

use by customers" has apparently not limited the application of the provision to a significant degree. The rental of land has satisfied that requirement.¹⁷

Self-developed rental property

Net rental income from self-developed rental property may be recharacterized as nonpassive income if the property is sold within 24 months after first being used as rental property and the taxpayer materially or significantly participated for any year in enhancing the property value.¹⁸

Sale of "substantially appreciated" property

Gains from the sale of "substantially appreciated" property used in a passive activity may be recharacterized as income from a nonpassive activity unless the property was used for either—(1) 20 percent of the period during which the taxpayer held an interest in the property or (2) the entire 24-month period ending on the date of the disposition.¹⁹ "Substantially appreciated" property is defined as property whose fair market value exceeds 120 percent of its adjusted income tax basis.²⁰

"Significant participation" activities

The regulations recharacterize the net income from a "significant participation activity" (SPA) as not from a passive activity.²¹ A SPA is a trade or business in which the taxpayer participates for more than 100 hours in an activity during the taxable year but fails to reach the 500 hour level which is required for material participation.²² The rule is an aggregate concept for individuals who devote more than 500 hours spread over several activities and meet the 100 hour test for each separate activity.²³ The idea is to treat individuals with several activities as favorably as someone who devotes an equivalent amount of time to a single activity.

If the taxpayer's aggregate SPAs do not constitute activities in which the taxpayer materially participates (the 500 hour test is not met), an amount of the taxpayer's gross income from each SPA equal to the taxpayer's net income from the SPA may be recharacterized as income from a nonpassive activity.²⁴

In conclusion

Planning to assure deductibility of passive activity losses is a challenge. The income recharacterization rules have added another complicating dimension to the problem. Thus far, the

courts have upheld the regulations and have generally supported the IRS interpretation of the rules.

FOOTNOTES

- ¹ Pub. L. No. 99-514, Sec. 501(a), 100 Stat. 2223 (1986), enacting I.R.C. § 469. See generally, 4 Harl, *Agricultural Law* § 30.08 (2000); Harl, *Agricultural Law Manual* § 4.05[3] (1999).
- ² I.R.C. § 469(a)(1), (c). See Char-Lil Corp., T.C. Memo. 1998-457 (interest from sales contract was portfolio income).
- ³ I.R.C. § 469(l)(3).
- ⁴ Treas. Reg. § 1.469-2(f).
- ⁵ *Id.*
- ⁶ Treas. Reg. § 1.469-2(f)(6).
- ⁷ See Sidel v. Comm'r, T.C. Memo. 1999-301 (regulations valid with income recharacterized as non-passive income).
- ⁸ Fransen v. United States, 98-2 U.S. Tax Cas. ¶ 50,776 (E.D. La. 1998), *aff'd*, 99-2 U.S. Tax Cas. ¶ 50,882 (5th Cir. 1999).
- ⁹ Connor v. Comm'r, T.C. Memo. 1999-185.
- ¹⁰ Ltr. Rul. 9406010, Nov. 9, 1993 (taxpayer materially participated in lessee corporation).
- ¹¹ Treas. Reg. § 1.469-11(a)(2)(ii).
- ¹² Treas. Reg. § 1.469-2(f)(6). See Swalbach v. Comm'r, 111 T.C. No. 9 (1998).
- ¹³ Treas. Reg. § 1.469-2(f)(3).
- ¹⁴ *Id.*
- ¹⁵ Wiseman v. Comm'r, T.C. Memo. 1995-203.
- ¹⁶ Kelly v. Comm'r, T.C. Memo. 2000-32.
- ¹⁷ Wiseman v. Comm'r, T.C. Memo. 1995-203.
- ¹⁸ Treas. Reg. § 1.469-2(f)(5).
- ¹⁹ Treas. Reg. § 1.469-2(c)(2)(iii).
- ²⁰ Treas. Reg. § 1.469-2(c)(2)(iii)(C).
- ²¹ Treas. Reg. § 1.469-2(f)(2).
- ²² Treas. Reg. §§ 1.469-2(f)(2)(ii), 1.469-5T(c).
- ²³ Temp. Treas. Reg. § 1.469-5T(a)(4). See Speer v. Comm'r, T.C. Memo. 1996-323 (taxpayer failed to meet burden of proof that test met; "ballpark guesstimate" unacceptable).
- ²⁴ Treas. Reg. § 1.469-2(f)(ii).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

