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Cases, Regulations, and Statutes

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CASES, REGULATIONS AND STATUTES

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ADVERSE POSSESSION

FENCE. The plaintiffs purchased their rural property in 1973 and were told that the property extended beyond the legal boundary to a fence separating the plaintiffs' and defendant's land. The plaintiffs did have a survey performed and the survey included the disputed land in the plaintiffs' title. The surveyor also included an Affidavit of Adverse Possession which included the disputed property in the plaintiffs' property. The defendant purchased the neighboring property in 1990 and cut the fence when the plaintiffs started logging on the disputed land. The trial court awarded title to the plaintiffs on the basis of adverse possession for more than 10 years. The defendant challenged the ruling as unsupported by the evidence. The appellate court affirmed the trial court, holding that the plaintiffs had met the five elements of adverse possession for 10 years. The court held that the plaintiffs satisfied the factor of (1) actual possession by using the land to pasture sheep and horses, maintaining the fence and recreation; (2) hostile possession through the posting of "no trespassing" signs on the fence; (3) open and notorious possession through the recording of the 1973 deed which included the disputed land in the recorded title; (4) exclusive possession through the allowance of hunting by third parties on the land and the "no trespassing" signs; and (5) continuous possession in that the plaintiffs' predecessors in interest held the disputed land in similar use for more than 10 years before the defendant purchased the land. **Martens v. White, 195 S.W.3d 548 (Mo. Ct. App. 2006)**.

RIGHT-OF-WAY. The defendant's parents originally owned farm land owned by the plaintiff and a neighboring 127 acre parcel owned by the defendant. The defendant's land had access to a public highway by means of a farm lane which ran over the plaintiff's land and another neighbor's land, although the defendant's land had a highway running along a portion of the land separated by a ditch. The defendant had lived on the plaintiff's land as a child and helped farm the land with the plaintiff's parents. When the land was sold to the plaintiff, the defendant moved elsewhere but used the farm land to access the neighboring land. The defendant claimed a prescriptive easement over the farm lane to access the 127 acre parcel based on adverse use while the defendant lived on the parents' farm. The court held that the evidence indicated that the defendant used the farm lane pursuant to acquiescence of the parents and other family members and could not acquire a prescriptive easement by adverse possession. **Banks v. Pusey, 2006 Md. LEXIS 472 (Md. Ct. App. 2006)**.

BANKRUPTCY

CHAPTER 12

PLAN. The debtor operated a hog confinement operation on contract from a hog supplier. The debtor was currently raising a batch of hogs from the supplier but the supplier did not guarantee any future batches. The debtor provided no records of past income or expenses from the hog operation. The debtor provided projections of income and expenses but did not include specific sources of the items or any comparison to past operations. The debtor did not include income from employment off the farm, but the debtor did cite the wages as a source of funds for the Chapter 12 plan. The court held that the plan could not be confirmed because of the failure of the debtor to provide sufficient information to determine the accuracy or reliability of the debtor's income and expense projections that would provide sufficient income to fund the plan payments. Because the case had been already pending for several months and the debtor had submitted several amended plans without success, the court dismissed the case. ***In re* Kowalzyk, 2006 Bankr. LEXIS 2806 (Bankr. D. Minn. 2006)**.

FEDERAL TAX

AUTOMATIC STAY. The debtors filed for Chapter 11 and the IRS filed a claim for pre-petition taxes. The debtors' Chapter 11 plan provided for payment of unsecured claims over three years with the Bankruptcy Court retaining jurisdiction over the case until all plan payments were made. The plan was confirmed and a discharge granted in February 1995, although the plan payments continued for three years. The confirmation order did not state that the automatic stay continued until all plan payments were made. The plan also provided that any nondischargeable taxes were not discharged by the plan. After the confirmation of the plan and entering of the discharge but before the plan payments were completed, the IRS made attempts to collect the pre-petition taxes which were not dischargeable and to collect post-petition taxes. The debtors argued that the retention of jurisdiction by the Bankruptcy Court extended the automatic stay until the plan payments were completed; therefore, the IRS collection efforts violated the automatic stay. The court held that, because the plan confirmation order did not extend the automatic stay, the IRS collection efforts for nondischargeable pre-petition taxes and post-petition taxes did not violate any automatic stay. ***In re* Wood, 2006-2 U.S. Tax Cas. (CCH) ¶ 50,563 (Bankr. S.D. Fla. 2006)**.

