CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

BANKRUPTCY

FEDERAL TAX

AUTOMATIC STAY. The debtor filed for Chapter 13 and listed an unsecured priority claim for federal income taxes owed to the IRS. The debtor's plan provided for full payment of the claim and the plan was confirmed without objection. Five months later, during the plan and when the debtor was not in default, the IRS filed for relief from the automatic stay to offset a refund claim by the debtor against the bankruptcy claim. The debtor argued (1) no right of setoff existed because there was no mutuality between the claims and (2) the IRS was bound by the provisions of the confirmed plan and was required to receive payments under the plan. The court initially looked at whether the IRS was entitled to relief from the automatic stay merely because it had a right of setoff. The court noted mixed precedent on this issue but also noted that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 included a provision which made the automatic stay inapplicable to governmental claim setoffs, indicating that such a right did not exist at the time of this case. Thus, the court held that the IRS was not entitled to relief from the automatic stay merely because it had a right of setoff of mutual claims but the IRS had to show some cause for relief from the automatic stay. The court noted that the IRS did not claim any improper conduct by the debtor or any danger to the IRS claim. The court held that the IRS was bound by the terms of the confirmed plan and was not entitled to relief from the automatic stay. ***In re* Schultz, 2005-2 U.S. Tax Cas. (CCH) ¶ 50,635 (Bankr. N.D. Ohio 2005)**.

FEDERAL AGRICULTURAL PROGRAMS

COFFEE. The United States Customs Service seized 600 sacks of beans from the defendant's premises and after testing the beans, determined that the beans were not from Puerto Rico and thus were imported without payment of duties. The beans were determined to be from another country because the beans were infested with bugs not found in Puerto Rico. The infestation also made the beans unfit for human consumption and were confiscated. The defendant claimed that the tests were inconclusive because the insect damage was minimal and could be purified by the roasting process. The court held that the insect test was sufficient to show that the beans were imported and were contraband because there were no records of importation or payment of duties. The contraband nature of the beans precluded the defendant from arguing that it was an innocent purchaser of the beans. The court also held that the beans could be confiscated as adulterated food because of the insect damage because the pre-roasted beans were "food," even though the beans would need to be roasted before being consumed. **United States v. Approximately 600 Sacks of Green Coffee Beans Seized from Cafe Rico, Inc., 381 F. Supp. 2d 57 (D. P.R. 2005)**.

FARM LABOR. The National Agricultural Statistics Service has issued farm employment figures as of October 9-15, 2005. There were 1,129,000 hired workers on the nation's farms and ranches the week of October 9-15, 2005, down 4 percent from a year ago. Of these hired workers, 840,000 workers were hired directly by farm operators. Agricultural service employees on farms and ranches made up the remaining 289,000 workers. All NASS reports are available free of charge on the internet. For access, go to the NASS Home Page at: http:/www.usda.gov/nass/. **Sp Sy 8 (11-05).**

GRAZING RIGHTS. In 1995, the plaintiff was granted a a ten year grazing permit for 265 head of cattle and eight horses on two allotments covering 17,000 acres in the Gila National Forest. A dispute arose between the plaintiff and the U.S. Forest Service as to the need for the grazing permit and the USFS canceled the permit in 1996 and ordered the plaintiff to remove the livestock. When the plaintiff failed to stop grazing on the land, the USFS sued for damages from trespass and for an injunction. The plaintiff argued that the plaintiff owned the surface rights to the land and the ejection order was an unconstitutional taking without compensation. The trial court ruled in favor of the USFS and the plaintiff removed the livestock. The ruling in that case did not bar the plaintiff's claim for compensation in the Court of Federal Claims. In 2004 the plaintiff filed the complaint in the current case in the Court of Federal Claims asserting the unconstitutional taking claim. The USFS argued that the ruling in the original case estopped the plaintiff from raising the issue of ownership in the allotment. The court originally ruled for the USFS but, on reconsideration, the court held that, under state law, the water, access and forage rights were separate rights from the ownership of the allotment; therefore, the court certified the question of ownership of water, access and forage to the New Mexico highest court. **Walker v. United States, 2005 U.S. Claims LEXIS 314 (Fed. Cls. 2005)**.

