CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

ANIMALS

HORSES. The plaintiff purchased a horse from the defendants and was injured while riding the horse at the defendant's farm. None of the parties had noticed that the horse had been attacked by fire ants and the biting ants caused the horse to throw the plaintiff to the ground. Although the defendants had mentioned that they had a fire ant problem at their farm, no one noticed any fire ants before the ride started. The plaintiff sued for damages for personal injuries and the defendants argued that the Texas equine activity statute, Tex. Civ. Prac. & Rem. Code §§ 87 et seq., barred the action because the risk of fire ants is part of the normal risks of riding horses. The plaintiff argued that an exception in the statute applied in that the fire ants were a condition of the property known to the defendants and the defendants failed to provide warning about the fire ants. The court held that, because fire ants are a natural condition of land beyond the control of the property owners and because the defendants did reveal that they had a fire ant problem, the plaintiff's accident was within the normal risks of riding a horse on the defendants' property and the action was barred by the statute. **Gamble v. Peyton, 2005 Tex. App. LEXIS 10590 (Tex. Ct. App. 2005)**.

BANKRUPTCY

GENERAL

INVOLUNTARY PETITION. An involuntary bankruptcy petition was filed against the debtor in 1998. The debtor did not raise the issue of the debtor's status as a farmer until 2003, arguing that the debtor's status as a farm deprived the bankruptcy court of jurisdiction. The appellate court held that the exception for farmers under the involuntary petition provisions was an affirmative defense which must be raised by the debtor. In addition, the court held that this affirmative defense must be raised in a timely manner. The court noted that in the five years since the petition was filed, several bankruptcy matters had been raised and determined in the case, including the sale of estate property; therefore, the five year delay made the debtor's status as a farm untimely raised. ***In re* Malar, 2005 U.S. App. LEXIS 28368 (8th Cir. 2005)**.

An involuntary bankruptcy petition was filed against the debtors and the debtors filed an answer which stated that the debtors were farmers but consented to the petition. An order for relief was filed by the court in August 2001. The debtors sought to convert the case from Chapter 7 to Chapter 11 but the Bankruptcy Court rejected the motion. One of the debtors plead guilty to fraud in the management of the debtors' company, including defrauding the company's creditors. The creditors then sought summary judgment on the issue that debtor's debts were nondischargeable. The debtor argued that the court did not have jurisdiction because the debtor was a farmer in an involuntary case. The court held that the defense of the status of a farmer had to be raised in the initial stages of the case and the failure to raise the defense then constituted a waiver of the issue. The court granted the summary judgment for the creditors. ***In re* Young, 2006 Bankr. LEXIS 23 (Bankr. 8th Cir. 2006)**.

SUBORDINATION. An attorney provided legal services for the debtor but was not paid. The attorney obtained a judgment and attached a judgment lien against the debtor's farm. The debtor wanted to sell the property and promised the attorney to grant the attorney a second mortgage on other real property. The debtor and the first mortgagee on the substitute property represented that the debtor had sufficient equity in the replacement property to cover the second mortgage. The attorney released the lien on the farm but the debtor refused to grant the second mortgage. In the bankruptcy case, the second property was subject to a higher mortgage than the debtor and creditor had represented. The attorney sought to have the creditor's first mortgage subordinated to the attorney's bankruptcy claim because of the misrepresentation. The debtor and creditor argued that equitable subordination was allowed only where the creditor was an "insider" in a debtor who was a corporation. The court held that equitable subordination was allowed for a non-insider creditor where the creditor's conduct was fraudulent. ***In re* Desmond, 331 B.R. 38 (Bankr. D. N.H. 2005)**.

