

with the provision also applicable to the states through the Fourteenth Amendment.

The common law tort of product disparagement generally required the plaintiff to prove that (1) the statement was communicated or published to a third person, (2) the statement played a material and substantial part in inducing others not to deal with the plaintiff, (3) the statement was false and (4) the defendant acted with wrongful intent or malice.²³ Some courts have adopted the Second Restatement of Torts analysis which requires that the plaintiff establish that publication of the statement would cause harm, that the harm was intended or that the defendant knew the statement was false but published the statement in reckless disregard of its truth or falsity.

Some commentators argue that food disparagement legislation should be viewed as dealing with a matter of great public interest and concern and that the statutes should be assessed on the basis of defamation jurisprudence²⁴ with the probable requirement that plaintiffs must prove a statement's falsity. A number of the state statutes have seemingly ignored this requirement.²⁵ That raises troubling constitutional issues in those states. The Texas statute, by requiring that the alleged disparager "knows" the information is false,²⁶ is less affected by that infirmity.

Further litigation will be necessary for the constitutional standing of the various statutes to be ascertained.

From a broader policy perspective, a good argument can be made that society is best served by rules which allow open, robust debate on matters of great public interest and concern. Food safety clearly falls into that category.

FOOTNOTES

- ¹ E.g., Ga. Code §§ 2-16-1 through 2-16-4; Okla. Stat., tit. 2, §§ 3010 through 3012.
- ² Ala. Code §§ 6-5-620 through 6-5-625; Ariz. Rev. Stat. § 3-113; Fla. Stat. § 5.065; Ga. Code §§ 2-16-1 through 2-16-4; Idaho Code §§ 6-2001 through 6-2003; La. Rev. Stat. tit. 3, §§ 4501 through 4504; Miss. Code §§ 69-1-251 through 69-1-257; Ohio Rev. Code Ann. § 2307.81 (Anderson 1995 & Supp. 1996); Okla. Stat., tit. 2, §§ 3010 through 3012; S.D. Cod. Laws §§ 20-10A-1 through 20-10A-4; Texas Civ. Proc. & Rem. Code §§ 96.001 through 96.004. See ; Colo. Rev. Stat.

§ 35-31-101 (criminalizes "knowingly to make any materially false state" regarding an agricultural product.

E.g., H.F. 106, Iowa General Assembly (1996).

See Semple, n. 17 *infra* n. 14.

Segal, David, "When a Put-Down of Produce Could Land You in Court," Washington Post, May 27, 1997, p. E1.

Id.

Texas Civ. Proc. & Rem. Code § 96.002(a).

Texas Civ. & Rem. Code § 96.002(b).

Texas Civ. Proc. & Rem. Code § 96.003.

Texas Civ. Proc. & Rem. Code § 96.001.

See n. 5 *supra*.

Fla. Stat. § 865.065(2)(a).

Id.

Id.

Ariz. Rev. Stat. § 3-113(B).

S.D. Cod. Laws § 20-10A-3.

See generally Semple, "Veggie Libel Meets Free Speech: A Constitutional Analysis of Agricultural Disparagement Laws," 15 *Va. Env'tl. L.J.* 403 (1995). See also Benderman, Christenson and Quesenberry, "Of Banana Bills and Veggie Hate Crimes: The Constitutionality of Agricultural Disparagement Statutes," 34 *Harv. J. on Legis.* 135 (1997).

¹⁸ See Bradford and Whyatt, "Intolerable Risk: Pesticides in Our Children's Food," Natural Resources Defense Council (1989).

¹⁹ See Semple, *supra* n. 17 at 407-408.

²⁰ See Nader v. EPA, 859 F.2d 747, 749-51 (9th Cir. 1988), *cert. denied*, 490 U.S. 1034 (1989).

²¹ *Auvil v. CBS "60 Minutes,"* 800 F. Supp. 941 (E.D. Wash. 1992), *aff'd*, 67 F.3d 816 (9th Cir. 1995).

²² U.S. Const., Amendment I.

²³ Semple, *supra* n. 17 at 419.

²⁴ See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

²⁵ See Ariz. Rev. Stat. § 3.113(E)(1); Ala. Code § 6-5-621(1); Fla. Stat. § 5.065(2); Ga. Code § 2-16-2(1); La. Rev. Stat. § 3:4502(1); Miss. Code § 69-1-253(a); Ohio Rev. Code § 2307.81(B)(2).

