy. The taxpayer's former spouse did not live in the property after the divorce. The taxpayer claimed an alimony deduction for the former spouse's share of the mortgage payments made by the taxpayer. The court held that, because the taxpayer was the sole owner of the property, lived in the property, was not required to pay the former spouse any maintenance, and the former spouse no longer lived in the property, the mortgage payments were not deductible as alimony. In addition, the court noted that the former spouse received no continuing benefit from the payments because the former spouse had no ownership in the house under the decree. **Picou v. Comm'r, T.C. Summary Op. 2006-82**.

DOMESTIC PRODUCTION DEDUCTION. The IRS has adopted as final, with changes, the regulations for the domestic production deduction, discussed in Harl and McEowen, "Proposed Regulations Issued on New Domestic Production Deduction," 16 *Agric. L. Dig*. 161. **71 Fed. Reg. 31267 (June 1, 2006)**.

HYBRID VEHICLE TAX CREDIT. Effective for vehicles placed in service after December 31, 2005, an alternative motor vehicle credit is allowed which is the sum of (1) qualified fuel cell motor vehicle credit, (2) advanced lean burn technology motor vehicle credit, (3) qualified hybrid motor vehicle credit, and (4) qualified alternative fuel motor vehicle credit. I.R.C. § 30B(a). The credits allowed cannot exceed the regular tax reduced by other credits over the tentative minimum tax for the year. I.R.C. § 30B(g)(2). The credits are treated as a general business credit if the vehicle is subject to an allowance for depreciation. I.R.C. § 30B(g)(1). The IRS has announced the vehicle certifications and the credit amounts for seven vehicles for the alternative motor vehicle credit, which will expire in the first calendar quarter after the quarter in which Honda records its sale of the 60,000th vehicle:

Year and Model	Credit Amount
2006 Civic Hybrid CVT	$2,100
2005 Civic Hybrid (SULEV) MT	$1,700
2005 Civic Hybrid (SULEV) CVT	$1,700
2005 Insight CVT	$1,450
2006 Insight CVT	$1,450
2006 Accord Hybrid AT	$1,300*
2005 Accord Hybrid AT	$650

*($650 credit if vehicle does not have updated control calibration)

See Harl, "Additional Items in the Energy Policy Act of 2005, 16 *Agric. L. Dig*. 131 (2005). **IR-2006-86**.

LONG-DISTANCE PHONE CALL TAX. The IRS has announced that it will no longer collect the 3 percent excise tax, under I.R.C. § 4251, effective July 31, 2006. Taxpayers will be allowed to file for a refund of the taxes paid on their 2006 return, either by documenting the tax paid or using a safe harbor amount. **IR-2006-82**.

RENEWABLE ELECTRICITY PRODUCTION CREDIT. The taxpayer was a limited liability company which owned another LLC which entered into wind leases with landowners for the construction of wind turbines which produced electricity. The electricity produced beyond the needs of the turbines was sold to utility companies. The IRS ruled that the taxpayer was eligible for I.R.C. § 45 renewable electricity production credit for turbines placed in service before January 1, 2008. **Ltr. Rul. 200620004, Nov. 2, 2005**.

RETURNS. The IRS has posted to its web site, www.irs.ustreas.gov, in the Forms & Pubs section Publication 4302 (Rev. 05-06), A Charity's Guide to Vehicle Donation.

STOCK OPTIONS. The taxpayer was employed as a computer software designer. The taxpayer agreed to a lower salary in exchange for options to purchase stock in the company. The taxpayer exercised the options by borrowing money in a margin account which was secured by the purchased stock. The margin account was also used to purchase luxury items and real estate. After purchasing the stock, the taxpayer had the right to the stock, receive dividends for the stock and to pledge the stock as collateral. The company's success faltered and the stock price fell, resulting in several margin calls on the account. The margin calls were paid with loans from the company's owners. Eventually, all the stock was sold to meet the margin calls. The taxpayer excluded from income the value of the exercised stock options in the tax year the options were exercised, arguing that the stock was subject to substantial risk of forfeiture and was non-transferable; therefore, the value of the stock options was income only in the tax year in which the stock was sold to cover the margin calls. The court found that, upon the exercise of the options, the taxpayer had full control and possession of the stock, could vote the stock, pledge the stock as collateral and receive any dividends from the stock; therefore, the value of the options was included in income when the options were exercised. **Facq v. Comm'r, T.C. Memo. 2006-111**.