PAYMENT LIMITATIONS. In 1998, the FSA ruled that the plaintiffs and two other persons violated the limitation on farm program payments by claiming to be five separate persons. The plaintiffs appealed that ruling but the National Appeals Division ruled against them. The plaintiffs repaid the amounts erroneously received but the other two persons did not. In 2002, the FSA ruled that the plaintiffs were jointly and severally liable for the amounts owed by the other two persons. The plaintiffs argued that, under 7 C.F.R. § 1400.7, they could not be liable for the other amounts because they and the other two were not "one person" as defined by 7 C.F.R. § 1400.3. The court looked at the original FSA ruling and appeals and found that the NAD ruled that the five persons were not separate persons because they did not keep separate funds. The evidence showed that the five persons had all guaranteed loans for the farming operation, indicating that they were not separate owners in the operation. The court held that the determination that the plaintiffs were not separate "persons" under payment limitation rules was sufficient to impose joint and several liability on the plaintiffs for the amounts owed by the other two persons. The court also noted that the FSA was entitled to deference in interpreting its regulations and the plaintiffs' liability under the regulations. **Mitchell v. Johanns, 2005 U.S. Dist. LEXIS 28196 (S.D. Iowa 2005)**.

FEDERAL ESTATE AND GIFT TAXATION

IRA. The decedent's estate included two IRAs, each of which consisted of marketable securities. On the estate tax return the value of the IRAs was discounted by 21 and 22 percent to reflect the anticipated income tax liability from distribution of the IRA assets to the beneficiaries. The estate argued that, under the valuation of assets under the willing buyer/willing seller test, the income tax liability to a beneficiary of IRA would decrease the price willing to be paid for the IRA assets. The estate cited *Estate of Davis v. Comm'r, 110 T.C. 530 (1998)* which held that the value of a gift of stock was decreased by the tax on built-in capital gains to which the corporation's assets was subject. the court distinguished the present case from Davis by noting that the stock in the IRA was not subject on resale to any tax liability. The estate also cited *Estate of Smith v. Comm'r, 198 F.3d 5115 (5th Cir. 1999),* which held that the income tax benefit of a deduction resulting from a claim against the estate should be included in the valuation of estate assets. The court also rejected this precedent as inapplicable in this case because the IRA assets, the stock, did not themselves carry any future tax liability; the income tax liability arose out of the beneficiaries' receipt of the stock from an IRA and this liability did not pass to any hypothetical or real buyer of the stock from the beneficiary. The estate also cited *Davis v. Comm'r, supra* as allowing a discount for lack of marketability of IRAs. The court held that this argument did not apply because the assets in question were not the interests in the IRAs, but the stock held by the IRAs. The estate also cited cases involving unassignable lottery annual payments and land subject to zoning laws or land which was contaminated. The court held that none of the cases applied here because the assets involved, the stock, had no special legal restrictions or difficulties which would make the stock less valuable. The court held that the IRA assets were to be valued at the full fair market value of the stock on the decedent's death. **Estate of Kahn v. Comm'r, 125 T.C. No. 11 (2005)**.

MARITAL DEDUCTION. The decedent's will bequeathed all the residuary estate to the decedent's surviving spouse if the surviving spouse is living when the estate is distributed. If the surviving spouse died before the estate was distributed, the residuary estate passed to the decedent's children. The estate claimed a marital deduction for the property which passed to the surviving spouse who did survive to receive the distribution. Under Rev. Code Wash. § 11.108.010(4), if it is determined that a testator intended a marital deduction gift in a will, the will shall be construed to comply with the federal marital deduction. the court noted that the decedent had ample notice of the marital deduction law and obtained surviving spouse insurance (provides funds for payment of estate tax), indicating the decedent's intent to make the bequest to the surviving spouse without qualification. The court held that the decedent intended to make a marital deduction bequest in the will provision for the surviving spouse and held that, for purposes of the marital deduction, the court would ignore the inconsistent language withdrawing the bequest if the surviving spouse did not survive until after the estate distribution. Thus, the reformed will provision did not place a time limitation on the bequest to the surviving spouse and the bequest qualified for the federal marital deduction. **Sowder v. United States, 2005-2 U.S. Tax Cas. (CCH) ¶ 60,512 (E.D. Wash. 2005)**.