The Debtors' Chapter 11 plan was confirmed in 1996 and included payments to the IRS for allowed claims for taxes. After the plan payments were completed, the IRS began collection efforts to collect taxes included in the plan, for which full payment was not received and which were not discharged in the Chapter 11 case. The court held that the IRS collection efforts did not violate the injunction of Section 524(a) because the IRS was attempting to collect only nondischargeable taxes which were not paid under the Chapter 11 plan. The court noted that the Chapter 11 plan could not discharge nondischargeable claims. ***In re* Gill, 343 B.R. 732 (Bankr. M.D. Fla. 2006)**.

CONTRACTS

DAMAGES. The defendants had entered into a contract to raise breeder hens on their farm. The plaintiff provided the chickens, feed and veterinarian services. The contract at issue ran from December 1999 to December 2002. The defendants built two hen houses for the chickens and received several flocks under the terms of the contracts. In October 2002, a new flock of hens was delivered and the parties entered into negotiations for the next contract. The defendants alleged that the October 2002 delivery was made under the original contract but the plaintiff alleged that the flock was part of the new contract. The new contract negotiations fell through and the plaintiff had the chickens seized and removed by the sheriff. The plaintiff sued and both parties filed claims for breach of contract. At trial a jury instruction on damages was given without objection which charged the jury to award such damages as would equal the income expectation of the non-breaching party. The jury awarded the defendants $275,000 in contract damages. The trial court reduced the damage award to $100,632 because the evidence indicated that the remaining payments on the contract would equal $110,632 less $10,000 in extra costs in caring for the chickens. The defendants challenged the reduction of damages, arguing that the defendants had incurred additional costs because of the seizure of the chickens. The appellate court affirmed the trial court's damage amount because the defendants failed to provide sufficient evidence to support any additional damages. **Goolesby v. Koch Farms, LLC, 2006 Ala. LEXIS 280 (Ala. 2006)**.

FEDERAL AGRICULTURAL PROGRAMS

COTTON. The CCC has adopted as final regulations implementing the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery of 2006 to provide assistance to producers and first-handlers of the 2005 crop of cottonseed in counties which were declared a natural disaster area by the President of the United States, and contiguous counties, due to Hurricanes Katrina, Ophelia, Rita, Wilma or a related condition in 2005. **71 Fed. Reg. 63665 (Oct. 31, 2006)**.

DAIRY. The CCC has adopted as final regulations governing the 2005 Dairy Disaster Assistance Payment Program for dairy production and milk spoilage losses due to hurricanes or a related condition in 2005. **71 Fed. Reg. 63668 (Oct. 31, 2006)**.

WETLANDS. The plaintiff purchased farm land from the plaintiff's parents in 1975. The farm land had been drained in part under assistance from the Soil Conservation Service (now Natural Resource Conservation Service). The parties at the time believed the farm was exempt from federal environmental regulations protecting wetlands under the Clean Water Act. However, in 1987, the plaintiff was ordered to cease drainage and fill activities and to restore the wetlands found on the farm. The plaintiff argued that the order was an unconstitutional taking of property without compensation. The court held that no taking occurred because (1) the loss of value in the farm as a whole was minimal and (2) the reasonable interpretation of the environmental regulations when the farm land was acquired placed the plaintiff on notice that the wetlands could not be converted. **Brace v. United States, 72 Fed. Cl. 337 (Ct. Cl. 2006)**.

FEDERAL ESTATE AND GIFT TAXATION

GENERATION SKIPPING TRANSFERS. The decedent's predeceased spouse had created a trust for the decedent which became irrevocable upon the death of the decedent's spouse in 1973. The trust provided the decedent with a testamentary power of appointment over the trust property and the decedent exercised the power in favor of the decedent's grandchildren. The estate filed a Form 706 which did not include any GSTT for the property transferred under the power of appointment but the estate included Form 8275-R, Regulation Disclosure Statement, which indicated that the failure to include GSTT was contrary to Treas. Reg. § 26.2602-1(b)(1)(i). Treas. Reg. § 26.2601-1(b)(1)(i) provides that a transfer of property pursuant to the exercise, release, or lapse of a general power of appointment that is treated as a taxable transfer under federal estate and/or gift tax provisions, is not a "transfer under a trust" that is eligible for transitional relief (for pre-September 1985 trusts) from GST tax under TRA 1986 Sec. 1433(b)(2)(A). The estate argued that the regulation was invalid because it was contrary to the intent of the TRA 1986 provision. The court held that the regulation was a valid interpretation of the TRA 1986 provision and was consistent with the statute's treatment of powers of appointment as the equivalent of full ownership of the power holder. **Estate of Gerson v. Comm'r, 127 T.C. No. 11 (2006)**.

