[3] See, e.g., Horvat v. Comm'r, T.C. Memo. 1977–104, *aff'd*, 582 F.2d 1282 (7th Cir. 1978), *cert. denied*, 440 U.S. 959 (1979).

[4] Lucas v. Earl, 281 U.S. 111 (1930).

[5] See Rev. Rul. 75-257, 1975-2 C.B. 251.

[6] For a list of litigated cases, see 8 Harl, *supra* note 1, § 62.09[2][a][i], n. 32.

[7] See, e.g., Neely v. U.S., 775 F.2d 1092 (9th Cir. 1985) (family grantor trust held to be sham for income tax purposes.

[8] Chase v. Comm'r, 91–1 U.S. Tax Cas. (CCH) ¶ 50,090 (8th Cir. 1991) (trusts irrevocable for 25 years; beneficial interests evidenced by trust certificates).

[9] Rev. Rul. 75-259, 1975-2 C.B. 361.

[10] Ltr. Rul. 9043074, July 12, 1990 (corpus of trust ostensibly established by nonresident alien in foreign country with foreign entities as trustees includible in U.S. decedent's gross estate because decedent was real transferor of property to trust; trust was sham and functioned as alter ego of decedent in personal capacity).

[11] Est. of Paxton v. Comm'r, 86 T.C. 785 (1986) (property transferred by decedent to two family trusts includible in decedent's estate).

[12] Rev. Rul. 75-260, 1975-2 C.B. 376.

[13] See Rev. Rul. 75-258, 1975-2 C.B. 503.

[14] See Rev. Rul 79-324, 1979-2 C.B. 119.

[15] E.g., Gran v. Comm'r, T.C. Memo. 1980–558, *aff'd*, 664 F.2d 199 (8th Cir. 1981). See Monesmith v. Comm'r, T.C. Memo. 1983–344 ($300 of $10,000 fee allocable to preparation of taxpayer's personal federal income tax return).

[16] E.g., Gibson v. Comm'r, T.C. Memo. 1982-374.

[17] See, e.g., United States v. Landsberger, 534 F. Supp. 142 (D. Minn. 1981), *aff'g on this issue*, 692 F.2d 501 (8th Cir. 1982) (promoter of "Foreign Tax Haven Double Trust" subjected to permanent injunction); United States v. Tranakos, 911 F.2d 1422 (10th Cir. 1990) (promoters convicted of conspiring to defraud U.S. and obstructing justice).

[18] See Rev. Rul. 75-257, 1975-2 C.B. 251. See Dahlstrom v. Comm'r, T.C. Memo. 1991-265 (additions to tax for substantial understatement of tax liability and fraud; taxpayer was major promoter of family estate trusts).

[19] Benson v. U.S., 85-1 U.S. Tax Cas. (CCH) ¶ 9424 (E.D. Calif. 1985).

[20] Neely v. U.S., 775 F.2d 1092 (9th Cir. 1985) (taxpayer assessed penalty for negligence in setting up family trust as flagrant tax avoidance scheme); Kerr v. Comm'r, T.C. Memo. 1987-470 (taxpayers liable for negligence penalty where taxpayers relied on legal advice from promoters of family trust).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

ADVERSE POSSESSION

POSSESSION. Due to recording errors, a timberland lot transferred by patent was not included on the assessor's real property tax rolls. The patent owner did not claim ownership of the lot and never paid taxes for the lot. The lot was transferred by tax deed to the county. The plaintiff, an employee in the assessor's office, began to use and improve the lot over five years and filed a quiet title action, claiming ownership by adverse possession. The trial court granted summary judgment to the county because the plaintiff did not fence the property or live on it and the improvements were insufficient to show hostile possession. The appellate court reversed, holding that the sufficiency of the improvements was a jury question. **Cluff v. Bonner County, 824 P.2d 115 (Idaho 1992)**.

BANKRUPTCY

GENERAL

AUTOMATIC STAY. The debtor corporation alleged a violation of the automatic stay by a creditor which raised the price of a manufacturing component as to the debtor. The debtor argued that the price rise was an improper attempt to collect a pre-petition debt. The court held that the remedy provided by Section 362(h) applied only to debtors who were individuals and not to business organizations. ***In re* Shape, Inc., 135 B.R. 707 (Bankr. D. Me. 1992)**.

EXEMPTIONS.

