CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

ADVERSE POSSESSION

CONTINUOUS USE. The parties' neighboring properties were separated by a fence which was located on the defendant's property such that nine acres were on the plaintiffs side of the fence. The plaintiffs alleged that they had title to the disputed land by adverse possession through use of the property for pasturing cattle and horses and for hunting. However, the pre-trial evidence presented by the plaintiffs did not conclusively demonstrate continuous use of the disputed property; therefore, the court held that summary judgment for the plaintiffs was improper. See also *Rodgers v. Threlkeld, 22 S.W.3d 706 (Mo. Ct. App. 1999*). **Rodgers v. Threlkeld, 80 S.W.2d 532 (Mo. Ct. App. 2002)**.

BANKRUPTCY

GENERAL-*ALM* § 13.03.*

DISCHARGE. The debtor owed a judgment awarded in a patent infringement lawsuit against the debtor for saving and using seeds from cotton and soybean plants grown from genetically modified cotton and soybean seeds without paying additional licensing fees. The jury found that the debtor willfully infringed upon the seed producer's patented seed technology. The seed producer sought to have the judgment award declared nondischargeable under Section 523(a)(6) for willful and malicious injury to the creditor's property. Although the debtor admitted that the jury finding established the element of willfulness, the debtor denied that the patent infringement was malicious. The court held that the producer failed to demonstrate that the debtor's action in saving and planting the seed from the genetically modified seed plants was done with intent to harm the seed producer. Therefore, the judgment was dischargeable. ***In re* Trantham, 286 B.R. 650 (Bankr. W.D. Tenn. 2002)**.

EXEMPTIONS. The debtors, husband and wife, filed a joint Chapter 7 petition. The husband was a resident of New York and the wife was a resident of New Jersey. The husband claimed exemptions under the New York state exemptions and the wife claimed exemptions under the federal exemptions. The court held that the debtors were allowed only the exemptions under New York law under Section 522(b) because they had filed a joint petition and New York had opted-out of the federal exemptions. ***In re* Seung, 288 B.R. 174 (E.D. N.Y. 2003)**.

CHAPTER 12-*ALM* § 13.03[8].*

ELIGIBILITY. The debtors, husband and wife, owned two farms which were used for crops and raising livestock. The debtors' Chapter 12 plan provided for modified payment of secured claims and about 10 percent of the unsecured claims. The plan was funded with the wife's income as a loan officer, the husband's income from off-farm employment, disability payments, farm subsidies and some calf liquidation. A secured creditor objected to the plan, arguing that the debtors were not eligible for Chapter 12 because the plan was not funded from farm operations. The farm had a profit of only $19 per month. The court held that Section 101(19) did not require that a farmer who met the pre-petition farm income test had to have sufficient farm income to fund the Chapter 12 plan. The court held that the definition of family farmer required only that the debtor have regular income. The court did require clarification of the plan in order for the plan to meet the good faith filing requirement. ***In re* Sorrell, 286 B.R. 798 (Bankr. D. Utah 2002)**.

PLAN. The Chapter 12 debtor's creditors objected to the plan because the plan (1) extended payments to secured creditors beyond five years, (2) the plan modified the interest rates paid on secured claims and (3) the plan was not feasible. The court held that Section 1222(b)(9) allowed payments to secured creditors beyond the five years of the plan. The court held that the plan interest rate complied with the rate on U.S. Treasury bonds plus 2 percent and did not have to provide for the contract rate of interest on the claims. Finally, the court found that the debtor's projected income well exceeded the plan payments and supported a finding that the plan was feasible. ***In re* Elk Creek Salers, Ltd., 286 B.R. 387 (Bankr. W.D. Mo. 2002)**.