TRANSFERS WITH RETAINED INTERESTS. The decedent owned two properties, a residence and a rental property. The decedent transferred an equal share of the rental property and a 49 percent interest in the residence to the decedent's son. The decedent continued to receive all the income from the rental property. The decedent continued to live in the residence paid almost 90 percent of the expenses for the property. The estate claimed that the son had agreed to an equal share of all income and expenses, but no evidence was presented that the son was obligated to reimburse the decedent for the expenses or that the decedent owed any of the income to the son. Thus, the court held that the transfers were valid gifts but the full value of the rental property was included in the decedent's estate, under I.R.C. § 2036(a)(1) because the decedent retained the economic benefits of the rental property. The IRS argued that the transfer of the residence was not a completed gift because the deed was not recorded until after the death of the decedent. The court held that the transfer of the 49 percent interest was a completed gift because the parties executed a deed and the son used the property as a residence. The court noted that, under New York law, recording of a deed was not required for completion of a gift of real property. **Estate of Stewart v. Comm'r, T.C. Memo. 2006-225**.

VALUATION. The decedent had owned a 29 percent interest in a family limited partnership which owned land held for development. The issue was the value of two parcels of the development. One parcel was valued using the appraisal made by the IRS expert because the estate did not present an opposing appraisal. The other parcel was valued using comparable land sales and allowed a 25 percent discount for the awkward configuration of the parcel and the poor retail location of the parcel. **Estate of Langer v. Comm'r, T.C. Memo. 2006-232**.

FEDERAL INCOME TAXATION

ALTERNATIVE MINIMUM TAX. The taxpayer filed a timely income tax return and claimed a refund. The IRS examined the return and determined that the taxpayer had alternative minimum tax liability in excess of the taxes paid by the taxpayer and decreased the refund claim by the amount of the increase due to the AMT. The taxpayer argued that the taxpayer was not subject to AMT because the taxpayer did not claim any deductions for state and local taxes. The court held that the AMT was applied independently of what deductions were or were not claimed by the taxpayer and especially the state and local tax deduction because AMTI is determined without regard to those deductions. The appellate court affirmed in a decision designated as not for publication. **Qureshi v. United States, 2006-2 U.S. Tax Cas. (CCH) ¶ 50,564 (Fed. Cir. 2006), *aff'g*, 67 Fed. Cl. 783 (Ct. Cl. 2006)**.

CORPORATIONS

BUILT-IN GAINS. The IRS has issued proposed regulations governing the determination of the bases of assets and stock in certain nonrecognition transactions, including exchanges under I.R.C. § 351. The regulations are intended to eliminate the possibility of duplicate loss deductions from net built-in gains attached to the exchanged assets. The proposed regulations apply to corporations and large shareholders of corporations, including shareholders who are individuals, partnerships, corporations and tax-exempt entities. **71 Fed. Reg. 62067 (Oct. 23, 2006)**.

DISASTER LOSSES. On October 27, 2006, the president determined that certain areas in Alaska are eligible for assistance from the government under the Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5121) as a result of fire which began on August 3, 2006. **FEMA-1666-DR.** On October 6, 2006, the president determined that certain areas in Indiana are eligible for assistance from the government under the Act as a result of severe storms and flooding, which began on September 12, 2006. **FEMA-1662-DR.** On October 16, 2006, the president determined that certain areas in Alaska are eligible for assistance from the government under the Act as a result of severe storms, flooding and landslides, which began on August 15, 2006. **FEMA-1663-DR.** On October 17, 2006, the president determined that certain areas in Hawaii are eligible for assistance from the government under the Act as a result of an earthquake which began on October 15, 2006. **FEMA-1664-DR.** On October 24, 2006, the president determined that certain areas in New York are eligible for assistance from the government under the Act as a result of severe storms and flooding, which began on October 12, 2006. **FEMA-1665-DR.** On October 5, 2006, the president determined that certain areas in New York are eligible for assistance from the government under the Act as a result of a snowstorm which began on October 12, 2006. **FEMA-3268-EM.** Taxpayers who sustained losses attributable to these disasters may deduct the losses on their 2005 returns.