FEDERAL INCOME TAXATION

BUSINESS DEDUCTIONS. The taxpayer claimed deductions in excess of revenue from a bed and breakfast operation for part of the taxpayer's residence. The evidence showed that the taxpayer's daughter and family lived in the bed and breakfast area for an undetermined portion of the tax year. The taxpayer did not keep records of the revenues and expenses associated with the bed and breakfast operation and could not show how many days in the tax year the area was rented to non-family members. The court upheld the IRS denial of the deduction for lack of substantiation and failure to prove that the area was used for personal use for less than the greater of 14 days or 10 percent of the time the area was rented to the public. The taxpayer also claimed deductions for expenses relating to travel and supplies for writing activities. The taxpayer did not have any evidence of any revenues from the writing activities, did not keep any records of the amount of time spent on the activity over several tax years, and did not have any profit from the activity. The court upheld the IRS denial of the deductions because the taxpayer did not show a profit motive for the activity. **Lofstrom v. Comm'r, 125 T.C. No. 13 (2005)**.

CHARITABLE DEDUCTIONS. The IRS has issued a reminder for partnerships and S corporations with fiscal tax years beginning in 2004 and ending after August 27, 2005, that two provisions in the Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73, may benefit their partners and shareholders. The first provision, Act § 301, suspends certain limitations applicable to charitable contributions by individuals and corporations. The second provision, Act § 305, extends to partnerships and S corporations the enhanced deduction for contributions of food inventory otherwise available only to corporations. The announcement, which supplements the 2005 instructions to Forms 1065 and 1120-S, also explains reporting requirements on Schedule K-1 for partnerships and S corporations. **Ann. 2005-84, I.R.B. 2005-48**.

DISASTER LOSSES. On October 26, 2005, the president determined that certain areas in New Hampshire are eligible for assistance from the government under the Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5121) as a result of severe storms and flooding, which began on October 7, 2005. **FEMA-1610-DR**. On November 8, 2005, the president determined that certain areas in the Northern Mariana Islands are eligible for assistance from the government under the Act as a result of Typhoon Nabi, which began on August 30, 2005. **FEMA-1611-DR**. On November 8, 2005, the president determined that certain areas in Indiana are eligible for assistance from the government under the Act as a result of a tornado and severe storms, which began on November 6, 2005. **FEMA-1612-DR**. Taxpayers who sustained losses attributable to the disaster may deduct the losses on their 2004 returns.

HEALTH SAVINGS ACCOUNT. The IRS has issued guidance on eligibility to contribute to a Health Savings Account (HSA) during a cafeteria plan grace period as described in Notice 2005-42, I.R.B. 2005-23, 1204. An individual participating in a health flexible spending arrangement (health FSA) who is covered by the grace period is generally not eligible to contribute to an HSA until the first day of the first month following the end of the grace period, even if the participant's health FSA has no unused benefits at the end of the prior cafeteria plan year. The guidance shows how an employer may amend the cafeteria plan document to enable a health FSA participant to become HSA eligible during the grace period. **Notice 2005-86, I.R.B. 2005-49**.