FEDERAL TAX-*ALM* § 13.03[7].*

DISCHARGE. The taxpayer operated an illegal telemarketing operation and received substantial income for several years. The taxpayer did not file tax returns for these years and did not pay taxes on the money received from this business. The taxpayer did file for extensions but never filed the returns within the extension periods. The taxpayer's business was investigated by the FBI and the taxpayer was incarcerated for the illegal activities. While in prison, the taxpayer filed the returns for the years of the illegal activities. The taxpayer sought to excuse the failure to file and pay the taxes by claiming that the criminal investigation and trial prevented the taxpayer from fully reporting the income. The court held that the taxes were nondischargeable under Section 523(a)(1)(C) for willful attempt to evade the taxes because (1) the taxpayer knew of the duty to report and pay the taxes, (2) the taxpayer had the funds to pay the taxes, and (3) the taxpayer had sufficient knowledge of the taxpayer's affairs to properly report the income. ***In re* Passavant, 2003-1 U.S. Tax Cas. (CCH) ¶ 50,264 (Bankr. M. D. Fla. 2003)**.

SETOFF. The IRS had agreed that the debtor's 1992 taxes were dischargeable in the debtor's current bankruptcy case. The IRS sought to setoff a pre-petition claim for refund against the 1992 taxes. The debtor, however, claimed the earned income tax credit portion of the refund and an additional $1,000 of the refund as exempt under state law exemptions. The court held that the exemptions were allowed. The court held that the setoff would be allowed to the extent the refund was not claimed as an exemption. ***In re* Sharp, 286 B.R. 627 (Bankr. E.D. Ky. 2002)**.

FEDERAL AGRICULTURAL PROGRAMS

ENDANGERED SPECIES ACT. The plaintiffs were ranchers whose property was near to areas in which wolves were introduced under the Endangered Species Act (ESA). The plaintiffs filed suit under the Fifth Amendment Takings Clause, alleging that the wolf reintroduction program caused them to lose cattle killed by the wolves. The court held that the Tucker Act required such suits to be brought in the Court of Claims and dismissed the suit. The court noted that the ESA did not have a provision withdrawing jurisdiction from the Court of Claims. **Gordon v. United States Department of Interior, 2003 U.S. App. LEXIS 3418 (10th Cir. February 25, 2003)**.

FARM CREDIT. The Economic Research Service has issued a report on the amount and quality of farm debt, interest rates, and available farm credit at the end of 2002 and the outlook for these factors in 2003. The report can be found on the ERS web site, http:www.ers.usda.gov. **Agricultural Income And Finance Outlook , March 11, 2003, ERS-AIB-80**.

GENETICALLY MODIFIED ORGANISMS. The APHIS has announced information to the public on technical aspects of its biotechnology regulatory program as it relates to permit conditions for field testing plants that have been genetically engineered for the production of biopharmaceuticals. An example of a complete permit, with all conditions, can be viewed at http://www.aphis.usda.gov/ppq/biotech. APHIS will institute the following changes in conditions for all plant species engineered to produce pharmaceutical and/or industrial compounds field tested under permit: (1) the size of the perimeter fallow zone (not in production) around the field test site increased from 25 to 50 feet; (2) the production of food and feed crops at the field test site and perimeter fallow zone in the following season is restricted in cases where there is a potential for volunteer plants to be inadvertently harvested with the following crop; (3) planters and harvesters are required to be dedicated to use in the permitted test site(s) for the duration of the tests; (4) tractors and tillage attachments, such as disks, plows, harrows, and subsoilers, do not have to be dedicated, but they must be cleaned in accordance with protocols approved by APHIS; (5) dedicated facilities must be used for the storage of equipment and regulated articles for the duration of the field test and must be must be cleaned according to APHIS-approved protocols prior to general use of the facilities; (6) cleaning procedures must be submitted and approved to minimize the risk of seed movement by field operations or equipment (movement of seed on tires of tractors, etc.) from the authorized test site; (7) procedures must be submitted and approved for seed cleaning and drying in order to confine the plant material and minimize the risk of seed loss or spillage; (8) the permittee must implement an approved training program to ensure that personnel are prepared to successfully implement and comply with permit conditions. In addition, no corn may grown within 1 mile of the field test site throughout the duration of any field test which involves open-pollinated corn. Border rows cannot be used to shorten this distance. In order to ensure compliance with the regulations, as well as all permit conditions, APHIS will increase the number of field site inspections during the upcoming growing season to correspond with critical times relevant to the confinement measures. Examples might include inspection at the pre-planting stage to evaluate the site location; at the planting stage to verify site coordinates and adequate cleaning of planting equipment; at midseason to verify reproduction isolation protocols and distances; at harvest to verify cleaning of equipment and appropriate storage; at post-harvest to verify cleanup at the field site; and for the following growing season, inspections will be timed to ensure that regulated articles do not persist in the environment. **68 Fed. Reg. 11337 (March 10, 2003)**.