OBJECTIONS. The trustee filed a motion for turnover of estate property which the debtor had claimed as exempt. The motion was filed after the date for filing objections to the exemptions. The court denied the motion as untimely. ***In re* Okoinyan, 135 B.R. 691 (Bankr. S.D. Fla. 1991)**.

PENSION PLAN. The court held that the Florida exemption for interests in an ERISA qualified pension plan was not pre-empted by ERISA. ***In re* Seslowsky, 135 B.R. 692 (Bankr. S.D. Fla. 1991)**.

The court held that the Massachusetts exemption for interests in ERISA qualified pension plans was pre-empted by ERISA but that the debtor's interest in the pension plan was exempt under ERISA as a nonbankruptcy federal exemption. ***In re* Hennessey, 135 B.R. 711 (Bankr. D. Mass. 1992)**.

PROCEEDS OF LAWSUIT. During the debtors' Chapter 7 case, the debtors claimed $6,000 as the value of an exempt interest in a lawsuit for damages. The trustee did not object to the exemption and the debtors received a discharge, although the case remained open while the trustee prosecuted the lawsuit through independent cousel. A settlement was reached in the lawsuit which provided a recovery for the debtors of almost $20,000. The debtors argued that the full amount of the recovery was exempt as appreciation of the interest claimed as exempt in the case. The court held that the additional recovery was not an appreciation of the original claimed amount and limited the debtors' exempt amount to that which would have been allowed in the bankruptcy case. ***In re*** **Bronner, 135 B.R. 645 (Bankr. 9th Cir. 1992).**

CHAPTER 12

PLAN. A creditor had sold farm land to the debtors who had given a promissory note payable in four years at 10 percent interest, with a balloon payment at the end of the four years. The creditor filed a partially secured claim on the note and the debtors' plan provided for payment of the secured portion over 30 years at 10 percent interest. The creditor argued that the plan was not fair and equitable because the creditor was 69 years old and would not sell the land on a 30 year note at 10 percent interest. The court held that because the creditor was not a commercial lender and was 69 years old, the plan was not fair and equitable. The debtors argued that the creditor could sell the promissory note, but the court held that it was not fair to consider the sale of the promissory note because the creditor would have to take a substantial discount because the creditor was not a commercial lender. The court also held that the 10 percent interest rate was too low, given the risks involved and held that the plan could provide for a 10 year payment of the secured portion of the note at the prime rate plus 3 percent. The court also held that the 30 year payment plan was unfeasible because the debtors would be retiring within that time with a substantial drop in income and the debtors had not shown how they were going to make the payments after the drop in income. **Matter of Rose, 135 B.R. 603 (Bankr. N.D. Ind. 1991)**.

SETOFF. Prior to filing Chapter 12 bankruptcy, the debtor obtained price support loans from the CCC and enrolled acres in the CRP for which the debtor received annual rent payments from the CCC. After filing for bankruptcy the debtor as debtor-in-possession assumed the CRP contract. The CCC moved for relief from the automatic stay to setoff the CRP payments against the amounts due under the price support loans. The debtor argued that the prepetition nature of the CRP contract and the mutuality of the loans and contracts were destroyed by the bankruptcy filing and the debtor's assumption of the CRP contract. The debtor, with the support of several cases, argued that the CRP contract was executory with conditions precedent required by each side before payments could be made. The court disagreed and held the CRP contract to be a contract for promises because the rent payments could be withheld only upon material breach by the debtor. Therefore, the parties' obligations completely arose prepetition. The debtor, again with the support of cases, argued that the mutuality of the contract and loans was destroyed by the creation of the debtor-in-possession in bankruptcy. The court held that under *N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513 (1984)*, the concept of the debtor-in-possession as a separate entity was rejected; therefore, the loans and CRP contracts remained the obligations of the debtor. The debtor also argued that the setoff should not be allowed because the setoff would harm the debtor's chance to reorganize. Although the court agreed that a setoff could be denied in such cases, the debtor was not entitled to such relief because the debtor provided no evidence of the harm to the debtor's reoganization. ***In re*** **Allen, 135 B.R. 856 (Bankr. N.D. Iowa 1992)**.

FEDERAL TAXATION

ABANDONMENT. The debtor was a partnership which operated a restaurant. The restaurant was sold during the bankruptcy case, resulting in a $100,000 tax liability from the gain on the sale. The IRS sought abandonment of the partnership interests to the individual partners which would result in the individual partners' liability for the taxable gain from the sale of the restaurant. The partners argued that the abandonment would impair their right to a fresh start. The court held that the abandonment rules did not apply to the fresh start of partners but to the efficient administration of the estate and that the partners had benefitted from the partnership form of doing business and could not now reject the liabilities of the partnership form. The court found that the tax liability was clearly a burden to the estate and ordered the abandonment. ***In re*** **Nevin, 135 B.R. 652 (Bankr. D. Hawaii 1991)**.