The IRS has issued a Chief Counsel's Advice letter ruling concerning the handling of net operating losses (NOLs) which include Gulf Opportunity Zone casualty losses (QGOZCL). Gulf Opportunity (Go Zone) losses, except for certain QGOZCLs, may be taken in either 2004 or 2005. To the extent that a QGOZCL is included in an NOL and carried back as a Go Zone loss, the taxpayer may not also treat the loss as having occurred in the prior year under I.R.C. § 165(i). QGOZCLs that offset gross income would be eligible for the I.R.C. § 165(i) election, but those that are treated as actually generating the NOL would not. When determining whether a taxpayer's QGOZCL generate an NOL, the QGOZCL should be taken into account last when computing the NOL, unless there are other deductions that take priority over the QGOZCL. A taxpayer is prohibited from treating part of its disaster loss as occurring in the actual year of the disaster and the remainder of its disaster losses as occurring in the preceding year. If an I.R.C. § 165(i) election is made for a 2005 QGOZCL, the loss does not generate a Go Zone loss. However, to the extent the loss generates an NOL, that NOL qualifies for the three year carryback under I.R.C. § 172. A taxpayer may make a I.R.C. § 1400N(k)(4) election to waive the five year carryback period for Go Zone losses. However, if the election is made, a Go Zone loss may be carried back only two years not three years. **CCA Ltr. Rul. 200642001, Sept. 12, 2006**.

ENERGY EFFICIENT HOME CREDIT. The IRS has announced that taxpayers may use either Residential Services Network (RESNET) Publication No. 05-001 or RESNET Publication No. 06-001 in determining whether a dwelling unit qualifies for the New Energy Efficient Home Credit. Similarly, an application to have a software program included on the public list of software programs that may be used to calculate energy consumption may be based on a declaration by the developer that the program satisfies the tests required to conform to the software accreditation process prescribed in either RESNET publication. This change is effective for new energy efficient homes acquired after December 31, 2005. **Ann. 2006-88, I.R.B. 2006-46**.

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 hybrid vehicle certifications and the credit amounts for two vehicles:

Year and Model	Credit Amount
2005 Ford Escape 2WD Hybrid	$2,600
2005 Ford Escape 4WD Hybrid	$1,950

The 2006 models have already been certified. See also Harl, "Additional Items in the Energy Policy Act of 2005, 16 *Agric. L. Dig*. 131 (2005). **IR-2006-165**.

IRA. The taxpayer retired from employment at age 54 and received two distributions from the taxpayer's 401(k) employee savings and profit sharing plan. The first distribution was rolled over to another IRA and represented the earnings on the plan account to that point. The second distribution represented the employer's and the taxpayer's pretax employee contributions to the plan. The taxpayer used the second distribution for personal expenses and to purchase a home for the first time. The home was purchased more than 120 days after the second distribution. The court held that the second distribution was subject to the 10 percent penalty for early distributions because the taxpayer failed to purchase the first home within 120 days after the distribution. The court noted that the rule was technical and that although the delay was caused by a death in the family, the court did not have equity powers to avoid application of the rule. **Smart v. Comm'r, T.C. Summary Op. 2006-177**.

The taxpayer had a 401(k) pension plan with an employer until the employment was terminated in 2002. In 1999, the taxpayer had borrowed $32,000 from the retirement plan and $23,378 was owed when the employment was terminated. The taxpayer included the unpaid loan as income for 2002 but did not pay the 10 percent penalty for early withdrawals. The taxpayer argued that the penalty should not be applied because the taxpayer was suffering financial hardship in 2002. The court held that financial hardship was not a statutory exception to the 10 percent penalty and held that the taxpayer was liable for the 10 percent penalty. **Ghazitehrani v. Comm'r, T.C. Summary Op. 2006-170**.

MILEAGE DEDUCTION. The IRS has issued a revenue procedure which provides that the standard mileage rate for 2006 is 48.5 cents per mile for business use, 14 cents per mile for charitable use and 20 cents per mile for medical and moving expense purposes. The revenue procedure also provides rules under which the amount of ordinary and necessary expenses of local travel or transportation away from home that are paid or incurred by an employee will be deemed substantiated under Treas. Reg. § 1.274-5 when a payor (the employer, its agent, or a third party) provides a mileage allowance under a reimbursement or other expense allowance arrangement to pay for such expenses. Use of a method of substantiation described in this revenue procedure is not mandatory and a taxpayer may use actual allowable expenses if the taxpayer maintains adequate records or other sufficient evidence for proper substantiation. **Rev. Proc. 2006-49, I.R.B. 2006-47**.