FEDERAL TAX

AUTOMATIC STAY. The debtors filed for Chapter 13 and received a discharge, including a discharge of federal taxes. After the discharge, the IRS attempted to recover the taxes by seizing the debtors' social security payment and freezing the debtors' bank account. The debtors sought recovery of (1) an overdraft fee from a check which was cashed after the freezing of the bank account, (2) the social security payment, (3) attorney fees and (4) legal costs. The court held that the IRS activities did violate the automatic stay. The IRS argued that no recovery was allowed because the debtors failed to exhaust their administrative remedies before bringing a court action. The court held that, although the damages could only be ordered in a court case, I.R.C. § 7433 required the exhaustion of all administrative appeals before the debtors could seek damages in court. However, the court did order the return of the seized social security payment. ***In re* Lowthorp, 332 B.R. 656 (Bankr. M.D. 2005)**.

The debtor filed for Chapter 7. After the petition was filed, the sent a request to the trustee for payment of employment taxes owed by the debtor. The trustee requested that the IRS file a claim in the bankruptcy case so that the taxes could be paid from the estate. Instead of filing a claim, the IRS filed a levy against the estate's bank account which the IRS agreed was a violation of the automatic stay. The trustee sought damages for legal expenses and punitive damages for the violation. The IRS rescinded its levy and filed a claim for the taxes. The trustee also sought to disallow this claim as untimely filed or to have the claim subordinated to the other bankruptcy claims. The court held that the trustee could not bring an action for damages without first exhausting the administrative remedies available under the IRS regulations. The court also allowed the claim because it was filed before any distributions were made from the estate and the claim was allowed under Section 507. The court also denied the subordination request because the IRS action did not harm the other creditors and did not result in any more payment to the IRS than what would have been paid for a timely filed claim. ***In re* Graycarr, Inc., 330 B.R. 741 (Bankr. W.D. Ark. 2005)**.

CRIMINAL LAW

SEARCH. A county sheriff was contacted by an electrician who had seen two horses in poor health at a farm. The sheriff found the horses, which belonged to the defendant, at an apparently abandoned farmstead, determined that the horses were in dangerous poor health and impounded the animals. The sheriff also visited another farm with horses belonging to the defendant and impounded several of those for the same reason. The defendant was charged and convicted of cruelty to animals and during the trial the defendant sought to exclude evidence of the horses' condition as part of an illegal search. The trial court allowed the evidence and the defendant appealed that decision. The appellate court held that the search was proper because (1) the defendant did not demonstrate any ownership or other property interest in the farm where the animals were found, (2) state law, Neb. Rev. Stat. § 28-1012(1), allows for a warrant but does not require one for animal cruelty cases, and (3) the animals were within plain view from a location in which the sheriff had a legal right to be. **State of Nebraska v. Ziemann, 705 N.W.2d 59 (Neb. 2005)**.

FEDERAL AGRICULTURAL PROGRAMS

CROP INSURANCE. The plaintiff was a partnership which originally consisted of three partners. The partnership applied for crop insurance and a policy was issued by the defendant insurance company. One partner was investigated for improprieties in a crop insurance claim filed by the partner before the formation of the partnership. Before the resolution of that matter, the partner sold the partner's interest in the partnership back to the partnership and assigned the partner's interest in the insurance policy to the partnership. The assignment was approved by the defendant. A few months later, the partner signed a settlement of the improper crop insurance claim under which the partner agreed to be listed on the FCIC disbarment/disqualification list for one year, which included a portion of the time covered by the partnership's policy. The defendant argued that the partner's listing voided the partnership's insurance contract from the beginning and entitled the defendant to deny the partnership's crop insurance loss claim. The court held that, since the assignment occurred before the partner became disqualified, the subsequent disqualification would not apply to the crop insurance contract as to the assignee, the partnership. Although the case does not discuss this issue, the defendant appears to have been concerned that the partner assigned the policy interest only because of the pending investigation and that the assignment may not have been bona fide. However, the insurance company did not seek to invalidate the assignment as fraudulent. The court's discussion indicates that the burden was on the insurance company to make that determination when it approves the assignment, not when a crop loss claim is made. **Kroeplin Farms General Partnership v. Heartland Crop Insurance, Inc., 430 F.3d 906 (8th Cir. 2005)**.