²⁶ Texas Civ. Proc. & Rem. Code § 96.002(a)(2).___

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

BANKRUPTCY

GENERAL-ALM § 13.03.*

AVOIDABLE TRANSFERS. The debtor was a producer of soybean seed and had contracted with a dealer to produce soybean seed from foundation seed

owned by the dealer. The debtor also contracted with several growers to grow the seed. The debtor was to receive a premium on each bushel of seed delivered to the dealer and paid a premium to the growers out of the premium received from the dealer. The debtor lost its state grain license and its business was operated under the state Department of Agriculture for the purpose of winding up the debtor's affairs. Although most of the

contract had been performed by the time the debtor filed for bankruptcy, several payments were made within 90 days prior to the filing. The payments were made to the state Department of Agriculture and were not part of the debtor's bankruptcy estate. The trustee sought to recover those payments as either fraudulent or preferential. The trustee alleged that the seed contract with the dealer was void because it was not written as required by Ill. Cod. Stat. ch. 505, § 105/1. The court held that the statute did not provide that an unwritten contract was void but only provided penalties for failing to put a seed contract in writing. The court also noted that the contract was also enforceable because both parties had made substantial performance in accordance with the oral contract. The trustee also argued that the payments were preferential. The court held that the payments were made in the ordinary course of business as part of the contract. **Barber v. Golden Seed Co., Inc.**, 129 F.3d 382 (7th Cir. 1997), *aff'g unrep. D.C. op. aff'g sub nom.*, *In re Ostrom-Martin, Inc.*, 191 B.R. 126 (Bankr. C.D. Ill. 1996).

CONSOLIDATION. The debtor was a family owned farm corporation. Several family members were also shareholders in another family-owned farm corporation which leased land and equipment from the debtor. The corporations shared some property and commingled assets. A judgment creditor of the debtor corporation alleged that the nondebtor corporation was an alter ego of the debtor and the debtor's assets were transferred to the nondebtor corporation in order to remove assets from the bankruptcy estate. The creditor sought to join the nondebtor corporation in the bankruptcy case, either under the alter ego doctrine or substantive consolidation. The court held that the alter ego doctrine was not available in bankruptcy and that state law was not applicable to make a nondebtor a debtor in federal bankruptcy. The court discussed the judge-made law of substantive consolidation, noting that no statutory authority existed for the doctrine except the equitable powers of the bankruptcy court. The doctrine required the showing of two elements: (1) the creditors dealt with both entities as a single unit and did not rely on their separateness and (2) the creditors would be benefited by the consolidation. The court found that the creditor failed to provide any information about the other creditors in the case; therefore, both elements of substantive consolidation were lacking in this case. In addition, the court noted that the creditor would not be benefited because the creditor was substantially oversecured. *In re Circle Land & Cattle Corp.*, 213 B.R. 870 (Bankr. D. Kan. 1997).

EXEMPTIONS

EARNED INCOME TAX CREDIT. The debtors filed for Chapter 7 in March 1997. On their schedules, the debtors listed an earned income tax credit refund as exempt. The trustee objected to the exemption as not allowed by statute. The court held that the credit was allowed under Okla. tit. 31, § 1.1, the "undue hardship" exemption for personal wages. The court held that the

credit was a supplement to other wages earned by the debtors because the credit was not obtainable unless the debtors had some income. *In re Barnett*, 214 B.R. 632 (Bankr. W.D. Okla. 1997).

FEDERAL TAXATION-ALM § 13.03[7].*

AUTOMATIC STAY. The IRS had filed secured and unsecured claims for pre-petition taxes. The debtor's confirmed Chapter 13 plan provided for full payment of all secured claims and 15 percent payment of all unsecured claims. The debtor was current on all plan payments. The debtor filed a current income tax return which claimed a refund. The IRS sought to offset the refund against the bankruptcy claims. The court held that the offset was not allowed because the confirmation of the plan established the method of payment of all claims. However, on its own initiative, the court stated that the refund would not be payable to the debtor or the bankruptcy estate unless it could be demonstrated that the IRS was adequately protected as to its secured claim. *In re Kirkpatrick*, 214 B.R. 314 (Bankr. S.D. Ohio 1997).