ADVERSE POSSESSION

PAYMENT OF TAXES. The parties' properties were originally deeded erroneously by a previous owner such that both parties had title to an 11 acre parcel of land. The defendant's title was created first in 1944, however, the

plaintiff had paid the taxes on the disputed property from 1958 through 1994. The disputed property was unimproved and unfenced until 1996 when the defendant fenced in the disputed tract. The evidence also showed that the tax assessor had alerted the parties' predecessor in interest about the title problem in 1980. Under Ark. Code § 18-11-102, the payment of taxes for seven consecutive years on

unimproved and unenclosed land under color of title was sufficient to be deemed possession of the land for the years the taxes are paid. The court held that (1) the plaintiff had sufficient color of title, (2) the plaintiff or the plaintiff's predecessors in interest had paid the taxes on the land for more than seven years, and (3) the land was unimproved and unenclosed during the years the taxes were paid. The court held that the plaintiff had acquired the land by adverse possession for over seven years. **Jones v. Barger, 1 S.W.3d 31 (Ark. Ct. App. 1999).**

ANIMALS

LIVESTOCK ON HIGHWAY. The plaintiff was injured while stopped on a public highway behind a flock of sheep owned by the defendants. The defendants were moving the sheep from one pasture to another and were on the highway for about three-fourths of a mile. The defendants had a vehicle with flashing lights in front of the sheep and behind the sheep. A third party failed to stop and hit the plaintiff's vehicle from behind. The defendants argued that Idaho Code § 25-2119 provided absolute immunity from liability from negligence. The statute provided immunity so long as the sheep were lawfully on the highway. The issue was certified to the Idaho Supreme Court with the finding that the sheep were lawfully on the highway at the time of the accident. The issue was the effect of the immunity. The defendant argued that the statute provided immunity from all negligence claims, whereas the plaintiff argued that the statute only eliminated the *res ipsa loquitur* inference of negligence which arose when animals are involved in an accident on a highway. In examining the historical development of liability for animal-related accidents on highways, the court noted that no case involving *res ipsa loquitur* had occurred prior to enactment of the statute; therefore, the court reasoned that the statute was not intended to apply only to *res ipsa loquitur* liability. The court held that the statute provided complete immunity to an animal owner for accidents resulting from the owner's animals lawfully on a public highway. **Adamson v. Blanchard, 990 P.2d 1213 (Idaho 1999).**

BANKRUPTCY

GENERAL-ALM § 13.03.*

DISCLAIMER. The debtor received an inheritance and disclaimed the inheritance before filing for Chapter 7. The trustee sought to recover the disclaimed inheritance as a preferential transfer. The court held that, because the disclaimer had the effect of relating back to erase the inheritance, the disclaimer was not a transfer of estate property subject to the preferential transfer rules. **In re Bright, 241 B.R. 664 (Bankr. 9th Cir. 1999).**

FEDERAL TAX-ALM § 13.03[7].*

AUTOMATIC STAY. The debtor had filed a suit with the Tax Court and sought relief from the automatic stay to continue the case. The court held that the automatic stay provisions do not apply to lawsuits brought by the debtor

and that no relief was necessary. **In re Thompson, 241 B.R. 920 (Bankr. S.D. Ga. 1999).**

Prior to filing for Chapter 7, the debtor entered into an offer of compromise with the IRS which provided for an immediate partial payment and the debtor's agreement to apply all future overpayments to the tax deficiency. After the petition, the debtor sought to apply the 1997 overpayment to 1998 estimated taxes. The IRS, however, applied the overpayment to the past tax deficiency. The trustee sought return of the overpayment because the IRS had not asked for setoff approval, the overpayment and past taxes had no mutuality and the post-petition setoff violated the automatic stay. The court held that the setoff did violate the automatic stay but also held that, because the overpayment was subject to setoff once the IRS properly applies for the setoff, the overpayment did not need to be returned. **In re Schield, 242 B.R. 1 (Bankr. C.D. Calif. 1999).**