FARM CREDIT ADMINISTRATION. The FCA has issued proposed regulations that allow a Farm Credit System (FCS) bank or association to terminate its FCS charter and become a financial institution under another federal or state chartering authority. The proposed regulations update the existing regulations by separating the FCA review of stockholder disclosure information from the review of the termination itself and by strengthening the role of an institution's directors in the termination process. **71 Fed. Reg. 1704 (Jan. 11, 2006)**.

MEAT AND POULTRY. The FSIS has issued interim final regulations which continue to provide that individual meat and poultry products bearing the claim "healthy" (or any other derivative of the term "health") must contain no more than 480 milligrams (mg) of sodium; and that meal-type products bearing the claim "healthy" (or any other derivative of the term "health") must contain no more than 600 mg of sodium. FSIS is deferring indefinitely, until further notice, implementation of the requirements that individual meat and poultry products bearing the claim "healthy" (or any other derivative of the term "health") contain no more than 360 milligrams (mg) of sodium and that meal-type products bearing the claim "healthy" (or any other derivative of the term "health") contain no more than 480 mg of sodium.**71 Fed. Reg. 1683 (Jan. 11, 2006)**.

PERISHABLE AGRICULTURAL COMMODITIES ACT. The plaintiff was a seller of perishable agricultural commodities. The defendant was hired by various produce retailers to pick up produce from the plaintiff and deliver it to the retailers. The retailers paid the defendant for this service but paid for the produce by cash or check made out to the plaintiff. The plaintiff filed suit to recover payments not made by the defendant and sought to require the defendant to set aside funds to cover the PACA trust. The defendant argued that the defendant was not subject to PACA because the defendant was not a dealer but only a delivery service. The court held that the defendant was not a dealer because the defendant did not buy or sell produce but merely transported it from the seller to the buyers. The court noted that the defendant did not charge any additional amounts for the produce. In addition, the defendant was not a dealer because the defendant did not handle more than 2,000 pounds of produce in any day. The court held that the defendant was not subject to PACA. The plaintiff also sought PACA trust recovery from the retailers who failed to pay for the produce. The court held that the plaintiff failed to provide any notice to these retailers because no invoices were presented to the retailers. **A & J Produce Corp. v. Chang, 385 F. Supp. 2d 354 (S.D. N.Y. 2005)**.

TUBERCULOSIS. The APHIS has issued proposed regulations regarding tuberculosis in captive cervids that extend, from 2 years to 3, the term for which accredited herd status is valid and increase by 12 months the interval for conducting the reaccreditation test required to maintain the accredited tuberculosis-free status of cervid herds. The proposed regulations also reduce, from three tests to two, the number of consecutive negative official tuberculosis tests required of all eligible captive cervids in a herd before a herd can be eligible for recognition as an accredited herd. The proposed regulations also remove references to the blood tuberculosis test for captive cervids, as that test is no longer used in the tuberculosis eradication program for captive cervids. **71 Fed. Reg. 1985 (Jan. 12, 2005)**.

FEDERAL ESTATE AND GIFT TAXATION

GIFTS. The taxpayers, husband and wife, had received a large amount of stock from the sale of two corporations in which the husband was employed. The taxpayers wanted to transfer much of the stock to their children and formed a family limited partnership, ostensibly with trusts for the children as limited partners; however, the taxpayers failed to completely establish the written materials for the trusts. Once the partnership was formed, the taxpayers transferred stock to the partnership and filed gift tax returns which treated the transfer as a transfer of partnership interests to the childrens' trusts. The transferred partnership interests were valued using discounts for lack of marketability and for minority interests. The court held that the transfers were deemed to be transfers of the underlying stock and not entitled to any discounts for valuation of the transfers. The court noted that, although the partnership was legitimate and the trusts effective, the taxpayers failure to follow all the legal requirements and procedures for trusts and partnerships indicated that the real purpose of the transfers was the transfer of the stock and not the establishment of a partnership for non-estate and gift planning purposes. **Senda v. Comm'r, 2006-1 U.S. Tax Cas. (CCH) ¶ 60,515 (8th Cir. 2006), *aff'g*, T.C. Memo. 2004-160**.