ALLOCATION OF PLAN PAYMENTS FOR TAXES. The Chapter 7 debtor was a corporation of which the sole shareholders had also filed Chapter 13. The shareholders were liable for the corporation's federal employment withholding taxes under I.R.C. § 6672 as responsible persons. The shareholders petitioned the bankruptcy trustee to require the IRS to apply any tax payments first to the withholding tax liability because the failure to do so would endanger the shareholders' reorganization ability in their own bankruptcy cases. The court held that under *U.S. v. Energy Resources, Co., Inc., 495 U.S. 545 (1990)*, the court may require allocation of tax payments only where the allocation will enhance the reorganization of the debtor, and not, as here, where the allocation will benefit only third parties' reorganization. ***In re*** **Gregory Engine & Mach. Services, Inc., 135 B.R. 807 (Bankr. E.D. Tex. 1992)**.

PENSION PLAN. The debtor was assessed the 10 percent tax, under I.R.C. § 4980, for reversion of a qualified pension plan to the debtor as employer. The IRS argued that the tax was entitled to a priority under Section 507(a)(7)(E) because the tax was enacted to recapture the tax advantages resulting from contributions to qualified pension funds. The court held that the tax was not a penalty and was entitled to priority because the tax is similar to an excise tax. ***In re*** **C-T of Virginia, Inc., 135 B.R. 501 (W.D. Va. 1991),** ***rev'g*****, 128 B.R. 628 (Bankr. W.D. Va. 1991)**.

PRIORITY. The Chapter 11 debtor's plan provided for a post-confirmation determination of the amount of the secured amount of the IRS claim for taxes and penalties. The post-confirmation determination was that the taxes were all secured claims but that the penalties were not entitled to any priority under Section 507(a)(7)(G) because the penalties were not compensatory. The District Court affirmed the decision, but under Section 510(c)(1), as a proper subordination of the noncompensatory penalties to other unsecured claims. ***In re*** **Mako, 135 B.R. 902 (E.D. Okla. 1991)**.

CONTRACTS

ANTICIPATORY BREACH. The plaintiff was a formerly licensed grain dealer which had entered into contracts to purchase grain in the future from the defendants.

Before delivery was due on the contracts, the plaintiff's grain dealer's license was revoked and the plaintiff assigned the contracts to another licensed grain dealer. The defendants sold their grain to other parties and the plaintiff sued for breach of contract after the contracts were reassigned to the plaintiff. The court held that the loss of the grain dealer's license and assignment of the contracts was an anticipatory breach excusing the defendants from performance. **S & S, Inc. v. Meyer, 478 N.W.2d 857 (Iowa Ct. App. 1991)**.

ENTRUSTING. The plaintiffs were grain producers who sold grain to an independent trucker who sold the grain to the defendant grain elevator but without paying the plaintiffs. The trucker had a history of buying grain from producers and selling the grain to the elevator. The plaintiffs sued the grain elevator for conversion or negligence in the payments to the trucker. The court applied Minn. Stat. § 336.2-403(2), (3) to hold that the plaintiffs had entrusted the grain to a merchant, the trucker, and that the defendant had purchased the grain in good faith without notice that the trucker was not the true owner of the grain. **Schluter v. United Farmers Elevator, 479 N.W.2d 82 (Minn. Ct. App. 1991)**.

FARM MACHINERY. The plaintiff purchased a farm from the defendant. The sales contract stated that the sale included "all supplies, repairs, old machinery, feeding equipment and other farm property." Some of the farm machinery included 12 hoe drills over which the defendant had a dispute with the seller because the drills were defective. The defendant defaulted on the purchase contracts on the drills but the plaintiff was able to obtain rescission of the contract plus a damage award for breach of warranty. The plaintiff had the award paid to the defendant as part payment on the sales contract for the farm and machinery and brought the instant action to enforce the payment. The court held that the drills were included in the sales contract and were the plaintiff's property at the time of the damage award. **Smolnikar v. Robinson, 479 N.W.2d 516 (S.D. 1992)**.