POST-PETITION TAXES. The debtor filed for Chapter 11 on October 24, 1995 and did not make the election to end the debtor's tax year on the date of the petition. The debtor's plan included claims for federal income taxes for several years, including 1995, and was confirmed without objection from the IRS. After the plan was confirmed, the IRS attempted to assess and collect the 1995 taxes. The debtor argued that the confirmed plan was *res judicata* as to the 1995 taxes. The court held that the 1995 taxes were clearly post-petition taxes and not part of the bankruptcy estate liability. In addition, because the taxes were not part of the bankruptcy case, the Anti-Injunction Act prohibited the Bankruptcy Court from modifying the collection of the taxes by the IRS. Therefore, the court held that the IRS was entitled to collect the taxes outside of the plan provisions. **In re Wood, 240 B.R. 609 (C.D. Cal. 1999).**

PREFERENTIAL TRANSFERS. The debtor had made a substantial payment to the IRS just before filing for Chapter 7. The trustee sought to avoid the payment as a preferential transfer, arguing that the IRS received more than it would post-petition because substantial administrative expenses from attorney's fees would diminish the share of the estate payable to the IRS. The Bankruptcy Court held that the determination of whether the IRS received more than it would have post-petition was to be made at the time of the Chapter 7 filing; therefore, the payment to the IRS was not preferential, since, at the time of the Chapter 7 filing, the IRS would receive more from the estate than it received in the pre-petition payment. The District court reversed, holding that the Bankruptcy Court should have determined the reasonable trustee and attorney's fees which would have a priority as an administrative claim and then determine whether the remainder of the estate was greater than the amount paid to the IRS pre-petition. If the value of the estate, after subtracting the trustee and attorney administrative claims, was less than the payment made to the IRS, the payment was a voidable preference. The case was remanded for a determination of the reasonable trustee and attorney fees. **In re Lutz, 241 B.R. 172 (E.D. Mich. 1997), rev'g and rem'g, 212 B.R. 846 (Bankr. E.D. Mich. 1997).**

FEDERAL AGRICULTURAL PROGRAMS

ADVERTISING ASSESSMENTS. The plaintiff was a mushroom grower assessed funds for the advertising of mushrooms as required under the Mushroom Promotion, Research and Consumer Information Act, 7 U.S.C. § 6101 *et seq.* The plaintiff argued that the assessment violated the First Amendment of the U.S. Constitution in that it required the plaintiff to participate in the advertisements which the plaintiff saw as against the plaintiff's interest. The court interpreted *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997) as upholding the constitutionality of advertising assessments only where the industry was completely regulated as was the fruit tree industry in *Wileman*. Because the mushroom industry was not completely regulated, the assessments for compelled commercial speech violated the plaintiff's First Amendment right to not participate in the commercial speech in the advertisements. **United Foods, Inc. v. United States**, 197 F.3d 221 (6th Cir. 1999).

FARM PROGRAMS. The FSA and CCC have adopted as final regulations which implement the crop and market loss provisions of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2000 and the Omnibus Consolidated Appropriations Act of 2000. The regulations also implement the statutory provisions related to the 1999 Crop Disaster Program, the Livestock Assistance and Livestock Indemnity Programs, Market Loss Assistance Programs for Dairy, Peanuts, and Tobacco, the Milk Price Support Program, Recourse Loan Programs for Mohair and Honey, advance production flexibility contract payments, revision of the Upland Cotton User Marketing Certificate Program, postponement of the Dairy Recourse Loan Program and elimination of the enforcement of sugar marketing assessments through FY 2001. **64 Fed. Reg. 7941 (Feb. 16, 2000).**

FEDERAL ESTATE AND GIFT TAX

INSTALLMENT PAYMENT OF ESTATE TAX. The decedent had owned land through a grantor trust. The trust also owned all of the stock of the decedent's wholly-owned corporation. The land was used by the decedent's corporation in the corporation's business. The decedent was actively involved in the daily business of the corporation and also hired managers and directed all the employees. The IRS ruled that the value of the land, building and other business assets were included in the decedent's trade or business for purposes of determining the percentage of the value of the estate which was an interest in a closely held business. The business was included as a corporation and the land as a sole proprietorship. The *Digest* will publish an

article by Neil Harl on this ruling. **Ltr. Rul. 200006034, Nov. 12, 1999.**

VALUATION. The decedent's estate included a 25 percent interest in a limited partnership which owned an apartment building. The other partnership interests were held by family members. The IRS agreed that the interest was entitled to a discount for lack of marketability and for a minority interest. The estate claimed a 62 percent combined discount but the IRS claimed a 32 percent discount. The court held that a discount of 53 percent was to be applied for lack of marketability and 20 percent for the minority interest. **Estate of Weinberg v. Comm'r, T.C. Memo. 2000-51.**