The IRS has extended the transitional relief for taxpayers in states which require health insurance plans without a deductible or with a deductible amount less than that required for a "high deductible health plan" as required for the federal HSAs. The IRS stated that low deductible plans will be treated as qualifying under I.R.C. § 223(c)(2) if the only reason the plans are not HDHPs is because of state-mandated benefits, effective for months before January 1, 2006, for state requirements in effect on January 1, 2004. The IRS noted that, even though a state may amend its laws before January 1, 2006, to authorize HDHPs, non-calendar year plans may fail to qualify after January 1, 2006, because existing benefits cannot be changed until the next renewal date. Thus under the extension, for any coverage period of 12 months or less beginning before January 1, 2006, a health plan that does not meet the definition of an HDHP because it complied with state-mandated requirements to provide certain benefits without regard to a deductible, or with a deductible below the minimum annual deductible requirements, will be treated as an HDHP. This relief is provided only until the earlier of the health plan's next renewal date or December 31, 2006. **Notice 2005-83, I.R.B. 2005-49.**

INTEREST. The IRS has announced the 2006 figure, $163,300, which may be loaned to a qualifying continuing care facility at a below-market interest rate without incurring imputed interest. **Rev. Rul. 2005-75, I.R.B. 2005-49**.

PARTNERSHIPS

DISTRIBUTIVE SHARE. The IRS has issued proposed regulations which provide rules for testing the substantiality of an allocation under I.R.C. § 704(b) where the partners are look-through entities or members of a consolidated group, provide additional guidance on the effect of other provisions, such as I.R.C. § 482, upon the tax treatment of a partner with respect to the partner's distributive share under I.R.C. § 704(b), and revise the existing rules for determining the partners' interests in a partnership. **70 Fed. Reg. 69919 (Nov. 18, 2005)**.

SALE OF PARTNERSHIP INTERESTS. The taxpayer owned interests in a partnership which owned an interest in a corporation controlled by the taxpayer. The companies were both involved in a single project and when the partnership encountered financial difficulties, the partnership creditors required the taxpayer to sell the taxpayer's interest in the partnership and contribute the proceeds to the corporation. The corporation listed the contribution as a liability to the taxpayer and repaid $15,000 of the contribution. The taxpayer filed an income tax return which reported all of the sale proceeds as gain because the taxpayer had a zero basis in the sold partnership interests. The taxpayer filed an amended return which claimed a basis in the partnership interest of the amount still owed by the corporation. The taxpayer did not provide any evidence to support the claimed basis in the partnership interests. The court held that the taxpayer had no basis in the partnership interests sold. The taxpayer also argued that the taxpayer should not be taxed on proceeds which the taxpayer could not personally keep but was required to contribute to the corporation. In effect, the interests were sold by the partnership as part of the financing for the inter-company project. The court held that the taxpayer was liable for the gain on the sale of the partnership interests because the interests belonged to the taxpayer before the sale. **Doll v. Comm'r, T.C. Memo. 2005-269**.

PENSION PLANS. Treas. Reg. § 1.401(l)-1(c)(7)(i) defines covered compensation for an employee as the average (without indexing) of the taxable wage bases in effect for each calendar year during the 35-year period ending with the last day of the calendar year in which the employee attains (or will attain) social security retirement age. A 35-year period is used for all individuals regardless of the year of birth of the individual. In determining an employee's covered compensation for a plan year, the taxable wage base for all calendar years beginning after the first day of the plan year is assumed to be the same as the taxable wage base in effect as of the beginning of the plan year. An employee's covered compensation for a plan year beginning after the 35-year period applicable under Treas. Reg. § 1.401(l)-1(c)(7)(i) is the employee's covered compensation for a plan year during which the 35-year period ends. An employee's covered compensation for a plan year beginning before the 35-year period applicable under Treas. Reg. § 1.401(1)-1(c)(7)(i) is the taxable wage base in effect as of the beginning of the plan year. Treas. Reg. § 1.401(1)-1(c)(7)(ii) provides that, for purposes of determining the amount of an employee's covered compensation under Treas. Reg. § 1.401(1)-1(c)(7)(i), a plan may use tables, provided by the Commissioner, that are developed by rounding the actual amounts of covered compensation for different years of birth. The IRS has issued tables of covered compensation under I.R.C. § 401(l)(5)(E) for the 2006 plan year. **Rev. Rul. 2005-72, I.R.B. 2005-46, 944**.