TUBERCULOSIS. The APHIS has adopted as final regulations amending the regulations regarding payments made in connection with animals and other property disposed of because of bovine tuberculosis to provide that the APHIS will make payments to owners of dairy cattle and other property used in connection with a dairy business, and a dairy processing plant in the area of El Paso, TX, provided the owners agree to dispose of their herds, close their existing dairy operations, and refrain from establishing new cattle breeding operations in the area. **68 Fed. Reg. 10361 (March 5, 2003)**.

FEDERAL ESTATE AND GIFT TAX

MARITAL DEDUCTION. The decedent's will provided for passing of estate property to the surviving spouse in trust for life. The trust made the surviving spouse the trustee and provided for the decedent's children to be successor trustees. The trust also provided for distribution of "all of the net income from the trust estate as the trustee, in the trustee's reasonable discretion, shall determine to be proper for the health, education, or support, maintenance, comfort and welfare of grantor's surviving spouse in accordance with the surviving spouse's accustomed manner of living." The court held that this language did not meet the all income requirement for qualification of the trust for the marital deduction because, under the language, less than all the income could be distributed. In addition, the surviving spouse's position as trustee did no insure distribution of all trust income to the surviving spouse because someone other than the surviving spouse could be a trustee. **Estate of Davis v. Comm'r, T.C. Memo. 2003-55**.

VALUATION OF STOCK. The decedent owned all the stock in a corporation formerly owned by the decedent's predeceased spouse. The decedent's estate filed a timely estate tax return which valued the stock at just over $2.1 million. The value was based on an appraisal and a settlement between two heirs who had disagreed as to the proper division of the estate. Four years later, the estate sought a refund based upon a value of the stock of less than half the reported amount. The estate claimed the appraiser had made several mistakes as to the nature of the business and the effect of loans. The court held that the original valuation was appropriate because none of the "mistakes" was substantial and the prior settlement agreed with the reported value. **Estate of Leichter v. Comm'r, T.C. Memo. 2003-66**.

FEDERAL INCOME TAXATION

CORPORATIONS

DEBT OR EQUITY. The taxpayer was a corporation which was started by former shareholders of a similar but unrelated corporation. The taxpayer received $183,000 in initial capital contributions from the shareholders, $2.3 million in loans from third parties and $1.3 from issuance of debentures to the shareholders and relatives of the shareholders. The debentures were unsecured and paid only interest for five years and interest and principal for the second five years. The IRS disallowed an interest deduction for the interest paid on the debentures, arguing that the debentures were actually capital contributions. The court held that the debentures were to be treated as debt for income tax purposes because (1) although the taxpayer was thinly capitalized initially, the initial 26:1 debt-to-equity ratio was reduced to 4:1 after three years of operation; (2) repayment was not directly dependent upon the taxpayer's profits; (3) the taxpayer obtained significant credit from third parties; (4) the debenture holders did not obtain management positions as a result of purchasing debentures; (5) all scheduled payments on the debentures were made; and (6) the evidence demonstrated that the parties intended the debentures to be debt. **Delta Plastics, Inc. v. Comm'r, T.C. Memo. 2003-54**.

MERGER. The taxpayer corporation had several subsidiaries and restructured by first changing the subsidiaries into partnerships, forming a partnership with one of the subsidiaries and merging into that partnership by distributing partnership interests to its former shareholders. The IRS ruled that the taxpayer recognized gain or loss on the distribution of its interests in liquidation because the taxpayer was treated as directly transferring all of its assets, subject to its liabilities, to a partnership in exchange for a partnership interest, and was treated as having distributed its partnership interests and subsidiary shares to its shareholders in exchange for parent common stock in a complete liquidation of the taxpayer, under a restructuring plan. **Ltr. Rul. 200310026, Aug. 27, 2003**.