The decedent owned three commercial rental properties as tenant in common with a trust established by the decedent's predeceased spouse for the decedent. The court allowed a 25 percent discount for lack of marketability of the decedent's interests in all three properties. **Estate of Stevens v. Comm'r, T.C. Memo. 2000-53.**

FEDERAL INCOME TAXATION

BAD DEBTS. The taxpayer loaned money to a corporation in which the taxpayer was a shareholder. The taxpayer sought to deduct the loans as business bad debts, arguing that the taxpayer was in the business of promoting corporations. The court held that the loans were in the nature of investments in the corporation and were not eligible for business bad debt treatment. **Chamberlin v. Comm'r, T.C. Memo. 2000-50.**

CASUALTY LOSSES. The taxpayers owned a residence which they put up for sale in October 1993. The taxpayers started extensive repairs and remodeling to enhance the sale and had some furniture in the property when it was damaged by an earthquake in January 1994. The property was rented four days later and the taxpayers claimed a business casualty loss for actual damage and loss of value. The court held that the taxpayers had not converted the residence to a business use prior to the earthquake and that the casualty losses were personal losses subject to the personal loss limitations of I.R.C. § 165(h). **Palos v. Comm'r, T.C. Memo. 2000-56.**

COURT AWARDS AND SETTLEMENTS. The plaintiff was a state patrol officer who had brought a suit under the federal Fair Labor Standards Act to recover wages for overtime work. The suit argued that the plaintiff was not exempt from the overtime requirements and was entitled to back pay for the overtime worked. The parties reached a settlement and the plaintiff signed a release of all claims, including any claims for personal injuries. The court held, however, that the settlement payments were made entirely for the overtime back pay claims; therefore, the court held that the settlement payments were all included in the plaintiff's income. **Jacobs v. Comm'r, T.C. Memo. 2000-59.**

EMPLOYEE BENEFITS. The taxpayer was a partnership which provided a self-funded health insurance plan for its partners and employees. The plan provided that the premiums were based on the actual claims against the plan, with some deficits covered by the partnership. Premiums were also determined by the type of coverage sought by each participant. The IRS ruled that (1) the plan was "an arrangement having the effect of accident or health insurance" as that phrase is used in I.R.C. § 104(a)(3); (2) payments from the plan made to or for the benefit of partners for themselves and their dependents will be excludable from the partners' income under I.R.C. § 104(a)(3); and (3) the premium payments made by individual partners for coverage under the self-funded plan would be deductible by them under I.R.C. § 162(I). **Ltr. Rul. 200007025, Nov. 19, 1999.**

EXPENSE METHOD DEPRECIATION. The taxpayer was a partner in an LLC which started a new business. The LLC was taxed as a partnership and had a net loss for the first tax year. In addition to the loss, the LLC claimed \$17,000 in expense method depreciation deduction for new equipment. The taxpayer claimed a share of the net loss and expense method depreciation on the taxpayer's personal income tax return. The court held that the eligibility for the expense method depreciation deduction had to be determined at the partnership level. Because the partnership did not have any taxable income, no expense method depreciation deduction could be taken. The taxpayer argued that the regulation involved, Treas. Reg. § 1.179-2(c)(2), was invalid. The taxpayer contended that, since for purposes of the I.R.C. § 179(b)(3)(A) limitation, the taxpayer could aggregate taxable incomes from different trades or businesses, the taxpayer should be able to aggregate the taxpayer's taxable income with the income of the partnership under I.R.C. § 179(d)(8) to determine the partnership's taxable income. The taxpayer also argued that I.R.C. § 179(b)(3)(A) applied only to the taxable income of the taxpayer derived from the trade or business by the taxpayer. The taxpayer contended that, under I.R.C. § 701, a partnership is not a taxpayer; therefore, that section cannot apply to a partnership. The taxable income limitation in I.R.C. § 179(b)(3)(A) was, therefore, meaningless when applied to a partnership, and Treas. Reg. § 1.179-2(c)(2) was accordingly invalid. The court noted that a partnership is often considered a taxpayer under the I.R.C. and held that the regulation was valid. **Hayden v. Comm'r, 2000-1 U.S. Tax Cas. (CCH) ¶ 50,219 (7th Cir. 2000), aff'g, 112 T.C. No. 11 (1999).**