FEDERAL AGRICULTURAL PROGRAMS

BORROWER'S RIGHTS. The court held that the plaintiffs' had no private right of action to force the defendant Farm Credit Bank to comply with the Agricultural Credit Act of 1987. **Abbott v. Farm Credit Bank of Omaha, 953 F.2d 1097 (8th Cir. 1992)**.

FEDERAL ESTATE AND GIFT TAX

CHARITABLE DEDUCTION. The decedent established an inter vivos trust which included most of the decedent's assets. The trust provided for an annuity for the surviving spouse, distributions of trust corpus to individuals and non-charitable organizations, and the remainder to a religious organization for the purposes of building a church if necessary or to other charitable organizations if a church was not built. The trust was to be reformed into three trusts, one charitable remainder annuity trust for the surviving spouse, one trust for non-charitable organization distributions and one trust for charitable organization distributions. The IRS ruled that the reformation was effective if the difference between the actuarial value of the original trust interests qualifying for a charitable deduction and the actuarial value of the reformed interests did not exceed 5 percent of the actuarial value of the reformed interest. **Ltr. Rul. 9211013, Dec. 11, 1991**.

DEDUCTIONS. The trustees of a trust claimed a deduction for the full cost of investment advice, arguing that the investment advice was required in order for the trustees to fulfill their fiduciary duty to make prudent investments of trust property. The court, however, held that I.R.C. § 67 allowed a full deduction (i.e. not limited to the excess of 2 percent of AGI) only for expenses unique to trust administration. Because the investment advice was normal for any investment, the advice was not unique to trusts and was subject to the 2 percent limitation. The court also held that the trustees failed to prove that the investment advice was required by state law. **O'Neill v. Comm'r, 98 T.C. No. 17 (1992)**.

GENERATION SKIPPING TRANSFER TAX. The decedent bequeathed property in trust to the decedent's daughter with a remainder to trusts for the daughter's children who had a power of appointment over their remainder interests. The daughter signed a written request for the trustee to make an early distribution of trust stock but rescinded the request before any property was distributed. The daughter then filed a written disclaimer of $1 million worth of the trust property which would then pass to the trusts for the children. The disclaimer was intended to create a generation skipping transfer for the decedent's estate to use the $1 million exemption. The IRS ruled that the disclaimer was effective because it was made before the daughter received any of the trust stock. The IRS also ruled that because all beneficiaries of the remainder trusts were skip persons, the disclaimed amount passing to the trusts was subject to GSTT and eligible for the $1 million exemption. **Ltr. Rul. 9210014, Dec. 11, 1991**.

This ruling involved eight irrevocable inter vivos trusts created before September 25, 1985, with several primary, secondary and tertiary beneficiaries. The trustees sought reformation of the trusts to split each trust into separate shares and to include adopted children as tertiary beneficiaries. The IRS ruled that the reformations would not subject the trusts to GSTT. **Ltr. Rul. 9211033, no date given**.

GROSS ESTATE. At the date of death, the decedent owned an interest in a pension plan which had no employee contributions. The decedent had been receiving payments in installments since retirement in 1978 and had changed the beneficiary several times, last on March 16, 1983, but had always designated a lump sum payment of any remainder amount. The final beneficiary was a marital deduction trust under which the trustee was to pay death taxes from trust property except for trust property not subject to federal estate taxes. The IRS ruled that under I.R.C. § 2039(c) as applicable before 1983, the lump sum distribution was not includible in the decedent's gross estate, because the decedent did not change the form of benefit and the trustee was not obligated to use the lump sum to pay estate taxes. **Ltr. Rul. 9211041, Dec. 17, 1991**.

The IRS ruled that funds in an IRA, whether contributed by the decedent or rolled over from an employer-contributed pension plan, were included in the decedent's gross estate where an irrevocable election of the form of benefit was not made by July 18, 1984, and the decedent was not in pay status as of December 31, 1984. **Rev. Rul. 92-22, I.R.B. 1992-13, 19**.

MARITAL DEDUCTION. The decedent's executor claimed a marital deduction on Schedule M for a trust eligible as QTIP but failed to make the QTIP election and listed the trust on Part I instead of Part II. The IRS allowed an extension to file an amended return with a proper election. **Ltr. Rul. 9210001, Oct. 15, 1991**.

An estate failed to make a timely reverse QTIP election due to an error in completion of Schedule R, Form 706. The decedent's will expressed a clear intent that the GSTT exemption was to be allocated to a marital trust. The IRS allowed an extension of time to file the reverse QTIP election. **Ltr. Rul. 9211038, Dec. 17, 1991**.