FEDERAL INCOME TAXATION

ALTERATIVE MINIMUM TAX. The IRS has provided a new online tool, the AMT Assistant, to help individual taxpayers determine whether they are potentially subject to the alternative minimum tax (AMT). The AMT Assistant automates the AMT Worksheet of the 1040 Instructions, Worksheet to See if You Should Fill in Form 6251-Line 45. Taxpayers who file paper returns will benefit the most from the AMT Assistant because e-file software generally computes AMT liability automatically. The information provided is anonymous and will be used only for purposes of determining AMT liability; it will not be shared, stored or used in any other way, nor can it be used to identify the individual who enters it. During the 2006 filing season, this new tool will be available on the IRS web site at www.irs.gov. To locate it, enter "AMT Assistant" in the search box on the web site. Taxpayers must complete a draft 1040 through line 44 and have that form available to use the AMT Assistant. **IR-2006-3**.

CHARITABLE DEDUCTIONS. The IRS has issued guidance on the reporting requirements for charitable organizations which receive a contribution of a qualified motor vehicle with a claimed value of more than $500. **Notice 2006-1, I.R.B. 2006-1**.

CORPORATIONS

NET OPERATING LOSSES. The taxpayer corporation was owned primarily by two brothers, with the remaining stock owned by members of their families. In 1998, one brother and spouse, owning 65 percent of the shares, sold all of their shares to the other brother, resulting in that brother's ownership share increasing from 19 percent to 84 percent. In 1998 the corporation had net operating losses and the IRS disallowed some of the losses as a deduction, under I.R.C. § 382, in 1998 because of the change in ownership of the corporation. The corporation argued that no ownership change occurred because the stock ownership of each brother could be attributed to the other under I.R.C. § 318. The court held that Section 318 did not attribute stock held by brothers to be ownership by the same family member. Section 318 grouped together only stock held by the stockholder and the stockholder's spouse, children, grandchildren and parents. The court noted that Section 318 also prohibits "double attribution" which would otherwise allow attribution from the shareholder to the parents and from the parents to a sibling. Therefore, the court held that, because the ownership status of two 5 percent or more shareholders changed and one shareholder's ownership changed by more than 50 percent, the corporation's net operating losses were limited by I.R.C. § 382. **Garber Industries, Inc. v. Comm'r, 2006-1 U.S. Tax Cas. (CCH) ¶ 50,109 (5th Cir. 2006), *aff'g*, 124 T.C. 1 (2005)**.

DISABLED ACCESS CREDIT. The taxpayers, husband and wife, had two small businesses in addition to their employment with other businesses. The taxpayer subscribed to a computer service which allowed hearing-impaired people to call them without using the free TTY service provided by all telephone companies. The taxpayers claimed a tax credit under I.R.C. § 44, arguing that the computer telephone service was obtained in order to comply with the Americans with Disability Act. The court held that the credit was not allowed because the computer telephone system was not required in order to comply with the ADA since all public telephone services are already required to provide telephone service for hearing-impaired individuals without extra charge. **Svoboda v. Comm'r, T.C. Memo. 2006-1**.

DISASTER LOSSES. On December 16, 2005, the president determined that certain areas in Connecticutt 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 14, 2005. **FEMA-1619-DR**. On December 20, 2005, the president determined that certain areas in the South Dakota are eligible for assistance from the government under the Act as a result of a severe winter storm which began on November 27, 2005. **FEMA-1620-DR**. On January 4, 2006, the president determined that certain areas in North Dakota are eligible for assistance from the government under the Act as a result of a severe winter storm which began on November 27, 2005. **FEMA-1621-DR**. On January 4, 2006, the president determined that certain areas in Minnesota are eligible for assistance from the government under the Act as a result of a severe winter storm, which began on November 27, 2005. **FEMA-1622-DR**. Taxpayers who sustained losses attributable to the disaster may deduct the losses on their 2004 returns.