GROSS INCOME. The IRS has announced its acquiescence in the result of the following case. The taxpayers sold a business property under a sales agreement which provided for escrow of initial payments and the title to the property until the closing of the sale. The amounts paid into the escrow by the buyer were immediately transferred to the taxpayers who made personal use of the funds. The sales agreement provided for the return of the deposit funds if the sale failed to close due to the taxpayers' fault. The escrow agreement was extended into the next tax year and eventually fell through when the taxpayers could not supply clear title to the property. The taxpayers had to

repay almost all of the deposits. The IRS argued that the deposits were to be included in the taxpayers' gross income when distributed to them because the taxpayers had a claim of right to the funds. The court held that the distribution was made only under a contingent claim and that the taxpayers always were liable for repayment until the sale closed. Therefore, the court held that the deposits were not included in the taxpayers' income in the year received. **Ahadpour v. Comm'r, T.C. Memo. 1999-9, acq. AOD 2000 FED (CCH) ¶ 46,283.**

PARTNERSHIPS-ALM § 7.02[3][c].*

DEFINITION. The decedent and two children and the members of another family created a limited partnership. Each member contributed an interest in a ranch and the decedent also contributed \$1 million in securities. Each member received an interest in the partnership in accordance with the value of the property contributed. The general partner was not formed until after the decedent's death. The court found that the purpose of the partnership formation was to centralize management and to preserve the ranch as a family business. The IRS argued that the partnership was formed solely for the purposes of reducing the value of the decedent's estate. The decedent had been diagnosed with breast cancer but died from another illness. The decedent had contributed \$1.5 million in property and securities but the limited partnership interest received had a fair market value of \$617,591. The court held that the partnership was valid. **Church v. United States, 2000-1 U.S. Tax Cas. (CCH) 60,369 (W.D. Tex. 2000).**

PASSIVE LOSSES. The taxpayer was employed as a mechanical engineer for a real estate development company. The taxpayer also owned two rental properties and spent more than 750 hours per year performing maintenance on the properties. The properties had net losses and the IRS disallowed the losses above the passive loss limit. The taxpayer argued that the tax treatment of 5 percent or more owners, allowing deduction of the losses, and non-owners of real estate businesses, denying the deduction, was unconstitutional. The court held that the distinction had a rational purpose in order to prevent the tax shelter possibilities, except in the case of real estate businesses. **Pungot v. Comm'r, T.C. Memo. 2000-60.**

PENSION PLANS. The IRS has issued a revenue procedure which provides for a waiver of the 100 percent tax imposed under I.R.C. § 4971(b) on an employer who maintains a pension plan for which there is an accumulated funding deficiency under I.R.C. § 412. The waiver is applicable if (1) the plan is subject to Title IV of ERISA and is terminated in a standard termination under section 4041 of ERISA; (2) plan participants are not entitled to any portion of residual assets remaining after all liabilities of the plan to participants and their beneficiaries have been satisfied; (3) excise taxes that have been or could be imposed under I.R.C. § 4971(a) have been paid for all taxable years, including the taxable year related to the year of plan termination; and (4) all applicable forms in the 5500 series, including Schedule B (Actuarial Information), have been filed for the plan for all plan years including the

year of plan termination. **Rev. Proc. 2000-17, I.R.B. 2000-___.**

S CORPORATIONS-ALM § 7.02[3][c].*

DISCHARGE OF INDEBTEDNESS. Certiorari has been sought for the following case. The taxpayer was a shareholder in an S corporation which was a partner in a joint venture which realized discharge of indebtedness income in 1991. The taxpayer increased the basis of the taxpayer's S corporation stock by the taxpayer's share of the discharge of indebtedness income passed through the S corporation. At the time of the discharge of the indebtedness, the S corporation was insolvent and had net operating losses. The increase in the stock basis enabled the taxpayer to deduct the carried-over losses in a later year. The IRS argued that the discharge of indebtedness income was not an item of income for purposes of determining stock basis because discharge of indebtedness income was excluded under the insolvency exclusion rule of I.R.C. § 108. The Tax Court held that, because the corporation was insolvent, I.R.C. § 108 caused an exclusion of the discharge of indebtedness income at the corporation level which was offset by reduction in tax attributes of the corporation, leaving no tax consequences to flow to the shareholders such as would increase the shareholders' basis in stock. **Gitlitz v. United States, 99-2 U.S. Tax Cas. (CCH) ¶ 50,645 (10th Cir. 1999), aff'g sub nom., Winn v. Comm'r, T.C. Memo. 1998-71, withdrawing T.C. Memo. 1997-286; Nelson v. Comm'r, 99-2 U.S. Tax Cas. (CCH) ¶ 50,646 (10th Cir. 1999), aff'g, 110 T.C. 114 (1998).**