COURT AWARDS AND SETTLEMENTS. The taxpayer was employed as a superintendent of a school district. After the taxpayer's employment contract was terminated early, the taxpayer sued the school district, claiming that the school district (1) deprived the taxpayer of a property interest in a written employment contract without due process in violation of the Fourteenth Amendment to the United States Constitution; (2) conspired to deprive the taxpayer of federally protected rights to due process in violation of 42 U.S.C. §§ 1983, 1985, and 1986; and (3) breached the taxpayer's employment contract, causing a loss of salary and various benefits. The taxpayer's complaint sought (1) lost wages, benefits, and compensatory damages; (2) punitive damages; and (3) costs and attorney's fees. The taxpayer received a judgment plus interest and attorney's fees but reported only the interest as income. The court held that the entire judgment was includible in income because the taxpayer sought only economic and punitive damages in the lawsuit against the school district. **Montgomery v. Comm'r, T.C. Memo. 2003-64**.

DEPENDENTS. The taxpayer was divorced and custody of the taxpayer's three children was granted to the taxpayer's former spouse. The former spouse did not execute a Form 8332, Release of Claim to Exemption for Child of Divorced or Separated Parents. The taxpayer claimed the dependent exemption and child tax credit for the children based on an earlier court order which had allowed the taxpayer to claim the children as dependents in alternate years. The court held that the taxpayer could not claim the exemption or credit because a later order granted full-time custody to the former spouse and did not provide for any sharing of the exemption or credit. **Norwood v. Comm'r, T.C. Memo. 2003-63**.

EDUCATION EXPENSES. The taxpayer had obtained a law degree in Belgium before coming to the U.S. The taxpayer almost immediately entered school and obtained an L.L.M. degree. However, the taxpayer determined that a J.D. degree was also needed in order to work in the U.S. so the taxpayer reentered law school and obtained the J.D. degree. The court held that the taxpayer could not claim a deduction for the education expenses because the taxpayer had not first engaged in the trade or business of being a practicing attorney and the degree program were started one after another. **Weyts v. Comm'r, T.C. Memo. 2003-68**.

INCOME AVERAGING. The IRS has announced that approximately 4,400 farmers, who filed Schedule J, Farm Income Averaging, in 1999 and entered zero as their taxable income for one of their base years on Schedule J, will be receiving a letter the week of March 10 advising them of a change in the farm income averaging method. Some farmers who did not file Schedule J, but would appear to benefit from doing so, may also receive the letter. The farm income averaging method was changed in 2000 to a method more favorable for farmers. The change was retroactive for 1998 and later taxable years. Originally, in 1998 and 1999, a negative amount could not be entered as a base year income. Therefore, the amount could not be less than zero. The letter advises them that, due to the more favorable method, they can now enter a negative taxable income for the base years. It also advises them to file an amended return, if they wish to do so, in order to claim a refund. For eligible farmers, immediate action is needed. The deadline for filing a claim for refund is three years from the date the original return was filed or two years from the date the tax was paid, whichever is later. Therefore, for farmers who filed and paid their Form 1040 for 1999 by April 15, 2000, the deadline for filing an amended return is April 15, 2003. Tax professionals are urged to recognize the imminent deadline in handling any client inquiries that may arise as the result of the IRS notices. The notices which have been sent to potentially affected farmers contain detailed instructions including how to request an extension of the refund statute should they need more time. Questions about the letters or other issues involving farm income averaging should be directed to toll-free number 866-223-8210.