AVOIDABLE TRANSFER. The debtor had become delinquent in payment of withheld employee taxes. The debtor and IRS reached an agreement to pay the delinquent taxes and the IRS filed a lien against the debtor's property. The debtor made a couple of pre-petition payments designated as payments for the delinquent taxes and a bank debited the debtor's account for a loan payment. After an involuntary petition was filed against the debtor by several judgment creditors, the bank paid the remainder of a checking account to the trustee, pending a decision on whether the funds were subject to the IRS lien as part of the "trust fund" created by I.R.C. § 7501. The issue was whether the bank account funds were considered designated as trust fund property. The court held that, although the debtor paid some of the past trust fund taxes from the account, other creditors were also paid from that account, including the bank; therefore, the bank account was not considered designated trust fund money and was property of the bankruptcy estate when the petition was filed. Thus, the trustee could avoid the tax lien and include the bank account funds in the bankruptcy estate. *In re Ruggeri Elec. Contracting, Inc.*, 214 B.R. 481 (E.D. Mich. 1997), *aff'g*, 199 B.R. 903 (Bankr. E.D. Mich. 1996).

DISCHARGE. The debtor had failed to file or pay income taxes for 1980-83 and had filed Form W-4 with excessive exemptions. The debtor sought discharge of the taxes because of mitigating factors, including (1) the debtor's submission to the tax system in 1985, (2) the debtor's attempts to pay the taxes, and (3) the filing of Forms 4589 and 870. The court held that the debtor's failure to file and pay income taxes for four years constituted willful attempt to evade payment of taxes and the debtor's subsequent actions had no effect on the dischargeability of the taxes. *In re Myers*, 98-1 U.S. Tax Cas. (CCH) ¶ 50,195 (Bankr. 6th Cir. 1998).

DISMISSAL. The debtors originally filed a Chapter 7 case but, when the trustee began proceedings to dismiss the case, the debtors converted the case to Chapter 13. The IRS filed a claim in both cases and the court ordered the debtors to file all due income tax returns in order to provide a basis for determining the IRS claim. The debtors refused to file the returns, arguing that the taxes were illegal. The court dismissed the case for cause because the debtors refused to file the income tax returns. The court also noted several other reasons for dismissal, including failure to include all disposable income in the plan payments and filing multiple objections to the tax claims after contrary rulings by the court. *In re Cobb*, 98-1 U.S. Tax Cas. (CCH) ¶ 50,192 (Bankr. M.D. Fla. 1998).

CONTRACTS

HEDGE-TO-ARRIVE CONTRACTS. The plaintiff was a cooperative which entered into several hedge-to-arrive or "flex-hedge" contracts with its members, including the defendant. As in all of these cases, the increasing price for corn in 1995-96 reduced the profitability of these contracts to the cooperative. The plaintiff in this case had also agreed to pay the margin costs of the contracts. When the cooperative's lender became concerned about the increased costs, the cooperative requested assurance of performance from the defendant. The court held that this assurance request was actually a request for modification of the contracts in order to avoid further costs to the cooperative. The defendant responded with written assurances of performance but the cooperative considered the assurances inadequate and sued for anticipatory breach of contract. The defendant counter-sued under the same action. The court held that the contracts were not illegal under the Commodity Exchange Act. The court also held that the cooperative was not entitled to demand assurance of performance from the defendant because it had no reasonable belief that the defendant would not perform. The court also held that the real reason for the demand was the increased costs to the cooperative, a risk inherent with the contract, and that the demand for modification of the contract amounted to an anticipatory breach of the contract by the cooperative. Dr. Neil Harl will publish an in-depth discussion of this case in the next issue of the *Digest*. **Farmers Cooperative Elevator v. Heyes**, No. 23493 (Iowa D. Ct. Kossuth County, Dec. 23, 1997). Subscribers may order a copy of this case to be sent by mail or fax for \$3.00 from the Agricultural Law Press, P.O. Box 50703, Eugene, OR 97405; (541) 302-1958.