SAFE HARBOR INTEREST RATES

March 2000

	Annual	Semi-annual	Quarterly	Monthly
Short-term				
AFR	6.45	6.35	6.30	6.27
110 percent AFR	7.11	6.99	6.93	6.89
120 percent AFR	7.77	7.62	7.55	7.50
Mid-term				
AFR	6.80	6.69	6.63	6.60
110 percent AFR	7.50	7.36	7.29	7.25
120 percent AFR	8.19	8.03	7.95	7.90
Long-term				
AFR	6.75	6.64	6.59	6.55
110 percent AFR	7.43	7.30	7.23	7.19
120 percent AFR	8.13	7.97	7.89	7.84

Rev. Rul. 2000-11, I.R.B. 2000-___.

TRAVEL EXPENSES. The taxpayer operated a delivery business and paid its drivers 40 percent of the delivery charge. A portion of the payment was straight wages, with the remainder allocated to reimbursement for car and other expenses. The drivers provided monthly statements of actual miles and expenses but the reimbursement amount did not equal the mileage rate and expenses reported. The difference occurred because the drivers could include more than one delivery in a single trip. The court held that the entire payment was wages subject to withholding because the reimbursement was not based on actual mileage or expenses and the taxpayer did not require the employees to return any reimbursement above the actual mileage rate or expenses reported. **Shotgun Delivery, Inc. v. United**

States, 2000-1 U.S. Tax Cas. (CCH) ¶ 50,210 (N.D. Calif. 2000).

WITHHOLDING TAXES. The taxpayer was a restaurant which collected the tips received by its waitstaff. However, the staff underreported its tip income and the IRS sought payment from the taxpayer of FICA taxes on the total unreported tip income. The IRS used the aggregate method of determining the underreported tip income instead of determining the amount of underreported tip income for each employee. The taxpayer argued that the aggregate method was not authorized by the FICA statute. The court held that the aggregate method was allowed by the statutory authority of the IRS to issue regulations to carryout the statute. **West Hubbard Restaurant Corp. v. United States, 2000-1 U.S. Tax Cas. (CCH) ¶ 50,225 (7th Cir. 2000), aff'g, 99-1 U.S. Tax Cas. (CCH) ¶ 50,107 (N.D. Ill. 1999).**

PRODUCTS LIABILITY

COMBINE. The plaintiff purchased a combine manufactured by the defendant. The engine in the combine caught fire and destroyed the combine and unharvested wheat. The general rule in Kansas, under *Koss Construction v. Caterpillar, Inc., 960 P.2d 255 (1998)*, is that a purchaser of defective goods cannot sue in tort for damages to the goods caused by the defect. The plaintiff argued that, because the engine, manufactured by another defendant, was not part of the combine, the damages were to other goods, allowing a suit in tort for those damages. The court rejected this argument, holding that the engine was a component part of the combine. The plaintiff also argued that the *Koss* rule did not apply to a consumer transaction. Although the court acknowledged that *Koss* involved a transaction between merchants, the court held that the *Koss* rule also applied to consumer transactions. There is no mention of the issue of whether the plaintiff was considered a merchant. **Jordan v. Case Corp., No 82,216 (Kan. Ct. App. 1999).**

PESTICIDES. The plaintiff had used a herbicide manufactured by the defendant. The herbicide label and the selling representative had claimed that the herbicide could be applied to soybeans in one year and would not carry over to a corn crop in the following year. The plaintiff claimed that the herbicide did carry over and caused damage to the plaintiff's corn crops. The plaintiff brought a suit under several theories but only two remained for this case, breach of implied warranty of merchantability and negligent design and testing. The court held that the breach of implied warranty of merchantability claim was preempted by FIFRA because the claim applied only to claims made on the label. The court held, however, that the negligence design and testing claim was not preempted because the claim did not affect any information on the label. **Ackerman v. American Cyanamid Co., 586 N.W.2d 208 (Iowa 1998).**