QUALIFIED DEBT INSTRUMENTS. The IRS has announced the 2006 inflation adjusted amounts of debt instruments which qualify for the interest rate limitations under I.R.C. §§ 483 and 1274:

Year of Sale or Exchange	1274A(b) Amount	1274A(c)(2)(A) Amount
2006	$4,630,300	$3,307,400

The $4,630,300 figure is the dividing line for 2006 below which (in terms of seller financing) the minimum interest rate is the lesser of 9 percent or the Applicable Federal Rate. See **SAFE HARBOR INTEREST RATES**, *infra*. Where the amount of seller financing exceeds the $4,630,300 figure, the imputed rate is 100 percent of the AFR except in cases of sale-leaseback transactions, where the imputed rate is 110 percent of AFR. If the amount of seller financing is $3,307,400 or less (for 2006), both parties may elect to account for the interest under the cash method of accounting. **Rev. Rul. 2005-76, I.R.B. 2005-49**.

RETURNS. The IRS has posted drafts of several forms in the Topics for Tax Professionals section of the IRS web site (http://www.irs.gov/taxpros/topic/index.html) under Draft Tax Forms. Posted forms included the 2005 Original Issue Discount Tables (text and PDF versions), released in advance of the 2005 version of Publication 1212; a draft of Form 8804, Schedule A (2005), Penalty for Underpayment of Estimated Section 1446 Tax by Partnerships; and a draft of Form 8903 (2005), Domestic Production Activities Deduction. Advance proof copies of IRS tax forms are subject to change and Office of Management and Budget approval before they are officially released.

SAFE HARBOR INTEREST RATES

December 2005

	Annual	Semi-annual	Quarterly	Monthly
		Short-term		
AFR	4.34	4.29	4.27	4.25
110 percent AFR	4.78	4.72	4.69	4.67
120 percent AFR	5.22	5.15	5.12	5.10
		Mid-term		
AFR	4.52	4.47	4.45	4.43
110 percent AFR	4.98	4.92	4.89	4.87
120 percent AFR	5.43	5.36	5.32	5.30
		Long-term		
AFR	4.79	4.73	4.70	4.68
110 percent AFR	5.27	5.20	5.17	5.14
120 percent AFR	5.76	5.68	5.64	5.61

Rev. Rul. 2005-77, I.R.B. 2005-49.