FEDERAL AGRICULTURAL PROGRAMS

BORROWER'S RIGHTS. The plaintiff was an officer in a farm corporation which had borrowed money

from the defendant. The farm corporation defaulted on its loan and alleged in previous litigation that after foreclosing on the farm, the defendant had failed to offer the corporation the chance to repurchase the farm on the same terms as the purchaser at the foreclosure sale. During protracted litigation, the plaintiff continued to operate the farm. In spite of the corporation losing all efforts to regain the farm, the plaintiff sought the right to repurchase the farm at the foreclosure sale purchase price by alleging that the defendant had orally agreed to offer the plaintiff a right of first refusal. The defendant argued that no contract existed because the plaintiff had given no consideration for the right of first refusal. The plaintiff argued that the plaintiff's efforts in operating the farm were adequate consideration for the contract right. The court held that the plaintiff was working entirely for the corporation; therefore, the efforts were for the corporation's benefit and not the defendant's benefit. Because the plaintiff provided no services for the defendant, the contract was unenforceable for lack of consideration. **Allison v. Agribank, FCB**, 949 S.W.2d 182 (Mo. Ct. App. 1997).

HERBICIDE. See the following case under **Products Liability** *infra*. **Kuiper v. American Cyanamid, Co.**, 131 F.3d 656 (7th Cir. 1997).

PERISHABLE AGRICULTURAL COMMODITIES ACT. The defendant was a bank which provided a line of credit to a produce buyer. The bank initially advanced on the line of credit to the buyer 80 percent of each invoice of purchased commodities. When the commodities were subsequently sold, the checks were mailed to a post office box to which only the bank had a key. The advanced amounts were withdrawn from the buyer's account as principal payments. The interest on the line of credit was paid directly by the buyer. When the bank became concerned about the buyer's financial status, the advance amount was lowered to 70 percent and the buyer was restricted as to which purchases amounts would be advanced. Although the buyer began to default on payments to the plaintiffs, produce sellers, the buyer never defaulted on the bank loan. The sellers sought to recover payments made to the bank made after the bank knew or should have known that the buyer was in default under PACA. The District Court had granted summary judgment for the produce sellers, ruling that the bank had notice of the buyer's breach of the PACA trust. The appellate court reversed, holding that several issues of material fact had not been decided, including (1) when the bank had notice of the buyer's default on produce payments, (2) whether the bank decreased the line of credit because of knowledge of the buyer's poor financial condition which was severe enough to indicate breach of the PACA trust, (3) whether the bank made a reasonable investigation of the buyer's financial status, and (4) whether the use of the post office box was peculiar to the buyer because of the buyer's poor financial status. **Gargiulo v. G.M. Sales, Inc.**, 131 F.3d 995 (11th Cir. 1997).

FEDERAL ESTATE AND GIFT TAX

ADMINISTRATIVE EXPENSES. The decedent's estate consisted, in part, of a cattle ranch. In order to pay the state and federal estate taxes, the executor decided to sell a portion of the land used as a cattle ranch. The executor continued to raise cattle on the property because removal of the cattle would allow the land to revert to swamp and decrease its value. The estate provided evidence of the sale of another neighboring parcel of land which had depreciated because cattle were taken off the land prior to sale. The court allowed the deduction as an administrative expense for the expense of raising cattle on the land as a necessary expense of preserving the estate property. **Estate of Lockett v. Comm'r, T.C. Memo. 1998-50.**

CHARITABLE DEDUCTION. The decedent's residence, part of a cattle ranch, had historical significance and the decedent's will bequeathed the property to a trust which gave the trustees the discretion to have the property maintained as a historical site. The trustees eventually gave the property to a water district for preservation. Although the water district was an organization for which a charitable gift would be qualified for a charitable deduction, the court held that the deduction was not allowed because the trustees had the discretion to fulfill the bequest without transferring the property to a qualified charitable organization. The discretion of the trustees made the value of the gift unascertainable at the death of the decedent, preventing the deduction. **Estate of Lockett v. Comm'r, T.C. Memo. 1998-50.**