RETURNS. The IRS has posted the following publications to its website, www.irs.ustreas.gov/formspubs/index.html, in the Forms & Pubs section: Publication 225 (2006), Farmer's Tax Guide; Publication 794 (Rev. September 2006), Favorable Determination Letter; Publication 1476 (09-2006), Retirement News for Employers; Publication 3066 (10-06), Retirement Plan Assistance for 401(k) Retirement Plans; Publication 4546 (10-06), 403(b) Plan Checklist; and Publication 4547 (10-06), Retirement Plan Assistance for 403(b) Retirement Plans.

SALE OF REAL PROPERTY. The taxpayer sold several real estate properties for a gain but did not file income tax returns reporting the sales or gain. The taxpayer argued that the basis in each property was increased by several items for which the taxpayer did not have records, including personal labor, remodeling expenses, taxes and interest. The IRS disallowed these additions to basis for lack of substantiation and because the expenses were not incurred as part of a trade or business. The taxpayer's response was several frivolous "tax protestor" arguments. The IRS assessed tax deficiencies based on the sale closing documents and disallowed any increase in basis for the expenses claimed by the taxpayer. The court upheld the IRS assessments and upheld imposition of the I.R.C. § 6651 penalty for failure to file a return, the I.R.C. § 6654 addition to tax for failure to pay estimate tax payments, and the I.R.C. § 6673 penalty for the making of frivolous arguments. the appellate court affirmed in a decision designated as unpublished. **Storaasli v. Comm'r, 2006-2 U.S. Tax Cas. (CCH) ¶ 50,567 (9th Cir. 2006), *aff'g*, TC. Memo. 2005-59**.

TELEPHONE EXCISE TAX REFUND. CCH has reported that a tax analyst with the IRS has stated that the IRS will not report to the states information about taxpayers who file a claim for a refund of the telephone excise tax, on Form 1040EZ-T, where the taxpayer does not otherwise file an income tax return.

The IRS has posted a draft of Form 8913 (2006), Credit for Federal Telephone Excise Tax Paid, in the Topics for Tax Professionals section (http://www.irs.gov/taxpros/topic/index.html) under Draft Tax Forms.

TRAVEL EXPENSES. The taxpayer was employed as a ferryboat captain who worked on a ferry run that took 24 hours to complete. The run included a six hour layover at one port and the taxpayer claimed deductions for meals and incidental expenses during these layover periods. The court held that the taxpayer was away from home for purposes of I.R.C. § 162(a)(2) and was entitled to deduct amounts based on the per diem rates listed in Rev. Proc. 2000-39, 2002-2 C.B. 340, subject to the 50 percent limitation of I.R.C. § 274(n). **Bissonnette v. Comm'r, 127 T.C. No. 10 (2006)**.

TRUSTS. The taxpayer was the beneficiary of a testamentary trust established by the taxpayer's deceased parent's will. The trustees had broad authority to invest the trust principal and the trustees hired an investment company to manage the trust's investments. The trust claimed the entire investment company fees as a deduction on line 15a "Other deductions not subject to the 2% floor" of Form 1041 for the trust. The trust argued that I.R.C. § 67(e)(1) allowed full (i.e. not subject to the 2 percent floor) deductions for trusts for costs of administration which would not have been incurred if the property were not held in trust. The trust argued that the trustees were required by their fiduciary duty to seek professional investment advice, which would not be required if the property were held by an individual. The IRS argued that there was no such fiduciary duty under state law and that investment services were commonly used by individuals; therefore, investment services costs were not excluded from the 2 percent floor. The court noted a split in authority in the reported cases, with *Scott v. United States, 328 F.3d 132 (4th Cir. 2003) and Mellon Bank, N.A. v. United States, 265 F.3d 1275 (Fed. Cir. 2001),* holding that investment costs were subject to the 2 percent floor and *O'Neill v. Comm'r, 994 F.2d 302 (6th Cir. 1993), rev'g. 98 T.C. 227 (1992)* holding that investment costs were not subject to the 2 percent floor. The court decided to follow the holdings of *Scott* and *Mellon Bank* to hold that the investment costs were subject to the 2 percent floor because investment services were not unique to trusts and were not required by any fiduciary duty. The appellate court affirmed. **William L. Rudkin Testamentary Trust v. Comm'r, 2006-2 U.S. Tax Cas. (CCH) ¶ 50,569 (2d Cir. 2006), *aff'g*, 124 T.C. 304 (2005)**.