FEDERAL INCOME TAXATION

BAD DEBT. The taxpayer was a shareholder and employee of a corporation for which the taxpayer guaranteed a loan. The court held that the taxpayer could not deduct payments made on the guarantee as a business bad debt because the guarantee was not made as part of the taxpayer's business as an employee. The payments were allowed as a nonbusiness bad debt deduction because the guarantee was made to protect the taxpayer's investment. **Jerich v. Comm'r, T.C. Memo. 1992-136**.

CAPITAL EXPENDITURES. The taxpayer was a farm corporation owned by two individual shareholders. The taxpayer and shareholders purchased additional farm land with the shareholders purchasing the land and dwelling and the taxpayer purchasing the other buildings, equipment and the "residual fertilizer supply" allegedly remaining in the land from the previous owner. The shareholders leased the land to the taxpayer and the taxpayer claimed depreciation on the "residual fertilizer supply" based on a seven year amortization period. The IRS ruled that the taxpayer could not claim the depreciation deduction because (1) the alleged fertilizer supply belonged to the landowners; (2) the taxpayer failed to demonstrate the amount, if any, of residual fertilizer supply in the land (although the taxpayer did submit soil tests from neighboring land); and (3) the taxpayer failed to demonstrate the rate of depletion, if any, of the residual fertilizer. **Ltr. Rul. 9211007, Dec. 3, 1991**.

COST SHARING PAYMENTS. The USDA has determined that cost share payments under the Florida Okeechobee Dairies Best Management Practices Program are made primarily for the purpose of soil and water conservations, protecting or restoring the environment, and improving the quality of water entering Lake Okeechobee, allowing such payments to be excluded from gross income under I.R.C. § 126. **56 Fed. Reg. 8109 (Mar. 6, 1992)**.

EMPLOYEE BENEFIT PLANS. The IRS has issued procedures for requesting determination letters of the effect of a plan's qualified status under Section 401(a) of plan language which permits the transfer of assets in a defined benefit plan to a health benefits account. **Rev. Proc. 92-24, I.R.B. 1992-13, 22**.

HOBBY LOSSES. The taxpayer was employed in the defense industry and was engaged in a breeding, selling and showing horses. The court held that the taxpayer did not operate the activity for profit where the taxpayer failed to investigate the profitability of the operation, did not hire any employees and did not keep separate records or accounts. The taxpayer was also not allowed deductions for moving to the horse farm because the tax home remained in the state of the taxpayer's regular employment. **Tirheimer v. Comm'r, T.C. Memo. 1992-137**.

INTEREST RATES. The IRS has announced that for the period April 1, 1992 through June 30, 1992, the interest rate for overpayment of taxes is 7 percent and the rate for underpayments is 8 percent. **Rev. Rul. 92-21, I.R.B. 1992-14, April 6, 1992**.

INVESTMENT TAX CREDIT. The taxpayer corporation distributed assets for which investment tax credit had been taken to a wholly-owned subsidiary in exchange for the subsidiary's stock. The taxpayer later transferred the subsidiary stock to the taxpayer's shareholders. The court held that the transactions were to be combined to divest the taxpayer of control over the investment tax credit property, causing recapture of investment tax credit. **Solomon, Inc. v. U.S., 92-1 U.S. Tax Cas. (CCH) ¶ 50,142 (S.D. N.Y. 1992)**.

PARTNERSHIPS

AMOUNTS AT RISK. The taxpayers were limited partners in a partnership which required the limited partners to contribute up to three times their original contribution if the partnership assets were insufficient to pay partnership obligations. The court held that the partners could not include the additional amounts in the partners' basis because the partners had no obligation as long as the partnership was solvent. **Callahan v. Comm'r, 98 T.C. No. 22 (1992)**.

WITHHOLDING TAXES. The taxpayers were partners in a motel operating partnership which failed to pay federal employee withholding taxes. The IRS levied against the property of the partners in partial satisfaction of the taxes. The IRS based its levy on I.R.C. § 3403, making employers liable for the withholding taxes, and state law, making partners liable for partnership debts. The taxpayers argued that they were liable only through I.R.C. § 6672 as responsible persons and that the IRS had to show that the taxpayers were responsible for the payment of the taxes within the partnership. The court held that Section 6672 did not pre-empt use of Section 3403 and state law to impose liability on partners for withholding taxes due from the partnership. **Livingston v. U.S., 92-1 U.S. Tax Cas. (CCH) ¶ 50,137 (D. Idaho 1992)**.