UNRELATED BUSINESS INCOME. The taxpayer was a fraternal society corporation exempt from income tax under I.R.C. § 501(c)(2). The taxpayer constructed two buildings, one of which will contain a new lodge on the first floor and residential apartments on the remaining floors. The other building will contain only residential apartments. Parking spaces were also constructed which the apartment residents can rent. The taxpayer will provide maintenance and utilities for the buildings. The IRS ruled that the income from the apartments and parking spaces will be unrelated business income if the construct is financed with debt until the debt has been repaid, at which time the rental income will no longer be unrelated business income. **Ltr. Rul. 200621031, March 1, 2006**.

NUISANCE

LANDLORD LIABILITY. The plaintiffs owned a rural residence and the defendant landlord owned neighboring farm land to the south and north of the plaintiffs. The tenant defendant leased the north and south properties from the defendant landlord, owned a hog confinement facility across the road from the plaintiffs' residence, and spread manure from the hog operation on the fields leased from the landlord. The plaintiffs filed a nuisance action against both defendants and the trial court dismissed the action against the landlord, ruling that the landlord had no control over the actions of the tenant. The court first held that the *Restatement Second of Torts*, Section 837 applied to determine the liability of a landlord for a nuisance caused by the actions of a tenant. The court held that the landlord was improperly dismissed from the case because there was substantial evidence that Section 837 applied to make the landlord liable for the negligence: (1) the landlord would be liable for the nuisance if the landlord carried on the activity; (2) the landlord consented to the spreading of the manure, based on statements by the landlord that the landlord expected the tenant to spread the manure on the fields; and (3) the landlord knew the tenant's activity would give rise to a nuisance, based on the long history of complaints by the plaintiffs about the manure spreading on the south field before the tenant leased the north field. The court noted that, although Iowa law generally protects a landlord from nuisances caused by tenants, the landlord's unique involvement with the tenant and the plaintiffs raises a fact issue sufficient to overcome summary judgment for the landlord. The court noted that the landlord had allowed the tenant to renew the lease even after ample notice of the possibility of a nuisance. **Tetzlaff v. Camp, No. 63/04-1499 (Iowa June 2, 2006)**.

NEGLIGENCE

CHEMICAL EMISSIONS. The plaintiffs owned dairy farms near the defendant's factory. In the 1970s, the plaintiffs' cows began to show symptoms of undetermined illnesses and the plaintiffs made many attempts over several years to discover the cause of the problem, testing the feed, water and air for various microbes and chemicals. The plaintiffs even contacted the defendant for possible chemical emissions and were told that no harmful, illegal emissions were produced by the factory. Although the Pennsylvania Department of the Environment conducted tests for fluoride and discovered higher levels of fluoride in the vegetation near the plaintiffs' farms, the test results were not sent to the plaintiffs, although the results were available to the public on request. The defendant had asked the PDE to keep the results confidential but the request was rejected. The plaintiffs continued to seek expert advice and were told that the problem was farm-specific and were told specifically that the problem was not fluoride. The problem was finally determined in 1999 when a study showed that the cows had fluorosis from eating vegetation with high levels of fluoride. The plaintiff brought an action in 2001 seeking damages from fluoride poisoning resulting from fluoride emissions at the factory. The claims include trespass, nuisance, negligent interference with business, outrageous conduct and negligence. The trial court dismissed all claims as barred by the two-year statute of limitations. The plaintiffs argued that the "discovery rule" applied to toll the statute of limitations because the plaintiff was unable to discover the cause of the injury after exercising due diligence to discover the cause. The court agreed, holding that the plaintiffs' extensive efforts to discover the cause of the illness together with the misdiagnoses that fluoride was not the cause of the cows' illness, raised a material issue of fact as to whether the plaintiffs exercised due diligence to discover the cause of the illness. In addition, the court held that the misrepresentations of the defendant as to the chemicals emitted from the factory also raised an issue of fact that could support tolling the statute of limitations under the fraudulent concealment doctrine. **Mest v. Cabot, 2006 U.S. App. LEXIS 13460 (3d Cir. 2006), *rev'g and rem'g*, 2004 U.S. Dist. LEXIS 9112 (E.D. Pa. 2004)**.