WAGES. A petition for certiorari has been filed with the U.S. Supreme Court for the following case. The taxpayers were employed as tenured public school teachers who elected to participate in an early retirement program under which they received payments over five years in exchange for taking early retirement. The taxpayers argued that the payments were not subject to FICA withholding because the payments were made in exchange for the taxpayer's tenure, a property right. The court held that the payments were subject to FICA withholding because the payments arose out of the taxpayer's employment. The court declined to follow the holding in *North Dakota State University v. United States, 255 F.3d 599 (8th Cir. 2001),* noting that the tenure in the present case was earned merely by length of employment and not through demonstrated and evaluated proficiency. **Appoloni v. United States, 2006-1 U.S. Tax Cas. (CCH) ¶ 50,347 (6th Cir. 2006), *aff'g*, 2004-2 U.S. Tax Cas. (CCH) ¶ 50,333 (W.D. Mich. 2004)**. **Appoloni v. United States, 2006-1 U.S. Tax Cas. (CCH) ¶ 50,347 (6th Cir. 2006), *rev'g*, Klender v. United States, 2004-2 U.S. Tax Cas. (CCH) ¶ 50,358 (W.D. Mich. 2004)**.

LANDLORD AND TENANT

FENCES. The plaintiff owned land neighboring the defendant landlord's land. The landlord leased the land to a dairy farmer who used the land to pasture cows. The plaintiff was injured while attempting to move some of the cows off the plaintiff's property after the cows escaped through a fence on the defendant's property. The plaintiff brought suit against the landlord and tenant and the jury found both defendants liable for the injury. The landlord appealed the jury verdict, arguing that it owed no duty to the plaintiff to build or maintain the fence. The landlord pointed to the lease agreement which provided that the fence was to be maintained by the tenant. The court agreed, holding that the duty to build and maintain a fence arose from the tenant's ownership of the cows and the tenants duty to prevent the cows from trespassing on others' property. The court refused to extend the duty to the landlord on the basis that the landlord's right to enter the property and construct utility structures was insufficient to create a duty to maintain the fence. **Florida Light & Power Co. v. Morris, 2006 Fla. App. LEXIS 17277 (Fla. Ct. App. 2006)**.

PATENTS

SEED SAVING. The action was a patent infringement action against a farmer who purchased Roundup Ready(R) soybean seed under a technology agreement. The plaintiff seed company accused the defendant of saving seed from the crops grown with the patented seed and giving the seed to neighbors. During a deposition, the defendant made the statement that all farmers were saving seeds from crops grown with the patented seed. The counsel for the plaintiff asked the defendant to name the persons known to be saving seed and the defendant refused. The plaintiff filed a motion to compel the testimony. The court granted the motion, noting that the defendant had not filed any objection to the motion, holding that such disclosure was not privileged or otherwise prohibited. **Monsanto Co. v. Dragan, 2006 U.S. Dist. LEXIS 75670 (W.D. N.Y. 2006)**.

PESTICIDES

AERIAL SPRAYING. The defendant was a crop sprayer who used a helicopter to apply Malathion to a cherry orchard. The defendant made an observation fly-by to see if any workers were in neighboring vineyards and did not see any before spraying the orchard. However, several workers were in the vineyard and testified that they felt a mist when the helicopter sprayed the orchard. Several of the workers became ill and tests found Malathion on clothing, plants and cars in the vineyard. The tests even found more concentration of the chemical farther from the orchard than nearer. Despite the testimony of the workers and the chemical tests, the administrative law judge ruled that there was insufficient evidence that the Malathion in the vineyard resulted from drift from the defendant's spraying activity. The trial court and the appellate court both reviewed the evidence and found sufficient evidence to overturn the administrative ruling and order that the defendant be charged with violation of the Washington Pesticide Control Act and its regulations. **Mendoza v. The Washington State Dep't. Of Agriculture, 2006 Wash. App. LEXIS 2363 (Wash. Ct. App. 2006)**.

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