The plaintiffs had used an insecticide manufactured by the defendant. The plaintiffs claimed that the pesticide caused

birth defects in their grandchild and filed a suit under theories of negligence, products liability, and breach of warranty. Most of the claims involved the failure of the defendant to warn that the insecticide could cause birth defects; therefore, the court held that those claims were preempted by FIFRA. However, the court held that the defective manufacturing and design claims were not preempted by FIFRA. Those claims however, were dismissed by summary judgment because the plaintiffs had failed to provide any evidence of causation between the defective insecticide and the birth defects. **National Bank of Commerce v. Dow Chemical Co.**, 165 F.3d 602 (8th Cir. 1999).

The plaintiffs were grain farmers and had applied to their fields a herbicide manufactured by the defendant. The plaintiffs claimed that the herbicide damaged the corn crops and sued in strict liability, breach of express and implied warranties, negligent formulation, and negligent testing. The plaintiffs sought damages for the loss of the crop. The court held that economic losses were not recoverable in tort under the strict liability and negligence claims. The court also held that consequential damages were not recoverable under the warranty claims because there was no privity of contract between the plaintiffs and defendant, since the plaintiff did not buy the herbicide directly from the defendant. **Frielein v. E.I. DuPont De Nemours & Co.**, 58 F. Supp.3d 1061 (N.D. Iowa 1999).

STATE REGULATION OF AGRICULTURE

PACKERS. Since 1949, under N.D.C.C. §§ 36-09-18, 36-22-03, 36-22-08, the North Dakota Stockmen's Association (NDSA) has been responsible for administering the livestock branding, recording and inspection program in North Dakota. The NDSA was authorized to charge a fee for the services which was paid directly to the NDSA. The plaintiffs were cattle owners who had registered livestock brands through the NDSA and they challenged the program as unconstitutional because the fees were not paid to the state treasury subject to appropriation by the legislature. The statute provided for a continuing appropriation of the fees directly to the NDSA. The NDSA first argued that the plaintiffs did not have standing because the suit was brought only to seek revenge against the NDSA for terminating the plaintiffs' employment. The court held that the motive for a suit had no effect on the standing of the plaintiffs who were clearly subject to the statutes. The NDSA then argued that it was not an agent of the state; therefore, the fees were not public moneys required to be paid to the state treasury by N.D. Const. Art. X, § 12. The court noted that (1) the NDSA had argued, and the court had held, that it was a state agency in a 1952 case and (2) the legislature had recognized that the fees were public moneys because it included the continuing appropriation of the fees to the NDSA; therefore, the court held that the fees were public moneys and had to be first paid to the state treasury. Finally, the NDSA argued that the branding program was preempted by the federal Packers and

Stockyards Act. The court held that the federal act did not preempt the state program because the state program did not interfere with the federal laws. **Billey v. North Dakota Stockmen's Ass'n**, 579 N.W.2d 171 (N.D. 1998).

STATE TAXATION

VALUATION OF LAND. The defendant's county assessor in 1997 made a county-wide reassessment of all property. The assessor hired a soil expert to map the soils in the county and based the assessment of the plaintiff's farm land on the soil type and comparable sales of other farms with the same soil type. The new assessment did not consider land features which limited or prohibited production, such as gravel pits, potholes, streams, drains or drainage problems. The plaintiff provided expert testimony as to the effect of these land features on land value. The evidence also showed that the defendant had known from past litigation that the plaintiff's property had many special features. The court held that the plaintiff had met the burden of proof that the valuation by the assessor was incorrect and did not reflect the true and full value of the property. **Kocer v. Bon Homme County Comm'rs**, 604 N.W.2d 1 (S.D. 1999).

WATER RIGHTS

INJUNCTION. The parties were neighbors and for several years the plaintiff had access to two ponds located on the defendant's land. The plaintiff installed a pipe to use the water in the ponds and the defendants cut off and capped the pipe because they claimed that the plaintiff used too much water and completely drained the ponds. The plaintiff sought a preliminary injunction which was denied by the trial court because the plaintiff failed to show any irreparable damages from the water cutoff. The appellate court reversed, holding that irreparable harm could include loss of business and goodwill and that the plaintiff should have the opportunity to present evidence that may indicate lasting damage to crop production. **Hunsaker v. Kersh**, 991 P.2d 67 (Utah 1999).