PROPERTY

PARTITION. The plaintiffs owned farm land as co-owners with a bank and were ordered by the trial court to partition the land by sale. The plaintiffs argued that the land should be partitioned in-kind, with owelty (money given to compensate for minor inequality in the partition in-kind), because the plaintiffs' child lived on the property and farmed it. The court noted that partition, in itself, generally prejudices both parties' interest in the land but the controlling factor is which method of partition prejudices the parties the least. The evidence of an appraiser was that the higher value would be obtained from a partition sale. The plaintiffs also argued that partition in-kind was required to protect the child's homestead interest in the property, but the court held that the homestead status of the property was irrelevant to the issue of the proper partition method. Finally, the plaintiffs argued that their preferred method of partition should be used because the bank was prohibited from owning farm land under the Minnesota corporate farming act, Minn. Stat. § 500.24. The court noted that an exception applied where a corporation acquired farm land by process of law and collection of a debt; therefore, the bank's temporary ownership of the farmland did not prevent partition by sale. The case is designated as unpublished. **Minnwest Bank, M.V. v. Meyers, 2006 Minn. App. Unpub. LEXIS 527 (Minn. Ct. App. 2006)**.

STATE REGULATION OF AGRICULTURE

FIELD BURNING. Under Idaho Code § 22-4803, the Director of the Department of Agriculture is to make an annual determination as to whether there exist viable economic alternatives to field burning for bluegrass farmers. In 2004 the Director determined that there was no viable economical alternative to field burning;

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therefore, under Idaho Code § 22-4803A, field burning could not constitute a nuisance or trespass. The plaintiffs challenged the Director's determination as arbitrary, capricious and an abuse of discretion. The court held that the determination was not an abuse of discretion because the determination had no discretionary effect because it was based on facts. The court also held that the determination was not arbitrary or capricious because the Director gave adequate consideration to large amounts of data and testimony. The court stated that the mere fact that field burning was banned in other states where bluegrass was still grown did not disprove the determination that no viable economic alternative was available in Idaho. **American Lung Ass'n of Idaho/Nevada v. State of Idaho, 130 P.3d 1082 (Idaho 2006)**.

POTATOES. The plaintiff was a potato processor who elected to have the plaintiff's end product, french fries, inspected by state inspectors instead of federal inspectors. The state charged inspection fees. The plaintiff changed to private inspectors and petitioned the state for a refund of a portion of the fees to the extent the Oregon Department of Agriculture had charged fees in excess of those needed to pay the inspection costs and the costs of administration. The plaintiff argued that Or. Rev. Stat. limited the inspection fees to the actual costs of the inspections, including administrative costs. The refund request was based on Or. Rev. Stat. § 293.445(2) which provided for refund of fees levied in excess of an amount legally due to an agency. The refunds could not be made more than three years after the initial payment to the agency. Although the plaintiff paid the inspection fees more than three years before its refund claim, the plaintiff argued that the legislature's continuing appropriation of funds for the refunds allowed the agency to make refunds more than three years after the initial payment. The court held that the appropriations of the legislature did not affect the clear three year limitation on payment of refunds and held that the plaintiff's refund claim was untimely. **J.R. Simplot Co. v. Department of Agriculture, 131 P.3d 162, *aff'g*, 96 P.3d 1262 (Or. Ct. App. 2004)**.

IN THE NEWS

FUNGICIDES. Leatherleaf fern farmers in Costa Rica have been awarded $113 million in damages in their lawsuit alleging that E.I. DuPont de Nemours & Company's fungicide, Benlate, permanently damaged the plaintiffs' crops. The plaintiffs provided scientific evidence demonstrating how the fungicide harmed the plants which was sufficient to overcome the alternative explanations offered by the defendant for the crop damage. **Environmental News Service, May 18, 2006; www.ens-newswire.com**.

HAY AND GRAIN TRACING. The FDA has published a fact sheet on hay and grain recordkeeping required under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002. The fact sheet notes that the following entities and persons are excluded from the recordkeeping requirements: (1) farms; foreign persons, except for foreign persons who transport food in the U.S.; (3) restaurants are excluded entirely, combination restaurant/retail facility is excluded entirely if sales of food it prepares and sells to consumers for immediate consumption are more than 90 percent of its total food sales; (4) persons performing covered activities with food to the extent that the food is within the exclusive jurisdiction of the U.S. Department of Agriculture; (5) persons who manufacture, process, pack, transport, distribute, receive, hold, or import food for personal consumption; (6) persons who receive or hold food on behalf of specific individual consumers and who are not also parties to the transaction and who are not in the business of distributing food; and (7) persons who manufacture, process, pack, transport, distribute, receive, hold, or import food packaging (the outer packaging of food that bears the label and does not contact the food), except for those persons who also engage in a covered activity with respect to food. See www.cfsan.fda.gov/~dms/fsbtac23.html.