INTEREST. The IRS has announced that banks, governmental agencies, educational institutions and other persons can request a waiver of penalties for failure to report interest income received in 2005. The notice provides the procedure for requesting the waiver. **Notice 2006-5, I.R.B. 2006-3**.

INVENTORY. The IRS has provided certain heavy equipment dealers a safe harbor that allows them to approximate the cost of the equipment parts inventory using the replacement cost method of accounting. **IR-2006-4**.

LETTER RULINGS. The IRS has issued its annual list of procedures for issuing letter rulings. **Rev. Proc. 2006-1, I.R.B. 2006-1**.

The IRS has issued its annual list of procedures for furnishing technical advice to District Directors and Chiefs, Appeals Offices. **Rev. Proc. 2006-2, I.R.B. 2006-1**.

The IRS has issued its annual list of tax issues for which the IRS will not give advance rulings or determination letters. **Rev. Proc. 2006-3, I.R.B. 2006-1**.

The IRS has issued its annual list of procedures for issuing letter rulings involving exempt organizations. **Rev. Proc. 2006-4, I.R.B. 2006-1**.

The IRS has issued its annual list of procedures for issuing letter rulings involving employee pension plans. **Rev. Proc. 2006-5, I.R.B. 2006-1**.

The IRS has issued a revenue procedure which provides guidance for complying with the user fee program of the Internal Revenue Service as it pertains to requests for letter rulings, determination letters, etc., on matters under the jurisdiction of the Commissioner, Tax Exempt and Government Entities Division; and requests for administrative scrutiny determinations under Rev. Proc. 93-41, 1993-2 C.B. 536. **Rev. Proc. 2006-8, I.R.B. 2006-1**.

PENSION PLANS. For plans beginning in January 2006 for purposes of determining the full funding limitation under I.R.C. § 412(c)(7), the 30-year Treasury securities rate for this period is 4.85 percent, the 90 percent to 105 percent permissible range is 4.37 percent to 5.10 percent, and the 90 percent to 110 percent permissible range is 4.37 percent to 5.34 percent. The corporate bond weighted average is no longer relevant for plans beginning after 2005. **Notice 2006-8, I.R.B. 2006-3**.

The taxpayer was employed by a company which provided a pension plan. The company was sold and the plan funds were distributed to the taxpayer. The taxpayer argued that the plan agreement provided for the employer to pay, by withholding, any taxes on distributions from the plan; therefore, the plan distribution amount was not included in income. No evidence of any withheld taxes was presented. The court noted that the parties agreed that the distribution was taxable income, whether or not the tax was paid by the taxpayer or company. Therefore, the court held that the distribution should have been included in income. The court noted that, if tax had been paid, the taxpayer could claim a credit against the tax owed. **Ackerman v. Comm'r, T.C. Memo. 2006-3**.

The IRS has adopted as final regulations governing designation of 401(k) pension plan contributions as Roth IRA contributions. Roth contributions are not excluded from gross income, and later distributions of Roth contributions are not subject to taxes on distributions; therefore, the regulations provide guidance for separate accounting of elective Roth contributions to 401(k) plans. **71 Fed. Reg. 6 (Jan. 3, 2006)**.

RETURNS. The IRS has posted the following publications to its website, www.irs.ustreas.gov, in the Forms & Pubs section: Publication 17 (2005), Your Federal Income Tax; Publication 51 (Rev. January 2006), (Circular A), Agricultural Employer's Tax Guide; Publication 1450 (Rev. 12-2005), Instructions on How to Request a Certificate of Release of Federal Tax Lien; Publication 1494 (2006), Table for Figuring Amount Exempt from Levy on Wages, Salary, and Other Income --Forms 668-W & 668-W(c)(DO) and 668-W(ICS); and Publication 3524 (Rev. 12-2005), EITC Eligibility Checklist For Tax Year 2005. The IRS has also posted a draft of Form 8908, Energy Efficient Home Credit in the Topics for Tax Professionals section, under

Draft Tax Forms. The IRS seeks comments on the draft form.