INFORMATION REPORTING. The IRS has announced that businesses that issue or redeem money orders or traveler's checks are now required to use a new form to report suspicious activities to the IRS. These money service businesses (MSBs), which include convenience stores, grocery stores, service stations, drug stores and liquor stores, must file the new form when they conduct a money service transaction that both is suspicious and is for $2,000 or more. New Form TD F 90-22.56 replaces the interim Bank Suspicious Activity Report (Form TD F 90-22.47) previously used by MSBs. Beginning March 1, if an MSB uses the old form to report suspicious activities, the IRS will return it to the originator with a request to complete the new form. Transactions that must be reported are those that an MSB knows

or suspects: (a) involve funds derived from illegal activity or are intended or conducted in order to hide or disguise funds or assets derived from illegal activity; (b) are designed to evade the requirements of the Bank Secrecy Act; or (c) serve no business or apparent lawful purpose, and the reporting business knows of no reasonable explanation for the transaction after examining all available facts. The form is available from the MSB website, www.msb.gov, the Financial Crimes Enforcement Network website, www.fincen.gov, and the IRS website, www.irs.gov. It is also available by calling 1-800-TAX FORM (1-800-829-3676). **IR-2003-26**.

INTEREST RATE. The IRS has announced that, for the period April 1, 2003 through June 30, 2003, the interest rate paid on tax overpayments remains at 5 percent (4 percent in the case of a corporation) and for underpayments at 5 percent. The interest rate for underpayments by large corporations is 7 percent. The overpayment rate for the portion of a corporate overpayment exceeding $10,000 is 2.5 percent. **Rev. Rul. 2003-30, I.R.B. 2003-__**.

LOSSES. The taxpayer was a commercial logger who had purchased several logging contracts for timberland in northern Arizona. The contracts included noncompetition agreements which the taxpayer amortized. Because of the inclusion of the Mexican Spotted Owl on the endangered species list, a federal court, in 1995, issued an injunction of all logging in northern Arizona. The taxpayer claimed that the noncompetition agreements were worthless because the court order prevented any logging. The court agreed and held that the noncompetition agreements became worthless as a result of the injunction and were deductible losses to the extent the value of the agreements had not been already amortized. **Precision Pine & Timber, Inc. v. Comm'r, T.C. Summary Op. 2003-19**.

PENSION PLANS. For plans beginning in March 2003, the weighted average is 5.49 percent with the permissible range of 4.94 to 6.03 percent (90 to 120 percent permissible range) and 4.94 to 6.58 percent (90 to 110 percent permissible range) for purposes of determining the full funding limitation under I.R.C. § 412(c)(7). **Notice 2003-17, I.R.B. 2003-12**.

PROFESSIONAL FEES. The taxpayer was a solely-owned corporation on the accrual method of accounting and which was in the business of designing, storing, and refurbishing trade show exhibits. The taxpayer hired an attorney to provide accounting and legal services, including income tax return preparation. The attorney prepared the 1994 return which claimed a $65,000 deduction for legal services by the attorney. However, the attorney did not bill the taxpayer for the services and no payments were made. Similar deductions were also claimed in other tax years without any payments. The taxpayer did submit payment in 1998 for the 1994 services after an audit by the IRS. The attorney refused to provide any evidence to the taxpayer, the IRS or the court to substantiate the charge for services. The court held that the deduction for professional services was not allowed for lack of substantiation of the services performed or their value. **Interex, Inc. v. Comm'r, 2003-1 U.S. Tax Cas. (CCH) ¶ 50,272 (1st Cir. 2003), *aff'g*, T.C. Memo. 2002-57**.

RETURNS. The IRS has announced that tax professionals are able to file employment taxes for business clients for the first time as part of a new Employment Tax e-filing System offered by the IRS. **IR-2003-25.**

The IRS has issued information on e-filing for small business and self-employed taxpayers. **IR-2003-29**.

The IRS has issued tips to taxpayers and tax professionals to help avoid errors related to Schedules K-1, which are used to report income from partnerships, S corporations, and some trusts. The IRS is attempting to improve its year-old program of matching income from Schedules K-1 to other returns, which stresses the importance of accurate filing. The improvements include a longer-term plan to eventually revise Schedules K-1 and E, Supplemental Income. **IR-2003-27**.

The IRS has announced the publication on its web site of Publication 783 (Rev. 1-2000), Certificate of Discharge of Property from Federal Tax Lien; and Publication 784 (Rev. 2-1999), Application for Certification of Subordination of Federal Tax Lien. This publication can be obtained by calling 1-800-TAX-FORM (1-800-829-3676); it is also available on the IRS's website at www.irs.gov.