REPORTING REQUIREMENTS. The IRS has issued proposed regulations providing an exception to the broker reporting requirements of I.R.C. § 6045 for the spot or forward sales of an agricultural commodity if the customer certifies that the customer produced the commodity and the broker does not know of any incorrect information on the certificate. Sales of agricultural commodities pursuant to regulated futures contracts and sales of derivative interests in agricultural commodities are not excepted. No information return is required for the sale of a CCC certificate effected on behalf of a customer. **IA-41-91, I.R.B. 1992-13, 29**.

SELF-EMPLOYMENT INCOME. The taxpayers were husband and wife who jointly owned farm land. The wife primarily provided bookkeeping services to the operation. In 1988 the husband delivered soybeans to a local elevator for storage with the husband's name listed as "patron" but the wife's name at the bottom. The taxpayers then executed a notarized statement that the stored soybeans were a gift to the wife but were to be sold before September 1, 1988. In a statement to the IRS, the husband claimed that the gift was to materially reward the wife for companionship and patience. When the soybeans were sold, the husband picked up the check made out to the wife and deposited the check in the taxpayers' joint checking account. The wife later wrote a check transferring the same amount to her personal savings account. The taxpayers did not include the soybeans in farm income, including self-employment income, but only claimed the proceeds of the soybeans as capital gain on Schedule D. The IRS acknowledged that gifts of agricultural products could be excluded from self-employment income under *SoRelle v. Comm'r, 22 T.C. 459 (1954), acq., 1955-1 C.B. 6; Farrier v. Comm'r, 15 T.C. 277 (1950), acq., 1955-1 C.B. 4; Rev. Rul. 55-551, 1955-2 C.B. 520*; however, the IRS stated that the rule applied only as to valid gifts. The IRS ruled that a valid gift was not made in this case because (1) the husband did not release control over the soybeans as evidenced by the notarized statement's condition that the beans be sold before a specific date; (2) the husband made the gift in return for the wife's companionship and patience; (3) the gift was made in the form of a warehouse receipt because at the time the notarized statement was made, the beans had already been stored in the elevator; (4) the gift lacked economic substance, given the close family relationship and joint ownership of the farm; and (5) the only purpose of the transaction was to avoid self-employment taxes. **Ltr. Rul. 9210004, Nov. 29, 1991**.

SAFE HARBOR INTEREST RATES

APRIL 1992

	Annual	Semi-annual	Quarterly	Monthly
		Short-term		
AFR	5.13	5.07	5.04	5.02
110% AFR	5.66	5.58	5.54	5.52
120% AFR	6.17	6.08	6.03	6.00
		Mid-term		
AFR	7.00	6.88	6.82	6.78
110% AFR	7.71	7.57	7.50	7.45
120% AFR	8.43	8.26	8.18	8.12
		Long-term		
AFR	7.83	7.68	7.61	7.56
110% AFR	8.63	8.45	8.36	8.30
120% AFR	9.43	9.22	9.12	9.05

S CORPORATIONS.

TERMINATION. The IRS waived as inadvertant the termination of a corporation's S status caused by a shareholder's transfer of stock in another corporation to the S corporation without knowledge that the transfer would cause termination of S corporation status. **Ltr. Rul. 9211034, Dec. 16, 1991**.

TRUSTS. A trust holding S corporation stock and otherwise qualifying as a Subchapter S trust contained a provision allowing the trustee to accumulate trust income if the trust did not hold S corporation stock. The IRS ruled that the trust was a QSST because the statute, I.R.C. § 1361(d)(3)(B), required only the actual distribution of income, whether or not the trustee had the power to accumulate income. **Rev. Rul. 92-20, I.R.B. 1992-13, 19**.

TRUSTS. The taxpayer established three irrevocable trusts, each with the same three beneficiaries, the taxpayer's children. The trustee of the first two trusts had the power, with the consent of the taxpayer's brother and former wife, to distribute trust income or corpus to a charitable organization. The trustee of the third trust was an employee of the taxpayer and had the power to accumulate income and principal or to distribute income of principal to the beneficiaries to to the taxpayer's former wife. The first two trusts transferred partnership interests to the third trust in order to diversify the risks among the trusts. The IRS ruled that the taxpayer was considered the owner of the first two trusts but was considered the owner of only the income interest of the third trust, because the power of distribution over the interests was exercisable without the consent of any adverse party. The IRS also ruled that any gain realized by the transfer of the partnership interests was taxable to the taxpayer, but that any loss deduction was not allowed under I.R.C. § 267. **Ltr. Rul. 9211026, Dec. 13, 1991**.