GIFT-ALM § 6.01.* The decedent had owned several thousand acres of timberland which were inherited from the decedent's predeceased spouse. The decedent agreed to allow a relative to manage the timber, including sharing the proceeds of timber cut by the relative, the proceeds of turpentine produced by the relative, and other proceeds from the land. The decedent had transferred a portion of the land to the relative for \$10 consideration and "love and affection." The decedent had given the relative other gifts over the years. The relative consulted with the decedent's estate attorneys who concluded that the transfer was a gift and helped the relative file gift tax returns. The relative now argued that the transfers were made in compensation for work performed by the relative for the decedent. The court held that the transfer was a gift because (1) the decedent had a history of gifts to the relative, (2) the transfer had no business purpose, (3) the decedent and relative did not form a partnership, and (4) the relative signed the gift tax returns. The value of the one-half interest in the property was discounted 20 percent for lack of marketability and another 30 percent (total of 44 percent) for lack of control. **Estate of Williams v. Comm'r, T.C. Memo. 1998-__ ; Dec. 52568(M).**

FEDERAL INCOME TAXATION

AIR TRANSPORTATION EXCISE TAX. The IRS has issued guidance which supplies a list of "rural airports" at which the air transportation excise tax (except the 7.5 percent tax on all flights) is not charged for flights originating or departing from the airport. **Rev. Proc. 98-18, I.R.B. 1998-__, __.**

BUSINESS EXPENSES. The taxpayer had income in 1992 and 1993 from disability insurance proceeds. The taxpayer's spouse was the sole shareholder of a corporation. The taxpayer filed an income tax return for 1993 under the married, filing separately status and claimed deductions for business expenses related to the corporation's business. The court held that the taxpayer was not allowed the deductions because the taxpayer provided no evidence of payment of the expenses. In addition, the court held that the deductions were not allowed because the expenses were related to the corporation's business and not to the taxpayer's trade or business. **Phillips v. Comm'r, T.C. Memo. 1998-56.**

LIKE-KIND EXCHANGES. The taxpayer was a limited partnership with a LLC and a general partnership as partners. The taxpayer owned one property which was leased to a commercial tenant. The property was security for the taxpayer's indebtedness. The taxpayer sought to exchange the property for several other properties, also subject to indebtedness. The properties involved were exchanged through a qualified intermediary. The new properties would be acquired by new entities formed by the taxpayer, one entity for each new property, with the taxpayer as the sole owner of each entity. Each new entity would file an election under Treas. Reg. § 301.7701-3 to be disregarded as an entity separate from its owner. The new properties would be held by the new entities as either part of a trade or business or as an investment. The IRS ruled that the exchange qualified as a tax-free, like-kind exchange of the original property and the new properties. **Ltr. Rul. 9807013, Nov. 13, 1997.**

RETURNS. The taxpayer failed to file returns for 1992, 1993 and 1994, during which time the taxpayer was married. The IRS assessed a deficiency, interest and penalty for each tax year based on the tax rate for single taxpayers. The taxpayer argued that the deficiency should have been determined using the rate for married taxpayers since the taxpayer was married during the tax years involved. The court held that the married taxpayer rate was available only if the taxpayer filed a joint return with the taxpayer's spouse. Because no joint return was filed, the single taxpayer rate applied. **Columbus v. Comm'r, T.C. Memo. 1998-__ ; Dec. 52569(M).**

S CORPORATIONS-ALM § 6.03[1].*

ELECTION. The taxpayer was an S corporation with two equal shareholders. One of the shareholders filed a

request with the IRS requesting revocation of the S corporation election. The IRS ruled that the revocation was insufficient in that shareholders holding more than 50 percent of the ownership interests did not make the request. **Ltr. Rul. 9807007, Nov. 6, 1997.**

PASSIVE ACTIVITY LOSSES. The taxpayer was originally a closely-held C corporation which had suspended passive activity losses (PALs) for three years. In the fourth year, the corporation elected S corporation status and sold several properties which had given rise to the PALs. Some of the suspended PALs resulted from depreciation taken on the properties and the corporation adjusted the bases of the properties by the amount of suspended PALs, resulting in losses or smaller gains from the sales. Four years later, the corporation terminated the S corporation election. The corporation argued that, under I.R.C. §§ 469(f)(2) and 469(g)(1)(A), the sale of a property which generated PAL resulted in offset of the PAL against the gain of the sale. Under I.R.C. § 469(f)(2), the PAL rules continue to apply when a closely-held C corporation ceased to be a closely-held corporation. The IRS argued that I.R.C. § 1371 applied to prevent any carryover of C corporation PALs to tax years when the corporation was an S corporation. The corporation argued that Section 1371 did not apply because the PAL rules were accounting rules and did not involve carryovers. The court held that the C corporation suspended PALs could not be carried forward to the years the corporation was an S corporation. The court also held that the C corporation depreciation which resulted in the PALs could not be added to the bases of the properties. **St. Charles Investment Co. v. Comm'r, 110 T.C. No. 6 (1998).**