S CORPORATIONS

PASSIVE INCOME. An S corporation owned interests in publicly traded limited partnerships in addition to its income from its own business of leasing office space. The limited partnerships were taxed as partnerships for federal tax purposes and were not electing large partnerships. The IRS ruled that the taxpayer's distributive share of the gross receipts of the limited partnerships would be included in the gross receipts for purposes of I.R.C. §§ 1362(a), 1375(a). The IRS also ruled that the taxpayer's distributive share of gross receipts of the limited partnerships that were attributable to the purchasing, gathering, transporting, trading, storage, and resale of crude oil, refined petroleum, and other mineral or natural resources would not constitute passive investment income as defined by I.R.C. § 1362(d)(3)(C)(i). **Ltr. Rul. 200309021, Nov. 22, 2003**.

TAX SHELTERS. The IRS has adopted as final regulations requiring corporations to register confidential corporate tax shelters under I.R.C. § 6111(d). The regulations also require corporations to maintain a list of investors in potentially abusive tax shelters under I.R.C. § 6112. **68 Fed. Reg. 10161 (March 4, 2003), adding Treas. Reg. §§ 301.6111-2, 301.6112-1**.

TRAVEL EXPENSES. The taxpayer operated a truck hauling business which required that the taxpayer spend about 345-360 days per year on the road. In early 1998, the taxpayer stayed at a partner's home when not traveling. In 1998, the taxpayer purchased a mobile home but did not incur any expenses except the purchase price of the home. In 1998, the taxpayer spent only a few hours at the mobile home and in 1999 the taxpayer spent 20 days at the home. The court held that the taxpayer could not claim business deductions for the cost of travel and meals because the taxpayer did not have a tax home since the taxpayer did not have a principal place of business or incur substantial living expenses for a residence. **McNeill v. Comm'r, T.C. Memo. 2003-65**.

The taxpayer was self-employed as a handyman and claimed travel expenses for travel to job sites from the taxpayer's residence. The taxpayer had only three clients and used a portion of the taxpayer's home for an office. The court held that the residence was not the taxpayer's principal place of business and allowed as deductible only the cost of travel between job sites. **White v. Comm'r, T.C. Summary Op. 2003-18**.

TRUSTS. The taxpayer was a trust which was assessed a tax deficiency. The purported trustee filed a petition for redetermination of the deficiency. Under the trust agreement, a successor trustee could be appointed only by a court or by consensus of the trust managers and beneficiaries if the trustee resigned after 30 days notice. The purported trustee assumed the

trusteeship with less than 30 days notice from the original trustee and without court order or consensus of the trust managers and beneficiaries. The purported trustee then altered the trust agreement to provide for appointment of a successor trustee by the original trustee. The court held that the purported trustee did not have the authority to bring suit for the trust because the purported trustee was not properly appointed. **Residential Management Services Trust v. Comm'r, T.C. Memo. 2003-56; Rancho Residential Services Trust v. Comm'r, T.C. Memo. 2003-57, Home Health Services Trust v. Comm'r, T.C. Memo. 2003-58, Sunshine Residential Trust v. Comm'r, T.C. Memo. 2003-59**.

The IRS was granted a preliminary injunction against an accountant which prohibited the accountant from (1) preparing or helping to prepare federal tax returns (or other documents to be filed with the IRS) for others; (2) engaging in activity subject to penalty under IRC § 6700, including organizing a plan or arrangement and making a statement regarding the excludibility of income that the accountant knows or has reason to know is false or fraudulent as to any material matter; (3) engaging in activity subject to penalty under I.R.C. § 6701, including preparing and/or assisting in the preparation of a document related to a matter material to the internal revenue laws that includes a position that the accountant knows will result in the understatement of tax liability; (4) failing to retain and produce to the IRS upon request, a list of all clients for whom the accountant performed return preparation services that involve the creation of trusts; (5) engaging in any other activity subject to penalty under IRC §§ 6694, 6695, 6700, or 6701; and (6) engaging in other similar conduct that substantially interferes with the proper administration and enforcement of the internal revenue laws. The accountant argued that taxpayers can lawfully create a trust, maintain complete control over all the trust's assets, and pay no income tax. The court held that argument to be absurd whether the trust was in the form of a business trust, equipment or service trust, family residence trust, charitable trust or final trust. **United States v. Welti, 2003-1 U.S. Tax Cas. (CCH) ¶ 50,280 (S.D. Ohio 2003)**.