NEGLIGENCE

LANDOWNER'S LIABILITY. The plaintiff was hired by the defendant to maintain some farm property and feed cattle on the property in exchange for the right to live on the property. Without the knowledge of the defendant, the plaintiff regularly drove a truck through a grove of freeze damaged orange trees in order to feed the cattle. During one of these drives, the plaintiff's eye was injured by a branch which came through the open window of the truck. The plaintiff testified that the plaintiff was aware of the thorns on the branches which struck the truck and usually closed the windows while driving through the trees. The plaintiff sued the defendant for failure to warn about the thorns and for failure to maintain the property in a reasonably safe condition. The court reversed a jury verdict for the plaintiff on the issue of failure to maintain a safe premises, because the defendant did not know that the plaintiff drove through the trees to feed the cattle; therefore, the defendant could not have reasonably anticipated any danger to the plaintiff. The court also reversed the verdict on the issue of failure to warn, because the evidence demonstrated that the plaintiff had superior knowledge of the danger and the defendant had no knowledge that the plaintiff drove through the trees. **Miller v. Wallace, 591 So.2d 971 (Fla. Ct. App. 1991)**.

The plaintiff was injured while diving into a rice pool on the defendant's property. The trial court granted summary judgment to the defendant under Tex. Civ. Prac. & Rem. Code § 75.002 (1986), because even if the plaintiff entered the land with the permission of the defendant, the defendant owed only a duty not to injure the plaintiff through gross negligence. The appellate court reversed because the plaintiff alleged that the defendant knew of the risk to divers and the defendant provided no proof that the defendant did not know the plaintiff was on the property or did not know about the danger. **Payne v. Cinco Ranch Venture, 822 S.W.2d 364 (Tex. Ct. App. 1992)**.

PARTNERSHIPS

SECURITIES FRAUD. The defendants were an individual and a corporation which had offered for sale limited partnership interests in a mare for the purpose of breeding the mare and selling the offspring. The plaintiffs were investors who alleged fraud from the misrepresentations in the partnership prospectus as to liens against the mare and financial information about the mare's owner. The defendants argued that the liability for the misrepresentations was limited to the partnership in which the limited interests were offered. The court held that although Ohio Rev. Code § 1707.41 refers only to directors of offering corporations, the statute also applies to subject partners of an offering partnership to liability for misrepresentations in an offering prospectus. **Baker v. Conlan, 585 N.E.2d 543 (Ohio Ct. App. 1990)**.

PRODUCTS LIABILITY

COMBINE. The plaintiff was injured while cleaning residue out of a combine's unloading auger. The plaintiff brought a products liability action against the combine manufacturer alleging strict liability, failure to warn and defective design. The jury found the combine manufacturer 60 percent at fault and awarded $650,000 in actual damages and $50 million in punitive damages. The court reduced the punitive damages to approximately 1 percent of the defendant's net worth, $28 million. The court otherwise denied the defendant's motion for judgment notwithstanding the verdict, holding that sufficient evidence was presented to create jury questions as to liability and damages. **Burke v. Deere & Co., 780 F. Supp. 1225 (S.D. Iowa 1991)**.

ELECTRICITY. The plaintiff was a dairy farmer who purchased electricity through the defendant utility company which supplied electricity produced by the TVA. In April 1987, the plaintiff discovered that stray voltage was present in the milking parlor and informed the defendant about the problem. In early 1988, the plaintiff's herd suffered an outbreak of mastitis allegedly caused by the stray voltage. In October 1988, the defendant installed, at the plaintiff's expense, a "Ronk blocker" which eliminated the stray voltage. In September 1989, the plaintiff filed suit in negligence, strict liability, breach of express and implied warranty, and breach of contract. The court held that the one year statute of limitations in a property damage action prevented any action for damages occurring before September 8, 1988. The court also held that an action in strict liability was not allowed because the defendant did not supply any product, but only supplied a service; stray voltage was not a product; and electricity transmission was not an ultrahazardous activity. The breach of warranty action was dismissed because the defendant did not supply a "good." The breach of contract action was dismissed because the electrical service contract expressly limited liability for breach of contract. The court allowed the action in negligence because the defendant had knowledge of the injury which could be caused by stray voltage and knowledge that stray voltage occurred in the plaintiff's milking parlor. **G & K Dairy v. Princeton Elec. Plant Bd., 781 F.Supp. 485 (W.D. Ky. 1991)**.