SALE OF RESIDENCE. The taxpayers sold their home and moved to another state where they purchased a home. Wile they were living in the new home, the taxpayers' daughter was divorced and the taxpayers wanted the daughter and her child to live with them; however, the housing community in which they lived did not allow the daughter and child to live with them. The taxpayers sold the new home and moved back to the original state where they purchased a third home for them and their daughter and grandchild. The taxpayers lived in the second home less than two years. The IRS ruled that the sale of the second home was for unforeseen circumstances and allowed the taxpayers an exclusion of gain on the sale of the second home based on the maximum dollar limitation multiplied by a fraction equal to the number of days lived in the second home divided by 730. **Ltr. Rul. 200601023, Sept. 30, 2005**.

The taxpayers, husband and wife, moved into the husband's house after they were married. The husband's house was outside the school of the wife's children and the children had to be driven to school. The taxpayers decided to purchase a second house in the school district to make transportation easier but kept the husband's house because they intended to move back when the children graduated. However, the taxpayers had another child and decided that the husband's house was not large enough for the larger family and sold the first house. The IRS ruled that the sale of the husband's house was the result of unforeseen circumstances and allowed the exclusion of gain on the sale of the husband's house based on the maximum dollar limitation multiplied by a fraction equal to the number of days lived in the second home divided by 730. **Ltr. Rul. 200601022, Sept. 30, 2005**.

The taxpayers moved to a new state and purchased a new house. The taxpayers were physically assaulted by neighbors to the extent that medical treatment was necessary. Because of the danagerous nature of the neighborhood, the taxpayers sold that home and purchased a third home within two years. The IRS ruled that the sale of the taxpayers' second house was the result of unforeseen circumstances and allowed the exclusion of gain on the sale of the husband's house based on the maximum dollar limitation multiplied by a fraction equal to the number of days lived in the second home divided by 730. **Ltr. Rul. 200601009 Sept. 30, 2005**.

WITHHOLDING TAXES. The IRS has issued proposed regulations relating to the annual filing of federal employment tax returns and requirements for employment tax deposits for employers in the Employers' Annual Federal Tax Program (Form 944). The proposed regulations provide requirements for filing returns to report the Federal Insurance Contributions Act (FICA) taxes and income tax withheld under I.R.C. § 6011 and Treas. Reg. §§ 31.6011(a)-1, 31.6011(a)-4. The proposed regulations also require employers qualified for the Form 944 Program to file Federal employment tax returns annually. In addition, the proposed regulations provide requirements for employers to make deposits of tax under FICA and the income tax withholding provisions of the Code (collectively, employment taxes) under I.R.C. § 6302 and Treas. Reg. § 31.6302-1. In addition to rules related to the Form 944 Program, the proposed regulations provide an additional method for quarterly return filers to determine whether the amount of accumulated employment taxes is considered *de minimis*. **71 Fed. Reg. 46 (Jan. 3, 2006)**.

PRODUCT LIABILITY

HERBICIDES. The plaintiff hired the defendant to apply herbicide to the plaintiff's alfalfa field. The plaintiff claimed that the defendant failed to properly clean the equipment, the herbicide was contaminated by chemicals from a previous application, and the contaminated herbicide damaged the crop. The herbicide was applied in January 2002 and, on May 6, 2002, the plaintiff filed notice of the intent to claim damages with the state department of agriculture as required by 2 Okla. Stat. § 3-82(H). The plaintiff filed suit on May 5, 2004 and the defendant filed a motion to dismiss because the suit was filed more than two years after the plaintiff discovered the damage. The plaintiff argued that the statutory filing requirement prevented the filing of a suit; therefore, the statute of limitations did not begin to run until the statutory notice was filed. The court held that the statute of limitations did not provide for any exception for state notices; therefore, the suit was barred because the suit was filed more than two years after discovery of the damage. **Brown v. Rocky Farmers Co-op, Inc., 118 P.3d 214 (Okla. Ct. App. 2005)**.