PRODUCT LIABILITY

HERBICIDE-*ALM* § 2.04.* The plaintiffs were peanut farmers who had applied on their crops a herbicide manufactured by the defendant. The plaintiffs filed suit for strict liability, breach of express and implied warranties, and violation of the Texas Deceptive Trade Practice-Consumer Protection Act. The defendant argued, and the trial court granted summary judgment on the grounds, that the suit was preempted by FIFRA. The plaintiffs claimed that the herbicide off-label advertisements and brochures stated that the herbicide could be mixed with another herbicide without damaging crops. In addition, the herbicide label stated that it could be mixed with another herbicide without damaging crops. The plaintiffs produced evidence that the damage to their crops resulted from mixing these two herbicides before applying them. The court noted that the EPA had issued Pesticide Regulation Notice 96-4 which stated that the EPA would no longer consider the efficacy of registered herbicides in the registration process. The court also noted that this notice was merely a restatement of a two decade practice by the EPA in not considering the efficacy of registered herbicides. The court held that, because the EPA did not regulate the efficacy of pesticides under FIFRA, FIFRA did not preempt state court actions involving herbicide labeling where the action involved the ability of the herbicide to perform as indicated on the label. This case conflicts with several other state court cases, including cases which have discussed the effect of Notice 96-4. **Geye v. American Cyanamid Co., 79 S.W.2d 21 (Tex. 2002), *aff'g*, 32 S.W.3d 916 (Tex. Ct. App. 2000)**.

SECURED TRANSACTIONS

PRIORITY. The debtor had granted security interests in farm property to a bank and equipment seller. The debtor was also responsible for payment of fees under the Tennessee Boll Weevil Eradication Program. The debtor failed to pay all of these fees and the Tennessee Department of Agriculture (TDOA) sought a priority claim on the proceeds of the debtor's cotton crops. The TDOA argued that Tenn. Code Ann. § 43-6-426(d) provided a superpriority lien for unpaid assessments under the program. The court held that the statute provided only two options for the TDOA, (1) destroy the cotton crop or (2) give notice to the buyer of the crop that any payment for the crop was to be made to TDOA. Because the TDOA did not exercise either of these options, the security interests of the creditors had priority over the TDOA interest in the crop. ***In re* Hollingshead, 286 B.R. 622 (Bankr. 6th Cir. 2002)**.

CITATION UPDATES

***In re* High Fructose Corn Syrup Antitrust Litigation, 295 F.3d 651 (7th Cir. 2002)** (price fixing) see Vol. 13 p. 121.

IN THE NEWS

CONTRACTS. A Pope County Arkansas court has allowed a lawsuit against Tyson on swine production contracts. The court ruled that the contracts at issue did not impose the same obligations on the contracting parties as required by state law. Under the contracts, Tyson could proceed directly to court concerning contract disputes, but the contract growers had to go to arbitration first. **Archer. et. al. v. Tyson, No. CIV-2002-497 (Pope County Circuit Court, Feb. 21, 2003)**.

GENETICALLY MODIFIED ORGANISMS. In mid-February, 2003, a proposed $110,000,000 settlement was announced to the class action lawsuit which had been filed in the United States District Court for the Northern District of Illinois. A Fairness Hearing is scheduled for April 7, 2003, at 10:00 a.m. in the Dirksen Federal Building in Chicago. Eligible claimants have until March 21, 2003 to opt out of the settlement. According to the summary statement notice, posted at www.non-starlinkfarmerssettlement.com, "Corn Loss Proof of Claim" forms must be postmarked no later than May 31, 2003 and "Property Damage Proof of Claim" forms must be postmarked not later than July 31, 2003.

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