SECOND CLASS OF STOCK. The taxpayer was a family-owned S corporation with one class of stock. The shareholders executed a stock redemption agreement which provided for the purchase of one shareholder's stock who decided to retire. The price for the shares was approximately the fair market value of the stock. The IRS ruled that the redemption agreement did not create a second class of stock. **Ltr. Rul. 9807002, Sept. 30, 1997.**

TRUSTS. The taxpayer was an S corporation which had several trusts as shareholders. When new regulations were published, the taxpayer realized that one of the trusts was not a QSST, causing the termination of the S corporation status. The stock owned by the trust was then immediately transferred to a person, requalifying the taxpayer as an S corporation. The IRS ruled that the termination was inadvertent and waived the termination of S corporation status. The other trusts (1) had a single beneficiary, (2) required all distributions be made only to that beneficiary, (3) required distribution of trust assets to the beneficiary upon termination of the trust other than upon the death of the beneficiary, (4) terminated the trusts at the death of the beneficiary's grandfather and granduncle, with discretionary distribution of trust assets to the beneficiary if the beneficiary is at least 30 years old, and (6) allowed trustee discretion to distribute principal at any time for the beneficiary's education,

support and maintenance. The IRS ruled that the trusts were QSSTs. **Ltr. Rul. 9807003, Sept. 30, 1997.**

SALE OF RESIDENCE. The IRS has issued procedures for exceptions from filing an information return reporting the sale of a residence as real estate. Under TRA 1997, taxpayers may exclude up to \$250,000 (\$500,000 for married taxpayers) of gain from the sale of a principal residence under certain conditions. The 1997 legislation also provided for an exception to the real estate transaction reporting requirements if the seller of the property provides the "real estate reporting person" with written assurances that the sale qualified for the exception. The IRS procedure requires the seller(s) each to provide, in writing and subject to penalties for perjury, assurances that each seller (1) owned and used the residence as the seller's principal residence for periods aggregating two years or more during the five years before the sale; (2) the seller did not sell or exchange another principal residence during the two years before the sale; (3) no portion of the residence was used for business or rental purposes after May 6, 1997; and (4) (a) the sale or exchange was \$250,000 or less, (b) the seller is married and the sale or exchange was \$500,000 or less and the gain on the sale was \$250,000 or less, or (c) the seller is married, the sale or exchange is \$500,000 or less, and (a) the seller intends to file a joint return for the year of sale, (b) the seller's spouse meets the requirements of (1) and (2) above. The procedure contains a sample form which may be used by real estate reporting persons to provide to sellers. **Rev. Proc. 98-20, I.R.B. 1998-7.**

NEGLIGENCE

UNDERGROUND STORAGE TANK. The plaintiff purchased a farm from one defendant who had purchased the farm from a second defendant. The second defendant had installed an underground gasoline storage tank on the farm. The tank began to leak and the second defendant removed the gasoline and placed it in an above-ground storage tank, but did not remove the underground tank. The current case involved only the issue of whether the defendants could be held strictly liable for the ground contamination from the tank. The court held that strict liability could not be imposed on the defendants because installation and use of an underground storage tank was not an abnormally dangerous activity. **Grube v. Daun, 570 N.W.2d 851 (Wis. 1997).**

NUISANCE

GROUND WATER CONTAMINATION. The plaintiffs were crop farmers under whose land ran an aquifer contaminated with salt from a salt mining and processing operation owned by the defendant. The defendant had been the defendant in several prior nuisance actions involving land upstream from the plaintiffs' land. In response to those actions, the Kansas Department of Water Resources (KDWR) adopted a

permit process for use of underground water for irrigation. However, the KDWR enacted a moratorium on permits involving the aquifer involved in these cases because the aquifer water was not usable in most areas and the contamination was spreading downstream. The plaintiff applied for the permits during the moratorium but had not obtained a permit for use of aquifer water at the time this action was brought. The plaintiffs obtained a jury verdict in nuisance. The defendant argued that the plaintiffs suffered no injury because they could not use the water in any case since they did not have a permit to use the water. The jury had found that the permit moratorium was an intervening cause for the plaintiffs' inability to irrigate because the salt contamination prevented the plaintiffs from obtaining a permit. The court upheld the jury verdict. **Scheufler v. General Host Corp.**, 126 F.3d 1261 (10th Cir. 1997).