S CORPORATIONS

NUMBER OF SHAREHOLDERS. The IRS has announced guidance regarding the election under I.R.C. § 1361(c)(1)(D), which allows members of a family to be treated as a single S corporation shareholder. The election was created by Section 231 of the American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 (2004) (the Act). The IRS also announced that it intends to issue future guidance. Section 231 of the Act allows any family member to make an election under new I.R.C. § 1361(c)(1)(D) to treat all members of the family as one shareholder of an S corporation for purposes of determining the number of shareholders of the corporation. The election is relevant only to the determination of whether the corporation has no more than 100 shareholders as required under I.R.C. § 1361(b)(1)(A) and has no impact on any other existing requirement for qualification as an S corporation. The term "members of the family" is defined in I.R.C. § 1361(c)(1)(B) to include (i) the common ancestor, (ii) the lineal descendants of the common ancestor, and (iii) the spouses (or former spouses) of the lineal descendants or of the common ancestor. The common ancestor may not be more than six generations removed from the youngest generation of shareholders who would be members of the common ancestor's family (but for the six-generation limit for identifying the common ancestor). This test is applied as of the later of the effective date of I.R.C. § 1361(c)(1), as amended by the Act, or the time the S corporation election under I.R.C. § 1362(a) (the S corporation election) is made. The election may be made (except as provided in Treasury regulations) by any member of the family. The election does not affect the requirement under I.R.C. § 1362(a)(2) that an S corporation election must be consented to by all shareholders, whether or not "members of the family," who are shareholders at the time of the S corporation election. The election may be made for taxable years of the S corporation beginning after December 31, 2004. The election will be effective as of the first day of the S corporation's taxable year identified in the election as the first taxable year of the corporation for which the election is effective, and shall remain in effect until terminated as provided in regulations prescribed by the Secretary. A member of the family who is (or is treated under I.R.C. § 1361 and the regulations thereunder as) a shareholder of the S corporation may make the election. The election is made by notifying the corporation to which the election applies. The notification shall identify by name the member of the family making the election, the "common ancestor" of the family to which the election applies, and the first taxable year of the corporation for which the election is to be effective. For purposes of identifying the common ancestor (who does not have to be alive at the time the election is made) any spouse or former spouse of the common ancestor will be treated as being in the same generation as the common ancestor, and any spouse or former spouse of a lineal descendant of the common ancestor will be treated as being in the same generation as the lineal descendant to whom that spouse is or was married. For purposes of the election, the estate of a deceased member of the family will be considered to be a member of the family during the period in which the estate, or a trust described in I.R.C. § 1361(c)(2)(A)(iii), holds stock in the S corporation. Additionally, for purposes of the election, the members of the family will include: (1) each potential current beneficiary of an electing small business trust (ESBT) who is a member of the family, (2) the income beneficiary of a qualified subchapter S trust (QSST) who makes the QSST election, if that income beneficiary is a member of the family, (3) each beneficiary of a trust who is a member of the family, if the trust was created primarily to exercise the voting power of stock transferred to it, (4) the member of the family for whose benefit a trust described in I.R.C. § 1361(c)(2)(A)(vi) was created, (5) the deemed owner of a trust treated as wholly owned under subpart E of Part I of subchapter J of Chapter 1 of Subtitle A of the Internal Revenue Code, if that deemed owner is a member of the family, and (6) the owner of an entity disregarded as an entity separate from its owner under Treas. Reg. § 301.7701-3 of the Procedure and Administration Regulations, if that owner is a member of the family. If a corporation has two or more elections in effect and the members of one family for which the election has been made (the inclusive family) include all the members of another family for which the election was also made (the subsumed family), then the members of the inclusive family will be counted as one shareholder for purposes of I.R.C. § 1361(b)(1)(A) as long as the inclusive family's election is in effect, and the members of the subsumed family will not be counted as a separate and additional shareholder. The election will be effective as of the first day of the corporation's taxable year designated by the shareholder making the election. Any election will remain in effect until terminated as provided in regulations. Taxpayers may have already taken certain actions in order to make this election by various forms of notification to the corporation or to the IRS. In order for the election to be effective for taxable years beginning after December 31, 2004, taxpayers will need to provide the information described in this guidance to the corporation (to the extent not already provided to the corporation). The corporation is required to keep records in accordance with I.R.C. § 6001 and the regulations thereunder. **Notice 2005-91, I.R.B. 2005-51**.

INSURANCE

CROP INSURANCE. The defendant rice farmer had purchased from the plaintiff insurance agency crop insurance in 1999 which covered crop damage from natural causes and contained a crop revenue coverage (CRC) provision that provided payment for prices received for the rice crop below a guaranteed price. In 2000, the defendant spoke with a different employee of the insurance agency and requested a quote on the same insurance for the 2000 rice crop. A written quote was provided to the defendant who signed it and returned it to the agency. The usual procedure was that the insurance premium was paid out of any claim made after harvest. During the 2000 harvest the defendant indicated that a below-guaranteed price claim may be made and was informed that no CRC provision was included. When the defendant refused to pay the insurance premium, the plaintiff sued. The trial court ruled that a mutual mistake had occurred and reformed the original insurance contract to include a CRC provision. The trial court awarded damages to the defendant under the CRC provision, less the insurance premium. The appellate court noted that the determination of mutual mistake was a fact issue and that the trial court's determination was entitled to deference. The appellate court held that the trial court's ruling was supported by substantial evidence of mistake by both the defendant and the plaintiff's agents and employees. The noted noted that the evidence included testimony of the plaintiff's agents reference to a CRC policy obtained by the defendant before the claim was made and that the policy number on the 1999 CRC policy was the same as the policy for 2000, giving an indication to the defendant that the same policy was being continued for the 2000 crop year. **Fireman's Fund Insurance Co, v. Bulliard Farm, Inc., 2005 La. App. LEXIS 2302 (La. Ct. App. 2005)**.