SECURED TRANSACTIONS

RIGHTS IN COLLATERAL. The defendant had entered into an agreement with the debtor for the debtor to keep, feed and care for the defendant's pigs in exchange for a decrease in a debt owed to the defendant. The defendant executed a written agreement with the debtor stating that the debtor had no title or other interest in the pigs. The plaintiff bank held a security interest in the debtor's livestock, including after-acquired livestock and argued that the debtor had sufficient interest in the defendant's pigs for the security interest to attach to the pigs. The court held that the debtor was a bailee and that under *Rohweder v. Aberdeen Prod. Credit Ass'n, 765 F.2d 109 (8th Cir. 1985)* and other cases, a bailee's interest in the pigs was insufficient for the security interest in after-acquired property to attach. **State Bank of Young America v. Wagener, 479 N.W.2d 92 (Minn. Ct. App. 1992)**.

REPLEVIN. After the debtors defaulted on several loans, a creditor brought a replevin action to recover collateral for the loans and obtained permission to repossess the collateral. After the collateral was repossessed, the debtors sought recovery of property seized which was not included in the repossession order, alleging improper notice and demand, fraud, waiver, duress, and accord and satisfaction. The court held that the only consideration in a replevin action was whether the creditor was entitled to possession of the property at the time of initiating the action. Therefore, the only elements for consideration were whether a valid lien existed on a defaulted debt. The court found that the evidence of a promissory note without any evidence of payment of the note was sufficient evidence of an existing debt. The lien was evidenced by a signed financing statement and security agreement covering all equipment and farm products and describing the land on which growing crops were to be grown. Thus, the court held that the creditor was entitled to possess all property seized, even though some of it was not listed on the repossession order. **Barelmann v. Fox, 478 N.W.2d 548 (Neb. 1992)**.

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P.O. BOX 5444
MADISON, WI 53705-5444

STATE REGULATION OF AGRICULTURE

BORROWER'S RIGHTS. The plaintiff had entered into a contract to purchase farmland from a bank which had obtained the land through foreclosure from the defendant. The bank sent the defendant notice of the sale and the statutorily required offer to purchase the land at the contract price. The defendant found another buyer for the land and gave notice of intent to exercise their statutory right of first refusal. The sale of the land to the third party produced the funds used by the defendant to exercise the right of first refusal. The plaintiff argued that the transactions violated Minn. Stat. § 500.24 which prohibited assignment of the right of first refusal. The court held that because the transfer occurred after the exercise of the right of first refusal, no assignment took place. The court also held that an amendment to the statute, prohibiting sale by the preceding former owners if the transaction was negotiated before the exercise of the right of first refusal, did not retroactively apply to this transaction. **Ludowese v. Redmann, 479 N.W.2d 59 (Minn. App. 1991)**.

VETERINARIANS

REPRIMAND. The appellant received a written reprimand for improper treatment of a kitten in violation of Ohio Rev. Code § 4721.22(A) and Ohio Admin. Code § 4741-1-03(A). The appellant argued that the administrative code rule was improper because it was not authorized by the statute. The court held that because the statute authorized promulgation of rules involving "hygenic methods," the rule involving treatment of animals was proper. The appellant also argued that the reviewing board improperly substituted its own professional opinion as to the propriety of the treatment instead of relying on the appellant's expert witness's testimony. The court held that where a reviewing board is comprised of professionals with expertise in the area under review, the board may use its own judgment in judging the professional conduct of a veterinarian. ***In re* Griffith, 66 Ohio App.3d 658, 585 N.E.2d 937 (1991)**.

CITATION UPDATES

U.S. v. Nordic Village, Inc., 112 S.Ct. 1011 (1992), *rev'g*, 915 F.2d 1049 (6th Cir. 1991) (governmental immunity in bankruptcy), see p. 51 *supra*.

Holywell Corp. v. Smith, 112 S.Ct. 1021 (1992), *rev'g*, 911 F.2d 1539 (11th Cir. 1990) (bankruptcy tax returns), see p. 52 *supra*.

Fehlhaber v. Comm'r, 954 F.2d 653 (11th Cir. 1992), *aff'g*, 94 T.C. 863 (1990) (statute of limitations), see p. 54 *supra*.

White Rubber Corp. v. U.S., 781 F. Supp. 507 (N.D. Ohio 1991) (S corporation re-election), see p. 46 *supra*.

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