PROPERTY

PRESCRIPTIVE EASEMENT. The plaintiff purchased 20 acres to add to the plaintiff's nursery crop land. The new acres had no direct road access but a railroad track ran along a portion of the land and a private crossing over the tracks allowed access to the land. The defendant owned the right-of-way and sought an agreement from the plaintiff that the plaintiff would indemnify the defendant for any liability claims for the crossing and asked the plaintiff to contribute to the costs of maintenance of the crossing. When the plaintiff refused both requests, the defendant had the crossing removed, although the defendant offered the use of a portion of the easement for an access road. The access road was not sufficiently wide for the plaintiff's delivery trucks. The plaintiff claimed that it had a prescriptive easement over the crossing and claimed that the removal of the crossing was tortious interference with the plaintiff's business operations. The trial court agreed with the plaintiff and ordered the defendant to restore the crossing. The appellate court reversed, holding that it was well-settled law that a private individual could not acquire a prescriptive easement over a public highway, which included working rail tracks. The plaintiff attempted to

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argue that a prescriptive easement was allowed to the extent of allowing a use which did not disturb the defendant's use of the right-of-way, but the court refused to provide a use exception to the general rule. **Mississippi Export Railroad Co. v. Rouse, 2005 Miss. LEXIS 808 (Miss. 2005)**.

TRESPASS

TIMBER CUTTING. The plaintiffs owned a rural property with substantial timber on it. The plaintiffs sold a portion of the land to the defendants but did not want the timber cut on the land except to the extent necessary for an easement for an access road. However, the real estate agent drafted the sales agreement and the defendants thought they had the right to remove all of the timber on the easement. The defendant removed the timber while the plaintiffs were on vacation. The plaintiffs sued for trespass and won a money damage award at the trial level for the value of the cut trees and for the loss of value of the land. The appellate court held that the sales contract was ambiguous and allowed testimony that demonstrated that the plaintiffs did not intend to convey any timber cutting rights except as necessary for the access road. The appellate court upheld the award of treble damages for the improper removal of the trees but denied the award for loss of property value because that would have produced a double recovery for the plaintiffs in that the timber damage award was already an award for the loss of property. **Sells v. Robinson, 118 P.3d 99 (Idaho 2005)**.

WATER

GROUND WATER. The plaintiff was a property owner near the defendant city. The city constructed an extension of its sewer line and had to pump out ground water in order to create a dry trench for the pipes. The parties agreed that the pumping resulted in the drying of the plaintiff's well and loss of ground water. The plaintiff sued for the loss of their ground water. The plaintiff was unsuccessful in state court and refiled the suit in federal court. The district court granted summary judgment to the defendant based on its holding that the plaintiff did not have a property right in the groundwater. On appeal, the federal appeals court certified the question to the Ohio Supreme Court as to whether a property owner had any property right in the ground water. The Ohio Supreme Court held that such a property right did exist. *Hensley v. City of Columbus, 807 N.E.2d 365 (Ohio 2004)*. On the basis of the Ohio Supreme Court decision, the case was reversed and remanded to the federal trial court. **Hensley v. City of Columbus, 2006 U.S. App. LEXIS 479 (6th Cir. 2006)**.

CITATION UPDATES

In re **Payne, 2006-1 U.S. Tax Cas. (CCH) ¶ 50,106, *rev'g and rem'g*, 331 B.R.358 (N.D. Ill. 2005), *aff'g*, 306 B.R.230 (Bankr. N.D. Ill. 2004)** (bankruptcy discharge of taxes) p. 4 *supra*.