NEGLIGENCE

RECREATIONAL USE. The Illinois Legislature has amended the Illinois Recreational Use statute, 745 ILCS 65, to allow protection from liability lawsuits for landowners, even though the landowners do not allow access to their land to all members of the public. The Act also removed residential buildings from the protection of the statute. In addition, the amendments include a restriction on covered activities to apply only to injuries resulting from "hunting or recreational shooting." See Uchtman and Endres, "New Recreational Use Act Rules for Illinois Landowner Liability: Two Steps Forward, One Step Back," 05-02 *Agricultural Law and Taxation Briefs*, Nov. 16, 2005.

PRODUCTS LIABILITY

CORN PICKER. The plaintiff was injured while attempting to unclog a corn picker manufactured by the defendant. The plaintiff was employed as a factory worker and had agreed to finish the corn harvest when the plaintiff's father had become ill. The court picker was pulled behind a tractor and used the PTO from the tractor for power. The plaintiff attempted to clear the picker while leaving the PTO on and engaged. The plaintiff sued for damages on the theory of defective design. The trial court granted summary judgment for the defendant on the grounds that the plaintiff voluntarily accepted a known risk in attempting to clear the picker without first turning off the PTO. The appellate court reversed, holding that summary judgment was improper because the evidence was inconclusive that this plaintiff had sufficient knowledge of the risks of attempting to unclog a running corn picker. The court even acknowledged that experienced farmers often do not appreciate the risk in such activities. **Zigler v. AVCO Corp., 2005 Ohio App. LEXIS 5517 (Ohio Ct. App. 2005)**.

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STATE REGULATION OF AGRICULTURE

AVIAN FLU. The plaintiff was a chicken producer who contracted with individual farmers to raise chickens for the plaintiff. The Pennsylvania Department of Agriculture (PDA) had found indications of avian flu in several flocks of the plaintiff's contract farmers and quarantined the flocks, although the PDA did not order the flocks killed. Instead, an association of producers purchased the suspect flocks and destroyed them after a vote of members. The flocks were later determined to be free of the avian flu. The producers received 67 percent of the value of the destroyed flocks. The plaintiff argued that the association acted under color of law for the PDA and the quarantine and destruction of the flocks violated the producers' due process rights because no notice and hearing was provided. The court held that the association did not act under color of law but at the voluntary consent of its members. The court also held that due process rights were not violated because the quarantine and destruction of the flocks resulted in adequate compensation. **Reichley v. Pennsylvania Department of Agriculture, 427 F.3d 236 (3d Cir. 2005)**.

VETERINARIANS

STANDARD OF CARE. The plaintiff owned two cockatiels and several parakeets. The plaintiff took the cockatiels to the defendant for examination and the defendant prescribed a drug, Panacur, for the treatment of roundworm in the birds as well as the other birds owned by the plaintiff. The birds became worse and the plaintiff took them to another veterinarian who claimed that Panacur was toxic to cockatiels and parakeets. The plaintiff sued for the loss of the birds under theories of negligence and breach of implied warranty. The court held that the standard of negligence for a veterinarian was that of a veterinarian of ordinary skill, care and diligence, demonstrated by expert testimony as to the proper treatment involved in the case. The defendant presented evidence of the research on the use of Panacur on parasites in animals and humans and the lack of any federal law or regulation prohibiting the use of Panacur on humans or animals. The court held that the defendant's evidence constituted expert testimony which place the burden on the plaintiff to supply opposing expert testimony. The plaintiff did not provide any expert testimony or written opinions but provided only general information on the treatment of cockatiels and parakeets. The court held that the plaintiff's evidence was insufficient to raise an issue of fact as to the standard of care exercised by the defendant in the treatment of the plaintiff's birds; therefore, the court held that the trial court's grant of summary judgment for the defendant was proper. **Ullmann v. Duffus, 2005 Ohio App. 5463 (Ohio Ct. App. 2005)**.