PRODUCT LIABILITY

HERBICIDE. The plaintiffs were soybean/corn farmers who applied to their soybean fields a herbicide, Scepter, manufactured by the defendant. The herbicide was registered with the EPA. The seller of the herbicide represented that the herbicide could be applied to soybean fields which would be next planted with corn. The label indicated that the following corn crop could be planted 11 months after the first application. The plaintiffs alleged that the herbicide carried over to damage subsequent corn crops and brought an action in common-law negligence and fraudulent misrepresentation. The court held that the fraudulent misrepresentation claim was barred by the three year statute of limitations because the alleged damages occurred in 1987 and the suit was brought in 1993. The court also held that the negligence claim was pre-empted by FIFRA because the claim involved information contained on the label. **Kuiper v. American Cyanamid, Co.**, 131 F.3d 656 (7th Cir. 1997).

SECURED TRANSACTIONS

PRIORITY. The plaintiff was a bank which had loaned money to the defendant's child as a dairy operating loan. The bank had filed a security interest in all farm products produced by the child's dairy. The bank also filed with the Nebraska central filing system to comply with the federal farm products statute but the filing did not include milk. The defendant also loaned money to the child and took an assignment of the proceeds of milk sold by the dairy. When the dairy defaulted on its bank loan, the bank sought to recover the proceeds of milk sales paid to the defendant as conversion of its security interest in the milk. The defendant argued that the bank's failure to include milk in the federal farm products filing either (1) waived the security interest in the milk or (2) made the defendant a buyer in the ordinary course of business who took the

milk without being subject to the bank's security interest. The court held that the defendant was not a buyer because the defendant did not receive the milk; therefore, the defendant could not invoke the protections of the federal statute. The court also held that, because the defendant had not filed any security interest, the bank's security interest had priority over the milk proceeds and could recover the proceeds under an action for conversion. **Battle Creek State Bank v. Preusker**, 571 N.W.2d 294 (Neb. 1997).

STATE REGULATION OF AGRICULTURE

LAND USE. The Oregon Land Conservation and Development Commission (LCDC) promulgated rules involving prohibited uses of "high value farmland" located in an area zoned as "exclusive farm use" (EFU) land. The state statute, Or. Rev. Stat. § 215.213, allowed some of the prohibited uses on EFU land. The court held that the LCDC regulations were allowed under the state statute because the regulations were more restrictive than the statute and consistent with the statute's purpose of preserving agricultural land. **Lane County v. LCDC**, 942 P.2d 278 (Or. 1997), *rev'g*, 914 P.2d 1114 (1996), *aff'g*, 910 P.2d 414 (1996).

TRESPASS

TIMBER. The plaintiff owned 10 acres of timberland which the plaintiff intended to use as a retirement residence. The land had been owned by the plaintiff's family for over 85 years, all without cutting down any trees. The defendant owned neighboring land and had removed trees from two acres of the plaintiff's land. The jury awarded the plaintiff an amount for the lost trees more than double the value of the entire 10 acres, plus punitive damages. The damages were tripled under statute because the trespass was knowing and willful. The trial judge ordered a new trial because the total damages were unreasonable in relation to the value of the land. The appellate court affirmed. The court held that, although each separate element of the damages was allowable, the total damages awarded could not be unreasonable in relation to the value of the land. Although the court stated that the damage award for the value of the trees could exceed the value of the land, such an award is impossible if punitive damages and the statutory triple damages are also involved, at least for smaller parcels of land. **Allyn v. Boe**, 943 P.2d 364 (Wash. Ct. app. 1997).

CITATION UPDATES

Saltzman v. Comm'r, 131 F.3d 87 (2d Cir. 1997 (valuation) see p. 4 *supra*).



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