CITATION UPDATES

C. Bean Lumber Transport, Inc. v. United States, 68 F. Supp.2d 1055 (W.D. Ark. 1999) (like-kind exchange) see 10 *Agric. L. Dig.* 78 (1999).

Davis v. United States, 71 F. Supp.3d 623 (W.D. Tex. 1999) (interest) see 10 *Agric. L. Dig.* 134 (1999).

Estate of Smith v. Comm'r, 198 F.3d 516 (5th Cir. 1999) (claims against estate) see p. 4 *supra*.

Great Rivers Coop. of Southeastern Iowa v. Farmland Industries, Inc., 198 F.3d 685 (8th Cir. 1999), *aff'g unrep. D. Ct. dec.* (S.D. Iowa 1997) (cooperative securities) see p. 3 *supra*.

The Agricultural Law Press announces two new annual seminars

SEMINAR IN THE OZARKS

&

SEMINAR IN NEW MEXICO

AGRICULTURAL TAX AND LAW SEMINARS

by Neil E. Harl and Roger A. McEowen

May 31, June 1-3, 2000

Tan-Tar-A Resort, Lake of the Ozarks

August 16-19, 2000

Inn of the Mountain Gods, Mescalero, NM

Come join us for a world-class seminar on the hottest topics in agricultural tax and law. **Space is limited** for these wonderful opportunities to gain expert insight into agricultural law and enjoy the many activities offered by both of these splendid resorts.

The first seminar will be Wednesday, Thursday, Friday and Saturday, May 31, June 1-3, 2000 at the Tan-Tar-A Resort & Spa located on the Lake of the Ozarks located in the heart of the Missouri Ozarks. The second seminar will be Wednesday, Thursday, Friday and Saturday, August 16-19, 2000 at the Inn of the Mountain Gods resort in the south central mountains of New Mexico. Registrants may attend one, two, three or all four days, with separate pricing for each combination. On Wednesday, Dr. Harl will speak about farm and ranch income tax. On Thursday, Dr. Harl will cover farm and ranch estate tax. On Friday, Roger McEowen will cover farm and ranch business planning. On Saturday, Roger McEowen will cover current developments in several other areas of agricultural law. Your registration fee includes a copy of Dr. Neil Harl's seminar manuals, *Farm Income Tax* (almost 300 pages) and *Farm Estate and Business Planning: Annotated Materials* (nearly 500 pages) and a copy of Roger McEowen's outline, all of which will be updated just prior to the seminar. The seminar materials will also be available on CD-ROM for a small additional charge. Continental buffet breakfasts and break refreshments are also included in the registration fee.

Here are some of the major topics to be covered:

- Taxation of debt, taxation of bankruptcy, the latest on SE tax of rental of land to a family-owned entity; income averaging; earned income credit; commodity futures transactions; paying wages in kind.
- Federal estate tax, including 15-year installment payment of federal estate tax, co-ownership discounts, alternate valuation date, special use valuation, family-owned business deduction (FOBD), handling life insurance, marital deduction planning, disclaimers, planning to minimize tax over deaths of both spouses, and generation skipping transfer tax.
- Gifts and federal gift tax, including problems with future interests, handling estate freezes, and "hidden" gifts.
- Income tax aspects of property transfer, including income in respect of decedent, installment sales, private annuities, self-canceling installment notes, and part gift/part sale transactions.
- Organizing the farm business--one entity or two, corporations, general and limited partnerships and limited liability companies.
- Legal developments in farm contracts, secured transactions, bankruptcy, real property, water law, torts, and environmental law.

Special room discounts are available at both resorts. The resorts feature a variety of splendid guest accommodations and activities, including horseback riding, golf, sailing, hiking, tennis, fishing, and swimming.

The seminar registration fees for current subscribers to the *Agricultural Law Digest*, the *Agricultural Law Manual*, or *Principles of Agricultural Law* are \$175 (one day), \$340 (two days), \$490 (three days), and \$620 (four days). The registration fees for nonsubscribers are \$195, \$380, \$550 and \$700 respectively. The registration fees are higher for registrations within 30 days prior to the seminar. A registration form is available online at **www.agrilawpress.com**

For more information, call/fax Robert Achenbach at 1-541-302-1958, or e-mail at **robert@agrilawpress.com**



Printed on recycled
paper using soy ink.